UNIVERSITY OF HAWAI'I
LAW REVIEW

VOLUME 28

2005-2006

University of Hawai'i Law Review

Volume 28 / Number 2 / Summer 2006

TRIBUTE

SYMPOSIUM: FEDERALISM ISSUES FOLLOWING *KELO v. CITY OF NEW LONDON*

COMMENTS

CASENOTES

For Judge David Alan Ezra

Aviam Soifer*

That we enthusiastically dedicate this Symposium to Judge David Alan Ezra is entirely mete and just.[1] After all, Judge Ezra has been a stalwart member of our law faculty for twenty-eight years, and he has been inducing students to ponder the wonderful intricacies of Federal Courts since 1994. Judge Ezra is also known far and wide as an outstanding Federal District Court Judge, a reputation he began to amass when he took the bench in 1988. Recently, he stepped down as Chief Judge of the District Court of Hawai'i after serving seven noteworthy years in that capacity.

All those accomplishments as well as many more make it fitting that we honor Judge Ezra. But what makes this accolade particularly appropriate is that it provides an excuse to celebrate his clear and abiding commitment, in both classroom and courtroom, to seeking out the essence of legal questions.

In his dedication to modeling how to think like a first-rate lawyer and act like an exemplary judge, Judge Ezra often swims vigorously against a rising tide. The roar of the crowd–live and in person, or in response to "reality" as conveyed through various media–increasingly dominates crucial decisions. Snap judgments, based largely on appearances, prevail not only in popular culture, but also throughout the political realm. Simplistic and often false dichotomies tend to appear to be the only available alternatives.

Yet legal analysis at its best will always be anchored in the complex process of finding facts and rendering careful, detached judgments. Law is not and should not be based on momentary popular referenda. Indeed, even our juries are carefully selected and instructed to function in deliberate ways. Jurors may represent the community, but they have to decide which version of alleged facts rings true and then they must wrestle collaboratively to reach difficult judgments. We continue to believe that legal quandaries ought not to be resolved with thumbs (either up or down), gut reactions, or even the quick impressions of focus groups and the like.

In fact, it is one of the glories of our legal system that judges generally must explain their decisions. A first-rate judge strives to make even a losing party understand why the judge decided as he did. Thus the role of a judge at his

---

* Dean and Professor of Law, William S. Richardson School of Law, University of Hawai'i.

[1] Even if it seemed apropos of the Takings focus for this Symposium, however, the decision to honor Judge Ezra implicates neither metes and bounds nor meat and potatoes. To our great delight and substantial benefit, Judge Ezra chose to be a teacher and a judge. His multiple perspectives and his daily work thus do not really fit either concept: neither the bounded qualities implied in "metes and bounds" nor the practical, predictable sustenance within "meat and potatoes."

or her best strikingly overlaps the role of an excellent law teacher. Both the judge and the professor must probe beneath the surface. And even if the judge or teacher knows considerably more than others in the room, he must make sure that they feel they have had an opportunity to participate and to get their day in court and/or their chance to learn.

Both in class and in court, Judge Ezra stands out for his open-minded willingness to consider nuances rather than anecdotes, to be open to evidence rather than to fall back on predispositions. Even more unusual is his strong dedication to explaining the law and legal processes to a myriad of audiences. He does this with great success in the classroom, but he also does it in the courtroom. In our hectic era, unfortunately, this approach has become increasingly unusual.

In his essence, Judge Ezra cares deeply about the people entangled in the law, and about the multiple ways that law is inextricably intertwined with many of our most complex problems and our greatest hopes. And he will take the time to explain to students, court watchers, the press–whomever he gets to listen.

For all the importance of judges in our society, and the increasingly controversial aspects of what they do and how they do it, we still lack either a precise or a deep understanding of what makes a good or a great judge. Indeed, we live in a time when politicians delight in pejoratively labeling judges as "activists," no matter what those judges do or, often, do not do. But the quest to define or identify good or great judges is important. It requires careful attention to real life examples as well as much thought. It also ought to account for the fact that "[l]egal principles, evolved to assist the orderly resolution of disputes arising across the full range of human activities, reflect the untidiness of life" and "will not remain static."[2] Yet there are indeed some basic principles for exemplary judging.

The prophet Isaiah's description of the judicial role, for instance, merits further thought. Isaiah said:

> He shall not judge by what his eyes behold,
> Nor decide by what his ears perceive.
> Thus he shall judge the poor with equity
> And decide with justice for the lowly of the land.[3]

At first glance (or first hearing), this description of the ideal functioning of a judge may seem counterintuitive, and starkly so at that. Yet Isaiah's

---

[2] Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 208 (1984). Admittedly I am partial to Judge Newman's views: I clerked for him over thirty years ago and he remains my model federal judge.

[3] *Isaiah* 11:3-4.

suggestion that good judging must delve deeply, probing far beyond surface appearances, advances an admirable ideal. If we are to be blessed with judges who judge with righteousness and who decide with equity, we might hope they seek to follow Isaiah.

We also might well hope that they discover a model of wisdom and wit, openness and deep questioning: it is to be found in the teaching/judging done so admirably by our friend, colleague, teacher, mentor, and judge—David Alan Ezra. We are greatly in his debt.

Kelo v. City of New London: Of Planning, Federalism, and a Switch in Time

David L. Callies*

I. INTRODUCTION

In a remarkable conversion, the so-called liberal wing of the U.S. Supreme Court, led by Justice Stevens, decided in *Kelo v. City of New London*[1] that federalism (state action is preferable to federal action across a spectrum of subjects) is a good thing after all. This is the same block which fulminated against the rebirth of federalism, the resuscitation of the Tenth Amendment, and similar relatively recent holdings by the so-called conservative wing of the Court in such cases as *United States v. Lopez*,[2] *New York v. United States*,[3] and *Gregory v. Ashcroft*.[4] Arguably going back to a somewhat different Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[5] Justice Stevens, usually joined by Justices Breyer, Ginsberg and Souter, has pressed for an increasingly pervasive federal role in the affairs of citizens at the expense of state and local government. His opinion in *Kelo*, in which he is joined by Justices Breyer, Ginsberg, and Souter (Justice Kennedy separately concurring) represents a philosophical U-turn in favor of state action and against the establishment of federal criteria, and from an area of law that cries out for federal standards and oversight. As demonstrated below, the states have certainly taken him at his word.

In *Kelo v. City of New London*, a bare majority of the Court upheld the exercise of eminent domain for the purpose of economic revitalization. Heavily relying on its previous decisions in *Berman v. Parker*[6] and *Hawaii*

---

* FAICP, ACREL, Kudo Professor of Law, William S. Richardson School of Law, University of Hawai'i at Manoa, where he teaches land use, state and local government, and property law. Professor Callies received his B.A. from DePauw University, his J.D. from the University of Michigan, his LL.M (planning law) from Nottingham University, and is a life member of Clare Hall, Cambridge University. The summary and analysis of the *Kelo* opinion is a modified version of an Alert prepared by the author for LexisNexis and Nichols on Eminent Domain, and is used here with the kind permission of the publisher. The author acknowledges with thanks the research assistance of Chris Goodin and Tina Wakayama, members of the University of Hawai'i Law Review, in the preparation of this Article.

1 ___U.S. ___, 125 S. Ct. 2655 (2005).

2 514 U.S. 549 (1995).

3 505 U.S. 144 (1992).

4 501 U.S. 452 (1991).

5 469 U.S. 528 (1985).

6 348 U.S. 26 (1954).

Housing Authority v. Midkiff,[7] the Court stated that it was too late in the game to revisit its present expansive view of public use, formally stating that there is no difference in modern eminent domain practice between public use and public purpose[8]—at least in federal court. Indeed, the Court specifically equated public use and public purpose before holding that condemning land for economic revitalization was at worst simply another small step along the continuum of permitting public benefits to be sufficient indicia of meeting public use/public purpose requirements for purposes of the Fifth Amendment's Takings Clause.[9] The Court specifically held that it is now up to the states to decide whether or not to increase the burden on government exercise of compulsory purchase powers.[10] The federal bar is presently set so low as to be little more than a speed bump. It is worth setting out what the Court decided in *Kelo*, and on what basis, before describing more fully the shift in favor of federalism there embraced by Justice Stevens' majority opinion.

II. THE STATE OF THE FEDERAL LAW ON PUBLIC USE BEFORE *KELO*: *BERMAN V. PARKER* AND *HAWAII HOUSING AUTHORITY V. MIDKIFF*

The members of the Court expressed different views on the historical antecedents of public use and how far back to go in deriving an appropriate definition to apply in *Kelo*.[11] Nevertheless, all (except perhaps Justice Thomas) agree that the most relevant precedents are the decisions of the Court in *Berman* and *Midkiff*. In both decisions, the Court wrote expansively about the public use requirement of the Fifth Amendment.

---

[7] 467 U.S. 229 (1984).

[8] ___ U.S. ___, 125 S. Ct. 2655, 2665 (2005).

[9] *Id.* at 2665-66.

[10] Of the slightly more than a dozen state courts that have considered whether economic revitalization is sufficient public use for governmental exercise of eminent domain, about half—such as Connecticut and now the U.S. Supreme Court—have decided that it is, and about half—such as Michigan in its recent and thoroughly reviewed and discussed *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)—that it is not, utilizing various tests such as whether the condemnation serves primarily a public purpose or primarily benefits the private sector. See Steven J. Eagle, *The Public Use Requirement and Doctrinal Renewal*, 34 ENVTL. L. REP. 10999 (2004) for extensive analysis and commentary, and Amanda S. Eckhoff & Dwight H. Merriam, *Public Use Goes Peripatetic: First, Michigan Reverses Poletown And Now The Supreme Court Grants Review In An Eminent Domain Case*, 57 PLAN. AND ENVTL. L. 3 (2005).

[11] Ranging from the lengthy historical analysis provided by Justice Thomas in dissent (he would have the Court return to original meaning in the 18th century in which most eminent domain cases appear to require actual use by the public, though Justice Stevens reads some of the same history quite differently by choosing other cases from that period upon which to rely) to concentration only on mid to late twentieth century cases by Justice Stevens for the majority and Justice O'Connor in dissent.

In *Berman*, the Court dealt with the condemnation of a thriving department store contained in a large parcel condemned by a redevelopment agency for the statutory (Congressional in this case) purpose of eliminating blight, all in accordance with a required redevelopment plan.[12] Justice Douglas for the majority commenced by observing famously that a community could decide to be attractive as well as safe, and that in thus justifying eminent domain to accomplish these goals, "[w]e deal, in other words, with . . . the police power[,]"[13] a controversial joining of the two powers which has affected definitions of public use ever since by obviating any need for the public to actually use the property condemned so long as it furthered a public purpose. Indeed, the landowners pointed out that their land would simply be turned over to another private owner.[14] No matter, said Douglas:

> But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.[15]

To the landowners' argument that their particular parcel was unblighted and that therefore its condemnation violated the Fifth Amendment's public purpose clause, Justice Douglas responded that if experts concluded the area must be planned as a whole in order to prevent reversion to a slum, so be it.[16] Despite this broad language, many conceived the decision to apply largely to redevelopment projects, and in particularly those which were well-planned in accordance with clear statutory mandates. Not so after *Midkiff*.

In 1967, the Hawai'i State Legislature passed a land reform act the principle purpose of which was to eliminate a perceived oligopoly in available residential land which was thought to adversely affect the price and availability of housing for its citizens.[17] Eminent domain was the means chosen to solve the problem. The act authorized a state agency—the Hawai'i Housing Authority—to condemn the fee simple interest in land which was leased to individual homeowners, for the purpose of conveying that interest to some other private owner, usually the existing owner's lessee who owned the house on the land.[18] The main target of the legislation was the Bishop

---

[12] Berman v. Parker, 348 U.S. 26, 31 (1954).
[13] *Id.* at 32.
[14] *Id.* at 31.
[15] *Id.* at 33-34.
[16] *Id.* at 34-35.
[17] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232-33 (1984).
[18] *Id.* at 233.

Estate (as it was then known), a charitable trust created by Princess Bernice Pauahi Bishop, a descendent of King Kamehameha the Great and whose large landholdings she eventually inherited. The Estate challenged the act's condemnation process as a taking without the public use required by the U.S. Constitution's Fifth Amendment.[19] While the Federal District Court upheld the statute, the Ninth Circuit Court of Appeals held that the statute essentially provided for a "naked" transfer from one private individual to another, and so lacked the requisite public use.[20]

In a unanimous decision, the U.S. Supreme Court reversed the Ninth Circuit, citing *Berman* for the proposition that once a legislative body had declared a public purpose, it was not for federal courts to interfere unless that purpose was "inconceivable" or an "impossibility."[21] The means were irrelevant; this was simply a mechanism or process to accomplish the legislatively-declared public purpose. Indeed, it would make no difference, said Justice O'Connor writing for the Court, if that public purpose never came to pass, so long as the legislature could reasonably have thought it would when enacting the statute.[22] Note throughout the frequent use of public purpose, instead of public use. These words would come back to haunt Justice O'Connor in *Kelo*, as appears below.

III. *KELO V. CITY OF NEW LONDON*

The Court in *Kelo* simply extended the reasoning in *Berman* and *Midkiff* to the economic revitalization condemnations increasingly common throughout urban areas in the United States during the last quarter of the Twentieth Century. Indeed, the majority was singularly unimpressed with extreme uses of eminent domain for the purposes of providing employment and bettering the local tax base as the parties brought to its attention: "A parade of horribles is especially unpersuasive in this context since the Takings Clause largely 'operates as a conditional limitation permitting the government to do what it wants so long as it pays the charge.'"[23]

The facts in *Kelo* are straightforward. In order to take advantage of a substantial private investment in new facilities by Pfizer, Inc., in an

---

[19] *Id.* at 234-35.

[20] *Id.* at 235.

[21] *Id.* at 240.

[22] *Id.* at 241.

[23] Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655, 2667 n.19 (2005) (citing Eastern Enters. v. Apfel, 524 U.S. 498, 545 (1998)). See DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), http://www.castlecoalition.org/pdf/report/ED_Report.pdf, for a compendious list of such "horribles."

economically depressed area of New London along the Thames River, the City reactivated the private non-profit New London Development Corporation ("NLDC") to assist in planning the area's economic development.[24] Authorized and aided by grants totaling millions of dollars, NLDC held meetings and eventually "finalized an integrated development plan focused on [ninety] acres in the Fort Trumbull area."[25] The City Council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name.[26] Although the NLDC successfully negotiated the purchase of most of the real estate, its negotiations with Kelo and fellow petitioners failed.[27] As a consequence, the NLDC initiated the condemnation proceedings that gave rise to this case.[28] There was no allegation than any of these properties were blighted or in poor condition; rather they were condemned "only because they happen to be located in the development area."[29]

The Kelos owned a single-family house with a water view, in which Mrs. Kelo had lived since 1997.[30] Petitioner Wilhemina Dery was born in her home in 1918, and has lived there her entire life.[31] On these facts, petitioners claimed that the taking of their property violated the public use restriction in the Fifth Amendment.[32] A trial court agreed as to the parcel containing the Kelo house, but a divided Supreme Court of Connecticut reversed, holding that all of the City's proposed takings were constitutional.[33] Noting that the proposed takings were authorized by the state's municipal development statute and in particular the taking of even developed land as part of an economic development project was for a public use and in the public interest, the court relied on *Berman* and *Midkiff* in holding that such economic development qualified as a public use under both Federal and State Constitutions.[34] The U.S. Supreme Court granted certiorari "to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[35]

The Court's answer: an unequivocal yes. While the Court noted that

---

[24] *Kelo*, ___ U.S. ___, 125 S. Ct. at 2659.
[25] *Id.*
[26] *Id.* at ___, 125 S. Ct. at 2660.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at ___, 125 S. Ct. at 2660-61.
[34] *Id.* at ___, 125 S. Ct. at 2660.
[35] *Id.* at ___, 125 S. Ct. at 2661.

> the sovereign may not take the property of *A* for the sole purpose of transferring to it another private party *B*. . . . [I]t is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking . . . .[36]

The question, then, is what constitutes sufficient use by the public. Three factors appear to be important in reaching the conclusion that economic revitalization in New London constitutes such use: a rigorous planning process, the Court's precedents embodied in *Berman* and *Midkiff*, and deference to federalism and state decision making.

The Court commences its analysis by reiterating that private-private transfers alone are unconstitutional and any pretextual public purposes meant solely to accomplish such transfers would fail the public use test.[37] The Court, however, observed that the governmental taking at issue in this case was meant to "revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront"[38] all in accordance with a "carefully considered"[39] and "carefully formulated"[40] development plan in accordance with a state statute "that specifically authorizes the use of eminent domain to promote economic development."[41] Therefore, the "record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity."[42] Indeed, the Court was particularly impressed by "the comprehensive character of the plan [and] the thorough deliberation that preceded its adoption[.]"[43] Although little in the plan demonstrated any actual use by the public, the Court observed that it had embraced a broader and more "natural" interpretation of public use as public purpose at least since the end of the Nineteenth Century,[44] and "[w]e have repeatedly and consistently rejected that narrow [use by the public] test ever since."[45]

---

[36] *Id.*

[37] *Id.*

[38] *Id.* at ___, 125 S. Ct. at 2661 n.6 (quoting Kelo v. City of New London, 843 A.2d 500, 595 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part)) (quotation marks omitted).

[39] *Id.* at ___, 125 S. Ct. at 2661 (quotation marks omitted).

[40] *Id.* at ___, 125 S. Ct. at 2665.

[41] *Id.*

[42] *Id.* at ___, 125 S. Ct. at 2661 n.6 (quoting Kelo v. City of New London, 843 A.2d 500, 595 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part)) (quotation marks omitted).

[43] *Id.* at ___, 125 S. Ct. at 2665.

[44] *Id.* at ___, 125 S. Ct. at 2662 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896)).

[45] *Id.* at ___, 125 S. Ct. at 2663.

Next, the Court observed that this broad definition of public use accorded with its "longstanding policy of deference to legislative judgments in this field."[46] The Court then discussed its decisions in *Berman* and *Midkiff* as demonstrations of such legislative deference, quoting heavily from the language in *Berman* about "'the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.'"[47] The Court concluded that its "jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[48] It thus appears that the Court has clearly and unequivocally substituted a welfare-based public needs test for use by the public when such needs are legislatively determined.

The Court steadfastly and bluntly rejected any suggestion that it formulate a more rigorous test.[49] Thus, for example, to require the government to show that public benefits would actually accrue with reasonable certainty or that the implementation of a development plan would actually occur, would take the Court into factual inquiries already rejected earlier in the term when the Court rejected the "substantially advances a legitimate state interest" test for regulatory takings in *Lingle v. Chevron U.S.A., Inc.*[50] Similarly, the Court declined to second-guess the city's determinations as to what lands it needed to acquire in order to effectuate the project.[51]

The Court rejected the invitation by some *amici* to deal with the appropriateness of compensation under the circumstances. Although the Court acknowledged the hardships which the condemnations might entail in this case, "these questions are not before us in this litigation," even though members of the Court itself raised the adequacy of compensation during oral argument.[52]

---

[46] *Id.*

[47] *Id.* (quoting Berman v. Parker, 348 U.S. 26, 33 (1954)).

[48] *Id.* at ___, 125 S. Ct. at 2664.

[49] *Id.* at ___, 125 S. Ct. at 2667.

[50] 544 U.S. 528 (2005).

[51] *Kelo*, ___ U.S. ___, 125 S. Ct. at 2668.

[52] *Id.* at ___, 125 S. Ct. at 2668 n.21. Other countries provide a measure of extra compensation where, as here, it is a private residence which is condemned and the landowner has a demonstrable emotional attachment to the improved land. See, for example, the Australian concept of solatium, amounting to up to 10% additional compensation beyond fair market value in such circumstances, briefly noted (among other compensation issues) in Lee Anne Fennell, *The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 1004 (2004), and referencing Murray J. Raff's more lengthy description in Chapter 1 of TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES (Tsuyoshi Kotaka & David L. Callies eds. 2002).

Lastly, and most important for purposes of this Article, in a nod to federalism and states rights, the Court closes by leaving to the states any remedy for such hardships posed by the condemnations in New London: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many states already impose 'public use' requirements that are stricter than the federal baseline."[53] Only Justice Kennedy's concurrence suggests some small role yet for federal courts in determining that a particular exercise of eminent domain might fall short of the required public use requirement: "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."[54] This is, however, largely a due process argument rather than a Fifth Amendment argument, and in any event, continued Kennedy: "This demanding level of scrutiny . . . is not required simply because the purpose of the taking is economic development."[55]

IV. THE DISSENTS

Oddly, it is the conservative wing of the Court that argues vigorously for federal intervention into this area which the liberal wing leaves to the states, as the vigorous dissents from Justices O'Connor and Thomas demonstrate. Particularly strong is the dissent by Justice O'Connor who wrote the broadly-worded *Midkiff* opinion for a unanimous Court in 1984. Observing that the question of what is a public use is a judicial, not a legislative one,[56] Justice O'Connor commences by declaring that if economic development takings meet the public use requirement, there is no longer any distinction between private and public use of property, the effect of which is "to delete the words 'for public use' from the Takings Clause of the Fifth Amendment."[57]

But what then of *Berman* and her own language in *Midkiff*? These decisions, according to O'Connor, were exceptions to the Court's jurisprudence that required public use to be actual use by the public. The Court, says O'Connor, has "identified" three categories of public use takings of private property: (1) transfers to public ownership for such as roads, hospitals and military bases; (2) transfers to private common carriers or utilities for railroads or stadia (both of which she characterizes as

---

[53] *Kelo*, ___ U.S. ___, 125 S. Ct. at 2668 (footnoting the recent Michigan decision in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)).

[54] *Id.* at ___, 125 S. Ct. at 2670 (Kennedy, J., concurring).

[55] *Id.*

[56] *Id.* at ___, 125 S. Ct. at 2673 (O'Connor, J., dissenting) (citing Cincinnati v. Vester, 281 U.S. 439 (1930)).

[57] *Id.* at ___, 125 S. Ct. at 2671.

"straightforward and uncontroversial"); and (3) the rare "public purpose" case "in certain circumstances and to meet certain exigencies" such as the eradication of blight and slums in *Berman* and the elimination of oligopoly in *Midkiff*, where deference to legislative determinations were warranted because the "extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society . . . ."[58] In other words, these were exceptional circumstances clearly not replicated in New London, and the application of this third exceptional category in these circumstances "significantly expands the meaning of public use."[59] If, as the majority suggests, government can take private property and give it to new private users so long as the new use is predicted to generate some secondary public benefit like increased tax revenues or more jobs, then "for public use" does not exclude any takings.[60] Dismissing Justice Kennedy's test as one in which no one but a "stupid staffer" could fail, Justice O'Connor warns that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[61] Leaving any tougher standards designed to limit such possibilities to the states is "an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution . . . is not among them."[62] She ends with concerns for those with fewer resources who will suffer in contests over exercises of eminent domain with those with "disproportionate influence and power in the political process, including large corporations and development firms."[63]

Justice Thomas raises similar concerns in his dissent, but in considerably more detail. Picking up on Justice O'Connor's concern for the politically least powerful and characterizing the Court's deferential standard as "deeply perverse,"[64] Justice Thomas provides several examples indicating that those uprooted in even the urban renewal cases were overwhelmingly poor, elderly, black, or all of the above.[65] His disagreement with the Court goes much deeper than that of Justice O'Connor, however. Reviewing a series of court opinions and writings from the late Eighteenth Century, Justice Thomas

---

[58] *Id.* at ___, 125 S. Ct. at 2674.

[59] *Id.* at ___, 125 S. Ct. at 2675.

[60] *Id.* Justice O'Connor also confesses error (her own as well as the Court's) in ever equating public use and the police power, from which, she accurately observes, much of the expanded doctrine of public use into broad public purpose, and particularly deference to legislative determinations of public purpose, derive. *Id.*

[61] *Id.* at ___, 125 S. Ct. at 2676.

[62] *Id.* at ___, 125 S. Ct. at 2677.

[63] *Id.*

[64] *Id.* at ___, 125 S. Ct. at 2687 (Thomas, J., dissenting).

[65] *Id.*

concludes that the cases cited by the majority for the proposition that public use meant public purpose rather than use by the public in the early years of the republic were exceptions—aberrations that varied from the usual rule. Thomas concludes that the Court's current public use jurisprudence therefore rejects the original meaning of the public use clause, to which he urges the Court to return, and from which it has clearly deviated.[66]

V. THE EXTENT OF THE SHIFT: A SELECTIVE STROLL THROUGH THE SUPREME COURT'S FEDERALISM CASES

A. Garcia v. San Antonio Metropolitan Transit Authority[67]

The San Antonio Metropolitan Transit Authority ("SAMTA"), a public mass-transit authority that is the major provider of transportation in the San Antonio, Texas, metropolitan area,[68] sought a declaratory judgment from the United States District Court for the Western District of Texas that, contrary to the determination of the Wage and Hour Administration of the Department of Labor, its operations were constitutionally immune from the application of the minimum-wage and overtime requirements of the Fair Labor Standards Act ("FLSA") under *National League of Cities v. Usery*.[69] The district court entered judgment for SAMTA, holding that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA.[70]

On appeal, the United States Supreme Court held that there is nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA that is "destructive of state sovereignty or violative of any constitutional provision":[71]

> Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

---

[66] *Id.*

[67] 469 U.S. 528 (1985).

[68] *Id.* at 531.

[69] *Id.* at 534. In *National League of Cities v. Usery*, the Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce such requirements against the states "in areas of traditional governmental functions." 426 U.S. 833, 852 (1976).

[70] 469 U.S. at 535-36.

[71] *Id.* at 554.

> In these cases, the status of public mass transit simply underscores the extent to which the structural protections of the Constitution insulate the States from federally imposed burdens. . . . In short, Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area. Congress' treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.[72]

The dissent by O'Connor, in which Rehnquist and Powell joined, expressed the view that "[t]he true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme."[73] Moreover, "[i]f federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States."[74] In sum, the Court held the only remedy the states have under the Tenth Amendment is political, and that there is no substantive legal effect to the Tenth Amendment.

B. Gregory v. Ashcroft[75]

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended in 1974, includes the States as employers,[76] and further provides that:

> The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.[77]

Several Missouri state judges, two of which were lower-court judges who had been appointed by the governor and who had been retained in office by means of retention elections in which the judges had run unopposed, subject

---

[72] *Id.* at 554-55.

[73] *Id.* at 581.

[74] *Id.*

[75] 501 U.S. 452 (1991).

[76] *Id.* at 464.

[77] *Id.* at 465 (quoting 29 U.S.C. § 630(f) (2000)).

to only a "yes or no" vote, filed suit in the United States District Court for the Eastern District of Missouri challenging the validity of the mandatory retirement provision in the state's constitution.[78] The judges claimed that article V, section 26, of the Missouri Constitution, which provides that "all judges other than municipal judges shall retire at the age of seventy years," violated the ADEA and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[79] The district court, however, granted the governor's motion to dismiss on the grounds that: (1) Missouri's appointed judges were not protected by the ADEA because they were appointees on the policymaking level and therefore excluded from the Act's definition of "employee"; and (2) the mandatory retirement provision did not violate the Equal Protection Clause because the provision had a rational basis.[80] On appeal, the United States Court of Appeals for the Eighth Circuit affirmed on similar grounds.[81]

On certiorari, the Supreme Court affirmed.[82] In an opinion by O'Connor, joined by Rehnquist, Scalia, Kennedy, and Souter, and joined in part as to holding (2) below by White and Stevens, the Court held that the Missouri Constitution's mandatory retirement provision did not violate either: (1) the ADEA because the ADEA does not cover appointed state judges, since, in the context of a statute that plainly excludes most important state officials, the ADEA's exclusion of appointees "on the policymaking level" is sufficiently broad that it cannot be concluded that the Act plainly covers appointed state judges;[83] or (2) the Equal Protection Clause because Missouri had a rational basis for distinguishing both between judges who had reached age seventy and judges who were younger, and between judges age seventy and over and other state employees of the same age who were not subject to mandatory retirement.[84]

Justice O'Connor's opinion classically states the case for federalism:

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also recognized this fundamental principle. . . . The Constitution created a Federal Government of limited powers. . . . This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases the opportunity for citizen involvement in democratic

---

[78] *Id.* at 455-56.
[79] *Id.* at 456.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 473.
[83] *Id.* at 467.
[84] *Id.* at 470-73.

> processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[85]

White, joined by Stevens, concurring in part, dissenting in part, and concurring in the judgment, expressed the view that the court's "plain statement" requirement for the application of a federal statute to state activities "ignores several areas of well-established precedent and announces a rule that is likely to prove unwise and infeasible."[86]

C. New York v. U.S.[87]

The Low-Level Radioactive Waste Policy Amendments Act of 1985 reflects a compromise whereby "sited" states, which are states that have low-level radioactive waste disposal sites, agreed to extend by seven years the period in which they would accept waste from "unsited" states, while the "unsited" states agreed to end their reliance on the sited states by 1992.[88] The Act required each state to be responsible for providing for the disposal of wastes generated within its borders. Three types of incentives were provided to encourage state compliance: (1) under the "monetary incentives" provisions, sited states were authorized to collect a surcharge for accepting waste during the seven year extension; a portion of those surcharges would go into an escrow account held by the United States Secretary of Energy and would be paid out to states which met a series of deadlines in complying with their obligations under the Act;[89] (2) under the "access incentives" provisions, states failing to comply with the statutory deadlines could be charged multiple surcharges by sited states for a certain period and then denied access altogether;[90] and (3) under the "take title" provision, each state that failed to provide for the disposal of internally generated waste by a specific date must, upon request of the waste's generator or owner, take title to the waste, be obligated to take possession of the waste, and become liable for all damages incurred by the generator or owner as a consequence of the state's failure to take possession promptly.[91] The State of New York and two of its counties sought a declaratory judgment that the Act violated the Tenth Amendment and the Constitution's Guarantee Clause, guaranteeing to the states a republican

---

[85] *Id.* at 457-58.

[86] *Id.* at 474 (White, J., concurring in part, dissenting in part, and concurring in the judgment).

[87] 505 U.S. 144 (1992).

[88] *Id.* at 151-52.

[89] *Id.* at 152-53.

[90] *Id.* at 153.

[91] *Id.* at 153-54.

form of government, and filed suit against the United States in the United States District Court for the Northern District of New York.[92] The district court dismissed the complaint, and the United States Court of Appeals for the Second Circuit affirmed.[93]

In an opinion by O'Connor, joined by Rehnquist, Scalia, Kennedy, Souter, and Thomas, the Court held that the "take title" provision was unconstitutional, either as lying outside Congress' enumerated powers or as violating the Tenth Amendment, "[b]ecause an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be [invalid], it follows that Congress lacks the power to offer the States a choice between the two."[94]

White, joined by Blackmun and Stevens, dissented in part expressing the view that: (1) the Act represented a hard-fought agreement among the states as refereed by Congress, rather than federal direction of state action;[95] (2) New York should be estopped from asserting the unconstitutionality of the "take title" provision, which sought to insure that the state, after deriving substantial advantages from the Act, either live up to its bargain by establishing an in-state waste facility or assume liability for its failure to act;[96] (3) such an incursion on state sovereignty can be deemed ratified by the consent of state officials;[97] and (4) there was no precedential support for the general proposition that Congress cannot directly compel states to enact and enforce federal regulatory programs.[98] Stevens, writing separately, expressed the view that the Constitution does not prohibit Congress from simply commanding state governments to implement congressional legislation.[99]

D. U.S. v. Lopez[100]

In a famous restriction of federal power under the Commerce Clause, the Court's conservative wing cobbled together a majority to strike down a federal statute prohibiting the carrying of firearms within one thousand feet of a school, on the ground that the relationship to the Commerce Clause was too attenuated. Justices O'Connor and Kennedy concurred on classic federalism

---

[92] *Id.* at 154.

[93] *Id.*

[94] *Id.* at 176.

[95] *Id.* at 194 (White, J., concurring in part and dissenting in part).

[96] *Id.* at 198-99.

[97] *Id.* at 200.

[98] *Id.* at 201-207.

[99] *Id.* at 211. (Stevens, J., concurring in part and dissenting in part).

[100] 514 U.S. 549 (1995).

grounds. In that case, respondent, who was then a 12th-grade student, was charged in a federal grand jury indictment with the knowing possession of a firearm at a school zone, in violation of the Gun-Free School Zones Act of 1990 ("GFSZA").[101] The Act makes it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[102] The term "school zone" is defined as "in, or on the grounds of, a public, parochial, or private school or within a distance of 1,000 feet from the grounds of" such a school.[103] The United States District Court for the Western District of Texas denied the respondent's motion to dismiss the indictment, concluding that the GFSZA was a constitutional exercise of Congress' power to regulate activities in and affecting commerce, and that the business of elementary, middle, and high schools affects interstate commerce.[104] The respondent was then tried in the District Court and convicted of violating the Act.[105] The respondent appealed, claiming that the GFSZA exceeded the power of Congress to legislate under the Commerce Clause.[106] The United States Court of Appeals for the Fifth Circuit agreed and reversed, holding that in light of what the court characterized as insufficient congressional findings and legislative history, the Act, "in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause."[107]

The Supreme Court affirmed.[108] In an opinion by Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas, the Court held that the GFSZA exceeded the authority of Congress to regulate commerce among the several states under the commerce clause and that the Act could not be sustained as a regulation of an activity that substantially affects interstate commerce.[109] The Court reasoned that the Act "is 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."[110] The Act also "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce."[111] While the Court agreed that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate

---

[101] *Id.* at 551.
[102] *Id.* (quoting 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)) (quotation marks omitted).
[103] *Id.* at 551 n.1 (quoting 18 U.S.C. § 921(a)(25)) (quotation marks omitted).
[104] *Id.* at 551-52.
[105] *Id.* at 552.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 568.
[109] *Id.*
[110] *Id.* at 561.
[111] *Id.*

commerce," to the extent that findings would have enabled the Court to evaluate the legislative judgment that the possession of a firearm in a local school zone substantially affected interstate commerce, such findings were lacking here.[112] The Court refused to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[113]

Kennedy, joined by O'Connor, concurring, expressed the view that the GFSZA "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power . . . ."[114] Kennedy agreed with the majority that "neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the Act have an evident commercial nexus."[115] "[E]ducation is a traditional concern of the states"[116] and "[i]f a state or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures."[117] The GFSZA "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term."[118]

Breyer, joined by Stevens, Souter, and Ginsburg, dissented reasoning that Congress could have had a rational basis for finding a significant or substantial connection between gun-related school violence and interstate commerce.[119] The Court's holding creates "serious legal problems" in that the 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."[120]

In sum, the liberal wing of the Court has previously eschewed federalism and states' rights in favor of an increasing federal presence—some would say intrusion—into the lives of the citizens of the several states that constitute the United States. Its new-found deference to the states is a welcome shift. But why now?

---

[112] *Id.* at 562-63.
[113] *Id.* at 567.
[114] *Id.* at 580 (Kennedy, J., concurring).
[115] *Id.*
[116] *Id.*
[117] *Id.* at 581.
[118] *Id.* at 583.
[119] *Id.* at 618-25 (Breyer, J., dissenting).
[120] *Id.* at 625.

There was very little left of the public use clause—at least in federal court—even before the *Kelo* decision. While a growing handful of state decisions (and federal decisions applying state law on property) found economic revitalization public purposes invalid on constitutional grounds,[121] an equal number of decisions agreed with the Connecticut Supreme Court that this was a valid public use. Clearly this is the view of hundreds of state and local revitalization and redevelopment agencies.[122] Whether one reads the Court's previous jurisprudence on public use broadly, as Justice Stevens does for the Court's majority, or more narrowly, as does the dissent, it is difficult to argue with the conclusions reached separately by Justices O'Connor and Thomas: the public use clause is virtually eliminated in federal court. What yellow light of caution the handful of recent cases signaled has now turned back to green, and government may once more acquire private property by eminent domain on the slightest of public purpose pretexts unless such a use is inconceivable or involves an impossibility, the tests following *Midkiff* in 1984. In other words, it's now all about process, and process only. There is no doubt that state and local governments will do much good in terms of public welfare and public benefits flowing from economic revitalization under such a relaxed standard, as they have often done in the past. They will do so with increased attention to carefully-drafted plans and procedures guaranteeing maximum public exposure and participation, both emphasized in the majority opinion. Moreover, members of the Court during oral argument suggested rethinking how to calculate and award "just" compensation in extenuating circumstances such as those in New London now that the public use clause is a mere procedural hurdle. And yet, the public use clause is more than simple policy; it is a bedrock principle contained in the Bill of Rights amendments to our Federal Constitution, designed not to further the goals and desires of the majority, but as a shield against majoritarian excesses at the expense of an otherwise defenseless minority—such as the Kelos. Surely we could have found grounds to preserve that shield in federal court.[123]

---

[121] See, for example, the decisions in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), and *Southwestern Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1 (Ill. 2001).

[122] *See* BERLINER, *supra* note 23.

[123] *See, e.g.*, James W. Ely Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, *in* CATO SUPREME COURT REVIEW, 2004-05, 39 (Mark Moller ed., 2005) (discussing commentary on both sides of the national debate on the decision); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335 (2006); Michael Berger, *Court Goes "Clueless": Now Public Use Means Whatever!*, L.A. DAILY J., June 30, 2005, *available at* http://www.manatt.com/newsevents.aspx?id=3571&folder=20; John Nolon & Jessica Bacher, *Fallout from Kelo: Ruling Spurs Legislative Proposals to Limit Takings*, N.Y. L.J., Oct. 19,

VI. STATE ACTION FOLLOWING *KELO*: FEDERALISM EXERCISED WITH A VENGEANCE

States have stepped up to the plate following the public outcry which greeted the decision. Forty-three state legislatures have passed or will soon consider eminent domain reform in their legislative sessions.[124] Local governments are also taking measures to protect their homeowners, with more than fifty cities and counties introducing their own bills and resolutions to restrict the use of eminent domain.[125] Since the ruling, lawmakers in forty-five states have introduced more than 400 bills on eminent domain.[126]

Alabama became the first state to enact new protections against local government seizure of property allowed under *Kelo* on August 3, 2005.[127] Republican governor Bob Riley signed a bill, which was passed unanimously by a special session of the Alabama Legislature, that will prohibit governments from using their eminent domain authority to take privately owned properties for the purpose of turning them over to retail, industrial, office or residential developers.[128] Besides Alabama, four other states—Texas, Delaware, Michigan, and Ohio—have passed legislation to restrict eminent domain.[129] Michigan approved a constitutional amendment that will be on the ballot in November and Ohio approved a one-year moratorium on eminent domain for economic development.[130]

The Texas bill, known as Senate Bill 7, forbids the taking of private property if the taking confers a private benefit on a particular private party. In particular, the bill prohibits the taking of private property for economic development as a primary purpose and appears to restrict such takings to blighted areas. The bill applies to all state and local government agencies as well as institutions of higher learning, particularly if taking land for parking

---

2005, at 5. See, for a full treatment of the issues raised by the Kelo decision, DWIGHT H. MERRIAM, EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT (Dwight H. Merriam et al. eds., 2006).

[124] John Kramer & Kisa Knepper, One Year After Kelo Argument National Property Rights Revolt Still Going Strong (Feb. 21, 2006), http://www.ij.org/private_property/connecticut/2_21_06pr.html.

[125] Castle Coalition, Current Proposed Local Legislation on Eminent Domain, http://www.castlecoalition.org/legislation/local/index.html (last visited Feb. 21, 2006).

[126] Castle Coalition, State Legislative Actions, http://maps.castlecoalition.org/legislation.html (last visited Feb. 21, 2006).

[127] Donald Labro, *Alabama Limits Eminent Domain*, WASH. TIMES, Aug. 4, 2005, at A1.

[128] *Id.*

[129] Dennis Cauchon, *States Review Eminent Domain*, USA TODAY, Feb. 20, 2006, *available at* http://www.usatoday.com/news/nation/2006-02-19-eminentdomain_x.htm?POE=NEWISVA.

[130] *Id.*

or facility parking. It specifically exempts "traditional" forms of eminent domain such as transportation projects, railroads, airports, roads, ports, navigation districts, certain conservation/reclamation districts, water supply, wastewater, flood control, drainage, libraries, museums, hospitals, parks, conceivably auditoriums, stadiums and convention facilities and leasehold interests in government-owned property.[131]

Commercial companies have also gotten caught up in the public outcry over *Kelo*, and on January 25, 2006, BB&T Corporation said it will not lend to commercial developers that plan to build condominiums, shopping malls and other private projects on land taken from private citizens by government entities using eminent domain. BB&T operates more than 1400 financial centers in eleven states and Washington D.C.—the Carolinas, Virginia, Maryland, West Virginia, Kentucky, Tennessee, Georgia, Florida, Alabama, and Indiana.[132] BB&T is the nation's ninth largest financial holding company, with $109.2 billion in assets.[133] In that same week, Montgomery Bank, which has $800 million in assets, announced that "it will not lend money for projects in which local governments use eminent domain to take private property for use by private developers."[134] The century-old financial lending house with six branches in St. Louis and five branches in Southeast Missouri is the first Missouri bank to take a principled stand against eminent domain for private development.[135]

VII. PLANNING AND THE CONSTITUTION: WHAT PLANNERS SHOULD KNOW ABOUT THE FIFTH AMENDMENT

Finally, it is all well and good for the majority to wax elegiac about the importance of planning in land use control. However, as Justice Brennan—a card-carrying liberal member of the Court if there ever was one—nicely observed in *San Diego Gas & Electric Co. v. San Diego*,[136] "[I]f a policeman must know the Constitution, then why not a planner?"[137] There, recall, San

---

[131] Peter G. Smith, Prospective Impacts of Texas Legislation Prohibiting Condemnation for Economic Development, Presentation at the Annual Program on Planning, Zoning and Eminent Domain at the Center for American and International Law (Nov. 2, 2005).

[132] BB&T, BB&T Announces Eminent Domain Policy, Jan. 25, 2006, http://www.bbandt.com/about/media/newsreleasedetail.asp?date=1%2F25%2F06+9%3A48%3A52+AM.

[133] *Id.*

[134] John Kramer & Lisa Knepper, Montgomery Bank Won't Finance Eminent Domain Abuse: Second bank within week to reject eminent domain for private gain, Feb. 6, 2006, http://www.castlecoalition.org/media/releases/2_6_06pr.html.

[135] *Id.*

[136] 450 U.S. 621 (1981).

[137] *Id.* at 661 (Brennan, J., dissenting).

Diego had reclassified (from industrial to agricultural through zoning, and to open space through an open space plan) dozens of acres owned by the utility and acquired for the construction of a power plant.[138] The utility successfully sued for damages, only to have its damage claim eventually overruled by the California Supreme Court which held invalidation was its only remedy. The Supreme Court narrowly voted to dismiss the utility's appeal for lack of a final judgment.[139]

Justice Brennan wrote a stinging dissent from which the above quotation is taken, noting that invalidation fell substantially short of a sufficient remedy, and proposing that once a court finds there has been a regulatory taking, the government must pay just compensation, either for the entire value of the property or, should government revoke the offending regulation, for the period during which the regulation effected a taking.[140]

Justice Stevens, however, was apparently unimpressed. In his dissent in *First English v. Los Angeles*,[141] Stevens stated that he liked Justice Brennan's take on takings much better, and finally persuaded the Court to his way of thinking in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[142]

The Supreme Court's narrow holding in *Tahoe-Sierra* broke little new ground in the takings debate, holding merely that a thirty-two-month moratorium is not a *per se* taking of property.[143] It is flawed in several respects, both in its random choice in factual context and in its misinterpretation of the Court's previous decisions in *Lucas v. South Carolina Coastal Commission*[144] and *First English*, all as set out in the cogent dissent by the late Chief Justice Rehnquist, who joined in the first opinion and wrote

---

[138] *Id.* at 624-25 (majority opinion).

[139] *Id.* at 636 (Rehnquist, J., concurring).

[140] Indeed, this theory became a matter of constitutional law in 1987, in *First English Evangelical Lutheran Church of Los Angeles v. Los Angeles*, 482 U.S. 304 (1987), an opinion written by Chief Justice Rehnquist who provided the fifth vote in favor of dismissal in *San Diego Gas & Electric*, by means of a concurring opinion in which he stated that except for the procedural issue, he basically agreed with the Brennan dissent on substance. 450 U.S. at 633-36 (Rehnquist, J., concurring).

[141] 482 U.S. at 335, 349 n.17 (Stevens, J., dissenting).

[142] 535 U.S. 302 (2002).

[143] See, for comment on the marginal relevance of the decision, David L. Callies & Calvert G. Chipchase, *Moratoria and Musings on Regulatory Takings: Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 25 U. HAW. L. REV. 279 (2003). See, for a different view on the importance of the holding, J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1 (2002).

[144] 505 U.S. 1003 (1992).

the second, and therefore can authoritatively comment upon what the Court said and meant.

In particular, the majority demonstrated a misunderstanding of land-use planning and controls by suggesting that loss of the moratorium as a planning tool would eviscerate local land-use regulatory schemes. As my colleague Edward Ziegler so amply demonstrates in his treatise, moratoria are only one form of interim land-use control, whose purpose is to maintain the status quo, not by stopping all economically beneficial land use, but by freezing *existing* land uses or by allowing the issuance of only selective building permits.[145] The lengthy moratorium imposed by the Tahoe Regional Planning Agency goes far beyond either one. Moreover, lengthy interim controls are usually provided by the enactment of interim zoning measures. Moratoria are designed for exceedingly short periods while interim zoning is formulated and adopted. The history of zoning is replete with such traditions, including short-term delays as part of a state's background principles of its law of property (though this is something of a stretch) and so beyond the reach of the *Lucas* categorical rule in the same manner as regulations that are designed to abate nuisances are, on the ground that such matters were not part of an owner's title to begin with. But a six-year (or indeed a three-year) moratorium does not fit within such an exception, at least in part because such lengthy moratoria are anathema to traditional land-use management and control processes of the sort envisioned in *First English*. As Rehnquist noted in conclusion, keeping Lake Tahoe as pristine as possible is clearly in the public interest.[146] However, the way in which the Tahoe Regional Planning Commission has gone about it targets only certain citizens, whereas the Constitution "requires that the costs and burdens be borne by the public at large."[147] The majority was clearly overly persuaded by arguments favoring land-use planning.

Thus, the liberal wing of the Court seems overly enamored of plans and planning as an excuse to avoid applying the public use standards of the Fifth Amendment. Planners, policemen—indeed all connected with government—need to know and apply the Constitution, and particularly the Fifth Amendment.

---

[145] EDWARD H. ZIEGLER, RATHKOPF'S LAW OF ZONING & PLANNING (4th ed. 2005).

[146] *Tahoe-Sierra Pres. Council*, 535 U.S. at 354 (Rehnquist, C.J., dissenting).

[147] *Id.*

The Overreaching Use of Eminent Domain and the Police Power After *Kelo*

Judge David Alan Ezra*

I. INTRODUCTION

As a direct consequence of the U.S. Supreme Court's decision in *Kelo v. City of New London*[1] in June 2005, property owners across the country are now susceptible to a taking of their property for economic development, characterized by the Court as a "public purpose," for the use and benefit of a private party. It is fair to say the Public Use Clause of the Fifth Amendment has been redefined such that eminent domain may be utilized for economic development whether or not a public benefit may ultimately accrue so long as an "incidental" public benefit is identified. Rather than scrutinizing whether a public benefit may actually be derived from the economic development in *Kelo*, the Court emphasized the longstanding principal of federalism and accorded unprecedented deference to the City of New London's determinations.[2]

Not surprisingly, *Kelo*, a five-to-four decision, has been met with substantial resistance and backlash nationwide. State[3] and federal lawmakers have responded swiftly in the hopes of minimizing the impact of the ruling on

---

* United States District Judge for the District of Hawai'i, Chief Judge Emeritus; University of Hawai'i at Manoa, William S. Richardson School of Law Adjunct Professor. I would like to express my sincere appreciation to my law clerk, Aimee M. Lum, a 2005 graduate of the William S. Richardson School of Law, for her invaluable assistance in the preparation of this Article.

[1] ___ U.S. ___, 125 S. Ct. 2655 (2005).

[2] *Id.* at ___, 125 S. Ct. at 2664, 2667-68.

[3] The following states have either passed, pending or are in the process of drafting legislation: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawai'i, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Castle Coalition, State Legislative Actions, http://maps.castlecoalition.org/legislation.html (last visited Jan. 26, 2006).

Cities within the following states have introduced legislation on eminent domain: Alaska, Arizona, California, Connecticut, Florida, Georgia, Illinois, Kentucky, Maryland, Massachusetts, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. Castle Coalition, Current Proposed Local Legislation on Eminent Domain, http://www.castlecoalition.org/legislation/local/index.html (last visited Jan. 26, 2006).

eminent domain practices by states and their subdivisions.[4] State legislation ranges from the creation of task forces to examine *Kelo* to prohibitions on eminent domain for economic development, in direct contravention of the Court's holding. At the federal level, the House of Representatives approved a resolution "expressing grave disapproval of the *Kelo* decision"[5] on June 30, 2005 (only one week following the decision) by a wide margin, 365 to 33.[6] On November 3, 2005, the House passed the Private Property Rights Protection Act of 2005 ("PPRPA") in direct response to *Kelo* to "preserve the property rights granted to our Nation's citizens under the Fifth Amendment of the Constitution."[7] Notably, the PPRPA passed with a resounding vote of 376 to 38, enjoying support across typically divided partisan lines.[8]

Notwithstanding the public outcry and efforts by state and federal lawmakers, *Kelo*'s effect has been widespread. As many feared, cities across the nation have wasted no time exercising eminent domain in light of *Kelo* to take property under the mantle of economic development for private uses such as office and retail space, condominiums, entertainment venues, and the like.[9] This Article addresses *Kelo* and how it abandoned the principles enunciated in the Takings Clause of the Fifth Amendment; specifically the Public Use Clause. Part II contains a brief history of the Public Use Clause as well as a summary of *Kelo*. Part III analyzes the Court's holding, focusing on the Court's misapplication of law; unjustified deference to sovereigns and their subdivisions; and violation of the principle that the government shall not take property except for a legitimate public purpose. Part IV examines the response to *Kelo* on both the state and federal levels with respect to legislation and eminent domain proceedings. Part V concludes that the Supreme Court should revisit the issue of what constitutes a "public use" so that it might,

---

[4] Institute for Justice, Grassroots Groundswell Grows Against Eminent Domain Abuse, http://www.ij.org/private_property/Connecticut/7_12_05pr.html (last visited Jan. 26, 2006).

[5] H.R. REP. NO. 109-262(II), at 10 (2005).

[6] *Id.*

[7] *Id.* at 4.

[8] H.R. 4128, 109th Cong. (1st Sess. 2005); *see also* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04128:@@@R (last visited Jan. 26, 2006). Other legislation is pending in both the Senate and the House. In the Senate, bills S. 1313, S. 1704 and S. 1883 are currently pending; in the House, H.J. Res. 60, HR 3083, HR 3087, HR 3135, HR 3315, HR 3405 and HR 4088 are pending. In addition to the resolution and PPRPA already discussed, HR 3058 became law on November 30, 2005. Castle Coalition, Current Proposed Federal Legislation on Eminent Domain, http://www.castlecoalition.org/legislation/federal/index.html (last visited Jan. 26, 2006).

[9] Institute for Justice, Floodgates Open: Tax-Hungry Governments & Land-Hungry Developers Rejoice in Green Light from U.S. Supreme Court, http://www.ij.org/private_property/Connecticut/6_29_05pr.html (last visited Jan. 26, 2006); *see also infra* note 68.

without compromise, re-bolster the constitutional right to be free from the taking of one's property for some private developer's use and benefit.

II. BACKGROUND

In a world of development and redevelopment, with decreasing numbers of undeveloped parcels upon which to build, the Takings Clause of the Fifth Amendment is at the forefront of litigation nationwide. Arguably, private property owners have more to be concerned about than ever before given the desire of developers to raze entire neighborhoods (whether blighted or not) and the cooperation and the willingness of sovereigns to act in furtherance thereof, using the power of eminent domain.

The U.S. Supreme Court recently had the occasion to revisit the Public Use Clause in *Kelo*. In a controversial move and to the dismay of property owners, the Court determined that economic development satisfies the Public Use Clause which, in essence, permits the transfer of private property via eminent domain to another private party. To fully comprehend the ramifications of such a decision, it is first necessary to examine the Fifth Amendment and what it stands for.

A. The Fifth Amendment and the Public Use Clause

The Fifth Amendment of the U.S. Constitution provides, in relevant part: "nor shall private property be taken for public use, without just compensation."[10] The key components of the Fifth Amendment are the Public Use and Just Compensation Clauses. One need not be a scholar to appreciate the restrictions on the takings of property plainly stated in the text of the Amendment.

It is well-established that the right to one's property is a fundamental protection upon which this country was founded. James Madison noted, in the Federalist Papers, that "[g]overnment is instituted no less for protection of the property, than of the persons, of individuals. The one as well as the other, therefore, may be considered as represented by those who are charged with the government."[11]

William Blackstone similarly commented at length about the right of property:

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. . . . certainly

---

[10] U.S. CONST. amend. V.

[11] THE FEDERALIST NO. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961).

> the modifications under which we at present find it, the method of conserving it in its present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. . . .
>
> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might be perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land.[12]

Even the Supreme Court, in *Vanhorne's Lessee v. Dorrance*,[13] asserted that "[t]he constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent and unalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the constitution. It is sacred . . . ."[14]

As much as the United States has changed since the inception of the Constitution, nothing warrants the deterioration of the Fifth Amendment seen in *Kelo*. Over time, constitutional rights have been expanded, not diminished. Property rights should not be the exception, as people are entitled to be secure in the ownership and occupation of their property.

B. Kelo v. City of New London

1. Facts and procedural history

On June 23, 2005, the U.S. Supreme Court issued its *Kelo* decision, marking a shift in the eminent domain landscape. The case involved nine property owners in the Fort Trumbull area of the City of New London, Connecticut, whose homes were situated within a ninety-acre development area designated by the New London Development Corporation ("NLDC").[15] Hoping to capitalize on the arrival of pharmaceutical giant Pfizer, Inc., the NLDC planned to create a hotel, office and retail space, a renovated marina, a riverwalk, restaurants, shops, a museum and more (divided into parcels 1, 2, 3, 4A, 4B, 5, 6 and 7).[16] Executing such a plan required the NLDC to acquire the necessary property. The city council authorized the NLDC to

---

[12] THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 376-77 (1997).

[13] 2 U.S. 304 (2 Dall. 1795).

[14] *Id.* at 311.

[15] Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655, 2659-60 (2005).

[16] *Id.* at ___, 125 S. Ct. at 2659.

purchase property or exercise eminent domain in the city's name.[17] While the NLDC successfully negotiated with many of the owners in the development area, petitioners refused to sell, which led to the condemnation proceedings at the heart of the case.

In December 2000, petitioners initiated action in the superior court of New London, alleging that the taking violated the Public Use Clause of the Fifth Amendment.[18] The superior court granted relief to some of the petitioners in certain parcels and denied relief as to petitioners in other parcels.[19] On appeal, the Supreme Court of Connecticut determined that all of the takings were valid under the state municipal development statute as well as the Federal and State Constitutions because "such economic development qualified as a valid public use."[20]

2. The majority opinion

The U.S. Supreme Court, in a five-to-four decision authored by Justice Stevens,[21] affirmed the Supreme Court of Connecticut and held that economic development qualified as a "public use" under the Fifth Amendment.[22] In doing so, the Court essentially permits the use of eminent domain to transfer property from one private owner to another as long as it is "executed pursuant to a 'carefully considered' development plan"[23] and as long as the plan is "not adopted to benefit a particular class of identifiable individuals."[24] Rejecting the requirement that "public use" involves use by the general public, Justice Stevens instead employed the more expansive "public purpose" test to satisfy the "public use" requirement.[25]

Justice Stevens relied on *Berman v. Parker*[26] and *Hawai'i Housing Authority v. Midkiff*[27] for the proposition that the Court has long held to a "strong theme of federalism."[28] As such, the Court's "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs

---

[17] *Id.* at ___, 125 S. Ct. at 2660.

[18] *Id.*

[19] *Id.* (citing Kelo v. City of New London, 843 A.2d 500, 527 (Conn. 2004)).

[20] *Id.*

[21] Justice Stevens was joined by Justices Kennedy, Ginsburg, Breyer and Souter.

[22] *Kelo*, ___ U.S. at ___, 125 S. Ct. at 2668.

[23] *Id.* at ___, 125 S. Ct. at 2661.

[24] *Id.* at ___, 125 S. Ct. at 2662 (quotation marks omitted).

[25] *Id.*

[26] 348 U.S. 26 (1954).

[27] 467 U.S. 229 (1984).

[28] *Kelo*, ___ U.S. at ___, 125 S. Ct. at 2664.

justify the use of the takings power."[29] To this end, Justice Stevens rejected petitioners' argument that takings for economic development should require a "reasonable certainty" that the public will actually benefit from the project because it is not the place of federal courts to second-guess city and state determinations regarding such development projects.[30]

It is difficult to accept the Court's mention of the hardships that accompany condemnation when it dismissed petitioners' concerns about the blurring of public and private takings by simply reasoning that "the government's pursuit of a public purpose will often benefit individual private parties."[31] Consistent with the Court's deferential approach in this case, Justice Stevens concluded his opinion by instructing that the states may impose greater restrictions on the exercise of the takings power via statutes and state constitutional law.[32]

3. Justice Kennedy's concurrence

Justice Kennedy, in his concurrence, proffered that the Public Use Clause requires meaningful rational basis review.[33] In conducting such a meaningful review, Justice Kennedy stated, a court "should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits."[34] He further instructed that where there exists a "plausible accusation of impermissible favoritism to private parties,"[35] a court should review the record, though with the presumption that the government acted reasonably.[36] Although seeming to require a more stringent review than the majority, with whom he joined, Justice Kennedy cited the trial court's findings with approval and appeared to approach the public use inquiry with the same deference as the majority. Moreover, he did not articulate how the meaningful rational basis review would be conducted in light of the majority's strict adherence to principles of federalism.

4. Justice O'Connor's dissent

In a scathing dissent, Justice O'Connor[37] criticized the Court for reasoning that the incidental public benefits that may arise from economic development

---

[29] *Id.*

[30] *Id.* at ___, 125 S. Ct. at 2667-68.

[31] *Id.* at ___, 125 S. Ct. at 2666, 2668.

[32] *Id.* at ___, 125 S. Ct. at 2668.

[33] *Id.* at ___, 125 S. Ct. at 2670 (Kennedy, J., concurring).

[34] *Id.* at ___, 125 S. Ct. at 2669.

[35] *Id.*

[36] *Id.*

[37] Justice O'Connor was joined by Chief Justice Rehnquist and Justices Scalia and Thomas.

satisfies the "public use" requirement. She asserted that by "wash[ing] out any distinction between private and public use of property,"[38] the Court has effectively "delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment."[39] As a consequence, "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner so long as it might be upgraded–i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public–in the process."[40]

Justice O'Connor then proceeded to highlight the limitations imposed by the Fifth Amendment and exercise of eminent domain: 1) "the taking must be for a 'public use'"[41] and 2)"'just compensation' must be paid to the owner."[42] Taken together, these conditions "ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power–particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will."[43] Justice O'Connor conceded that the Court indeed gives considerable deference to legislative determinations, but also noted that in order for the Public Use Clause to retain any meaning, an external judicial check is necessary, however limited it may be.[44]

While the Court relied almost exclusively on *Midkiff* and *Berman* to support its extraordinary deference of legislative determinations, Justice O'Connor noted that, in fact, both cases "hewed to a bedrock principle without which our public use jurisprudence would collapse: 'A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.'"[45] Of further significance, both cases dealt with harms–land oligopoly and blight–that, when eliminated, fulfilled a defined public purpose, whereas the instant case

---

[38] *Kelo*, ___ U.S. at ___, 125 S. Ct. at 2671 (O'Connor, J., dissenting).

[39] *Id.*

[40] *Id.*

[41] *Id.* at ___, 125 S. Ct. at 2672 (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 231-32 (2003)). The Court has found three categories of takings that satisfy the "public use" requirement: 1) private to public ownership for roads, military bases or hospitals; 2) private to private transfers (typically common carriers) and the property is made available to the public for uses such as stadiums, railroads or public utilities; and 3) private transfers to "meet certain exigencies" such as blight or land oligopoly. *Id.* at ___, 125 S. Ct. at 2673-74.

[42] *Id.* at ___, 125 S. Ct. at 2762 (quoting *Brown*, 538 U.S. at 231-32).

[43] *Id.*

[44] *Id.* at ___, 125 S. Ct. at 2673 ("It is well established that . . . the question [of] what is a public use is a judicial one[.]" (quoting Cincinnati v. Vester, 281 U.S. 439, 446 (1930) (first alteration in original))).

[45] *Id.* at ___, 125 S. Ct. at 2674 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984)).

does not involve properties that "are the source of any social harm."[46] By significantly expanding the meaning of public use, the Court essentially permits the sovereign to take property from one private owner and transfer it to another private owner as long as the new use will generate some secondary public benefit—i.e., increased tax revenue, jobs, aesthetic pleasure.[47] As such, Justice O'Connor cautioned, if any anticipated positive side-effects amount to a constitutional transfer of property from one private party to another, "then the words 'for public use' do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power."[48]

Justice O'Connor additionally denounced the Court's previous treatment of the "public use" requirement as coterminous with a sovereign's police powers.[49] In previous cases, she observed, the takings were within the police power and actually satisfied the "public use" requirement whereas here, the taking cannot be said to fall within the Public Use Clause. Last, she forecasted the unfortunate result of the economic development takings now permitted by the Court–powerful parties will benefit at the expense of those with fewer resources and influence.[50]

5. Justice Thomas' dissent

Justice Thomas drafted a separate dissent to address his concerns about the Court's marked departure from the true meaning and substance of the Takings Clause. In a thorough discussion of the Takings Clause and its relation to other provisions in the Constitution, he noted that "[t]he Takings Clause is a prohibition, not a grant of power: The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever."[51] Surveying the Court's jurisprudence regarding the Public Use Clause, Justice Thomas highlighted two lines of cases that initiated a deviation from the original meaning of the Clause. The first involved the utilization of

---

[46] *Id.* at ___, 125 S. Ct. at 2675.

[47] If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice Kennedy's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

Id. at ___, 125 S. Ct. at 2676-77.

[48] *Id.* at ___, 125 S. Ct. at 2675. "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Id.* at ___, 125 S. Ct. at 2676.

[49] *Id.* at ___, 125 S. Ct. at 2675.

[50] *Id.* at ___, 125 S. Ct. at 2677.

[51] *Id.* at ___, 125 S. Ct. at 2680 (Thomas, J., dissenting).

the "public purpose" test to satisfy the Clause and the other permitted "legislatures to define the scope of valid 'public uses.'"[52]

Justice Thomas took issue with the Court's "almost insurmountable deference to legislative conclusions that a use serves a 'public use'"[53] and proffered that "[e]ven under the 'public purpose' interpretation . . . it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights."[54] He also proposed that the Court revisit its Public Use Clause cases and re-employ the Clause's original meaning: "that the government may take property only if it actually uses or gives the public a legal right to use the property."[55]

In closing, Justice Thomas predicted two consequences of the Court's holding. First, despite the compensation paid for property taken in urban renewal projects, such compensation does not adequately redress the indignities suffered as a result of displacement and the subjective value of the property to the owners.[56] Second, the burden of takings for any economically beneficial goal "will fall disproportionately on poor communities,"[57] as they are "systematically less likely to put their lands to the highest and best social use, [and] are also the least politically powerful."[58] He urged the Court to therefore impose judicial review for "public use" determinations to protect powerless groups and individuals in place of the highly deferential standard adopted and enforced by the Court.[59]

III. *KELO*'S FAR-REACHING IMPLICATIONS

As previously discussed, *Kelo*'s holding has outraged many. Any bite remaining in the Takings Clause was, in effect, eliminated by *Kelo*. Currently, if a city determines that economic development will render the use of properties more beneficial and that some incidental public benefit may result, then the city has the authority to exercise eminent domain. This result violates the principle that the government shall not take one's property *except* for a legitimate public purpose and affords sovereigns too broad a swath in exercising their police power.

---

[52] *Id.* at ___, 125 S. Ct. at 2683-84.
[53] *Id.* at ___, 125 S. Ct. at 2684.
[54] *Id.*
[55] *Id.* at ___, 125 S. Ct. at 2686.
[56] *Id.*
[57] *Id.* at ___, 125 S. Ct. at 2686-87.
[58] *Id.* at ___, 125 S. Ct. at 2687.
[59] *Id.*

The Court relied heavily on its jurisprudence to reach the result that it did (most specifically *Berman* and *Midkiff*). And while it can be argued that the Court adhered to its own precedent to some degree, a clear and dramatic dilution of the Public Use Clause occurred. Under the facts of the case, there was as much, if not more, justification for holding that the economic development proposed did not satisfy the "public use" requirement of the Fifth Amendment. None of the petitioners' properties were blighted or the cause of any social harm. Moreover, it is not clear that a true public benefit will ever accrue.

What is perhaps most troubling about the ruling is that the Court did not even question the City of New London's determination that the "public use" requirement had been satisfied. The Court's unbridled deference of the City of New London's characterization of the project signifies a marked departure from those protections emanating from the Fifth Amendment. The Court expressed satisfaction with what appears to be a rather illusory "public purpose," using amorphous standards and, in fact, avoiding the articulation of a standard all together (with the exception of Justice Kennedy's attempt in his concurring opinion).

Realistically, is the sovereign best equipped to determine that the more appropriate use for a property is a public storage facility versus a single-family home? Not necessarily, if financial motivations drive those determinations. Under an economic development standard, *all* property could potentially be put to a better use and could "benefit" the public on some level. But that does not justify displacing people from their homes. We should be concerned with developments that have a finite number of beneficiaries with mere secondary public benefits.

One thing is certain if *Kelo* is adhered to: the scales will be tipped in favor of those promising increased revenue and income. As both Justice O'Connor and Justice Thomas suggested, this will have a disproportionate impact on minorities and other financially and politically powerless groups.[60] That is not what the Framers intended.

Property rights, however revered, have always been subject to infringement by state legislatures where there is a necessity under the Public Use Clause. In this regard, courts have deferred to legislative determinations about what constitutes necessity and whether the public interest is served.[61] But never has

---

[60] *See supra* text accompanying notes 50, 57, 58.

[61] Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 45 (N.Y. Ch. 1831) ("[I]f the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of *eminent domain*, and to authorize an interference with the private rights of individuals for that purpose."). It should be noted that the types of uses that may justify eminent domain include: mills, roads, canals,

anyone supported blind deference of legislative determinations simply because of a belief that federalism dictates so. Rather, courts have long expressed misgivings about the propriety of legislative determinations with respect to constitutional rights because of the potential for abuse. In *Vanhorne's Lessee*, the Court stated that "the legislature shall have no power to add to, alter, abolish, or infringe any part of, the constitution."[62] The Court expressed concerns that "[i]nnovation is dangerous[;] [o]ne encroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the constitution eventually destroyed."[63]

Indeed, it is not always the place of courts to review legislative determinations.[64] In a case involving constitutional provisions, however, it is the court, not the city, that ought to assess whether a taking satisfies the Public Use Clause.[65] Certainly, a city or sovereign would best be able to evaluate the needs of a community/neighborhood and should thus enjoy some substantial degree of deference. But by no means should this preclude a judicial check

---

ferries, transport of water to cities, etc.; not economic development. *Id.*

[62] Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 311 (2 Dall. 1795).

[63] *Id.* at 311-12.

[64] In my opinions, I too have adhered to the principle that legislative determinations warrant deference. *See, e.g.*, Richardson v. City and County of Honolulu, 802 F. Supp. 326, 341 (D. Haw. 1992) ("The Supreme Court in *Midkiff* repeatedly emphasized the substantial deference which should be accorded to the relevant legislative body in the area of public use." (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239-43 (1984) (internal quotations omitted))). *Richardson* dealt with a city ordinance, Ordinance 91-95, that provided a "mechanism for the transfer of the fee simple interest of leasehold property from condominium lessors to condominium lessees in Honolulu." *Id.* at 339. I held Ordinance 91-95 constitutional under the Takings Clause and found that 1) the Supreme Court had already thoroughly addressed this general issue in *Midkiff*; 2) the city properly determined that allowing "leasehold condominium owners to purchase the underlying property serve[d] a legitimate public purpose"; and 3) compensation to the lessors "equivalent to 'the current fair market value of the leased fee interest'" comported with the just compensation requirement of the Fifth Amendment. *Id.* at 339, 341.

See also Matsuda v. City and County of Honolulu, 378 F. Supp. 2d 1249 (D. Haw. 2005); Hsiung v. City and County of Honolulu, 378 F. Supp. 2d 1258 (D. Haw. 2005).

[65] Alexander Hamilton, in discussing the necessity for permanent tenure in federal judgeships, stated that:

> [t]his independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

on whether a sovereign's determination is legitimate. If increased tax revenue can satisfy the "public purpose" test, then what sovereign or subdivision thereof would be motivated to carefully scrutinize development plans that come before them? Without a clear test for the determination of what constitutes a valid "public purpose" and a requirement that development plans are well-articulated so that the purpose is readily apparent, collusion between private developers and cities could result. As it stands, the Court has set up a scheme by which systematic abuses of the police power will undoubtedly occur at the local government level.

Both Justice Stevens and Justice Kennedy in part justified the exercise of eminent domain in *Kelo* because the identities of the private beneficiaries were unknown at the time the development plan was adopted.[66] This potentially leads to an interesting result. To say that the transfer of property to some private beneficiary is a proper taking for a "public purpose" because, among other things, the identity of that beneficiary is unknown, is to completely abandon the Public Use Clause. According to the Court's analysis, it would be to the benefit of developers or sovereigns to leave private beneficiaries unknown in order to pass "public use" scrutiny. The fact that the private beneficiaries were unknown at the outset of the development does not change the character of what will ultimately be a private transfer. Even the Court declared that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."[67] Yet the Court more or less permits such private to private transfers where the beneficiary is unknown as long as the sovereign has determined that the "public purpose" test is satisfied. The mere fact that property is not being transferred to a "particular private party" should not legitimize the taking in *Kelo* nor in any other similar situation.

The Court's analysis will likely be revisited at some point in the future. If the Court is presented with the opportunity to reassess the Public Use Clause, it should strengthen and restore the clause to its original meaning; that is, takings should be for the benefit of the public, not private developers. Mere

---

[66] Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655, 2662 n.6 (2005) ("[T]he identities of [the] private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown."); *id.* at ___, 125 S. Ct. at 2669-70 (Kennedy, J., concurring) (Evidence considered as part of an extensive inquiry conducted by the trial court including "the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known, . . . and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be build has not yet been rented") (citations omitted).

[67] *Id.* at ___, 125 S. Ct. at 2661.

secondary benefits to the public, no matter how ethereal, do not justify the exercise of eminent domain and it is the Court's place to scrutinize legislative determinations that find otherwise, especially when property is transferred from private party A to private party B. Otherwise, all property owners will have to live in fear of being uprooted without their consent to make way for the next luxury condo, super mall, or office building.

IV. CITIES, STATES AND CONGRESS RESPOND

As many anticipated, city officials across the country have aggressively initiated eminent domain proceedings or moved forward with condemnations for "economic development" in reliance on *Kelo*. When asked about the takings, officials reflexively respond that the Supreme Court permits such takings. The fact that people are being displaced from their homes (often in nice neighborhoods) or small businesses for the development of exclusive condominiums, shopping centers, entertainment venues, and office complexes is troublesome and highlights the far-reaching implications of the Court's holding.[68]

---

[68] Here is just a sampling of the eminent domain use across the country in the name of private development: Monrovia, California—housing development in place of small business; Moorpark, California—return of power of eminent domain to Moorpark Redevelopment Agency for redevelopment of downtown; National City, California—seized properties (non-blighted) turned over to private developer to build office tower, condos and retail space because of greater profit from the proposed development than the current use; Oakland, California—condemnation of downtown tire shop owned by family since 1949 to make way for a new housing development; San Diego, California—150-employee laundry company being threatened with eminent domain for the development of condos and retail; San Pablo, California—seizure of mobile home park and Salvation Army store for redevelopment; Ridgefield, Connecticut—154 vacant acres under threat of eminent domain for use as corporate office space while current owner desires to build apartments; Washington, D.C.—the city desires to use eminent domain to take property from business owners for a new shopping complex; Boynton Beach, Florida—sale of 50-year-old barber shop under the threat of eminent domain to make way for new residences and storefronts; Daytona Beach, Florida—seizure of properties to be replaced by $120 million retail complex; Hollywood, Fort Lauderdale and Mirimar, Florida—threats of eminent domain because of newly approved plans for condo and retail development; Hollywood, Florida—taking of a bank parking lot (private property) for use by a private developer to build an exclusive condo tower (purely private gain); Lake Zurich, Illinois—condemnation of five property owners holding out until *Kelo* decision published; Baltimore (East Side), Maryland—use of eminent domain to acquire 2,000 properties for a biotech park and new residences; Baltimore (West Side), Maryland—city moving to acquire shops for private development; Boston, Massachusetts—plans to seize waterfront property from unwilling sellers for private development; Arnold, Missouri—city wants to seize 30 homes and 15 small businesses for Lowe's Home Improvement store and strip mall; Richmond Heights, Missouri—city seeks to take 200 homes in a neighborhood using public funds and eminent domain to turn over the land to a private developer who will build more homes; Saint Louis,

Under the guise of economic development, a city has almost limitless power to condemn properties and the Supreme Court has so restricted authority to review city determinations as to render these determinations incontestable. As Justice O'Connor intimated, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[69] This is precisely the injustice that citizens are now facing: a taking of their property for some more desirable use which, incidentally, also happens to generate substantially greater tax revenue for the city or state. No one, including the very Justices who comprised the majority, are safe from having their property condemned for some better use.[70]

In light of cities' race to condemn properties for the benefit of private developers who promise greater tax revenue, one can only hope that the efforts by state and federal lawmakers will be effective. Surely these newly enacted or pending laws will curb some of the eminent domain abuses occurring in various states.

Missouri—court reluctantly ordered condemnation pursuant to Missouri law and *Kelo* against two homeowners in upscale neighborhood to make way for shopping center; Sunset Hills, Missouri—city officials voted to allow condemnation of 85 homes and small businesses for a $165 million shopping center and office complex, but the development is now in limbo because financing fell through; Lodi, New Jersey—200 residents in a trailer park are fighting plans to use the land for private retail development and senior-living community; Long Branch, New Jersey—use of eminent domain to take oceanfront homes to be replaced with luxury condos; Spring Valley, New York—condemnation of more than 30 properties for private developer to construct residential and retail buildings; Ventor City, New Jersey—Mayor seeks to demolish small businesses, $200,000 homes, and apartments (126 buildings in all) to build luxury condos, high-end specialty stores and parking garage; Cleveland, Ohio—developer pleased with *Kelo* in the event he must condemn property for his planned $225 million residential and retail development; Toledo, Ohio—99 properties taken for expansion of Jeep plant; Warwick, Rhode Island—developer pleased with *Kelo* because of difficulties negotiating with property owners; Memphis, Tennessee—plans by city to use eminent domain to take a four-block section of land for mixed-use development; Freeport, Texas—officials initiated seizure (hours after *Kelo* came out) of waterfront businesses to make way for $8 million private boat marina; Menomonee Falls, Wisconsin—80 parcels of land at risk of eminent domain for redevelopment project; West Allis, Wisconsin—desire of officials to use eminent domain to take shopping mall in order to revitalize it. *See* Institute for Justice, *supra* note 9.

[69] *Kelo*, ___ U.S. at ___, 125 S. Ct. at 2676 (O'Connor, J., dissenting).

[70] Logan Darrow Clements of California desires to seize Justice Souter's farmhouse in Weare, New Hampshire to build the "Lost Liberty Hotel." Kathy McCormack, *Critics of Court Ruling Seek Seizure of Justice's Home*, HONOLULU ADVERTISER, Jan. 22, 2006, at A4. Enough signatures have been submitted to bring the matter before voters on March 14. *Id.* As justification for the move to seize Justice Souter's home, Clements stated that "[t]he justification for such an eminent domain action is that our hotel will better serve the public interest as it will bring in economic development and higher tax revenue to Weare . . . ." Associated Press, *Eminent Domain This! Justice's Farm is Target*, http://msnbc.msn.com/id/8406056/ (last visited Jan. 26, 2006).

As a prime example, the PPRPA seeks to curb the use of eminent domain for economic development by withholding federal funds for a specified period of time if state and local entities abuse their power of eminent domain.[71] According to the House Report, this penalty has "a clear connection between the Federal funds that would be denied and the abuse Congress is intending to prevent . . . ."[72] The rationale behind the denial of funds is that states or localities improperly exercising eminent domain cannot "be trusted with Federal taxpayer funds for . . . 'economic development' projects which could . . . result in abusive takings of private property."[73] The safeguards incorporated into the PPRPA include a notification requirement and opportunities for states and localities to cure violations before losing federal funds.[74] Moreover, the PPRPA creates a private cause of action to enforce its provisions.[75] If enacted, this could have a significant impact on takings within states and cities.

Lawmakers are not the only parties who will influence eminent domain; the judiciary will also play a vital role in the direction of eminent domain in the months and years to come. On January 11, 2006, the Ohio Supreme Court heard the first challenge to the taking of property since *Kelo*.[76] Commentators suggest that a ruling in favor of the property owners could set limits that might prove influential and useful for other courts across the country to follow.[77] The interest and outrage generated by *Kelo* promises to fuel more debate and action on the issue of private property rights, whether by legislation or judicial determinations. Only time will tell if the Fifth Amendment is restored to its original strength.

V. CONCLUSION

The Supreme Court may have temporarily opened the floodgates for cities and developers to deprive citizens of their properties in contravention of the

---

[71] H.R. REP. NO. 109-262(II), at 11 (2005).

[72] *Id.*

[73] *Id.* at 11-12.

[74] *Id.*

[75] *Id.* at 2.

[76] Andrew Welsh-Huggins, *Ohio Court Hears Case on Eminent Domain*, http://www.washingtonpost.com/wp-dyn/content/article/2006/11/AR2006011100201.html (last visited Jan. 26, 2006). Ohio property owners, Joy and Carl Gamble, contest the use of eminent domain to take their property in the Cincinnati suburb of Norwood. *Id.* The city considers the neighborhood to be "deteriorating" and seeks to permit redevelopment through a $125 million development that includes offices and shops. *Id.*

[77] *Id.*

Fifth Amendment. It appears unlikely, however, that these deprivations will continue for any extended period of time because of the highly public nature of the condemnations and because private property owners are fighting against such action. If the Court is presented with the opportunity to revisit this very issue, it is my hope that the Court will carefully consider and uphold constitutional rights and restrengthen the Public Use Clause without blindly deferring to legislative determinations. For if this precedent stands, no property owner can be secure in that "natural, inherent and inalienable" right to possess and protect property.

Kelo: A Case Rightly Decided

Joseph L. Sax*

By my calculation, the U.S. Supreme Court has decided twelve eminent domain/public use cases, the first in 1893, and the most recent, the *Kelo* decision in 2005.[1] Eight of the eleven preceding *Kelo* were decided unanimously.[2] Of the remaining three, one had a dissent on a non-public use ground,[3] and two had dissents (each by two judges) without opinion.[4] In every one of the cases, the Court sustained the exercise of the eminent domain power against a claim that it violated the "public use" provision of the Fifth Amendment. Moreover, as Justice Thomas pointed out in his dissent in *Kelo*, the Court repeatedly used very broad language in disposing of those cases, treating the public use limitation as effectively a "public purpose" standard,[5] under authority as broad as the police power.[6] And the Court gave great leeway to legislative authorizations for condemnation, saying "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[7]

In light of this background,[8] the intense controversy that the *Kelo* case itself sparked within the Court, and especially the hard-hitting dissent of Justice O'Connor, came as a surprise to many of us who follow this specialized area of the law.[9] Similarly, the intense and pervasive publicity the case generated

---

* James H. House and Hiram H. Hurd Professor of Environmental Regulation, Emeritus, University of California Berkeley, Boalt Hall School of Law.

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

[2] Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954); Old Dominion Land Co. v. United States, 269 U.S. 55 (1925); Rindge Co. v. L.A. County, 262 U.S. 700 (1923); Strickley v. Highland Boy Mining Co., 200 U.S. 527 (1906); United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896); Shoemaker v. United States, 147 U.S. 282 (1893).

[3] Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

[4] Clark v. Nash, 198 U.S. 361 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

[5] *Bradley*, 164 U.S. at 161-62.

[6] *Midkiff*, 467 U.S. at 240.

[7] *Berman*, 348 U.S. at 32.

[8] Though it was clear that "public use" issues were getting serious attention in some state eminent domain cases, and not just *Kelo*. *See, e.g.*, County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (overruling Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981)).

[9] Another surprise, to me at least, was that the land development community, which is the primary beneficiary of this technique, never uttered a peep in favor of New London when *Kelo* was before the Court. Presumably property rights ideology trumped economic self-interest. The municipalities were left to fight the battle on their own. Nonetheless, when one seeks out candid comment, one finds that

> [a]round the country, developers and city officials say weakening or destroying the power

also came as something of a surprise, since takings cases usually produce little more than a yawn either in the public press or the community.[10]

At the same time, it was not all surprising to learn that once ordinary people are told that government can expropriate your house in order to turn it over to a private company for its profit-making use (even though paid full value), they are shocked, and strongly believe that such actions must be illegitimate. Nor are their fears fanciful. There is no doubt that the eminent domain power is sometimes misused, with local governments doing the bidding of powerful business interests without sufficient public benefit to justify the decision.[11]

The question raised by *Kelo*, however, is not whether the decision to condemn was unwise, but whether it violated some constitutional entitlement. A century of very diverse Supreme Court litigation over the "public use" language of the Fifth Amendment has failed to uncover any significant constitutional principle in that phrase that can be meaningfully differentiated from the more general precept that eminent domain must be for a public purpose, that is, justifiable within the general confines of the police power.

Unlike much constitutional language, such as freedom of speech or the free exercise of religion, or even the notion of a property "taken", there was no historic experience familiar to late eighteenth-century Americans, nor was there contemporary writing as in the Federalist Papers that would help us to understand what sort of problem, distinct from public purpose, the authors of the Fifth Amendment intended to deal with by using the phrase "public use". In that respect "public use" presents a blank historical page.[12]

So we turn to the words themselves. Justice Thomas said in his *Kelo* dissent, "the most natural reading . . . is that it allows the government to take property only if the government owns, or the public has a legal right to use,

---

to condemn property will seriously undermine efforts to rehabilitate decaying cities. . . . Yet many developers and politicians have been loath to speak up. . . . [F]or many politicians, defending eminent domain was as perilous as endorsing gay marriage.

Terry Pristin, *Developers Can't Imagine A World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5.

[10] *E.g.*, Ralph Blumenthal, *Humble Church Is at Center of Debate on Eminent Domain*, N.Y. TIMES, Jan. 25, 2006, at A11.

[11] A recent article in Harper's suggests that many cities are in league with big-box developers such as Wal-Mart and Target, and condemn largely at their behest. It also quotes a study asserting that there are as many as several thousand condemnations a year in which property is turned over to a private party. Joshua Kurlantzick, *Condemnation Nation: The Big Business of Eminent Domain*, HARPER'S, Oct. 2005, at 72.

[12] A rare study of the provision's history is Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245 (2002), suggesting that "public use" was not meant to be imposed as a limiting standard on the use of eminent domain, but that the Fifth Amendment was only drafted to assure the payment of compensation. *See also* John F. Hart, *Fish, Dams and James Madison: The Original Understanding of the Takings Clause*, 63 MD. L. REV. 287, 306 (2004).

the property, as opposed to taking it for any public purpose or necessity whatever."[13] That seems a perfectly reasonable thing to say. One difficulty with it, however, is that the first half of the formulation (government ownership), seems every bit as natural as the more expansive interpretation Thomas urges. Another difficulty is that the reading Thomas gives has been rejected by the Supreme Court for well over a century.

Let's look at both halves of the Thomas "natural reading" proposition. Can the government condemn property only if it is to own it? If so, utilities like the railroads and telephone and electric companies could not be given eminent domain authority. Yet everyone (except perhaps the most doctrinaire property rights libertarian) agrees that such use of condemnation is desirable and constitutional. That brings us to the more interesting point, Justice Thomas's suggested test whether "the public has a legal right to use the property." This is by no means a perfectly clear standard, as I shall explain presently. But in any event, it would invalidate many of the uses that the Court has sustained over many decades. It is not only at odds with modern cases such as *Midkiff* (condemnation power to shift ownership of land from lessors to lessees),[14] *Berman* (slum clearance and redevelopment of private structures),[15] *Monsanto* (where new drug applicants get data condemned from previous applicants),[16] and *Boston & Maine* (track condemned and transferred from one railroad to another to assure adequate maintenance),[17] but also the old cases where private condemnation was allowed so an appropriator of water who wanted to irrigate his farm could obtain a right-of-way for a ditch over private land from the river to the appropriator's land;[18] or where a miner could condemn a right of way over intervening land to get his ore to a location for transportation or processing.[19] These early cases were justified by the Court on the ground that they were supportive of needed commercial activity,

---

[13] Kelo v. New London, ___ U.S. ___, 125 S. Ct. 2655, 2679 (2005) (Thomas, J., dissenting).

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

[15] Berman v. Parker, 348 U.S. 26 (1954). Another interesting example was the World Trade Center, office buildings that were occupied by both private and public enterprises, for construction of which eminent domain was used and challenged as not for a public use. Courtesy Sandwich Shop, Inc. v. Port N.Y. Auth., 190 N.E.2d 402 (1963), *appeal dismissed*, 375 U.S. 78 (1963).

[16] Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

[17] Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992).

[18] Clark v. Nash, 198 U.S. 361 (1905); *see also* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

[19] Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906). Interestingly, the other old cases allowed condemnation for a purpose that was nowhere contemplated in the Constitution, creation of a park. *See* United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896) (Civil War battlefield historic park); Shoemaker v. United States, 147 U.S. 282 (1893) (Rock Creek park in D.C., case limited to the District's authority).

mining, and irrigation, though through the medium of private entrepreneurs, and not on the ground that there was any public right of use of the condemned property interests. Indeed, there was no such right in those cases.

Aside from these long-standing and consistent precedents to the contrary, the notion that eminent domain can be justified only if the public has a "legal right to use the property" raises a number of questions. I suspect a great many people who were disturbed by *Kelo* would be more favorable to the exercise of the eminent domain power if the issue was a city's desire to provide a new baseball or football stadium for its team, to keep it from moving to another town. Indeed, the State of Texas, which moved rapidly to pass a new law limiting economic development condemnations in the wake of *Kelo*, inserted an explicit exception for a sports stadium.[20]

Of course such facilities are open to the public, as are private shopping malls, though I'm not sure if Justice Thomas would consider that "a legal right to use the property." In any event, in that sense hotels are open to the public too (and under many innkeepers laws perhaps even more legally obliged to serve the public than are sports facilities). Yet condemnation for hotel use was one of the very concerns that the dissenters in *Kelo* raised both in oral argument and in the dissents: "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton . . . ."[21] One can imagine other facilities that are not open to the public at all, such as a private university's medical research facility, yet whose product will be available to the general public. Or places on public property, that serve and are open to the public, but are private, profit-making economic developments, such as the newly-created and highly successful farmers' market on the San Francisco waterfront. I don't know what Justices Thomas or O'Connor would think of a case in which the lease of a private warehouse on that waterfront would be condemned to make way for a lease to private farmers' market stands.

My purpose is only to suggest that once one moves away from the narrowest view of "public use", such as a governmentally owned facility used directly by the government for a public service, such as a fire station, a military base or a school, it is difficult indeed to see where (and why) a court should draw a line. Intuitively, it seems that if a facility is somehow 'purely private' that ought to be over the line. But is a new factory that a rust-belt city

---

[20] TEX. GOV'T CODE ANN. § 2206.001 (Vernon 2005).

[21] Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655, 2676 (2005) (O'Connor, J., dissenting). At the oral argument the following was directed to the lawyer for the city:

> Justice Scalia: [Assume] I just want to take property from people who are paying less taxes and give it to people who are paying more taxes. That would be a public use, wouldn't it?
> Justice O'Connor: For example, Motel 6 and the city thinks, well, it we had a Ritz-Carlton, we would have higher taxes. Now, is that okay?

Transcript of Oral Argument at 29-30, *Kelo*, ___ U.S. ___, 125 S. Ct. 2655 (No. 04-108), *available at* http://supremecourtus.gov/oral_arguments/argument_transcripts/04-108.pdf.

has induced to locate there, and that will cut deeply into a high unemployment rate, and huge welfare burdens, 'purely private'? After all, promoting a viable economy seems to be one of the primary functions of government today, though it is almost always accomplished through the medium of private enterprise. It seems unlikely that the dissenters in *Kelo* think the Constitution compels government to return to the most limited functions of the so-called night watchman state, or to accomplish economic goals solely by voluntary means. So what economy-promoting goals are seen as being constitutionally prohibited by the "public use" language?

The Constitution itself gives no direction, and as one can see from the various opinions in *Kelo*, judges feel free to find the line pretty much where they wish. Justice O'Connor sought to justify her opinion sustaining eminent domain in Midkiff (and the earlier decision in Berman) on the ground that the condemnation was a response to some harm, though that wasn't the way the decisions were justified at the time, and it isn't a ground on which most of the earlier decisions can be justified. And what in the Constitution suggests that physical blight is a harm to the public but unemployment isn't? The same claim of judicial inventiveness may be charged against the concurring opinion of Justice Kennedy who came up with "impermissible favoritism" as a test.[22] So too with Thomas's theory. Where does the "legal right" of use—as contrasted with use as it occurs in a shopping mall—test come from if not from the Justice's own head? It is based on nothing more than what he thinks is a "natural" way to read the language, though it's not the way other Justices over more than one hundred years ever read the language in any of a dozen previous cases. Maybe it's not so "natural" after all.

I suggest that the problem lies deeper than any of these formulae suggest. It goes to the intense difficulty of drawing any sort of even moderately clear public vs. private line when it comes to modern-day urban development. Anyone who has dealt with contemporary land use development knows that most projects these days are done collaboratively between developers and the local government. If a city condemns land for a parking structure to facilitate access to a new shopping mall, does it really matter constitutionally whether it continues to own the facility, or sells or leases it to a private entrepreneur to operate under certain regulations designed to protect the public who uses it? If a city condemns a right-of-way to provide railroad freight access to a new auto manufacturing plant it has lured to town, is that the sort of economic development, tax generating activity that Justice O'Connor condemned in her *Kelo* dissent?[23] Is the constitutional key the fact that railroad tracks are not

---

[22] ___ U.S. ___, 125 S. Ct. at 2669.

[23] The following little local historical tidbit may be of interest. In 1876, Hawai'i enacted a law to promote the development of sugar cane and other crops vesting in the Minister of the Interior authority to condemn such land and water as may be required to meet the needs of such

legally open to the public, whereas a road for truck access might be, even though that particular road spur might never be used for any traffic other than access to the factory?[24] Or is the private railroad's right-of-way constitutionally distinct from the private factory it serves?

The real issue, it seems to me, is not whether some (or many) exercises of eminent domain are inappropriate or even outrageous, but whether controlling misuse of the power should be seen—except in the sort of extreme case (outside the police power, ultra vires) the Court has traditionally cited—as raising a federal constitutional question at all, rather than as a matter that is dealt with by restrictions imposed by local or state legislation. Where drawing the line between "public use" and somehow "not public use" is as vague and slippery as it plainly is (dealing with housing for the poor is acceptable, but dealing with employment for the poor isn't), one may truly wonder what constitutional principle is at stake.

Of course property rights are constitutionally protected, and the Court has been vigilant in recent decades to protect owners' economic values.[25] But the question raised by the "public use" cases, where compensation is paid, is what sort of local publicly approved projects are constitutionally impermissible as being insufficiently public in their use? Is there some constitutionally significant difference to be found among the economic purposes government seeks to advance by promoting irrigated agriculture,[26] facilitating mining,[27] using private companies to effect slum clearance,[28] assembling parcels for a key local industry to save jobs,[29] inducing new industry to come to a depressed city,[30] or keeping the local football team from leaving?[31] For a full century, the Supreme Court has been unable to identify any such principle, and I see nothing in the several *Kelo* opinions to suggest that any of the current justices

---

plantations. Here we had, as I understand the law, public ownership of expropriated lands and waters, so no *Kelo* type problem was directly raised, but this was no doubt a classic example of using the eminent domain power for economic development with extraordinary benefits to private enterprise. 1876 Haw. Sess. Laws 126-30.

[24] That sort of distinction was the very issue in the Malibu Ranch case, in which the Court allowed condemnation for an allegedly private (though technically public) road. Rindge v. L.A. County, 262 U.S. 700 (1923).

[25] *E.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Loretto v. Teleprompter, 458 U.S. 419 (1982).

[26] Clark v. Nash, 198 U.S. 361 (1905).

[27] Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906).

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

[29] Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1931), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

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

[31] City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982).

have discovered something where so many of their predecessors said there was nothing to discover.

That, of course, isn't to say at all that the public should accede to every proposed use of the eminent domain power. Where the problem is left to the legislative process, states can legislate in ways that offer flexibility to deal with the wide range of situations that arise, and can even make specific rules to deal with particular cases that may call for special attention. When states do legislate on these matters, I think it is the course of wisdom not to do so by amending the state constitutions (as has been proposed in a number of places post-*Kelo*).[32] Eminent domain development projects present the sort of highly varied issues that are most likely to benefit from the flexibility a legislative approach affords. Some existing laws require findings of blight, for example, to limit condemnation by redevelopment agencies.[33] States may quite appropriately wish to make exceptions for specific sorts of facilities, such as sports stadia or waterfront redevelopment.[34]

I personally feel very sympathetic to the individual whose home is condemned so that Wal-Mart or General Motors can make more money (while stimulating the local economy); and I most certainly would not want my house taken for that purpose. Moreover, personally I have no interest in public assistance to the local baseball or football team, and could care less whether they go elsewhere. But all these seem to me to be just the sort of issues that raise disputable policy issues that are far more amenable to the judgment of the community's own elected officials than to a nonet of judges in Washington with no principled constitutional precept to guide them.

While some may strongly feel that no project, public or private or mixed, is worthy of success if it cannot be achieved by voluntary acquisition, it is impossible by any accepted means of interpretation to demonstrate that such a view is constitutionally mandated. The majority view in *Kelo* may give a green-light to bad public policy, but it's good constitutional law.

---

[32] For example, a state constitutional proposal sought to be put on the ballot in California is The Homeowners and Private Property Protection Act of 2006, S.C.A. 20, 2005-06 Reg. Sess. (Cal. 2006). Numerous other state legislative changes have been advanced or enacted. *See generally* National Conference of State Legislatures, Post Kelo v. New London State Eminent Domain Legislation, http://www.ncsl.org/programs/natres/post-keloleg.htm (last visited Jan. 10, 2006).

[33] Interestingly, a case currently before the California Court of Appeals involves the condemnation of an undeveloped desert tract in Kern County under a statute that limits eminent domain to blighted urbanized lands under HEALTH & SAFETY CODE § 33000 (Deering 2006). Ass'n for Legal Desert Dev. v. Cal. City, No. 251026JIK (Cal. Ct. App. filed Nov. 3, 2005); *see* CAL. CIV. PROC. CODE § 1240.010 (Deering 2006); HEALTH & SAFETY CODE § 33367.

[34] In one celebrated case, Oakland condemned a football franchise to keep its football team from going to Southern California. *Oakland Raiders*, 646 P.2d 835.

Text-Mess: There is No Textual Basis for Application of the Takings Clause to the States

Aviam Soifer*

There can be no denying that the entire country has witnessed loud, frequent, and riveting fireworks following the United States Supreme Court's decision in *Kelo v. City of New London*.[1] Much of the reaction may have been orchestrated by well-organized critics of the decision, but the stark and vehement differences among the Justices surely helped to trigger a striking reaction full of public outcry, many legislative responses, substantial commentary, and an unusual number of learned symposia—such as this one.

Despite the sound and fury, however, *Kelo* actually demonstrates a solid consensus among the Justices on one basic point: the Takings Clause[2] of the Fifth Amendment long ago was made applicable to the states by the Fourteenth Amendment.[3] Everyone assumes that this issue is one of the few

---

* Dean and Professor of Law, William S. Richardson School of Law, University of Hawai'i. The author thanks the Law Review staff for a multitude of things, not least their stalwart performance in getting this Symposium launched, presented, and published in such excellent and timely fashion. All mistakes are my own, of course, but I received invaluable help as I made them from colleagues Mary Bilder, Al Brophy, David Callies, Maeva Marcus, Carol Rose, Joseph Sax, and Joseph Singer, and from student assistants Shyla Cockett and Jason Kaneyuki.

[1] ___ U.S. ___, 125 S. Ct. 2655 (2005).

[2] As Joseph Sax ably discusses in this Symposium, there are significant implications in whatever label one chooses as the shorthand for the Fifth Amendment's phrase "nor shall private property be taken for public use, without just compensation." For this Symposium, I will defer to the general use of "Takings Clause" by my fellow participants.

[3] There was full agreement on this point in *Kelo*. Writing for the majority, Justice Stevens's first footnote stated simply: "'Nor shall private property be taken for public use, without just compensation.' U.S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897)." *Kelo*, ___ U.S. at___, 125 S. Ct. at 2658 n.1.

Justice O'Connor's dissent made it abundantly clear that she disagreed with the majority on many points, yet O'Connor was in complete agreement on this one, *id.* at___, 125 S. Ct. at 2672 (O'Connor, J., dissenting) ("The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment"), even as she launched into her textual argument about "the unremarkable presumption that every word in the document has independent meaning." *Id.* In his *Kelo* dissent, Justice Thomas acknowledged that some state constitutions lacked just compensation clauses at the time of the founding, but claimed that this "bedrock principle" was adopted by the Framers in the Fifth Amendment, albeit "not incorporated against the States until much later." *Id.* at ___, 125 S. Ct. at 2679 & n.1 (Thomas, J., dissenting). For textual support for a "bedrock principle" that did not actually apply "until much later," Thomas cited only *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992). In that footnote, Justice Scalia's *Lucas* opinion relied exclusively on *Chicago, Burlington & Quincy*

surrounding the Takings Clause that has been settled. A month before *Kelo*, for example, Justice O'Connor used virtually the same language and the same citation concerning Fifth Amendment/Fourteenth Amendment incorporation in *Lingle v. Chevron U.S.A. Inc.*[4] as Stevens used in *Kelo*.[5]

But there is a problem with this move. The Court is accurate in saying that the move has been used for over a century. But its problematic nature is particularly stark for anyone who purports to be a textualist. Taking constitutional texts seriously is worth a few moments, even for those of us who do not loudly proclaim ourselves to be textualists. Unnoticed or entirely forgotten though the textual problem appears to be,[6] a brief consideration of why it arose and how the Court has filled a particularly stark textual lacuna is illuminating.

I. THE TEXTUAL PROBLEM

The Fifth Amendment ends its list of important personal guarantees as follows: "Nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*"[7]	Section 1 of the Fourteenth Amendment, concludes in this way: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[8]

Railroad Co. for the "incorporation of the Takings and Just Compensation Clauses." *Id.* Justice Kennedy's decisive concurring opinion in *Kelo* did not address the incorporation issue. But elsewhere Kennedy often has joined opinions that reflect the longstanding consensus about incorporation of the Takings Clause through the Fourteenth Amendment, indicated simply by citing *Chicago, Burlington & Quincy Railroad Co.*

[4] ___ U.S. ___, 125 S. Ct. 2074, 2080 (2005). Here the Court was unanimous, though Justice Kennedy wrote a one-paragraph concurring opinion discussing other issues.

[5] O'Connor relied exclusively on *Chicago, Burlington & Quincy Railroad Co.* for her point that the Takings Clause of the Fifth Amendment was "made applicable to the States through the Fourteenth." *Id.* The *Lingle* Court emphatically rejected "a freestanding takings test" and "an inquiry in the nature of a due process, not a takings, test." *Id.* at ___, 125 S. Ct. at 2083. Indeed, the Court roundly condemned the "substantially advances" formula it had earlier embraced because such a test is "tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause." *Id.* at ___, 125 S. Ct. at 2084. As we will see, however, any possible tether to the text of the Takings Clause that might be invoked to govern takings by state and local governments is, ironically, invisible.

[6] Joe Singer makes the point that our tendency in legal education starkly to separate courses and to stress coverage may help to explain why this problem slides by. E-mail from Joe Singer, Professor of Law, Harvard Law School to author (Apr. 28, 2006) (on file with author). Property teachers tend to miss its constitutional law context, and constitutional law teachers tend to omit Takings Clause cases entirely. *Id.*

[7] U.S. CONST. amend. V (emphasis added).

[8] *Id.* amend. XIV, 1.

This poses an irrefutable logical problem:

1. The Framers of the Bill of Rights, i.e., James Madison and whoever else we might wish to identify as within this exalted cohort, obviously thought it important to add the Takings Clause to the "life, liberty, or property" guarantees of the Due Process Clause of the Fifth Amendment.

Core rights of "life, liberty, or property" needed to be supplemented if the constitutional text were to provide a guarantee of just compensation for the taking of private property. Thus the Fifth Amendment contains an added Takings clause, though early state constitutions did not have such a clause. The new Takings Clause protected private property rights only against takings by the federal government.

2. The Framers of the Fourteenth Amendment were well-aware of the specific language of the Fifth Amendment and of Chief Justice John Marshall's holding in *Barron v. Mayor of Baltimore*,[9] in which a unanimous Supreme Court emphasized that the Takings Clause did not apply to the states.[10]

In drafting the Fourteenth Amendment in 1866, Congress lifted the Due Process Clause from the Fifth Amendment and plugged its language *haec verba* into the Fourteenth Amendment. *But* they entirely omitted the Takings Clause. Nor does the Takings Clause language appear elsewhere in the text of the Federal Constitution.

∴ The text of the Fourteenth Amendment does not apply the Takings Clause to the states.

This omission is glaring. Like the vital clue for Sherlock Holmes when the dog did not bark in *The Adventure of Silver Blaze*,[11] this failure to make any Takings Clause noise ought to command our attention. Any genuine textualist has to be deeply troubled by a great paradox. How can an omitted text possibly be said to be included in the very text from which it was so clearly omitted?

As we will see, it took just such an exquisite somersault for the incorporation of the Takings Clause to be accomplished in the 1890s. A Supreme Court uninhibited by textual constraints performed the trick. Natural rights rhetoric and great and explicit enthusiasm for substantive due process provided the trampoline in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*[12] and similar cases.

---

[9] 32 U.S. (7 Pet.) 243 (1833).

[10] *Id.* at 250-51.

[11] ARTHUR CONAN DOYLE, *The Adventure of Silver Blaze*, *in* THE MEMOIRS OF SHERLOCK HOLMES (Berkely Books 1963) (1892). Sherlock Holmes understood that the dog would have been quiet only for the owner, and thereby cracked the case.

[12] 166 U.S. 226 (1897).

A. Inadvertent Omission?

As a preliminary matter, however, we should note that there is no way for a textualist to argue that the omission of the Takings Clause from the Fourteenth Amendment was somehow an oversight—a kind of mid-nineteenth century equivalent of the contemporary computer glitch. This claim cannot pass the straight-face test for several reasons:

First, it would need to ignore the clarity and great weight of *Barron v. Mayor of Baltimore*.[13] This famous decision was acknowledged as the leading precedent on the subject, well known to any and all competent lawyers at the time of the framing of the Fourteenth Amendment. In 1833, the great Chief Justice John Marshall could hardly have been more explicit. In *Barron*, Marshall emphatically did not follow his usual nationalist instincts. Instead, he rejected a claim by property holder Barron that Baltimore's failure to dredge the sludge engulfing Barron's wharf amounted to a taking of his property without just compensation in violation of the Fifth Amendment to the Federal Constitution.[14]

The unanimous Court was blunt:

> We are of the opinion that the provision in the Fifth Amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.[15]

Marshall described the question about application of the Takings Clause to the states to be "of great importance, but not of much difficulty."[16] Marshall's contemporaries and those who followed virtually all agreed. For decades, *Barron v. Mayor of Baltimore* remained the standard citation for the core concept that the Federal Bill of Rights did not apply to the states.

---

[13] 32 U.S. (7 Pet.) 243.

[14] *Id.*

[15] *Id.* at 250-51.

[16] *Id.* at 247. There is much fine historical work that supports Marshall's point from various perspectives. Excellent work by legal historians such as William Treanor, Morton Horwitz, and Matt Harrington, for example, underscores the point that the very idea of the Takings Clause was a relatively late concept, not requested as a constitutional amendment by any state. It was inserted in the Fifth Amendment through James Madison largely for hortatory purposes, because people in the new Republic had little fear of the federal government taking property. *See, e.g.*, William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985); Morton J. Horwitz, *The Constitution in Perspective: Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Matthew P. Harrington, *Public Use and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245 (2002).

Indeed this point was so firmly established that in 1872 Justice Miller's unanimous opinion in *Pumpelly v. Green Bay Co.*[17] had to construe the Wisconsin Constitution because, as Miller emphatically explained, the new Fourteenth Amendment did not change long-settled federal constitutional doctrine: "[T]hough the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States."[18] This was four years after Secretary of State William P. Seward declared the Fourteenth Amendment officially ratified.

From the era of the framing of the Constitution and the Bill or Rights through *Barron v. Mayor of Baltimore* and well beyond, it thus was clear that a property owner could not expect to make out a federal case with any claim that a state or local government had deprived him of his property without just compensation. If one did have a colorable federal constitutional claim against a state involving property, it had to be clothed not in Fifth Amendment language, but rather in the changeable context of the Contracts Clause and/or linked to unwritten natural rights doctrine.[19] In work that analyzes nineteenth century property rights claims in detail, moreover, leading legal historians such as Morton Horwitz, Stanley Kutler, Leonard Levy, William Novak, Harry Scheiber, and Gordon Wood all have emphasized the very narrow protection afforded individual property claims and the surprisingly broad deference generally given to public welfare claims.[20]

---

[17] 80 U.S. (13 Wall.) 166 (1872). Obviously the Court's jurisdictional rules surrounding writs of error were quite different from the current jurisdictional rules, and the Court was not similarly concerned with the niceties of "independent" and "adequate state grounds," when it reviewed state court decisions. Michigan v. Long, 463 U.S. 1032 (1983).

[18] *Pumpelly*, 80 U.S. (13 Wall.) at 176-77.

[19] *See, e.g.*, Fletcher v. Peck, 10 U.S (6 Cranch) 87 (1810). Chief Justice John Marshall relied primarily on natural rights/common law principles and his alternative Contracts Clause claim clearly was a secondary argument. Further, Justice William Johnson's dissent relied exclusively on natural rights, anchored in "the reason and nature of things: a principle which will impose laws even on the deity." *Id.* at 143 (Johnson, J., dissenting). *See also* Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); C. PETER MCGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF FLETCHER V. PECK (1966). The antebellum Contracts Clause story is well told in STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971). *See generally* Harry N. Scheiber, *Economic Liberty and the Modern State*, *in* THE STATE AND FREEDOM OF CONTRACT 126-28 (Harry N. Scheiber ed., 1998); Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND L. REV. 73 (2000).

[20] *See* Horwitz, *supra* note 16; KUTLER, *supra* note 19; LEONARD W. LEVY, LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 71 CAL. L. REV. 217

Further evidence of the absence of textual support for Federal Takings Clause claims also turns up, ironically, if one actually reads the original source for the much-favored citation to Justice Samuel Chase's argument in *Calder v. Bull*.[21] People still love to quote Chase's famous condemnation of "a law that takes *property* from A. and gives it to B" as something "against all reason and justice."[22] Purported textualists fail to notice, however, what sources Chase invoked for this argument. Chase relied not on any text, but on "the *great first principles* of the *social compact*" and on "general principles of law and reason."[23] In fact, Justice James Iredell directly attacked Chase precisely on the grounds that Chase entirely lacked textual support for his claims. Iredell insisted on the need to limit judicial review through textualism because:

> The ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) has passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[24]

If it is a clear and basic violation of natural justice to take property from A to give it to B, and if federal courts must afford remedies for such injustices, there ought to be long lines of claimants, perhaps led by Native Americans and Native Hawaiians but also joined by many others. Strikingly, however, doctrines that are not anchored in text have been used repeatedly to defeat

---

(1984); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 (1969).

[21] 3 U.S. (3 Dall.) 386, 388 (1798) (holding that Ex Post Facto Clause was limited to criminal legislation and thus did not bar a Connecticut legislative act setting aside a probate court decree). Justice O'Connor began her vigorous dissent in *Kelo*, for example, with this citation to Justice Chase's natural rights analysis, ___ U.S. ___, ___, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J., dissenting), and Justice Thomas's dissent also relied upon it to claim that the Public Use Clause—yet another label for the Takings Clause—"embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'taking *property* from A. and giving it to B.'" *Id.* at ___, 125 S. Ct. at 2680 (Thomas, J., dissenting) (citations omitted). Unfortunately for genuine textualists, this embodiment also has no anchor in the constitutional text. *See supra* note 3. Indeed, in 1991 several leading legal historians described the *Calder* opinion as "the clearest and most definitive expression of higher-law doctrine to emanate from the United States Supreme Court." KERMIT T. HALL, WILLIAM M. WIECEK & PAUL FINKELMAN, AMERICAN LEGAL HISTORY 107 (1991).

[22] 3 U.S. (3 Dall.) at 388.

[23] *Id.*

[24] *Id.* at 399 (Iredell, J., dissenting). *See generally* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (examining the natural rights background and "pure interpretive model" of constitutional inquiry); Edwin Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928) (providing historical background and philosophical underpinnings of "natural law" theory of constitutional authority).

such basic justice claims concerning land grabs when raised by indigenous peoples. A version of sovereign immunity described by Justice Scalia in remarkably open-ended, nontextual fashion as "the presupposition of our constitutional structure,"[25] for example, defeated a claim by Native Alaskans for compensation. Other doctrines frequently excuse unjust laws that strongly suggest actions that are "taking from A. to give to B."[26] Within the familiar tension between natural justice and the technicalities of lawyers' law, it is easy to discern a pattern that has not favored people who held property initially, had it taken away in a variety of ways over time (often with the help of lawyers), and recently have sought legal redress.

B. Possible Explanations for the Omission from the Fourteenth Amendment

Why was the Takings Clause omitted from the Fourteenth Amendment? One possibility is that *Barron v. Mayor of Baltimore* was so well entrenched that it might seem a radical departure to try to change its approach to property rights on the local level. Another reason is probably even more salient: by the time of the Civil War and the Reconstruction-era constitutional amendments, the issue of slavery had raised the stakes about both property rights and natural rights in complex ways. At the time the 39th Congress began drafting the Fourteenth Amendment in 1866, the leading members of Congress and

---

[25] Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (Native Alaskan Village akin to foreign sovereign and thus barred from suing state), discussed in AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 85-88 (1995); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54-73 (1996) (Congress lacks Commerce Clause power to abrogate Eleventh Amendment immunity).

[26] *Calder*, 3 U.S. (3 Dall.) at 388. Judges often use a variety of nontextual constructs to bar compensation claims made by historically subordinated groups. *See, e.g.*, ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION 52-53 (2002) (compensation claims by victims of the Tulsa race riots barred by the statute of limitations); Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994). In *Hall v. United States*, 92 U.S. 27 (1875), when the Court analyzed the claim of a former slave to a share of cotton that he toiled to produce, the Justices unanimously described the Court's task to be to "roll back the tide of time, and to imagine ourselves in the presence of the circumstances by which the parties were surrounded when and where the contract is said to have been made." *Id.* at 30. The Court then found it unproblematic to bar plaintiff's claim because, as a slave, he could not legally contract.

There has been a good deal of important recent work dealing with reparations issues in the United States. *See, e.g.*, ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191 (2003); William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002).

their allies very recently had "taken" huge amounts of "property" from southern slaveholders worth many millions of dollars. Just compensation, to put it mildly, was not a high priority in the context of the Thirteenth Amendment, nor can it be said to have had much to do with the new inclusion of "privileges or immunities" or "equal protection" in the Federal Constitution through the Fourteenth Amendment.

That Congress was sensitive about the takings issue is underscored by its enactment, during the Civil War, of the District of Columbia Emancipation Act.[27] In addition, at the very time that Congress passed the Civil Rights Act of 1866 over President Andrew Johnson's veto and promulgated the text that became the Fourteenth Amendment, the shape of Reconstruction was still open and hotly contested. As Republicans sought to establish an effective Reconstruction policy, some of their leaders favored the redistribution of southern land so that even "40 acres and a mule" still seemed a real possibility.[28]

II. NATURAL RIGHTS, EQUITY, AND THE LATE NINETEENTH CENTURY

The decisions that began to apply the Just Compensation Clause to the states in the 1890s merit close scrutiny. As we have seen, for instance, the *Chicago, Burlington & Quincy Railroad Co.*[29] decision is the basic source for Justices on all sides in *Kelo* to apply Takings Clause protections against actions by the states. But even this key decision generally receives only passing, formulaic attention.

If we read the whole *Chicago, Burlington & Quincy Railroad Co.* decision, however, several important ironies emerge. First, it is absolutely clear that Justice Harlan's majority opinion was insistently nontextualist. In characteristic fashion, Harlan did not even try to anchor his analysis within the text of the Constitution.[30] Nor did he attempt to distinguish key precedents such as *Barron v. Mayor of Baltimore* and *Pumpelly v. Green Bay Co.*

---

[27] The District of Columbia Emancipation Act, ch. 54, § 1, 12 Stat. 376 (1862) (provided compensation plan for slaves taken from slaveholders loyal to the Union). For a good discussion of related issues on the Confederate side, see Al Brophy, *"Necessity Knows No Law": Vested Rights and the Styles of Reasoning in the Confederate Conscription Cases*, 69 MISS. L.J. 1123 (2000).

[28] *See generally* Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987); Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

[29] 166 U.S. 226 (1897). Chief Justice Melville Fuller did not take part, and Justice David Brewer dissented because he believed the majority did not go far enough in protecting the rights of the property holder.

[30] For a good description of Harlan's abiding enthusiasm for judicial intervention through substantive due process, see LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 158-67 (1999).

Instead, Harlan's opinion asserted that "natural equity"[31] compelled the Court to stretch Due Process protections beyond procedure to substance. He relied primarily on a smattering of state court decisions and treatises he favored. At one point, in fact, Harlan simply asserted: "Due protection of the rights of property has been regarded as a vital principle of republican institutions."[32] Perhaps "due protection" ought to be a constitutional concept. Yet as invoked here by Justice Harlan, the phrase almost makes a joke of the claim that judges ought to be limited by a specific constitutional text.

Further, Harlan was quite explicit that substantive due process was the doctrine upon which the Court relied. He wrote, for example, that "judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that [a state's] final action would be inconsistent"[33] with the Fourteenth Amendment.

In retrospect, there is a great deal more that is ironic in this opinion. The majority insisted that the Seventh Amendment jury trial right applies to state jury trials.[34] In a final irony, the majority upheld—over Justice Brewer's strenuous dissent—the Illinois jury's decision to award a symbolic one dollar to the railroad even though the city put a street across its railroad tracks. This, Harlan wrote, was "a fair and full equivalent for the thing taken" by the public.[35]

---

[31] *Chi., Burlington & Quincy R.R. Co.*, 166 U.S. at 238.

[32] *Id.* at 235-36.

[33] *Id.* at 234-35.

[34] *Id.* at 242-43. The last clause of the Seventh Amendment, according to the Court, "applies equally to a case tried before a jury in a state court and brought here by writ of error from the highest court of the State." *Id.* Harlan noted that state court jury decisions could be reviewed "only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation." *Id.* at 246. In contrast to the broad Takings Clause part of Harlan's opinion, these more specific and more procedural Seventh Amendment aspects have not been followed. *See, e.g.*, Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916) (no federal right to civil jury trial in state courts).

[35] *Chi., Burlington & Quincy R.R. Co.*, 166 U.S. at 242. Harlan's extensive discussion of this point emphasized that the railroad "took its charter subject to the power of the State to provide for the safety of the public" and "laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety." *Id.* at 252.

Indeed, Harlan announced:

> The company must be deemed to have laid its tracks within the corporate limits of the city subject to the condition—not, it is true, expressed, but necessarily implied—that new streets of the city might be opened and extended from time to time across its tracks, as the public convenience required, and under such restrictions as might be prescribed by statute.

Id. at 250.

This was hardly a glorious period for the Supreme Court. The Justices who produced the *Chicago, Burlington & Quincy Railroad Co.* decision had given the world *Plessy v. Ferguson*[36] less than a year earlier. Also this was basically the same array of Justices who had handed down an infamous trilogy of decisions in 1895, including one that Charles Evans Hughes famously cited as an example of the Court's "self-inflicted wounds."[37] This Court's struggles to invalidate paternalistic government action and class-based legislation produced inconsistency at best[38] and the Justices' frequent wrestling with substantive due process in the realm of Takings by both federal and state governments[39] offers a cautionary tale.

It is illuminating to consider how sharply the presumptions in the Court's recent regulatory takings decisions contrast even with those of the Court in *Chicago, Burlington & Quincy Railroad Co. See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Dolan v. City of Tigard, 512 U.S. 374 (1994).

[36] 163 U.S. 537 (1896).

[37] CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 50-54 (1928) (Hughes listed the rehearing, switched vote, and ultimate invalidation of the federal income tax in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 696 (1895), as one of three examples of the Supreme Court's self-induced "disesteem." Two other notorious decisions in 1895 were: *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (Congress lacked constitutional authority to regulate acquisition that gave single corporation control of ninety-eight percent of nation's sugar refining capacity) and *In re* Debs, 158 U.S. 564 (1895) (federal government had inherent power to use labor injunction against union leadership to halt national Pullman strike)). *See generally* ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW (1960).

[38] *See, e.g.*, Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. OF AM. HIST. 970 (1975); Richard Kay, *The Equal Protection Clause in the Supreme Court, 1873-1903*, 29 BUFF. L. REV. 667 (1980); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249 (1987).

[39] United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896) (upholding federal taking of battlefield as an incident of federal sovereignty); Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896) (preceding *Chicago, Burlington & Quincy Railroad Co.* in invoking Fourteenth Amendment due process to uphold railroad's Takings claim, thereby reversing the Nebraska Supreme Court decision that allowed the State Board of Transportation to order railroad to permit farmers to build needed grain elevator on railroad right of way). There is, moreover, deep historic irony in the almost forgotten fact that the Court had earlier considered Bill of Rights claims against a state as it reviewed the Illinois conviction of August Spies in *Spies v. Illinois*, 123 U.S. 131 (1887). Spies, an anarchist on the lam after the Haymarket Riot of 1886, successfully eluded capture until he turned himself in. Apparently his trust in the legal process was misplaced. Spies was executed after the United States Supreme Court rejected his federal constitutional claims.

III. FEDERALISM AND FEDERAL COURT JURISDICTION

Justice Holmes may have transformed the law of takings with his balancing test or spectrum approach in *Pennsylvania Coal Co. v. Mahon*.[40] But it took decades more for federal courts to be drawn back into the maelstrom as they had been in decisions from the 1890s-World War I era. New-fangled zoning, upheld by the Court in the late 1920s and practical jurisdictional constraints on federal courts combined with more permissive notions of the appropriate role of government to keep lower federal court judges from becoming much entangled in local property disputes. There were even several property-specific prudential abstention doctrines such as *Burford v. Sun Oil Co.*[41] and *Louisiana Power & Light Co. v. City of Thibodaux*[42] that warned federal courts away from even attractive nuisances.

The *Lucas-Nollan-Dolan* revolution, however, has forced federal judges into a briar patch of intricate pleading, delays, duplicated efforts, and unseemly interventions. The esoteric elements of the decision last Term in *San Remo Hotel v. City and County of San Francisco*,[43] for example, underscore how treacherous the terrain has become for any lawyer hoping to get a ripe and final state court decision regarding just compensation without waiving possible federal constitutional attacks. Interestingly, for example, most of the heat in the lower court debate in *Hawaii Housing Authority v. Midkiff*[44] concerned whether and what kind of abstention rules ought to apply.[45]

---

[40] 260 U.S. 393 (1922).

[41] 319 U.S. 315, 332 (1943) (invoking "equitable discretion" to give Texas courts the first opportunity to consider "basic problems of Texas policy" in a dispute over oil well drilling permits). *See also* Ala. Public Servs. Comm'n v. S. Ry. Co., 341 U.S. 341 (1951) (stressing importance of allowing state authorities to handle "an essentially local problem" regarding train regulations).

[42] 360 U.S. 25 (1959) (divided court upheld federal district court decision in diversity case to stay federal case, pending resolution of state proceedings regarding city condemnation action). Ever since, students in Federal Courts classes have struggled to reconcile the *Louisiana Power & Light Co.* decision with *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959), handed down the same day. In *County of Allegheny*, when Justices Stewart and Whittaker switched sides, Justice Brennan's opinion for the Court disallowed federal abstention in a Takings Clause action, terming abstention "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id.* at 188-89.

[43] ___ U.S. ___, 125 S. Ct. 2491 (2005). The case involves an intricate minuet of trying to preserve a federal claim in state court, following federal court abstention, while both making sure a takings claim is ripe and trying to avoid falling prey to various esoteric rules regarding federal preclusion.

[44] 467 U.S. 229 (1984).

[45] Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), *rev'd sub nom. Midkiff*, 467 U.S. 229.

Here I should confess that a long time ago I went on record at considerable length and in overly intricate detail criticizing federal court abstention, at least of the *Younger v. Harris*[46] variety. Yet decades later, it seems clearer to me that there may be some forms of prudential federal court abstention that are at least justified and probably to be recommended. It begins to seem that a major example ought to be within the realm of takings/just compensation jurisprudence.[47]

We also ought to be skeptical about the wisdom, and even the constitutionality, of current proposals that Congress reach into the realm of state property law to "overrule" or limit *Kelo* by federal fiat. The spending power might stretch past the breaking point if it were to be used in this context. This is so for a variety of reasons, not least the problems caused by the use of an attenuated basis for direct interference by Washington, D.C. with traditional, integral, and essential state functions within the regulation of property.

IV. BEDROCK PRINCIPLES AND THE SANDS OF TIME

Narrow textualist claims are doomed to failure. Even the staunchest contemporary self-proclaimed textualists easily can be shown to manipulate or ignore texts they do not much like.[48] There may or may not be what the separate *Kelo* dissents each dub as "a bedrock principle"[49] in the realm of

---

[46] 401 U.S. 37 (1971). *See* Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977). I also helped write the brief for the winning side in *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496 (1982), a decision that established that there should be no need to exhaust administrative remedies before invoking federal court jurisdiction under the Civil Rights Act of 1871, currently 42 U.S.C. § 1983 (2006).

[47] Carol Rose suggests a distinction that might allow abstention in the context of regulatory takings litigation, but not in eminent domain disputes. E-mail from Carol Rose, Lohse Chair in Water and Natural Resources, University of Arizona, James E. Rogers College of Law to author (May 02, 2006) (on file with author).

[48] Indisputably stretching the Eleventh Amendment beyond its language comes to mind immediately, for example, as does entirely ignoring the words of the Ninth Amendment. It turns out that self-proclaimed textualists such as Justices Scalia and Thomas are sometimes not bound by words even when it comes to interpreting statutes or quoting dictionaries. *See, e.g.*, Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't. of Health & Human Res., 532 U.S. 598, 615 (2001) (Scalia, concurring in a decision that refused to award civil rights attorneys' fees and used a crabbed interpretation of "prevailing party," insisted on a "term of art" interpretation: "Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning"); Olmstead v. Zimring, 527 U.S. 581, 616 (1999) (Thomas, dissenting in Americans with Disabilities Act ("ADA") case, purporting to rely on a dictionary definition of "discrimination" that misrepresented and even misquoted dictionary source, discussed in Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1296 n.68, 1315-16 (2000)).

[49] ___ U.S. ___, 125 S. Ct. 2655 (2005). O'Connor described "a bedrock principle without which our public use jurisprudence would collapse" that forbids any "purely private taking"

property rights and takings. A viable principle might sensibly boil down to unconstitutional arbitrariness. But we already have constitutional texts and precedents that invalidate such arbitrariness with much less strain than recent Takings Clause decisions. This is particularly the case now that the Court has handed down its anomalous little *per curiam* opinion in *Village of Willowbrook v. Olech*.[50]

Yet when we say that we feel bound by the text, we really ought to attend to the words with some care. The blundering Fifth Amendment-Fourteenth Amendment piñata contest around the Takings Clause makes it hard to claim with a straight face that there is textual or contextual support even to apply that Clause to the states.

If, instead, we want to add words that were intentionally omitted, we ought to own up to doing so. That would entail interpreting law in the name of fundamental values: equity, fairness, and other appealing albeit vague concepts that otherwise might be dubbed judicial activism, or worse.[51]

Indeed, to slip the anchor of textual constraint as clearly as the Court has done with the Takings Clause is to sound a lot like someone who believes, for example, that there may be a privacy right in the Federal Constitution. Or like a lawyer or a judge who relies upon unspecified, inherent executive power that seems to become infinitely distensible, no matter what the constitutional text and judicial precedents say.

But that is another story.

---

without a justifying public purpose, even if just compensation is paid. *Id.* at ___, 125 S. Ct. at 2674 (O'Connor, J., dissenting). Thomas's bedrock principle is different. He claimed "a bedrock principle well established by the time of the founding" that provides "that all takings required the payment of compensation." *Id.* at ___, 125 S. Ct. at 2679 (Thomas, J., dissenting). Shifting bedrock could make one wary about the stability of its foundations.

[50] 528 U.S. 562, 565 (2000) (allegations of "irrational and wholly arbitrary" conduct by Village in dealing with property owners deemed "quite apart from the Village's subjective motivation . . . sufficient to state a claim for relief under traditional equal protection analysis"). Such an open-ended approach to equal protection analysis—apparently not requiring the usual prerequisite of discriminatory motive—provoked a concurrence by Justice Breyer in which he attempted to contain the danger of "transforming run-of-the-mill zoning cases into cases of constitutional right." *Id.* at 566 (Breyer, J., concurring).

[51] In *Lingle v. Chevron U.S.A. Inc.*, ___ U.S. ___, 125 S. Ct. 2074 (2005), for example, the Court paradoxically rejected as "regrettably imprecise" its earlier formula that examined ends and means and asked whether a regulatory taking "'substantially advances'" legitimate state interests. *Id.* at ___, 125 S. Ct. at 2083 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). In its place, the Court explicitly substituted an undifferentiated substantive due process test, to be employed henceforth by judges "addressing substantive due process challenges to government regulation." *Id.* at ___, 125 S. Ct. at 2085.

Biopiracy in Paradise?: Fulfilling the Legal Duty to Regulate Bioprospecting in Hawai'i

I. INTRODUCTION

In response to questions regarding a June 2002 bioprospecting agreement between the University of Hawai'i Marine Bioproducts Engineering Center ("MarBEC") and San Diego-based Diversa Corporation ("Diversa"),[1] which gave Diversa the exclusive right to discover, harvest, and exploit genes from environmental samples collected off of Hawai'i's shores in order to develop commercially marketable products,[2] University of Hawai'i ("UH") President for Research James Gaines remarked, "[i]t's not like they wanted the beak of an endangered bird or something like that . . . . We aren't doing sinister things."[3] Although this agreement was not sinister *per se* and has not lead to the development of any commercially marketable products,[4] it raised many complicated legal, economic, social, and moral issues, none of which have been resolved.[5] While countries and communities around the world have dealt with bioprospecting for decades, the worldwide wave of bioprospecting has not yet fully arrived in Hawai'i.

Bioprospecting is defined as the examination of biological resources for features of commercial value.[6] Since the 1950s, worldwide bioprospecting has

---

[1] *Diversa Will Mine Biodiversity in Hawaii*, ENVTL. NEWS SERVICE, June 11, 2002, *available at* http://www.kahea.org/gmo/pdf/diversa_corp_bioprospecting.pdf. Diversa provides an explanation of its business in its Corporate Overview:

> Diversa Corporation is a leader in applying proprietary genomic technologies for the rapid discovery and optimization of novel products from genes and gene pathways. Diversa is directing its integrated portfolio of technologies to the discovery, evolution, and production of commercially valuable molecules with pharmaceutical applications, such as optimized monoclonal antibodies and orally active drugs, as well as enzymes and small molecules with agricultural, chemical, and industrial applications.

Diversa Corporation, Corporate Overview, http://www.diversa.com/corpinfo/corpover.asp (last visited Mar. 3, 2005).

[2] Howard Dicus, *Weird Science: Company Contracts with UH for Access to Strange DNA*, PAC. BUS. NEWS, June 7, 2002, *available at* http://pacific.bizjournals.com/pacific/stories/2002/06/10/story6.html (internal quotation marks omitted).

[3] Nelson Daranciang, *House Bill Would Halt UH 'Bioprospecting' of Native Species*, HONOLULU STAR-BULL., Mar. 18, 2004, *available at* http://starbulletin.com/2004/03/18/news/story7.html.

[4] Telephone Interview with Kevin Kelly, Dir. of Bus. Dev., Ctr. for Marine Microbial Ecology and Diversity, University of Hawai'i at Manoa, in Honolulu, Haw. (Apr. 27, 2005).

[5] *Id.* Kevin Kelly explained that UH often shares material with Diversa and other companies, but for some reason this particular agreement caught a lot of people's attention. *Id.*

[6] Kristy Hall, Bioprospecting Background Paper: What is Bioprospecting and what are Our International Commitments? (2003) (unpublished M.A. thesis, The University of Auckland)

led to the creation of new medicines, agricultural products, and the growth of the multi-billion dollar biotechnology industry.[7] Although many view bioprospecting as a mechanism to generate revenue and promote scientific research,[8] others say that bioprospecting comes at too high a cost. Bioprospecting has adversely affected environments and indigenous peoples throughout the world, including the extinction of natural species and the unauthorized appropriation of traditional knowledge.[9]

This Article demonstrates that bioprospecting activity in Hawai'i will continue to increase because of Hawai'i's unique biodiversity, the wealth of Native Hawaiian traditional knowledge, as well as the State of Hawai'i's active investment in and promotion of the biotechnology industry. Bioprospecting in Hawai'i, however, is currently unregulated and legislative proposals to develop regulations have faced strong opposition.[10] Set against this backdrop, this Article asserts that the State of Hawai'i has an inescapable legal duty to regulate the bioprospecting of public natural resources, and addresses several key issues that the Hawai'i State Legislature must consider in devising an appropriate legislative solution.

(on file with author) (internal quotations omitted). Hall's paper was "written as part of the Bioprospecting Review currently being undertaken by the [New Zealand] Natural Resources Policy Group of the Ministry of Economic Development." *Id.* It "aims to provide a precise definition of bioprospecting and to discuss some of the issues inherent with the management of this industry for New Zealand." *Id.* Hall explains that "[t]he term 'biodiversity prospecting,' otherwise known as 'bioprospecting,' was first defined in 1993 as the 'exploration of biodiversity for commercially valuable genetic resources and biochemicals.'" *Id.* The current definition is a result of subsequent revisions. *Id.*

[7] *See* Annie O. Wu, Note, *Surpassing the Material: The Human Rights Implications of Informed Consent in Bioprospecting Cells Derived from Indigenous Peoples Groups*, 78 WASH. U. L.Q. 979, 982 (2000). For example, "[i]n the 1950s, scientists from the pharmaceutical firm, Eli Lilly & Co. discovered a plant from which the company derived compounds leading to the production of the anticancer agents vincristine and vinblastine." Lonie R. Boens, Note, *Edmonds Institute v. Babbit: Bioprospecting on Federal Lands, Public Loss or Public Gain?*, 4 GREAT PLAINS NAT. RESOURCES J. 50, 56 (1999).

[8] *See* Dicus, *supra* note 2 (stating that "[b]iotech explorers in search of the world's most unusual life forms have found their way to Hawai'i, and the result may be local research and revenue").

[9] *See infra* Part II.C.

[10] There are numerous treaties, agreements, and other frameworks that attempt to regulate bioprospecting throughout the world. One such major framework is the Convention on Biological Diversity. However, because none of these frameworks are binding on the United States, and because neither the United States nor any individual state has regulated bioprospecting, this Article concentrates specifically on the State of Hawai'i's legal duty to regulate bioprospecting. *See* PETER G. PAN, BIOPROSPECTING: ISSUES AND POLICY CONSIDERATIONS (Legislative Reference Bureau 2006) (undertaken in response to H.R. Con. Res. 146, H.D. 1, 23d Leg., Reg. Sess. (Haw. 2005)), *available at* http://www.hawaii.gov/lrb/rpts06/biocon.pdf.

Part II of this Article discusses the important role that bioprospecting plays in the growth of the powerful international biotechnology industry. While acknowledging the various benefits bioprospecting creates, this part examines how bioprospecting has impacted environments and indigenous communities throughout the world. Part III evaluates the likelihood of bioprospecting occurring in Hawai'i, and addresses the current status of bioprospecting in Hawai'i: a natural resource free-for-all. Part IV considers and concludes that the public and ceded land trusts, in addition to constitutional and statutorily protected Native Hawaiian rights, give rise to an inescapable legal duty that requires the State of Hawai'i to regulate the bioprospecting of public natural resources. Part V proposes that in order to fulfill this duty, the State of Hawai'i must develop a legislative solution that at a minimum, resolves several key issues discussed in this part. Part VI provides a brief conclusion to this Article.

II. BIODIVERSITY, BIOTECHNOLOGY, AND THE SEARCH FOR COMMERCIALLY VALUABLE NATURAL RESOURCES

The biotechnology industry is becoming increasingly dependent on the use of bioprospecting. Although this has generated various social and economic benefits, it has also adversely impacted environments and indigenous communities throughout the world.

A. Biodiversity and the Growing Biotechnology Industry

Biodiversity, simply defined as "life," consists of a wide spectrum of evolutionarily developed organisms and their genetic composition and communities.[11] Scientists have long recognized that in order to achieve an ecologically sustainable society, biodiversity must be preserved.[12] Despite this awareness, worldwide levels of biodiversity are decreasing at an alarming rate, which some commentators call a "biodiversity crisis."[13] Each day, approximately fifty species become extinct, and experts predict that by 2020, fifteen percent of biodiversity worldwide will be lost.[14] Because the loss of biodiversity is permanent in many instances, "biodiversity can be lost before it has ever been discovered[,]" and before any potential benefit is realized.[15]

---

[11] Boens, *supra* note 7.

[12] *Id.* at 55.

[13] *Id.* at 55-56.

[14] Simon Fenwick, *Bioprospecting or Biopiracy?*, 3 DRUG DISCOVERY TODAY 399 (1998).

[15] Boens, *supra* note 7.

The growing biotechnology industry is fueled by biodiversity.[16] Biotechnology, defined as "any technological application that uses biological systems living organisms, or their products for a specific purpose,"[17] is a multi-billion dollar industry.[18] In 2000, the United States led this industry with $100 billion in revenue.[19] In fact, the U.S. biotechnology industry has experienced a sixteen percent compound growth rate since 1989,[20] while the number of domestic biotechnology patent applications increased fifteen percent each year between 1985 and 1990.[21] Meanwhile, European market revenues increased by 845% between 1998 and 2003, and are expected to grow to $100 billion by 2005.[22] The emerging international biotechnology industries in Canada and the Asia-Pacific region have also experienced significant growth.[23]

Experts attribute the rapid growth of the domestic biotechnology industry to two major developments. First, the development of advanced scientific processes has created new uses for natural genetic resources.[24] In particular, scientists now have the capability to synthesize complex chemicals and genetically alter DNA.[25] The National Science Foundation, National Institute of Health, and other major federal granting agencies have been instrumental in influencing scientific development by encouraging partnerships between corporations and universities to conduct costly and complicated biotechnology research.[26]

Second, but perhaps more significantly, researchers are now able to recoup high development costs through the broad recognition of intellectual property rights.[27] Although not generally granted for unmodified wild organisms, patents can be issued for the discovery and use of information derived from these organisms.[28] In 1990, in a case of first impression, the United States

---

[16] *Id.*

[17] *Id.*

[18] John R. Adair, *The Bioprospecting Question: Should the United States Charge Biotechnology Companies for the Commercial Use of Public Wild Genetic Resources?*, 24 ECOLOGY L.Q. 131, 133 (1997).

[19] *Id.* at 135.

[20] U.N. Univ./Inst. of Adv. Studies, *Biodiversity Access and Benefit-Sharing Policies for Protected Areas* 7 (2003), *available at* http://www.ias.unu.edu/binaries/UNUIAS_ProtectedAreasReport.pdf.

[21] Adair, *supra* note 18, at 135.

[22] U.N. Univ., *supra* note 20.

[23] *Id.*

[24] Adair, *supra* note 18, at 135.

[25] *Id.*

[26] Katy Moran et al., *Biodiversity Prospecting: Lessons and Prospects*, ANN. REV. ANTHROPOLOGY 508, 508 (2001).

[27] Boens, *supra* note 7, at 57.

[28] Adair, *supra* note 18, at 136. A patent is "[t]he right to exclude others from making, using, marketing, selling, offering for sale, or importing an invention for a specified period (20

Supreme Court in *Diamond v. Chakrabarty*[29] considered whether a live, human-made micro-organism could be patented.[30] In a five-to-three opinion, the Court held that the micro-organism was patentable subject matter because "the patentee ha[d] produced a new bacterium with markedly different characteristics from any found in nature and one having the potential for significant utility."[31] The Court further concluded that the patentee's "discovery [was] not nature's handiwork, but his own."[32]

Since the landmark *Diamond* decision, and over objections from groups opposing the patenting of life forms, the United States has issued numerous patents for "DNA sequences, genes, plant and animal varieties and biotechnological processes."[33] In fact, thousands of patents have been issued for "human, animal and plant genetic material as well as whole animals and plants."[34] Furthermore, in 1995, the United States Patent and Trademark Office issued the first patent for a human cell line, which came from an indigenous person of Papua New Guinea.[35] All of this has spawned many moral, social, and legal debates.[36]

---

years from the date of filing), granted by the federal government to the inventor if the device or process is novel, useful, and nonobvious." 35 U.S.C. §§ 101-103 (2000).

[29] 447 U.S. 303 (1980).

[30] *Id.* 35 U.S.C. § 101 provides that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title."

[31] *Diamond*, 447 U.S. at 310. It should be noted, however, that Justice Brennan, in his dissent, argued that that majority's holding "extend[ed] the patent system to cover living material even though Congress plainly has legislated in the belief that [35 U.S.C.] section 101 does not encompass living organisms." *Id.* at 321-22 (Brennan, J., dissenting). Justice Brennan warned that "[i]t is the role of Congress, not this Court to broaden or narrow the reach of the patent laws. This is especially true where, as here, the composition sought to be patented uniquely implicates matters of public concern." *Id.* at 322.

[32] *Id.* at 310.

[33] Boens, *supra* note 7, at 57.

[34] STEPHANIE HOWARD, LIFE, LINEAGE AND SUSTENANCE 12 (Debra Harry & Brett Lee Shelton eds., Indigenous Peoples Council on Biocolonialism 2001).

[35] Fenwick, *supra* note 14, at 399.

[36] Moran et al., *supra* note 26, at 508. Some of the issues debated include "the collaboration of big business and big science, the ethics of genetic engineering, and the patentability of life forms." *Id.* Biotechnology is intertwined "with ideas about genetics and racism, culture and ethnicity." *Id.* Also frequently debated is "the public safety and genetic pollution some associate with genetically modified organisms versus the ability of genetically modified organisms to alleviate world hunger and environmental degradation." *Id. See also* Diane E. Hoffman & Lawrence Sung, *Future Public Policy and Ethical Issues Facing the Agricultural and Microbial Genomics Sectors of the Biotechnology Industry*, 24 BIOTECH. L. REP. 10 (2005).

B. What Is Bioprospecting?

The success of the biotechnology industry largely depends on scientific research, namely "bioprospecting." Bioprospecting, which some refer to as "[t]he driving force behind the biotechnology industry,"[37] involves the "examination of biological resources for features that may be of value for commercial development."[38] Bioprospecting generally occurs in two major areas: macroscopic and microscopic.[39] Macroscopic species, namely plants and reef organisms, are commonly used by indigenous people for traditional uses.[40] Meanwhile, microscopic species, including bacteria, archae, and viruses, "are included in the integrity of the waters [which sustain] the people and marine ecosystems."[41]

Bioprospectors seek biological resources with specific "features," such as "morphological, physiological, genetic or biochemical characteristics of *potential commercial applicability* which have been sourced from or produced by biological organisms."[42] Biological resources encompass "genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity."[43] Therefore, this definition includes "plants, animals, microorganisms, and viruses, the parts and products thereof which may be of value to humans."[44] Some biological resources currently being studied include the sweat of hippopotamuses for its ultraviolet blockers and antibiotic properties, ocean sponges for their novel structures to design new optical fibers, venom of Gila monsters for treating diabetes, and the hearing of certain flies to improve the construction of hearing aids.[45]

Although some biotechnology companies conduct their own bioprospecting activities, many often rely on third party intermediaries to collect promising biological samples because of high research and development costs.[46] On average, finding a single potentially commercially valuable medicinal species

---

[37] Boens, *supra* note 7, at 57.

[38] Hall, *supra* note 6, at 2 (citation omitted).

[39] Alexander Malahoff & Victoria Rectenwald, *Study on Marine Biotechnology Policy in Hawai'i: Analysis of the Laws and Policies Related to Marine Bioprospecting and Harvesting* 2 (2002) (draft on file with author).

[40] *Id.*

[41] *Id.*

[42] Hall, *supra* note 6, at 2 (emphasis added).

[43] *Id.* (citation omitted).

[44] *Id.*

[45] Jennifer Hile, *Spider-Venom Profits to Be Funneled into Conservation*, NAT'L GEOGRAPHIC NEWS, Aug. 13, 2004, http://news.nationalgeographic.com/news/2004/08/0812_040811_tv_spider_venom.html.

[46] Adair, *supra* note 18, at 138.

requires bioprospectors to examine at least 10,000 plants.[47] Even after finding a potentially valuable species, biotechnology companies must invest significant effort and resources before the species can be converted into a marketable product.[48] Pharmaceutical companies, for example, must invest approximately twelve years and $231 million before a drug can be marketed.[49]

Biotechnology companies ultimately use the genetic and biochemical materials collected through bioprospecting in various ways.[50] In the agricultural industry, for example, genetic resources have been used in traditional crossbreeding for many years.[51] Crossbreeding with wild varieties of plants contributes an estimated $1 billion per year of value to agricultural products.[52] Also, within the agricultural industry, biotechnology companies have used genetic engineering to create a variety of new species.[53] Some of these species include "a frost-resistant tobacco plant . . . created by transferring a natural anti-freeze producing gene from a flounder, [while] new pest-resistant strains of corn, cotton and potatoes have been created by transferring a gene from a soil bacterium."[54]

Genetic resources have also been used in non-agriculture related ways.[55] For example, scientists discovered fish that produce their own "anti-freeze" in order to survive the Antarctic water.[56] These scientists patented the molecule responsible for this phenomenon and developed commercial uses for it such as "to protect frozen food, or keep ice cream soft in freezers."[57] More new uses for genetic resources are expected to be discovered as technology develops.[58]

---

[47] John L. Trotti, Article, *Compensation Versus Colonization: A Common Heritage Approach to the Use of Indigenous Medicine in Developing Western Pharmaceuticals*, 56 FOOD DRUG L.J. 367, 367 (2001).

[48] Adair, *supra* note 18, at 141.

[49] *Id.*

[50] *Id.* at 138.

[51] *Id.* at 139. Wild potatoes from Peru are commonly used to "invigorate and improve existing varieties of commercial potatoes, and an Ethiopian barley plant was used to develop a fungus-resistant commercial strain in America." *Id.*

[52] *Id.* at 139-40.

[53] *Id.*

[54] *Id.* at 140.

[55] *Id.*

[56] Ian Sample, *Scientists Warn that the World's Least Damaged Environment Could be Changed Forever by the Hunt for Potentially Lucrative Organisms: Cold Rush Threatens Pristine Antarctic*, THE GUARDIAN (LONDON), Feb. 2, 2004, at 9.

[57] *Id.* Furthermore, genetically modified organisms have also been used in other industries, such as "to improve mining, wastewater treatment, and bioremediation processes." Adair, *supra* note 18, at 140.

[58] Adair, *supra* note 18, at 140.

The pharmaceutical industry, however, arguably benefits the most from bioprospecting.[59] The global pharmaceutical market is worth more than $300 billion per year, with research and development costs between $250 and $500 million.[60] In order to achieve financial success, pharmaceutical companies often rely upon the "abundant and diverse" plant life in many developing countries for their research.[61] As the National Cancer Institute's ("NCI") natural products branch chief commented, although maybe one in 10,000 potentially commercially valuable discoveries ends up getting to the market, "there's still a wealth of material out there. There's no doubt that nature is a wonderful source of potential new drugs."[62]

At one time pharmaceutical companies favored the production of synthetic drugs through computer modeling; but now, many scientists believe that drug discovery is most successful through the use of biological resources.[63] The United States derives an estimated thirty-five percent of its medicines from plants, animals, and microorganisms.[64] Furthermore, many expect bioprospecting levels to increase with improvements in genetic engineering capabilities and increased knowledge about domestic biodiversity.[65]

C. Potential Impacts of Bioprospecting

Despite the various benefits that it generates, bioprospecting can cause adverse impacts. Some of these impacts include environmental degradation, and the exploitation of indigenous communities.

1. Environmental degradation

Overall, approximately 35,000-70,000 of the 250,000 plant species in the world are used for medicinal purposes.[66] Approximately fifty-seven percent of the top 150 prescription drugs sold in the United States are derived from natural resources.[67] The world market also depends heavily on drugs derived from natural resources; seventy-eight percent of anti-bacterial agents and sixty-

---

[59] *Id.* at 139.

[60] Hall, *supra* note 6, at 5.

[61] Trotti, *supra* note 47, at 367.

[62] Laurie Goering, *Rain Forests May Offer New Miracle Drugs*, CHI. TRIB., Sept. 12, 1995, at 1.

[63] Christopher J. Hunter, Comment, *Sustainable Bioprospecting: Using Private Contracts and International Legal Principles and Policies to Conserve Raw Medicinal Materials*, 25 B.C. ENVTL. AFF. L. REV. 129, 137 (1997).

[64] Adair, *supra* note 18, at 139.

[65] *Id.* at 155.

[66] Fenwick, *supra* note 14, at 400.

[67] *Id.*

one percent of anti-cancer compounds are derived from natural resources.[68] Medicinally beneficial natural species include fungi, which provide a source of bioactive compounds, venomous animal species, and plants,[69] as well as the "highly adapted species" found in the coastal regions of marine ecosystems.[70] Medicinal discoveries from biological resources include the heart drug digitalis, derived from the biennial plant foxglove, aspirin, derived from the white willow tree, and penicillin, created from a fungus.[71]

In addition to providing medicinal benefits, some people claim that bioprospecting "hardly disturbs the environment."[72] Bioprospecting is said to be distinguishable from environmentally destructive activities such as mining and ranching because "it involves the removal of such a small amount of material that it usually does not harm the ecosystem."[73] In fact, some conservationists, as well as the drug industry, have even touted bioprospecting as a conservation mechanism.[74] They claim that "[e]ven if a drug never makes it to market, money spent to build new laboratories in developing countries and to hire and train local scientists to find, study, and test rain forest plants and animals for medicinal cures brings immediate value to the rain forest."[75] Others argue that "the development of powerful new drugs from natural products can provide an economic return . . . [t]hat, in turn, will encourage the sustainable use of native plants and other natural resources."[76] However, this is not necessarily the case.

For example, in 1991,[77] Cornell University brokered the first "conservation-

---

[68] *Id.*

[69] *Id.*

[70] *Id.* Fenwick explains that marine ecosystems constitute ninety-five percent of the biosphere. *Id.*

[71] Charles Seabrook, *Treasures From the Tropics; Georgia Scientists are Prospecting – But Not for Gold. They're Hunting for Plants that May Hold the Key to Healing Human Ailments*, THE ATLANTA J. AND CONST., Feb. 7, 1999, at 01C.

[72] Paul Elias, *'Bio-Prospecting' as Firms Mine Bacteria, Questions Arise as to Who Profits and Who Loses*, PITTSBURGH POST-GAZETTE, July 1, 2004, at E3. *See also Hearings on H.B. 247*, 23d Leg., Reg. Sess. (Haw. 2005) (testimony of James R. Gaines, Interim Vice President for Research, UH) (testifying that "[b]ioprospecting however, has but a minor impact on the loss of biodiversity and the use of biological resources") (copy on file with author).

[73] Adair, *supra* note 18, at 134 & n.13.

[74] John Roach, *Rain Forest Plan Bends Drug Research, Conservation*, NAT'L GEOGRAPHIC NEWS, Oct. 7, 2003, http://news.nationalgeographic.com/news/2003/10/1007_031007_bioprospect.html. *See also* Boens, *supra* note 7, at 73 ("Bioprospecting is a potentially environmentally friendly activity that may help to preserve the world's biodiversity treasures.").

[75] Roach, *supra* note 74.

[76] Seabrook, *supra* note 71, at 01C.

[77] Devinder Sharma, *Selling Biodiversity: Benefit Sharing is a Dead Concept*, *in* THE CATCH: PERSPECTIVES IN BENEFIT SHARING 1, 7 (Beth Burrows ed., 2005). Sharma discussed other bioprospecting agreements that INBio entered into:

oriented" bioprospecting agreement.[78] Under this deal, Costa Rica's National Institute of Biodiversity ("INBio") was to "provide samples of various organisms to the Merck pharmaceutical company."[79] Furthermore, in the event Merck discovered a commercially valuable compound, the profits would be shared with INBio to be used towards conservation.[80] Although this agreement was conceptually popular, the difficulty in finding a profitable compound stymied its success.[81] In addition, even if rainforests were to receive a royalty from a bioprospecting discovery, the time frame for receiving the royalty (an estimated seven to eight years after the compound is collected) may be too long to benefit conservation.[82]

Bioprospecting, despite its medicinal value and promotion as a conservation mechanism, can cause deleterious environmental effects.[83] Increased bioprospecting often results in increased harvesting, thereby potentially accelerating the rates of decline for living organisms.[84] In some instances, even removing a small amount of biological material for testing may compromise the survival of particularly sensitive species.[85] Furthermore, as one commentator noted, "[e]nthusiasm over discovering a promising plant may propel scientists and their collectors to extract species or samples of species at

---

Subsequently, INBio signed similar bioprospecting agreements with the cosmetic company Givaudan Roure in 1995 to explore the potential of biodiversity fragrances and aromas, which could be eventually synthetically reproduced. In 1996, INBio signed an agreement with another company, Indena Spa, to procure antimicrobial compounds to be used in cosmetics. Three years later, it also entered into an agreement with the US-based Diversa to explore new enzymes in aquatic and terrestrial microorganisms.

Numerous other INBio agreements involved ICBG (the group operating in Papua New Guinea), British Technology Group, University of Massachusetts, University of Strathclyde, NASA, American Development Bank, Cornell University, and the pharmaceutical company Bristol Myers Squibb. INBio has so far signed eleven international agreements on behalf of the Costa Rica Government. Significantly, INBio provided unrestricted access to scout the tropical forests for a paltry fee. Costa Rica alone is home to five per cent of the world's biodiversity, with an estimated worth of several billion dollars, and all it has managed to get in return for its biodiversity is US $2.6 million.

Id. at 7-8.

[78] Hile, *supra* note 45.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Roach, *supra* note 74.

[83] Hunter, *supra* note 63, at 138.

[84] John Pickrell, *"Wonder Drug" Snails Face Threats, Experts Warn*, NAT'L GEOGRAPHIC NEWS, Oct. 16, 2003, http://news.nationalgeographic.com/news/2003/10/1016_031016_conesnails.html.

[85] Adair, *supra* note 18, at 134 & n.13.

a rate and volume that threaten the source species' very existence."[86] In one case, bioprospectors, sponsored by the NCI, caused the extinction of the entire adult population of the plant *Maytenus buchananni*, often used in anti-cancer compounds, by harvesting 27,215 kilograms for experimentation in NCI's drug development program.[87] Although NCI's motives for harvesting the plant may have been altruistic, "impulse, whether altruistic or commercial, may blind individuals, institutions, and corporations to the necessity of maintaining long-term sustainability of biodiversity resources."[88]

2. Exploitation of indigenous communities

Bioprospecting has harmed many of the estimated 300 million indigenous people worldwide.[89] Although difficult to define, "indigenous peoples" are generally considered to be "descendents of the original inhabitants of many countries and their cultures, religions and a distinct mode of socio-economic organizations."[90] Indigenous peoples are generally thought to share a "holistic view of nature and society where the well-being of both go hand in hand."[91] A legend of the Amerendians in Latin America exemplifies this holistic view: "The sky is held by the trees. If the forest disappears the sky, which is the roof of the world, collapses. Nature and man perish together."[92] Many indigenous peoples hold the belief that "land belongs to [a] vast family of people many of whom are dead, a few living and countless members unborn."[93]

Although much of the biodiversity in developed countries has been destroyed by industrialization and monoculture, indigenous peoples have managed to conserve much of the biodiversity in their communities,[94] which has not gone unnoticed. Partly because ninety percent of the earth's biodiversity is located in indigenous territories, indigenous communities have become the "primary target" of bioprospectors.[95] As one commentator observes,

---

[86] Hunter, *supra* note 63, at 138.

[87] *Id.*

[88] *Id.*

[89] *See* James A.S. Musisi, *Cultural Diversity and Environment: The Case for Indigenous People*, *in* ENVIRONMENT AND DEVELOPMENT IN DEVELOPING COUNTRIES: NATIONAL AND INTERNATIONAL LAW 150 (Ing Lorange Backer et. al. eds., Institute of Public and International Law, University of Oslo 1994), *reprinted in* INDIGENOUS PEOPLES, THE ENVIRONMENT AND LAW 3, 4 (Lawrence Watters ed., 2004).

[90] *Id.*

[91] Fenwick, *supra* note 14, at 400.

[92] Musisi, *supra* note 89, at 5.

[93] *Id.* (alteration in original) (internal quotation marks omitted).

[94] HOWARD, *supra* note 34, at 11.

[95] *Id.*

> [n]ot only have indigenous peoples proved to be the most practical conservators of natural resources, and indeed have passed on this valuable knowledge to successive generations, they have also turned out to be an invaluable source of super-profits for the gigantic multi-national corporations, especially those involved in the pharmaceutical industry.[96]

As a result of high research and development costs, pharmaceutical companies have become increasingly dependent on indigenous peoples' traditional knowledge of medicinally useful biological resources.[97] "Traditional knowledge" generally "refers to knowledge, possessed by indigenous people, in one or more societies and in one or more forms, including, but not limited to art, dance and music, medicines and folk remedies, folk culture, biodiversity, knowledge and protection of plant varieties, handicrafts, designs, literature."[98] Indigenous peoples' traditional knowledge is valuable for biological and cultural conservation, and may be the most efficient way to discover new medicines from natural sources.[99] Researching traditional uses give pharmaceutical companies approximately a sixty percent greater chance of discovering commercially valuable medicinal species than randomly examining plants.[100] Indigenous peoples' traditional knowledge has led to the creation of approximately seventy-four percent of the plant-based medicines consumed in the United States.[101]

It is often the case, however, that indigenous and local communities do not patent and commercially benefit from their traditional knowledge and natural resources, and are often times exploited.[102] Although reliance on indigenous traditional knowledge has provided bioprospectors with substantial savings in research costs, in addition to profits from discoveries and other benefits, indigenous peoples' cooperation and teachings often go unrewarded.[103] In fact, in many instances, bioprospectors remove plants and animals from indigenous communities without the prior consent of the Native people.[104] Bioprospectors often take these valuable species without intending to

---

[96] Musisi, *supra* note 89, at 5.

[97] Trotti, *supra* note 47, at 367.

[98] Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1 (2000), *reprinted in* INDIGENOUS PEOPLES, THE ENVIRONMENT AND LAW 93, 94 (Lawrence Watters ed., 2004).

[99] Fenwick, *supra* note 14, at 400.

[100] HOWARD, *supra* note 34, at 11.

[101] *Id.*

[102] Elizabeth Longacre, Note, *Advancing Science While Protecting Developing Countries from Exploitation of Their Resources and Knowledge*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 963, 969-70 (2003).

[103] Trotti, *supra* note 47, at 367.

[104] HOWARD, *supra* note 34, at 11.

acknowledge or share any commercial benefits with the local communities, even though the local communities cultivated the biological resource.[105] This type of exploitation, where a source community or country is not allowed to control its biological resource and is not compensated for its taking, is referred to as "biopiracy."[106]

In some instances, biopiracy has occurred through the issuance of patents.[107] Discoverers of commercially valuable species in indigenous and rural communities, such as companies and government agencies, often assert ownership over the species in the form of a patent.[108] Some argue that the bioprospecting industry aims "to boost profits from medical, agricultural and industrial products . . . [by] taking traditional knowledge about useful aspects of plants, or information established by science at public expense, patenting the life forms and then selling products back to the public, who arguably owned the wildlife in the first place."[109] Although patents were originally intended to promote innovation and invention, for items such as toasters and cameras, life forms can now be patented.[110] One commentator explained, "[i]f people have rich biodiversity and intellectual wealth, they can meet their needs for health care and nutrition through their own resources and knowledge."[111] If, however, "the rights to both resources and knowledge have been transferred from the community to [intellectual property rights] holders, the members of the community end up paying high prices or royalties for what was originally theirs and free."[112] Notwithstanding the various benefits it creates,

---

[105] *Id.* For example, in Latin America, "the Amazonian Indians for centuries used tamate (a small cylindrical tomato) from the jungle in Ecuador for its cancer-fighting properties." Longacre, *supra* note 102, at 970. "A multi-national pharmaceutical company then isolated the tomato's active ingredient, lycopene, and now sells it as a cutting-edge product in cancer treatment," but does not share any profits with the Amazonian Indians. *Id.*

[106] Longacre, *supra* note 102, at 969.

[107] *Id.* at 969-70.

[108] HOWARD, *supra* note 34, at 12.

[109] Paul Evans, *Pirates of the High Fields: Is the Search for Plants that are Useful to Genetics Leading to the Exploitation of Nature and the Public?*, THE GUARDIAN (LONDON), Mar. 31, 2004, at 13.

[110] HOWARD, *supra* note 34, at 12.

[111] Vandana Shiva, *Bioprospecting as Sophisticated Biopiracy*, *in* THE CATCH: PERSPECTIVES IN BENEFIT SHARING 15, 31 (Beth Burrows ed., 2005).

[112] *Id.* at 31-32. Bioprospecting combined with the assertion of intellectual property rights can adversely impact indigenous communities in a variety of ways. If, for instance, a certain "community enters into a bioprospecting contract about a medicinal plant with a corporation and the corporation subsequently claims intellectual property rights . . . related to the products derived from the plant," then the following effects would likely result. *Id.* at 32. First, other communities who used that plant may lose access to the plant, which may lead to poorer nutrition and health. *Id.* Second, other communities may be forced to pay for seeds and medicines that were once free. *Id.*

bioprospecting has raised important issues pertaining to at least the environment and indigenous peoples.

III. HAWAI'I'S NATURAL RESOURCE FREE-FOR-ALL

Considering the growing international biotechnology industry and the serious impacts that bioprospecting can cause, it is important to evaluate the likelihood of bioprospecting taking place in Hawai'i. Because of the State of Hawai'i's unique biodiversity, the wealth of Native Hawaiian traditional knowledge, and the State's active investment in and promotion of the biotechnology industry, bioprospecting activity in Hawai'i is likely to increase. Bioprospecting in Hawai'i, however, is unregulated and legislative proposals to develop regulations introduced in 2003, 2004, and 2005 faced strong opposition. Consequently, bioprospecting in Hawai'i is currently a natural resource free-for-all.

A. Hawai'i's Attractiveness to Bioprospectors

Hawai'i possesses many qualities that will attract the biotechnology industry, and ultimately bioprospecting.[113] First, and perhaps most significantly, Hawai'i is part of a class of biodiversity "hot spots," which include Australia and Costa Rica[114]—countries that have already been targeted by bioprospectors. In fact, Hawai'i has been described as having "truly unique marine and terrestrial biodiversity."[115] Approximately forty percent of the

---

The donor community may also be impacted if its traditional knowledge is commercialized and transformed into protected intellectual property. *Id.* at 33. First, as the demand for the product increases, the plant may be exploited more intensely than before, which may diminish the supply of the resource. *Id.* Consequently, this diminishment could lead to price increases and increased exploitation of the biological resource, and possibly extinction. *Id.* The scarcity of the plant in conjunction with intellectual property rights exercised over the product may ultimately prevent the donor community from using the resource anymore. *Id.* at 34.

[113] Kevin Kelly agrees that there is great potential for bioprospecting to occur in Hawai'i. Interview with Kevin Kelly, *supra* note 4. In fact, Kelly stated that there may even be greater potential for commercially valuable discoveries in Hawai'i than anywhere else. *Id.*

[114] Jennifer Hamilton, *State Sees 'Green' in Bioprospecting*, PAC. BUS. NEWS, May 10, 2004, *available at* http://www.bizjournals.com/pacific/stories/2004/05/10/story3.html.

[115] ENTERPRISE HONOLULU, BIOTECHNOLOGY IN HAWAI'I 2 (2003), *available at* http://www.enterprisehonolulu.com/html/pdf/Biotechnology_Hawaii.pdf (last visited Feb. 26, 2006). Enterprise Honolulu describes itself as "a non-profit economic development organization funded by Oahu's private sector . . . focused on attracting, retaining and growing businesses within the island of Oahu." Enterprise Honolulu, Why Honolulu?, http://www.enterprisehonolulu.com/index_home.cfm (last visited Feb. 26, 2006). Enterprise Honolulu strives "towards improving Hawai'i's business climate and global competitiveness, in collaboration with the City and County of Honolulu, Department of Business Economic Development &

State's 22,000 known species are unique to the islands.[116] Many expect Hawai'i's marine plants to have especially strong potential in the development of drugs and other pharmaceuticals.[117] Researchers have already isolated and patented several new antibiotic drugs derived from micro-algae, which are believed to have immense potential for controlling *Streptococcus*, and other resistant infections.[118] UH has also developed the anti-cancer drug *Cryptophycin* from Hawai'i's marine algae.[119]

Hawai'i's unique biodiversity is often attributed to the State's isolation and tropical climate.[120] The islands, however, also encompass other climatic zones including a snow capped mountain on the island of Hawai'i, an alpine desert on Maui, and miles of coral reefs surrounding the islands.[121] In addition, the islands are surrounded by sunshine and saltwater, which are major natural assets, especially to marine biotechnology.[122]

Second, Native Hawaiians have a wealth of traditional knowledge that will likely attract bioprospectors to Hawai'i. As discussed above, bioprospectors often rely on indigenous peoples' traditional knowledge in finding commercially valuable natural resources.[123] Native Hawaiian traditional knowledge that may be of value to bioprospectors include, but is not limited to, "knowledge of current use, previous use, and/or potential use of plant and animal species, soils, minerals, and objects"; "knowledge of planting methods, care for, selection criteria, and systems of taxonomy of individual species"; "knowledge of preparation, processing, or storage of useful species and formulations involving more than one ingredient"; "knowledge of ecosystem conservation (methods of protecting or maintaining a resource)"; "biogenetic resources that originate (or originated) in *Ka Pae 'Aina* [("Hawaiian archipelago")] Hawai'i and consistent with the *Kumulipo* [("creation")]"; and "tissues, cells, biogenetic molecules, including DNA, RNA, and proteins, and all other substances originating in the bodies of *Kanaka Maoli* [("Native Hawaiians")], in addition to genetic and other information derived

---

Tourism, and the Hawai'i Chamber of Commerce." *Id.*

[116] Hamilton, *supra* note 114.

[117] ENTERPRISE HONOLULU, *supra* note 115, at 8.

[118] *Id.* at 8-9.

[119] *Id.* at 8.

[120] Hamilton, *supra* note 114. Hawai'i's tropical climate has enabled the development of unique tropical plants, such kava, which has already experienced commercial success. ENTERPRISE HONOLULU, *supra* note 115, at 8.

[121] *Diversa Will Mine Biodiversity in Hawaii*, *supra* note 1.

[122] Terrence Sing, *Hawaii Natural Resources Seen as Boon for Biotech*, PAC. BUS. NEWS, Dec. 15, 2000, *available at* http://pacific.bizjournals.com/pacific/stories/2000/12/18/story8.html.

[123] *See supra* Part II.C.2.

therefrom."[124] Until now, Hawai'i's natural, physical, and human resources have been largely untapped—and remain unprotected.[125]

In addition to Hawai'i's unique biodiversity and Native Hawaiian traditional knowledge, which could independently attract bioprospectors, the State of Hawai'i has actively invested in and promoted the biotechnology industry.[126] In 2002, the Biotechnology Industry Organization[127] ("BIO") named former Hawai'i Governor, Ben Cayetano, Governor of the Year.[128] BIO praised Cayetano and the Hawai'i State Legislature for their promotion of technology business development, especially for Act 221, which provides generous tax breaks for biotechnology businesses in the State.[129]

---

[124] *Paoakalani Declaration*, Ka 'Aha Pono '03: Native Hawaiian Intellectual Property Rights Conference, Waikiki, Hawai'i, Oct. 2003, 5-6. Following the commercial exploitation of "territories, lands, submerged lands, marine resources and seas," allegedly "perpetrated by state and national governments, international agencies, private corporations, academic institutions and associated research corporations," in 2003, Native Hawaiians united for a three-day intellectual property conference "to express [their] collective right of self-determination to perpetuate [their] culture under threat of theft and commercialization of traditional knowledge." *Id.* at 1. Additional sources of Native Hawaiian traditional knowledge include the following: "knowledge of the histories and traditions transmitted through *Kanaka Maoli* traditional and contemporary means"; "details of cultural landscapes and particularly sites of cultural significance"; "sacred ceremonies, images, sounds, knowledge, material, culture or anything that is deemed sacred by the *lahui*, *'ohana*, and traditional institutions and communities"; and "cultural property, including but not limited to expressions, images, sounds, objects, crafts, art, symbols, motifs, names, and performances." *Id.* at 5.

[125] Jan Tenbruggencate, *Hawai'i Drawing Waves of Ocean Researchers*, HONOLULU ADVERTISER, Aug. 17, 2004, at A, *available at* http://the.honoluluadvertiser.com/article/2004/Aug/17/ln/ln03a.html.

[126] *Biotech Firms Draw Investor*, HONOLULU ADVERTISER, Dec. 13, 2004, at C, *available at* http://the.honoluluadvertiser.com/article/2004/Dec/13/bz/bz02p.html.

[127] BIO describes itself as:

> [T]he national trade association for the biotechnology industry, representing more than 1,000 member companies, in the United States and in 33 nations. BIO has worked closely with the State of Hawaii for the past several years to grow and attract technology-based industries that bring high-skill, high-wage jobs to the state. BIO is now joined by the Hawaii Life Sciences Council (HLSC) in its mission to work with the Hawaii Department of Business, Economic Development, and Tourism (DBEDT), Hawaii High Technology Development Corporation (HTDC), the University of Hawaii, and others to promote the life sciences industry development in Hawaii.

Hearings on S.B. 1425 and S.B. 1692, 23d Leg., Reg. Sess. (Haw. 2005) (testimony of the Biotechnology Industry Organization), *available at* http://www.bio.org/local/foodag/20050210sb1425-1692.pdf.

[128] *Biotechs Call Cayetano Their Governor of the Year*, PAC. BUS. NEWS, Oct. 22, 2002, *available at* http://pacific.bizjournals.com/pacific/stories/2002/10/21/daily22.html.

[129] *Id.*

The State of Hawai'i also has infrastructure that will facilitate biotechnology.[130] The State hosts "world-renowned research centers" such as the Oceanic Institute, Queen's Medical Center, Natural Energy Laboratory of Hawai'i Authority, Hawai'i Agriculture Research Center, MarBec, and UH.[131] UH, the main research campus in the State, attracts major federal research funding, and has over 20,000 students enrolled.[132] In addition to other resources, UH has many large-scale biological programs including its medical school and college of agriculture.[133] Furthermore, the development of a $150 million bioscience park next to the new UH Medical School on O'ahu is also currently underway.[134]

The biotechnology industry is considered to be the "smallest, yet fastest growing activity in Hawai[']i's private technology sector."[135] Hawai'i's biotechnology industry grew 94.74% between 1996 and 2001.[136] In fact, numerous "cutting edge" private and public biotechnology companies do business in Hawai'i.[137] Enterprise Honolulu, a non-profit development organization funded by O'ahu's private sector, estimates that by 2010, Hawai'i's biotechnology industry will employ 6700 people and generate $3.1 billion in revenues.[138] Although the State of Hawai'i does not have a precise inventory, some estimate that "5,000 bioprospecting projects are under way in Hawai'i's rain forests, volcanic fields, teeming reefs and deep ocean chasms

---

[130] *See* Malahoff & Rectenwald, *supra* note 39, at 2. *See also* Adair, *supra* note 18, at 167 ("[F]ederal public land may provide conditions especially favorable to bioprospectors." For example, "federal public lands are often more accessible than the public land of other countries because of their fairly well-developed infrastructures.").

[131] Terrence Sing, *Where is Biotech?*, PAC. BUS. NEWS, Feb. 23, 2001, *available at* http://pacific.bizjournals.com/pacific/stories/2001/02/26/story2.html.

[132] Email from The Sunshine Project, to KAHEA, kahea-alliance@hawaii.rr.com (June 29, 2004) (copy on file with author) (The Sunshine Project distributed a short series of publications named "Biosafety Bites" describing cases of problems that primarily related to laboratory safety).

[133] *Id.*

[134] Helen Altonn, *UH Seeks Firms for Biotech Facility*, HONOLULU STAR-BULL., Mar. 27, 2005, *available at* http://starbulletin.com/2005/03/27/news/story5.html.

[135] ENTERPRISE HONOLULU, *supra* note 115, at 2.

[136] *Id.*

[137] *Id.* at 3. Enterprise Honolulu lists the following companies as leaders in the biotechnology industry in Hawai'i: Cyanotech, Mera Pharmaceuticals Inc., Mauna Kea Nutraceuticals, Micro Gaia, Inc., Enzamin USA, Inc., High Health Aquaculture, Inc., and Ceatech USA, Inc. *Id.*

[138] *Id.* at 2.

between the islands."[139] This has led many to believe that the State of Hawai'i is unprepared to handle the impacts of unregulated bioprospecting.[140]

B. "Hawai'i's Bold Bid for a Bioprospecting Bill"[141]

Despite the State of Hawai'i's growing biotechnology industry, bioprospecting, the fuel of biotechnology, is currently unregulated.[142] In 2002, Diversa, a domestic corporation that conducts bioprospecting activities worldwide, entered into an agreement with UH, and received "exclusive rights to discoveries based on genes drawn from existing material collections at the university and from new samples isolated from ocean resources in the future."[143] As one commentator explained, "[t]his agreement, set against a backdrop of a legal vacuum regarding rights to biological resources in the state, prompted a number of [N]ative Hawaiian and other civil society organizations to push for legislation governing bioprospecting."[144]

In 2003, Hawai'i attempted to "become the first state to stake legal claim to potentially valuable animal and plant products discovered by bioprospectors on state land and offshore."[145] During the 2004 legislative session, the Hawai'i

---

[139] Bruce Dunford, *Hawaii May Seek Legal Claim to Its Resources*, HOUSTON CHRON., Apr. 4, 2004. Although Kevin Kelly acknowledged that bioprospecting is occurring in Hawai'i, he disagreed that 5000 bioprospecting projects are actually occurring. Interview with Kevin Kelly, *supra* note 4. Kelly explained that less than twelve bioprospecting projects are underway at UH, which is the largest research enterprise in the State of Hawai'i. *Id.*

As one commentator recognizes, it is impossible to measure bioprospecting activity occurring on federal lands in the United States "because the federal government does not keep comprehensive records of this activity." Adair, *supra* note 18, at 153. Furthermore, "[n]o system tracks the eventual disposition of biological samples taken from federal land, and it seems likely that a great deal of biological samples taken from federal lands for pure scientific 'research' purposes are analyzed for commercial potential without government knowledge." *Id.* However, "anecdotal evidence suggests that [the current domestic bioprospecting rate] is significant." *Id.*

[140] *See* Le'a Malia Kanehe, *Biopiracy in Hawai'i: A Case Study on Material Transfer Agreements between Public Universities and Private Biotechnology Corporations*, PAC. REGION REP. 3 (2004).

[141] *Hawaii's Bold Bid for a Bioprospecting Bill*, GRAIN, July 2004, at 23.

[142] Boens, *supra* note 7, at 57-58; *see also* PAN, *supra* note 10.

[143] *Hawaii's Bold Bid for a Bioprospecting Bill*, *supra* note 141. "This agreement gives Diversa the right to discover genes from existing material collections . . . with the intent of commercializing the resulting products." Dicus, *supra* note 2. "Founded in 1994, Diversa [in 2001] had expenses of $60.9 million and revenues of $36 million. It has plenty of cash on hand, having raised $200 million in its February 2000 initial public offering, a biotech record." *Id.*

[144] *Hawaii's Bold Bid for a Bioprospecting Bill*, *supra* note 141.

[145] Bruce Dunford, *Measure Protects Discovered Resources*, HONOLULU STAR-BULL., Mar. 28, 2004, *available at* http://starbulletin.com/2004/03/28/news/story5.html. Hawai'i followed 2003's "lead by China, Brazil, India and nine other of the world's most biodiverse countries

State Legislature considered two bills, one that originated in the Senate in 2003, and the other introduced by the House in 2004, which aimed to establish a Temporary Bioprospecting Advisory Commission and a moratorium on bioprospecting.[146] Proponents of the legislation, concerned with the exploitation of natural resources in several developing countries, advocated that biotechnology research in Hawai'i be conducted with sensitivity towards cultural and environmental issues.[147] Some commented that the proposed bills marked a claim to finite public resources, and were "not an assertion that biotechnology is an evil doer."[148]

Meanwhile, opposition to the proposed legislation centered on concerns about the potential effect that the proposed moratorium could have on the biotechnology industry, research, and ultimately the State economy.[149] Some worried that the proposed legislation could cause the departure of biotechnology companies, research companies, and universities and research institutes that partner with UH, and could ultimately result in the losses of revenue, grants, and jobs.[150] Others lamented that "regulations and profit-sharing mandates threaten to inhibit bioresearch in a state where there is a hot pursuit for biotechnology[,]"[151] and some even went as far as saying that for bioprospectors "*to pay anything* to do bioprospecting is *unfriendly* to their existence."[152] Opponents also raised the familiar argument that because it is

---

who signed an alliance to fight 'biopiracy' and press for rules protecting their people's rights to genetic resources found on their land." *Id.*

[146] Vicki Viotti, *Hawaiians, Environmentalists Protest Native Species Study*, HONOLULU ADVERTISER, Mar. 18, 2004, at 4B. *See* SEN. STAND. COMM. REP. NO. 712, 21st Leg., Reg. Sess. (2003), *reprinted in* 2003 HAW. SEN. J. 1323 (stating that the purpose of S.B. No. 643 is "to prohibit the sale or transfer of biological resources and biological diversity on trust lands" and to establish a "Temporary Bioprospecting Advisory Commission"). *See also* H.R. STAND. COMM. REP. NO. 761-04, 22d Leg., Reg. Sess. (2004), *reprinted in* 2004 HAW. HOUSE J. 1699 (stating that the purpose of H.B. No. 2034 is "to help protect Hawai['i]'s biological resources and diversity" by: (1) "Prohibiting the conveyance of the rights, interest, and title of biological resources or biological diversity on public lands"; (2) "Establishing a Temporary Bioprospecting Advisory Commission"; and (3) "Appropriating funds to enable the Commission to develop a comprehensive bioprospecting plan").

[147] Hamilton, *supra* note 114.

[148] Dunford, *supra* note 145.

[149] *Hearings on S.B. 643*, 21st Leg., Reg. Sess. (Haw. 2003) (statement of Sen. Ige) (Senator Ige in regards to S.B. No. 643 spoke with reservations on this measure stating that, "I do believe that it's overly broad and . . . it may have the unintended consequences of really shutting down lots of other private sector research that may be beneficial in the long run. So, I have strong reservations on this measure").

[150] *Hearings on H.B. 2034*, 22d Leg., Reg. Sess. (Haw. 2004) (statement of Rep. Karamatsu).

[151] Hamilton, *supra* note 114.

[152] *Id.* (emphasis added). This view, however, is not necessarily that of the bioprospecting industry. Kevin Kelly, for example, described this view as "ignorant." Interview with Kevin

in bioprospectors' interest to preserve biodiversity,[153] regulating bioprospecting could result in the loss of "research needed to preserve endangered species, control invasive species, preserve fragile ecosystems and discover potential drugs and vaccines."[154]

Hawai'i State Representative Glenn Wakai, who sponsored some of the proposed legislation, commented on the reality of bioprospecting:

> There may be a few bioprospecting companies that are more interested in making a profit than the public welfare. They can easily go from being a bio-prospector to becoming a bio-pirate. However, it is possible that bioprospecting can occur in a manner that protects the integrity of the ecosystem, recognizes Native Hawaiian rights and secures a beneficial economic return for the State. And that possibility is embodied in this bill.[155]

Furthermore, regulation of the bioprospecting industry could provide more certainty, thereby decreasing the amount of risk for investors and increasing investment in the State of Hawai'i. None of the bills, however, were enacted during the 2003 and 2004 legislative sessions.

Four bills relating to bioprospecting were introduced during the 2005 legislative session. These bills, similar to the 2003 and 2004 bills, sought to prohibit the sale or transfer of biological resources or biological diversity on public lands, and to establish a Temporary Bioprospecting Advisory Commission.[156] All of these bills were carried over to the 2006 regular legislative session. Meanwhile, a concurrent resolution requesting "the Legislative Reference Bureau . . . to conduct a study on the fair and equitable sharing of benefits arising from research, indigenous knowledge, intellectual property, or application of biological resources that are public natural resources held in trust by the State for the benefit of the people" was passed.[157] However, bioprospecting in Hawai'i is still unregulated.

Kelly, *supra* note 4.

[153] Hamilton, *supra* note 114.

[154] *Hearings on H.B. 2034*, *supra* note 150.

[155] *Id.* (statement of Rep. Wakai).

[156] *See* H.B. 247, H.D. 1, 23d Leg., Reg. Sess. (Haw. 2005); S.B. 484, 23d Leg., Reg. Sess. (Haw. 2005); S.B. 1692, S.D. 1, 23d Leg., Reg. Sess. (Haw. 2005); and S.B. 1425, 23d Leg., Reg. Sess. (Haw. 2005).

[157] HI H.C.R. 146, H.D. 1, 23d Leg., Reg. Sess. (Haw. 2005). A report was undertaken and published in response to this resolution. *See* PAN, *supra* note 10.

C. The Current Status of Bioprospecting in Hawai'i: A Natural Resource Free-For-All

Because bioprospecting involves the examination of biological resources for features suitable for commercial development,[158] bioprospecting in Hawai'i implicates the State's public natural resources. On April 11, 2003, the Attorney General of the State of Hawai'i explained that "inasmuch as the genetic material or composition of the natural resources and things connected to public lands, including ceded lands, are an integral part of those resources and things, title to the biogenetic resources will still be held by the State if it has not sold the land."[159] The Attorney General opined, however, that "[b]ecause there is no statute or law that presently reserves, or prevents or regulates the sale of, biogenetic resources extracted from resources or things situated on lands the State owns, [it could not be] simply assume[d] that the State owns the biogenetic resources gathered from those lands."[160]

In the absence of regulation, the State of Hawai'i is in jeopardy of losing title to its biogenetic resources. Where "biogenetic resources" are defined as "the genetic material or composition of the natural resources and other things connected to, or gathered from public lands," excluding "wild animals or other things found on the land over which the State does not exercise dominion and control," if the State allows third persons to remove "natural resource[s] or thing[s] from which the biogenetic resources were extracted or [if] the State sold or leased title to a parcel of public land without reserving title or retaining control of the resources or things connected to the transferred land, or their biogenetic contents," then "legal title to biogenetic resources gathered from

---

[158] Hall, *supra* note 6, at 2; *see supra* Part II.B.

[159] Haw. Op. Att'y Gen. No. 03-3 (2003). Pursuant to HRS section 171-2 (2004), and subject to certain exceptions, "public lands" are:

> all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including accreted lands not otherwise awarded, submerged lands, and lands beneath tidal waters which are suitable for reclamation, together with reclaimed lands which have been given the status of public lands under this chapter.

Id.

[160] Haw. Op. Att'y Gen. No. 03-3. In 2003, Representative Sol Kaho'ohalahala, with the assistance of Native Hawaiian attorney Le'a Malia Kanehe, requested an opinion from the Attorney General of the State of Hawai'i regarding legal title to biogenetic resources from public lands. Interview with Le'a Malia Kanehe, Esq., Legal Analyst, Indigenous Peoples Council on Biocolonialism (Mar. 6, 2005). Although "an Attorney General's opinion cannot by itself establish 'clearly established law,'" Price v. Akaka, 3 F.3d 1220, 1225 (9th Cir. 1993) (citations omitted), attorney general opinions are regarded as highly persuasive authority. Cedar Shake and Shingle Bureau v. City of Los Angeles, 997 F.2d 620, 625 (9th Cir. 1993) (citations omitted).

State public lands will not still be vested in the State."[161] It should be noted, however, that "the State would not lose its title to the biogenetic resources if the natural resource or thing from which the biogenetic resource originated was removed from the public lands without authority or the State's permission."[162]

Currently, legal title to "product[s] developed from the genetic material extracted from the resources and things connected to public lands . . . may not be vested in the State."[163] If the State, however, "retained legal title to the resource or thing from which the genetic material was taken to make the product," the State "may have a right of action for damages against the product's developer."[164] Therefore, it is clear that in the absence of regulation and without reservation of title, Hawai'i will lose title to public natural resources that are removed from public lands and converted into commercial products.

IV. THE STATE OF HAWAI'I'S INESCAPABLE LEGAL DUTY TO REGULATE BIOPROSPECTING

The State of Hawai'i is at great risk of losing legal title to its biological resources, and bioprospecting activity is only expected to increase. Meanwhile, legislative proposals to regulate bioprospecting have faced strong opposition. The State of Hawai'i, however, has an inescapable legal duty to regulate the bioprospecting of its public natural resources under *at least* the public and ceded land trusts, and because of constitutional and statutorily protected Native Hawaiian rights. This legal duty must be given foremost consideration.

A. The Constitutional Mandate that Public Natural Resources be Held in Trust

Searching for and removing commercially valuable biogenetic resources from Hawai'i's public lands can violate article XI, section 1 of the Hawai'i State Constitution and the public trust doctrine. Article XI, section 1, provision 1 mandates that:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall

---

[161] Haw. Op. Att'y Gen. No. 03-3.

[162] *Id.*

[163] *Id.* & n.2.

[164] *Id.*

> promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.[165]

In addition, provision 2 requires that the State hold "[a]ll public natural resources . . . in trust . . . for the benefit of the people."[166] In 2003, the Hawai'i Supreme Court in *In re Water Use Permit Applications*[167] defined Hawai'i's public trust doctrine with respect to water resources, and held *inter alia* that "article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."[168] Although the court has yet to explicitly define the full extent of article XI, section 1's reference to "all natural resources,"[169] public trust doctrine principles should apply to "all natural resources."

1. The expanding common law public trust doctrine includes "all natural resources"

Professor Joseph L. Sax explained in his seminal article, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*,[170] that the modern public trust concept is rooted in Roman and English law.[171] Roman and English law recognized "the nature of property rights in rivers, the sea, and the seashore[,]" and sought to preserve "certain interests, such as navigation and fishing . . . for the benefit of the public."[172] The public trust

---

[165] HAW. CONST. art. XI, § 1.

[166] Kent Morihara, Comment, *Hawai'i Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources*, 19 U. HAW. L. REV. 177, 196 (1997).

[167] 94 Hawai'i 97, 9 P.3d 409 (2000).

[168] *Id.* at 131, 9 P.3d at 444 (citation omitted). During the 2001 University of Hawai'i Law Review Symposium "Managing Hawaii's Public Trust Doctrine," Bill Tam, lawyer to the Hawaii Water Commission for over ten years, and lawyer for the Water Commission during most of the underlying proceedings in *In re Water Use Permit Applications* (also known as the Waiahole case), argued that Hawai'i adopted the public trust doctrine long before this case:

> Hawai'i adopted the public trust doctrine, not in the Waiahole decision, not in the McBryde decision, not in the 1978 ConCon, not in statehood, not in territorial time, not even in 1899 when the Republic Supreme Court formally adopted the common law doctrine, King v. Oahu Railway. Arguably, the public trust doctrine, which was part of common law in England and in the United States, was adopted in 1892 when Hawai'i Revised Statutes 1-1 said that the common law of England, as amended by the common law of the United States and the statutory law, is the law of Hawai'i.

Proceedings of the 2001 Symposium on Managing Hawaii's Public Trust Doctrine, 24 U. HAW. L. REV. 21, 40 (2001).

[169] *See In re Water Use Permit Applications*, 94 Hawai'i at 133, 9 P.3d at 445.

[170] 68 MICH. L. REV. 471 (1970).

[171] *Id.* at 475.

[172] *Id.*

doctrine is based on the principle that "certain public resources are enjoyed by everyone, and these resources are subject to demands which necessitate that the state act as trustee to prevent their abuse."[173] The United States Supreme Court in *Illinois Central Railroad Co. v. Illinois*,[174] "[t]he most celebrated public trust case in American law,"[175] created the following principle:

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to relocate that resource to more restricted uses *or* subject public uses to the self-interest of private parties.[176]

The public trust doctrine expanded "[c]oncurrent with the fostering of environmentally conscious legislation and the growing recognition that there are public rights and duties in natural resources."[177] In fact, early American public trust cases abandoned the notion that the public trust was restricted to navigable water or water subject to tides.[178] Furthermore, Professor Sax's reintroduction of the public trust doctrine in the 1970s led to a "more dramatic expansion of the doctrine."[179] As a result, "[i]n the 1970s and 1980s, the public trust doctrine was applied far beyond water to parks, archaeological artifacts, beach access over uplands, critical upland areas surrounding a redwood forest, trees damaged by oil spills, and wildlife."[180] It is yet to be decided "just how expansive the public trust doctrine can be."[181]

2. The public trust doctrine is a fundamental principle of Hawai'i constitutional law

Under the public trust doctrine, "each individual state has the power to define the scope of the land that [it holds] in trust."[182] In 2003, the Hawai'i Supreme Court defined Hawai'i's public trust doctrine with respect to water resources, and held that "the public trust doctrine [is] a fundamental principle of constitutional law in Hawai'i."[183] In reaching this holding, the court first noted the extensive historical endorsement of the public trust doctrine in

---

[173] Anna R. C. Caspersen, Comment, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 361 (1996).

[174] 146 U.S. 387 (1892).

[175] Sax, *supra* note 170, at 489.

[176] *Id.* at 490.

[177] Caspersen, *supra* note 173, at 369.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] Morihara, *supra* note 166, at 189.

[183] 94 Hawai'i 97, 131, 9 P.3d 409, 444 (2000).

Hawai'i case law.[184] Second and most importantly, the court recognized that the people of Hawai'i "elevated the public trust doctrine to the level of a constitutional mandate."[185]

Hawai'i courts "have long recognized that the Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent . . . [which] is to be found in the instrument itself."[186] The Hawai'i Constitution evidences the framer's intent to adopt public trust doctrine principles.

During the 1978 Constitutional Convention, the State added article XI, section 1 entitled "Conservation and Development of Resources" to the Hawai'i Constitution, which mandates that the State conserve and protect *all natural resources*:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[187]

In addition, the State added article XI, section 7, specific to water resources, which provides: "The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people."[188] Accordingly, "[t]he plain reading of these provisions manifests the framers' intent to incorporate the notion of the public trust into [Hawai'i's] constitution."[189] Furthermore, "[a]rticle XI, section 7 is thus self-executing to the

---

[184] *See id.* at 126-29, 9 P.3d at 439-41. The Hawai'i Supreme Court explained that:

> This court endorsed the public trust doctrine in *King v. Oahu Railway & Land Co.*, 11 Haw. 717 (1899). Quoting extensively from *Illinois Central* [*Railroad v. Illinois*, 146 U.S. 387 (1892)], we agreed that "the people of Hawai'i hold the absolute rights to all its navigable waters and the soils under them for their own common use. The lands under the navigable waters in and around the territory of the Hawaiian Government are held in trust for the public uses of navigation." *Id.* at 725 (citation omitted). Later decisions confirmed our embrace of the public trust doctrine.

Id. at 128, 9 P.3d at 440.

[185] *Id.* at 131, 9 P.3d at 443.

[186] *Id.* (citations and quotation marks omitted).

[187] HAW. CONST. art. XI, § 1; *see also In re Water Use Permit Applications*, 94 Hawai'i at 129-30, 9 P.3d at 441-42.

[188] HAW. CONST. art. XI, § 7; *see also In re Water Use Permit Applications*, 94 Hawai'i at 130, 9 P.3d at 442.

[189] *In re Water Use Permit Applications*, 94 Hawai'i at 131, 9 P.3d at 443.

extent that it adopts the public trust doctrine."[190] Notably, "[o]ther state courts, without the benefit of such constitutional provisions, have decided that the public trust doctrine exists independently of any statutory protections supplied by the legislature,"[191] which the court found "all the more compelling."[192]

Although the court declined to "define the full extent of article XI, section 1's reference to 'all public resources,'"[193] other natural resources are encompassed by Hawai'i's interpretation of the public trust doctrine. First, the plain language of article XI, section 1 indicates that the public trust doctrine applies to "all public natural resources, including land, water, air, minerals, and energy sources."[194] Second and alternatively, "[t]he public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances."[195] The growing biotechnology industry and complimentary increase in bioprospecting in the State of Hawai'i, and the potential environmental and social impacts, are changing needs and circumstances that warrant the inclusion of all natural resources under the public trust doctrine.

3. The State's affirmative duty as trustee of public natural resources

The State and its political subdivisions are designated as trustees of public natural resources pursuant to article XI, section 1 of the Hawai'i Constitution.[196] "[A]s the primary guardian of public rights under the trust,"[197] the State cannot "relegate itself to the role of a mere 'umpire passively calling balls and strikes for adversaries in appearing before it,' but instead *must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.*"[198]

The State's two-part constitutional duty under article XI, section 1 of the Hawai'i Constitution is: (1) to protect natural resources; and (2) to promote their use and development.[199] With respect to part one, "[a]s commonly understood, the trust protects . . . against irrevocable transfer to private parties . . . whether for private or public purposes."[200] As discussed above, in the

---

[190] *Id.* at 132, 9 P.3d at 444 & n.30.

[191] *Id.* (citations omitted).

[192] *Id.*

[193] *Id.* at 133, 9 P.3d at 445.

[194] HAW. CONST. art. XI, § 1.

[195] *In re Water Use Permit Applications*, 94 Hawai'i at 135, 9 P.3d at 447 (2000) (citations omitted).

[196] HAW. CONST. art. XI, § 1.

[197] *In re Water Use Permit Applications*, 94 Hawai'i at 143, 9 P.3d at 455.

[198] *Id.* (citations omitted) (emphasis added).

[199] *Id.* at 138-39, 9 P.3d at 450-51; HAW. CONST. art. XI, § 1.

[200] *In re Water Use Permit Applications*, 94 Hawai'i at 139, 9 P.3d at 451 (internal citations omitted).

absence of regulations, if the State allows bioprospectors to remove biological resources from public lands, the State will irrevocably lose legal title to the resources as well as benefits derived from those resources.[201] Losing title constitutes a failure to protect natural resources, and violates article XI, section 1.

Furthermore, consistent with precedent, "the plain meaning and history of the term 'protect' in article XI, section 1, and article XI, section 7 establish that the [S]tate has a comparable duty to ensure the continued availability and existence of its . . . resources for present and future generations."[202] Because of the permanent environmental degradation that bioprospecting can cause, the State's failure to regulate bioprospecting could jeopardize the continued availability and existence of certain natural resources for present and future generations, which would also violate article XI, section 1.

The second part of the State's obligation under article XI, section 1 "encompasses a duty to promote the reasonable and beneficial use of [natural] resources in order to maximize their social and economic benefits to the people of [Hawai'i]."[203] The second clause of article XI, section 1, however, provides that the State "shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."[204] "Conservation" is defined as "the protection, improvement and use of natural resources according to principles that will assure their highest economic or social benefits."[205]

This "mandate of 'conservation'-minded use recognizes 'protection' as a valid purpose consonant with assuring the 'highest economic and social benefits' of the resource."[206] In sum, "the object is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of [natural] resources, with full recognition that resource protection also constitutes 'use.'"[207] Although bioprospecting can potentially lead to new medicinal discoveries, economic stimulation, and other benefits, bioprospecting must be managed in a manner consistent with the conservation of natural resources.

It is also important to mention that a "higher level of scrutiny" is necessary when private commercial uses of trust resources are proposed,[208] such as when

---

[201] *See supra* Part III.C.

[202] *In re Water Use Permit Applications*, 94 Hawai'i at 139, 9 P.3d at 451.

[203] *Id.*

[204] HAW. CONST. art. XI, § 1.

[205] *In re Water Use Permit Applications*, 94 Hawai'i at 139, 9 P.3d at 451 (quoting SEN. STAND. COMM. REP. NO. 77, *reprinted in* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 685-86) (quotation marks omitted).

[206] *Id.*

[207] *Id.* at 140, 9 P.3d at 452.

[208] *Id.* at 142, 9 P.3d at 454.

bioprospectors search for commercially valuable biogenetic resources. "In practical terms, this means that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust."[209] Therefore, bioprospectors, who often seek the use of public trust resources for commercial development, must bear the burden of justifying their use of these resources under a high level of scrutiny.

Bioprospectors could conceivably argue that their search for commercially valuable biological resources is intended to facilitate scientific and economic development, and in many cases, the development of new pharmaceuticals, a legitimate public purpose. The public trust doctrine, however, does not protect private interests in trust resources because "if the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time."[210] Therefore, bioprospectors will not necessarily be justified in using public trust resources, even if their use leads to discoveries that would benefit society at large.

Under Hawai'i law, "the [S]tate may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command . . . ."[211] This in turn "requires planning and decisionmaking from a global, long-term perspective."[212] Therefore, passively or affirmatively allowing biological resources to be removed from public lands, which could ultimately lead to the extinction of natural species and other forms of environmental degradation, is a violation of the State's constitutional duty as trustee of public natural resources.

B. The State's Duty Under the Ceded Land Trust

The State of Hawai'i, as trustee of ceded lands, must also manage the natural resources on those lands.[213] As trustee of ceded lands, the State has a legal duty to collect "all income and proceeds" derived from ceded lands, and to hold these funds as a public trust for five purposes.[214] Hawai'i Revised Statutes ("HRS") section 10-13.5 specifies that the Office of Hawaiian Affairs ("OHA") is to receive twenty percent of all funds "derived" from the ceded

---

[209] *Id.*

[210] *Id.* at 138, 9 P.3d at 450.

[211] *Id.* at 143, 9 P.3d at 455.

[212] *Id.* (citations omitted).

[213] Vicki Viotti, *Hawaiians, Environmentalists Protest Native Species Study*, HONOLULU ADVERTISER, Mar. 18, 2004, at 4B.

[214] *See* Hawai'i Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959).

land trust.[215] For purposes of chapter 10, the ceded land trust "shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii."[216] Therefore, where the biotechnology industry in Hawai'i "seeks to develop derivatives and products from the genetic resources taken from Hawai'i's natural resources, the State's rights and fiduciary obligations to the native and the general public must be upheld."[217]

Ceded lands represent one third of the lands in the State of Hawai'i[218] and are those lands classified as Government or Crown lands prior to the overthrow of the Hawaiian monarchy in 1893.[219] In 1848, King Kamehameha III set aside the Government Lands "for the benefit of the chiefs and people."[220] The Crown Lands, which were reserved to the sovereign, were made inalienable pursuant to an 1865 act, and generated income for the crown.[221] The Government and Crown lands reflected "the trust concept that lands were held by the sovereign on behalf of the gods and for the benefit of all."[222]

Following the illegal overthrow of Queen Lili'uokalani in 1893,[223] and under the 1898 Joint Resolution annexing Hawai'i to the United States, the Republic of Hawai'i ceded 1.75 million acres of land to the United States government.[224] "At the time of annexation, the United States implicitly recognized the trust nature of the Government and Crown Lands."[225] Existing federal laws pertaining to public lands did not apply to Hawai'i and the Joint Resolution expressed that Congress would enact specific laws to manage Hawai'i's public lands.[226] The United States Attorney General opined that the Joint Resolution subjected Hawai'i's public lands to a "special trust."[227]

---

[215] HAW. REV. STAT. § 10-13.5 (2005).

[216] *Id.* § 10-3.

[217] *Hearings on S.B. 643 and H.B. 2034*, 22d Leg., Reg. Sess. (Haw. 2004) (testimony of Le'a Malia Kanehe, Native Hawaiian Legal Corp.).

[218] Sharon K. Hom & Eric Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1766 (2000).

[219] Pele Def. Fund v. Paty, 73 Haw. 578, 585, 837 P.2d 1247, 1254 (1992).

[220] NATIVE HAWAIIAN RIGHTS HANDBOOK 26 (Melody Kapilialoha MacKenzie ed., Native Hawaiian Legal Corporation 1991).

[221] *Id.*

[222] *Id.*

[223] Brian Duus, Article, *Reconciliation Between the United States and Native Hawaiians: The Duty of the United States to Recognize a Native Hawaiian Nation and Settle the Ceded Lands Dispute*, 4 ASIAN-PAC. L. & POL'Y J. 393, 407 (2003).

[224] NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 220, at 26.

[225] *Id.*

[226] *Id.*

[227] *Id.*

The Organic Act, approved on April 30, 1900, established Hawai'i's territorial government and gave the Territory of Hawai'i administrative control over the ceded lands.[228] The Hawai'i Supreme Court in *Kobayashi v. Zimring*[229] noted that "[t]he federal government has always recognized the people of Hawai'i as the equitable owners of all public lands."[230] Although title to the ceded lands was vested in the United States,[231] "while Hawai'i was a territory, the federal government held such lands in 'special trust' for the benefit of the people of Hawai'i."[232] Furthermore, "both the Joint Resolution of Annexation and the Organic Act recognized that these lands were impressed with a special trust under the federal government's proprietorship."[233]

When Hawai'i was admitted into the Union in 1959, "the ceded lands were transferred to the newly created state, subject to the trust provisions set forth in [section] 5(f) of the Admission Act."[234] The United States, however, retained approximately 400,000 acres of the estimated 1.75-1.8 million acres of ceded lands.[235] Section 5(f) provided that the ceded lands transferred "and the income and proceeds derived from them are to be held by the [S]tate as a public trust" [236] for the following five purposes:

(1) for the support of the public schools and other public educational institutions;
(2) for the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act of 1920;
(3) for the development of farm and home ownership on as widespread a basis as possible;
(4) for the making of public improvements; and
(5) for the provision of lands for public use.[237]

---

[228] *Id.* at 27.

[229] 58 Haw. 106, 566 P.2d 725 (1977).

[230] *Id.* at 124, 566 P.2d at 736.

[231] NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 220, at 27.

[232] *Kobayashi*, 58 Haw. at 124, 566 P.2d at 736.

[233] NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 220, at 27.

[234] Pele Def. Fund v. Paty, 73 Haw. 578, 585, 837 P.2d 1247, 1254 (1992) (citing Hawai'i Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959)).

[235] Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 U. HAW. L. REV. 519, 539 (1992). It should be noted that the United States government retained lands "that had been set aside pursuant to an act of congress, executive order, presidential proclamation, or gubernatorial proclamation." NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 220, at 18. Congress later "passed an act allowing the return of these lands to the state at any time they are declared unnecessary to federal needs." *Id.*

[236] NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 220, at 30.

[237] *Id.* "In the absence of more specific guiding mandates, 'public education became the primary beneficiary of the trust.'" Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 390, 31 P.3d 901, 903 (2001) (quoting Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 161-62, 737 P.2d 446, 451 (1987)).

During the 1978 Constitutional Convention, the State of Hawai'i clarified its trust obligations and reaffirmed the Admission Act trust in article XII of the Hawai'i Constitution entitled "Hawaiian Affairs."[238] The State added sections 4, 5, and 6 "to provide further details on how the ceded land receipts were to be used to accomplish section 5(f)'s purposes."[239] Article XII, section 4 states:

> The lands granted to the State of Hawai'i by [s]ection 5(b) of the Admission Act and pursuant to [a]rticle XVI, [s]ection 7, of the State Constitution, excluding therefrom lands defined as "available lands" by [s]ection 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for [N]ative Hawaiians and the general public.[240]

Meanwhile, "[s]ection 5[241] establishes OHA as a 'trust entity' with a board of elected trustees to receive and administer: (1) the Native Hawaiians' share of the income and proceeds from the section 5(f) trust; and (2) any other property that might be conveyed to OHA for [N]ative Hawaiians in the future."[242] Furthermore, "[s]ection 6[243] sets out the powers of OHA's trustees, and

---

[238] *Office of Hawaiian Affairs*, 96 Hawai'i at 390, 31 P.3d at 903.

[239] Haw. Op. Att'y Gen. No. 03-4 (2003).

[240] HAW. CONST. art. XII, § 4.

[241] Article XII, section 5 of the Hawai'i Constitution provides:

> There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for [N]ative Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawai'i. The board shall select a chairperson from its members.

Id. § 5.

[242] Haw. Op. Att'y Gen. No. 03-4.

[243] Article XII, section 6 of the Hawai'i Constitution provides:

> The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for [N]ative Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for [N]ative Hawaiians; to formulate policy relating to affairs of [N]ative Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for [N]ative Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

HAW. CONST. art. XII, § 6.

implicitly directs the Legislature to quantify the extent of the [N]ative Hawaiians' share of ceded land receipts."[244]

The Department of Land and Natural Resources ("DLNR") has been responsible for the administration of the 1.2 million acres of ceded public land trust since Hawai'i became a state.[245] Significantly, "Article XII, [section] 4 imposes a fiduciary duty on Hawai'i's officials to hold ceded lands in accordance with the [section] 5(f) trust provisions."[246] The Hawai'i Supreme Court in *Pele Defense Fund v. Paty*[247] instructed that section 5(f) requires that ceded

> lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of

---

[244] Haw. Op. Att'y Gen. No. 03-4. Although OHA's twenty percent share is of ceded land revenues is ingrained in the Hawai'i Constitution, there is no such provision which ensures that the remaining eighty percent of revenues will go towards the trust fund purposes articulated in section 5(f) of the Admission Act. Interview with Melody K. MacKenzie, Visiting Professor of Law, William S. Richardson School of Law, in Honolulu, Haw. (Apr. 13, 2005). Although the eighty percent of revenues from ceded lands are supposed to go to a "special fund" pursuant to HRS chapter 171, there is no "check" to ensure that this is occurring. *Id.*

[245] NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 220, at 31; *see also* Duus, *supra* note 223, at 409. Furthermore, HRS section 171-3 states that:

> The department of land and natural resources shall be headed by an executive board to be known as the board of land and natural resources. The department shall manage, administer, and exercise control over public lands, the water resources, ocean waters, navigable streams, coastal areas (excluding commercial harbor areas), and minerals and all other interests therein and exercise such powers of disposition thereof as may be authorized by law. The department shall also manage and administer the state parks, historical sites, forests, forest reserves, aquatic life, aquatic life sanctuaries, public fishing areas, boating, ocean recreation, coastal programs, wildlife, wildlife sanctuaries, game management areas, public hunting areas, natural area reserves, and other functions assigned by law.

HAW. REV. STAT. § 171-3 (2005). HRS chapter 171 "governs the management and disposition of public lands in general." Pele Def. Fund v. Paty, 73 Haw. 578, 587, 837 P.2d 1247, 1254 (1992). Furthermore, HRS chapter 195 "establishes that certain lands, endowed with 'unique natural resources,' should be preserved 'in perpetuity' in a statewide Natural Area Reserves System (NARS)." *Id.*

[246] *Pele Def. Fund*, 73 Haw. at 605, 837 P.2d at 1264. Despite the fact that DLNR is responsible for the administration of the ceded land trust, it has been argued that the DLNR has failed to fulfill its statutory obligation "to segregate monies obtained through conveyance of ceded lands from monies received from other public lands." Friedman, *supra* note 235, at 549. Instead, monies which should have gone towards the benefit of Native Hawaiians "were commingled with general public funds from non-ceded public lands." *Id.* DLNR's mismanagement of ceded lands with respect to inventorying, however, is beyond the scope of this Article.

[247] 73 Haw. 578, 837 P.2d 1247.

> [Hawai'i] shall provide, and their use for any other object *shall constitute a breach of trust* for which suit may be brought by the United States.[248]

Furthermore, in enacting the Admission Act, Congress recognized "a federal public trust, which by its nature creates a federally enforceable right for its beneficiaries to maintain an action against the trustee in breach of the trust."[249] "[U]nder basic trust law principles, beneficiaries have the right to 'maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust.'"[250] Section 5(f) "can be viewed as a further safeguard to the continued existence of Native Hawaiians and additional protection of their rights in native lands."[251]

In sum, not only is the State of Hawai'i's failure to collect income and proceeds from commercial products derived from biological resources taken from ceded lands a lost source of revenue for Native Hawaiians and the general population, it is a violation of its fiduciary duties. Furthermore, nothing forecloses OHA from receiving funds derived from ceded lands.[252] However, "until the Legislature makes [that] policy determination . . . , there are no standards or precedents for determining whether receipts from the sale of extracts from material originating on ceded lands constitute 'funds derived from the public land trust' under [HRS] section 10-13.5."[253] The Hawai'i State Legislature must make such a policy determination in order to satisfy the State's ceded land trust obligations.

---

[248] *Id.* at 586, 837 P.2d at 1254 (citing Hawai'i Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959)) (emphasis added).

[249] Price v. Akaka, 3 F.3d 1220, 1224 (9th Cir. 1993). In *Price*, the Ninth Circuit allowed the plaintiff, who was a beneficiary of the trust, to bring a 42 U.S.C. § 1983 action against the trustees. *Id.* 42 U.S.C. § 1983 entitled "Civil Action for Deprivation of Rights" states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

[250] *Price*, 3 F.3d at 1224 (quoting RESTATEMENT (SECOND) OF TRUSTS §§ 199-200 (1959)).

[251] NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 220, at 31.

[252] Haw. Op. Att'y Gen. No. 03-3 (2003).

[253] *Id.*

C. The State's Duty to Protect Native Hawaiian Traditional Knowledge

In addition to violating the public and ceded land trust, unregulated bioprospecting threatens Native Hawaiian rights in several other ways.[254] Unregulated bioprospecting impacts Native Hawaiian traditional knowledge, which gives rise to a corresponding legal duty. As discussed above, "[i]ndigenous peoples worldwide are now at the forefront of a new wave of scientific investigation: the question to privatize and claim monopoly ownership of genetic resources that will be useful in new pharmaceuticals, nutriceuticals, and other bio-engineered products."[255] Under the current western intellectual property regime, corporations are allowed to assert ownership over genes, products, and data derived from the natural resources of indigenous territories.[256]

The situation is no different for Native Hawaiians, the indigenous people of Hawai'i. Native Hawaiian traditional knowledge regarding various uses of natural resources is valuable to the bioprospecting industry.[257] Consequently, bioprospecting puts Native Hawaiian traditional knowledge at risk because of the intellectual property regime. The State of Hawai'i must prevent this exploitation from occurring because Native Hawaiian traditional knowledge is a subset of traditional and customary rights.

Under the Hawai'i Constitution and statutory law, the State has an affirmative duty to protect Native Hawaiian traditional and customary rights.[258] First, article XII, section 7 of the Hawai'i Constitution mandates that the State "shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of [N]ative Hawaiians who inhabited the Hawaiian Islands prior

---

[254] Daranciang, *supra* note 3. Native Hawaiian rights are implicated in a number of ways that are outside the scope of this Article. For example, although federal or Hawai'i State law may not specifically recognize indigenous peoples' permanent sovereignty over their natural resources, international law may recognize such a right. Interview with Le'a Malia Kanehe, *supra* note 160. The 1993 Apology Resolution, a "Joint Resolution [t]o acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United State for the overthrow of the Kingdom of Hawaii" indicates that Native Hawaiians never conceded their sovereignty. S.J. Res. 19, 103d Cong., Pub. L. No. 103-150, 107 Stat. 1510, 1513 (1993). The Apology Resolution recognized that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." *Id.*

[255] *Hearings on S.C.R. 167*, 22d Leg., Reg. Sess. (Haw. 2004) (testimony of Le'a Malia Kanehe, Esq., Native Hawaiian Legal Corp.); *see also supra* Part II.C.2.

[256] *Hearings on S.C.R. 167*, *supra* note 255.

[257] *See* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 220, at 223; *see also supra* Part III.A.

[258] Pai 'Ohana v. United States, 76 F.3d 280, 281 (9th Cir. 1996).

to 1778."[259] Second, HRS section 7-1 "enumerates the certain rights of access to the property of others that are held by native tenants, such as the right to gather fruit, plants, and timber, and the right to obtain drinking water."[260] Third, HRS section 1-1 allows the State to "establish certain customary Hawaiian rights beyond those found in [section] 7-1."[261] This authority establishes the State's legal duty to protect Native Hawaiian traditional knowledge.

Hawai'i case law offers further guidance in understanding this duty. As the Hawai'i Supreme Court in *Ka Pa'akai O Ka'aina v. Land Use Commission*[262] explained, article XII, section 7 of the Hawai'i Constitution "places an affirmative duty on the State and its agencies to preserve and protect traditional and customary [N]ative Hawaiian rights, and confers upon the State and its agencies 'the power to protect these rights and to prevent any interference with the exercise of these rights.'"[263] This "mandate grew out of a desire to 'preserve the small remaining vestiges of a quickly disappearing culture [by providing] a legal means by constitutional amendment to recognize and reaffirm [N]ative Hawaiian rights.'"[264] Section 7 "also recognized that '[s]ustenance, religious and cultural practices of [N]ative Hawaiians are an integral part of their culture, tradition and heritage, with such practices forming the basis of Hawaiian identity and value systems.'"[265]

As examples from other indigenous communities illustrate, the assertion of intellectual property rights over traditional knowledge can interfere with the exercise of traditional and customary rights.[266] Therefore, the State must fulfill its affirmative duty to protect Native Hawaiian traditional knowledge from being exploited by bioprospectors.

---

[259] HAW. CONST. art. XII, § 7.

[260] *Pai 'Ohana*, 76 F.3d at 281 (citing HAW. REV. STAT. § 7-1 (1992)).

[261] *Id.* (quotations and citations omitted).

[262] 94 Hawai'i 31, 7 P.3d 1068 (2000).

[263] *Id.* at 45, 7 P.3d at 1082 (quoting STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 639 (1980)) (citing Pub. Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 437, 903 P.2d 1246, 1258 (1995); HAW. REV. STAT. §§ 1-1, 7-1 (2000)).

[264] *Id.* (quoting STAND. COMM. REP. NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 640) (alteration in original).

[265] *Id.* (quoting COMM. WHOLE REP. NO. 12, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 1016) (alteration in original).

[266] *See supra* Part II.C.2. It should be noted that some commentators argue that the current intellectual property regime is inadequate to protect Native Hawaiian traditional knowledge. *See* Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Commodification of Culture*, 48 HOW. L.J. 737, 760 (2004) (concluding that "protection of Hawaiian traditional knowledge and cultural heritage has to emanate from a *sui generis* system originating with Native Hawaiians").

D. A Summary of the State's Inescapable Duty

The State of Hawai'i has an inescapable legal duty to regulate the bioprospecting of public natural resources under various legal instruments. First, article XI, section 1 requires that the State regulate bioprospecting in order to protect the sustainability of public natural resources for future generations. Second, the ceded land trust requires the State, at the very least, to collect revenues generated by biological resources derived from resources taken from ceded lands. And finally, because bioprospecting threatens to exploit Native Hawaiian traditional knowledge, and interfere with Native Hawaiian traditional and customary rights, the State must take affirmative action to prevent this from occurring.[267]

It should also be noted that UH and the bioprospecting industry are not opposed to the regulation of bioprospecting. For example, BIO recognizes "that the conservation of biological diversity has significant long-term advantages for all[,]" as well as "the importance of promoting the sustainable use of biodiversity and of equitably sharing the benefits arising from use of genetic resources with the parties providing access to those resources."[268] In fact, the current unregulated state of bioprospecting deters new businesses and investment in the State economy.[269] Many bioprospecting companies want to invest in Hawai'i, but want to know what the legal framework is before doing so.[270]

V. Fulfilling the Legal Duty to Regulate Bioprospecting in Hawai'i

Because of duties arising under various legal instruments, the State of Hawai'i must regulate the bioprospecting of its public natural resources. The State must consider several key legal and policy issues in developing a legislative solution. Although this part does not fully resolve all the complicated legal issues that bioprospecting in Hawai'i raises, it strives to provide at least a starting point for the Hawai'i State Legislature.

A. Why a Legislative Solution?

While individual plaintiffs could potentially file suit against the State of Hawai'i for its failure to regulate the bioprospecting of public natural

---

[267] *See supra* Part IV.C.

[268] Biotechnology Industry Organization, Guidelines for BIO Members Engaging in Bioprospecting, http://www.bio.org/ip/international/200507guide.asp (last visited Jan. 22, 2006).

[269] Interview with Kevin Kelly, *supra* note 4.

[270] *Id.*

resources in Hawai'i courts, this part proposes a legislative solution for three main reasons. First, an immediate solution is necessary—bioprospecting activities are already taking place on public lands and in public waters—and are only expected to increase. Meanwhile, irreparable damage is occurring; the State is losing legal title to its public natural resources, it is forgoing revenues it is entitled to, and Native Hawaiian traditional knowledge is at risk of being exploited. Therefore, there is no time for this matter to be resolved in the judiciary, which could take any number of years. In addition, a legislative solution could serve as a preventative measure against years of legal battles once a discovery is made.[271] Second, because the State of Hawai'i has a legal duty to regulate bioprospecting under the public and ceded land trusts, and because of recognized Native Hawaiian rights, the State must take action. Finally, the environmental, social, economic, and other complicated policy issues that bioprospecting raises are more appropriate to be resolved by the legislature, rather than the judiciary.[272]

B. A Legal Promotion of Bioprospecting

Bioprospecting in Hawai'i can provide economic, social, and various other benefits. These benefits, however, can only be pursued in a manner which does not violate any of the State of Hawai'i's legal duties. Material Transfer

---

[271] *Cf.* James Reynolds, *Fighting the Pirates of the Natural World*, THE SCOTSMAN, Apr. 5, 2004, at 6. For example, it was many years before the South African Kalahari bushmen were compensated for the unauthorized use of a traditional herbal remedy by a Western medicine company. *Id.* The tribesmen, for thousands of years, used the Hoodia cactus as a hunger and thirst suppressant on long hunting trips. *Id.* The bushmen of the Kalahari desert, cut off a cucumber-sized stem of the cactus and chewed on it for days. *Id.* When Western medicine companies eventually learned of this plant, also known as Xhoba, "it appeared to promise the impossible to the over-fed developed world--the production of a drug that can help the obese to lose weight." *Id.* The relevant bioactive compound of the plant was isolated and patented as P57 by the South African government's Council for Scientific and Industrial Research ("CSIR"). *Id.* Following further experimentation by Phytopharm, a Cambridgeshire-based drug research team, the P57 was sub-licensed in a multi-million dollar deal to Pfizer, one of the world's largest pharmaceutical companies. *Id.* The 7,000 Kalahari bushmen did not learn of the commodification of their traditional knowledge until a charity that advocates the interests of tribal peoples brought it to their attention. *Id.* In February 2004, "the CSIR agreed to a 'memorandum of understanding,' which acknowledged the rights of the bushmen as 'custodians of the ancient body of traditional knowledge,' and the CSIR's role in developing the technology involved in extracting the plant's properties." *Id.*

[272] *See* Bissen v. Fujii, 51 Haw. 636, 638-39, 466 P.2d 429, 431 (1970). The Hawai'i Supreme Court has "recognize[d] that, although courts, at times, in arriving at decisions have taken into consideration social needs and policy, it is the paramount role of the legislature as a coordinate branch of our government to meet the needs and demands of changing times and legislate accordingly." *Id.*

Agreements ("MTAs") can be an effective tool to facilitate a legal promotion of bioprospecting. MTAs are "special types of contracts routinely used by the biotechnology industry and academic researchers in Northern countries to facilitate the sharing of biological research for mutual gain."[273] Specifically, "MTAs define the rights and obligations of all parties, including third parties, involved in a transfer of biological material."[274] The State of Hawai'i currently has no such system in place. If the State is allowed to enter into MTAs for bioprospecting, the Hawai'i State Legislature must proscribe certain restrictions on the State's authority to enter into such agreements. *It must be recognized that in some circumstances, the State of Hawai'i must be prevented from entering into a bioprospecting agreement.*

Although the specific provisions of a single MTA *must* vary between bioprospecting projects, the State may be allowed to enter into a bioprospecting MTA *only if* two threshold requirements are satisfied: (1) adverse environmental impacts are unlikely; *and* (2) Native Hawaiian traditional knowledge is not implicated *or* prior informed consent has been granted by the Native Hawaiian community. If the State has met these threshold requirements, then the State may be allowed to enter into an MTA, subject to certain conditions. When entering into an MTA, at a minimum, the State *must always* maintain its legal title to transferred biological resources in bioprospecting and must establish a benefit sharing agreement. The State must comply with these requirements in order to fulfill its legal duties related to bioprospecting.

1. Preventing environmental degradation

The State of Hawai'i should only be allowed to enter into an MTA where adverse environmental impacts are unlikely to occur. As discussed above, the State has a duty to conserve and protect all public natural resources for the benefit of present and future generations.[275] These duties are not simply that of a good business manager, and consequently economic concerns cannot outweigh this fiduciary duty.[276] Potential environmental impacts caused by bioprospecting could be evaluated on a case-by-case basis through the use of environmental impact assessments. In cases where biological resources are too delicate to be bioprospected, which could result in the extinction of those species, the State shall not be allowed to enter into an MTA.

---

[273] Daniel M. Putterman, *Model Material Transfer Agreements for Equitable Biodiversity Prospecting*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 149, 150-51 (1996).

[274] *Id.* at 151.

[275] *See supra* Part IV.A.

[276] *In re* Water Use Permit Applications, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000) (citation omitted).

Although some may argue that this restriction could effectively end bioprospecting in Hawai, this is not the case. When bioprospecting results in environmental damage, it is usually when bioprospectors over harvest a particular species.[277] In most cases, bioprospecting, if done properly, involves only the removal of a small sample of a biological resource, which does not typically harm the resource.[278] It will be up to the Hawai'i State Legislature to devise appropriate safeguards to protect the sustainability of the State's natural resources.

2. Protecting Native Hawaiian traditional knowledge

Native Hawaiian traditional knowledge is of value to the bioprospecting industry because it may lead to the development of commercially valuable products. However, because bioprospecting puts Native Hawaiian traditional knowledge at risk of exploitation, the Native Hawaiian perspective must be considered in developing appropriate bioprospecting regulations.[279] As discussed above, the State of Hawai'i has an affirmative duty to protect Native Hawaiian traditional knowledge under article XII, section 7 of the Hawai'i Constitution.[280] In order to fulfill this duty and to be considered *pono* ("just"), the State should value Native Hawaiians' close relationship to natural resources and their spiritual and genealogical relationship with the resources.[281] Therefore, the State should consult with Native Hawaiians in making bioprospecting decisions.[282] It is only fair that Native Hawaiians must give prior informed consent before the State of Hawai'i enters into a bioprospecting MTA that implicates Native Hawaiian traditional knowledge.

Although it may be difficult to determine how to consult with Native Hawaiians and who should have the authority to give consent on behalf of Native Hawaiians, this challenge may be negated by the passage of the Akaka Bill, which would lead to the federal recognition of Native Hawaiians and the creation of a Native Hawaiian governing entity.[283] In the interim, there are numerous Native Hawaiian organizations that could serve as representatives

---

[277] *See supra* Part II.C.1.

[278] *See supra* Part II.C.1.

[279] *See generally* Malahoff & Rectenwald, *supra* note 39, at 73.

[280] *See supra* Part IV.C.

[281] E-mail from Vicky Holt Takamine, President of 'Ilio'ulaokalani Coalition to author (Feb. 6, 2005) (on file with author).

[282] *Id.*

[283] *See* Vicki Viotti, *The Akaka Bill—What Would it Mean for Hawaii?*, HONOLULU ADVERTISER, Apr. 10, 2005, *available at* http://the.honoluluadvertiser.com/article/2005/Apr/10/op/op05p.html.

of the Native Hawaiian community, or an interim organization comprised of members of the Native Hawaiian community could be created.

Another concern with the use of Native Hawaiian traditional knowledge in bioprospecting is that the Native Hawaiian community may not fully understand the implications of their consent. Because contract law would apply to MTAs, if Native Hawaiians were not fully informed and did not understand the implications of their consent, the contract would be voidable and Native Hawaiians would receive damages.[284] It should also be recognized that Native Hawaiians *have the right to say no to the use of their traditional knowledge*, and in those cases bioprospectors shall not be allowed to use it. Furthermore, when Native Hawaiian traditional knowledge is used in making commercial discoveries, Native Hawaiians must receive compensation.[285]

For the most part, Native Hawaiian traditional knowledge has not yet been implicated, at least with respect to research conducted at UH. According to Kevin Kelly, UH avoids involving Native Hawaiian traditional knowledge in its research because of a lack of a suitable legal framework.[286] According to Kelly, engaging Native Hawaiians in bioprospecting could lead to benefits for Native Hawaiians and the general public.[287]

3. Maintenance of rights, interest, and title to biological resources and benefit sharing

If a proposed bioprospecting project will not result in environmental degradation and if it does not implicate Native Hawaiian traditional knowledge or prior informed consent has been granted, then the State of Hawai'i may be allowed to enter into a MTA. There is currently, however, nothing that reserves the State's title to public natural resources when bioprospectors take these resources for possible commercial development.[288] Therefore, bioprospecting regulations *must maintain the State's rights, interest, and title* to the transferred biological resources in order to fulfill its legal duty under article XI, section 1 of the Hawai'i Constitution.

---

[284] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981) ("When a Misrepresentation Makes a Contract Voidable"); *id.* § 175 ("When Duress by Threat Makes a Contract Voidable"); *id.* § 177 ("When Undue Influence Makes a Contract Voidable"); *id.* § 178 ("When a Term Is Unenforceable on Grounds of Public Policy"); *id.* § 346 ("Availability of Damages").

[285] Email from Vicky Holt Takamine, *supra* note 281.

[286] Interview with Kevin Kelly, *supra* note 4. Kelly explains that involving Native Hawaiian traditional knowledge without such a framework could cause more trouble than benefits. *Id.*

[287] *Id.*

[288] *Id.*; *see also supra* Part III.C.

As discussed above, the State of Hawai'i has a constitutional duty to "*conserve and protect* Hawai'i's natural beauty and all natural resources . . . and . . . promote the development and utilization of these resources *in a manner consistent with their conservation* and in furtherance of the self-sufficiency of the State" for the "*benefit of present and future generations*."[289] Without reserving title, the State can lose title to its biological resources, as well as any products derived from the resource. Because future generations are listed as beneficiaries under the Hawai'i Constitution, the alienation of these resources will be a violation of this constitutional mandate.

The following is a suggested draft proposal of a provision that should be included in all MTAs:

> *Reservation of Title to All Public Natural Resources*: The State of Hawai'i holds legal title to all public natural resources including land, water, air, mineral, and energy sources as trustee of these resources, pursuant to the Hawai'i Constitution, article XI, section 1. The State of Hawai'i reserves its title to all biological resources transferred to recipients, including genetic material or composition of the natural resources and other things connected to, or gathered from public lands.
>
> The State of Hawai'i also reserves its title to any derivatives of the transferred biological resources. Subject to the approval of the State of Hawai'i, recipients may seek to develop intellectual property derived from the transferred biological resources that is of potential commercial interest into commercial products or to license this intellectual property to commercial firms. The State of Hawai'i will be entitled to a percentage of total income derived from the commercialization of transferred biological resources and to other benefits described herein. Said commercialization includes early processes involving uses of, or constituents, or molecular constituents, including derivatives or analogs or molecular fingerprints (such as those derived from a gas chromatograph trace) developed from transferred biological resources.[290]

This provision assures that the State will reserve its title and will receive fair and equitable benefit sharing for any future proceeds of the natural resource.

Although relatively few biological resources lead to commercially valuable discoveries,[291] the few resources that do result in such a discovery can generate tremendous revenue.[292] Furthermore, as discussed above, the State has a legal

---

[289] HAW. CONST. art. XI, § 1 (emphasis added).

[290] *See generally* Putterman, *supra* note 273, at 149.

[291] Interview with Kevin Kelly, *supra* note 4.

[292] In 2000, "nearly $26 billion worth of drugs were developed from microbes, including about half of all cancer drugs." *Going Back to Nature for Breakthrough Compounds*, BIOTECHNOLGY NEWSWATCH, July 16, 2001, at 1. An example of a revenue generating drug from a natural resource "is taxol, which hit $1.5 billion in sales [in 2000], according to Gary Strobel, Ph.D., professor of plant sciences at Montana State University in Bozeman." *Id.*

duty to hold all income and proceeds derived from ceded lands as a public trust for the five purposes of section 5(f) of the Admission Act.[293] In order to fulfill this duty, the State must collect its fair share of revenues generated from its biological resources collected from at least ceded lands.

C. Economic Interests Cannot Override the State's Legal Duty

Some critics argue that regulating bioprospecting will make products, including new medicines, less accessible and more expensive.[294] However, because the State has legal duty to regulate bioprospecting under *at least* the public and ceded land trusts, and because of recognized Native Hawaiian rights, economic considerations cannot take precedence.

VI. CONCLUSION

Bioprospecting is likely to impact the State of Hawai'i in a significant way.[295] Meanwhile, the current lack of bioprospecting regulations is a violation of the State's legal duties under the ceded land and public trusts, and its constitutional and statutory duty to protect Native Hawaiian rights. The State of Hawai'i must undertake a regulatory approach that maintains title to its biological resources, and at minimum, prevents environmental degradation, collects revenues derived from biological resources taken from ceded lands, and protects Native Hawaiian traditional knowledge. Only then can the bioprospecting of Hawai'i's public natural resources be allowed. Bioprospecting has the potential to create many benefits for society, but those benefits can only be sought within the confines of the law.

Sarah K. Kam[296]

---

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

[294] *See* James P. Pinkerton, Op-Ed, *Alphabet Soup Won't Cure this Ailment*, NEWSDAY (NEW YORK), Feb. 24, 2005, at A42.

[295] *Cf.* Sample, *supra* note 56, at 9. Similar to the unregulated state of bioprospecting in Hawai'i, as recent as February 2004, there was "nothing to stop biotech companies going into Antarctica and hunting or 'bioprospecting' for potentially lucrative organisms." *Id.* With respect to the Antarctica situation, Dr. Sam Johnston, a researcher at the United Nations University in Tokyo, commented that "[i]f bioprospecting is done properly, it can be useful and beneficial for all and can have a minimum impact on the environment, but you want it to be controlled to prevent companies from causing significant environmental damage." *Id.* Dr. Johnston explained that Antarctica is "a pristine, global park and it needs to be preserved." *Id.* Furthermore, "[i]t's going to be much easier to put regulations in place that are effective and meaningful before there are vested interests." *Id.*

[296] J.D. Candidate 2006, William S. Richardson School of Law, University of Hawai'i at Manoa. Special thanks to Le'a Malia Kanehe, Dan Park, Brandon Ito, Nathan Okubo, and Professor Denise Antolini.

Extending Loss of Consortium to Reciprocal Beneficiaries: Breaking the Illogical Boundary Between Severe Injury and Death in Hawai'i Tort Law

I. INTRODUCTION

In an instant, Steven and Frank's lives changed forever. Steven, a twenty-eight year old mechanic, was trying to jump-start a Chevrolet van needing maintenance work.[1] Having already tried and failed to start the vehicle using the ignition, Steven crawled underneath the vehicle to connect a remote starter.[2] After connecting the necessary equipment, Steven pushed the starter button and the engine roared to a start.[3] As Steven crawled under the vehicle for a second time to disconnect the remote starter's wires, a product defect caused the vehicle to change gears.[4] The vehicle lurched backward hitting Steven in the back of the head, breaking his neck.[5] The injury left Steven a quadriplegic.[6] He will never walk again.

When the vehicle broke Steven's neck, Frank's family life changed dramatically. Due to the negligence of the vehicle's manufacturer, Frank lost the love, comfort, and companionship of his son.[7] Instead of sharing in Steven's hopes and dreams, Frank will spend the rest of his life as one of his son's primary caregivers and financial supporters. For his loss, the jury awarded Frank half a million dollars.[8]

But what if Frank was not Steven's father but rather his life partner? What if Frank and Steven had solidified their partnership by becoming legal reciprocal beneficiaries under Hawai'i law,[9] promising to love and care for each other for the rest of their lives? Would Frank, as the life partner, the caregiver, and the financial supporter, be less entitled to compensation for losing Steven's love, comfort, and companionship?

---

[1] *See* Masaki v. Gen. Motors Corp., 71 Haw. 1, 3, 780 P.2d 566, 569 (1989). The narrative in this introduction is closely modeled after the facts in *Masaki*.

[2] *See id.* at 4, 780 P.2d at 569.

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id.* at 5, 780 P.2d at 569.

[9] *See* HAW. REV. STAT. § 572C-1 (2005).

As the law stands today in Hawai'i, a common law loss of consortium[10] action would compensate only a spouse, parent, or, arguably, a child for the losses described above.[11] Legal scholars hypothesize that reciprocal beneficiary laws, like those enacted in Hawai'i, would persuade courts to recognize loss of consortium actions for same-sex partners.[12] In Hawai'i, Frank is eligible for loss of consortium compensation as a life partner only if Steven dies from his injuries under the wrongful death statute. However, if Steven narrowly misses death, yet is still severely and permanently injured, Frank is precluded from compensation.

Social justice requires that Hawai'i courts do not perpetuate this illogical boundary between death and severe injury when the court has the occasion to clarify the law. This article examines doctrinal and statutory developments of loss of consortium in Hawai'i in conjunction with Hawai'i's reciprocal beneficiary law to determine whether Hawai'i courts should recognize reciprocal beneficiaries' right to recover for loss of consortium. Part II begins by discussing the history of loss of consortium both generally and in Hawai'i, detailing the events leading up to the enactment of the Reciprocal Beneficiaries Act in 1997.[13] Part III offers Hawai'i's judiciary a framework for analyzing the issue of whether reciprocal beneficiaries have standing to sue for loss of consortium, arguing that Hawai'i's doctrinal trends and statutes support extending loss of consortium to reciprocal beneficiaries. Finally, Part IV concludes that given the opportunity, Hawai'i's court should recognize reciprocal beneficiaries' right to recover for loss of consortium resulting from the serious injuries of their partners.

II. BACKGROUND

Although loss of consortium claims were historically articulated as a benefit of the marital relationship, within the past two decades Hawai'i has expanded loss of consortium by focusing on the relational interests between claimants

---

[10] For the purpose of this paper, the term "loss of consortium" will refer to a common law loss of consortium action. A loss of consortium action derived from the wrongful-death statute will be referred to as statutory loss of consortium.

[11] *See* Marquardt v. United Airlines, Inc., 781 F. Supp. 1487 (D. Haw. 1992) (holding children have a right to sue for loss of parental consortium under Hawai'i state law); *Masaki*, 71 Haw. 1, 780 P.2d 566 (holding that parents may sue for loss of consortium of injured children); Waki v. Yamada, 26 Haw. 52 (1921) (recognizing the right to sue for loss of spousal consortium).

[12] *See, e.g.*, Flynn Sylvest, Note, *New Tort Rules for Unmarried Partners: The Enhanced Potential For Successful Loss of Consortium and NIED Claims by Same Sex Partners in New Mexico After Lozoya*, 34 N.M. L. REV. 461, 484-85 (2004).

[13] HAW. REV. STAT. § 572C (2005).

and victims.[14] Through the Reciprocal Beneficiaries Act, Hawai'i provided registered same-sex partners with certain rights and benefits afforded to legally married couples.[15] Thus, the question remains whether loss of consortium recovery is a right that Hawai'i's court should bestow upon reciprocal beneficiaries.[16]

A. Loss of Consortium

Black's Law Dictionary defines "consortium" as "[t]he benefits that one person, esp[ecially] a spouse, is entitled to receive from another, including companionship, cooperation, affection, aid, financial support, and (between spouses) sexual relations."[17] The law gives certain individuals the right to recover damages from negligent tortfeasors for loss of consortium in personal injury and wrongful death cases.[18]

Historically, a loss of consortium claim was reserved for a husband based upon the husband's propriety interest in the injury to his wife.[19] A husband suffered property damage if his wife was injured because, at the point of marriage, husband and wife were seen as one under the law,[20] and thus all of the wife's property, including her services and affection became the husband's property.[21]

A wife was not afforded the same right to sue for loss of consortium until 1950.[22] In *Hitaffer v. Argonne*,[23] the United States Court of Appeals for the District of Columbia recognized that the rights to comfort, companionship, and affection of a spouse should be equal among both parties in the marital

---

[14] *See* discussion *infra* Part II.A.

[15] *See* discussion *infra* Part II.B.

[16] *See* discussion *infra* Part III.

[17] BLACK'S LAW DICTIONARY 328 (8th ed. 2004).

[18] *See id.* Depending upon the jurisdiction, possible classes of individuals that may sue for loss of consortium damages include: parents, children, spouses, dependents, and cohabitators. Currently, Hawai'i recognizes spousal consortium, *Waki v. Yamada*, 26 Haw. 52 (1921), filial consortium, *Masaki v. Gen. Motors Corp.*, 71 Haw. 1, 780 P.2d 566 (1989) (holding that parent's have a right to recover), and arguably parental consortium, *Marquardt v. United Airlines, Inc.*, 781 F. Supp. 1487 (D. Haw. 1992) (holding that children have a right to recover).

[19] *See* Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923); Gary Johnston Jr., Comment, *Losing the Nuptials in Loss of Consortium: Correcting California's Common Law Claim*, 39 U.S.F. L. REV. 201, 203 (2004).

[20] Thompson v. Thompson, 218 U.S. 611, 614 (1910).

[21] *See* Holbrook, *supra* note 19, at 2; Carol Ann Lum, Comment, *Loss of Consortium: Extending the Cause of Action to Cohabitors in Hawaii*, 10 U. HAW. L. REV. 291, 293 (1988).

[22] Hitaffer v. Argonne, 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950); Lum, *supra* note 21, at 294.

[23] 183 F.2d 811.

relationship.[24] By the 1970s, most state courts were extending loss of consortium claims to wives, and loss of consortium shifted from a proprietary interest to a relational interest[25] in intangible benefits such as companionship and affection.[26]

Today, some jurisdictions not only recognize spousal loss of consortium but have further expanded the loss of consortium doctrine to cover parents[27] and children.[28] In 2003, the Supreme Court of New Mexico became the first jurisdiction to broaden the loss of consortium doctrine to encompass a cohabitant's right to recover under defined circumstances.[29]

In Hawai'i, the initial development of loss of consortium recovery paralleled the rest of the country.[30] In 1921, the Hawai'i Supreme Court recognized the right of a husband to bring an action against another man for "surreptitiously"[31] absconding with his wife, when the defendant allegedly took the plaintiff's wife to Japan "to deprive [him] of her . . . company and services."[32] Hawai'i courts did not officially rule on a wife's right to sue for loss of consortium until 1982.[33] However, the legislature's amendment of the Death by Wrongful Act statute in 1955,[34] and dicta discussed by the Hawai'i Supreme Court in a 1970 case,[35] suggest that Hawai'i would have recognized the right as early as 1955.[36]

---

[24] *Id.* at 816-17; Lum, *supra* note 21, at 294.

[25] Johnston, *supra* note 19, at 203. This shift illustrated the courts willingness to "realize [] that the loss of intangible benefits, such as emotional support, solace, and sexual relations, should be permitted to be claimed by both husband and wife." *Id.*

[26] *See* Alisha M. Carlile, Note, *Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions*, 46 B.C. L. REV. 391, 395 (2005); Lum, *supra* note 21, at 295.

[27] *See, e.g.*, Howard Frank, M.D., P.C. v. Superior Court of Ariz., 722 P.2d 955 (Ariz. 1986); *see also supra* note 18.

[28] *See, e.g.*, Berger v. Weber, 303 N.W.2d 424 (Mich. 1981); *see also supra* note 18.

[29] Lozoya v. Sanchez, 66 P.3d 948 (N.M. 2003); *see* discussion *infra* Part III.C.1.

[30] *See* Lum, *supra* note 21, at 295.

[31] Waki v. Yamada, 26 Haw. 52, 52 (1921).

[32] *Id.*; *see also* Lum, *supra* note 21, at 296, 316 n.32.

[33] Lum, *supra* note 21, at 297 & n.38 (citing Towse v. State, 64 Haw. 624, 637, 647 P.2d 696, 705 (1982)) (holding that the wives of prison guards claiming loss of consortium were proper derivative claims of their husbands' defamation and false imprisonment allegations therefore, summary judgment by the lower court was properly granted).

[34] HAW. REV. STAT. § 663-3 (2005). The Hawai'i legislature amended the Death By Wrongful Act statute in 1955, giving a woman the right to recover for loss of consortium due to wrongful death. Lum, *supra* note 21, at 297 & n.35.

[35] The Hawai'i Supreme Court decided it would recognize a wife's loss of consortium claim to proceed. Lum, *supra* note 21, at 297 & n.37 (citing Nishi v. Hartwell, 52 Haw. 188, 473 P.2d 116 (1970)).

[36] *Id.* at 296.

Within the last fifteen years, Hawai'i's court broadened the applicability of loss of consortium recovery beyond spouses to parents and arguably children. In 1989, the Hawai'i Supreme Court held that a "parent may recover damages for the loss of filial consortium of an injured child" in *Masaki v. General Motors Corp.*[37] Approximately three years later in *Marquardt v. United Airlines, Inc.*,[38] the United States District Court for the District of Hawai'i relied upon *Masaki* in finding that "a cause of action for loss of parental consortium now exists under Hawaii law"[39] and the plaintiff daughter had standing to sue for the loss of consortium of her mother.[40] Hawai'i's court has yet to face the issue of whether reciprocal beneficiaries can recover loss of consortium damages; therefore, when such a case arises it will be a question of first impression for the court.

B. Reciprocal Beneficiaries

In 1997, the Hawai'i State Legislature passed the Reciprocal Beneficiaries Act,[41] affording rights and benefits to reciprocal beneficiaries that, historically, were reserved for married couples.[42] These rights and benefits entitled reciprocal beneficiaries to hospital visitation rights,[43] property rights,[44] inheritance rights,[45] the right to sue for wrongful death of a reciprocal

---

[37] 71 Haw. 1, 22, 780 P.2d 566, 578 (1989).

[38] 781 F. Supp. 1487 (D. Haw. 1992); *see* discussion *infra* Part III.A.

[39] *Marquardt*, 781 F. Supp. at 1492.

[40] *Id.* Based upon dicta in *Masaki*, the court in *Marquardt* stated that it found "no relevant distinction between loss of parental consortium and loss of filial consortium." *Id.* The court further commented that the intangible elements of love, comfort, and companionship that the *Masaki* court relied upon are "equally applicable regardless of whether the parent or the child later becomes injured . . . ." *Id.*

[41] HAW. REV. STAT. § 572C (2005).

[42] *Id.* § 572C-1. The Act's stated purpose is to "extend certain rights and benefits which are presently available only to married couples [and] to couples composed of two individuals who are legally prohibited from marrying under state law." *Id.*; *see generally* W. Brian Burnette, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same Sex Marriage*, 37 BRANDEIS L.J. 81 (1998-99).

[43] *See* HAW. REV. STAT. § 323-2 (2005) (affording reciprocal beneficiaries of a patient the same rights as a spouse in making visitation and health care decisions).

[44] *See, e.g., id.* § 509-2 (allowing reciprocal beneficiaries to enter into joint tenancy, tenancy by the entirety, or tenancy in common property interest); *id.* § 516-71 (stating a transfer of property to a reciprocal beneficiary, like a spouse, is not deemed a sale for the purposes of disclosing the sale of a residential leasehold lot).

[45] *See, e.g., id.* § 171-99 (including reciprocal beneficiaries as family for purpose of the section pertaining to continuation of rights under homestead leases, certificates of occupation, right of purchase leases, and case freehold agreements); *id.* §§ 560:2 to :6 (providing reciprocal beneficiaries and children equivalent status as spouses and children under the uniform probate code).

partner,[46] the right to seek protection from the domestic violence of a reciprocal partner,[47] the potential right to have private employers to supply health care benefits to reciprocal beneficiaries,[48] the right to receive wages and pension and retirement benefits left by a deceased partner,[49] and the right to donate the anatomical parts of a reciprocal partner.[50]

Reciprocal beneficiaries are two adults, in a valid reciprocal beneficiary relationship meeting the statutory requirements of a valid reciprocal beneficiary relationship.[51] These requirements include:

> (1) Each of the parties be a least eighteen years old; (2) Neither of the parties be married nor a party to another reciprocal beneficiary relationship; (3) The parties be legally prohibited from marrying one another . . . ; (4) Consent of either party to the reciprocal beneficiary relationship has not been obtained by force, duress, or fraud; and (5) Each of the parties sign a declaration of reciprocal beneficiary relationship . . . [with the Hawai'i State Department of Health].[52]

The cornerstone of a reciprocal beneficiary relationship is two adults with a "significant personal, emotional, and economic" relationship who are not legally entitled to marry.[53] The Hawai'i State Legislature illustrated valid reciprocal beneficiary relationships through the examples of a same-sex couple and "two individuals who are related to one another, such as a widowed mother and her unmarried son."[54] Even though two related individuals who cannot legally marry are included in the law, it is clear from the Reciprocal Beneficiary Act's legislative history that the main purpose was to bestow benefits and rights upon same-sex couples.[55]

---

[46] *See id.* § 663-3.

[47] *See id.* § 586-1 (defining a reciprocal beneficiary as a family or household member eligible of obtaining a domestic abuse protective order).

[48] *See id.* § 431:10A-601 (mandating mandatory reciprocal beneficiary family coverage equivalent to other family coverage offered).

[49] *See, e.g., id.* § 88-93 (providing reciprocal beneficiaries and children with benefits equivalent to spouses and children in the benefits and pensions of a deceased public officer or employee).

[50] *See id.* § 327-3 (providing reciprocal beneficiaries with the same rights as spouses in making anatomical gifts of all or part of their deceased partners' bodies).

[51] *Id.* § 572C-3.

[52] *Id.* § 572C-4.

[53] *Id.* § 572C-2.

[54] *Id.*

[55] *See* H.R. CONF. COMM. REP. NO. 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. HOUSE J. 911, 911-14 (transcript of proceeding to pass H.B. No. 118 through final reading); *Hearings on H.B. 118*, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. SEN. J. 156, 165-66 (transcript of proceeding to pass H.B. No. 118 through third reading).

When the Reciprocal Beneficiary Act passed in 1997,[56] the legislature also passed a bill calling for an amendment to the Hawai'i Constitution limiting marriage to opposite sex couples.[57] The interaction of the two bills acted as a compromise to the same-sex marriage controversy beginning almost five years earlier with the Hawai'i Supreme Court's landmark decision in *Baehr v. Lewin*.[58] In *Lewin*, three same-sex couples sued the State of Hawai'i after the Department of Health rejected their applications for marriage licenses, alleging that the State's prohibition on same-sex marriage (1) violated their right to privacy, and (2) violated their equal protection and due process rights under article I, section 5 of the Hawai'i Constitution.[59] On appeal, the Hawai'i Supreme Court held that the marriage statute facially violated the equal protection clause of the Hawai'i Constitution due to a sex-based classification.[60]

Pursuant to the court's decision, the legislature passed Act 217[61] during the next legislative session thereby amending the marriage law[62] to limit eligibility for marriage licenses to a man and a woman, and creating the eleven-member Commission on Sexual Orientation and the Law to address issues surfacing from the *Lewin* decision.[63] In December 1994, Judge Harold Fong of the United States District Court for the District of Hawai'i permanently enjoined four Commission members from participating.[64] The court found the participation of these four individuals, who represented the Catholic Diocese and the Church of Jesus Christ of Latter-Day Saints, was a constitutional violation of the duty to keep church and state separate.[65] The legislature reacted in January 1995 by passing Act 5,[66] calling for a new commission comprised of seven members.[67] From late September to early December 1995,

---

[56] HAW. REV. STAT. § 572C (2005).

[57] *Id.* § 572-1; *see also* Act of 1994, No. 217, § 6, 17th Leg., Reg. Sess. (1994), *reprinted in* 1994 Haw. Sess. Laws 526, 531-32.

[58] 74 Haw. 530, 852 P.2d 44 (1993), *reh'g granted in part*, 76 Haw. 276, 875 P.2d 225 (1993), *aff'd sub nom.* Baehr v. Miike, 80 Hawai'i 341, 910 P.2d 112 (1996).

[59] *Id.* at 539-40, 852 P.2d at 50.

[60] *Id.* at 580, 852 P.2d at 67.

[61] *See* Act of 1994, No. 217, § 6, 17th Leg., Reg. Sess. (1994), *reprinted in* 1994 Haw. Sess. Laws 526, 531-32.

[62] *See* HAW. REV. STAT. § 572-1 (2005).

[63] COMM'N ON SEXUAL ORIENTATION AND THE LAW, STATE OF HAWAII REPORT ON THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW (1995), *available at* http://www.hawaii.gov/lrb/rpts95/sol/solcvr.html [hereinafter COMMISSION REPORT].

[64] McGivern v. Waihee, No. 94-00843 (D. Haw. Jan. 13, 1995) (order granting preliminary injunction).

[65] *Id.*

[66] *See* Act of 1995, No. 5, § 3, 18th Leg., Reg. Sess. (1995), *reprinted in* 1995 Haw. Sess. Laws 5, 5-6.

[67] *Id.*; *see also* COMMISSION REPORT, *supra* note 63.

the new commission worked on three tasks: "(1) examining major legal and economic benefits extended to married opposite-sex couples but not to same-sex couples; (2) examining the public policy reasons to extend or not to extend all or some of such benefits to same-sex couples; and (3) recommended legislative action to so extend such benefits."[68]

Five out of the seven members wrote the majority report recommending that the "simplest solution"[69] for the legislature was to extend "all the benefits and burdens"[70] of marital status to same-sex couples by allowing them to marry.[71] In the alternative, the Commission recommended that the legislature create a comprehensive domestic partnership law, which would not solve the equal protection issues but would give same-sex couples many of the rights and obligations of marriage.[72] The two-member minority crafted an additional opinion asking the Legislature to take "no action . . . to extend any legal or economic marital benefits to homosexual couples that they do not already enjoy,"[73] to take steps to amend the Hawai'i Constitution limiting marriage to one man and one woman, and to consider passing laws enlarging the definition of "family" to "protect legitimate 'family' needs for unmarried couples."[74]

This interaction between the court and the legislature continued in 1996 with the court's decision in *Baehr v. Miike*.[75] In *Miike*, Judge Chang found that (1) the sex-based classification in the marriage statute was unconstitutional because it violated the equal protection clause of article I, section 5 of the Hawai'i Constitution; and (2) the State was enjoined from prohibiting applications for marriage licenses to same-sex couples.[76] While the *Miike* decision was on appeal to the Hawai'i Supreme Court, the 1997 legislature passed House Bill 117 amending the Hawai'i Constitution to allow the legislature to define marriage as one man and one woman.[77] In the

---

[68] *See* COMMISSION REPORT, *supra* note 63.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 87 Haw. 34, 950 P.2d 1234 (1997). *Miike* became the title of the *Lewin* case upon remand from the Hawai'i Supreme Court back down to the circuit court. Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993), *reh'g granted in part*, 76 Haw. 276, 875 P.2d 225 (1993), *aff'd sub nom.* Baehr v. Miike, 80 Hawai'i 341, 910 P.2d 112 (1996).

[76] *Miike*, 1996 WL 694235, at *21-22.

[77] HAW. REV. STAT. § 572-1 (2005); *see also* H.R. CONF. COMM. REP. NO. 1, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. HOUSE J. 918, 922; SEN. CONF. COMM. REP. NO. 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. SEN. J. 763, 766.

November 1998 election, voters ratified the proposed amendment.[78] Therefore, in 1999, when the *Miike* appeal came before the Hawai'i Supreme Court, the court reversed the opinion of the circuit court, holding that in light of the constitutional amendment, the marriage statute no longer violated the equal protection clause of the Hawai'i Constitution.[79]

The Hawai'i State Legislature enacted the Reciprocal Beneficiaries Act[80] to function as a compromise between those who supported same-sex marriage and those who vigorously protected the traditional definition of marriage.[81] The solution was, "'as a matter of fundamental fairness,'"[82] to advance "the 'equal rights and possibilities for all law abiding' citizens of Hawaii while preserving 'the tradition of marriage as a unique social institution based upon the committed union of one man and one woman.'"[83] The Reciprocal Beneficiaries Act encompasses many of the rights the Hawai'i Supreme Court listed in *Lewin* that were afforded to married coupled but denied to same-sex couples, to provide the level of equal protection required by the court.[84] These rights include the property right of joint tenancy in the entirety, the inheritance right of electing a statutory share of a deceased spouse's estate, and the tort right for recovery of the wrongful death of a spouse.[85]

In enacting the Reciprocal Beneficiaries Act, the legislature acknowledged the existence of individuals who are legally prohibited from marrying each other, yet have "significant personal, emotional, and economic relationships."[86] The legislature bestowed upon reciprocal beneficiaries rights and benefits traditionally reserved for married couples. The legislature was

---

[78] *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *5 (Haw. Dec. 9, 1999). The constitutional amendment passed with approximately 70% of voters approving the amendment—285,000 votes for and 127,000 votes against. Ken Kobayashi, *Hawaii Justices Uphold State's Marriage Laws*, HONOLULU ADVERTISER, Dec. 10, 1999, at A1.

[79] *Miike*, 1999 Haw. LEXIS 391, at *6.

[80] HAW. REV. STAT. § 572C (2005).

[81] Burnette, *supra* note 42, at 86.

[82] *Id.* at 85 (quoting SEN. CONF. COMM. REP. NO. 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. SEN. J. 658, 658 (statement of Senator Matsunaga)).

[83] *Id.* (quoting SEN. CONF. COMM. REP. NO. 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. SEN. J., 658, 661 (statement of Senator Metcalf)); *see also* HAW. REV. STAT. § 572C-2 (2005).

[84] Baehr v. Lewin, 74 Haw. 530, 561, 852 P.2d 44, 59 (1993), *reh'g granted in part*, 76 Haw. 276, 875 P.2d 225 (1993), *aff'd sub nom.* Baehr v. Miike, 80 Hawai'i 341, 910 P.2d 112 (1996); *see also* Burnette, *supra* note 42, at 87-88.

[85] *Lewin*, 74 Haw. at 561, 852 P.2d at 59; *see also* Burnette, *supra* note 42, at 87-88. Three important rights and benefits listed by the Hawai'i Supreme Court but not conferred upon reciprocal beneficiaries include: (1) the right to state income advantages; (2) the ability to invoke a martial privilege in court; and (3) rights provided after a divorce, such as maintenance, child support, and equitable division of property. *Id.*

[86] HAW. REV. STAT. § 572C-2 (2005).

careful to point out that the Act was in no way extending the right of marriage to reciprocal beneficiaries,[87] but the Act was to give reciprocal beneficiaries some of the "multiplicity of rights and benefits throughout our laws that are contingent upon [the unique] status [of marriage]."[88] During the Act's final reading in the House on April 29, 1997, Representative Tom commented that the Act "provides the legal framework for non-traditional couples to enjoy those basic legal benefits, which provides a measure of financial, personal, and emotional protection."[89]

Currently, the Hawai'i Department of Health records reflect 1076 reciprocal beneficiary relationships registered with the State from June 1, 1997, to September 2, 2005.[90]

III. ANALYSIS

Given the doctrinal trends laid out by the judiciary and the current state of statutory law, Hawai'i's courts should consider the arguments put forth in this Article as a lens to view the issue of whether reciprocal beneficiaries should have the right at common law to recover for the loss of consortium of their partners. Much like the approach courts use in evaluating whether a claimant has standing to sue, this Article approaches the question by examining the doctrinal and statutory developments surrounding the question in Hawai'i to determine a result that is socially just.

Hawai'i case law takes an expansive approach to determining eligibility for common law loss of consortium that favors including reciprocal beneficiaries.[91] By focusing on the unique cultural and familial relationships in Hawai'i, both the court and the legislature have provided individuals in non-traditional relationships legal rights and protections.[92] Additionally, the recent decision by the New Mexico Supreme Court, granting unmarried cohabitants standing to sue for loss of consortium, sets forth compelling policy

---

[87] *See id.* In the findings section of the Reciprocal Beneficiaries Statute, the legislature commented "[t]he legislature finds that the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman." *Id.*

[88] *Id.* The Reciprocal Beneficiary Statute states that reciprocal beneficiaries are entitled to "those rights and obligations provided by the law to reciprocal beneficiaries . . . [but] reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage . . . ." HAW. REV. STAT. § 572C-6 (2005).

[89] H.R. CONF. COMM. REP. NO. 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. HOUSE J. 911, 911 (statement of Representative Tom).

[90] HAW. DEP'T OF HEALTH, COMPUTERIZED PRINT-OUT OF REGISTERED RECIPROCAL BENEFICIARIES (2005).

[91] *See* discussion *infra* Part III.A.

[92] *See* discussion *infra* Part III.B.

arguments that are consistent with Hawai'i's expansive interpretation of the loss of consortium doctrine.[93]

A. Hawai'i Case Law Illustrates a Court Willing to Expand Loss of Consortium Beyond the Confines of a Spousal Relationship

Hawai'i courts broadly interpret the applicability of the loss of consortium doctrine. Hawai'i has expanded loss of consortium beyond the spousal relationship to provide parents and arguably children with the right to recover for the loss of love, affection, society, companionship, and comfort of a child or parent.[94]

In 1989, the Hawai'i Supreme Court first addressed the issue of whether parents may sue for loss of consortium in *Maskai v. General Motors Corp.*[95] In *Masaki*, the parents of an adult child sued General Motors ("GM") for loss of consortium of their twenty-eight year old son who was injured while trying to jump start a GM truck.[96] While their son was under the truck removing the remote starter used to start the engine, a defect in the truck caused the truck to lurch forward subsequently hitting their son in the back of the neck.[97] The Masaki's alleged their son's severe and permanent injuries, which left him just short of death, were a result of GM's negligence and sued for the loss of companionship, services, and support of their son.[98] The court held that a parent is entitled to recover for loss of filial consortium of an injured child,[99] remarking that the "intangible elements of love, comfort, companionship, and society have emerged as the predominant focus of consortium actions"[100] lessening the focus on services and economic factors.[101] The court noted that in a modern family, children are valued for their society and companionship and not as an economic asset, because children today tend to be more of a financial burden to their parents.[102]

Additionally the court pointed out the inconsistency in holding that parents may recover for the death of a child but not if the child is injured, stating that the

---

[93] *See* discussion *infra* Part III.C.

[94] *See* Marquardt v. United Airlines, Inc., 781 F. Supp. 1487 (D. Haw. 1992); Masaki v. Gen. Motors Corp., 71 Haw. 1, 780 P.2d 566 (1989).

[95] 71 Haw. 1, 780 P.2d 566.

[96] *Id.* at 3-4, 780 P.2d at 569.

[97] *Id.* at 6, 780 P.2d at 569.

[98] *Id.* at 7, 780 P.2d at 569.

[99] *Id.* at 22, 780 P.2d at 578.

[100] *Id.* at 21, 780 P.2d at 577 (citing Frank v. Super. Ct. of Ariz., 722 P.2d 955, 959 (Ariz. 1986)).

[101] *See id.*

[102] *Id.*

> loss of companionship and society experienced by the parents of a child permanently and severely injured . . . is in some ways even greater than that suffered by parents of a deceased child . . . the parent also is confronted with his loss each time he is with his child and experiences again the child's diminished capacity to give comfort, society, and companionship.[103]

In 1992, three years after the Hawai'i Supreme Court's decision in *Masaki*, Judge David Ezra of the United States District Court for the District of Hawai'i interpreted Hawai'i's loss of consortium laws in *Marquardt v. United Airlines, Inc.*[104] The issue in *Marquardt* was whether Hawai'i's loss of consortium laws recognized the right of a daughter to sue for parental loss of consortium for injury to her mother that did not result in death.[105] Ethel Marquardt received injuries while transported from inside a United Airlines plane to the ground by use of a forklift.[106] Ethel's hand was squeezed in-between the basket and the forklift mast causing her pain and swelling, as well as a diagnosis of post-traumatic stress syndrome.[107] Dolores, Ethel's daughter, joined in the suit against United alleging that "as a result of United's negligence, normal family relations between . . . [Dolores and her mother] have been impaired thereby causing [Dolores] to suffer a loss of consortium."[108] The court denied United's motion for summary judgment holding that a cause of action for loss of parental consortium exists in Hawai'i.[109]

The court relied upon *Masaki*, commenting that there was no "relevant distinction between loss of parental consortium and loss of filial consortium"[110] seeing the "intangible elements of love, comfort, and companionship"[111] equally applicable to both relationships.[112] *Masaki* directly demonstrates that the Hawai'i judiciary is not always bound strictly to previous interpretations of the law. The court's comments in *Masaki*, recognizing that parental consortium is similar to filial consortium, as relied

---

[103] *Id.* at 20, 780 P.2d at 577 (quoting *Frank*, 722 P.2d at 958).

[104] 781 F. Supp. 1487 (D. Haw. 1992).

[105] *Id.* at 1491.

[106] *Id.* at 1489. Ethel had physical disabilities that made her unable to exit the aircraft using the mobile stairway. *Id.*

[107] *Id.*

[108] *Id.* at 1491.

[109] *Id.* at 1492.

[110] *Id.*

[111] *Id.*

[112] *Id.*

upon in *Marquardt*, demonstrates the same willingness to rule beyond previous legal interpretations.[113]

Expanding loss of consortium actions to parents and children illustrates Hawai'i's deeper commitment to the relational interests involved in loss of consortium claims. The relational interests between reciprocal beneficiaries and spouses are equivalent. The devastation to the relationship resulting from serious injury to one reciprocal beneficiary is the same as the damage to a spousal or parent-child relationship. Hawai'i's loss of consortium case law depicts a court willing to include reciprocal beneficiaries to recovering for the loss of love, comfort, companionship, and society to their relationships.

B. The Courts and the Legislature Emphasize the Importance of Supporting and Substantiating Hawai'i's Unique Cultural and Familial Relationships

Hawai'i's courts and the legislature have a history of valuing non-traditional relationships by extending similar rights and protections automatically afforded to individuals in traditional or nuclear relationships to individuals in non-traditional relationships.[114] Hawai'i case law and statutes both illustrate this policy.[115] The court's loss of consortium and negligent infliction of emotional distress ("NIED") case law emphasizes the relationship between claimants and victims as opposed to the parties' legal status.[116] Hawai'i's expansive Wrongful Death Statute also stresses the importance of the relationship over legal status.[117]

---

[113] *See* Masaki v. Gen. Motors Corp., 71 Haw. 1, 19 n.8, 780 P.2d 566, 576 n.8 (1989). The court first recognized that it had previously held that children do not have standing to sue for the loss of consortium of their parents. *Id.* (citing Halberg v. Young, 41 Haw. 634, 1957 Haw. LEXIS 32 (Haw. Apr. 15, 1957)). The court then stated,

> [a]ppellants claim that our decision in *Halberg* is dispositive of the instant case because a parent's claim for the lost consortium of a child is merely the reciprocal of a child's claim for the lost consortium of his parents. While we recognize that the two actions are analogous in many respects, the issue of parental consortium is not before us today.

Id.

[114] *See, e.g.*, HAW. REV. STAT. § 572C (2005) (Hawai'i's Reciprocal Beneficiaries Act); *id.* § 663-3 (Hawai'i's Wrongful Death Statute); Lealaimatafao v. Woodward-Clyde Consultants, 75 Haw. 544, 867 P.2d 220 (1994) (holding that the decedent's non-legal wife and non-legally adopted son may sue for loss of consortium under Hawai'i's Wrongful Death Statute); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974) (holding that the decedent's non-blood related step-grandson may sue for negligent infliction of emotional distress after witnessing his step-grandmother be struck by a car).

[115] See *infra* note 114.

[116] See *infra* note 114.

[117] *See* HAW. REV. STAT. § 663-3; *see infra* note 128.

1. Hawai'i places value on non-traditional relationships and extended families

Hawai'i courts recognize the unique familial and cultural dynamics existing in Hawai'i creating close relationships among individuals that the law has traditionally excluded.[118] This "willingness to break new ground in the area of relational interests"[119] is illustrated by two Hawai'i Supreme Court cases where plaintiffs sought recovery for injuries to non-traditional loved ones.

In 1974, in *Leong v. Takasaki*,[120] the Hawai'i Supreme Court expanded the NIED doctrine holding that a ten-year-old child, who witnessed his step-grandmother die after being struck by an automobile while crossing the street, was given standing to recover even though he lacked a blood relationship with the grandmother.[121] Traditionally, a plaintiff claiming NIED had to be a blood relative of the injured victim to recover.[122] By allowing a non-blood relative standing to sue, the Hawai'i Supreme Court exemplified its "willingness to reach beyond the previously determined scope of the law . . . to promote fairness and to redress otherwise uncompensable injuries, in certain circumstances."[123] The court gave weight to the unique familial and cultural traditions prevalent in Hawai'i,[124] thus relying more on the "extremely close"[125] relationship between plaintiff and his step-grandmother than on the societal label placed upon it.[126]

The court again highlighted the quality of a relationship over legal status twenty years later in *Lealaimatafao v. Woodward-Clyde Consultants*.[127] The Hawai'i Supreme Court's 1994 decision construed Hawai'i's Death by Wrongful Act Statute[128] to cover the loss of love and affection suffered by the

---

[118] *See, e.g.*, *Lealaimatafao*, 75 Haw. 544, 867 P.2d 220; *Leong*, 55 Haw. 398, 520 P.2d. 758.

[119] Lum, *supra* note 21, at 311.

[120] 55 Haw. 398, 520 P.2d 758.

[121] *Id.*

[122] *See id.* at 410, 520 P.2d at 766.

[123] Lum, *supra* note 21, at 311.

[124] The Hawai'i Supreme Court commented, "Hawaiian and Asian families of this state have long maintained strong ties among members of the same extended family group." *Leong*, 55 Haw. at 410, 520 P.2d at 766.

[125] *Id.* at 400, 520 P.2d at 760.

[126] *Id.*

[127] 75 Haw. 544, 867 P.2d 220 (1994).

[128] HAW. REV. STAT. § 663-3 (2005). Hawai'i's wrongful death statute reads:

> Death by wrongful act. (a) When the death of a person is caused by the wrongful act, neglect, or default of any person, the deceased's legal representative, or any of the persons enumerated in subsection (b), may maintain an action against the person causing the death or against the person responsible for the death. The action hall be maintained on behalf of the persons enumerated in subsection (b), except that the legal representative may

deceased's non-legal wife[129] and non-biological and non-legally-adopted son.[130] The defendants argued that Toefoi (deceased's "wife") and Alex (deceased's "son") were not eligible to recover for loss of love and affection because they did not fit under the specifically enumerated claims in the Wrongful Death Statute.[131] The court rejected the defendant's argument holding that "it is irrelevant whether Appellants are entitled to one of the specifically enumerated claims for damages[,]"[132] and went on to conclude that the "plain and unambiguous language of HRS section 663-3 states that dependents may bring a claim for 'pecuniary loss and loss of love and affection.'"[133] Essentially, the court found that the legislature, in enacting the Wrongful Death Statute,[134] expanded the number of individuals eligible to

---

recover on behalf of the estate the reasonable expenses of the deceased's last illness and burial.

(b) In any action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including:

(1) Loss of society, companionship, comfort, consortium, or protection;

(2) Loss of martial care, attention, advice, or counsel;

(3) Loss of care, attention, advice, or counsel of a reciprocal beneficiary as defined in chapter 572C;

(4) Loss of filial care or attention;

(5) Loss of parental care, training, guidance, or education, suffered as a result of the death of the person; by the surviving spouse, reciprocal beneficiary, children, father, mother, *and by any person wholly or partly dependent upon the deceased person* . . . .

Id. (emphasis added). The deceased was killed when his drilling rig contacted a high-voltage wire, which fatally electrocuted him. *Lealaimatafao*, 75 Haw. at 547, 867 P.2d at 222.

[129] The deceased was never legally divorced from his first wife but had been living with Toefoi Lealaimatafao since 1973, and the deceased held Toefoi out as his wife. *Lealaimatafao*, at 547-48, 867 P.2d at 222.

[130] *Id.* at 548, 556-57, 867 P.2d at 222, 226. Alex Faagai, Jr. (also known as Semaia Lealaimatafao, Jr.) argued that he had been raised by the deceased and held out by the deceased to be his own son. *Id.* at 548, 867 P.2d at 222.

[131] *Id.* at 555-56, 867 P.2d at 225. These claims include: "(1) loss of society, companionship, comfort, consortium, or protection; (2) loss of marital care, attention, advice, or counsel; (3) loss of filial care or attention; and (4) loss of parental care, training, guidance, or education." *Id.* These enumerated claims are those recognized by the common law. *Id.*

[132] *Id.* at 556-57, 867 P.2d at 226.

[133] *Id.* (quotations omitted). The court stated that Toefoi and Alex would be dependents of the deceased "if they wholly or partly derived physical, moral, and/or social necessities from him." *Id.* at 552, 867 P.2d at 224. The court also rejected the defendant's argument that Alex was not a dependent of the deceased because Hawai'i does not recognize equitable adoption. *Id.* at 553, 867 P.2d at 224-25. The court ruled that Hawai'i's failure to recognize equitable adoptions is irrelevant because "the only relevant criterion is whether Alex is wholly or partly dependant [sic.] on [the deceased] for physical, moral, and/or social necessities." *Id.* at 555, 867 P.2d at 225.

[134] HAW. REV. STAT. § 663-3 (2005). See *supra* note 128 for statute text.

recover for loss of love and affection from those traditionally recognized under the common law.[135] The court interpreted the intent of the Wrongful Death Statute to protect the relational and financial interests of individuals dependent upon the deceased, not just those individuals with traditional legal status as enumerated in the statute.[136]

Hawai'i places value upon non-traditional relationships by rejecting the idea that traditional labels determine. By enacting the Reciprocal Beneficiaries Act,[137] the Hawai'i State Legislature gave legal value to same-sex relationships by providing these non-traditional couples with certain marital benefits. The legislature's actions demonstrate that the quality of the relationship between a same-sex couple and a married couple is sufficiently analogous to warrant registration and the conferral of benefits.[138] This determination in conjunction with the judiciary's valuation of non-traditional relationships supports the notion that reciprocal beneficiaries should be eligible for loss of consortium recovery.

2. Wrongful Death Statute[139] allows reciprocal beneficiaries to recover for loss of consortium

The most compelling argument for promoting Hawai'i's recognition of loss of consortium recovery for reciprocal beneficiaries comes from the close relationship between Hawai'i's statutory wrongful death and common law loss of consortium laws. This close relationship is illustrated by: (1) the legislature's incorporation of the loss of consortium doctrine into the statutory language of the wrongful death laws; and (2) the judiciary's reliance on the Wrongful Death Statute in interpreting common law loss of consortium.

---

[135] *Compare Lealaimatafao*, 75 Haw. at 556, 867 P.2d at 226 (holding that "[t]he plain and unambiguous language of HRS § 663-3 states that dependents may bring a claim for 'pecuniary loss and loss of love and affection . . . .'"), *with* Marquardt v. United Airlines, Inc., 781 F. Supp. 1487 (D. Haw. 1992) (holding children have a right to sue for loss of parental consortium under Hawai'i state law), *and* Masaki v. Gen. Motors Corp., 71 Haw. 1, 780 P.2d 566 (1989) (holding that parents may sue for loss of consortium of injured children), *and* Waki v. Yamada, 26 Haw. 52 (1921) (recognizing the right to sue for loss of spousal consortium).

[136] *See Lealaimatafao*, 75 Haw. at 556-57, 867 P.2d at 226. The court stated that by using the term "including" before specifying enumerated classes, the legislature intended the classes to be examples of claims that might be brought, not an exclusive list of possible claims. *Id.*

[137] HAW. REV. STAT. § 572C (2005).

[138] *See, e.g.*, H.R. STAND. COMM. REP. NO. 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. HOUSE J. 1118, 1118. The Judiciary Committee found that "there are many couples comprised of individuals who are are [sic] prohibited by law from marrying, yet who nonetheless maintain such a close relationship with each other that they wish to designate each other as beneficiary of a number of benefits presently available only to married couples." *Id.*

[139] HAW. REV. STAT. § 663-3. See *supra* note 128 for statute text.

In promulgating the Wrongful Death Statute[140] the legislature embedded in the statute the ability of certain individuals to recover for loss of consortium.[141] Individuals permitted to recover under the Wrongful Death Statute include spouses, children, reciprocal beneficiaries, and those dependent upon the deceased.[142] The legislature clearly intended a reciprocal beneficiary to recover if the wrongful act or negligence of another results in the death of his/her partner.[143]

The court looks to statutory loss of consortium, embedded in the Wrongful Death Statute,[144] for guidance in interpreting Hawai'i's common law loss of consortium doctrine.[145] In deciding on first impression whether parents of a severely and permanently injured son has standing to sue for loss of consortium, the *Masaki* court factored into its analysis the legislature's recognition of filial consortium as a cause of action in the Wrongful Death Statute.[146] The court commented that "'no meaningful distinction can be drawn between death and severe injury where the effect on consortium is concerned. Often death is separated from severe injury by mere fortuity.'"[147] The court stated, "[s]evere injury may have just as deleterious an impact . . . as death."[148] The *Masaki* court again looked to Hawai'i's Wrongful Death Statute in holding that no arbitrary age limit should be placed upon recovery of filial loss of consortium, because the Wrongful Death Statute does not distinguish between minor and adult children; thus, the court saw "no reason why in cases of severe injury the result should be any different."[149]

It seems illogical that the intent of the people of Hawai'i, as codified in the Wrongful Death Statute,[150] supports a loss of consortium cause of action when a reciprocal beneficiary dies but does not support a cause of action when the same individual is severely and permanently injured. As with a spouse, parent, or child, the loss of love, comfort, companionship, and society experienced by a reciprocal beneficiary is often greater than if the injury had resulted in his/her partner's death.[151] The loss seems greater because not only

---

[140] *Id.*

[141] *See id.*

[142] *Id.*; *see also* Lealaimatafao v. Woodward-Clyde Consultants, 75 Haw. 544, 867 P.2d 220 (1994).

[143] *See* HAW. REV. STAT. § 663-3.

[144] *Id.*

[145] *See, e.g.*, Masaki v. Gen. Motors Corp., 71 Haw. 1, 19, 780 P.2d 566, 576 (1989).

[146] *Id.*

[147] *Id.* at 20, 780 P.2d at 577 (quoting Frank v. Super. Ct. of Ariz., 722 P.2d 955, 957-58 (Ariz. 1986)).

[148] *Id.* at 19-20, 780 P.2d at 577.

[149] *Id.* at 22, 780 P.2d at 578.

[150] HAW. REV. STAT. § 663-3 (2005). See *supra* note 128 for statue text.

[151] *Cf. Masaki*, 71 Haw. at 20, 780 P.2d at 577.

is the normal relationship between the injured party and his/her reciprocal beneficiary destroyed, but also the partner is repeatedly faced with his/her loss while caring for the permanently injured loved one.[152] The fact that Hawai'i's Wrongful Death Statute[153] covers loss of consortium to reciprocal beneficiaries, combined with the courts' willingness to extend the traditional loss of consortium doctrine to parents and children of a severely injured party (by recognizing that the loss suffered is just as harmful, if not more harmful, than if relationship was completely destroyed by death), supports recognizing reciprocal beneficiaries' right to recovery for loss of consortium.

C. Given Hawai'i's Case Law and Relational Sensitivity, Hawai'i's Court is More Likely to Construe Common Law Loss of Consortium Broadly to Cover Reciprocal Beneficiaries

Jurisdictions conferring benefits upon reciprocal beneficiary-like or domestic partnership relationships are susceptible to loss of consortium claims brought by registered same-sex partners.[154] The decision to recognize or deny standing to same-sex partners is closely tied to each jurisdictions' purpose in enacting same-sex partnership laws, rights conferred upon same-sex partners, and the doctrinal trends in loss of consortium case law.[155] Hawai'i's courts are likely to find a more comprehensive analysis of the issues in decisions where courts have struggled with whether to grant standing to unmarried cohabitants[156] given the context and purpose in enacting Hawai'i's reciprocal

---

[152] *Cf. id.*

[153] HAW. REV. STAT. § 663-3.

[154] *See, e.g.*, N.Y. CITY ADMIN. CODE § 3-241 (2005); Lennon v. Charney, 797 N.Y.S.2d 891 (N.Y. Sup. Ct. 2005) (holding that a plaintiff, who was a Registered Domestic Partner in New York City, could not sue for the loss of consortium of his partner).

[155] *See, e.g.*, *Lennon*, 797 N.Y.S.2d 891. The Supreme Court of New York, Westchester County, held that the New York City Domestic Partnership Law did not change the requirement that the plaintiff asserting loss of consortium damages be "lawfully married to the injured person at the time of the actionable conduct." *Id.* at 892 (citing Briggs v. Butterfield Mem'l Hosp., 479 N.Y.S.2d 758 (N.Y. App. Div. 1984)). The court further noted that the Domestic Partnership Law was not "intended to reach beyond the relatively minimal benefits," *id.* (quoting *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005)) (quotation marks omitted), enumerated in the statute "compared to those of civil marriage." *Id.*; *see also* N.Y. CITY ADMIN. CODE § 3-244 (2005). Hawai'i's Reciprocal Beneficiaries Act, HAW. REV. STAT. § 572C (2005), is distinguishable from New York City's Domestic Partnership Law, N.Y. CITY ADMIN CODE § 3-241, in that the purpose of Hawai'i's law was to confer certain marital benefits upon those couples unable to legally marry. *See* HAW. REV. STAT. § 572C-1 (2005). Thus, Hawai'i's court would not be able to so promptly dismiss a reciprocal beneficiary's cause of action.

[156] *See, e.g.*, Elden v. Sheldon, 758 P.2d 582 (Cal. 1988); Lozoya v. Sanchez, 66 P.3d 948 (N.M. 2003).

beneficiary laws,[157] the court and legislature's history of relational sensitivity,[158] and the expansive nature of Hawai'i's loss of consortium doctrine.[159]

In some respects, deciding whether reciprocal beneficiaries have standing to sue for loss of consortium is easier than deciding whether unmarried cohabitants have standing because for reciprocal beneficiaries, a bright line can still be drawn between who is included and who is excluded. A bright line distinction puts less pressure on the court because the court is kept from individually analyzing the quality of each claimant's relationship with the victim to determine if the relationship meets a required threshold.[160] A bright line distinction keeps the "floodgates" closed because claimants must still possess a required legal status with the victim to bring suit.[161] Conversely, determining the issue of loss of consortium for unmarried cohabitants requires that the court make value judgments on the quality and significance of relationships between victims and their partners, regardless of a legal relationship between victims and claimants.[162]

In 2003, New Mexico became the only jurisdiction allowing unmarried cohabitants to sue for loss of consortium.[163] When Hawai'i's courts are faced with the decision of whether to extend loss of consortium to reciprocal beneficiaries, the court will have to grapple with the arguments articulated in the recent New Mexico decision. Given Hawai'i's case law, statutes, and policy rationales, the court is more likely to incorporate reciprocal beneficiaries into those protected by loss of consortium relying on the arguments set forth by the New Mexico decision, broadening loss of consortium to include unmarried cohabitants.[164]

1. The majority and minority rules

The majority rule among states holds that unmarried cohabitants do not have standing to sue for loss of consortium damages.[165] The 1988 decision by

---

[157] *See* discussion *supra* Part II.B.

[158] *See* discussion *supra* Part III.B.

[159] *See* discussion *supra* Part III.A.

[160] *Cf. Lozoya*, 66 P.3d at 954-56.

[161] *Cf. id.*

[162] *See id.* at 955-56.

[163] *Lozoya*, 66 P.3d 948. In 1983, the California Court of Appeals recognized loss of consortium for unmarried cohabitants, *Butcher v. Superior Court*, 188 Cal. Rptr. 503 (Cal. Ct. App. 1983), however, a subsequent case decided by the California Supreme Court overruled the cause of action for unmarried cohabitants, *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988).

[164] *See* discussion *supra* Part II.C.2.

[165] Margaret M. Mahoney, *Forces Shaping the law of Cohabitation For Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 192 (2005); *see also, e.g., Elden*, 758 P.2d 582.

the Supreme Court of California in *Elden v. Sheldon*[166] illustrates the stance taken by a majority of state courts.[167] In *Elden*, the court denied the plaintiff standing to recover for loss of consortium damages after witnessing the injury and death of the woman with whom he had a relationship "akin to a marital relationship."[168] Richard Elden and his "de-facto" spouse Linda Eberling were involved in an automobile accident negligently caused by Robert Sheldon.[169] During the accident, Linda was thrown from the car, dying a few hours later from her injuries.[170] In Richard's suit against Sheldon for loss of consortium, he categorized his relationship with Linda as an "unmarried cohabitation relationship . . . which was both stable and significant and parallel to a marital relationship."[171]

The Supreme Court of California held that the ability to sue for loss of consortium was contingent upon a marital relationship.[172] Thus, regardless of whether un-married cohabitants can prove the same stable and significant relationship presumed of most married couples, they are still barred from seeking loss of consortium damages. The court reasoned that the "intangible nature of the loss, the difficulty of measuring damages, and the possibility of an unreasonable increase in the number of persons who would be entitled to sue for the loss of a loved one" require such a bright-line ruling.[173] Additionally, the court stressed the "state's interest in promoting the responsibilities of marriage and the difficulty of assessing the emotional, sexual and financial relationship of cohabitating parties to determine whether their arrangement was the equivalent of a marriage."[174]

In March of 2003, the New Mexico Supreme Court articulated the minority approach in *Lozoya v. Sanchez*.[175] The court allowed Sara Lozoya to bring a loss of consortium claim based upon the injuries sustained by her domestic partner in the combination of two automobile accidents.[176] Ublado and Sara

---

[166] 758 P.2d 582.

[167] Mahoney, *supra* note 165, at 192.

[168] *Elden*, 758 P.2d at 582-83. The court also held that Elden lacked standing to sue for negligent infliction of emotional distress. *Id.*

[169] *Id.* at 582.

[170] *Id.*

[171] *Id.* (quotation marks omitted).

[172] *Id.* at 589.

[173] *Id.*

[174] *Id.*

[175] 66 P.3d 948 (N.M. 2003).

[176] *Id.* at 951-52. The injuries Ubaldo Lozoya sustained steamed from two automobile collisions. *Id.* at 951. Collision number one occurred on June 21, 1999, when Ubaldo and his son were hit from behind while stopped at a red light by the first defendant. *Id.* A doctor examined Ubaldo eight days later and found that Ubaldo had "pretty good to close to normal" range of motion despite the tenderness he was experiencing in his neck and back. *Id.* When the pain did not subside, Ubaldo consulted with a second doctor who prescribed chiropractic care

Lozoya had been in a relationship for over thirty years, had three children together, and had lived together for fifteen years in a jointly purchased home.[177] Sara claimed that as a result of the first accident, the intimate relationship shared between the couple "changed dramatically because Ubaldo became depressed"[178] which only "worsened" after the second accident.[179] Sara illustrated the change in their relationship by commenting that the two "could not socialize nearly as much because of Ubaldo's pain," that Ublado was bed-ridden quite often, and that their sexual relationship decreased.[180]

The court held that a claim for loss of consortium under New Mexico law is not limited to married partners and articulated the test used to determine whether any individual has a right to recover.[181] The claimant, married or unmarried, has the burden of proving that he or she had an "intimate familial relationship" with the victim to claim loss of consortium damages.[182] If the claimant and the victim are engaged, married, or otherwise met the requirements for a common law marriage, then the court will presume an "intimate familial relationship."[183] In making its determination, the court may consider several other factors, such as: (1) the duration of the relationship; (2) the degree of mutual dependence; (3) the extent of common contributions; (4) the extent and quality of shared experiences; (5) whether the two live in the same household; (6) the level of emotional reliance between the two; (7) the day to day relationship between the two individuals; and (8) how the two individuals related to each other in the mundane aspects of daily life.[184] The court articulated further limitations on the test by stating that a person may have only one "intimate familial relationship" at a time and if the claimant and the victim are unmarried then they must prove an exclusive and committed relationship with one another.[185]

After a lengthy discussion of the history of the loss of consortium doctrine in New Mexico, emphasizing New Mexico's previous stance as the first state to extend loss of consortium to grandparents with close familial relationships

---

and physical therapy. *Id.* The doctor also commented that due to his back pain Ubaldo would not be able to return to his former occupation. *Id.* The second accident occurred on April 18, 2000, when Ubaldo and his son were rear-ended by second defendant. *Id.* The doctor who examined Ubaldo stated that Ubaldo's condition after the second crash was "10 to 15[%] attributable" to the second accident. *Id.* at 952.

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.* at 951.

182 *Id.* at 957.

183 *Id.*

184 *Id.*

185 *Id.* at 958.

to an injured child the court found that "that the jury should have been allowed to consider Ms. Lozoya's claim."[186] The court commented that after reviewing a "thorough and thoughtful analysis by the judiciary across the country," it was "more convinced by the policies and rationales that favor recognizing the claim by unmarried cohabitants in certain circumstances."[187]

In answering the defendants' specific arguments against the claim, the court held that: (1) a special legal status is not an independent basis for recovery but can be evidence of a close familial relationship; (2) relying on the legal status of the parties for providing clear guidance for eligibility of recovery does not further the interests of justice because the purpose behind loss of consortium is to claim damages to "relational interests, not a legal interest";[188] (3) it is not inequitable to allow unmarried cohabitants to benefit from a doctrine traditionally held for married couples without assuming the burdens of marriage because most of the burdens assumed also have "corresponding benefit[s]"[189] that the unmarried cohabitants do "not receive";[190] (4) recognizing loss of consortium for unmarried cohabitants "in no way alters [the] State's non recognition of common law marriage";[191] and (5) extending loss of consortium to unmarried cohabitants does not lead to "an unworkable standard with many unanswered questions"[192] because the court is given sufficient guidance to determine whether an intimate familial relationship exists between the parties.[193] At the crux of the court's decision was that "Ubaldo and Sara enjoyed a relationship that was very similar, if not identical, to that of the typical married couple[,]"[194] and that the evidence supported a loss of consortium claim "but for the lack of a valid marriage."[195]

2. The minority approach is more consistent with Hawai'i's current jurisprudence

The minority opinion expressed by the New Mexico Supreme Court[196] is more consistent with the current state of Hawai'i's case law, statutes, and

---

[186] *Id.* at 953-54.

[187] *Id.*

[188] *Id.* at 955. The court commented that the "use of legal status necessarily excludes many persons whose loss of significant relational interest may be just as devastating as the loss of a legal spouse." *Id.*

[189] *Id.* at 956.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 954, 957-58.

[193] *Id.* at 954-57.

[194] *Id.* at 958.

[195] *Id.* at 958 n.7.

[196] *Lozoya*, 66 P.3d 948.

policy rationales. The Supreme Court of Hawai'i has expanded recovery doctrines to incorporate parties that would traditionally be excluded.[197] The court supports a theoretical interpretation of loss of consortium that is not tightly constrained by the presence of a specific relationship between the parties, i.e., a marital relationship, but focuses on the impact of the injury to the parties' relationship.[198] It was that focus on relational damage that led the Hawai'i Supreme Court to extend loss of consortium initially to victims' parents, and support the Hawai'i federal district court's ruling that loss of consortium for victims' children are permitted as well.[199]

New Mexico's emphasis on a close familial relationship rather than a special legal status mirrors decisions by Hawai'i courts recognizing that the quality of the relationship is often more important than the societal label placed upon the relationship.[200] This importance in the quality of the relationship supports expanding the loss of consortium doctrine in Hawai'i to include reciprocal beneficiaries. Like the couple in *Lozoya*,[201] who had all the evidence to support a loss of consortium claim, "but for a valid marriage," so do the parties of a reciprocal beneficiary relationship.[202] Loss of consortium should not be used as a reward for those that may enter into traditional marriages, but as "recognition of the right to form intimate relationships by compensating the individual whose relationship is injured by the tortious conduct of another."[203]

Statutorily, Hawai'i's legislature has a history of promulgating laws that extend recovery rights to parties who are not traditionally protected under legal doctrines. Hawai'i's Wrongful Death Statute,[204] which enables a dependent of the victim to sue for damages caused by the negligence of another,[205] exemplifies the legislature's willingness to be overinclusive rather than underinclusive. Additionally, the Reciprocal Beneficiaries Act affords reciprocal beneficiary relationships the same protection that long established legal doctrines historically provided to traditional relationships to minimize the potentially devastating impact of hardships such as illness, death, or

---

[197] *See* Lealaimatafao v. Woodward-Clyde Consultants, 75 Haw. 544, 867 P.2d 220 (1994); Leong v. Takasaki, 55 Haw. 398, 400, 520 P.2d 758, 760 (1974).

[198] *See infra* Part III.A-B.

[199] *See* Masaki v. Gen. Motors Corp., 71 Haw. 1, 19-22 n.8, 780 P.2d 566, 576-78 n.8 (1989).

[200] *See Lealaimatafao*, 75 Haw. 544, 867 P.2d 220; *Leong*, 55 Haw. 398, 520 P.2d 758.

[201] 66 P.3d 948.

[202] *See* HAW. REV. STAT. § 572C-1 (2005).

[203] Johnston, *supra* note 19, at 218-19.

[204] HAW. REV. STAT. § 663-3 (2005). See *supra* note 128 for statute text.

[205] *Id.*

financial difficulty.[206] For this purpose, the legislature added reciprocal beneficiaries into the category of people eligible to sue for loss of consortium recovery under the Wrongful Death Statute.[207]

The supporting rationales expressed by the majority for keeping non-married partners from claiming loss of consortium are inconsistent with Hawai'i case law, policies, and statutes. The common arguments for not extending loss of consortium to unmarried cohabitants, outlined by the *Elden*[208] and *Lozoya*[209] courts, include: (1) the lack of legal precedent; (2) the lack of a legal relationship between the parties; (3) the lack of a much needed bright line rule for courts to follow considering the intangible nature of the loss, the difficulty of measuring damages, and the possibility of an unreasonable increase in the number of persons who would be entitled to sue for the loss of a loved one; (4) the inequity of allowing parties receive a benefit of marriage without assuming the burdens; (5) the risk of promoting common law marriage; and (6) the great burden placed upon the court.[210]

First, the Hawai'i Supreme Court is not required to constrain its rulings due to lack of legal precedent. When the Hawai'i Supreme Court extended loss of consortium to parents in 1989,[211] the court acted on and ruled in favor of a question of first impression for the State. If the court willingly broadened the applicability of loss of consortium without direct legal precedent once, deriving support from the State's statutory scheme, it arguably could do so again under similar circumstances. The Wrongful Death Statute[212] and the Reciprocal Beneficiaries Act[213] provide the support that the court would likely rely on. The court stated in *Masaki* that allowing parents to recover under the Wrongful Death Statute yet denying them recovery under the common law for injuries just short of death is an inconsistent position for the court to hold.[214] It is equally inconsistent to allow reciprocal beneficiaries loss of consortium damages when their partners die but to deny them recovery when their partners are injured.

---

[206] H.R. STAND. COMM. REP. NO. 2, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. HOUSE J. 1118, 1118. The House Judiciary Committee stressed that the bill creates a legal structure for individuals who maintain close relationships, yet, are prohibited from marrying to be protected from circumstances such as illness, death, or financial hardships where long-established legal doctrines do not protect them. *Id.*

[207] *Id.*

[208] 758 P.2d 582 (Cal. 1988).

[209] 66 P.3d 948 (N.M. 2003).

[210] *See Elden*, 758 P.2d 582; *Lozoya*, 66 P.3d 948.

[211] *See* Masaki v. Gen. Motors Corp., 71 Haw. 1, 780 P.2d 566 (1989).

[212] HAW. REV. STAT. § 663-3 (2005).

[213] *Id.* § 572C.

[214] *Masaki*, 71 Haw. at 20, 780 P.2d at 577.

Second, reciprocal beneficiaries create legal relationships with their partners by registering their commitment with the Hawai'i Department of Health, much like those couples who obtain marriage licenses.[215] Arguing that only individuals with a "special legal status"[216] to the victim are able to recover for loss of consortium does not exclude reciprocal beneficiaries from recovery.

Third, extending loss of consortium to reciprocal beneficiaries does not blur a bright-line demarcation that opponents of expanding loss of consortium to unmarried cohabitants argue are crucial.[217] By having a reciprocal beneficiary law, the court can still make determinations on legal status rather than on the quality of relationships. However, requiring Hawai'i courts to make bright-line distinctions between individuals able to recover and those excluded, based upon traditional legal relationships, runs contrary to the court's policy of integrating Hawai'i's unique cultural and familial relationships into the law.[218] Additionally, as the New Mexico Supreme Court expressed in *Lozoya*, "hastily-drawn bright line"[219] distinctions do not further the purpose behind loss of consortium.[220] Loss of consortium brings recovery to those individuals who are owed a duty of care by the tortfeasor based upon the significant relational interests they share with the victims.[221] "Ease of administration . . . does not necessarily further the interests of justice . . . the use of legal status necessarily excludes many persons whose loss of a significant relational interest may be just as devastating as the loss of a legal spouse."[222] Whether or not there is a duty owed to a particular individual may be dependent upon the specific facts of the case. Therefore, "it [is] appropriate that the finder of fact be allowed to determine, with proper guidance from the court, whether a[n] [individual] has a sufficient enough relational interest with the victim . . . to recover for loss of consortium."[223]

---

[215] *See* HAW. REV. STAT. § 572C-6 (2005). Although reciprocal beneficiaries do not have the exact same legal rights and obligations as married couples, both reciprocal beneficiaries and married couples obtain their legal rights once the State issues either a reciprocal beneficiary or marriage certificate. *Compare id.* (stating that issuance of a reciprocal beneficiary certificate by the State Department of Health entitles reciprocal beneficiaries to the rights and obligations under the law), *with id.* § 572-1(6) (requiring a couple to obtain a marriage license from a state agent in order to make a valid marriage contract).

[216] Lozoya v. Sanchez, 66 P.3d 948, 954 (N.M. 2003).

[217] *See* discussion *supra* Part III.C.1.

[218] *See* discussion *supra* Part III.B.

[219] *Lozoya*, 66 P.3d at 955 (quoting Dunphy v. Gregor, 642 A.2d 372, 376 (N.J. 1994)) (quotation marks omitted).

[220] *See id.*

[221] *Id.*

[222] *Id.*

[223] *Id.* at 955-56.

Next, because reciprocal beneficiaries by definition are prohibited from entering into valid marriages with one another,[224] allowing reciprocal beneficiaries to claim loss of consortium neither provides them with benefits of marriage without assuming the burdens of marriage, nor promotes common law marriage. By entering into a reciprocal beneficiary relationship, same-sex couples take the only step available to them for solidifying their commitment to assume the burdens of their partners. Just because the law does not yet provide reciprocal beneficiaries with the same consequences of marriage[225] does not mean that reciprocal beneficiaries should be barred from loss of consortium recovery.

Finally, extending loss of consortium to reciprocal beneficiaries places no greater burden upon the court than already exists.[226] Unlike expanding loss of consortium to all unmarried cohabitants, where the court is faced with outlining a structure to determine whether a claimant's relationship with the victim is sufficient enough to constitute recovery,[227] deciding that a reciprocal beneficiary has standing entails no more effort than the level required for a spouse, parent, or child. Each is based upon a legal relationship between the parties.

Thus, the supporting rationales expressed by the majority are inconsistent with Hawai'i's current jurisprudence. Hawai'i courts articulate a broader framework for those eligible for protection under loss of consortium.[228] The arguments set forth by the minority approach for extending loss of consortium to unmarried cohabitants are more consistent with Hawai'i case law, statutes, and policy decisions.[229] The court is likely to adopt the arguments laid out by the minority given the opportunity to rule on whether reciprocal beneficiaries have standing to sue for loss of consortium. The trend in Hawai'i case law,[230] and the court and legislature's valuation of non-traditional relationships and

---

[224] *See* HAW. REV. STAT. § 572C-4 (2005).

[225] For example, married couples have legal claim to marital property, to cover martial debts, and to obtain support payments upon dissolution of the marriage. *See, e.g.*, *Lozoya*, 66 P.3d at 956.

[226] *See* discussion *supra* Part III.C.

[227] *See* discussion *supra* Part III.C.

[228] *See* discussion *supra* Part III.A-B.

[229] *Compare Lozoya*, 66 P.3d 948, *with* Marquardt v. United Airlines, Inc., 781 F. Supp. 1487 (D. Haw. 1992) (holding children have a right to sue for loss of parental consortium under Hawai'i state law), *and* Lealaimatafao v. Woodward-Clyde Consultants, 75 Haw. 544, 867 P.2d 220 (1994) (holding that non-legally married wife and non-biological and non-legally adopted son have standing to sue for statutory loss of consortium), *and* Masaki v. Gen. Motors Corp., 71 Haw. 1, 780 P.2d 566 (1989) (holding that parents may sue for loss of consortium of injured children), *and* Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974) (holding that a step-grandson has the right to sue for NIED after witnessing the death of his step-grandmother).

[230] *See* discussion *supra* Part III.A.

extended families,[231] combined with the consistency of the rationales behind *Lozoya*[232] with Hawai'i's jurisprudence, illustrates a court willing to include reciprocal beneficiaries into the category of people eligible to recover for the loss of consortium of their loved ones.

IV. CONCLUSION

Frank the life partner, whose life was forever changed by the negligence of another, deserves the same level of protection under Hawai'i's loss of consortium laws as Frank the loving father. Allowing reciprocal beneficiaries compensation for the loss of love, support, and companionship upon the death of their partners, while denying them recovery under the common law is an inconsistent position for the court to hold. Given the opportunity, social justice requires that the court break the illogical boundary that currently exists between reciprocal beneficiaries' right to recover loss of consortium under the Wrongful Death Statute as opposed to no right under common law.

Sarah M. Love[233]

---

[231] *See* discussion *supra* Part III.B.

[232] 66 P.3d 948.

[233] J.D. Candidate 2006, William S. Richardson School of Law, University of Hawai'i at Manoa. Special thanks to Professor Denise Antolini for her wisdom and guidance. Also thanks to Chris Goodin, Brandon Ito, Erika Lewis, Nathan Okubo, Larissa Schwartz, Damon Schmidt, Jeannie Choi, Bradley Davis, Brooke Kumabe, Jeff Lau, and Tina Wakayama for their help throughout the writing process.

State v. Rivera: Extended Sentencing and the Sixth Amendment Right to Trial by Jury in Hawai'i

I. INTRODUCTION

In *Apprendi v. New Jersey*,[1] the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[2] The State of Hawai'i's extended sentencing statute provides that a convicted defendant who is a persistent offender or multiple offender may be subject to an extended term of imprisonment when the defendant's imprisonment for an extended term is "necessary for the protection of the public."[3] In *State v. Rivera*,[4] the Hawai'i Supreme Court held that the extended sentence imposed on Larry Rivera (as both a persistent offender and a multiple offender) was not contrary to *Apprendi* or its progeny because (1) Hawai'i's sentencing scheme is indeterminate, and (2) the factors that subjected the defendant to an extended sentence were extrinsic to the substantive offenses charged.[5]

This note asserts that the Hawai'i Supreme Court erred in upholding Rivera's extended sentence, and in so doing, violated the Sixth Amendment of the United States Constitution. Part II summarizes the factual and procedural background of the case. Part III discusses the legal background of extended sentencing and *Apprendi* issues at the United States Supreme Court and in Hawai'i. Part IV examines the court's *Rivera* analysis to determine that Hawai'i's extended sentencing scheme does not survive the *Apprendi* line of cases and calls for legislative action. Part V concludes that Hawai'i's extended sentencing scheme fails constitutional muster and that a remedy is timely.

---

[1] 530 U.S. 466 (2000).

[2] *Id.* at 490.

[3] HAW. REV. STAT. § 706-662 (2005).

[4] 106 Hawai'i 146, 102 P.3d 1044 (2004), *cert. denied*, 126 S. Ct. 45 (2005).

[5] *Id.* at 150, 102 P.3d at 1048.

II. STATEMENT OF THE CASE: FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

On September 19, 2002, a security guard at the Island Colony Hotel in Honolulu discovered defendant/appellant Larry Rivera asleep in the hallway of the hotel's twenty-sixth floor with a small plastic bag and an "ice pipe" next to him.[6] The guard notified the Honolulu Police Department ("HPD"), who arrested Rivera for the promotion of dangerous drugs in the third degree.[7] Upon conducting a search, HPD discovered marijuana and crystal methamphetamine in Rivera's front pocket.[8] On September 27, 2002, the prosecution charged Rivera with the following offenses:[9] promoting a dangerous drug, in violation of Hawai'i Revised Statutes ("HRS") section 712-1243, a Class C felony ("Count 1");[10] unlawful use of drug paraphernalia, in violation of HRS section 329-43.5(a), a Class C felony ("Count 2");[11] and promoting a detrimental drug in the third degree, in violation of HRS section 712-1249, a petty misdemeanor ("Count 3").[12] On July 11, 2003, the jury returned a verdict of guilty as charged on all three counts.[13]

B. Procedural Background

Ordinary imprisonment terms for Class C felonies are governed by HRS section 706-660, which prescribes "an indeterminate term of imprisonment" of a maximum of five years for a Class C felony.[14] After the return of the jury's verdict and prior to sentencing, the prosecution filed the following motions: (1) a motion for extended term of imprisonment as a multiple offender, pursuant to HRS section 706-662(4)(a); (2) a motion for extended term of imprisonment as a persistent offender, pursuant to HRS section 706-662(1); and (3) a motion for sentencing as a repeat offender, which carries a mandatory minimum sentence pursuant to HRS section 706-606.5.[15] Rivera opposed the prosecution's motions, but maintained that he understood that "the repeat offender statute applies here and that this court has an obligation

---

[6] *Id.* at 151, 102 P.3d at 1049.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] HAW. REV. STAT. § 712-1243(2) (2005).

[11] *Id.* § 329-43.5(a).

[12] *Id.* § 712-1249(2).

[13] *Rivera*, 106 Hawai'i at 151, 102 P.3d at 1049.

[14] HAW. REV. STAT. § 706-660 (2005).

[15] *Rivera*, 106 Hawai'i at 151, 102 P.3d at 1049.

to impose a mandatory minimum[.]"[16] The circuit court granted all three of the prosecution's motions and on October 8, 2003, orally sentenced Rivera to ten years for Count 1; ten years for Count 2; and thirty days for Count 3, with a mandatory minimum sentence of three years and four months on Counts 1 and 2.[17]

On November 3, 2003, the circuit court filed its written findings of fact, conclusions of law, and order granting the prosecution's motion for an extended term of imprisonment as a persistent offender and as a multiple offender.[18] The court found that Rivera was a "persistent offender" and a "multiple offender" whose extended sentence was "necessary for the protection of the public."[19] The court based these findings on his criminal history, which included eighty-two arrests, resulting in three prior felony convictions (one conviction for Rape in the Second Degree and two convictions for Promoting a Dangerous Drug in the Second Degree) and twenty-seven misdemeanor convictions, petty misdemeanor convictions, and violations;[20] the extensive and violent character of his criminal history;[21] the continuation of his criminality despite probation and incarceration;[22] his "demonstrated . . . total disregard for the rights of others and [his] poor attitude towards the law";[23] his "demonstrated . . . pattern of criminality";[24] and because, "due to the quantity and seriousness of his past convictions and the seriousness of the instant offenses,"[25] he "poses a serious threat to the community[,] and his long term incarceration is necessary for the protection of the public."[26]

On November 4, 2003, Rivera timely filed a notice of appeal.[27] On appeal, Rivera contended that the circuit court erred in granting the State's motions for an extended term of imprisonment as a "persistent offender" and as a "multiple offender" because a jury did not decide whether the extended terms were necessary for the protection of the public, thereby violating *Apprendi*.[28]

---

[16] *Id.*
[17] *Id.*
[18] *Id.* at 152-53, 102 P.3d at 1050-51.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 152, 154, 102 P.3d at 1050, 1053.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 153, 102 P.3d at 1051.
[26] *Id.*
[27] *Id.* at 154, 102 P.3d at 1052.
[28] *Id.* at 148, 102 P.3d at 1046.

III. LEGAL BACKGROUND: HISTORY OF THE APPLICATION OF THE SIXTH AMENDMENT TO SENTENCING FACTORS IN THE UNITED STATES SUPREME COURT AND IN HAWAI'I

A. The United States Supreme Court Cases

The Sixth Amendment of the United States Constitution guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State."[29] In *Duncan v. Louisiana*,[30] the United States Supreme Court recognized the right to jury trial for serious crimes as "fundamental to the American scheme of justice"[31] such that under the Due Process Clause of the Fourteenth Amendment,[32] it is "a fundamental right" in both federal and state courts.[33] The Court reasoned that the right is essential both "in order to prevent oppression by the Government"[34] and as "a defense against arbitrary law enforcement [by one judge or a group of judges]."[35] The Court later clarified that serious crimes included those offenses for which imprisonment of more than six months is authorized.[36]

1. Facts requiring proof "beyond a reasonable doubt": The road to Apprendi

The Court's *Apprendi* jurisprudence originates with *In re Winship*.[37] In the majority opinion, delivered by Justice Brennan, the Court declared, "[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[38] The application of the reasonable doubt standard in criminal procedure is an extension of the core societal principles of liberty and due process; as Justice Harlan described

---

[29] U.S. CONST. amend. VI. In Hawai'i, see also HAW. CONST. art. I, § 14 ("the accused shall enjoy the right to a speedy and public trial by an impartial jury").

[30] 391 U.S. 145 (1968).

[31] *Id.* at 149 ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice . . . .").

[32] U.S. CONST. amend. XIV.

[33] *Duncan*, 391 U.S. at 157-58.

[34] *Id.* at 155.

[35] *Id.* at 156.

[36] *See* Baldwin v. New York, 399 U.S. 66, 69 (1970) ("[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized.").

[37] 397 U.S. 358 (1970).

[38] *Id.* at 364.

in his concurrence, it is "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[39]

In *Mullaney v. Wilbur*,[40] the Court examined which facts are "necessary to constitute the crime charged."[41] The *Mullaney* defendant had been convicted of murder under a statute that presumed the defendant's malice aforethought, the presence of which characterized a felonious homicide as murder instead of manslaughter.[42] In order to lower the charge from murder, which carried a life sentence, to manslaughter, which carried a twenty-year maximum term of imprisonment,[43] the defendant had the burden of "[proving] by a fair preponderance of the evidence that he [had] acted in the heat of passion on sudden provocation."[44] Although the state court held for the prosecution and characterized murder and manslaughter as "different degrees of the single generic offense of felonious homicide,"[45] the defendant argued that malice aforethought was an essential element of murder that distinguished murder as a crime separate from manslaughter.[46] The Court, in a unanimous opinion by Justice Powell, agreed with the defendant and held that in light of the defendant's strong liberty interest, the burden was on the prosecution to prove, beyond a reasonable doubt, the absence of the heat of passion on sudden provocation.[47] The Court held that the *Winship* reasonable doubt standard applied to the element of malice aforethought, even though the element did not arise as an issue until post-conviction proceedings, after the criminality of the act had already been determined.[48] The reason given by the Court for extending the reasonable doubt standard to what the state considered as, operationally, a sentencing factor is that otherwise, states could legislatively characterize a fact of the crime as a sentencing factor, even if the determination of the fact made the crime another crime altogether (e.g., murder instead of manslaughter).[49] In this way, the Court attempted to prevent states from committing linguistic end-runs around the liberty interests protected by *Winship*.

Eleven years later, the Court began to consider the explicit application of the reasonable doubt standard to sentencing factors—as well as its ongoing

---

[39] *Id.* at 372 (Harlan, J., concurring).
[40] 421 U.S. 684 (1975).
[41] *Id.* at 685 (citing *Winship*, 397 U.S. at 364).
[42] *Id.* at 688.
[43] *Id.* at 691-92.
[44] *Id.* at 686.
[45] *Id.* at 688 (citing State v. Wilbur, 278 A.2d 139 (Me. 1971)).
[46] *Id.* at 687.
[47] *Id.* at 704.
[48] *Id.* at 697.
[49] *Id.* at 698-99.

split on this issue–in *McMillan v. Pennsylvania*.[50] Pursuant to the Pennsylvania Mandatory Minimum Sentencing Act,[51] defendants convicted of certain felonies were subject to a minimum five-year sentence if the sentencing judge found, by a preponderance of the evidence, that the defendant "'visibly possessed a firearm' during the commission of the offense."[52] The five-to-four majority opinion authored by Justice Rehnquist upheld the preponderance standard because the state legislature had expressly provided that firearm possession was a sentencing factor and not an element of the crime,[53] and "the state legislature's definition of the elements of the offense is usually dispositive";[54] the federal system grants states the authority to define a fact as an element of the offense.[55] Further, firearm possession did not create a separate offense with a separate penalty, but rather, the statute "[operated] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm."[56] Two separate dissents, authored by Justices Marshall and Stevens, argued that the Court—and not state legislatures—maintained the authority to determine whether a fact is an element of a crime because state powers are subject to constitutional limitations, such as the protection of liberty interests.[57]

In 1998, the Court revisited sentencing factors in *Almendarez-Torres v. United States*.[58] Under the statute at issue, a previously deported alien who re-enters the United States without special permission is subject to a maximum of two years imprisonment.[59] However, if the previous deportation was subsequent to an aggravated felony conviction, the alien is subject to a maximum prison term of twenty years.[60] In another five-to-four split, the majority opinion by Justice Breyer held that the enhanced sentence was constitutional because it was a penalty provision authorizing a court to increase the sentence for recidivism, rather than creating a separate crime.[61] As such, the fact of the prior conviction is not an element of the crime and does not need to be alleged in the indictment for determination by the jury. In particular, the majority relied upon the historical role of recidivism as a

---

[50] 477 U.S. 79 (1986).

[51] 42 PA. CONS. STAT. § 9712 (1982).

[52] *McMillan*, 477 U.S. at 81 (quoting 42 PA. CONS. STAT. § 9712).

[53] *Id.* at 85-86.

[54] *Id.* at 85 (citing Patterson v. New York, 432 U.S. 197, 201-02 (1977)).

[55] *Id.* at 89-90.

[56] *Id.* at 87-88.

[57] *Id.* at 93 (Marshall, J., dissenting); *id.* at 98 (Stevens, J., dissenting).

[58] 523 U.S. 224 (1998).

[59] *Id.* at 226.

[60] *Id.*

[61] *Id.*

sentencing factor,[62] as well as the discretion retained by the sentencing judge even with a raised sentencing ceiling; an enhanced maximum permissible sentence did not mandate an increase in the sentence ultimately imposed, as the judge was still free to impose any sentence within the range.[63] In his dissent (notable because Justice Scalia's contingent was to emerge as the majority in later sentencing factor cases), Justice Scalia argued that the majority's grounds for determining that the fact of a prior conviction was merely a sentencing factor were weak,[64] and moreover, that the Court should consider the larger question of whether a fact that increases maximum punishment must be found by a jury.[65]

The tide shifted once more in *Jones v. United States*.[66] Although *Jones* was decided by the same nine justices as *Almendarez-Torres*, Justice Thomas changed his vote from the *Almendarez-Torres* majority to join Justice Souter in the *Jones* majority, perpetuating the five-to-four split.[67] The federal carjacking statute at issue permitted a maximum sentence of fifteen years imprisonment, a maximum that increased to twenty-five years if "'serious bodily injury'" resulted, or to life imprisonment if death resulted.[68] The majority opinion held that although the section listing these factors gave the "superficial impression" of sentencing considerations, more importantly, the subsections provided for steeply higher penalties conditioned on facts (i.e., serious bodily injury, death) that appeared at least as essential as the outlined elements of the crime itself.[69] Basing its analysis on the substantial effect of the provisions rather than their appearance (noting that it would be questionable that facts that could so drastically increase a penalty range would not be afforded the same procedural safeguards, e.g. determination by a jury, accorded to elements of an offense),[70] the majority held that the enhancements constituted three separate offenses, requiring specific allegation of the elements in the indictment for submission to a jury.[71] This focus on effect is a departure from the judicial deference to legislative labels favored in *McMillan*.[72] Still, the majority holding distinguished that "[no one] would

---

[62] *Id.* at 243 ("[Recidivism] is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence.").

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

[64] *Id.* at 269 (Scalia, J., dissenting).

[65] *Id.* at 257-58.

[66] 526 U.S. 227 (1999).

[67] *Id.* at 228.

[68] *Id.* at 230 (quoting 18 U.S.C. § 2119 (Supp. V 1988)).

[69] *Id.* at 232-33.

[70] *Id.* at 233.

[71] *Id.* at 251-52.

[72] *See supra* Part III.A.1.

claim that every fact with a bearing on sentencing must be found by a jury . . . ."[73]

2. Apprendi v. New Jersey*: a bright-line rule?*

The cases leading to *Apprendi* present a jurisprudence conflicted on what constitutes an "element" of a crime: judicial determination of facts increasing the minimum sentence was held constitutional (*McMillan*), while those increasing the maximum required a jury trial (*Jones*); facts resulting in a ten-year extension to the maximum sentence warranted consideration by a jury (*Jones*), while those that could add eighteen years imprisonment could be determined by a judge (*Almendarez-Torres*). The *Apprendi* majority (another five-to-four split, along lines identical to *Jones*) attempted to clarify the confusion with a seemingly simple pronouncement: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[74]

As applied in the case, the holding rendered a New Jersey hate crime enhancement statute unconstitutional because it allowed the sentencing judge to extend the defendant's sentence from the five to ten year range to between ten and twenty years upon finding, by a preponderance of the evidence, that the crime was racially motivated.[75] In striking down the New Jersey statute, the Court underscored the "surpassing importance" of the Sixth Amendment and the Due Process protections that underlie a criminal defendant's entitlement to "'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"[76]

However, it is portentous that this landmark case produced *five* opinions, a sign of the Court's forthcoming struggle to define the standard for the submission of sentencing factors to a jury. In addition to Justice Stevens' opinion for the majority, in which Justices Scalia, Souter, Thomas, and Ginsburg joined, there were two concurrences and two dissents: Justice Scalia's concurrence (responding to Justice Breyer's dissent by arguing that a textualist reading of the Sixth Amendment would preclude "[leaving] criminal justice to the State" in the person of a sentencing judge);[77] Justice Thomas' concurrence, in which Justice Scalia joined in part (describing a long history of judicial definition of elements of crimes and calling for an even broader rule that defines an element as a fact that is "the basis for imposing

---

[73] *Jones*, 526 U.S. at 248.

[74] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

[75] *Id.* at 468-69, 497.

[76] *Id.* at 476-77 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).

[77] *Id.* at 498-99 (Scalia, J., concurring).

or increasing punishment");[78] Justice O'Connor's dissent, in which Chief Justice Rehnquist and Justices Kennedy and Breyer joined (dissuading the majority's bright-line approach because it contradicts, without sufficient authority, judicial deference as required by precedent);[79] and Justice Breyer's dissent, in which Chief Justice Rehnquist joined (arguing that the majority's proposition is procedurally unrealistic).[80]

3. Blakely v. Washington*:* Apprendi *applied and explained*

Despite the Court's attempt to provide bright-line guidance, confusion persisted both at the federal level with the United States Sentencing Guidelines, and at the state level across individual state sentencing schemes.[81] The Court granted certiorari in 2003 to examine the application of *Apprendi* to one such state scheme, Washington's Sentencing Reform Act.[82]

In *Blakely v. Washington*,[83] the defendant had entered a plea admitting to second-degree kidnapping involving domestic violence and use of a firearm.[84] The crime was a Class B felony, which carried a ten-year maximum, but the specific offense of second-degree kidnapping with a firearm was subject to a "standard range" of imprisonment of forty-nine to fifty-three months.[85] However, another statute in the Sentencing Reform Act allowed judges to impose sentences beyond the standard range and up to the maximum for the class upon finding "substantial and compelling reasons justifying an exceptional sentence,"[86] as long as those reasons "[took] into account factors other than those used [to compute] the standard range."[87] Pursuant to the Sentencing Reform Act, the sentencing judge found that the defendant had acted with "deliberate cruelty" and imposed an exceptional sentence of ninety

---

[78] *Id.* at 521 (Thomas, J., concurring).

[79] *Id.* at 524-25 (O'Connor, J., dissenting).

[80] *Id.* at 555 (Breyer, J., dissenting).

[81] *See, e.g.*, Joseph L. Hoffman, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 255 (2001) ("many still-unanswered questions about the scope of *Apprendi*"); Christopher H. Lindstrom, Article, *In the Shadow of Apprendi: People v. Rosen Reveals the Impractical Nature and Uncertain Future of Apprendi v. New Jersey*, 36 COLUM. J.L. & SOC. PROBS. 103, 104 (2002) ("[*Apprendi*] has forced state legislatures across the country to reevaluate their sentencing schemes . . . . Unfortunately for the courts, *Apprendi* . . . has left uncertain how to measure other federal and state statutes' constitutionality.").

[82] Blakely v. Washington, 540 U.S. 965 (2003).

[83] 542 U.S. 296 (2004).

[84] *Id.* at 299.

[85] *Id.* (citing WASH. REV. CODE ANN. §§ 9.94A.320, .360, .310(1), .310(3)(b) (2000)).

[86] *Id.* (citing WASH. REV. CODE ANN. § 9.94A.120(2) (2000)).

[87] *Id.* (citing State v. Gore, 21 P.3d 262, 277 (Wash. 2001)).

months.[88] The prosecution argued that there was no *Apprendi* violation because *Apprendi* provided for judicial discretion within the statutory limits, and the ninety-month sentence was within the ten-year maximum imposed by statute for Class B felonies.[89]

The Court, once again highly divided and mirroring the *Apprendi* split, struck down the statute, holding that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[90] The Court further specified, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[91] In Blakely's case, the sentencing judge could not have imposed a sentence in excess of fifty-three months without the "deliberate cruelty" finding, and as such, fifty-three months was the *Apprendi* statutory maximum, regardless of a general statutory maximum for Class B felonies. The *Blakely* holding represents a more operational and outcome-oriented application of *Apprendi*, focusing more on the penalty-enhancing effect of a factual determination, rather than any legislative characterization of a fact as a sentencing factor, to distinguish between sentencing factors and elements of the offense.

The entrenchment of the *Apprendi* division is evident in the number and tenor of the dissents. In addition to Justice Scalia's majority opinion, in which Justices Stevens, Souter, Thomas, and Ginsburg joined, the case produced three dissents. Justice O'Connor's dissent, in which Chief Justice Rehnquist and Justice Breyer joined in part, criticized the majority's adherence to formalism at the cost of consistency in sentencing—indeed, "the very principles the majority purports to vindicate."[92] She closes in lament at the holding's likely impact, "[w]hat I have feared most has now come to pass: Over [twenty] years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."[93]

Justice Kennedy's dissent, in which Justice Breyer joined, added to Justice O'Connor's dissent his concern that the majority, in striking the Washington statute, severed the "dynamic and fruitful dialogue" between the legislature and the judiciary that serves as a basis for evolution of law.[94] By declaring the

---

[88] *Id.* at 300 (citing WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (2000)).

[89] *Id.* at 303.

[90] *Id.* (citing Ring v. Arizona, 536 U.S. 584, 602 (2002)).

[91] *Id.* at 303-04.

[92] *Id.* at 322 (O'Connor, J., dissenting).

[93] *Id.* at 326.

[94] *Id.* at 328 (Kennedy, J., dissenting).

statute unconstitutional, the majority quieted the opinions and knowledge of the people as voiced by their elected representatives.[95]

Justice Breyer also authored his own dissent, in which Justice O'Connor joined. Although he agreed with the majority that the difference between a "sentencing factor" and an "element" of the offense may be merely superficial, dependent on the legislature's choice of label, he was reluctant to require jury determination across the board for both sentencing factors and elements for fear of "consequences that threaten the fairness of our traditional criminal justice system."[96] Justice Breyer argued that the majority holding, in practice, could lead to disastrously inequitable and impractical outcomes, such as a determinate sentencing system in which crimes committed in vastly different manners would result in identical punishments;[97] a purely indeterminate sentencing system, in which the term of imprisonment is wholly subject to inclinations of a judge or parole board;[98] statutory revision to provide a specific sentence for every possible permutation of a crime, or alternatively, a bifurcated trial for guilt and for sentencing;[99] or statutory revision to provide an exhaustive list of mitigating factors (which can be judicially determined) from an extraordinarily high maximum sentence.[100]

B. Extended Sentencing in Hawai'i: Subject to Judicial Determination

The rationale and history of the Hawai'i Supreme Court's application of *Apprendi* in Hawai'i is best articulated in *State v. Kaua*.[101] As the court's holding in *Rivera* upheld its *Kaua* analysis,[102] it is useful to examine *Kaua*—and its subsequent history—as representative of the current state of *Apprendi* and *Blakely* in Hawai'i.

1. Hawai'i's extended sentencing scheme: Kaua's *underlying principles*

The *Kaua* holding builds on the Hawai'i Supreme Court's jurisprudence interpreting and applying Hawai'i's extended sentencing scheme. The scheme is statutorily defined in HRS section 706-662, which provides, in relevant part, that "[a] convicted defendant may be subject to an extended term of

---

[95] *Id.* at 327.

[96] *Id.* at 329 (Breyer, J., dissenting).

[97] *Id.* at 330.

[98] *Id.* at 332.

[99] *Id.* at 333-36.

[100] *Id.* at 339.

[101] 102 Hawai'i 1, 72 P.3d 473 (2003).

[102] State v. Rivera, 106 Hawai'i 146, 150, 102 P.3d 1044, 1048 (2004).

imprisonment"[103] if "[t]he defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public"[104] or "[t]he defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public."[105] A hearing on extended term sentencing "'is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes'"[106] in which a defendant "'is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings'"[107] and "all relevant issues should be established by the state beyond a reasonable doubt."[108]

The Hawai'i Supreme Court recognizes the test for imposition of an extended sentence as "a two-step process."[109] The first step requires the sentencing court to find that "the defendant is within the class of offenders to which the particular subsection applies";[110] under subsection (1), the court must first find that the defendant is a "persistent offender," and under subsection (4), the court must first find that the defendant is a "multiple offender."[111] This first step involves "historical facts" which are "wholly extrinsic to the specific circumstances of the defendant's offenses and therefore have no bearing on the issue of guilt per se."[112] Extrinsic facts are found by the sentencing court because submission to the jury would "[admit] potentially irrelevant and prejudicial evidence and contaminate the jury's required focus on the specific elements of the offense charged."[113]

The second step requires the sentencing court to find that "the defendant's commitment for an extended term is necessary for the protection of the public."[114] The Hawai'i Supreme Court noted that the "necessary for the protection of the public" finding is not "a factual finding susceptible to jury determination," and thus, falls within the purview of the sentencing court.[115]

---

[103] HAW. REV. STAT. § 706-662(1) (2005).

[104] *Id.*

[105] *Id.* § 706-662(4).

[106] State v. Kamae, 56 Haw. 628, 634, 548 P.2d 632, 636 (1976) (quoting United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

[107] *Id.* (quoting *Gerchman*, 355 F.2d at 312).

[108] *Id.* at 635, 548 P.2d at 637.

[109] *See, e.g.*, State v. Huelsman, 60 Haw. 71, 76, 588 P.2d 394, 398 (1978); State v. Tamura, 63 Haw. 636, 638, 633 P.2d 1115, 1117 (1981).

[110] *Huelsman*, 60 Haw. at 76, 588 P.2d at 398.

[111] *Id.* (citing HAW. REV. STAT. § 706-662 (1978)).

[112] State v. Schroeder, 76 Hawai'i 517, 528, 880 P.2d 192, 203 (1994) (emphasis omitted).

[113] State v. Tafoya, 91 Hawai'i 261, 271, 982 P.2d 890, 900 (1999).

[114] *Huelsman*, 60 Haw. at 77, 588 P.2d at 398.

[115] *Tafoya*, 91 Hawai'i at 275, 982 P.2d at 904 n.19.

2. State v. Kaua: *the state supreme court reconciles the extended sentencing statute with* Apprendi

The defendant in *Kaua* was sentenced to an extended sentence as a "multiple offender" whose imprisonment was necessary for the protection of the public, pursuant to HRS section 706-662(4)(a).[116] The sentencing court granted the motion for an extended sentence upon taking judicial notice of Kaua's prior firearms possession convictions, and citing his history of alcoholism, substance abuse, and assaultive behavior, as well as his access to firearms.[117] Kaua appealed, arguing that *Apprendi* required that the HRS section 706-662(4)(a) factors be proven beyond a reasonable doubt to a jury.[118] The prosecution responded that the extended sentencing statute did not violate *Apprendi* because (1) the *Apprendi* court had drawn a distinction between "sentencing factors" and "elements" of the offense, and only elements needed to be determined by a jury;[119] and (2) the Hawai'i Supreme Court's precedent dictated that, in applying HRS section 706-662(4), facts "extrinsic" to the crime charged be found by the sentencing court and not the jury.[120] The Hawai'i Supreme Court agreed with the prosecution,[121] holding that Hawai'i's extended sentencing statute called for the sentencing court to find historical, "wholly extrinsic" facts, which are sentencing factors falling outside the *Apprendi* mandate for determination by a jury because "[historical facts] have no bearing on the issue of guilt per se."[122] The holding reaffirmed the distinction between intrinsic facts, which are "'contemporaneous with, and enmeshed in, the statutory elements of the proscribed offense,'" [123] and extrinsic facts, which are "'separable from the offense itself in that they involve consideration of collateral events or information.'"[124]

Furthermore, the sole factor subjecting Kaua to an extended sentence was his status as a "multiple offender," which is subject to judicial determination both because it is based on extrinsic facts[125] and because it falls within the prior conviction exception articulated in *Almendarez-Torres* and retained in

---

[116] State v. Kaua, 102 Hawai'i 1, 2-4, 72 P.3d 473, 474-76 (2003) (applying HAW. REV. STAT. § 706-662(4)(a) (Supp. 1999)).

[117] *Id.* at 4-5, 72 P.3d at 476-77.

[118] *Id.* at 7, 72 P.3d at 479.

[119] *Id.* at 9, 72 P.3d at 481.

[120] *Id.* (citing *Tafoya*, 91 Hawai'i 261, 982 P.2d 890).

[121] *Id.*

[122] *Id.* at 10, 72 P.3d at 482 (emphases omitted).

[123] *Id.* at 11, 72 P.3d at 483 (quoting *Tafoya*, 91 Hawai'i at 271, 982 P.2d at 900).

[124] *Id.*

[125] *Id.* at 12-13, 72 P.3d at 484-85.

Apprendi.[126] The subsequent finding of whether imprisonment is "necessary for the protection of the public" can be judicially determined because it does not "[increase] the penalty . . . beyond the prescribed statutory maximum,"[127] but rather, merely informs sentencing somewhere within the range delimited by the "multiple offender" status.[128]

3. Kaua *on appeal: disputing the Hawai'i Supreme Court's rationale*

Kaua filed a petition for relief from the extended sentence to the United States District Court for the District of Hawai'i under the Antiterrorism and Effective Death Penalty Act,[129] arguing that the Hawai'i Supreme Court's decision upheld a violation of his Sixth Amendment rights as interpreted by *Apprendi*.[130] Judge Mollway agreed with Kaua, stating in her opinion that "[t]he *Kaua* decision's reading of [*Apprendi*] flies in the face of the actual language of [*Apprendi*] . . . ."[131] The opinion analogizes *Kaua* to *Ring v. Arizona*,[132] which had been decided by the United States Supreme Court prior to the Hawai'i Supreme Court's consideration of Kaua's final appeal.[133] In *Ring*, the Court held that aggravating circumstances subjecting the defendant to the death penalty had to be submitted to a jury because they operated as "'the functional equivalent of an element of a greater offense.'"[134] The federal district court found that Kaua was similarly subject to enhanced punishment as a result of the sentencing judge's "protection of the public" determination, which was based on findings about Kaua's substance abuse, behavior, and access to firearms.[135]

---

[126] *See id.* at 12, 72 P.3d at 484. The court cites *State v. Carvalho*, 101 Hawai'i 97, 63 P.3d 405 (App. 2002). In *Carvalho*, the Intermediate Court of Appeals recognized that "[u]nder the express *Apprendi* exception for prior convictions . . . predicate facts [supporting finding of persistent offender or multiple offender status] need not [be] 'submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at 111, 63 P.3d at 419 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

[127] *Apprendi*, 530 U.S. at 490.

[128] *Kaua*, 102 Hawai'i at 13, 72 P.3d at 485.

[129] 28 U.S.C. § 2254(d) (2004). In relevant part, the Act provides for the grant of a federal writ of habeas corpus on a state court judgment when the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* § 2254(d)(1).

[130] Kaua v. Frank, 350 F. Supp. 2d 848, 850 (D. Haw. 2004).

[131] *Id.* at 859.

[132] 536 U.S. 584 (2002).

[133] *Kaua*, 350 F. Supp. 2d at 859-60.

[134] *Id.* at 860 (quoting *Ring*, 536 U.S. at 609).

[135] *Id.* at 861.

The federal district court's opinion was recently affirmed by the United States Court of Appeals for the Ninth Circuit.[136] In the brief opinion by Judge Nelson, the court of appeals discredited the Hawai'i Supreme Court's "intrinsic-extrinsic" analysis, describing it as "a variant of the 'element-sentencing factor' distinction that *Apprendi* explicitly rejected."[137] The court of appeals concluded that the "[t]he sentencing court's public protection finding, coupled with the finding of multiple felonies, exposed Kaua to a sentence greater than the jury's guilty verdict authorized."[138] Therefore, "under *Apprendi*, a jury should have made the public protection finding."[139]

IV. ANALYSIS

A. The Opinions

Similar to the United States Supreme Court in *Apprendi* issues, the Hawai'i Supreme Court also split in *Rivera*; the majority was a narrow three-to-two.[140] The split is noteworthy in that where the court's *Kaua* opinion was unanimous, here Justice Acoba departs from his colleagues, perhaps reflecting the general polarization on *Apprendi* issues developing nationally in the wake of *Blakely*'s bright-line decree.

1. The majority opinion

The majority opinion held that Hawai'i's extended term sentencing scheme survives *Blakely* because (1) whereas *Blakely* addresses only statutory "determinate" sentencing, sentencing in Hawai'i is indeterminate with limited judicial discretion; and (2) upholding the "intrinsic-extrinsic" analysis articulated in *State v. Kaua*, sentencing courts' fact-finding is limited to extrinsic facts, which are not subject to the *Apprendi/Blakely* mandate for jury determination.[141] The court characterized *Blakely* as "a gloss on *Apprendi*,"[142] and decided that *Blakely* does not affect the rule set forth in *Apprendi*.[143]

---

[136] Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006).

[137] *Id.* at 1062.

[138] *Id.*

[139] *Id.*

[140] State v. Rivera, 106 Hawai'i 146, 147, 102 P.3d 1044, 1045 (2004).

[141] *Id.* at 156-60, 102 P.3d 1054-58.

[142] *Id.* at 156, 102 P.3d at 1054.

[143] *Id.* at 157, 102 P.3d at 1055. For further discussion of the court's analysis in this case, see *infra* Part IV.B.

2. The dissent

In his dissent, Justice Acoba credits *Blakely* and its explication of *Apprendi* as the impetus for reexamining *Kaua*.[144] Applying the United States Supreme Court's language in *Blakely*, the dissent argues that Kaua's "'prescribed statutory maximum'" was five years because that was "'the maximum [sentence] a [judge could] impose without any additional findings.'"[145] The extension of Kaua's sentence beyond the five-year "statutory maximum" was based on the court's findings of fact supporting the judgment that the extended sentence was "necessary for the protection of the public."[146]

The dissent asserts that the majority's conclusion that the indeterminate nature of Hawai'i's sentencing scheme places it out of *Blakely*'s applicability is erroneous because the United States Supreme Court never limited the *Blakely* holding to determinate sentencing.[147] Much like the federal district court's *Kaua* opinion, the dissent argues that the majority's "intrinsic-extrinsic" distinction is analogous to the "element-sentencing factor" distinction that the United States Supreme Court rejected in favor of answering "whether such a 'finding exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict . . . .'"[148]

B. The Rivera *Court's Rationale and the Constitutionality of Hawai'i's Sentencing Scheme*

The Hawai'i Supreme Court's analysis in *State v. Rivera* is flawed because its "intrinsic-extrinsic" analysis is based on the *Almendarez-Torres* prior conviction exception, which is of questionable ongoing validity, and because the "intrinsic-extrinsic" distinction disregards *Apprendi*'s directive to consider the effect of the fact in question on the defendant's punishment rather than on the "form" of the fact,[149] misconstruing *Blakely* in the process. Additionally, the court incorrectly found that *Blakely* does not apply to Hawai'i's extended sentencing scheme because it is indeterminate, when the scheme is in fact

---

[144] *Id.* at 166-67, 102 P.3d at 1064-65 (Acoba, J., dissenting).

[145] *Id.* at 171, 102 P.3d at 1069 (quoting Blakely v. Washington, 542 U.S. 296, 301-04 (2004)).

[146] *Id.*

[147] *Id.*; *id.* n.7 ("'[T]his case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.'" (quoting *Blakely*, 542 U.S. at 308)).

[148] *Id.* at 173, 102 P.3d at 1071 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).

[149] *Apprendi*, 530 U.S. at 494.

determinate as *Blakely* utilizes the term.[150] A survey of other jurisdictions' approaches to resolving *Blakely* conflicts suggests some options to remedy the Hawai'i scheme.

1. The intrinsic-extrinsic analysis fails because it relies on the prior conviction exception

The court held that Hawai'i's extended sentencing scheme satisfies *Apprendi* and *Blakely* because all of the facts that increase the maximum term of imprisonment fell within the prior conviction exception to *Apprendi*, thereby allowing for judicial determination of those facts.[151] The court's rationale was that the first step of the *Huelsman* test—the determination that the defendant is a persistent or multiple offender—is based wholly on facts of prior convictions and recidivism, which are sentencing factors that can be found judicially.[152] Satisfaction of the first step alone triggers the defendant's susceptibility to an extended sentence; the "necessary for the protection of the public" finding second step is merely a sentencing factor that helps inform the imposition of the sentence somewhere within the range defined by the defendant's categorization as a persistent or multiple offender.[153] The court reasoned that because the second step of the test does not extend a statutory maximum, it is extrinsic to the offense, and so, did not attach any Sixth Amendment right to trial by jury.[154] In this way, the court hinged the intrinsic-extrinsic analysis on the prior conviction exception to circumvent jury involvement in the *Huelsman* test.

The prior conviction exception has been questioned at length in the aftermath of *Apprendi*[155] and *Blakely*, which together propose a bright-line rule requiring jury submission of any facts—outside of prior convictions—that increase a maximum penalty beyond the statutory maximum, defined as the maximum sentence that a judge can impose "*solely on the basis of facts*

---

[150] *See* Jon Wool, *Beyond Blakely: Implications of the Booker Decision for State Sentencing Systems*, POL'Y AND PRAC. REV. 1, 3 (2005) (discussing the different meanings of "indeterminate sentencing").

[151] *Rivera*, 106 Hawai'i at 163, 102 P.3d at 1061.

[152] *Id.* at 160, 102 P.3d at 1058 ("[W]hat subjected Rivera to an extended term of imprisonment as a multiple offender under [HRS] § 706-662(4)(a) was the fact of his current convictions of and sentencing for two or more felonies . . . .").

[153] *See supra* Part III.B.1.

[154] *See Rivera*, 106 Hawai'i at 157, 102 P.3d at 1055 (citing State v. Kaua, 102 Hawai'i 1, 12-13, 72 P.3d 473, 484-85 (2003)).

[155] The *Apprendi* court recognized that "a logical application of our reasoning today should apply if the recidivist issue were contested . . . ." Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000).

reflected in the jury verdict or admitted by the defendant."[156] Since *Apprendi*, the United States Supreme Court has further limited the factual value of prior convictions, restricting the boundaries of the exception to "[examination of] the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[157] In a concurring opinion, Justice Thomas stated, "[*Almendarez-Torres*] has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."[158]

Although the U.S. Supreme Court's ambivalence toward *Almendarez-Torres* itself is insufficient to reverse *Rivera*,[159] it does provide some guidance on the future of the prior conviction exception: the exception's tenuous standing, combined with the departure of three members of the five-to-four *Almendarez-Torres*' majority,[160] leave but two members of the original majority to reconcile the prior conviction exception with succeeding opinions that, by the Court's own admission, present "difficult constitutional questions" about *Almendarez-Torres*' validity.[161] Notwithstanding the limited jurisprudential import of Supreme Court dicta, the growing questionability of the prior conviction exception surely draws the *Rivera* court's heavy dependence on the exception into question, or at the very least, encourages a reformulation of the court's intrinsic-extrinsic analysis to reflect the likely decline of the prior conviction exception. Without the prior conviction exception, *Apprendi* would mandate jury trials for any and all facts that increase a defendant's penalty beyond the statutory maximum, and the intrinsic-extrinsic rationale as a basis for restricting the *Huelsman* test to the judiciary would collapse: under an unrestricted *Apprendi* rule, invariably the first step (which subjects the defendant to an extended sentence beyond the sentence prescribed on the basis of the verdict alone)—if not both steps—would require jury determination.

The weakening of the prior conviction exception in Hawai'i is indicated additionally by the United States Court of Appeals for the Ninth Circuit. In

---

[156] Blakely v. Washington, 542 U.S. 296, 303 (2004).

[157] Shepard v. United States, 544 U.S. 13, 15 (2005).

[158] *Id.* at 27 (Thomas, J., concurring).

[159] The Court has explicitly instructed that its decisions "remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." Hohn v. United States, 524 U.S. 236, 252-53 (1998) (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)).

[160] Of the *Almendarez-Torres* majority, Chief Justice Rehnquist and Justice O'Connor have been replaced by Chief Justice Roberts and Justice Alito, respectively, and Justice Thomas renounced his allegiance to the *Almendarez-Torres* majority in his *Apprendi* concurrence. *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring) (describing *Almendarez-Torres*' rationale as "an error to which I succumbed").

[161] Dretke v. Haley, 541 U.S. 386, 395-96 (2004).

United States v. Kortgaard,[162] the Ninth Circuit upheld a narrow construction of the exception, stating, "[w]e . . . decline to [extend or broadly construe *Apprendi*'s exception in order to include within it issues that have not been submitted to a jury] and continue to treat the exception as 'a narrow exception to the general rule.'"[163] The court looked to *United States v. Tighe*[164] for guidance, in which the court limited the exception to "prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt."[165] Although this interpretation is not necessarily contrary to *Apprendi* itself,[166] its construction is at the narrow end of the spectrum of post-*Apprendi* interpretation of *Almendarez-Torres*.[167]

With this narrow interpretation, the Ninth Circuit—the largest of all federal circuits[168]—could significantly change state sentencing statutes, particularly in view of the large number of individuals in the state criminal justice systems within the Ninth Circuit's geographical borders.[169] Although the Ninth Circuit is one of thirteen federal circuits, the Ninth Circuit's member states represented 19.8 percent of all individuals incarcerated in state prisons in the United States at the end of calendar year 2004.[170] In addition to the Ninth Circuit's direct impact on the prior conviction exception through its decisions on the cases before it, its narrow construction of the exception may impact Supreme Court jurisprudence due to the sheer volume of case law generated by the habeas petitions in its jurisdiction, whether it is to sway the Supreme Court or to prompt a reaffirmation of *Almendarez-Torres* in the form of a reversal. However the Ninth Circuit's influence is to be felt, it is clear that it would be short-sighted to continue to predicate a sentencing scheme on a principle that is at risk in this circuit.

---

[162] 425 F.3d 602 (9th Cir. 2005).

[163] *Id.* at 610 (quoting *Apprendi*, 530 U.S. at 489-90).

[164] 266 F.3d 1187 (9th Cir. 2001).

[165] *Id.* at 1194.

[166] The *Apprendi* court "[treats *Almendarez-Torres*] as a narrow exception to the general rule." *Apprendi*, 530 U.S. at 490.

[167] For a broader interpretation of the prior conviction exception, see *United States v. Carpenter*, 406 F.3d 915, 917 (7th Cir. 2005) ("Criminal history is all about prior convictions; its ascertainment therefore is an issue of law . . . .").

[168] Federal Judiciary Frequently Asked Questions, http://www.uscourts.gov/faq.html (last visited Jan. 23, 2006).

[169] *See* Sentencing Law and Policy, http://sentencing.typepad.com (Sept. 21, 2005, 13:08 EST).

[170] *See* Paige M. Harrison & Allen J. Beck, *Prisoners in 2004*, 210677 BUREAU OF JUST. STAT. BULL. 3 (2005) (providing number of prisoners under the jurisdiction of state correctional authorities by state); Ninth Circuit Homepage, http://www.ce9.uscourts.gov (last visited Jan. 23, 2006) (listing the states in the Ninth Circuit).

2. The intrinsic-extrinsic analysis fails because it misinterprets and incorrectly applies Apprendi *and* Blakely

The *Rivera* majority bases its holding that Hawai'i's extended sentencing scheme satisfies *Apprendi* and *Blakely* in large part on an intrinsic-extrinsic analysis, articulated in *Kaua*,[171] of the *Huelsman* two-part test for the imposition of an extended sentence. The court's analysis characterizes the first step as an intrinsic factor, and the second step as extrinsic, and therefore not an "element of the offense" governed by *Apprendi* and *Blakely*. However, the court's superficial disqualification of the second step from *Apprendi/Blakely* applicability by referring to it as "extrinsic" contradicts the very significance of *Apprendi*.

The United States Supreme Court has traversed a lengthy jurisprudential path[172] to reach its current rule, stated in *Apprendi*, that requires a jury determination for any facts increasing the penalty beyond the prescribed statutory maximum.[173] *Blakely* modified the holding, specifying that the prescribed statutory maximum is the maximum sentence that a judge can impose based solely on the facts in the verdict, without any additional findings of fact.[174] Although often cited, these principles are the essential foundation to deconstructing the intrinsic-extrinsic analysis because they outline the functions of those facts requiring submission to a jury.

The *Apprendi* court affirmed the focus on function in determining the distinction between elements and sentencing factors, declaring that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[175] The Court's favoring of function over form echoes throughout its jurisprudence, from *Mullaney* (extending *Winship*'s beyond a reasonable doubt standard of proof to facts outside of those defined by state law as an element of the crime, in recognition of the state's power to redefine elements of a crime at will),[176] through *Ring* ("the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury").[177]

Ultimately, *Apprendi* calls for the application of sentencing-related facts to a function-based paradigm, wherein a fact labelled a "sentence

---

[171] *See supra* Parts III.B.1, IV.B.1.

[172] *See supra* Part III.A.

[173] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

[174] Blakely v. Washington, 542 U.S. 296, 303-04 (2004).

[175] *Apprendi*, 530 U.S. at 494.

[176] Mullaney v. Wilbur, 421 U.S. 684, 698 (1975); *see also id.* at 699 ("*Winship* is concerned with substance rather than . . . formalism.").

[177] Ring v. Arizona, 536 U.S. 584, 605 (2002) (citing *Apprendi*, 530 U.S. at 492).

enhancement,"[178] if it describes an upward departure of the sentence from the prescribed statutory maximum, is rather "the functional equivalent of an *element* of a greater offense than the one covered by the jury's guilty verdict."[179] Applying the Hawai'i statute's "necessary for the protection of the public" fact in *Rivera* to this framework, it is evident that although the State refers to the fact as a sentencing enhancement, it is functionally an element of a greater offense because the finding of the fact adds five years to the sentence. Although the majority disregarded *Blakely* and dismissed it as "a gloss on *Apprendi*,"[180] the *Blakely* holding is critical to the facts in *Rivera* because it clarifies that the applicable prescribed "statutory maximum"[181] for Rivera was five years: in *Blakely* terms, the maximum sentence that the judge could impose without finding the "necessary for the protection of the public" fact was five years.[182]

3. Hawai'i's sentencing scheme is not "indeterminate" for the purpose of Blakely *exemption*

The *Rivera* majority contends that because *Blakely* affects only determinate sentencing schemes, and Hawai'i's extended sentencing scheme is indeterminate, the *Blakely* definition of "statutory maximum" does not apply to Hawai'i.[183] However, the majority errs in characterizing Hawai'i's extended sentencing scheme as indeterminate because, as applied in *Rivera*, Hawai'i's scheme parallels the Washington sentencing scheme that the United States Supreme Court identified as determinate in *Blakely*. In *Blakely*, the offense called for a "standard range"[184] sentence of forty-nine to fifty-three months imprisonment, but the sentencing judge imposed an extended sentence of ninety months upon finding that the defendant had acted with "deliberate cruelty."[185] Similarly, Rivera's Class C felony offenses carried an "indeterminate term" of five years imprisonment,[186] but the sentencing judge imposed

---

[178] *Apprendi*, 530 U.S. at 494 n.19.

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

[180] State v. Rivera, 106 Hawai'i 146, 156, 102 P.3d 1044, 1054 (2004).

[181] Blakely v. Washington, 542 U.S. 296, 303 (2004) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.").

[182] *Rivera*, 106 Hawai'i at 149, 102 P.3d at 1047 nn.1-4 (citing HAW. REV. STAT. §§ 712-1243 (1993 & Supp. 2003), 329-43.5(a) (1993), 712-1249, 706-662 (1993 & Supp. 2003)).

[183] *Id.* at 156, 102 P.3d at 1054.

[184] *Blakely*, 542 U.S. at 299.

[185] *Id.*

[186] *Rivera*, 106 Hawai'i at 148, 102 P.3d at 1046 n.1 (citing HAW. REV. STAT. § 712-1243); *id.* n.2 (citing HAW. REV. STAT. § 329-43.5(a)).

an extended sentence of ten years upon finding that the extended term was "necessary for the protection of the public."[187]

The *Rivera* majority's operating definition of an indeterminate sentence, rather than focusing on liberal judicial discretion, is "'[a] sentence to imprisonment for the maximum period defined by law, subject to termination by the parole board or other [authorized] agency at any time after service of the minimum period' ordinarily set by the paroling authority."[188] As support for the sentencing scheme's indeterminate nature, the opinion incorporates a detailed history of judicial deference to the Hawai'i State Legislature regarding sentencing guidelines[189] and cites the legislature's exclusive reservation of authority to set mandatory minimum sentences and to restrict judicial authority in imposing sentences.[190] The opinion notes that in Hawai'i, in line with the quoted *Black's Law Dictionary* definition, the sentencing court sentences the defendant to the maximum period as defined by the legislature, and the defendant can be released only upon approval by the paroling authority.[191]

In contrast, the *Blakely* court defines indeterminate sentencing as a scheme wherein a judge has the unrestricted discretion, relying on facts outside the trial record as he or she chooses, to impose any sentence up to the limit authorized by state law on the basis of verdict alone.[192] The sentencing judge has no such discretion in Hawai'i: even if Rivera's verdict alone "authorized" an extended sentence under HRS section 706-661 by triggering Rivera's susceptibility to an extended sentence,[193] the judge's discretion was restricted because sentences of more than five years require the satisfaction of one or more of the HRS section 706-662 criteria.

Similarly, in *Blakely*, the state argued that the verdict subjected the defendant to the statutory maximum for Class B felonies, or ten years imprisonment.[194] Although the state did not contend that the sentencing

---

[187] *Id.* at 152-53, 102 P.3d at 1050-51.

[188] *Id.* at 158, 102 P.3d at 1056 (quoting BLACK'S LAW DICTIONARY 911 (4th ed. 1968)) (alteration in original).

[189] *Id.* at 158-59, 102 P.3d at 1056-57.

[190] *Id.* at 158, 102 P.3d at 1056.

[191] *Id.* at 159, 102 P.3d at 1057.

[192] Blakely v. Washington, 542 U.S. 296, 305 (2004) (citing Williams v. New York, 337 U.S. 241, 242-43 (1949)). In her dissent, Justice O'Connor describes an indeterminate sentencing scheme as one in which "[a sentencing judge], in conjunction with parole boards, [has] virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range." *Id.* at 315 (O'Connor, J., dissenting).

[193] HAW. REV. STAT. § 706-661 (2005) ("In the cases designated in section 706-662, a person who has been convicted of a felony may be sentenced to an extended indeterminate term of imprisonment.").

[194] *Blakely*, 542 U.S. at 303.

scheme was indeterminate, it did argue that the scheme retained sufficient judicial discretion to fall outside the realm of *Apprendi*.[195] The United States Supreme Court held that the judicial discretion reserved by the Washington scheme was insufficient because the judge's discretion was limited to a maximum of fifty-three months imprisonment without the finding of additional facts.[196] As Hawai'i's sentencing scheme features a comparable restriction on judicial discretion, Hawai'i likewise cannot escape the scope of *Apprendi* and *Blakely*.

Even if Hawai'i's sentencing scheme is indeterminate as defined by *Blakely*, it is not clear that the scheme would be exempt because *Blakely* was not limited to determinate sentencing schemes.[197] The *Blakely* opinion stated, "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."[198] Referring to the Framers' likely intent, the United States Supreme Court interprets the Sixth Amendment of the U.S. Constitution as a guarantee to the right to trial by jury, free from the government's restraint, rather than as a limit on judicial authority.[199] As such, regardless of the *source* of the authority usurping the jury's authority—whether the judiciary (in indeterminate schemes) or the legislature (in determinate schemes)—*Blakely* protects the Sixth Amendment right as a "fundamental reservation of power in our constitutional structure,"[200] and is a logical extension of the Court's explicit holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[201] The Supreme Court may provide more guidance on *Apprendi/Blakely* applicability to determinate sentencing in *Cunningham v. California*,[202] to which it recently granted certiorari to consider whether California's determinate sentencing scheme violates the Sixth and Fourteenth Amendments.[203]

---

[195] Brief for the State of Washington at 12, *Blakely*, 542 U.S. 296 (No. 02-1632).

[196] *Blakely*, 542 U.S. at 304.

[197] *See* State v. Rivera, 106 Hawai'i 146, 171, 102 P.3d 1044, 1069 (2004) (Acoba, J., dissenting).

[198] *Blakely*, 542 U.S. at 308.

[199] *Id.* ("[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power.").

[200] *Id.* at 306.

[201] *In re* Winship, 397 U.S. 358, 364 (1970).

[202] 126 S. Ct. 1329 (2006).

[203] Petition for Writ of Certiorari at 8, *Cunningham*, 126 S. Ct. 1329, *available at* http://www.fdap.org/downloads/blakely/CunninghamCertPet.pdf.

4. Other jurisdictions' approaches to Blakely *compliance*

Decisions from other jurisdictions struggling with *Blakely* applicability help inform options for remedies to Hawai'i's *Blakely*-impaired scheme. In the most significant post-*Blakely* (as well as post-*Rivera*) ruling, the United States Supreme Court examined the applicability of *Blakely* to the United States Sentencing Guidelines ("USSG") in *United States v. Booker*.[204] Defendant/respondent Freddie Booker was found guilty of drug possession with the intent to distribute under a statute which prescribed a minimum sentence of ten years imprisonment and a maximum sentence of life imprisonment.[205] Booker's criminal history and the jury's finding of the amount of drugs limited the district judge to a "base" sentence of between 210 and 262 months.[206] However, in a post-trial proceeding, the judge found by a preponderance of the evidence that Booker had possessed a greater amount of drugs and that he was guilty of obstructing justice, findings which increased the mandatory sentence to between 360 months and life imprisonment.[207]

In a two-part opinion accompanied by four dissents, the Court held in the first part (representing the *Apprendi/Blakely* majority) that *Blakely* applied to the USSG and that the USSG violated the Sixth Amendment because it imposed an enhanced sentence "based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant."[208] But in the second part (featuring a majority comprised of the *Apprendi/Blakely* minority, with the addition of Justice Ginsburg), the Court proposed that the solution was to make the USSG advisory rather than mandatory,[209] reasoning that Congress would have preferred this solution to invalidation of the USSG, and that Congress would still have preferred invalidation to the alternative of engrafting the jury trial requirement to the USSG.[210]

Although the *Booker* fix for the USSG has proved less than dispositive for many courts facing *Blakely* problems,[211] it does present one solution for

---

[204] 543 U.S. 220 (2005).

[205] *Id.* at 227 (citing 21 U.S.C. § 841(b)(1)(A)(iii) (2005)).

[206] *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(4), 4A1.1 (2003)).

[207] *Id.*

[208] *Id.* at 229.

[209] *Id.* at 245-46.

[210] *Id.* at 249.

[211] *See, e.g.*, United States v. Ameline, 409 F.3d 1073, 1074 (9th Cir. 2005) ("Our colleagues across the country have also wrestled with the aftermath of *Booker*."); United States v. Pirani, 406 F.3d 543, 562-63 (8th Cir. 2005) (Bye, J., concurring in part and dissenting in part) ("The phrase 'three-ring circus' . . . has been used to describe the federal circuits' disparate handling of [*Booker*] pipeline cases. Such a phrase is descriptive, nonetheless, it is probably more appropriate to characterize the split as a three-ring circus with twelve unique acts . . . .");

determinate sentencing schemes vulnerable to *Blakely*: make the guidelines truly indeterminate by making them advisory, placing unencumbered sentencing discretion with the judge. State legislatures in Alaska[212] and Tennessee[213] have both moved toward this "advisory" approach to some degree. In contrast, the Kansas State Legislature responded by creating the option for a bifurcated proceeding for aggravating factors.[214]

Other jurisdictions with nominally indeterminate state sentencing schemes[215] have reached divergent judicial resolutions to *Blakely* applicability. The Colorado Supreme Court determined that Colorado's sentencing scheme, which allows for departure from a presumptive range based on a judge's finding of "'extraordinary mitigating or aggravating circumstances,'"[216] survived *Blakely* because those circumstances could be found within *Blakely*-compliant or *Blakely*-exempt facts, such as facts to which the defendant has stipulated or facts of prior convictions.[217] The Idaho Supreme Court also found that Idaho's sentencing scheme, wherein the offense in question carried a maximum of life imprisonment with the stipulation that any term of imprisonment required the court to find that "imprisonment is appropriate for protection of the public,"[218] satisfied *Blakely* because the statutory maximum was life imprisonment and the "appropriate for protection of the public" finding consisted of sentencing factors appropriately subjected to judicial determination.[219]

Meanwhile, the Tennessee Supreme Court—while awaiting the proposed legislative *Booker* fix—distinguished a similar statute, the Tennessee Criminal

---

United States v. McBride, 434 F.3d 470, 474 (6th Cir. 2006) ("Achieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow.").

[212] S.B. 56, 24th Leg., 1st Sess. (Alaska 2005) (granting greater judicial discretion within presumptive sentencing).

[213] STATE OF TENN. OFFICE OF THE GOVERNOR, REPORT OF THE GOVERNOR'S TASK FORCE ON THE USE OF ENHANCEMENT FACTORS IN CRIMINAL SENTENCING (2005) ("The proposed Act requires the judge to consider, but not be bound by . . . advisory guidelines to arrive at an appropriate sentence which is subject to appellate review.").

[214] ANNE SKOVE, NATIONAL CENTER FOR STATE COURTS, BLAKELY V. WASHINGTON: IMPLICATIONS FOR STATE COURTS 17 (2004) (citing KAN. STAT. ANN. § 21-4718 (2003)).

[215] *See* Wool, *supra* note 150, at 7 n.12 (characterizing sentencing schemes in Alaska, Colorado, Michigan, Ohio and Tennessee as indeterminate by the *Rivera* court's reasoning but determinate in the *Blakely* sense).

[216] Lopez v. People, 113 P.3d 713, 724-25 (Colo. 2005) (quoting COLO. REV. STAT. § 18-1.3-401(6) (2004)).

[217] *Id.* at 726.

[218] State v. Stover, 104 P.3d 969, 973 (Idaho 2005) (citing IDAHO CODE ANN. §§ 18-1508, 19-2521 (2005)).

[219] *Id.* at 974.

Reform Act,[220] from the *Blakely* statute because the Tennessee statute set a statutory range within which a judge could consider enhancement factors.[221] Still other jurisdictions have accepted appeals to the state high court, but have yet to release decisions regarding *Blakely* applicability.[222]

5. The Blakely *fix to Hawai'i's extended sentencing statute calls for legislative involvement*

The varying approaches of the federal government and the states to *Blakely* compliance reflect the many options, whether by legislative action or judicial decree, available to remedy the Hawai'i extended sentencing scheme. Hawai'i state court and United States Supreme Court jurisprudence support legislative action as the most appropriate avenue to address the *Blakely* infirmities of Hawai'i's extended sentencing statute.

As discussed by the Hawai'i Supreme Court *Rivera* majority, "'the power to determine appropriate punishment for criminal acts'" has long resided in the legislative branch.[223] Since 1965, the legislature, through the body of the paroling authority, has had the sole authority to determine minimum terms of imprisonment.[224] In 1976, the legislature further restricted judicial authority in sentencing by passing HRS section 706-660,[225] which limited the sentences that judges could impose for different felony classes. Prior to *Rivera*, the Hawai'i Supreme Court held that "[t]he prescription of penalties is a legislative prerogative."[226] The legislature is the source of sentencing authority, and it "[vests] in the courts 'wide latitude in the selection of penalties from those prescribed and in the determination of their severity.'"[227]

The United States Supreme Court has also recognized sentencing as a legislative concern. The Court acknowledged "the principle that the definition

---

[220] State v. Gomez, 163 S.W.3d 632, 658 (Tenn. 2005) (citing TENN. CODE ANN. § 40-35-105-114 (2003)).

[221] *Id.* at 660.

[222] *See, e.g.*, People v. Drohan, 693 N.W.2d 823 (Mich. 2005) (granting appeal to decide "whether [*Blakely*] and [*Booker*] apply to Michigan's sentencing scheme"); State v. Quinones, 821 N.E.2d 1023 (Ohio 2005) (granting appeal to decide whether the Ohio sentencing statute complies with *Blakely*).

[223] 106 Hawai'i 146, 158, 102 P.3d 1044, 1056 (2004) (quoting State v. Bernades, 71 Haw. 485, 490, 795 P.2d 842, 845 (1990)).

[224] *Id.* (citing State v. Kido, 3 Haw. App. 516, 654 P.2d 1351 (1982)).

[225] HAW. REV. STAT. § 706-660 (1976).

[226] State v. Murray, 63 Haw. 12, 25, 621 P.2d 334, 342 (1980) (citing State v. Freitas, 61 Haw. 262, 267, 602 P.2d 914, 919 (1979)).

[227] State v. Kumukau, 71 Haw. 218, 224-25, 787 P.2d 682, 686 (1990) (quoting State v. Johnson, 68 Haw. 292, 296, 711 P.2d 1295, 1298 (1985)).

of the elements of a criminal offense is entrusted to the legislature,"[228] and the legislature's ability "to identify the conduct they wish [to] characterize as criminal or to define the facts whose proof is essential to the establishment of criminal liability,"[229] although this authority is subject to "constitutional limits beyond which the States may not go."[230] Justice Kennedy emphasized the legislature's central role by describing sentencing guidelines as a "collaborative process" that draws on "the collective wisdom of legislators" to fuel "constant, constructive discourse between our courts and our legislature."[231] Even as it devised a judicial fix in *United States v. Booker*,[232] the Court noted the legislature's sentencing authority, remarking, "[o]urs, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[233]

At the Hawai'i State Legislature, the *Blakely* fix can take one of several forms, which include rendering the relevant statutes entirely advisory, as in *Booker*;[234] appending a jury trial requirement to every sentencing factor;[235] or bifurcating the trial for guilt of the offense and for sentencing.[236] Despite Justice Breyer's concern that bifurcation would prove "costly,"[237] expense is an insufficient state interest for the denial of this right.[238] With few legislative models at this time, just two years after *Blakely* and one and a half years after *Booker*, any proposals to revise the sentencing scheme would benefit considerably from additional Supreme Court opinions to illuminate the *Blakely* guideposts.

---

[228] Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

[229] *Id.*

[230] Patterson v. New York, 432 U.S. 197, 210 (1977).

[231] Blakely v. Washington, 542 U.S. 296, 326-27 (2004) (Kennedy, J., dissenting).

[232] 543 U.S. 220 (2005).

[233] *Id.* at 265.

[234] *See id.* at 245.

[235] *Blakely*, 542 U.S. at 334-336 (Breyer, J., dissenting).

[236] *See, e.g.*, KAN. STAT. ANN. § 21-4718 (2003).

[237] *Blakely*, 542 U.S. at 336 (Breyer, J., dissenting).

[238] *See* Watson v. Memphis, 373 U.S. 526, 537 (1963) ("vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them"); Stanley v. Illinois, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency . . . . [T]he Bill of Rights in general, and the Due Process Clause in particular, [were] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy . . . .").

V. CONCLUSION

In *State v. Rivera*, the Hawai'i Supreme Court attempted to reconcile Hawai'i's extended sentencing scheme with the Sixth Amendment right to trial by jury through linguistic manipulation of a fact as "intrinsic" or "extrinsic" where no substantial distinction in effect upon the statutory maximum exists.[239] The court also claimed that the state's scheme was exempt from *Blakely* because it is indeterminate, when by *Blakely*'s terms, the scheme is determinate.[240] In upholding the trial court's imposition of a ten-year sentence on defendant/appellant Rivera when the facts of prior convictions and the facts found in the verdict alone authorized only a five-year sentence, the court undermined the central tenet of recent United States Supreme Court *Apprendi* jurisprudence, that all facts that increase a defendant's penalty beyond the statutory maximum are subject to trial by jury.[241]

The unconstitutionality of the extended sentencing scheme obstructs the Sixth Amendment right to trial by jury, which has been affirmed repeatedly as a fundamental right.[242] In addition to the constitutional violations committed under this scheme to people who are sentenced to extended terms without exercise of their right to a jury trial for the sentence-extending facts, the unconstitutional scheme implicates many facets of the Hawai'i state criminal justice system, such as the drafting of indictments, the stability of the incarcerated population, and, with the potential flood of habeas petitions and vacated sentences, the very operation of the courts themselves.

Although revising the established scheme will not be an easy transition, the *Apprendi* and *Blakely* issues are timely and ripe for resolution. With the recent changes to the United States Supreme Court and its delicately balanced splits in this line of cases, the Supreme Court is also at a unique juncture to define the next stage in a long evolution of Sixth Amendment jurisprudence.[243] Together with guidance from the Supreme Court and from the practices of other jurisdictions, the State of Hawai'i will be able to reach a solution that ensures defendants' jury trial rights, while assigning appropriate penalties for crimes committed.

Jeannie Choi[244]

---

[239] *See supra* Part IV.B.2.

[240] *See supra* Part IV.B.3.

[241] *See supra* Part III.A.2-3.

[242] *See supra* Part III.A.

[243] *See supra* Part III.A.1.

[244] J.D. Candidate 2007, William S. Richardson School of Law, University of Hawai'i at Mānoa.

Re-Defining Public Use: *Kelo v. City of New London*

I. INTRODUCTION

The public use doctrine has disappeared. At least, cases leading to *Kelo v. City of New London*[1] suggest this phenomenon. The Fifth Amendment states that the government cannot take property for public use without just compensation.[2] Before the nineteenth century, taking property for public use required that the government own and control the property.[3] Recently, interpretation of the public use doctrine expanded to include condemnation for purposes associated with the public interest, such as economic development.[4] This expansive interpretation of public use impacted landowners in irreparable ways.[5]

Although judges spent time debating the constitutionality of the condemnations, they sometimes overlooked landowners' stories. In the 1940s, thousands of families and businesses faced eviction when developers constructed highways or attempted to eliminate blight.[6] These developers picked low-income areas where residents depended on the close community for support.[7] Communities disintegrated as a result of eminent domain proceedings.[8]

Even with these sacrifices by minority communities, redevelopment efforts sometimes failed: St. Louis' Kosciusko Project, Buffalo's Ellicott District Project, and Chicago's Lake Meadows Project all failed to combat urban blight.[9] These areas have remained undeveloped since the 1950s, earning such infamous names "as 'Hiroshima flats' and 'ragweed acres.'"[10] Eminent domain can affect people in traumatic ways. As a result, this Article proposes

---

[1] ___ U.S. ___, 125 S. Ct. 2655 (2005).

[2] U.S. CONST. amend. V.

[3] Thomas W. Merrill, *The Goods, The Bads, and the Ugly: The Fifth Amendment Says That the Government Can Take Private Property from Its Owners for Public Use. Just What That Means is a Question the Supreme Court is Reconsidering*, LEGAL AFF., Jan.-Feb. 2005, at 16 (discussing the history of the public use doctrine).

[4] *Id.* at 17.

[5] *See* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 946-49 (2003).

[6] *Id.* at 945-46.

[7] *Id.* at 946.

[8] *Id.*

[9] *Id.* at 954.

[10] *Id.*

a framework for eminent domain proceedings that takes the experiences of landowners and businesses into account.

This Article analyzes the use of eminent domain for economic redevelopment. Part II summarizes the history of eminent domain, specifically cases dealing with transfers between private parties. Part III analyzes different factors used to determine whether such transfers fulfilled valid public purposes, creating a test to determine the constitutionality of transfers for economic redevelopment. Part IV applies the test to the situation presented in *Kelo* to demonstrate how the test functions. Part V concludes the Article.

II. BACKGROUND ON EMINENT DOMAIN

The Public Use Clause of the Fifth Amendment slowly mutated into its liberal form, permitting the use of eminent domain power to transfer land between private owners. When the framers of the Constitution drafted the Fifth Amendment, they provided protection to landowners by requiring that the government condemn land for public use only, and that the government must justly compensate landowners.[11] In the 1930s, the U.S. government's goals shifted to solve societal problems rather than safeguard property rights, resulting in less protection for landowners.[12] This part traces the development of eminent domain jurisprudence and ends with a summary of important cases dealing with private transfers.

A. History of Eminent Domain

While the Constitution permits the government to condemn land for public use through the Fifth Amendment,[13] the Constitution also protects private property rights through two other amendments.[14] The Ninth Amendment protects rights, such as property rights, not explicitly listed in the Bill of Rights.[15] The Privileges and Immunities Clause of the Fourteenth Amendment safeguards a variety of rights, including "economic and property rights," from state infringement.[16] Consequently, the framers sought to restrain the government from excessive use of eminent domain.[17]

---

[11] U.S. CONST. amend. V.

[12] *See* Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 184 (2003).

[13] U.S. CONST. amend. V.

[14] Simpson, *supra* note 12, at 186.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 183-84.

Initially, courts defined public use narrowly: the government must "own and control the propert[ies] after the condemnation[s]."[18] In the early nineteenth century, private companies could use eminent domain power to obtain land to build "turnpike[s], canal[s], and railroad[s]."[19] When landowners appealed these takings, the courts expanded the definition of public use: the government no longer needed to own the property as long as the public had a right to use it following condemnation.[20]

Nevertheless, this broader definition of public use hampered the government in its efforts to condemn land for offices, prisons, and military bases.[21] Unlike roadways and highways, the public possessed no right to use these areas.[22] Since these uses did not fit this definition of public use, the Supreme Court broadened its meaning in the 1920s.[23]

The definition of public use expanded significantly in the 1930s.[24] Influenced by progressivism, judges endeavored to alleviate social ills by deferring to legislative bodies[25] in their decisions to improve "public health, safety, welfare, and morals."[26] However, legislatures and their agencies did not stop at eliminating harmful living conditions; they also tried to encourage beneficial projects, such as economic development.[27] As a result, the definition of public use continued to expand.[28] The following survey of cases reveals that courts stretched the public use doctrine to allow transfers between private parties.

B. Private Transfer Cases

The precedent for private transfer began with the Supreme Court's 1954 decision in *Berman v. Parker*.[29] In *Berman*, the Court allowed the government to condemn non-blighted, commercial property to create low-income housing.[30] The Court held that the government could use its eminent domain

---

[18] Merrill, *supra* note 3, at 16.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 16-17.

[22] *Id.* at 17.

[23] *Id.*

[24] Simpson, *supra* note 12, at 184.

[25] *Id.*

[26] Kelo v. City of New London, 843 A.2d 500, 578 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part), *aff'd*, ___ U.S. ___, 125 S. Ct. 2655 (2005).

[27] *See* Merrill, *supra* note 3, at 17.

[28] *Id.*

[29] 348 U.S. 26 (1954).

[30] *Id.* at 31-36.

power to improve the public welfare, a "broad and inclusive" concept.[31] The Court also held that once a legislative body determined the scope of public use, it could use any means to reach its goal, including condemning properties and transferring them to private landowners.[32] With this decision, the Court granted the government unrestrained eminent domain power to accomplish public goals, specifically blight elimination.[33]

After *Berman*, the 1981 Michigan Supreme Court's decision in *Poletown Neighborhood Council v. City of Detroit*[34] diluted the Public Use Clause further, holding that a city could condemn land for a private company to improve the economy.[35] In 1980, General Motors closed its manufacturing plants in Detroit but offered to build another plant in the city, if the city provided land and railroad and freeway accesses.[36] The court held that the project served a public use by revitalizing the economy; the transfer materially benefited the public but only incidentally benefited General Motors.[37] *Poletown* exemplified one creative interpretation of the Public Use Clause.

In 1984, the Supreme Court in *Hawaii Housing Authority v. Midkiff*[38] demolished the remnants of the Public Use Clause by permitting the Hawai'i legislature to condemn properties and transfer them to lessees to improve the land market.[39] The Supreme Court held that "the 'public use' requirement is thus coterminous with [the] scope of the sovereign's [] powers."[40] The Supreme Court in *Midkiff* established a rational basis threshold for eminent domain cases.[41]

These cases set the trend for eminent domain decisions by holding that economic development fulfilled a public use. The courts upheld each of the following eminent domain proceedings. First, the Las Vegas Redevelopment Agency planned to create a tourist attraction in downtown in the 1980s, and implemented eminent domain proceedings to obtain land in 1993.[42] Second, in 1998, the local government in Kansas condemned land for a private

---

[31] *Id.* at 33.

[32] *Id.*

[33] *See* David L. Callies, *Public Use: What Should Replace the Rational Basis Test?*, PROB. & PROP., Mar.-Apr. 2005, at 14.

[34] 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

[35] *Id.* at 459.

[36] *Id.* at 460 (Fitzgerald, J., dissenting).

[37] *Id.* at 459 (majority opinion).

[38] 467 U.S. 229 (1984).

[39] *Id.* at 231-32.

[40] *Id.* at 240.

[41] *Id.* at 241.

[42] City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 5-8 (Nev. 2003).

automobile racetrack, because the public would enjoy economic and recreational benefits.[43] Third, in 2000, the City of Shreveport condemned land to create a garage for a private hotel and a convention center, because the city could not get the land through other means.[44] These cases represent some of the creative uses of eminent domain power.

Although courts often construed the Public Use Clause liberally, not all claims of economic benefit satisfied the courts. For example, the Illinois Supreme Court in 2002 held that the condemnation of a recycling plant to build a private parking lot resulted in purely private benefits.[45] In Indiana, the local government failed to meet the public use requirement when it sought to rezone residential land to a commercial zone for a shopping center.[46] In these cases, private benefits overshadowed public economic benefits.

The Michigan Supreme Court curtailed the flagrant misuse of eminent domain power in *County of Wayne v. Hathcock*.[47] *Hathcock* involved the condemnation of land to create a technology park that would attract businesses to the economically hard-pressed county.[48] The court dismissed the county's argument that the condemnation fulfilled a public use, because the public would benefit economically from the new businesses.[49] Instead, the court concluded that all businesses benefit the public in some way, and that if all economically beneficial projects satisfy the Public Use Clause, the clause would lose its meaning.[50] This decision demonstrated the Michigan Supreme Court's willingness to contract the definition of public use. The Michigan Supreme Court seized the opportunity to define public use in *Hathcock*. The Supreme Court likewise had a chance to restrict the reach of the public use doctrine when it decided *Kelo*.

C. The Story of Kelo

The City of New London wanted to develop a commercial and residential complex to complement the facility pharmaceutical giant, Pfizer, planned to build.[51] To accomplish this goal, New London, through its development

---

[43] Kansas *ex rel.* Tomasic v. Unified Gov't of Wyandotte County/Kansas City, 962 P.2d 543, 551-54 (Kan. 1998).

[44] City of Shreveport v. Shreve Town Corp., 314 F.3d 229 (5th Cir. 2002).

[45] Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 4, 9-11 (Ill. 2002).

[46] Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445, 449-50, 462-66 (7th Cir. 2002).

[47] 684 N.W.2d 765 (Mich. 2004).

[48] *Id.* at 769.

[49] *Id.* at 787.

[50] *Id.* at 786.

[51] Kelo v. City of New London, 843 A.2d 500, 509 (Conn. 2004), *aff'd*, ___ U.S. ___, 125 S. Ct. 2655 (2005).

corporation, sought to condemn land to lease to private land developers.[52] The development corporation expected the plan to generate up to three thousand jobs and over $1,000,000 in property taxes.[53] Consequently, the city offered the same economic development arguments as other governments did in previous cases to defend the use of eminent domain power.[54]

However, some property owners wished to remain.[55] Two owners lived there for decades, while others, who rented out their properties, invested much time, money, and effort maintaining and repairing their houses.[56] These individuals probably possessed close relationships to the community or their properties, intangible aspects of property ownership that cannot be compensated monetarily.[57] They did not want to move, probably fearing that the community would fray.[58]

Nevertheless, the Supreme Court ruled in favor of the government. In its recent decision, *Kelo v. City of New London*,[59] the Court held that economic redevelopment constituted a valid public purpose.[60] The Court wrote, "[p]romoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized."[61] Although the Court included economic development in its definition of public use, the Court did not provide a test to determine when private-to-private transfers fulfilled economic public purposes. The following part provides such a test by analyzing different factors that other courts have considered in determining the constitutionality of eminent domain proceedings for economic public purposes.

III. ELEMENTS OF SURPRISE: FACTORS IN REDEVELOPMENT TRANSFERS

The cases preceding *Kelo* where courts held that economic projects fulfilled public purposes focused on six factors. These factors included legislative

---

[52] *Id.* at 510.

[53] *Id.*

[54] *See id.* at 520.

[55] *Id.* at 511.

[56] *Id.*

[57] *Cf.* Garnett, *supra* note 5, at 946-48 (detailing how evictions wrecked close communities by decimating small businesses and forcing people to relocate).

[58] *Cf. id.* at 946-47.

[59] ___ U.S. ___, 125 S. Ct. 2655 (2005).

[60] *Id.* at ___, 125 S. Ct. at 2664-65.

[61] *Id.*

empowerment through state statutes,[62] other options available,[63] time,[64] government oversight,[65] partnerships between private companies and the government,[66] and benefits to private parties.[67] Each of these factors combines to form a comprehensive test to determine the constitutionality of transfers for economic development.

A. Legislative Empowerment

Statutes played major roles in determining the constitutionality of eminent domain proceedings in economic development cases. Judges have deferred to state or local governments when the governments' definitions of public use fit within constitutional parameters.[68] In contrast to local and state mandates, federal case law played little role in molding judicial decisions on state condemnation proceedings.[69]

When a legislative body enacted a statute that explicitly allowed condemnation for economic development, the Supreme Court held that the condemnation fulfilled a public use.[70] In *Berman*, Congress created the District of Columbia Redevelopment Act, which stated that "the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use."[71] Due in part to this specific language, the Supreme Court permitted condemnation of land to transfer to a private developer.[72] Hence, specific language provided the necessary proof that the transfer served a public use.

Besides explicit language, judges sometimes analyzed statutes that bestowed power on a local government to create programs for economic growth in reaching a conclusion favorable to the government. In *General Building Contractors, L.L.C., v. Board of Shawnee County Commissioners of Shawnee County*,[73] the Kansas legislature adopted two statutes: one statute permitted counties to create programs to encourage economic growth, and

---

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

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

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

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

[66] *See infra* Part III.E.

[67] *See infra* Part III.F.

[68] Berman v. Parker, 348 U.S. 26, 32 (1954).

[69] County of Wayne v. Hathcock, 684 N.W.2d 765, 785 (Mich. 2004); *see also* Bailey v. Super. Ct. of Ariz., 76 P.3d 898, 903 (Ariz. Ct. App. 2003).

[70] *See Berman*, 348 U.S. at 29, 33.

[71] *Id.* at 29 (quoting D.C. CODE § 5-702 (1951)) (quotation marks omitted).

[72] *Id.* at 33-36.

[73] 66 P.3d 873 (Kan. 2003).

another statute gave the commissioners "power . . . to incorporate, organize and enlarge industrial districts[.]"[74] The interplay between one statute hinting that economic development served a public use and another statute granting the means to pursue economic goals enabled the county to constitutionally condemn land and transfer it to private owners.[75] Notably, the Kansas legislature did not specifically label economic development a public use.[76] Although multiple statutes provided legislative power to condemn land for economic use, a single statute could likewise accomplish this feat.

The Economic Development Corporations Act, created by Michigan legislators and at issue in *Poletown*, "provide[d] means and methods for the encouragement and assistance of industrial and commercial enterprises[.]"[77] Like the Kansas legislature, the Michigan legislature did not explicitly state that economic development was a public use, but it did grant municipalities the power to accomplish economic goals.[78] The Michigan statute authorizing municipalities to create projects that encourage economic development implicitly characterized economic development as a public use.[79] Consequently, eminent domain proceedings for economic purposes under this statute passed constitutional muster.[80] Even with these types of statutes, however, legislatures and city councils encountered limitations to their uses of eminent domain power: they needed to provide facts to support their claims that the projects would advance public purposes and check that their uses of eminent domain powers would not conflict with other statutes.[81]

First, courts required law-making bodies to provide findings, proving that the communities suffer from economic blight and that the projects alleviate blight.[82] Without sufficient factual support, judges did not rule for developers.[83] Consequently, legislatures and their agencies would need to establish findings specifying the ways the projects would meet public economic needs.

Second, other statutes could counterbalance eminent domain statutes. For example, a New Hampshire statute that recognized that open land provided

---

[74] *Id.* at 883.

[75] *Id.*

[76] *Id.*

[77] MICH. COMP. LAWS § 125.1602 (2006).

[78] *Id.*

[79] *See id.*

[80] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459-60 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

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

[82] *See* City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 13 (Nev. 2003); *Poletown Neighborhood Council*, 304 N.W.2d at 459.

[83] *See* Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445, 465-66 (7th Cir. 2002).

"recreational, scenic, and ecological"[84] benefits prevented condemnation of open land to build an industrial park.[85] Similar statutes, listing benefits of the land, could reduce the unbridled use of the eminent domain power.

Legislative empowerment played a major role in determining the constitutionality of eminent domain proceedings for economic development purposes. Courts analyzed the explicit statutory language,[86] combinations of statutes,[87] factual findings,[88] and conflicting statutes.[89] However, courts did not stop their analyses at legislative empowerment.

B. Other Available Options

Besides statutes, courts also examined alternatives to condemnation.[90] When developers sought to construct "instrumentalities of commerce,"[91] such as "highways, railroads, [and] canals,"[92] courts permitted condemnation because developers had no opportunity to purchase all the necessary land.[93] Landowners could refuse to sell their land, barring the formation of these essential roads and canals.[94] Similarly, for blight elimination, judges allowed condemnation to ensure uniform, coordinated redevelopment instead of fragmentary plans that would cost communities more.[95] Yet the condemnation of land for transportation purposes or blight elimination differed significantly from condemnation for economic development.

Unlike blight elimination and transportation purposes, judges found that developers of economic projects had options besides condemnation.[96] The Illinois Supreme Court held that the condemnation of land for a parking lot to support a racetrack was unconstitutional, because the owner of the racetrack

---

[84] Merrill v. City of Manchester, 499 A.2d 216, 218 (N.H. 1985).

[85] *Id.* at 218-19. The court, however, did not hold that all condemnation of open land leads to unconstitutional takings, but rather that "preservation of New Hampshire's open spaces is in the public interest," when the blight does not actually inflict harm upon the community. *Id.*

[86] *See* Berman v. Parker, 348 U.S. 26, 29, 33 (1954).

[87] *See* Gen. Bldg. Contractors v. Bd. of Shawnee County Comm'rs, 66 P.3d 873, 883 (Kan. 2003).

[88] *See Daniels*, 306 F.3d at 465.

[89] *See Merrill*, 499 A.2d at 218-19.

[90] *See* Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9 (Ill. 2002).

[91] County of Wayne v. Hathcock, 684 N.W.2d 765, 781 (Mich. 2004) (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 475 (Mich. 1981) (Ryan, J., dissenting)) (quotation marks omitted).

[92] *Id.*

[93] *Id.*; *see* Joseph Lazoratti, *Public Use or Abuse*, 68 UMKC L. REV. 49, 61 (1999).

[94] *See* Lazoratti, *supra* note 93, at 61.

[95] Berman v. Parker, 348 U.S. 26, 35 (1954).

[96] *See* Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9 (Ill. 2002).

could build the parking lot on the owner's own property.[97] The court also held that the owner should participate in the open land market rather than rely on eminent domain proceedings.[98] These two factors convinced the court that the condemnation did not fulfill a public use, because the owner had options other than condemnation.[99]

If all courts required private parties to participate in the market, then government would rarely condemn land. Not all courts, however, forced private parties to purchase land on the private market, especially when a land oligopoly controlled the prices.[100] In *Midkiff*, the Hawai'i legislature sought to reduce land prices for the public benefit by allowing lessees to purchase their land through condemnation.[101] The history of land concentration in Hawai'i convinced the Justices that condemnation was the only way to improve the market.[102] This case contrasted sharply with most cases, because legislatures in other cases did not seek to eliminate land oligopolies. As a result, many economic public use cases did not fit the *Midkiff* paradigm.

Judges weighed other available options against the use of eminent domain proceedings. When developers faced severe difficulties obtaining sufficient land, as in transportation development cases,[103] or maintaining uniformity, as in blight elimination cases,[104] judges permitted condemnation. Sometimes judges required developers to develop on their own properties or participate in the market system in lieu of condemnation.[105] This factor protected property owners from developers who wanted to avoid participating in the private land market.

C. Time Factor

In addition to considering other options, judges evaluated the amount of time that would pass before the pubic would enjoy the benefits of the projects. Some judges demanded concrete and significant benefits at the time of the condemnation rather than mere predictions.[106] In blight elimination, the benefits occurred at the time of the condemnation when the blighted

---

[97] *Id.*

[98] *Id.* at 11.

[99] *Id.* at 9, 11.

[100] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984).

[101] *Id.* at 231-34.

[102] *Id.* at 231-36.

[103] *See* Lazoratti, *supra* note 93, at 61.

[104] *See* Berman v. Parker, 348 U.S. 26, 35 (1954); Lazoratti, *supra* note 93, at 57.

[105] *See* Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 9-11 (Ill. 2002).

[106] *See* Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445, 464-66 (7th Cir. 2002); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

conditions were eliminated.[107] However, in economic cases, the benefits depended on the future uses of the properties.[108] The benefits may or may not materialize, contingent on developers' inclinations after the condemnation.[109] The Seventh Circuit Court of Appeals held that speculative benefits did not meet the demands of the Public Use Clause.[110] Consequently, developers needed to prove that benefits would result quickly.

Judges also required developers and local governments to complete the project within reasonable time.[111] For example, the Connecticut Supreme Court held that the City of Stamford and its redevelopment commission could continue to condemn land within the duration of the development plan to address changing needs.[112] Although the city and its agency could exercise eminent domain powers within the allotted time span, they could not extend the plan indefinitely without renewed findings.[113] They could modify the plan a few years later to include more parcels to address the same problematic conditions.[114] In another case, the Connecticut Supreme Court permitted condemnation of additional land, because "the modification was adopted only three years after the original plan, was intended to alleviate the same conditions as the original plan[,] and had the same objectives as the original plan, with only a change in scale."[115] This case demonstrated that developers and local governments had limited time to act, and could not indefinitely postpone development.

When deciding whether or not the public would benefit in a timely fashion, judges considered two issues: the time required to realize the benefits,[116] and

---

[107] County of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004).

[108] *See Daniels*, 306 F.3d at 465.

[109] *Id.*

[110] *Id.* at 466-67.

[111] *See* Aposporos v. Urban Redevelopment Comm'n of the City of Stamford, 790 A.2d 1167, 1175 (Conn. 2002) ("[A] redevelopment agency may [not] make an initial finding of blight and rely on that finding indefinitely to amend and extend a redevelopment plan to respond to conditions that did not exist, or to accomplish objectives that were not contemplated, at the time that the original plan was adopted.").

[112] *Cf. id.* (holding that a redevelopment agency cannot rely on blight determinations to indefinitely amend a redevelopment plan).

[113] *Id.* (citing Charleston Urban Renewal Auth. v. Courtland Co., 509 S.E.2d 569, 576 (W. Va. 1998)).

[114] *Id.* at 1176-77 (citing Fishman v. Stamford, 267 A.2d 443, 445 (Conn. 1970)).

[115] *Id.*

[116] *See* Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445, 465 (7th Cir. 2002). The community could not benefit if the developers or the statute did not indicate the specific type of use for the land. *Id.* The court required that the projects create substantial benefits that can be realized immediately, similar to blight elimination cases where the community benefited when the area was condemned. *See supra* Part III.C.

the time needed to complete the projects.[117] By imposing time restraints, judges protected private landowners from developers making speculative promises. Judges often analyzed time factors in conjunction with the next consideration: government oversight.

D. Government Oversight

In addition to quick results, judges preferred significant government oversight.[118] The Michigan Supreme Court held that "the transfer of condemned property to a private entity is consistent with the constitution's 'public use' requirement when the private entity remains accountable to the public in its use of that property."[119] Legislatures could keep private developers accountable through formal mechanisms.[120] For example, in *Berman*, the leases on the land indicated that the private developers must adhere to the redevelopment plan and refrain from erecting any structure that did not fit the plan.[121] These restrictions provided guidance to developers and instilled public confidence.

In contrast, when the legislative body did not provide oversight, judges refused to approve the condemnation, even when the local government received federal funding to improve the community.[122] In *Hathcock*, the Federal Aviation Administration ("FAA") gave Wayne County a twenty-one million dollar grant to condemn land adjacent to the Metropolitan Airport for economic development.[123] Wayne County decided to construct "a large business and technology park with a conference center, hotel accommodations, and a recreational facility . . . [named the] 'Pinnacle Project.'"[124] Although the county adhered to FAA conditions and received a large grant, the Michigan Supreme Court held that the condemnation was unconstitutional, in part because the county did not require future owners of the property to account for their actions.[125] The court concluded that the "plaintiff intend[ed] for the private entities purchasing defendants' properties to pursue their own financial welfare with the single-mindedness expected of any profit-making

---

[117] *Cf. Aposporos*, 790 A.2d at 1175 (holding that a redevelopment agency cannot rely on blight determinations to indefinitely amend a redevelopment plan).

[118] County of Wayne v. Hathcock, 684 N.W.2d 765, 782 (Mich. 2004).

[119] *Id.*

[120] *Id.* at 784.

[121] Berman v. Parker, 348 U.S. 26, 30 (1954).

[122] *Hathcock*, 684 N.W.2d at 770.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 784.

enterprise."[126] The county could not ensure that future owners would use the property for public economic uses.

Hence, a contract between the local government and a federal administration did not meet the oversight requirement, because third party businesses would use the land without any obligation to the public.[127] Judges required accountability mechanisms.[128] When formal mechanisms that could prevent future owners from subverting public economic purposes to their own private agendas were absent, judges ruled against the condemnation.[129]

The government should police private developers through formal mechanisms. Legislative bodies could write conditions in leases.[130] However, they could not rely on vague contract terms with funding organizations, especially when legislative bodies would partner with private developers in fulfilling the contract terms.[131] By demanding government oversight, judges prevented developers from seeking private pecuniary benefits. Sometimes, private developers evidenced their true intentions through their deep and extensive involvement with the government prior to condemnation.

E. Private-Public Partnerships

Although government should provide accountability through oversight, the government should not become too involved with developers or other private companies, creating suspiciously close working relationships. Government agencies sometimes formed these relationships by advertising for bids.[132] In *Southwestern Illinois Development Authority v. National City Environmental* ("*SWIDA*"),[133] the development authority created by the legislature sought to construct a parking lot for a racetrack to promote economic activity.[134] The development authority "advertised that, for a fee, it would condemn land at the request of 'private developers' for the 'private use' of developers."[135] This type of advertisement hinted that the government would be willing to bow to private developers. The fee for condemnation smacked of secret political

---

[126] *Id.*

[127] *Id.*

[128] *See id.* at 782-84.

[129] *Id.* at 784.

[130] *See* Berman v. Parker, 348 U.S. 26, 30 (1954).

[131] *See Hathcock*, 684 N.W.2d at 770, 784 (holding that, even with a contract with the FAA that granted money to the community to put the condemned area "to economically productive use," private parties would end up using the land for their own private gain).

[132] *See* Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 10 (Ill. 2002).

[133] 768 N.E.2d 1.

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

[135] *Id.* at 10.

favors.[136] The government appeared to sell the power of eminent domain, betraying the Public Use Clause.[137]

Even if the government merely wanted to entice developers with such advertisements, the government could not give the public the impression that it would entertain developers' every whim. Judges in *SWIDA* demanded that the government maintain its integrity even in advertising,[138] probably because the public would lose confidence in the Illinois legislature upon viewing such a notice. Yet, even if legislatures carefully drafted their advertisements, they sometimes encountered problems when companies initiated the relationships.[139]

Besides advertisements, judges disapproved of developers who requested governmental assistance for their projects. In *Poletown*, Judge Fitzgerald dissented from the majority's decision to allow condemnation, partly because General Motors asked the government to find an appropriate site for the plant after General Motors formulated its plans.[140] Even more egregious, in *Daniels v. Area Plan Commission of Allen County*,[141] the developer requested that the county planning agency abandon covenants and rezone an area of Allen County, Indiana, for commercial use to accommodate the developer's plan to build a shopping center.[142] As demonstrated in these two cases, when developers approached the government with set plans, private interests appeared to dominate, because the legislatures did not participate extensively in preparing the plans to fit the Public Use Clause. Hence, some judges viewed public involvement in planning crucial in determining whether projects fulfilled public uses.

Following creation of private-public partnerships, private companies and the government allocated control over the projects. When private companies maintained most of the control, judges held that the use of eminent domain violated the Public Use Clause.[143] For example, the private developer in *SWIDA* entered into a contract stipulating that the development authority would condemn any land the developer wanted.[144] In *Poletown*, General

---

[136] *See id.*

[137] *See id.*

[138] *See id.*

[139] *See* Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445, 449-50 (7th Cir. 2002); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 464 (Mich. 1981) (Fitzgerald, J., dissenting), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

[140] *See Poletown Neighborhood Council*, 304 N.W.2d at 464.

[141] 306 F.3d 445.

[142] *Id.* at 449-50.

[143] *See Sw. Ill. Dev. Auth.*, 768 N.E.2d at 10; *Poletown Neighborhood Council*, 304 N.W.2d at 477 (Ryan, J., dissenting).

[144] *Sw. Ill. Dev. Auth.*, 768 N.E.2d at 10.

Motors listed requirements, such as road improvements, street lighting, and underground utilities.[145] In addition, General Motors provided a timetable for the county to complete the work.[146] Judge Ryan, dissenting, characterized General Motors as an "unmistakable guiding and sustaining, indeed controlling, hand."[147]

Each of these cases demonstrated control by a private company. The private company dominated the project either by exercising power granted by the public agency or by demanding certain conditions. In either case, it did not matter whether the public agency voluntarily granted such exorbitant powers or whether the developer implicitly requested such powers by making specific demands. A public development agency could not permit a developer to exercise such immense powers, even if doing so would further the public use. Public participation and government oversight would ensure that developers would advance the public interest.

Although sometimes developers clearly controlled the relationships, not all cases had obvious indications that private developers dominated the partnerships. In *Poletown*, prior to making specific demands, General Motors worked closely with the development agency for about six months to negotiate a compromise.[148] Dissenting, Judge Ryan found this intimate working relationship too conciliatory to General Motors, and associated such dominance with actual control of the project by General Motors.[149] The close working relationship perhaps indicated that General Motors could overreach and create unconscionable terms with the economically struggling community. Ultimately, the government should retain more power than private companies.

Judges considered the partnerships between private companies and the government, analyzing the formation of the partnerships[150] and the amount of control given to or requested by private companies.[151] Although this factor alone did not always convince judges to rule against developers, it could generate heated dissent.[152] This distrust stemmed from the suspicion that private developers were the main beneficiaries of these close arrangements.[153]

---

[145] *Poletown Neighborhood Council*, 304 N.W.2d at 469 (Ryan, J., dissenting).

[146] *Id.* at 467.

[147] *Id.* at 468.

[148] *Id.*

[149] *See id.*

[150] *Id.*

[151] Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 10 (Ill. 2002); *Poletown Neighborhood Council*, 304 N.W.2d at 468-69 (Ryan, J., dissenting).

[152] *See Poletown Neighborhood Council*, 304 N.W.2d at 460-64 (Fitzgerald, J., dissenting); *Id.* at 464-82 (Ryan, J., dissenting).

[153] *See infra* Part III.F.

F. Benefits to Private Parties

Condemnations of land for transfer to private parties could pass constitutional muster if the main goals of the transfers satisfied the Public Use Clause. As the Kansas Supreme Court held, "[t]he mere fact that through the ultimate operation of the law the possibility exists that some individual or private corporation might make a profit does not, in and of itself, divest the act of its public use and purpose."[154] Consequently, developers could benefit as long as the procurement of private benefits did not become the overarching purpose.[155] Yet courts frequently declined from establishing a clear line delineating when private interests overshadowed public purposes.[156]

Private interests often intertwined with public purposes, making condemnation for economic reasons a conundrum for legislators. In *Poletown*, the Michigan Supreme Court held that General Motors received only incidental benefits, because the assembling plant that would be built on the land promoted economic development.[157] In *City of Las Vegas Downtown Redevelopment Agency v. Pappas*,[158] the Nevada Supreme Court held that the garage for the Fremont Street Experience benefited casino owners incidentally, because the attraction primarily benefited the public by offering a clean and attractive environment.[159] In these examples, the courts assumed that the developers benefited incidentally as long as the projects served public uses.[160]

This type of analysis failed because of its circular logic. If courts would instead focus on the types of benefits received by private companies first, the projects would not fulfill public uses because most of the benefits would flow to private companies rather than the public. The following two examples, which uses facts from past cases, reveal that courts that decided that private companies received only incidental benefits could easily reach the opposite conclusion. First, in *Poletown*, if the court had analyzed all the benefits received by General Motors, whether in expected revenue, tax breaks, or road construction, then the court would most likely disapprove the condemnation, because General Motors directly and substantially benefited at the public's

---

[154] Kansas *ex rel.* Tomasic v. Unified Gov't of Wyandotte County/Kansas City, 962 P.2d 543, 553-54 (Kan. 1998) (quoting Kansas *ex rel.* Fatzer v. Urban Renewal Agency of Kansas City, 296 P.2d 656, 660 (Kan. 1956)) (quotation marks omitted).

[155] *Cf. id.*

[156] *See* Gen. Bldg. Contractors v. Bd. of Shawnee County Comm'rs, 66 P.3d 873, 883 (Kan. 2003); *Tomasic*, 962 P.2d at 557.

[157] *Poletown Neighborhood Council*, 304 N.W.2d at 459.

[158] 76 P.3d 1 (Nev. 2003).

[159] *Id.* at 7-8, 12.

[160] *See Pappas*, 76 P.3d at 12; *Poletown Neighborhood Council*, 304 N.W.2d at 459.

expense. Second, in *Pappas*, if the court also had scrutinized the benefits received by the casinos first, the court would reach a similar conclusion, because the attraction would draw visitors to the businesses located in that area. The Michigan Supreme Court astutely held that "[t]o justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain."[161] The determination of whether private companies received incidental benefits depended largely on what the court focused on.

When private developers would benefit substantially from condemnations, courts should hold that these takings violated the Public Use Clause.[162] Although these explanations provided insight into the courts' calculations, the court decisions hinged on the courts' focuses. Courts concluded that developers received only incidental benefits when their projects contributed to the public welfare in some way.[163] Yet courts could easily reach the opposite conclusion by measuring private benefits first, which often flowed directly to private developers. This predicament made judgments appear arbitrary, especially in economic development cases where all businesses contributed to the good of the community.[164]

Each of these elements provides a tool for judges to measure the extent to which the public benefits from a condemnation. These elements include legislative empowerment,[165] other options available,[166] time,[167] government oversight,[168] private-public partnerships,[169] and amount of benefits received by developers.[170] The next part offers an analysis of *Kelo* with these six elements.

IV. APPLYING THE ELEMENTS TO *KELO*

Although the Supreme Court ruled that economic development fulfilled a public use, the Court failed to offer a framework to determine the constitutionality of future economic development cases. The previous section

---

[161] County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004).

[162] *See id.*

[163] *See Pappas*, 76 P.3d at 12; *Poletown Neighborhood Council*, 304 N.W.2d at 459.

[164] *Hathcock*, 684 N.W.2d at 786.

[165] *See supra* Part III.A.

[166] *See supra* Part III.B.

[167] *See supra* Part III.C.

[168] *See supra* Part III.D.

[169] *See supra* Part III.E.

[170] *See supra* Part III.F.

proposes such a test to determine whether economic public use is served by the condemnation.[171] Using the facts from *Kelo*, the Court could have implemented this test in the following manner.[172]

A. Legislative Empowerment in Kelo

The Court should have first considered the legislative empowerment factor. If statutes include economic development in their definitions of public use, then legislatures may condemn land for transfers between private parties to further economic revitalization.[173] The Justices should have inspected the explicit language of relevant statutes, factual determinations or projections, and the original definitions within statutes to determine whether economic revitalization fulfills a public use.[174]

In *Kelo*, Connecticut General Statutes section 8-186 states, "that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes . . . are public uses and purposes for which public moneys may be expended."[175] This statute parallels the District of Columbia Redevelopment Act in *Berman*, through which the Court permitted private companies to obtain land through eminent domain for development purposes.[176] Moreover, Connecticut General Statutes section 8-186 labels "industrial and business purposes" as public uses.[177] Because courts have often deferred to legislatures once legislatures have declared that certain actions fulfill public uses,[178] New London would have prevailed on the legislative empowerment prong.

In addition to Connecticut General Statutes section 8-186, Connecticut General Statutes section 8-193 states that the agency may use eminent domain power to acquire property, if permitted by the city council.[179] Because Connecticut General Statutes section 8-186 labels economic purposes as legitimate public uses, and Connecticut General Statutes section 8-189 provides the means to achieve these purposes, New London may condemn land for economic public use. However, New London must make factual determinations or projections to support this legislative mandate.

---

[171] *See supra* Part III.
[172] *See infra* Part IV.
[173] *See supra* Part III.A.
[174] *See supra* Part III.A.
[175] CONN. GEN. STAT. § 8-186 (2004).
[176] *See* Berman v. Parker, 348 U.S. 26, 29 (1954) (quoting D.C. CODE § 5-706 (1951)).
[177] CONN. GEN. STAT. § 8-186.
[178] *See supra* Part III.A.
[179] CONN. GEN. STAT. § 8-193(a) (2004).

The city development corporation has made factual projections regarding increases in jobs and tax revenues.[180] The corporation has estimated that "[t]he development plan [will] generate approximately between: (1) 518 and 876 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs . . . [and will] generate between $680,554 and $1,249,843 in property tax revenues."[181] These projections demonstrate that the plan accomplishes economic goals beneficial to the public. Critics might instead question the method used by the corporation to reach such projections and demand more proof. Nevertheless, New London has offered some projections proving that the condemnation supports economic public use.

The other factors regarding competing statutes and expansion of original definitions in statutes do not apply in *Kelo*. Based on explicit legislative language, an accompanying statute that grants condemnation power and projections of public benefit, New London would have a strong case in proving that the Connecticut legislature encourages economic public use. After passing this hurdle, the city would face the other options criterion.

B. Other Options in Kelo

The Court should have condoned condemnation only if the city lacked other options.[182] The city development agency considered six other plans, including plans to refrain from action, create "recreational and cultural facilities,"[183] build residential areas, form business facilities, and combine "residences, recreational, commercial, hotel, and retail uses."[184] Two of these plans allowed homeowners to remain, but the agency rejected them because of the difficulty transforming residential areas to office facilities.[185] Moreover, these arrangements would attract fewer investors.[186] Due to the agency's findings, the city argued that it had no choice but to condemn the plaintiffs' properties.[187]

Nevertheless, the city development agency had other options. Although the two plans that allowed the homeowners to remain might reduce the attractiveness of the site, the agency did not prove that economic revitalization

---

[180] Kelo v. City of New London, 843 A.2d 500, 510 (Conn. 2004), *aff'd*, ___ U.S. ___, 125 S. Ct. 2655 (2005).

[181] *Id.*

[182] *See supra* Part III.B.

[183] *Kelo*, 843 A.2d at 509 n.6.

[184] *Id.*

[185] *Id.* at 554.

[186] *Id.*

[187] *See id.*

efforts would fail entirely if either of those two plans were adopted.[188] In addition, New London neither encountered an inflated land market, nor did the legislature hint that landownership itself fulfilled a public use.[189] Even though the other plans could affect the marketability of the project,[190] the project could still achieve its public purpose of alleviating the economic downturn by attracting some investors.

The city would have failed to show a lack of options. The city through its agency had chosen the most productive option from seven plans.[191] Although the other choices might produce lower profits, the city had other options to revitalize the economy and could not rely on eminent domain proceedings.

C. Time in Kelo

Besides lack of options, the Court should have required that New London prove that the public would enjoy benefits flowing from the condemnation within a reasonable amount of time.[192] Here, analysts predicted a shortage of offices in 2010.[193] The city's director of real estate development and planning noted an increased interest in real estate in 1998 when Pfizer presented its proposal.[194] Yet these facts only added to a speculative determination of when the public would realize benefits, if any. The city did not guarantee public enjoyment of economic benefits; the occupation of the offices would depend on the whims of outside companies that may come to New London after Pfizer established itself.[195] Even with a detailed plan describing the projections,[196] the city could not definitively promise any public benefit if the market should change.

Consequently, the city would have failed the time factor requirement, because it could not state when the public would realize benefits. The city presented projections but not a concrete time frame. By failing to provide a timeline, New London could not show the Court that the public would experience economic benefits within a reasonable time.

---

[188] *Id.*

[189] *Cf.* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232-33 (1984) (describing how transfer of property from one private owner to another helped to break the land oligopoly in Hawai'i, meeting a public use).

[190] *Kelo*, 843 A.2d at 554.

[191] *Id.* at 509-10.

[192] *See supra* Part III.C.

[193] *See Kelo*, 843 A.2d at 559.

[194] *Id.*

[195] *See id.*

[196] *Id.* at 562.

D. Government Oversight in Kelo

The next issue the Court should have addressed was government oversight. Government oversight sometimes occurs when the lease limits the types of uses on the condemned land.[197] Vague contract terms, however, do not provide sufficient oversight.[198] In *Kelo*, the city development agency stipulated that the plan would be enforced for thirty years.[199] In addition, the city agency required that all successive owners use the land in a manner mandated by the plan, "unless prior written consent [had been] given by the [development corporation] and [city department] for a different use[.]"[200] These clauses in the agreement would provide the necessary government oversight because they would force subsequent developers to adhere to the plan for a long span of time, and would grant the governmental authority unilateral power to make changes.

Aside from these clauses, the Connecticut General Statutes would also enforce the agreement.[201] For example, Connecticut General Statutes section 8-191 requires that the department approve the development plan if the state funds the project,[202] while Connecticut General Statutes section 8-189 mandates that the plan adhere to department regulations.[203] Both state law and the contract between the city and subsequent developers would ensure government participation and oversight.

Due to the agreement and the statutes, the Court should have found that New London provided sufficient oversight, especially through its power to regulate any modifications.[204] The government would have the necessary tools to keep future owners and developers from straying from their obligations to produce public economic benefits. As a result, the city would meet this oversight requirement, thereby generating public confidence in the project.

E. Private-Public Partnership in Kelo

In addition to government oversight, private parties and the New London government must possess arms-length relationships.[205] The Justices should have analyzed the creation of the relationships and the amount of control

---

[197] Berman v. Parker, 348 U.S. 26, 30 (1954).

[198] *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 765 (Mich. 2004).

[199] *Kelo*, 843 A.2d at 545.

[200] *Id.* at 545 n.64 (emphasis omitted).

[201] *Id.* at 544-45 n.63 (citing CONN. GEN. STAT. §§ 8-189, -190, -191, -193(a), -200(a) (2004)).

[202] *Id.* (citing CONN. GEN. STAT. § 8-191).

[203] *Id.* (citing CONN. GEN. STAT. § 8-189).

[204] *Id.* at 545 n.64.

[205] *See supra* Part III.E.

given or requested by the private parties through explicit demands.[206] In *Kelo*, although the city negotiated with one private developer,[207] the city through its development agency created a relationship with Pfizer.[208] Although Pfizer would not develop the condemned parcels, Pfizer's involvement with the city would raise questions about Pfizer's influences on the city.

Moreover, although the Connecticut trial court did not document how the relationship formed, it did detail Pfizer's requests.[209] Pfizer demanded restoration of the state park and improvement of sewage treatment.[210] Pfizer also requested hotel space and homes for employees, but did not suggest that it would not come if the hotel was not created.[211] Underscoring its commitment to the public, Pfizer stated that local investment from the project would be used to improve the entire city.[212] These demands differed from the exorbitant requests of General Motors in *Poletown*, where General Motors demanded that the city bear substantially all of the improvement costs.[213] Here, Pfizer limited its requests to certain improvements and did not demand that a particular parcel of land be used for a specific purpose.[214] More importantly, Pfizer requested that the investment from the land benefit the community, stating that "certain functions that the company was involved in . . . were natural stepping stones that the community could use to its benefit to leverage the investment."[215] As a result, Pfizer did not possess more control than the government over the project, because it limited its demands and listed community benefit as a high priority.

Due to Pfizer's minimal demands, the city would meet the requirements of the private-public partnership factor. Unlike General Motors in *Poletown*,[216] Pfizer refrained from excessive requests and even stated that community development was one of its goals.[217] Having addressed this factor, the city

---

[206] *See supra* Part III.E.

[207] *See Kelo*, 843 A.2d at 510. The case did not detail the nature of the relationship between the developer and the city government. Since the project concerned mostly Pfizer, the analysis of the private-public partnership focuses on Pfizer's and the city's relationship. However, the terms between the developer and the city appeared skewed in the developer's favor with a rent of one dollar each year for ninety-nine years. *Id.*

[208] *See id.* at 537-38.

[209] *Id.*

[210] *Id.* at 538.

[211] *Id.* at 538-39.

[212] *Id.* at 538.

[213] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 469 (Mich. 1981) (Ryan, J., dissenting), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

[214] *Kelo*, 843 A.2d at 538-39.

[215] *Id.* at 538.

[216] *Poletown Neighborhood Council*, 304 N.W.2d at 469 (Ryan, J., dissenting).

[217] *Kelo*, 843 A.2d at 538-39.

would need to convince the Court that private parties would receive incidental benefits only.

F. Benefits to Private Parties in Kelo

Finally, New London would need to show that the project would primarily benefit the public.[218] Property transfer to a private corporation does not render a project unconstitutional when public benefit remains the main focus.[219] The trial court in *Kelo* held that "Pfizer would only 'tangentially benefit.'"[220] The court reached this conclusion because Pfizer did not push for development of the parcels in question.[221]

Nevertheless, Pfizer would benefit substantially because offices and parking space would serve Pfizer's guests and employees, some of whom would probably transfer to New London for their jobs.[222] The stockholders who would receive a significant portion of the profits would probably not reside in New London. While determining whether private parties would receive incidental or substantial benefits depends largely on the focus of the Court, the Court should have considered both private savings and profits resulting from the condemnation.

On the incidental benefits issue, the Court should have found for the plaintiffs because most of the benefits from the project, such as revenue and use of land, flow to Pfizer. The trial court found that Pfizer received only incidental benefits, because Pfizer did not choose specific purposes for the sites.[223] However, this analysis obscures the real benefits Pfizer and other investors would receive through the condemnation. Since most of the project benefits Pfizer and outsiders not residing in New London, the condemnation would fail to satisfy the incidental benefit factor.

From the factors discussed above, the Court should have found for the plaintiffs on the issues of other options, time, and incidental benefits. The Court should have found for New London on the issues of legislative empowerment, government oversight, and private-public partnership. Even with this tight margin, the Court should have found for the plaintiffs, because the most important factor, benefits to private parties, would favor the plaintiffs. Ultimately, benefits must flow directly to the public to fulfill the Public Use Clause.

---

[218] *See supra* Part III.F.

[219] *See supra* Part III.F.

[220] *Kelo*, 843 A.2d at 540.

[221] *Id.*

[222] *See id.* at 538-39.

[223] *Id.* at 539-40.

V. A NEW DAWN: THE FATE OF PUBLIC USE

The definition of public use has evolved over time from one requiring absolute government control to one with greater leniency for transfers between private landowners.[224] Courts have been reluctant to assign any definition to public use in fear of curtailing creative uses of eminent domain power, especially for economic uses.[225] Yet courts use certain factors to determine whether state action constituted valid economic public uses, including legislative empowerment, available options, time, government oversight, private-public partnerships, and incidental benefits.[226] These factors provide a framework upon which courts can base their decisions.[227]

The Supreme Court missed an opportunity to define public use more precisely in *Kelo*. Although the Court has held that economic development is a public use,[228] the Court has not provided further guidance. This situation leaves state governments with opportunities to tinker with their definitions of public purpose. In the midst of such reconsiderations, state governments must not forget the stories of those who own the condemned parcels.[229] The residents of New London may experience the disintegration of community as a result of the Supreme Court decision. Although Pfizer's project may benefit the community, Pfizer will gain the most from the condemnation.

As one scholar insightfully noted, "[h]uman beings often seek to benefit themselves at the expense of others. They do not perform much better when they organize themselves into groups and call themselves 'legislatures.'"[230] State governments can protect the public against such selfish ambitions by specifically defining economic public use through the test proposed in this Article.

Connie Liu[231]

---

[224] *See supra* Part II.A-B.

[225] *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

[226] *See supra* Part III.

[227] *See supra* Part IV.

[228] Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655, 2665, 2668 (2005).

[229] *See* Garnett, *supra* note 5, at 946-49.

[230] Simpson, *supra* note 12, at 193.

[231] J.D. Candidate, 2006, William S. Richardson School of Law, University of Hawai'i. I would first like to thank God for sustaining me through the writing and editing process. I would also like to thank Professor David L. Callies, Kat Gabriesheski, Jason Lui, Taron Murakami, Rochelle Sparko, and the 2005-2006 University of Hawai'i Law Review members and board for their editing assistance. This Article is dedicated to my family, who has been my gracious support.