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LECTURE

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COMMENTS

Constitutionalizing the Right of Property: The U.S., England and Europe[1]

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I. INTRODUCTION

In modern America, the right of private property receives special protection from the Takings Clause in the 1791 Bill of Rights: "[N]or shall private property be taken for public use, without just compensation."[2] The protection of private property was thereby constitutionalized. Originally, this provision did not apply to the states, but it now does, and of course state constitutions have provisions dealing with the matter.

Since a very long time ago, Western states have regularly taken property from owners for public purposes, such as the building of roads, and provisions for defense. As F. A. Mann put it in an article published in 1959: "Can property be expropriated at all? The answer is clear: All the available evidence goes to show that at all stages of history the individual owner was liable to have his property taken away from him."[3]

Additionally, regulation of land use—either through the imposition of tort liability, criminal liability, or through legislation—has a very long history.

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[1] The basic bibliography used for preparing this lecture comprises: TOM ALLEN, PROPERTY AND THE HUMAN RIGHTS ACT 1998 (2005); TOM ALLEN, THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS (2000) [hereinafter ALLEN, COMMONWEALTH CONSTITUTIONS]; A.V. DICEY, INTRODUCTION TO THE LAW OF THE CONSTITUTION (9th ed. 1952) (1885); R.W. KOSTAL, LAW AND ENGLISH RAILWAY CAPITALISM, 1825-1875 (1994); PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN (2d ed. 1917); CARMAN F. RANDOLPH, THE LAW OF EMINENT DOMAIN IN THE UNITED STATES (1894); G.R. RUBIN, PRIVATE PROPERTY, GOVERNMENT AND REQUISITION AND THE CONSTITUTION, 1914-1927 (1994); J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); F.A. Mann, *Outlines of a History of Expropriation*, 75 L.Q.R. 188 (1959); Carman F. Randolph, *The Eminent Domain*, 3 L.Q.R. 314 (1887); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); J.B. Thayer, *The Right to Eminent Domain*, 19 MONTHLY. L. REP. 241 (1856). There is of course a substantial amount of literature on the subject and I have not attempted to provide full documentation.

[2] U.S. CONST. amend. V. The right of property is of course protected by an elaborate legal remedial structure—by tort actions for damages, by actions for specific recovery of property, by provisions of the criminal law and indirectly by many other branches of the law, such as, for example, the law of contract.

[3] Mann, *supra* note 1, at 189. Mann was writing of the western world.

From the point of view of the individual property owner, what is and has long been important are the limitations on the power of expropriation and the award of compensation, which may be either generous or niggardly, when property is lawfully expropriated. The enthusiasm with which the power of expropriation is confined, and provisions made for entitling the owner to receive compensation, reflect societal attitudes towards two basic issues with which courts and legislatures have been, and are, endlessly engaged. The first is the extent to which the interests of individual property owners should be subordinated to some vision of the public or general welfare. The second (about which I shall have little to say) is the extent to which public or general welfare can best be achieved by leaving matters to the free market. Put simply, if Uncle Sam wants land to build an airfield, why should he not buy some land for that purpose on the market the same as everyone else?

What I shall address in this lecture is a comparison between the legal mechanisms whereby property owners are protected from expropriation in the United States, Britain, and now in Europe. I shall concentrate mainly on constitutional mechanisms, or their absence. What I have to say will very much rely on work that is incomplete, for no comprehensive comparison has ever been attempted.

II. HISTORICAL UNDERPINNINGS OF EXPROPRIATION

Let me at the outset say a word about the historical background to the legal issues that I shall talk about. The eighteenth and nineteenth centuries were periods of astonishing economic and commercial development both in Britain and the United States, though Britain was of course far in advance of the United States until the late nineteenth century. The wilder enthusiasts for the free market and for the economic analysis of law tend today to suppose that sanctity of private property, and freedom from government regulation, are fundamental to economic development.

However, this was not the view taken back then, if we may judge by the extensive use of the power of expropriation and of legal regulation of economic activity. Earlier, in the sixteenth and seventeenth centuries, there was little expropriation in England, if we exclude the special case of the dissolution of the monasteries, and we shall come back to monasteries later. There was, however, plenty of regulation. In the great days of British expansion in the eighteenth and nineteenth century, there was a great deal of both expropriation and regulation. It was a period when the political economists preached the gospel of *laissez faire*, and as they did so, the regulatory state, as we know it today, came into existence despite their preaching. The seminal study of this curious phenomenon is Oliver MacDonagh's *A Pattern of Government*

Growth,[4] and since its publication in 1961 there has been a considerable body of writing on the subject.

Today, there are all sorts of differences between the law governing expropriation and entitlement to compensation in the United States and in Britain. There are also differences between the position in the various States of the Union, and also some between the various territories which comprise the British Isles. But there are also fundamental respects in which these differences, though important to lawyers, are usually not very important to property owners. If I were to buy a house in Ann Arbor, Michigan, and the government wanted to take it from me to build a highway, they would have to pay me for it. That is also the position in relation to the house I do own, 3 The Butchery, in Sandwich, England. And it would indeed be surprising if courts and legislatures addressing the two fundamental questions I have set out, albeit on different sides of the Atlantic, would not have tended to come up with similar solutions. There is, however, one cultural difference that I need to mention: socialism, which has never caught on in the United States.

Socialist thought has a tendency to downplay the rights of individual ownership and favor wealth transfer and schemes of nationalization of private enterprises. Socialists may even aim to abolish private property entirely. Socialist theory is thus very likely to make a difference in theories of property in England and the United States. There is another factor I should mention: war. Since the Civil War, the wars in which the United States have engaged have never had anything remotely comparable to the domestic effect which the two world wars had on Britain and its system of government, much less on the states of continental Europe. Thus, in May 1940, legislation was passed in Britain enabling the executive by regulation: "[T]o make . . . provision for requiring persons to place themselves, their services *and their property* at the disposal of His Majesty as appears to him to be necessary or expedient . . . ."[5]

One effect was to encourage the subordination of private owners' rights to the national interest. For example, in World War II, a farmer in Britain who did not farm efficiently could be dispossessed, and some were. They were not compensated. The national interest in food production ranked higher than the right of private property.

I have said that in the United States the right of property is constitutionalized, which in a sense it is, but I must make a clarification. In some U.S. legal thought, the power of government to take private property derives its ultimate justification not directly from the U.S. Constitution, but instead from its existence as an inherent aspect of sovereignty; a mysterious

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[4] OLIVER MACDONAGH, A PATTERN OF GOVERNMENT GROWTH, 1800 TO 1860: THE PASSENGER ACTS AND THEIR ENFORCEMENT (1961).

[5] Emergency Powers (Defence) Act, 1940, 3 & 4 Geo. 6, c. 20 (Eng.) (emphasis added).

thing called "the power of eminent domain." This was an invention, or if you like, a discovery, of natural law writers.

The expression itself, *dominium eminens*, was first used by Hugo Grotius in 1583,[6] by the good Samuel von Pufendorf (1632-1694),[7] and by Cornelius van Bynkershoek (1673-1743). They made cameo appearances in the ludicrous fox case, *Pierson v. Post*.[8] Hugo wanted to rationalize the fact that European monarchs, who were thought to be bound by the laws of nature, nations, and God, appropriated the property of their subjects. These writers also wanted to argue that monarchs must compensate subjects for their property, so they came up with a strange theory locating the ultimate right of property in the State:

> [T]he property of subjects belongs to the state under the right of eminent domain; in consequence the state, or he who represents the state, can use the property of subjects, and even destroy it or alienate it, not only in cases of direct need [*ex summa necessitate*], which grants even to private citizens a measure of right over others' property, but also for the sake of the public advantage . . . .[9]
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> But, we must add, when this happens, the state is bound to make good at public expense the damage to those who lose their property . . . .[10]

Grotius was primarily concerned not so much with the right to expropriate, but with its limitations. So the duty to compensate was what the doctrine of eminent domain was all about—it was not primarily concerned with the power of the state, but with the rights of property owners to receive compensation and to not be expropriated unless for public benefit. It was therefore strongly protective of the right of private property. As Gough wrote in his *Fundamental Law in English Constitutional History*, the English did not need John Locke to tell them that the "chief reason" why they submitted to government was the protection of their property.[11]

A version of Grotius passed into American law and is still with us. Why? The moving spirit was Chancellor James Kent, who espoused the view that the rights and liberties of Americans were not conferred upon them by the U.S. Constitution, or the constitutions of the states, but by higher law, or if you like,

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[6] 1 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 83 (1720). This work was originally published in 1625.

[7] 8 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (1672). For a more recent publication see SAMUEL PUFENDORF ET AL., DE JURE NATURAE ET GENTIUM (Oxford, Clarendon Press 1934) (1688).

[8] 3 Cai. 175 (N.Y. Sup. Ct. 1805).

[9] 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 807 (Francis W. Kelsey trans., Oxford, Clarendon Press 1925) (1646). Grotius is thinking, for example, of the right to demolish a house to prevent the spread of fire.

[10] *Id.*

[11] J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 54 (1955).

natural law. He applied this theory in the case of *Gardner v. Village of Newburgh*,[12] the consequence being that uncompensated takings were unlawful regardless of whether a state constitution included a bill of rights with a takings clause.[13] This was important because virtually all expropriation in the United States took place through the actions of the states, or corporations to whom states delegated the powers of expropriation. After *Gardner*, versions of Kent's theory came to be part of U.S. legal doctrine.

The theory of eminent domain could also serve another function: explaining why the federal government or a state government had the power to expropriate in the first place, even without an explicit constitutional warrant. As a result, it came to be settled that the federal government could expropriate land, for example for post offices or courthouses, although there is no express provision in the U.S. Constitution to this effect.[14] One way of explaining federal power was to state that the text of the Fifth Amendment implied the existence of such a power. An alternative explanation, which is derivative of Kent and several natural lawyers, is that the power was an inherent aspect of sovereignty; this explanation relies on the notion of a higher law. A curious amalgam of these explanations can be found in case law.[15]

Today, because it is widely known that the power of expropriation exists, its theoretical basis is usually unimportant, although its limits are. In the past this was not so clear, and paradoxically, property owners wanted a power of expropriation because they wanted the economic development it was thought to foster.[16]

I am sure you all know that the eighteenth century Constitution of the United States, and in particular the Bill of Rights, was significantly derived from the English Constitution of that time, which was in turn based upon constitutional ideas developed in the seventeenth century and earlier.[17] The earliest relevant American text addressing takings is Massachusetts' *The Body of Liberties* of 1641, which dealt only with personal property.[18] From England, the earliest and only significant text is a celebrated passage in Sir William Blackstone's

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[12] 2 Johns. Ch. 162 (N.Y. Ch. 1816).

[13] For example, the New York State Constitution did not include a takings clause at the time of this case.

[14] Some state constitutions also lacked an express provision to expropriate land.

[15] *See* Kohl v. United States, 91 U.S. 367 (1875); United States v. Carmack, 329 U.S. 230 (1946).

[16] *See infra* Part III.

[17] For an in depth documentary review of the process by which the rights in the Bill of Rights were defined and recorded, I direct you to an outstanding work of scholarship edited by Neil H. Cogan. NEIL H. COGAN ET AL., THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (Neil H. Cogan ed., 1997).

[18] NATHANIEL WARD, THE BODY OF LIBERTIES (1641).

Commentaries on the Laws of England of 1665.[19] Blackstone states: "The third absolute right, inherent in every Englishman, is that of property . . . ."[20] He continues:

> 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 . . . . In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, *or even any public tribunal*, to be the judge of the common good, and to decide whether it be expedient or no[t].[21]

He then explains that the legislature, meaning Parliament, nevertheless regularly forces individuals to acquiesce in the taking of their property although "[n]ot by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained."[22]

Only Parliament can force an owner to give up his property for the public good, and what is really involved is a compulsory contract of sale at a reasonable price,[23] or in the case of enclosures, an equitable exchange. Under Enclosure Acts, property owners were allotted enclosed lands in return for strips they owned in the open fields. These and other land rights were extinguished in what was supposed to be a fair exchange. Enclosure Acts did not involve monetary compensation. You may find the idea of a compulsory contract rather odd, but there are other important examples in English common law.[24] The practice of authorizing the compulsory purchase of land by Acts of Parliament can be traced back to Acts of 1514,[25] 1539[26] and 1541,[27] and possibly earlier.

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[19] 1 WILLIAM BLACKSTONE, COMMENTARIES *134-40.

[20] *Id.* at *134.

[21] *Id.* at *135 (emphasis added).

[22] *Id.*

[23] COGAN ET AL., *supra* note 17, at 377 (citing Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 359 (Pa. 1788)). This is the earliest American case on the subject which Cogan was able to find, and it predates the Bill of Rights. The use of the passage in the case is misleading because it gives the impression that in England property could not be taken for the public good, the second half of the passage being passed over in silence. The case was determined on the basis of the right of necessity in the course of war; there is no reference to the doctrine of eminent domain. *Id.* at 358-63.

[24] *See* A. W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 140-42 (1987).

[25] Deepening River at Canterbury Act, 1514, 6 Hen. 8, c. 17 (Eng.) (allowing improvement to the River Stour in Canterbury and providing for compensation).

[26] River Exe Act, 1539, 31 Hen. 8, c. 4 (Eng.) (dealing with Exeter and the River Exe, with provision for compensation to be assessed by Justices of Assize).

[27] Gloucester Water Supply Act, 1541, 33 Hen. 8, c. 35 (Eng.) (dealing with the provision of a water supply for the City of Gloucester); *see also* Mann, *supra* note 1, at 194; Stoebuck,

In Blackstone, there is not a ghost of a reference to a power of eminent domain, and in the common law world, except for the United States, the concept is not used.[28] As counsel put it in *Burmah Oil v. Lord Advocate* in 1965,[29] it had been "swallowed up" by the doctrine of Parliamentary sovereignty. If Parliament can do anything it likes, there is no need for special theoretical justification for its ability to take away property. But what about the right to compensation? I suppose old Sir William Blackstone, if we could somehow get him here by extraordinary rendition and waterboard the truth out of him, would say that since Parliament always provided for compensation, there was no call for any theory *requiring* Parliament to do what it always did anyway. But, if Parliament took leave of its senses and failed to provide for compensation, there existed no legal mechanism for the aggrieved property owner; though, in construing legislation the courts would apply a strong presumption that there was an intent to provide compensation. In Blackstone's legal theory, the rights of Englishmen were not necessarily protected by the courts; in this instance the protection was secured through Parliament. There was no institutional legal remedy through the courts if Parliament engaged in oppression: "[A]ll oppression[], which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal provision*: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies."[30]

Blackstone's account in this passage is possibly misleading, since there probably existed in his time what are called prerogative powers exercisable by the Crown, that is the government, to take property without Parliamentary approval, especially if land was needed for the defense of the realm.[31]

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supra note 1, at 565 (citing Assises, Wages of Artificers, Parliament, Commissioners of Sewers, Wool Act, 1427, 6 Hen. 6, cc. 2-6 (Eng.)). The Act dealing with sewers may have allowed expropriation and does not mention compensation. Although Coke argues that it did, *see* The Case of the Isle of Ely, (1610) 77 Eng. Rep. 1139 (K.B.), I remain dubious. An Act of 1512, Bulwarks on the coast Act, 1512, 4 Hen. 8, c. 1 (Eng.), allowed land on the Cornish coast to be occupied for defense and does not mention compensation. Stoebuck, *supra* note 1, at 565.

[28] *But see* Mann, *supra* note 1, at 194 (in Scotland there was some reception of the doctrine in the eighteenth century).

[29] [1965] A.C. 75, 87 (H.L.) (appeal taken from S.C.) (U.K.).

[30] 1 BLACKSTONE, *supra* note 19, at *237-38. For further discussion, see A. W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 28-29 (2001).

[31] Or, somewhat oddly, to build a lighthouse, though I know of no case in which this power was used. *See* 10 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 389 (Little, Brown & Co. 1938) (1903); *see also* 6 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 49-54 (1924). For seventeenth century authority from a period when the scope of Crown rights was in dispute, see The Case of The King's Prerogative in Saltpetre, (1607) 77 Eng. Rep. 1294 (K.B.) (also cited as 12 Co. Rep. 12), and R. v. Hampden (1637) 3 St. Tr. 826; *see also* 4 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 331, 352 (2d ed. 1937).

Prerogative powers were powers vested in the Crown (i.e., the executive) which had not been taken away by Parliament. Blackstone does not mention these powers; he may have thought that those relating to the taking of property had become obsolete. In his time, these powers, supposing they still existed, had ceased to have practical importance because from 1708 onwards Parliamentary legislation empowered expropriation for defense purposes and provided for compensation.[32] The executive attempted to revive the ghosts of these powers during World War I, in order to take property for military use—but not for military operations—and pay less for it. Elaborate research undertaken in connection with litigation established that the executive had, in fact, always provided compensation, so far as it was possible to tell from the dusty records in the British archives. Whether there was a legal entitlement to such compensation through court proceedings was unclear, since the issue had never arisen in litigation.

The issue of whether there was a legal right of compensation arose for the first time in *Attorney General v. De Keyser's Royal Hotel*,[33] where a hotel had been taken to provide a headquarters in London for the Royal Flying Corps, the ancestor of the Royal Air Force. The ruling was that the property had been taken under the Defence Act of 1842, under which compensation had to be paid, the result being that any judicial statement as to the position had the property been taken under the prerogative was *obiter*. Some Law Lords expressed the view that if the taking had been under the prerogative there would have been a common law right to compensation; however, others took a different view[34] so that there was no binding judicial ruling on the matter. The first legal decision holding that there was such a right was given in 1965, and only by a majority of the House of Lords.[35] To briefly summarize, what happened was that when British forces were retreating in Burma before the invading the Japanese, the military ordered the destruction of the Company's Burmese installations. The U.K. government accepted an obligation—if you

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[32] They begin in 1708 with the use of legislation for particular pieces of land. *See* Fortifications Act, 1708, 7 Ann., c. 26 (Eng.). General though temporary legislation begins in 1798, Defence of the Realm Act, 1798, 38 Geo. 3, c. 27 (Eng.), and in 1803. Defence of the Realm Act, 1803, 43 Geo. 3, c. 55 (Eng.). Permanent powers were introduced in 1804, Defence of the Realm Act, 1804, 44 Geo. 3 c. 95 (Eng.), and by the Defence Act of 1842, Defence Act, 1843, 5 & 6 Vict., c. 94 (Eng.), which repealed earlier legislation. *See generally* Att'y Gen. v. De Keyser's Royal Hotel, [1920] A.C. 508, 550 (H.L.) (appeal taken from Eng.). During the First and Second World Wars the acquisition of private property was regulated under the elaborate schemes of Defence Regulations.

[33] [1920] A.C. 508 (H.L.).

[34] *See* RUBIN, *supra* note 1, at 15-16.

[35] Burmah Oil, Co. v. Lord Advocate, [1965] A.C. 75 (H.L.) (appeal taken from Scot.) (U.K.). For further discussion see T.C. Daintith, *The Case of the Demolitions*, 14 INT'L & COMP. L.Q. 1000 (1965), and SIMPSON, *supra* note 30, at 1092-95.

like, a moral obligation—to pay compensation and made an *ex gratia* payment of £4.600,000.

During the war, many companies and individuals incurred losses through enemy action, and with the country being almost bankrupt, the government felt itself unable to provide full compensation to everyone. The Burmah Oil Company thought the payment inadequate, sued, and won. The court did not address the issue of how to assess the amount of compensation to be paid. An obvious problem was that the installations might have been destroyed anyway when the Japanese army arrived a day or so later. The facts of *Burmah Oil* are similar to those in *United States v. Caltex.*[36] In *Caltrex* the Supreme Court, with Justices Douglas and Black dissenting, held that a wartime destruction of property to prevent its capture by the enemy did not count as a taking under the Fifth Amendment, and was therefore not compensable. So much for the merits of having a constitutional protection, rather than one resting on the common law. The *Burmah Oil* decision, however, did the company not the least good, for the decision was, controversially, reversed by legislation.[37] Neither of the two aforementioned cases was concerned with battle damage, the received view being that there is no right to compensation for such damage.

Blackstone's *Commentaries* provide an account of the English Constitution. In the advertisement for his lectures on which the Commentaries are based, Blackstone said they were appropriate both for prospective lawyers and for others who were "desirous to be in some Degree acquainted with the Constitution and Polity of their own Country."[38] Constitution, in this sense, does not mean a fundamental text, but the legal arrangements under which a society is governed. The British have never possessed a constitution in the sense U.S. lawyers commonly use the term. However, many former British dependencies currently do have such constitutions as well as bills of rights.[39] When Blackstone explained that Parliament could take away a person's property, he was doing nothing more than reiterating the doctrine of the legislative sovereignty of the English Parliament: "So long as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control."[40]

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[36] 344 U.S. 149 (1952).

[37] Such legislative overturning of judicial decisions is valid under the doctrine of Parliamentary sovereignty.

[38] This advertisement appeared on June 23, 1753.

[39] Such constitutions do not always make much difference to everyday life, as, for example, the case of Zimbabwe illustrates.

[40] 1 BLACKSTONE, *supra* note 19, at *157; *see generally id.* at *156-59; RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 162 (1951). Claims that in England the Parliamentary power of taking property was descended from a feudal theory in which all property was originally vested in the Crown are simply wrong; there never was such a theory and there is no evidence to support this view.

Thus, when Blackstone conceded that Parliament, and Parliament alone, had the power to deprive individuals of their property, but that it compensated them for their loss, the implication was that compensating was the invariable practice, and he plainly thought it was the right practice. But Blackstone was certainly not saying that there was any enforceable *legal* obligation on Parliament to provide for compensation, in the sense of an obligation enforceable through the courts.

In Blackstone's time, and indeed long after, the English Parliament was a Parliament of the propertied. Because of this, the interests of the propertied were very strongly represented there, and the absence of a legal obligation did not matter. This only changed with extensions of the franchise which led to the direct representation not only of the haves, but also of the have-nots, and the rise of collectivism. Full adult suffrage was only achieved in Britain in 1929, when women under thirty but over twenty-one obtained the vote, earlier than the *de facto* position in the United States.[41]

In a book first published in 1885, the English legal scholar, Albert Venn Dicey, developed the idea that it was impossible to give an account of English Constitutional arrangements simply in terms of legal obligations, meaning obligations recognized by courts.[42] Dicey thought that a full account of those arrangements had to recognize, in addition to such obligations, what he called "conventions of the constitution," an expression which has become standard in American writings on the English constitution.[43] Dicey also described these as "customs, practices, maxims, or precepts which are *not* enforced or recognised by the courts [which] make up a body not of laws, but of constitutional or political ethics . . .,"[44] "constitutional morality,"[45] and as "conventions, understandings, habits, or practices."[46] Dicey found no difficulty in saying what these were *not*—they were not enforced or recognized by courts. Dicey had, as is reflected in the varied expressions he used, much more trouble in saying what they were, or why they were observed. But Dicey claimed that insofar as they had one common quality or property: "[T]hey are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of Ministers as servants of the Crown) ought to be exercised."[47]

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[41] The major extensions of the franchise in the United Kingdom came about through legislation in 1832, 1867, 1884, 1929 and 1969. The legislation of 1969 lowered the voting age to eighteen.

[42] DICEY, *supra* note 1, at chs. 14-15.

[43] *Id.* at 23-24, 26-30, & chs. 14-15. For further discussion, see also *id.* at xcv-cxlvi and 1 SIR W. IVOR JENNINGS, THE LAW AND THE CONSTITUTION ch. 3 (5th ed. 1959).

[44] DICEY, *supra* note 1, at 417 (emphasis added).

[45] *E.g.*, *id.* at 422.

[46] *Id.* at 24.

[47] *Id.* at 422-23.

Dicey went on to concede that they might also relate to the exercise of the powers of either or both of the Houses of Parliament.[48] If we apply Dicey's concept to the practice of giving compensation when property is taken under Parliamentary authority, we can view this practice as one of Dicey's "convention of the English constitution." It was not simply a practice; it was a practice which was in some sense the right or obligatory practice. The obligation to compensate was not a legal obligation in that it was not enforceable through the courts, but it formed part of eighteenth century and later English constitutional morality.[49] The same might be said of the obligation to compensate when property was taken under the prerogative, though as I have explained, some judges finally decided in 1965 that in such a case there was a legal obligation. Of course, the categorization of the obligation to compensate as not being legal depends on a concept of law which is rooted in court practice. This is a fundamental feature of the common law tradition of legal thought.

So, both in the United States and in England property can be taken, but the theoretical justification is quite different. In the United States it is based on and limited by the doctrine of eminent domain, in origin a doctrine of natural law, whilst in England, when property is taken under Parliamentary authorization, it rests simply on the general doctrine of Parliamentary sovereignty, or on the prerogative. As for the duty to compensate, the same obligation is recognized in both England and the United States, but its theoretical character was quite different. In the United States, the obligation to compensate is constitutionalized, whereas in England it is an aspect of political morality where the basis is statutory, and as belatedly decided in 1965, a legally binding common law obligation where the basis is the prerogative.

III. ENGLISH LEGISLATIVE PROVISIONS GOVERNING EXPROPRIATION AND COMPENSATION

When property was taken under Parliamentary authority, there was no justiciable obligation requiring compensation. However, the courts had an important role to play; they had to interpret the legislative provisions under which property was taken. This interpretative function requires a short explanation.

In the eighteenth and nineteenth centuries, public works and utilities—for example turnpike roads, canals, railways, docks, water works—as well as

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[48] *Id.* at 427-38.

[49] It is commonplace to recognize various subsets of morality, as when we speak of medical ethics, etc.

agricultural enclosures, were authorised by Private Acts of Parliament.[50] All such developments would usually involve either compulsory purchase of property, rights over property, compulsory exchange of property, or voluntary transfer under the threat of compulsory acquisition. The Crown (i.e., the government) did not normally become directly involved.[51] Thus, the Crown and its agents did not build canals or railways, or establish water works and systems of water supply. Instead, private entrepreneurs came up with a scheme, and sought an Act of Parliament that authorized the scheme. Parliament then conferred the necessary powers, and usually subjected the enterprise to some degree of regulation. Sometimes the promoter of a scheme might not be a private entrepreneur, but an institution of local government such as a borough council. Virtually the whole of the infrastructure of the English Agricultural and Industrial Revolutions were established under these Private Acts.[52]

Today, enthusiasts for the free market and for the economic analysis of law tend to suppose that the sanctity of private property, and freedom from government regulation, are critical to economic development. However, this was not the view taken in the great days of English economic development. Under these Private Acts, the sanctity of private property was sacrificed to economic development driven by entrepreneurs. These entrepreneurs took the view that they could not get what they wanted by private contract through the free market and were therefore prepared to invest the very large sums required to promote a scheme for a Private Act. However, there was always entitlement to compensation for property taken that was payable under the Acts. English lawyers, then and now, conceptualized expropriation under such Acts as "compulsory purchase."

The procedures employed by the two houses of Parliament were elaborate. They came to involve a partially adjudicative procedure in which the promoters of the scheme and its opponents could put forward their cases. A special group of barristers made their living representing promoters and opponents before

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[50] Also called "Local and Personal Acts."

[51] The one major institution which was run by central government was the navy, together with the system of taxation required to fund it, far and away the largest enterprise in the world in the eighteenth and nineteenth centuries. For an outstanding account see N.A.M. RODGER, THE COMMAND OF THE OCEAN: A NAVAL HISTORY OF BRITAIN, 1649-1815 (2004).

[52] For detailed accounts see 11 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 287-363 (1938); FREDERICK CLIFFORD, A HISTORY OF PRIVATE BILL LEGISLATION (2d ed. 1887); KOSTAL, *supra* note 1; D. L. RYDZ, THE PARLIAMENTARY AGENTS: A HISTORY (1979); O. CYPRIAN WILLIAMS, THE HISTORICAL DEVELOPMENT OF PRIVATE BILL PROCEDURE AND STANDING ORDERS OF THE HOUSE OF COMMONS (1948). I have discussed the subject in A. W. BRIAN SIMPSON, VICTORIAN LAW AND THE INDUSTRIAL SPIRIT (1995) and in A. W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 218-22 (1995) [hereinafter SIMPSON, COMMON LAW]. The provision of lighthouses is an exception, they being normally authorized by patents under the prerogative, and occasionally by General Acts.

Parliamentary committees. Originally, the Private Acts were varied in their provisions, but progressively became more uniform, initially based on standing orders of the Parliamentary committees. In the nineteenth century, uniformity was increased by the passage, in 1845, of general acts known as "Clauses Acts." These Acts set out provisions that were the default setting in either all Private Acts or those of a particular kind. These Acts were the Companies Clauses, the Land Clauses, and the Railways Clauses Consolidation Acts.[53]

The legislative provisions dealing with compensation were cast in general terms. The courts were left with in the task of settling the principles according to which claims to compensation were to be decided. The courts also had to settle the relationship between the regular private law of tort liability, and the authorization of schemes of development under Private Acts. The rules that evolved in the nineteenth century were generous. This fact, coupled with rules as to costs and the delays involved in having compensation determined by a jury, meant entrepreneurs were encouraged to offer generous sums in compensation. For this reason most land was acquired by agreement.[54]

Under the Land Clauses Consolidation Act, a property owner whose land was acquired by compulsory purchase was entitled to the market value of the land. This meant the owner[55] could take into account enhanced value through planned development. To this was added a sum to compensate for the fact that the purchase was compulsory.[56] In addition, there was compensation for any reduction in value of land not taken (the term used was severance). The Land Clauses Consolidation Act also provided for compensation for land that was "injuriously affected." This, it came to be settled, gave rise to a right to compensation for loss caused through the execution of the authorized works—for example, the building of a railway might cause physical damage to adjacent buildings on land which was not itself expropriated.[57] Beyond that, it became tricky and controversial.[58]

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[53] 8 & 9 Vict., 1845, cc. 16, 18, 20 (Eng.). For a more thorough discussion see SIMPSON, COMMON LAW, *supra* note 52, at 220.

[54] *See* KOSTAL, *supra* note 1, at 152-53, 161-71.

[55] *See* Stebbing v. Metro. Bd. of Works, (1870-71) 6 L.R.Q.B. 37, 42 (Eng.).

[56] *See* RUBIN, *supra* note 1, at 13 (stating a figure of ten percent).

[57] The system was modified in 1919 by the Acquisition of Land Act, which aimed to cut back on the generosity of the Land Clauses Act as interpreted, and by the Town and Country Planning Act of 1947, which attempted to expropriate the development value of land. This failed and the 1919 system was restored by the Land Compensation Act of 1961. There was further modification in the Land Compensation Act of 1973. *See generally* ALLEN, COMMONWEALTH CONSTITUTIONS, *supra* note 1, at 169-70.

[58] *See* Caledonian Ry. Co. v. Walker's Trs., (1881-82) 7 App. Cas. 259 (H.L.) (appeal taken from Scot.) (U.K.); Re Stockport Ry., (1864) 33 L.J.Q.B. 251; R. v. Essex, (1886) 17 Q.B.D. 447; Hammersmith & City Ry. Co. v. Brand (1869) 4 L.R.H.L. 171.

One example of such controversies is the problem of loss of custom, which I call the problem of the Bates Motel. You will recall that in Hitchcock's movie *Psycho*, the emptiness of the motel was caused by the fact that a new highway has been built, isolating the motel and depriving it of custom. Did the right to statutory compensation include a right to be compensated for loss of custom? The case of *Rickett v. Directors of the Metropolitan Railway*[59] addressed such an issue. The claim, arising through loss of custom to the Pickled Egg Pub which was located in a user friendly way in Pickled Egg Walk, Clerkenwell, and whose owner had not had his land taken, was ultimately rejected by the House of Lords, with one dissent. This case produced radical judicial disagreement in the lower courts, with seven judges on one side and seven on the other. Underlying the decision was the basic idea that the common law does not treat harm caused by commercial competition as actionable; capitalism is all about causing such harm. Limitations on the right to compensation were justified under the theory of implicit compensation, i.e., the public benefit likely to flow from development.

About this time, U.S. judges were addressing similar problems, but neither I, nor I think anyone else, has ever investigated whether there was some cross influence, as I suspect there may have been. Judges on both sides of the Atlantic were addressing the same basic issue: the extent to which the private interests of property owners should be sacrificed to the public interest in development. This issue does not ever go away. There is certainly a book waiting to be written on how nineteenth century judges in various jurisdictions of the common law world handled the issue. An even more exciting book would also consider the state of the civil law world, where similar problems must surely have arisen.

In nineteenth century English case law, it was never argued that regulatory control of land could count as a compulsory purchase. The whole scheme of thought embodied in Private Acts and in the Clauses Consolidation Acts was directed towards facilitating the voluntary transfer of property interests to make possible schemes of development. This compelled transfer if agreement could not be reach. The legislative provisions were not structured around the concept of establishing a right to compensation after property interests had been taken. Regulatory control may have seriously reduced the value of property, but it did not involve transfer. In the United States, the concept of a "regulatory taking" has been elaborated around the well-known Holmes opinion in *Pennsylvania Coal Company v. Mahon*,[60] and has antecedents in nineteenth century case law on what constitutes a taking. There is nothing similar in English common law of this period.

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[59] (1867) 2 L.R.H.L. 175.

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

What Americans call zoning law and the English call planning law goes back to 1909 in England, and there has been much subsequent legislation. This also gave rise to problems over compensation. Simplifying a complex body of law, if one owns property in England and wants to develop it in any significant way, one must get planning permission from a local planning authority. In practice, however, the system is largely under the centralized control of government ministry officials. There is no right to compensation for any loss caused through refusal to allow development. There are, however, limited provisions for other types of compensation. If the result of planning control is that property becomes incapable of reasonably beneficial use, a landowner can force the local government authority to accept a transfer of title at market value. The scope of this right, the nearest thing in English law to the American concept of a regulatory taking, has been narrowly construed, as I shall illustrate from the story of the unfortunate Mrs. Colley.

Mrs. Colley owned an oak wood and wanted to build a house on part of it. She was given outline planning permission to do so, but before she began building, the local planning authority (the Canterbury City Council) changed its mind and withdrew permission. For this, they had to pay her modest compensation, which they did. The Council then became excited about conservation and imposed a tree preservation order on all the oak trees in the wood. As a result, Mrs. Colley could not fell any without permission—permission she was not going to get until the trees became mature, about fifty years later. In the meantime, she could only obtain a trivial income from her property by selling thinnings for firewood, or making other modest sales. Her claim failed; she still had an oak wood and I suppose she could gaze at it, bird watch in it, sleep out in it during the summer, conduct love affairs there, and so forth. Her wood was not valueless, but she wanted to be given the development value without the tree preservation order.[61]

In England, all these difficult questions on the relationship between private property rights and the public interest were addressed partly by government departments promoting general legislation,[62] partly by decisions taken in Parliament, and partly through judicial application of the common law and interpretation of legislation by the judges. The judges also tried to fit all the statute based law into the general scheme of tort remedies, primarily nuisance, in private law. Constitutional provisions played no part, for there were none. However, all this has now changed.

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[61] Colley v. Sec'y of State for the Env't & Canterbury City Council, (1998) 77 P. & C.R. 190.

[62] Thus the Board of Trade, a government department, promoted the Clauses Consolidation Acts of 1845.

IV. THE CONSTITUTIONALIZING OF PROPERTY RIGHTS

In 1951, the United Kingdom ratified the European Convention on Human Rights ("Convention"), and in 1952 it ratified the First Protocol to the Convention. The First Protocol contained provisions on certain protected rights over which it had proven extremely difficult to negotiate an agreed text. For political reasons there was a desire to agree to a convention rapidly, and so these rights were not covered by the Convention itself but postponed to allow more time for negotiations. The First Protocol, unlike the four later protocols, is understood to form an integral part of the basic original Convention. These instruments are creatures not of the European Union, but of the Council of Europe, which today has no less than forty seven members, and applies to some 800 million people.[63] Article 1 of the First Protocol provides that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[64]

This provision is in some ways more broadly drafted than the Fifth Amendment. It is about "possessions," which seems more inclusive than "property," and it talks about an entitlement to "peaceful enjoyment," not merely about a restraint on "takings." In other respects it seems less sympathetic to private interests. For example, it explicitly permits what is called in the United States regulatory control under the police power. This is yet another concept which does not feature in English common law, and is indeed not mentioned in the Takings Clause of the Fifth Amendment.

I will not go into the details of how these provisions have been interpreted, although I shall say a little about the matter. You will also notice that the text does not mention any entitlement to compensation.

Until the passage of the Human Rights Act in 1998, the Convention was not part of English domestic law. Thus, if you thought your right of property had been infringed by the British government, or someone for whom it was answerable, you had first to exhaust any domestic remedies, and only then

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[63] An application by Belarus is pending. The only western European state which is not and cannot be a member is the Vatican, which is not a democratic state, and you have to be one to join the club.

[64] European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf [hereinafter European Convention].

could you take your complaint to the European Court of Human Rights in Strasbourg ("ECHR").[65] The Court could give a ruling, binding in international law on the United Kingdom, that there had been a violation of the Convention, and if it thought appropriate, say what "just satisfaction" should be made.[66] But the ECHR is not a court of appeal from the decisions of domestic courts, so it could not overrule a domestic decision, much less invalidate domestic legislation. Once a judgement has been given against a respondent state by the ECHR it is then up to another organ of the Council of Europe, the Committee of Ministers, to receive proposals from the respondent state explaining what it proposes to do to put matters to rights. For example, there might need to be a change in the law or in administrative practices. The Committee of Ministers, in effect, supervises the implementation of the Court's decision. In general, members of the Council of Europe have been good about conforming to Strasbourg decisions, though there have been some bad boys, or perhaps I should say bad persons.

Under this system the Convention operated, so far as the United Kingdom is concerned, as a sort of bill of rights, but it was not a bill of rights which had any direct effect in U.K. domestic law.[67] It operated only at an international level. However, whereas the English Constitution, insofar as it is to be found in Parliamentary legislation, judicial decisions, or in practice, is entirely at the mercy of the doctrine of Parliamentary sovereignty; there are no special rules governing legislation of constitutional importance. In reality Parliament is largely controlled by the government in power, and increasingly by the Prime Minister and the Cabinet Office.

Under the British system, the government may have achieved power even though it was put into power by a minority of electors. It is said, with some truth, that the British Constitution is what the government of the day can get away with. The United Kingdom could, as a matter of law, denounce the European Convention, but in terms of political reality this is now quite impossible. But if the present government took leave of their senses and did denounce the Convention, the United Kingdom would not just have to leave the Council of Europe, but also the European Union, as you have to sign up to the Convention in order to be a member of the Union. Of course, some major

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[65] The United Kingdom only accepted this right of access to the court in 1966. Before then, complaints went to a commission that could give a legal opinion but not a binding judgement. Complaints were in effect handled through a political rather than a judicial procedure, the final decision resting with the Committee of Ministers.

[66] Human Rights Act, 1998, c. 42, § 8, 3(b) (U.K.).

[67] Although a loose practice developed of using the Convention as an interpretative aid, on the theory that it must be presumed, in the absence of evidence the other way, that domestic law conformed to it.

political upheaval in Europe might change all this, but I am talking about present political reality.

This is still the position in international law. You can still, as people say, "take them to Strasbourg." But there is an important twist because, in 1998, the U.K. Parliament, by the Human Rights Act, incorporated most of the provisions of the Convention and its First Protocol into U.K. domestic law.[68] Thus, today U.K. judges can directly give effect to this European Bill of Rights. If, however, U.K. judges decide that legislation is not compatible with the Convention, they cannot actually invalidate it—they can only declare it is incompatible. It is then up to Parliament and the government to do something to put matters to rights. However, the Human Rights Act only operates in U.K. domestic law and does not supplant the international operation of the Convention system. Furthermore, the United Kingdom could repeal the Human Rights Act, and the Conservative Party has said it will do this if it wins the next election. But much of this is huffing and puffing, because if this happens there is bound to be a new version of it and I guess it will be not very different from the present Act.

The outcome of all this is that today, in the United Kingdom, the right of property, previously protected by the Convention at an international level, by the common law and by constitutional convention at a domestic level, is constitutionalized in a very curious way. At the international level it is done through the United Kingdom's becoming a party to the ECHR and at a domestic level, through the incorporation of the ECHR into U.K. domestic law. The domestic constitutionalization co-exists with the international constitutionalization.[69]

Since the First Protocol came into force on May 18, 1954,[70] the Strasbourg institutions,[71] principally the ECHR, have developed an elaborate case law, or jurisprudence as it is called, developing the conceptions embodied in the general terms in the text of Article 1. They have also developed an elaborate set of interpretative principles to guide them. These principles are not to be found in the text, and a friend of mine, Ms. Nuala Mole, who runs a Human Rights NGO in London, calls them "the invisible articles" in talks she gives on the Convention.[72] For example, one of the principles is that the Convention

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[68] *See generally* Human Rights Act, 1998, c. 42 (U.K.).

[69] In many former British dependencies the position is different, for they have domestic bills of rights, some of them modelled on the European Convention, and written constitutions.

[70] *See generally* European Convention, *supra* note 64.

[71] Originally in addition to the court there was a commission, which had no power to issue a binding judgement, but had other functions, such as deciding on admissibility and investigating the facts, but, it no longer exists.

[72] There is an excellent account of these principles of interpretation in RONALD ST. J. MACDONALD ET AL., THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS chs. 5-6 (1993).

must be interpreted as a "living instrument."[73] As such, we do not have to put up with any romantics about the intention of the founders, although the *Travaux Préparatoires* may be used as an aid in interpretation. Since the Human Rights Act, the English courts have to attend to this jurisprudence. I cannot deal at all fully with it here, however, as an example, it includes case law on what is meant by "possessions" and so forth.

If you look at the text of Article 1, you will see first of all that it explicitly provides that no one shall be deprived of his possessions "except in the public *interest*."[74] This will immediately remind you of the U.S. constitutional text, which has the words "for public *use*," and implies thereby a limit on the purposes for which property may be taken. On the face of things, the European provision seems to envision a somewhat wider power of expropriation since it does not mandate expropriation only for public *use*. Decisions about this requirement have been affected by two interpretative legal doctrines that are not part of the stock in trade of U.S. constitutional lawyers.

The first is the doctrine of the "margin of appreciation," which was imported into the jurisprudence back in the 1950s from German law.[75] According to this doctrine, states enjoy a considerable area of discretion in implementing the Convention rights in light of their individual attitudes and conditions. It is not the function of the Convention to impose complete uniformity throughout the forty-seven member states of the Council of Europe. As the Court said in *James v. The United Kingdom*: "[T]he decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinion within a democratic society may reasonably differ widely."[76]

The Court will thus respect legislative judgements unless they are "manifestly without reasonable foundation."[77] You will see that this concept performs similar functions to that of concepts such as "deference" in U.S. law. One consequence is that the European Bill of Rights is not supposed to produce a wholly homogeneous system of rights protection, and so the right of property can vary in the way it is protected from member state to member state.

Let me tell you a little more about the *James* case, which may have echoes for you of a notable takings case in this part of the world, *Hawaii Housing Authority v. Midkiff*.[78] Back in the nineteenth century, much property was

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[73] Established in Tyrer v. United Kingdom, 2 Eur. Ct. H.R. 1 (1978); *see also* Marckx v. Belgium, 2 Eur. Ct. H.R. 330 (1979). The English judge on the Court, Sir Gerald Fitzmaurice, fought a losing battle against the acceptance of this doctrine.

[74] European Convention, *supra* note 64, Protocol I, art. I.

[75] For a more complete history see SIMPSON, *supra* note 30, at 676-78, 1000-1005.

[76] James v. United Kingdom, 8 Eur. Ct. H.R. 123, 142 (1986).

[77] *Id.* at 142.

[78] 467 U.S. 229 (1984).

developed in England through building leases. The owner of undeveloped land would lease it to a building contractor, reserving a modest rent known as a ground rent, usually for ninety-nine years.[79] Such rents were usually higher than an agricultural rent for the land in its undeveloped state. The builder contracted to erect specified homes on the land. The builder would erect these houses and then sell them off individually by assigning the residue of the term for a lump sum. The leaseholders would also have to pay the modest "ground rent."

Purchasers would obtain a leasehold interest, initially for say ninety-seven years if the homes were constructed within three years. They would pay much the same price as for a freehold, ninety-seven years being a long time. Homes would subsequently change hands at diminishing prices as the end of the ninety-nine-year lease came closer. At the end of the term, the landlord would get back the property free of any leasehold interests. If homeowners wanted to stay on, they would have to buy the fee simple from the landlord at full market price. The use of ninety-nine-year leases was popular with institutions like the Oxbridge Colleges, which assumed they would exist forever, and with trusts set up by aristocratic families which adopted a similarly rosy view. A movement developed to entitle holders of leasehold interests to acquire the freehold from the landlord compulsorily.

In 1967 and 1974, the British Labour government passed legislation entitling leaseholders to purchase the freehold compulsorily. They only had to pay site value, which did not take into account the value of the building on the land. Thus, the leaseholders got the freehold at below its actual market value. The *James* case concerned leaseholders on the Belgravia Estate in London, one of the most chic residential areas.[80] It has largely been acquired by expatriate Russian oligarchs with funny money. Those who purchased the freeholds and rapidly sold them on made large profits. The legislation was challenged on various grounds, one being that it simply benefited wealthy private individuals in Belgravia, and that it was not driven by public interest but merely by Labour Party populism. The ECHR, relying on the doctrine of the margin of appreciation, declined to hold the legislation contrary to Article 1. To date, the ECHR has indeed never held that a deprivation challenged before it constituted a violation as not being in the public interest.

The other interpretative concept much used is that of "proportionality." Measures which involved deprivation of possessions must be proportional to the aim being pursued in the public interest, which aim is essential if the deprivation is not to violate the Convention. There is a large amount of case

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[79] It was common for this rent to be increased at set intervals by some specified amount.

[80] The area was developed by the Dukes of Westminster, one of whom, amalgamated with Lord Londonderry, appears as Lord Darlington in the movie *Remains of the Day*.

law addressing this concept, which performs some of the same functions as does "reasonableness" and "rational relation" in U.S. law. If you look at the text of Article 1, it says nothing whatsoever about a duty to pay compensation. Why not? During the negotiations, a majority of member states thought that there should be an explicit right to compensation in the text. However, it was impossible to persuade all the negotiating states to agree to this and the negotiators wanted to produce a text which would be acceptable to all member states.[81]

In the *James* case, the majority of the judges took the view that although there was no explicit reference to an entitlement to compensation, the protection of property under Article 1 would be illusory unless there was such an entitlement. There is another general doctrine to the effect that Convention rights must never be illusory.[82] Since in Western European states the taking of property without compensation was viewed as justifiable only in exceptional circumstances, the arrangements made for compensation can be treated as relevant to a claim asserting violation of Article 1 under the principle of "proportionality," which required a "fair balance" to be struck between the pursuit of the public interest, and the interests of the property holders. So, Article 1 normally required the payment of compensation.[83] The majority also took the view that the references to the general principles of international law were not relevant since they only mandated compensation when the property of non-nationals was taken.[84]

Let me illustrate the use of the concept of a "fair balance." If a vehicle, including an aircraft, is used to smuggle prohibited drugs into the United Kingdom, the customs authorities have power to enforce its forfeiture. For some time, Air Canada aircraft had been used by drug smugglers, and after warnings, an airliner worth £60,000,000 was seized at Heathrow; it had on it 331 kilograms of cannabis.[85] At the time of the seizure, passengers were waiting to board; they could not have been pleased. Later that same day the aircraft was returned upon payment of a penalty of £50,000; however, under domestic law there was no legal obligation for customs authorities to return the aircraft. The ECHR took the view that the seizure was, in effect, a mere

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[81] *See* 7 *Travaux Préparatoires* 208 and 223-24. For a discussion of the tortuous negotiations, see SIMPSON, *supra* note 30, at ch. 15, especially pages 780-81, 785-86, 792, and 799. Opposition to including a right to compensation came mainly from the United Kingdom, with support from France. At the time, there was a Labour Party government in power in Britain.

[82] *See* Lithgow v. United Kingdom, 8 Eur. Ct. H.R. 329 (1986).

[83] There was dissent from Judge Thor Vilhjalmsson.

[84] Six judges had doubts and expressed the view that the issue would better have not been addressed in this case since it was not necessary to do so.

[85] It was not suggested that Air Canada was itself involved; the argument was that its security arrangements were not effective.

interference with use, and that in light of all the circumstances, this was a legitimate exercise of the right to control the use of property "in accordance with the general interest." Taking into account the margin of appreciation to which the U.K. authorities were entitled, a fair balance had been struck since the penalty was not disproportionate.[86]

The *James* case involved a challenge to legislation, but an attempt has been made to use Article 1 to mount an attack on a long established common law doctrine: the doctrine of adverse possession. Under the doctrine of adverse possession a person who squats on land for the requisite period, in England twelve years, acquires a good title, and does not have to pay any compensation. A case can surely be made for saying that this violates Article 1.[87] This issue arose in the case of *J.A. Pye Ltd. v. Graham*,[88] where a farmer had occupied for the required period some land to which the Pye Company had a registered title. The land in question was said to have been worth as much as £10,000,000, but this figure was disputed. Under the relevant law at the time, a squatter's rights, even if not appearing on the Register, could trump those of a registered proprietor.[89] The farmer won in the domestic courts[90] and since the Human Rights Act was not in force at the relevant time, the judges were unable to apply Article 1, though if they had been able to, some of the judges would have held there to be a violation.

The company—for under the Convention, companies have human rights, which may surprise you—took the case to Strasbourg, and won by four votes to three before a panel of judges of the Chamber of the Court.[91] That looked like curtains for the doctrine of adverse possession. But no, there is a system whereby a case can go to what is called a Grand Chamber of the Court, which in effect operates as an appeals court, and the case was so taken. The Grand Chamber ruled that there had been no violation of Article 1. The existence of the system of limitation of actions pursued a legitimate aim in the public interest, and under the concept of proportionality, operating together with the margin of appreciation, a fair balance was struck. One of the factors which influenced the court was the fact that a large number of member states of the Council of Europe had some form of limitation of actions, though they differed

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[86] Air Can. v. United Kingdom, 20 Eur. Ct. H.R. 150, 174 (1995).

[87] If there was a violation the U.K. would be answerable since the violation was the product of the state of U.K. law.

[88] [2002] UKHL 30, [2003] 1 A.C. 419 (appeal taken from Eng.) (U.K.).

[89] A registered title was taken subject to what are called "overriding interests," and these included the rights of a squatter.

[90] J.A. Pye v. United Kingdom, 43 Eur. Ct. H.R. 3 (2006), *vacated*, 46 Eur. Ct. H.R. 45 (2008).

considerably in their operation, and that they did not involve the payment of compensation:

> It is a characteristic of property that different countries regulate its use and transfer in a variety of way. The relevant rules reflect social policies against the background of the local conception of the importance and role of property. Even where title to real property is registered, it must be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration.[92]

So, the doctrine of adverse possession can breathe again.

There is a case from the United Kingdom pending in Strasbourg that raises even more mysterious issues than adverse possession, and we are all gripping our seats awaiting the outcome. The case depends on antique features of property law and ecclesiastical law, and illustrates the potentially wide possibility of challenging aspects of established domestic property law through human rights law. In Medieval England, parish priests were supported by property endowments from which they derived a living. Parish priests, or "parsons," enjoyed a property right for life in the endowments. These endowments consisted partly in the parsonage and other land, called "glebe land,"[93] but also included tithes—a ten percent tax imposed on land for the maintenance of the church. A parson entitled to such endowments was called a "rector," and the tithes he received were called the "rectorial tithes." The rector of a parish was responsible for the maintenance of the chancel of church, and the parishioners were responsible for the nave. The chancel was the part of the church where the priest did his priestly things, and the nave was where the parishioners prayed or slept or whatever during divine service. The original idea was probably that the rector was supposed to pay the cost of repair out of the income from the endowments associated with his parish, but in modern law, according to the only modern case on point, the obligation is not limited in this way.[94] If you are liable to pay for the upkeep of a chancel there is no cap on liability.

Back in the Middle Ages, the entitlement to the rectorial endowments, together sometimes with a distinct right—the advowson—which was the right to nominate the parson,[95] often passed into the possession of institutions like

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[92] J.A. Pye v. United Kingdom, 46 Eur. Ct. H.R. 45, [74] (2008).

[93] When my father was the Rector of Clapham in West Yorkshire some of his income still came from a glebe farm, which was let to a tenant. My brother and I used to shoot rabbits on the glebe land and, illegally, on adjacent land.

[94] The fact that the obligation is not limited depends on the decision of the Court of Appeals. *See* Wickhambrook Parochial Church Council v. Croxford, [1935] 2 K.B. 417, especially the opinion of Lord Scott at [105-08]. [1935] All E.R. 95 (K.B.).

[95] Advowsons were marketable property rights, but today they can no longer be bought and sold.

monasteries or colleges. The institutions would put in a priest to perform the holy offices but retain the endowment; paying the priest, who was called a "vicar,"[96] a salary out of them, and keeping the balance. The right to some of the tithes might be given to the vicar as part of his remuneration; these were called "vicarial tithes."[97]

At the dissolution of the monasteries in Henry VIII's time, such appropriations passed to the Crown, who disposed of them, sometimes to institutions such as Oxford and Cambridge colleges, but sometimes to lay persons. These were called lay rectors or "lay appropriators." They were valuable property rights, especially if combined with the advowson, which enabled the lay rector to appoint some crony of his, or a family member without a job, to the living.[98] The appointee had to be in "holy orders," of course, but this could be arranged. However, there are no free lunches, and the catch was that an obligation fell on the lay appropriator, or lay rector, to repair the chancel based on his entitlement to receive the rectorial tithes.

In the seventeenth and eighteenth centuries, the elaborate property rights in village communities were often reordered by schemes of enclosure. As part of an enclosure scheme, carried into effect under a Private Act, the duty to pay tithes could be commuted and an allotment of land could be made to compensate the lay appropriators for their loss of the tithes. If this happened, the obligation to repair the chancel attached to the owner of the substitute land.[99] Believe it or not, this obligation can still attach to certain land in England as a consequence of Enclosure Acts, and the obligation also still exists in the case of some colleges in Oxford and Cambridge.[100] Indeed, large sums of money can be involved in the repair of an ancient church. Under the English system of registered title the obligation does not have to be registered.[101] Establishing when it does exist, and when it does not, is extremely complicated and may involve extensive historical research. Over the centuries, various steps

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[96] "Vicar" means "a substitute," hence the word "vicarious."

[97] It never was the law that receipt of these tithes or possession of the glebe land made the vicar responsible for chancel repairs.

[98] There is a brief and unclear account in 1 BLACKSTONE, *supra* note 19, at ch. 11, and a clearer account in the opinion of Lord Scott of Fosdale in the House of Lords.

[99] The position was different after the Tithe Commutation Act, 1836, 6 & 7 Will. 4, c. 71 (Eng.).

[100] According to the Report of the Law Commission of 1983 (No. 152) there remain 5,200 chancels to which the obligation relates. Only in some cases are individual landowners involved; in other cases, the obligation rests with Cathedrals, or with a body known as the Church Commissioners, or with educational foundations such as Oxford and Cambridge Colleges.

[101] This will change after 2013 under the Transitional Provisions Order which takes effect under the Land Registration Act 2002, c. 9 (U.K.).

have been taken to get rid of the whole system of tithes, which are no longer payable, but these steps have not yet abolished this ancient liability.[102]

For example, one Mrs. Wallbank had purchased Glebe Farm in the Parish of Aston Cantlow. In 1994, the Parochial Church Council served a notice on her, and later on she and her husband— who owned a half share in the property— requiring her to pay for the repair of the chancel of their Parish Church of St. John the Baptist.[103] When the property was acquired by the Wallbanks, they had knowledge of this potential liability.[104] Back in 1994, the estimated bill was around £95,000—around £250,000 today—and whilst litigation grinds on, nothing is done to repair it.[105] The obligation resting on the owner of a fifty-two-acre part of Glebe Farm, called Clanacre Fields, arose under the Private Enclosure Act of 1742 and an award in 1743 under it reallocating property rights in the parish. Litigation on this claim began in 1995 and has since reached the House of Lords, the highest domestic court of appeal.[106]

This case essentially raised the question of whether this weird and antique obligation was still enforceable today; the answer to this depended on two issues.[107] One was whether the Human Rights Act applied to the action taken by the Parochial Church Council, which, simplifying somewhat, turned on whether the Church Council counted as a "public authority" under the Act. Such a distinction is relevant because the basic scheme of the Act applies the provision of the Convention only to actions of public authorities. If the Act applied then the domestic courts could apply the relevant provisions of the Convention, including Article 1. The second issue was, if the Act did apply, whether the existence of the obligation to repair the chancel violated Article 1. Mr. and Mrs. Wallbank, it could be argued, were not going to enjoy Clanacre Fields very peacefully if they were going to have to pay out a huge sum for the

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[102] The National Archives has made available in Legal Records Leaflet 33 a guide to help those attempting the complex historical research which may be necessary. In November 1985, the Law Commission issued a report recommending the abolition of the liability, but no action has yet been taken.

[103] *See* Aston Cantlow PCC v. Wallbank, [2001] EWCA (Civ) 713, [1-54] (Eng.). For an image of the Parish Church see www.genuki.org.uk/big/eng/WAR/images (last visited Sept. 12, 2008).

[104] This was the church in which Shakespeare's mother, Mary Arden married, John Shakespeare, and is a few miles away from Stratford on Avon.

[105] As a guess, the current litigation will take us to 2009, and there is further litigation possible which would seek to limit the extent of the liability to the income from, or perhaps value of, Clanacre Fields. On the basis of the existing case law, even if they handed over Clanacre Fields to the church authorities they would still be liable for any excess, and the church authorities would, in any event, have no obligation to accept a transfer.

[106] Aston Cantlow PCC v. Wallbank, [2003] UKHL 37, [2004] 1 A.C. 546 (appeal taken from Eng.) (U.K.).

[107] There was also a possible problem over retrospectivity which I do not discuss.

repair of the local church as a consequence of their ownership. In the Court of Appeal, the view taken was that it did violate Article 1, reversing the trial judge who had ruled that it did not. The view taken, based on Strasbourg jurisprudence, was that the Human Rights Act did apply to the Parochial Church Council, and that the sum claimed, in effect a tax, violated Article 1: "'[T]he legitimate aim of taxation in the public interest must be pursued by means which are not completely arbitrary or out of all proportion to their purpose . . . .'"[108]

The tax was arbitrary since it was imposed on the owner of land which had no special connection with the church, differentiating it from any other land in the parish.[109] In the House of Lords there was unanimity that the Human Rights Act did not apply; this made it unnecessary to decide whether there was a violation of Article 1. Of the five Law Lords, two expressed no opinion on this matter.[110] The other three expressed the view that it was not a violation.[111] The case is on its way to Strasbourg, and one can only speculate as to the possible outcome. My guess is that the ECHR will shy away from becoming involved in this can of worms, and rely on the doctrine of the margin of appreciation to do so. The court, mindful of the range of politically sensitive issues surrounding the right of property in Europe, has generally been very reluctant to second guess states' property laws. Additionally, this case raised the peculiarly difficult issue of the law relating to the Church of England, which is an established church with special status in England. But it could be, if I am wrong, that a decision in favour of Mr. and Mrs. Wallbank will force the United Kingdom Government to implement the recommendation made by the Law Commission back in 1983 and introduce legislation to abolish the obligation. This would have serious financial implications for the maintenance of the ancient churches of England.

V. CONCLUSION

In the United States, there has long been extreme reluctance to sign up to any international instrument which is capable of providing any form of even mildly effective international supervision of the protection of rights within the United States. I can see no signs of this changing in the immediate future. In the United Kingdom too, there is in some quarters resentment over what some see as the meddling interference of the Strasbourg court in our domestic affairs. I

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[108] *Aston Cantlow PCC*, [2003] UKHL at [126], [2004] 1 A.C. at 588 (quoting *Aston Cantlow PCC*, [2001] EWCA (Civ) 713, at [44]).

[109] The obligation also, according to the Court of Appeal, violated Article 14 of the Convention, which deals with discrimination in the protection of convention rights. European Convention note 64, art. 14.

[110] Lords Nicholls and Scott.

[111] Lords Hope, Hobhouse, and Rodger.

shall not try to say anything about the possible advantages to the United States of a change of heart, but in the case of the United Kingdom, there can be no doubt of the advantages which accrue to us from membership of the Council of Europe and of the European Union, though both may also come with costs. In reality, Strasbourg decisions have in the main done us no harm, and this is especially true over the right of property. One particular advantage in my mind is that international supervision has to some degree had the consequence that the democratic institutions of my country are no longer wholly at the mercy of our prime ministers. Being myself no great admirer of Mr. Blair or his successor Mr. Brown, nor of the current leader of the opposition, Mr. Cameron, I think this no bad thing, but that is a matter of politics and outside the scope of a lecture on the law.

May Religious Worship be Excluded from a Limited Public Forum? Commentary on the Ninth Circuit Court of Appeals Decision in *Faith Center Church Evangelistic Ministries v. Glover*

Norman T. Deutsch*

I. INTRODUCTION

The Supreme Court has struck down every attempt to exclude private religious speakers from limited public forums. In every such case that has reached it, the Court held that the particular exclusion at issue violated the First Amendment Speech Clause, and that the inclusion of religious speakers did not violate the First Amendment Establishment Clause.[1] Nonetheless, governments keep trying to exclude them.[2] *Faith Center Church Evangelistic Ministries v. Glover*[3] is a recent example. In *Glover*, a divided three judge panel in the Ninth Circuit Court of Appeals held that religious worship could constitutionally be excluded from a limited public forum.[4] This commentary analyzes the issues in *Glover* and explains why the result violated the First Amendment rights of the religious speaker.

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[1] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981); *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (similar result in the context of an open access forum); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (similar result in the context of a "limited open forum" under the Equal Access Act, 42 U.S.C. § 4071 (a)–(b) (2000)).

[2] *See* Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342 (2d Cir. 2003) (public school building); DeBoer v. Vill. of Oak Park, 267 F.3d 558 (7th Cir. 2001) (Village Hall); Gentala v. City of Tucson, 325 F. Supp. 2d 1012 (D. Ariz. 2003) (Civic Events Fund); Campbell v. St. Tammany Parish Sch. Bd., No. Civ.A.98-2605, 2003 WL 21783317 (E.D. La. July 30, 2003) (public school buildings); Moore v. City of Van, 238 F. Supp. 2d 837 (E.D. Tex. 2003) (community center); Daily v. N.Y. City Hous. Auth., 221 F. Supp. 2d 390 (E.D.N.Y. 2002).

[3] 462 F.3d 1194 (9th Cir. 2006) (panel decision).

[4] *See id.* at 1207–14. Throughout the opinion the speech at issue was sometimes described as "pure religious worship," other times as "mere religious worship." *See id.* at 1200, 1201 & n.6, 1209, 1210, 1211–12 & n.14, 1214.

II. THE *GLOVER* DECISION

In *Glover*, the County made its public library meeting rooms available to "'[n]on–profit and civic organizations, for–profit organizations, schools and governmental organizations' . . . for 'meetings, programs, or activities of educational, cultural or community interest.'"[5] However, the County also had a "Religious Use" policy that at the time of suit, barred the rooms use for "religious services."[6] Faith Center Church Evangelistic Ministries applied and received approval to use a library meeting room on two occasions for "Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage Salvation thru Jesus Christ and Build up Community."[7] Its advertising literature for the first meeting described it as a "Women of Excellence Conference" divided into morning and afternoon sessions.[8] The morning session was described as a "Wordshop" focusing on the topic "'The Making of an Intercessor,' an End-time call to Prayer for every Believer, and how to pray fervent, effectual Prayers that God hears and answers."[9] The afternoon session was described as a "'Praise and Worship' service with a sermon by Pastor Hopkins."[10] The first meeting occurred, but the County canceled the second one on the ground that Faith Center's meeting violated the religious use policy.[11]

Faith Center brought suit seeking injunctive relief arguing that the County's religious use policy violated the First Amendment on its face and as applied.[12] The County conceded at trial that Faith Center's morning "wordshop" could not be excluded.[13] It argued, however, that the afternoon session amounted to "mere religious worship" that "exceed[ed] the purpose for which the meeting room forum had been created."[14] Therefore its prohibition "was a permissible exclusion of a category of speech meant to preserve a limited public forum for its intended uses."[15]

The trial court rejected the County's argument. It held that Faith Center's exclusion violated the First Amendment Speech Clause because it was

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[5] *Id.* at 1198 (alteration in original) (quoting County's library meeting room policy).

[6] *Id.* at 1198–99. Two prior versions of the policy barred respectively the use of the meetings rooms "for religious purposes" and "for religious services or activities." *Id.* at 1198-99.

[7] *Id.* at 1199.

[8] *Id.*

[9] *Id.* (quoting Faith Center's advertising flyer).

[10] *Id.* (quoting Faith Center's advertising flyer).

[11] *Id.* at 1199–1200.

[12] *See id.* at 1200.

[13] *See id.*

[14] *Id.*

[15] *Id.*

viewpoint discriminatory, and that the First Amendment Establishment Clause did not provide a compelling reason for the exclusion.[16]

On appeal to the Ninth Circuit Court of Appeals, a divided three judge panel reversed.[17] Over Judge Tallman's vigorous dissent, Judge Paez, writing for himself and Judge Karlton, echoed the County's argument, and held that the exclusion of religious worship from the library meeting room was a reasonable viewpoint neutral constitutionally permissible exclusion of a category of speech from a limited public forum.[18] Because he concluded that the exclusion was permissible under the Speech Clause, Judge Paez did not address whether the Establishment Clause mandated the exclusion.[19]

A majority of the full Ninth Circuit denied a rehearing en banc.[20] However, Judge Bybee, writing for himself and six other judges, filed an opinion strongly dissenting from the denial.[21] He opined the that "[t]he panel majority's decision . . . disregarded equal–access cases stretching back nearly three decades, turned a blind eye to blatant viewpoint discrimination, and endorsed disparate treatment of different religious groups."[22]

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[16] *Id.* at 1200–01.

[17] *Id.* at 1214.

[18] *See id.* at 1204–14.

[19] However, both Judge Karlton in a separate concurring opinion and Judge Tallman in his dissenting opinion did address the issue. Both seemed to agree that under Supreme Court precedents, permitting Faith Center to use the meeting rooms would not violate the Establishment Clause, but their approaches were quite different. Judge Tallman reasoned from the precedents. *See id.* at 1226–27 (Tallman, J., dissenting). Judge Karlton, however, severely criticized Supreme Court jurisprudence insofar as it treats religious speech as constitutionally protected under the First Amendment Free Speech Clause. *Id.* at 1215–16 (Karlton, J., concurring). He opined that "religious speech is categorically different than secular speech and is subject to analysis under the Establishment and Free Exercise Clause without regard to the jurisprudence of free speech." *Id.* at 1215. He apparently thought that the Establishment Clause, properly interpreted, prevented the County from providing Faith Center "a free place to worship." *Id.* Nonetheless, he concluded that "as a subordinate judge, it [was his] duty to adhere to the precedent of the Supreme Court 'no matter how misguided.'" *Id.* at 1216 (quoting Hutto v. Davis, 454 U.S. 370, 375 (1982)). The Establishment Clause issue is discussed *infra* at notes 170–212 and accompanying text.

[20] Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 895 (9th Cir. 2007) (denial of en banc rehearing).

[21] *Id.* at 895–902 (Bybee, J., dissenting).

[22] *Id.* at 895. Many of the same issues that divided the judges in *Glover* have also divided the judges on the Second Circuit Court of Appeals. *See* Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89 (2d Cir. 2007); Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342 (2d Cir. 2003); Bronx Household of Faith v. Cmty. Sch. Dist., 127 F.3d 207 (2d Cir. 1997), *overruled in part by* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001). For commentary on the *Bronx Household* litigation, see Kevin Fiet, Comment, *The Bronx Household of Faith: Looking at the Unanswered Questions*, 2007 BYU EDUC. & L.J. 153 (2007); Ralph D. Mawdsley, *Religious Worship in Public School Facilities: New York's Section 414*

III. FAITH CENTER'S RIGHTS UNDER THE FIRST AMENDMENT SPEECH CLAUSE

There is no question that religious speech, including religious worship, is constitutionally protected speech within the meaning of the First Amendment Speech Clause.[23] That fact alone, however, does not give religious or other speakers the right to use government property for speech purposes.[24] Instead, the right to exercise First Amendment protected speech rights on government property is governed by Supreme Court created categorical rules collectively known as the public forum doctrine.[25] Under this construct there is no right to use such property for speech purposes unless the property qualifies as a traditional public forum—streets, sidewalks, and parks that are generally open and available to the public—or unless the government intentionally opens its property for speech purposes.[26] If the government chooses, however, it may make its property an open access forum that is generally available for all speakers and topics.[27] In the alternative, the government may make its property a restricted access forum that is available only for certain speakers and topics.[28]

The County purported to create a type of restricted access forum known as a limited public forum.[29] The policy on its face did not make the library meeting rooms generally available for all speakers and topics; rather, it made them generally available only for "[n]on–profit and civic organizations, for–profit organizations, schools and governmental organizations . . . for meetings,

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and Closing the Gap Between Free Speech and the Establishment Clause, 178 W. EDUC. L. REP. 19 (2003). For commentary on both *Bronx Household* and *Glover*, see John Tyler, Comment, *Is Worship a Unique Subject or Way of Approaching Many Different Subjects?: Two Recent Decisions that Attempt to Answer This Question Set the Second and Ninth Circuits on a Course Toward State Entanglement with Religion*, 59 MERCER L. REV. 1319 (2008).

[23] Widmar v. Vincent, 454 U.S. 263, 269 (1981).

[24] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

[25] For background on the public forum doctrine, see Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 ST. JOHN'S L. REV. 107 (2008).

[26] *See Perry*, 460 U.S. at 45–46.

[27] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech . . . ."). Such a forum is "the functional equivalent of a traditional public forum." G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 958 (1991).

[28] *See Cornelius*, 473 U.S. at 802 ("[A] public forum may be created by government designation of a place or channel of communication for use by . . . certain speakers, or for the discussion of certain subjects.").

[29] *See Perry*, 460 U.S. at 46 n.7 ("A public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects.") (citations omitted).

programs or activities of educational cultural or community interest."[30] The language of inclusion was so broad, however, that it could be argued that the forum was generally available for all speakers and topics. Indeed, the Court has said that there is "considerable force" to the argument that such broad language creates an open access forum, but it has so far not found it necessary to decide the issue.[31] Nonetheless, Judge Paez held that the school's "policy and practice" as well as the nature of a library made it "clear" that the County intended to create a limited public forum, not an open access forum.[32]

Even if Judge Paez was correct that the County only created a restrictive access limited public forum, the exclusions must still meet First Amendment standards. This requires that viewpoint neutral exclusions be reasonable.[33] Exclusions that are impermissibly content or viewpoint discriminatory, however, are subject to strict scrutiny.[34] The essence of Judge Paez's holding was that the exclusion met these standards. He reasoned that the County's religious use policy was a constitutionally permissible content discriminatory "blanket exclusion" of subject matter that defined the parameters of the limited public forum.[35] Consequently, Faith Center's afternoon "praise and worship [service] . . . exceeded the boundaries of the library's limited forum."[36] The exclusion was therefore constitutional because it was viewpoint neutral and reasonable.[37]

Judge Paez's analysis is faulty in two fundamental respects. The first is his assumption that the content based exclusion in this case was constitutionally permissible. The second is his conclusion that the exclusion was not viewpoint discriminatory.

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[30] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1198 (9th Cir. 2006) (panel decision) (alteration in original) (quoting County's library meeting room policy).

[31] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387, 391–92 (1993). The school district made its public school facilities broadly available to members of the public for "social, civic, and recreational use." *Id.* at 396.

[32] *See Glover*, 462 F.3d at 1204–06.

[33] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (stating the principle).

[34] *See Lamb's Chapel*, 508 U.S. at 391–95 (finding that the exclusion at issue was viewpoint discriminatory and that the Establishment Clause did not provide a compelling justification) (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)); Widmar v. Vincent, 454 U.S. 263, 269–78 (1981) (applying strict scrutiny to a content based exclusion).

[35] *See Glover*, 462 F.3d at 1211.

[36] *Id.* at 1210 (internal quotations omitted).

[37] *See id.* at 1206–14.

A. Prohibiting Faith Center's "Praise and Worship Service" Was a Content Based Exclusion That Should Have Been Subject to Strict Scrutiny

The principal issue that divided the Judges and the parties in *Glover* was whether Faith Center's exclusion was viewpoint neutral or viewpoint discriminatory.[38] Apart from that issue, however, it appears that the prohibition was an impermissible content based exclusion of subject matter that was otherwise within the scope of the forum; not, as Judge Paez asserted, a permissible content-based exclusion of subject matter that was outside of its scope. Consequently, the exclusion should have been subject to strict scrutiny even if it was viewpoint neutral.

1. Content based exclusions of subject matter otherwise within the boundaries of a limited public forum are subject to strict scrutiny

There should be no doubt that content-based exclusions of speakers and topics that are otherwise within the boundaries of a limited public forum are subject to strict scrutiny.[39] Indeed, the Court specifically reached that conclusion twenty–eight years ago in a case raising the very same point at issue in *Glover*—the exclusion of religious worship from a limited public forum.

In *Widmar v. Vincent*, a university created a limited public forum[40] when it made "its facilities generally available for the activities of registered student groups."[41] The University, however, denied access to such a group that wanted "to use the facilities for religious worship and religious discussion."[42] Justice Powell, writing for seven members of the Court, found that the exclusion was

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[38] The majority panel held that the exclusion was viewpoint neutral. *Id.* at 1207–14. However, the trial judge, Judge Tallman, in his dissent, and Judge Bybee in his dissent from the denial of a rehearing, found that the exclusion was viewpoint discriminatory. *See id.* at 1200–01; *see also id.* at 1222–26 (Tallman, J., dissenting); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 895–902 (9th Cir. 2007) (Bybee, J., dissenting) (denial of en banc rehearing).

[39] *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677, 678–79 (1998) (using the limited public forum case Widmar v. Vincent, 454 U.S. 263 (1981), as an example of a designated public forum). The *Forbes* court noted that "[i]f the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Id.* at 677; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983). In discussing limited public forums the court explained that "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Id.* at 46.

[40] *Widmar*, 454 U.S. at 271–72 (referring to the property as a limited public forum).

[41] *Id.* at 264–65.

[42] *Id.* at 265. The exclusion was made pursuant to a regulation that "prohibit[ed] the use of University buildings or grounds 'for purposes of religious worship or religious teaching.'" *Id.* (quoting University's regulation).

based on the religious content of the group's speech.[43] Consequently, he held, without at all mentioning viewpoint, that to justify the exclusion, the University had to "show that its regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."[44] The University failed to meet this standard because neither the Establishment Clause nor the state constitution provided a compelling reason for the exclusion.[45]

Judge Paez cited and discussed *Widmar*, but only for other propositions.[46] He ignored the main point of the case that a content based exclusion of religious worship that is otherwise within the scope of a limited public forum is subject to strict scrutiny.

Judge Paez did not deny that Faith Center's exclusion was content based. To the contrary, he went out of his way to emphasize that it was in fact a content based discrimination of subject matter, not viewpoint.[47] In partial support of this position, he cited *Boos v. Barry*[48] as example of a case that "exemplifies the difficulty of identifying whether a regulation excludes an entire category of speech or restricts a prohibited viewpoint."[49] *Boos* involved the constitutionality of a statute that made it "unlawful" to, among other things, "'display'... signs tending to bring a foreign government into public odium or public disrepute, such as signs critical of a foreign government or its policies" "within 500 feet of... any foreign... embassy."[50] According to Judge Paez, a plurality of the Court found that the statute was viewpoint neutral because it "excluded [the] entire category of speech [against foreign governments] without regard to any particular foreign government or criticism."[51]

However, just as he did with respect to *Widmar*, Judge Paez discussed *Boos* selectively. He failed to mention that although a plurality of the Court found the statute viewpoint neutral, a majority that included the plurality also held that statute was a content based restriction of political speech in a public forum that was therefore subject to strict scrutiny.[52]

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[43] *Id.* at 269–70.

[44] *Id.* at 270.

[45] *See id.* at 270–76.

[46] *See* Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1202, 1212–13 (9th Cir. 2006) (panel decision) (citing *Widmar* for the proposition that the First Amendment protects religious speech, and discussing the analysis therein on the issue of whether religious worship can be distinguished from other types of religious speech).

[47] *See id.* at 1207–11.

[48] 485 U.S. 312 (1988).

[49] *Glover*, 462 F.3d at 1208.

[50] *Boos*, 485 U.S. at 316 (quoting D.C. CODE ANN. § 22-1115 (LexisNexis 1981)) (internal citation marks omitted).

[51] *Glover*, 462 F.3d at 1208.

[52] *See Boos*, 485 U.S. at 321 (plurality opinion); *id.* at 334 (Brennan & Marshall, JJ., concurring).

The only authority that Judge Paez cited, that even arguably supports his position, that the prohibition of Faith Center's "'Praise and Worship' service" was a constitutionally permissible content based subject matter exclusion, is dictum in *Rosenberger v. Rector & Visitors of University of Virginia*.[53] In *Rosenberger*, a university created what the Court assumed was a limited public forum[54] when it made funds generally available to certain student groups to cover the cost of printing student-run publications.[55] Ultimately, a majority of the Court held that the denial of funds to a student-run publication that had a religious point of view was viewpoint discriminatory.[56] In the course of his majority opinion, however, Justice Kennedy said that:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purpose of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.[57]

This dictum does not support Judge Paez's holding to the effect that the exclusion of Faith Center's afternoon "'Praise and Worship' service with a sermon by Pastor Hopkins"[58] was a constitutionally permissible content based subject matter exclusion that defined the scope of the forum. Justice Kennedy did not say that content discrimination from a limited public forum *is* constitutionally permissible. To the contrary, in the previous paragraph he specifically stated the general rule that "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys" and that such "[d]iscrimination against speech because of its message is presumed to be unconstitutional."[59] What Justice Kennedy did say in his dictum, however, was that content discrimination *may be* permissible *if* it preserves the purpose of the limited public forum.

The facts of *City of Madison Joint School District v. Wisconsin Employment Relations Commission*[60] illustrate the distinction that Justice Kennedy was making between "content" discrimination that may be permissible and content discrimination that is impermissible. In *Madison*, a school board created a limited public forum when it made its school board meetings generally open to

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[53] 515 U.S. 819 (1995).

[54] *See id.* at 829.

[55] *See id.* at 824.

[56] *See id.* at 831.

[57] *Id.* at 829–30.

[58] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1199 (9th Cir. 2006) (panel decision) (quoting Faith Centers' advertisement flyer).

[59] *Rosenberger*, 515 U.S. at 828.

[60] 429 U.S. 167 (1976).

the public for the discussion of school board business.[61] Accordingly, it could exclude speakers who wished to speak on other topics. Such exclusion, of course, would have the incidental effect of "discriminating" against the content of the excluded speaker's message. However, the whole point of limited public forums is that the government has the discretion to define the scope of speakers and topics that are permitted in such forums.[62] Consequently, the exclusion of subjects that went beyond the scope of school board business would be constitutionally permissible because such "content discrimination" would preserve the forum for its intended purpose.[63]

On the other hand, government may not engage in content discrimination against a subject matter, otherwise within the boundaries of a limited public, "because of [agreement or] disagreement"[64] or "hostility—or favoritism—towards the underlying message expressed."[65] For example, on the actual facts of *Madison*, the state's Employment Relations Board ordered the school board to prohibit teachers in the district from speaking at the meetings "on matters subject to collective bargaining," but that were otherwise within the scope of the forum.[66] Since the excluded teachers wanted to speak on includable subjects, the exclusion obviously was not designed to preserve the forum for its intended purpose. Instead, the exclusion was based on the theory that such speech amounted to "negotiation" that might "undermine the bargaining exclusivity guaranteed the majority union."[67] In other words, the exclusion was based on nothing more than hostility towards the content of the excluded teachers' speech on a subject that was otherwise within the scope of the forum. Consequently, the Court had no trouble finding that the exclusion was impermissibly content based.[68]

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[61] *Id.* at 174 n.6. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983) (describing *Madison* as a limited public forum "for the discussion of certain subjects").

[62] *See supra* notes 28-29 and accompanying text.

[63] *See Rosenberger*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

[64] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (internal quotation marks omitted).

[65] R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

[66] *See Madison*, 429 U.S. at 173–75. The Court noted that "any citizen could have presented precisely the same points and provided the board with the same information as [the teachers]." *Id.* at 175.

[67] *Id.* at 173.

[68] *See id.* at 176 ("Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.").

The exclusion in *Glover* was not a constitutionally permissible "content" based subject matter limitation that defined the scope of the forum. Instead, for the reasons discussed below, it was, as in *Madison*, a constitutionally impermissible content exclusion of speech otherwise within the scope of the forum that was based on disagreement with, and hostility towards, the underlying message expressed. Accordingly, the exclusion should have been subject to strict scrutiny.

2. Limited public forums are defined by their inclusions

Judge Paez held that Faith Center's afternoon service "exceeded the boundaries of the library's limited [public] forum."[69] He reached this result largely by defining the scope of the forum in terms of both its inclusions and exclusions. He viewed the forum as one that was generally available "for 'meetings, programs, or activities of educational, cultural or community interest,'" but not "religious services."[70] There is some support in Supreme Court dissenting opinions for this approach.[71] However, a majority of the Court has consistently defined the scope of limited public forums by their inclusions, without regard to their exclusions.[72]

For example, recall that in *Rosenberger v. Rector & Visitors of University of Virginia*,[73] the university created a limited public forum[74] when it made funds generally available to certain student groups to cover the cost of printing student run publications.[75] However, the funding guidelines prohibited funding for "'religious activit[ies]' . . . defined as any activity that 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'"[76] Applying these guidelines, the university denied funding to a student run publication that "was established '[t]o publish a magazine of philosophical and religious expression,' '[t]o facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints,' and '[t]o provide a unifying focus for Christians of multicultural backgrounds.'"[77]

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[69] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1210 (9th Cir. 2006) (panel decision).

[70] *Id.* at 1198–99, 1210–11 (quoting County's library meeting room policy) (internal quotation marks omitted).

[71] *See infra* notes 73–88 and accompanying text.

[72] *See infra* notes 73–106 and accompanying text.

[73] 515 U.S. 819 (1995).

[74] *Id.* at 829.

[75] *See id.* at 823–25.

[76] *Id.* at 825 (quoting Petition for Writ of Certiorari app. at 66a, *Rosenberger*, 515 U.S. 819 (No. 94-329)).

[77] *Id.* at 825–26 (quoting Petition for Writ of Certiorari, *supra* note 76, app. 67).

Justice Souter, writing for four members of the Court in dissent, viewed the exclusion as a subject matter limitation that defined the scope of the forum.[78] He noted that the funding guidelines "simply deny funding for hortatory speech that 'primarily promotes or manifests' any view on the merits of religion; they deny funding for the entire subject matter of religious apologetics."[79] The majority, however, did not consider the exclusion to be part of the definition of the forum's boundaries. To the contrary, they considered the exception for religious activities to be an unconstitutional exclusion of subjects that were "otherwise within" the scope of the forum.[80]

Similarly, in *Good News Club v. Milford Central School*[81] the Court assumed that a school district created a limited public forum[82] when it made its public school facilities generally available to members of the public "for 'instruction in any branch of education, learning or the arts'" and "for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community.'"[83] The district "interpret[ed] its [use] policy to permit discussions of subjects such as child rearing, and of 'the development of character and morals from a religious perspective.'"[84] Nonetheless, the policy also provided that the facilities could not be used for "religious purposes."[85] Under this policy, the district denied a Christian children's club access to the forum "for the purpose of conducting religious instruction and Bible study."[86] In their dissents, both Justice Stevens and Justice Souter, joined by Justice Ginsburg, defined the scope of the forum by its exclusions. The former characterized the club's activities as religious proselytizing that was outside the boundaries of the forum under the exclusion for religious purposes.[87] The latter agreed with Justice Stevens' analysis, but he also thought that the club's activities were outside the scope of the forum, under the religious purposes exclusion, because they also involved religious worship.[88]

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[78] *See id.* at 892–99 (Souter, J., dissenting).

[79] *Id.* at 896.

[80] *Id.* at 831, 837 (majority opinion).

[81] 533 U.S. 98 (2001).

[82] *Id.* at 106.

[83] *Id.* at 102 (quoting Petition for Writ of Certiorari app. at D1, *Good News Club*, 533 U.S. 98 (No. 99-2036)).

[84] *Id.* at 108 (quoting Brief for Appellee at 6, *Good News Club*, 533 U.S. 98 (No. 98-9494) (CA2)).

[85] *Id.* at 103 (quoting Petition for Writ of Certiorari, *supra* note 83, app. at D2) (internal quotation marks omitted).

[86] *Id.* at 104 (quoting Brief for Appellee, *supra* note 84, app. at A56) (internal quotation marks omitted).

[87] *Id.* at 132–33 (Stevens, J., dissenting).

[88] *See id.* at 135–39 (Souter, J., dissenting).

The majority, however, did not define the forum's scope based on the religious purpose exclusion. Instead, they defined the scope of the forum based on its inclusions. Justice Thomas conceded that "Justice Souter's recitation of the Club's activities [was] accurate."[89] Nonetheless, he held that despite "any evangelical message it convey[ed],"[90] the Club fell within the scope of the forum's inclusions because it sought "to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint."[91]

The Court also defined the scope of the forum by its inclusions in *Lamb's Chapel v. Center Moriches Union Free School District.*[92] In *Lamb's Chapel*, which involved the same statutory scheme as in *Good News Club*, a school district made its facilities generally available to members of the public for "social, civic, or recreational uses."[93] The access policy, however, prohibited "use[] by any group for religious purposes."[94] Pursuant to the policy, the district prohibited a church from using the facilities to show a film on "family and child-rearing issues" from a religious perspective.[95] The Court did not define the scope of the forum by its "religious purposes" exclusion. Instead, it defined the scope of the forum by its inclusion "for social or civic purposes."[96] It held that even though the film had a religious point of view, it dealt with a subject that the access policy otherwise permitted.[97]

Additionally, in *City of Madison Joint School District v. Wisconsin Employment Relations Commission*[98] the school board created a limited public forum when it opened its meetings to the public for school board business.[99] The state's Employment Relations Board ordered the school board to prohibit teachers in the district from speaking at the meetings "on matters subject to collective bargaining between [the school board and the teachers]."[100] Again, however, the Court defined the parameters of the forum by its inclusions, generally available for school board business, not by its exclusion, generally

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[89] *Id.* at 112 n.4 (majority opinion).

[90] *Id.*

[91] *Id.* at 109.

[92] 508 U.S. 384 (1993).

[93] *Id.* at 387 (citing N.Y. EDUC. LAW § 414 (McKinney 1988 & Supp. 1993)).

[94] *Id.* (quoting N.Y. EDUC. LAW. § 414) (internal quotation marks omitted).

[95] *Id.* at 387; *see also id.* at 393–94.

[96] *Id.* at 393.

[97] *Id.* at 393–94.

[98] 429 U.S. 167 (1976).

[99] *Id.* at 174 & n.6. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983) (describing *Madison* as a limited public forum "for the discussion of certain subjects").

[100] *Madison*, 429 U.S. at 173 (quoting Wisconsin Employment Relations Commission Hearing) (internal quotation marks omitted).

available for school board business except matters subject to collective bargaining.[101]

Finally, in *Widmar v. Vincent*,[102] the university created a limited public forum[103] when it made "its facilities generally available for the activities of registered student groups."[104] The use policy, however, "prohibit[ed] the use of University buildings or grounds 'for purposes of religious worship or religious teaching.'"[105] Again, the Court defined the limited public forum by its inclusions, generally available to student groups, not by its exclusion, generally available to student groups except those who wish to engage in religious worship and teaching.[106]

The principle that the scope of a limited public forum is defined by its inclusions, not by its exclusions, is analogous to rules that apply with respect to procedural due process. The government has the discretion whether to create constitutionally protected property interests. Once a property interest is created, however, it is the Constitution, not the government regulations, that determines the procedures required for its deprivation.[107]

Similarly, the government has the discretion to decide what speakers and subjects are permitted in a limited public forum.[108] However, once the

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[101] *Id.* at 175 (noting that "the State [had] opened [the] forum for direct citizen involvement").

[102] 454 U.S. 263 (1981).

[103] *Id.* at 271–72 (referring to the property as a limited public forum).

[104] *Id.* at 264-65.

[105] *Id.* at 265 (quoting University Regulation No. 4.0314.0107).

[106] *Id.* at 267 (holding that "[t]hrough its policy of accommodating their meetings, the University has created a forum generally open for use by student groups").

[107] The principal case is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). There, a state statute granted classified civil service employees a property interest in continued employment when it provided that they were "entitled to retain their positions 'during good behavior and efficient service,'" and "could not be dismissed 'except . . . for . . . misfeasance, malfeasance, or nonfeasance in office.'" *Id.* at 538–39 (quoting OHIO REV. CODE ANN. § 124.34 (LexisNexis 1984). The statute also provided procedures for removal. *Id.* at 539. Two dismissed employees brought suit arguing that the statute "was unconstitutional on its face because it provided no opportunity for a discharged employee to respond to charges against him prior to removal." *Id.* at 532. The government argued that employees' "property right [was] defined by, and conditioned on, the legislature's choice of procedures for its deprivation." *Id.* at 539. The Court rejected the government's argument. It held that "'[p]roperty' cannot be defined by the procedures provided for its deprivation." *Id.* at 541. Instead, "[t]he right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'" *Id.* (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell J., concurring in part and concurring in the result in part)). Those safeguards are found in the Constitution, not the state statute. *See id.*

[108] *See supra* note 28 and accompanying text.

inclusions are set, the Constitution, not government regulations, determines the propriety of exclusions.

3. Faith Center's "Praise and Worship service" fell within the scope of the forum's inclusions

The County included within the scope of its forum use by "'[n]on–profit and civic organizations, for–profit organizations, schools and governmental organizations' . . . for 'meetings, programs, or activities of educational, cultural or community interest.'"[109] As both Judge Tallman, in his dissent from the panel decision, and Judge Bybee, in his dissent from the denial of a rehearing en banc, pointed out, surely Faith Center's "'Praise and Worship' service" fell within this broad language of inclusion.[110] At the very least it was an "organization" that wanted to use the library meeting room for an "activity" (if not also a "program") of "community interest" (if not also of "educational and cultural interest").

Judge Paez did not deny that religious worship was an activity of community interest. Instead, he asserted that the relationship between religious worship and such activity was "tenuous[]" and that "[a]lthough religious worship is an important institution in any community, we disagree that anything remotely community–related must therefore be granted access to the Antioch Library meeting room."[111] However, quite the opposite is true. The County was not constitutionally required to open its library meeting rooms for community activities. Once it did, however, it was constitutionally bound to "respect the lawful boundaries it has itself set."[112] Thus, unless Judge Paez was prepared to say that religious worship was not a community activity, which he did not do, he was quite wrong when he held that Faith Center's "'Praise and Worship' service" did not fall within the scope of the forum.

4. Faith Center's exclusion was content based

Since Faith Center's "'Praise and Worship' service" fell within the forum's inclusions, its exclusion was not a constitutionally permissible "content" subject matter limitation that defined the scope of the forum. Instead, it was a constitutionally impermissible content based exclusion of subject matter that was otherwise within the boundaries of the forum. Consequently, the exclusion

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[109] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1198 (9th Cir. 2006) (panel decision) (alteration in original) (quoting County's library meeting room policy).

[110] *See id.* at 1217 (Tallman, J., dissenting); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 896 (9th Cir. 2007) (Bybee, J., dissenting) (denial of en banc rehearing).

[111] *Glover*, 462 F.3d at 1211 & n.14.

[112] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

fell within the general rule that "the government may not regulate speech based on its substantive content or the message it conveys," and that "[d]iscrimination against speech because of its message is presumed to be unconstitutional."[113] Indeed, in every case where the government excluded speech, including religious prayer, that otherwise fell within the scope of a limited public forum, the Court struck down the exclusion.[114] The same result should have obtained in this case.

There is no doubt that the exclusion of Faith Center's "'Praise and Worship' service" was impermissibly content based. Judge Paez gave two justifications for the exclusion, both of which he characterized as "reasonable."[115] First, it was designed to prevent the library meeting room from being "transformed into an occasional house of worship."[116] In this regard, he quoted Justice Souter's dissent in *Good News Club* for the proposition that to permit "religious worship services . . . [in] government buildings . . . would result in the 'remarkable proposition that any public [building] opened for civic meetings must be opened for use as a church, synagogue, or mosque.'"[117]

The problem with this reasoning is that it is directly attributable to the content of the speech. In so far as the First Amendment speech clause is concerned,[118] it evidences nothing more than the government's disagreement with, and outright hostility toward, the exercise of religious services in the limited forum.[119] Consequently, it demonstrates that the exclusion was constitutionally impermissible "[d]iscrimination against speech because of" "its substantive content [and] the message it conveys."[120]

The second justification Judge Paez gave for the exclusion was to prevent "controversy and distraction of religious worship within the Antioch Library meeting room [that might] alienate patrons and undermine the library's purpose of making itself available to the whole community," and "interfere with the library's primary function as a sanctuary for reading, writing, and quiet

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[113] *Id.* at 828.

[114] *See id.* (denying funds to student group with a religious point of view); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111 (2001) (denying access to public school buildings for "quintessentially religious" and "decidedly religious" speech); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (similar); Widmar v. Vincent, 454 U.S. 263 (1981) (denying access to university meeting facilities for religious worship and discussion); City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976) (prohibiting teachers from speaking at school board meeting).

[115] *See Glover*, 462 F.3d at 1206-07.

[116] *Id. at 1206.*

[117] *Id.* (quoting *Good News Club*, 533 U.S. at 139 (Souter, J., dissenting)).

[118] The constitutionality of the use of a limited public forum for religious services under the Establishment Clause is discussed *infra* at notes 170–212 and accompanying text.

[119] *See supra* notes 64–65 and accompanying text.

[120] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

contemplation."[121] These reasons, however, cannot support the exclusion. First of all, as a factual matter, it is doubtful that Faith Center's service would cause alienation, controversy, or distraction. The service was to be held behind closed doors,[122] and "[t]he County [did] not argue that excessive noise was a problem."[123] In any event, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[124]

More importantly, however, these reasons too are directly related to the content of the speech. Listeners' reaction to speech is not a content neutral basis of regulation; instead, it is a type of content based restriction that is subject to strict scrutiny.[125] Indeed one of the underlying purposes why a democratic society needs the First Amendment is to protect speech that causes alienation and controversy.[126]

Furthermore, the County had permitted a variety of groups to use the meeting rooms. These "include[ed] the Sierra Club for purposes of letter writing, Narcotics Anonymous for a recovery meeting, and the East Contra Costa Democratic Club to 'let people learn about Democratic candidates and issues.'"[127] The County was thus not at all concerned about any alienation, controversy, and distraction that might be engendered by the meeting room's use by "liberal" environmentalists, former drug users, and democrats. The fact that they were only concerned with alienation, controversy, and distraction with respect to Faith Center's "'Praise and Worship' service" illustrates again that the County discriminated against Faith Center's speech because of disagreement with and hostility towards its religious content.

In addition to disagreement with and hostility towards its religious content, there is yet another reason why the exclusion of Faith Center's "'Praise and Worship' service" should have been analyzed as the type of content based discrimination that is subject to strict scrutiny. The County and Judge Paez conceded that a large variety of religious speech, other than religious worship, would be permitted in the library meeting room. These include "workshop[s] . . . devoted to . . . how to communicate effectively with one's God," as well as other activities such as "discussing the Bible and other religious books[,] . . . teaching, praying, singing, sharing testimonies, sharing meals, and discussing

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[121] *Glover*, 462 F.3d at 1207.

[122] *Id.* at 1226 (Tallman, J., dissenting).

[123] *Id.* at 1200 n.1 (majority opinion).

[124] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

[125] *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) (plurality opinion) (foreign diplomat's reaction to picketing); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–12 (1975) (public's reaction to offensive speech).

[126] *See* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (stating that "a function of free speech under our system of government is to invite dispute").

[127] *Glover*, 462 F.3d at 1204 (quoting County's use policy).

social and political issues."[128] However, in excluding religious worship from the list of permissible religious uses in the forum, the County took it upon itself to decide what "ideas and beliefs [are] deserving of expression."[129] This "contravenes th[e] essential right . . ." "[a]t the heart of the First Amendment . . . that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[130] Consequently, such content based regulations are subject to "the most exacting scrutiny."[131]

B. The Religious Use Policy Was Also Viewpoint Discriminatory

The County not only impermissibly discriminated against Faith Center's "'Praise and Worship' service" based on its religious content, but it also impermissibly discriminated against it based on its viewpoint. As the Court has explained, viewpoint discrimination is "a subset or particular instance of" [132] and "an egregious form of content discrimination."[133] "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[134] Consequently, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[135]

Judge Paez asserted that the "test" of determining viewpoint discrimination "is whether the government has excluded perspectives on a subject matter otherwise permitted by the forum."[136] He concluded that the exclusion of Faith Center's afternoon "'Praise and Worship' service" was not viewpoint discriminatory under this test.[137] His basic reasoning was that the afternoon session amounted to "pure religious worship," and that pure religious worship is different from other types of religious speech because it "is not a *secular* activity that conveys a religious viewpoint on otherwise permissible subject matter."[138]

There are two fundamental problems with Judge Paez's reasoning. First of all, he did not even apply the rule he stated. There is no question that government engages in viewpoint discrimination when it excludes a perspective

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[128] *Id.* at 1210 (internal quotation marks omitted).

[129] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

[130] *Id.*

[131] *Id.* at 642.

[132] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995).

[133] *Id.* at 829. Although viewpoint discrimination is a subset of content discrimination, the latter can exist without the former. *See* Deutsch, *supra* note 25, at 134–35.

[134] *Rosenberger*, 515 U.S. at 829.

[135] *Id.*

[136] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1208 (9th Cir. 2006) (panel decision).

[137] *Id.* at 1208–14.

[138] *Id.* at 1210 (emphasis added).

on a subject otherwise within the scope of a limited public forum.[139] In applying the rule, however, Judge Paez suggested that the government engages in viewpoint discrimination only when it excludes *secular* activities that convey a religious viewpoint. This is not the law. The fact is that the government also engages in such discrimination when it excludes religious activities that convey a religious viewpoint on an includable subject. For example, in *Good News Club*, where a majority found that the government had excluded a religious perspective on an includable subject,[140] all of the Justices agreed that the claimant was engaged in religious activities.[141]

The second problem is Judge Paez's assumption that "pure religious worship" can be separated from other religious activities because it does not express a viewpoint. Judge Paez based this supposition in large measure on language in Justice Thomas' majority opinion in *Good News Club*. Recall that in that case the school district, as in the instant case, made its property generally available to members of the public for a variety of activities including "instruction in any branch of education, learning or the arts," and "for 'social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community.'"[142] The school district "interpret[ed] its policy to permit discussions of subjects such as child rearing, and of 'the development of character and morals from a religious perspective.'"[143] However, it denied Good News Club access to the facilities on the ground that "the kinds of activities . . . engaged in by the . . . Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself."[144]

Justice Souter, in his dissent, "characterized" the Club's activities as "proselytizing" with "elements of worship."[145] As he saw it, the Club "intend[ed] to use the . . . premises . . . for an evangelical service of worship calling children to commit themselves in an act of Christian conversion."[146] In response, Justice Thomas, writing for the majority, conceded in a footnote that

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[139] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001) (holding "that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint").

[140] *Id.* at 109–12.

[141] *See id.* at 112 n.4; *id.* at 130–34 (Stevens, J., dissenting); *see also id.* at 134–39 (Souter, J., dissenting).

[142] *Id.* at 102 (majority opinion) (quoting Petition for Writ of Certiorari, *Good News Club*, *supra* note 83, app. at D1).

[143] *Id.* at 108 (quoting Brief for Appellee, *supra* note 84, at 6).

[144] *Id.* at 103–04 (quoting Brief for the Appellee, *supra* note 84, app. A25).

[145] *Id.* at 139 n.3 (Souter, J., dissenting).

[146] *Id.* at 138.

"Justice Souter's recitation of the Club's activities [was] accurate."[147] However, he also said:

> Despite [the district's] insistence that the Club's activities constitute religious worship, the Court of Appeals made no such determination. It did compare the Club's activities to religious worship, but ultimately it concluded merely that the Club's activities fall outside the bounds of pure moral and character development. In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.[148]

Judge Paez seems to have read this as "dr[awing] a line" between "religious worship" and all other religious activities, and indicating that the Justice Thomas did not consider the former has having a "viewpoint from which ideas are conveyed."[149] He also opined that the language indicates that Justice Thomas thought that "pure religious worship was too tenuously associated to the forum's purpose."[150]

A more likely interpretation of what Justice Thomas was saying, however, is that even if the Club was engaged in religious worship, it was using religious worship to teach moral values which was within the scope of the forum. This interpretation makes the most sense since, as explained below, religious worship is inherently about morals and ethics from a religious perspective.[151] It is also supported by Justice Thomas' further statement that "we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys."[152] Indeed, even Judge Paez conceded that "[i]t is difficult to imagine . . . that religious worship could ever truly be divorced from moral instruction or character development."[153]

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[147] *Id.* at 112 n.4 (majority opinion).

[148] *Id.* (citations and internal quotations omitted).

[149] Faith Center Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1209 (9th Cir. 2006) (panel decision) (quoting *Good News Club*, 533 U.S. at 112 n.4) (internal quotation marks omitted). For an article criticizing treating religious worship as a separate category of speech, see Tyler, *supra* note 22, at 1360-69 (arguing that such a distinction creates uncertainty and risks entanglement with religion, and opining that the focus should be not on whether the speech at issue is worship but whether it falls within the scope of the forum).

[150] *Glover*, 462 F.3d at 1211-12 n.14.

[151] *See infra* notes 163–69 and accompanying text.

[152] *Good News Club*, 533 U.S. at 112 n.4.

[153] *Glover*, 462 F.3d at 1211 n.14. For cases holding that the religious activities at issue did not constitute mere religious worship divorced from the teaching of moral values, see Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 354 (2d Cir. 2003); Moore v. City of Van, 238 F. Supp. 2d 837, 847 (E.D. Tex. 2003); Campbell v. St. Tammany Parish Sch. Bd., No. Civ.A.98-2605, 2003 WL 21783317, at *9, (E.D. La. July 30, 2003). The issues involved in attempting to separate religious worship from the teaching of moral values were raised, but not answered in *Bronx Household*. *See Bronx Household*, 331 F.3d at 355.

There is some support for Judge Paez's position that religious worship can be separated from other religious speech in Supreme Court dissenting opinions. In his dissent in *Good News Club*, Justice Stevens, with whom Justice Souter in a separate dissent joined by Justice Ginsburg seemed to agree, opined that religious speech can be divided into three categories: (1) "speech about a particular topic from a religious point of view[;]" (2) "religious speech that amounts to worship, or its equivalent[;]" and (3) "proselytizing or inculcating belief in a particular religious faith."[154] In addition, in his dissent in *Widmar v. Vincent*, Justice White went so far as to argue that not only is religious worship distinguishable from speech about religion and religious beliefs, but also that the former is not even protected by the First Amendment Speech Clause.[155]

A majority of the Court, however, has rejected these arguments. In response to Justice White, Justice Powell, writing for the majority in *Widmar*, gave three reasons why religious worship cannot be distinguished constitutionally from other types of religious speech:

> First . . . the distinction has [no] intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," . . . cease to be "singing, teaching, and reading"—all apparently forms of "speech," despite their religious subject matter—and become unprotected "worship."
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> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.
>
> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.[156]

Justice Paez dismissed this language as "dicta that was not central to the Court's holding."[157] However, this rejection of Justice White's reasoning was essential to the holding. If Justice Powell had agreed with Justice White, he would have upheld the exclusion at issue instead of striking it down. Moreover, as Judge Bybee put it in his dissent from the denial of a rehearing,

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[154] *Good News Club*, 533 U.S. at 130 (Stevens, J., dissenting); *see also id.* at 138–39, 139 n.3 (Souter, J., dissenting) (agreeing with Justice Stevens).

[155] Widmar v. Vincent, 454 U.S. 263, 282–89 (1981) (White, J., dissenting).

[156] *Id.* at 269–70 n.6 (majority opinion) (citations omitted).

[157] *Glover*, 462 F.3d at 1212.

"[e]ven if *Widmar*'s express rejection of the panel majority's distinction [was] not dispositive, the distinction would still collapse under the weight of these three objections."[158]

In fact, Judge Paez all but conceded Justice Powell's second point involving unconstitutional entanglement with religion. He agreed that "[t]he distinction . . . between religious worship and virtually all other forms of religious speech . . . [is] one that the government and the courts are not competent to make."[159] Nevertheless, he insisted that distinction in this case was permissible because it was not made by either the County or the court. Instead, it was "made by Faith Center itself when it separated its afternoon religious worship service from its morning activities."[160] Thus, on Judge Paez's reasoning, whether religious worship is distinguishable from other religious activities turns not on the substance of the activities, but on the how they are described. Such a rule is devoid of meaning. As Judge Tallman pointed out in his dissent, the next religious group that wishes to use the forum is likely to choose its words more carefully.[161]

Furthermore, with respect to Justice Powell's other two points, Judge Paez's distinction between religious worship and other religious activities has no "intelligible content" or constitutional "relevance." Once again, Judge Paez conceded that it would be viewpoint discriminatory for the government to exclude a wide variety of religious speech, such as "discussing the Bible and other religious books . . . praying, singing, [and] sharing testimonies . . ." because "[t]hese activities convey a religious perspective on subjects that are or have been permitted in the Antioch Library meeting room."[162] But religious worship includes these exact same religious activities—praying and discussion of sacred texts, if not also singing and sharing testimonies. As Justice Powell said, there is simply no way from a constitutional perspective (whether by the courts, the government, or the claimant) to determine when such activities are protected and when they are not.

Moreover, Judge Paez's attempt to find a constitutional relevance for the distinction, on the theory that religious worship, unlike other religious activities, is a subject matter, not a viewpoint, is also flawed. One dictionary definition of religious worship is "[r]everence or veneration paid to a being or power regarded as supernatural or divine; the action or practice of displaying this by appropriate acts, rites, or ceremonies."[163] Such activities inherently

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[158] Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 899 (9th Cir. 2007) (Bybee, J., dissenting) (denial of en banc rehearing).

[159] *Glover*, 462 F.3d at 1214.

[160] *Id.*

[161] *Id.* at 1218 (Tallman, J., dissenting).

[162] *Id.* at 1210 (majority opinion) (internal quotation marks and citation omitted).

[163] Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 366 n.7 (2d Cir. 2003) (Miner,

have a viewpoint on the nature of the universe and human existence. The point of view expressed is that a supernatural being exists and that to live a moral and ethical life one needs to seek divine revelation and guidance. In addition, the "mere acknowledgement of a higher being or a person's dependence on such could of itself be considered a moral lesson."[164] The fact that such expression may be more symbolic than verbal creates no constitutional infirmity. Just as one has a First Amendment protected right to express a point of view on the nature of America by burning the American flag without having to say "I hate America,"[165] one has a First Amendment protected right to express a point of view on the nature of existence through religious worship without having to say "I believe there is a deity."

Furthermore, much of religious worship in fact involves verbalized points of view. As Judge Tallman pointed out in his dissent, "[i]t is difficult to imagine any religious service, no matter how traditional or nontraditional that does not include sermons, homilies or lessons directed at moral and ethical conduct or how one should live one's life."[166]

In any event, there seems no doubt that the exclusion of Faith Center's specific service was viewpoint discriminatory. Recall that the articulated purpose of the forum was use by "'[n]on–profit and civic organizations, for–profit organizations, schools and governmental organizations' . . . for 'meetings, programs, or activities of educational, cultural or community interest.'"[167] This would encompass discussions on everything from alcohol abuse to the Zephaniah, including such things as domestic relations and how to live life in a moral and ethical way.

Clearly, Faith Center's afternoon session sought to bring a religious viewpoint to these otherwise permissible subjects. It was described as a "'Praise and Worship' service with a sermon by Pastor Hopkins."[168] Again, as Judge Tallman cogently stated:

J., dissenting) (quoting OXFORD ENGLISH DICTIONARY 577 (2d ed. 1989)) (internal quotation marks omitted).

[164] Fiet, *supra* note 22, at 173.

[165] *See* Texas v. Johnson, 491 U.S. 397, 402–06 (1989). Of course, the government has a right to regulate conduct intended as speech, but any such regulation must be content neutral. *See id.* at 410–12 (holding that regulation at issue was "related to the suppression of free expression"). As previously explained, the exclusion in this case was impermissibly content discriminatory. *See supra* notes 113–31 and accompanying text.

[166] *Glover*, 462 F.3d. at 1224 (Tallman, J., dissenting) (alteration in original) (quoting Campbell v. St. Tammany Parish Sch. Bd., No. Civ.A.98-2605, 2003 WL 21783317, at *9 (E.D. La. July 30, 2003)) (internal quotation marks omitted).

[167] *Id.* at 1198 (majority opinion) (alteration in original) (quoting County's library meeting room policy).

[168] *Id.* at 1199 (quoting Faith Center's advertising flyer).

> Singing a religious song may very well be akin to singing about morality according to religious tenets. Praying is usually speech containing praise to a higher being, but may also contain personal characterizations of one's own life, wishes, hopes, or concerns. Pastor Hopkins's sermon is the clearest example of religious speech which expresses a viewpoint on otherwise permissible secular topics. One can imagine the variety of subject matter that could be included in a sermon money, family, love, or avoiding drugs and alcohol, to name a few. The list is endless.[169]

Thus, denying Faith Center access to the library meeting room for its "'Praise and Worship' service" prevented it from expressing a religious point of view on otherwise permissible subjects. Accordingly, the exclusion was impermissibly viewpoint as well as content discriminatory. It should, therefore, have been subject to strict scrutiny.

IV. THE ESTABLISHMENT CLAUSE

As just stated, because the exclusion of Faith Center's "'Praise and Worship' service with a sermon by Pastor Hopkins"[170] was both content and viewpoint discriminatory, it should have been subject to strict scrutiny. This would have required the County to "show that its regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."[171] In similar cases, governments have argued that "not violating the Establishment Clause" provides such an "interest."[172] A majority of the Court, however, has consistently rejected this argument.[173] Instead, they have effectively held that the government does not violate the Establishment Clause when private religious speakers, including those engaged in "religious worship"[174] and other "quintessentially religious" or "decidedly religious"[175] activities, are granted no more than equal access to limited public forums along with other nonreligious speakers.[176]

Widmar is again the foundation case. Recall that there, a university created a limited public forum when it made its meeting facilities generally available to

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[169] *Id.* at 1225–26 (Tallman, J., dissenting).

[170] *Id.* at 1199 (majority opinion) (quoting Faith Center's advertising flyer).

[171] Widmar v. Vincent, 454 U.S. 263, 270 (1981).

[172] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 (2001); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394–95 (1993) (similar); *Widmar*, 454 U.S. at 270 (similar).

[173] Indeed in his majority opinion in *Good News Club*, Justice Thomas questioned, but did not decide, whether even "avoiding an Establishment Clause violation would justify viewpoint discrimination." *Good News Club*, 533 U.S. at 113.

[174] *Widmar*, 454 U.S. at 265.

[175] *Good News Club*, 533 U.S. at 111 (internal quotation marks omitted).

[176] *See infra* notes 177–201 and accompanying text.

registered student groups, but denied access to such a group that wished to use them for "religious worship and religious discussion."[177] Applying the so-called "three-pronged test" in *Lemon v. Kurtzman*,[178] Justice Powell, writing for seven members of the Court, held that permitting such use would not violate the Establishment Clause. The university's forum policy had "a secular legislative purpose; . . . its principle or primary effect . . . neither advance[d] nor inhibit[ed] religion . . . [and it did] not foster an excessive entanglement with religion."[179]

Justice Powell reasoned that the university's secular purpose was "to provide a forum in which students could exchange ideas."[180] Furthermore, "an open forum in a public university . . . [that] is available to a broad class of nonreligious as well as religious speakers" "does not confer any imprimatur of state approval on religious sects or practices,"[181] and any "incidental benefits" that the latter receive "from access to University facilities . . . does not violate the prohibition against the 'primary advancement' of religion."[182] Additionally, he agreed with the lower court "that the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'"[183]

The Court followed *Widmar* in *Lambs Chapel v. Center Moriches Union Free School District*.[184] Remember that there the school district made its facilities generally available to members of the public for "social, civic, or recreational uses," but denied access to a church that wanted to show "for assertedly religious purposes, a film series dealing with family and child-rearing issues."[185] Justice White, writing for six members of the Court, held such use would not violate the Establishment Clause. He reasoned that:

> The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. As

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[177] *Widmar*, 454 U.S at 264–65, 271–72.

[178] 403 U.S. 602, 612-15 (1971).

[179] *Widmar*, 454 U.S. at 271 (quoting *Lemon*, 403 U.S. at 612–13) (internal quotation marks omitted).

[180] *Id.* at 271-72 n.10.

[181] *Id.* at 274.

[182] *Id.* at 273.

[183] *Id.* at 272 n.11 (citing Chess v. Widmar, 635 F.2d 1310, 1318 (8th Cir. 1980)).

[184] 508 U.S. 384 (1993).

[185] *Id.* at 387.

> in *Widmar*, permitting District property to be used to exhibit the film series involved in this case would not have been an establishment of religion under the three–part test articulated in *Lemon v. Kurtzman*: The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.[186]

The Court reached the same result in *Good News Club v. Milford Central School*.[187] Recall there the school district made its public facilities generally available to members of the public "for instruction in any branch of education, learning or the arts" and "for social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community."[188] Nonetheless, it denied access to a Christian children's club whose activities were described as "quintessentially religious," "decidedly religious,"[189] and "the equivalent of religious instruction itself."[190] Justice Thomas, writing for the majority held that such activities did not violate the Establishment because they were "materially indistinguishable from those in *Lambs Chapel* and *Widmar*."[191]

Justice Thomas found the district's attempt to distinguish those cases "unpersuasive."[192] The district argued that the case was different because it "involve[d] elementary school children . . . [who] will perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities take place on school grounds, even though they occur during nonschool hours."[193] In rejecting this argument Justice Thomas emphasized "that 'a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion.'"[194] He noted that in cases such as this, "the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints,

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[186] *Id.* at 395 (internal citations omitted). Three other Justices objected to the invocation of *Lemon*, but agreed that such use did not pose an Establishment Clause violation. *Id.* at 397 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 397–400 (Scalia, J., joined by Thomas, J., concurring in the judgment).

[187] 533 U.S. 98 (2001).

[188] *Id.* at 102 (quoting Petition for Writ of Certiorari, *Good News Club*, *supra* note 83, app. D2).

[189] *Id.* at 111.

[190] *Id.* at 108 (quoting Good News Club v. Milford Cent. Sch., 202 F.3d 502, 507 (2d Cir. 2000)).

[191] *Id.* at 113.

[192] *Id.* at 114.

[193] *Id.* at 113–14.

[194] *Id.* at 114 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995)).

including religious ones, are broad and diverse.'"[195] Here, "Good News Club [was] seek[ing] nothing more than to be treated neutrally and given access to speak about the same topics as are other groups."[196]

Justice Thomas also reasoned that children would not be coerced into joining the club because they needed their parent's permission to attend.[197] Furthermore, even if "elementary school children are more impressionable than adults [the Court has] never extended . . . Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present."[198] Additionally, the "circumstances . . . [did] not support the theory that small children would perceive endorsement[;]"[199] and, in any event, the Court could not "operate . . . under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity."[200] In the end he "decline[d] to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."[201]

The application of these precedents makes it clear that permitting "Faith Center's 'Praise and Worship' service" in the library meeting room would not have violated the Establishment Clause. The County opened its library meeting rooms for the secular purpose of providing a space for a wide variety of organizations to hold "meetings, programs, or activities of educational, cultural or community interest."[202]

Permitting religious worship in the forum would not have the primary effect of advancing religion. A limited public forum that "is available to a broad class of nonreligious as well as religious speakers," "does not confer any imprimatur of state approval on religious sects or practices,"[203] and any "incidental

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[195] *Id.* (quoting *Rosenberger*, 515 U.S. at 839).

[196] *Id.*

[197] *Id.* at 115.

[198] *Id.*

[199] *Id.* at 118. Among other things, Justice Thomas noted that "[t]here [was] no evidence that young children [were] permitted to loiter outside classrooms after the school day [had] ended;" the club met in a combined "high school resource" and "middle school special education room" instead of "an elementary school classroom;" "[t]he instructors [were] not schoolteachers;" "[a]nd the children in the group [were] not all the same age as in the normal classroom setting; their ages range[d] from 6 to 12." *Id.* at 117–18.

[200] *Id.* at 119.

[201] *Id.*

[202] Faith Ctr. Church Evangelistic Ministries v. Glover, 462 F.3d 1194, 1198 (9th Cir. 2006) (panel decision) (quoting County's library meeting room policy) (internal quotation marks omitted).

[203] Widmar v. Vincent, 454 U.S 263, 274 (1981).

benefits" that the latter receive "from access . . . does not violate the prohibition against the 'primary advancement' of religion."[204] Any "reasonable observer,"[205] familiar with the forum, would understand that in allowing religious worship the County was simply acting neutrally towards religion by "following neutral criteria and even handed policies."[206]

Furthermore, the service itself would be held behind closed doors,[207] and Faith Center's advertising literature made it clear that it, not the County, sponsored the service and that it was open to the public on a voluntary basis.[208] Consequently, "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed,"[209] or that anyone would be coerced into participating. And, of course, even if some unaccompanied child in the library might be misled as to the County's endorsement of religion, "a group's religious activity [cannot] be proscribed on the basis of what the youngest members of the audience might misperceive."[210]

Finally the application of an evenhanded neutral policy of access would "not foster an excessive entanglement with religion."[211] To the contrary, the County "would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship.'"[212]

V. CONCLUSION

Nothing that has been said in this commentary prevents the government from excluding religious worship or any other speech from public property. That,

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[204] *Id.* at 273.

[205] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 848 (1995) (O'Connor, J., concurring) (quoting Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring)).

[206] *Good News Club*, 533 U.S. at 114 (quoting *Rosenberger*, 515 U.S. at 839) (internal quotation marks omitted).

[207] *Glover*, 462 F.3d at 1226 (Tallman, J., dissenting).

[208] *Id.* at 1199 (majority opinion). Judge Paez noted that:

> Faith Center advertised its May 29, 2004 meeting with a flyer describing a "Women of Excellence Conference" sponsored by Faith Center Evangelistic Ministries Outreach. The flyer stated: Coming to Antioch, California, on May 29th 2004, where the power of God would be moving to bring miracles into your life. "For this is the hour of the believer," thus saith the Lord, for divine impartation of spiritual gifts, and empowerment, for the body of Christ to move forward in total victory. Come and receive your blessing!

Id.

[209] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993).

[210] *Good News*, 533 U.S. at 119.

[211] Widmar v. Vincent, 454 U.S. 263, 271 (1981) (quoting Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)) (internal quotation marks omitted).

[212] *Id.* at 272 n.11 (citing Chess v. Widmar, 635 F.2d 1310, 1318 (8th Cir. 1980).

however, depends on the nature of the forum. As Judge Bybee explained in his dissent from the denial of a rehearing:

> There are, of course, perfectly permissible means by which categories of speech—including worship activities—could be excluded from the library. For example, if the library had set aside its meeting rooms for book clubs, it could certainly exclude every other category of expressive activity that did not fall within the purposes of the forum. The library could exclude worship services that were not book clubs, just as it could exclude political debates and city council meetings. What it could not do is exclude book clubs discussing the Koran, the Torah, or the Tibetan Book of the Dead. Or the library might open its meeting rooms broadly, while prohibiting food or drink. That policy would exclude meetings at which communion might be served, or a Seder celebrated, or prashad distributed, just as it would exclude serving refreshments at a Boy Scout Court of Honor or tea at a meeting of the Garden Club. What the library cannot do is permit food and drink *except* when it is consumed in connection with religious services.[213]

In *Glover*, however, the County did not so restrict its forum. At the very least, it created a limited public forum that was generally available to "'[n]on–profit and civic organizations, for–profit organizations, schools and governmental organizations' . . . for 'meetings, programs, or activities of educational, cultural or community interest.'"[214] The boundaries of such forums are defined by their inclusions, not their exclusions. Faith Center's afternoon "'Praise and Worship' service with a sermon by Pastor Hopkins"[215] was undoubtedly a community activity that fell within scope of the forum.

Faith Center sought to bring a religious perspective to otherwise permissible subjects even if it did involve religious worship. The County excluded it from doing so because of disagreement with, and hostility towards, religious worship in the forum. The County also impermissibly took it upon itself to decide what religious speech is deserving of expression. Consequently, the exclusion should have been subject to strict scrutiny because it was impermissibly content and viewpoint discriminatory. Under the applicable precedents, the Establishment Clause would not have provided a compelling reason for the exclusion.

Regrettably, a majority of the judges on Ninth Circuit Court of Appeals failed in their duty to correct the error. Again, as Judge Bybee succinctly stated with respect to the majority panel decision, "[i]n so doing, the majority . . . disregarded equal–access cases stretching back nearly three decades, turned a blind eye to blatant viewpoint discrimination, and endorsed disparate treatment

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[213] Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 900 (9th Cir. 2007) (Bybee, J., dissenting) (denial of en banc rehearing).

[214] *Glover*, 462 U.S. at 1198 (alteration in original) (quoting County's library meeting room policy).

[215] *Id.* at 1199 (quoting Faith Center's advertising flyer).

of different religious groups."[216] One can only hope that in future cases, these judges will be more attuned to the Freedom of Speech granted to religious speakers under the First Amendment to the United States Constitution.

[216] *Glover*, 480 F.3d at 895 (Bybee, J., dissenting).

Are Anti-Corruption Efforts Paying Off? International and National Measures in the Asia-Pacific Region and Their Impact on India and Multinational Corporations

Beverley Earle* and Anita Cava**

I. INTRODUCTION

In many parts of the world, corruption and bribery have been accepted as a necessary evil, difficult to eradicate and integral to the existing business landscape. Bribes have long been business deductions in many countries. Yet the world and business people noticed when, on July 10, 2007, the People's Republic of China (PRC) executed the former long time head of the State Food and Drug agency, Zheng Xiaoyu, for accepting bribes; the action was swift, as his sentence had been imposed just weeks earlier, in May 2007.[1] While many would disagree with the death penalty for any crime, this growing attention of countries to the "cancer of corruption" reflects a willingness to begin to change the culture of looking the other way.

Efforts to rid a country of bribery and corruption are driven not by a false moralism, but rather a realization that without transparency, individuals will enrich themselves to the detriment of society's growth and development. What was thought to be an entrenched habit in many parts of the world may in fact be a practice that will be eradicated or at the very least dramatically reduced in the twenty first century.

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[1] *See generally Former SFDA Chief Executed for Corruption*, CHINA DAILY, July 10, 2007, *available at* http://www.chinadaily.com.cn/china/2007-07/10/content_5424937.htm.

Nor is bribery limited to only developing countries as illustrated by the recent Siemens scandal in Germany in 2007.[2] At the same time, Tony Blair, then Prime Minister of Britain, terminated a probe of BAE Systems' alleged payments to the Saudi royal family on the basis of national security.[3] However, recent reports show an increased global focus on the problem of corruption.[4] A new FBI team is reportedly assigned to investigate bribery and corruption while 150 investigations are proceeding worldwide.[5]

This paper examines the development of anti-bribery law in the United States and the corollary international efforts by the Organization for Economic Co-operation and Development (OECD), the United Nations, the World Bank, and the NGO, Transparency International (TI). We then focus on the new developments spurred in part by the Asian Development Bank, reviewing in particular the effects of these changes on business in India. We do not suggest that the United States has succeeded in eradicating corruption. While the U.S.

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[2] David Crawford & Mike Esterl, *Siemens Ruling Details Bribery Across Globe*, WALL ST. J., Nov. 16, 2007, at A1 (discussing the Oct. 4, 2007 ruling by a Munich court detailing seventy-seven bribes worth over $17.5 million. Siemens had agreed to pay a 201 million Euro fine); *see also* Mike Esterl & David Crawford, *Why Siemens Bribery Probe Slogs on*, WALL ST. J., Aug. 16, 2007, at A12 (noting the decentralized set-up of Siemens hampered the investigation when even the law firm hired by Siemens to investigate could not get cooperation. Many consultant contracts are under suspicion of hiding bribes); Mark Landler & Carter Dougherty, *Scandal at Siemens Tarnishes Promising Results*, N.Y. TIMES, Feb. 28, 2007, at C1 (noting that Siemens "has failed to reconcile its old ways of doing business with a new code of corporate ethics evolving here." The CEO also discusses the "adjustment" involved in changing the culture); *The Reluctant Briber: Face Value*, ECONOMIST, Nov. 4, 2006, at 79 (discussing a Russian businessman's problems of bribery in Russia. He notes that "fear that once restrained the worst of it [bribery] is gone," thus making the situation very unpredictable and difficult).

[3] For a discussion of ramifications, see Nelson D. Schwartz & Lowell Bergman, *Payload: Taking Aim at Corporate Bribery*, N.Y. TIMES, Nov. 25, 2007, at Bu1 (discussing the increased world attention to corporate bribery).

[4] *See generally* David Barboza, *Charges of Bribery in a Chinese Bank Deal*, N.Y. TIMES, Nov. 29, 2006, at C1 (discussing suit in Florida federal district court by Chinese company against American software company alleging that it paid bribes to secure a banking contract). The Chairman of the bank was also sentenced to fifteen years in a Chinese prison. *Id.* Bribery took the form of trips for bank officials and family members as well as thousands of dollars of gifts. *Id.* IBM was also implicated in the Chinese trial. *Id.*

[5] Schwartz & Bergman, *supra* note 3, at Bu1. However, it is difficult to verify this figure. Reporters note that "[w]hile law enforcement officials and governments in disparate jurisdictions once hesitated to work together to combat corporate fraud, graft has come to be seen as such a severe impediment to global economic growth that cooperation is becoming more frequent." *Id.*

The cost of corruption in just one country, Nigeria, was estimated at $400 billion or two-thirds of all western aid given to it. *Capping the Well-Heads of Corruption: Nigeria*, ECONOMIST, Oct. 21, 2006, at 55 (also noting that a new leader of anti-corruption unit has ninety-one convictions and 2000 people have gone to prison).

has made significant progress through the Foreign Corrupt Practices Act[6] (FCPA) and Sarbanes-Oxley[7] in deterring bribery of foreign officials, corruption is nonetheless alive and well. Recent reports cite Medicare fraud as a particular example;[8] no doubt there are many others. We conclude the paper with some suggestions for reform.

Rooting out corruption is not a hopeless endeavor. However, research shows that if it took twenty years for European practice to begin to converge with U.S. anti-bribery laws, it will no doubt take at least as long for India to harmonize its laws with international standards and to truly enforce the provisions uniformly.

II. ADDRESSING THE PAY-OFF: UNITED STATES FOREIGN CORRUPT PRACTICES ACT

In the 1970s, a wave of legal and administrative investigations of U.S. corporations generated evidence of a pattern and practice of bribing foreign officials.[9] In particular, a 1976 scandal involving Lockheed paying $1.4 million to the Japanese Prime Minister to secure a contract for its L-1011 jet dominated the news.[10] In the subsequent investigation, over 400 corporations admitted authorizing significant payments to foreign officials to secure

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[6] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -2 (1994)). The Act was amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended at 19 U.S.C. §§ 2901-3000), and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff).

[7] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15, 18, and 28 U.S.C.).

[8] For a recent discussion of Medicare fraud's pervasiveness particularly in Florida, see generally *$20M Miami Medicare Fraud Exposed*, S. FL. BUS. J., Mar. 23, 2007, *available at* http://charlotte.bizjournals.com/southflorida/stories/2007/03/19/daily47.html; Press Release, United States Attorney's Office Southern District of Florida, U.S. Attorney and CMS Director Announce Results of Medicare Fraud Strike Force (May 10, 2007), *available at* http://www.usdoj.gov/usao/fls/PressReleases/070510-01.html. It is the basis of another paper to speculate on why bribery of foreign officials has diminished and Medicare fraud increased. The authors conjecture that the cost and certainty of punishment to large corporations has motivated them to abide by the law. On the contrary, the opportunity for large profits and the lack of punishment may encourage small companies to engage in the criminal entrepreneurial activity of Medicare fraud.

[9] Michael V. Seitzinger, Foreign Corrupt Practices Act, CRS Report (March 3, 1999), *available at* http://www.fas.org/irp/crs/Crsfcpa.htm. For a detailed description of the events leading up to adopting the FCPA, see Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345 (2000).

[10] *See* Lori Ann Wanlin, *The Gap Between Promise and Practice in the Global Fight Against Corruption*, 6 ASPER REV. INT'L BUS. & TRADE L. 209, 209-11 (2006).

lucrative contracts for their companies.[11] Not surprisingly, the existing prohibitions positioned within the Securities and Exchange Commission's (SEC) regulatory framework were seen as insufficient to address the problem. Accordingly, Congress enacted the Foreign Corrupt Practices Act of 1977.[12]

This statute stands as an early effort to legislate corporate ethics in America. Analytically, it addresses both bribery and accounting requirements, two distinct but related prongs of accuracy and transparency.

The anti-bribery provisions apply to three broad categories of entities: "Issuers" who have a class of securities registered with the SEC, including "foreign" private issuers; "domestic concerns," or any U.S. citizen, national, or resident as well as any business that has its principal place of business in the United States or is organized under its laws; and any person or entity that violates the law while in the United States.[13] This includes non-issuer foreign nationals and companies.[14] Officers, directors, employees and agents of issuers and domestic businesses are also directly liable under this prong of the FCPA.[15]

Of course, the FCPA flatly prohibits public corporations from offering something of "value" to foreign officials to influence official decisions[16] or inducing the use of influence to affect governmental decisions regarding obtaining or retaining business.[17] Payments to government employees, political parties, party officials, and candidates for office are forbidden, as are offers or even authorizing such payments. Indeed, benefiting family members of such officials by scholarships or loans is prohibited.[18]

The accounting provisions require issuers, including foreign private issuers, to make and keep accurate books, records, and accounts of the company's dispositions. Under the FCPA, an issuer is strictly liable for inaccuracies in its books and records; issuers registered with the SEC, including foreign, private issuers, are required to maintain responsible accounting systems.[19] A public

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[11] U.S. Dep't of Justice, Lay-Person's Guide to FCPA, http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html (last visited Nov. 4, 2008) (discussing background of the FCPA).

[12] *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -2 (1994)).

[13] 15 U.S.C. §§ 78dd-1 to -3 (2000); *see* Andrea Dahms & Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 AM. CRIM. L. REV. 605, 608 & n.15 (2007).

[14] 15 U.S.C. § 78dd-3(f)(1).

[15] 15 U.S.C § 78-dd-1 (for issuers); § 78-dd-2 (for domestic concerns); *see* Dahms & Mitchell, *supra* note 13, at 614-15 and accompanying notes.

[16] 15 U.S.C. § 78dd-1(a), (f) (for issuers); § 78dd-2(a), (h)(2)(A) (for domestic concerns); § 78dd-3(a), (f)(2)(a) (for any person).

[17] 15 U.S.C. § 78dd-1(a) (for issuers); § 78dd-2(a) (for domestic concerns); §78dd-3(a) (for any person).

[18] United States v. Schwartz, 785 F.2d 673, 680-81 (9th Cir. 1986).

[19] Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78m(b)(2) (2002); *see* Dahms & Mitchell, *supra* note 13, at 609-13 (providing a detailed outline of the current accounting requirements under the FCPA).

entity may be liable under the FCPA even if its officers were not aware of the inaccuracies, even if they are considered immaterial, and even if they do not include bribes.[20] Further, the United States may assert jurisdiction over a foreign issuer under the accounting provisions even if a foreign corrupt payment occurs entirely outside the country. The mere filing of a periodic report with the SEC or a single transaction with a U.S. bank is sufficient to trigger the obligations of the statute.[21]

In its initial iteration, the FCPA staked out ground that proved far more than it could enforce or police.[22] Congress recognized that it might be necessary to facilitate or "grease" a transaction once a deal had been reached and amended the statute in 1988 to address certain realities of the marketplace.[23] Accordingly, certain "facilitating payments" were carved out of the prohibitions of the FCPA, including those made to: (1) expedite or secure routine governmental actions such as getting permits, licenses or other documents necessary to qualify a person to do business; (2) process governmental documents such as visas, etc.; and (3) provide police protection, mail pickup or delivery, schedule inspections and move goods on or off a dock.[24] In addition, payments that are lawful under the written laws and regulations of the local country may be permissible.[25] In reality, even countries where graft is commonplace, it is not in fact legal.

Further, the FCPA permits corporations to pay certain reasonable entertainment expenses to foreign officials if they are related to the promotion, demonstration or explanation of products or services.[26] The statute was

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[20] Justin F. Marceau, *A Little Less Conversation, a Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 298-300 (2007) (discussing agency law and FCPA); Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 601-04 (2002) (summarizing effect of 1988 amendments).

[21] Oren Gleich & Ryan Woodward, *Foreign Corrupt Practices Act*, 42 AM. CRIM. L. REV. 545 (2005) (summarizing the key features of the FCPA and analyzing its implementation); U.S. Department of Justice, Foreign Corruption Practices Act, http://www.usdoj.gov/criminal/fraud/fcpa/ (last visited Nov. 4, 2008).

[22] *See* Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 869 n.57 (2001) (citing Robert S. Levy, Note, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really as Valuable as We Think They Are?*, 10 DEL. J. CORP. L. 71, 82 (1985)).

[23] Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(b), -2(b), -3(b).

[24] 15 U.S.C. § 78dd-1(f)(3)(B) (for issuers); § 78dd-2(h)(4) (for domestic concerns); § 78dd-3(f)(4)(A) (for "any person").

[25] H.R. REP. NO. 100-418, at 921-23 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1949, 1954-56. The conference agreement defined "lawful payment" as "a payment to a foreign official [that] is 'lawful under the written laws and regulations of the foreign official's country.'" *Id.* at 1955.

[26] 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2). This issue was the topic of two Department of Justice "Opinion Procedure Releases" in 2007, both approving expenditures for travel for

amended again in 1998 to mirror the principles adopted by the OECD, extending its reach to include some foreign nationals[27] and expanding its jurisdiction beyond U.S. borders.[28]

The FCPA provides for both civil and criminal penalties for violation of either its anti-bribery or the accounting requirements.[29] Civil penalties for the former include up to $10,000 per violation for both corporate and individual defendant; criminal fines may be up to two million dollars per violation for corporations and up to one hundred thousand dollars per violation and prison time up to five years for individuals. Failure to comply with the accounting requirements may result in criminal penalties of up to twenty-five million dollars for the corporation and individuals may face fines of up to five million and twenty years in jail.

Until recently, enforcement of the FCPA has been lax, with relatively light financial consequences for violating its prohibitions and few reported cases.[30] For example, between 1995 and 2000, the U.S. Department of Justice (DOJ) averaged less than one completed investigation per year.[31] However, a series of recent investigations in connection with mergers and acquisitions have generated heightened awareness of the statute and more vigorous efforts to assure compliance.

In 2002, while doing its due diligence in a nine-hundred million-dollar deal to take over InVision Technologies, General Electric Co. uncovered improper payments made by InVision to foreign government officials in Asia.[32] The

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foreign officials to company's headquarters to become familiar with business operations. *See* U.S. Department of Justice, Opinion Procedure Release 07-02, http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2007/0701.html (last visited Nov. 4, 2008); U.S. Department of Justice, Opinion Procedure Release 07-01, http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2007/0702.html (last visited Nov. 4, 2008).

[27] 15 U.S.C. § 78dd-1(f); *see* Dahms & Mitchell, *supra* note 13, at 607 & n.8; *see also*, Posadas, *supra* note 9, at 346.

[28] 15 U.S.C. § 78dd-(g) (for issuers); § 78dd-2(i) (for domestic concerns).

[29] *See* 15 U.S.C. §§ 78dd-3(d)-(e), 78ff (outlining penalties for violations of the FCPA).

[30] *See* Marceau, *supra* note 20, at 285 (discussing Justice Department's increased vigor in recent FCPA prosecutions); Philip Segal, Comment, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT'L L. 169 (2006) (surveying all reported FCPA enforcement actions and concluding FCPA has been "greatly under-enforced"); *see also* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 231-32 (arguing generally that FCPA ignores cultural norms of gift-giving and is overly intrusive).

[31] Patti Waldmeir, *Bribery is Not Just a Cost of Doing Business*, FIN. TIMES, Apr. 4, 2007, *available at* http://search.ft.com/ftArticle?queryText=waldmeir+bribery&y=0&aje=true&x=0&id=070404009310&ct=0&nclick_check=1.

[32] Joan Harrison, *Does Your Foreign Target Have Clean Hands? Cross-Border Deals Have Gotten More Difficult as Regulators Focus on FCPA Enforcement*, MERGERS & ACQUISITIONS: DEALMAKER'S J., July 1, 2007, *available at* 2007 WLNR 12480518.

information threatened to derail the merger. Another international acquisition, that of Syncor International Corp. by Cardinal Health, Inc., was delayed after discovery of improper payments by Syncor to doctors in various countries.[33] A full DOJ investigation and settlement with the SEC ensued before the deal went forward; as a result Cardinal shareholders enjoyed the benefit of a significantly reduced price.[34]

In this vein, the largest combined civil and criminal fine ever imposed on a company in an FCPA case — $28.5 million on Titan Corp. in 2005 — was the result of discoveries made by Lockheed Martin Corp. in the course of doing due diligence of the company prior to buying it. Titan did not resolve the matter and Lockheed Martin abandoned the deal.[35]

This focus on the internal controls prong of the FCPA mirrors the pressure that Sarbanes-Oxley puts upon public corporations to implement appropriate accounting controls, thereby ensuring that CEOs cannot claim lack of knowledge. Indeed, it is interesting to note a spate of self-reporting of possible FCPA problems to the DOJ in the past year, a likely result of closer scrutiny of transactions a part of compliance with Sarbanes-Oxley.[36] This development suggests that heightened attention to disclosures coupled with heightened liability of company officers will generate heightened compliance with anti-corruption efforts. In one noteworthy case, Paradigm, a Dutch software company, moved its principal place of business from Israel to Texas and, in the course of so doing, discovered that it had either made or promised bribes to officials in five countries. Paradigm notified the DOJ, implemented training and other compliance procedures, and ended up with an eighteen month non-prosecution agreement. Assuming no further issues, there will be no further legal consequences for the company.[37]

This spirit of self-assessment and self-reporting heralds perhaps a new level of compliance with the tenets of the FCPA by U.S. companies. As discussed in more detail below, one can speculate as to whether the motivation is based in a new ethical fiber or by more robust scrutiny. Either way, observers abroad will surely take note of the changes evident in the U.S. approach to bribery.

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Marie Leone, *Coming Clean about Bribery*, CFO.COM, Apr. 3, 2006, *available at* http://www.cfo.com/article.cfm/6764209/c_2984290/?f=archives.

[37] Melissa Klein Aguilar, *FCPA Case Demonstrates Benefits of Self-Disclosure*, COMPLIANCE WEEK, Oct. 30, 2007, at 1.

III. STUDYING THE PAY-OFF: SCHOLARLY COMMENT ON CORRUPTION

Bribery is an ancient practice and was a concern even during the glory days of Athens.[38] Efforts to eradicate it there were unsuccessful. In his seminal book *Bribes*, John Noonan traced the history of this practice through the centuries but did not address strategies for changing it. Susan Rose-Akerman's first book, *Corruption: A Study in Political Economy*, began the examination of corruption not from a cultural or moral point of view but from an economic one.[39] Published contemporaneously with the passage of the FCPA, this book began an examination by a host of scholars into this topic.

Not surprisingly, after the passage of the FCPA, researchers from different disciplines began addressing the topic from multiple perspectives. Robert Klitgaard in 1988 wrote *Controlling Corruption*. Klitgaard compares Noonan's approach of chronicling corruption to his which raised "practical policies to reduce corruption."[40] Although scholars assumed that other countries would quickly follow suit with legislation similar to the FCPA, this did not occur.[41] Facing the derision of the world community, advocates for reform birthed this new approach focusing on the economic cost of corruption to the society's development.[42] The popular press played a major role in educating the public about the deleterious impact of bribery on the economy of any country but especially on developing nations.[43] Transparency International, founded in 1993 and originally based in Berlin, provided intellectual impetus to the development of the understanding that bribery and corruption were more than some moral vice.

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[38] *See* JOHN T. NOONAN, BRIBES (1984); Claire Taylor, *Bribery in Athenian Politics Part II: Ancient Reaction and Perceptions*, 48 GREECE & ROME 154-72 (2001), *available at* http://links.jstor.org/sici?sici=00173835%28200110%292%3A48%3A2%3C154%3ABIAPPI%3E2.0.CO%3B2-R.

[39] SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY xi (1978).

[40] NOONAN, *supra* note 38, at xv.

[41] For discussion of the history of the FCPA, see Beverley H. Earle, *Foreign Corrupt Practices Act Amendments: The Omnibus Trade and Competitiveness Act's Focus on Improving Investment Opportunities*, 37 CLEV. ST. L. REV. 549, 550 (1989); *see supra* notes 12-34 and accompanying text.

[42] For exegesis of this shift, see generally Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207, 207-09 (1996) (discussing the history of the efforts for reforms); *see also* Susan Rose-Ackerman, *Political Economy of Corruption*, *in* CORRUPTION AND THE GLOBAL ECONOMY 31-60 (Kimberly Ann Elliot ed., 1996).

[43] *See generally Bribonomics: Does Corruption Hinder Economic Growth?*, ECONOMIST, Mar. 19, 1994, at 86; Andrei Schleifer & Robert Vishny, *Corruption*, 108 Q. J. ECON. 599 (1993). *But see* Thanassis Cambanis, *Harvard Defense of Project Described*, BOSTON GLOBE, June 29, 2002, at B4 (discussing Schleifer's alleged ethical problems); Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681-712 (1995).

Subsequently, a conference held by the Institute for International Economics produced the volume *Corruption and the Global Economy*. The introduction to the book links the rise of forces of globalization and international economic policy. Editor Kimberly Ann Elliot noted:

> Corruption is a recent addition to this agenda. Corruption is by no means a new issue, but it has only recently emerged as a global issue. With the end of the Cold war, the pace and breadth of democratization and international economic integration have accelerated and expanded. Yet, in some parts of the world, corruption threatens to slow or even reverse these trends.[44]

Two years later, another seminal work by Susan Rose-Ackerman, *Corruption and Government*, provided an exhaustive analysis of this topic.[45] She paid homage to Paulo Mauro's work connecting low development with high corruption.[46] In 2006, Rose-Ackerman followed with a collection of research in the *International Handbook on the Economics of Corruption*.[47] The thesis regarding the economic cost to development is well accepted. Cornell Law School featured a symposium entitled "Fighting International Corruption & Bribery in the 21st Century" in 2000.[48] A symposium Law Review issue followed.

Other scholars and practitioners have continued the examination of bribery.[49] Daniel Jordan Smith, an anthropology professor at Brown, wrote *A Culture of*

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[44] KIMBERLY ANN ELLIOT, CORRUPTION AND THE GLOBAL ECONOMY VII (Kimberly Ann Elliot ed., 1997).

[45] SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999).

[46] Mauro, *supra* note 43.

[47] INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION (Susan Rose-Ackerman, ed., 2006).

[48] Symposium, *Fighting International Corruption and Bribery in the 21st Century*, 33 CORNELL INT'L L. J. 469 (2000) (including multiple articles and addresses).

[49] For a discussion on corruption in India see generally CORRUPTION IN INDIA: AGENDA FOR ACTION (Sanjivi Guhan & Paul Samuel eds., 1997); S.K. DAS, PUBLIC OFFICE, PRIVATE INTEREST: BUREAUCRACY AND CORRUPTION IN INDIA (2001); THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS (1999) (concluding—pursuant to extensive discussions of bribery with Indian businesspersons in India—that while most admitted to having paid bribes, all expressed outrage and disgust at the practice); SURENDRANATH DWIVEDY & G.S. BHARGAVA, POLITICAL CORRUPTION IN INDIA (1967); K.N. GUPTA, CORRUPTION IN INDIA (2003); ROBERTA ANN JOHNSON, THE STRUGGLE AGAINST CORRUPTION: A COMPARATIVE STUDY (2004) (Chapter five, "India: Between Majesty and Modernity," also focuses on a country where corruption seems to be everywhere. The chapter describes two patterns of corruption in India—petty bribes and grand larceny.); VINOD PAVARALA, INTERPRETING CORRUPTION: ELITE PERSPECTIVES IN INDIA (1997); P.V. RAMAKRISHNA, A TREATISE ON ANTI-CORRUPTION LAW IN INDIA 1563 (S. Gogia & Company 2005) (1969); A. RANGA REDDY, DIMENSIONS OF CRIME AND CORRUPTION IN INDIA (2005); C. P. SRIVASTAVA, CORRUPTION: INDIA'S ENEMY WITHIN (2001); N. VITTAL, CORRUPTION IN INDIA:

THE ROADBLOCK TO NATIONAL PROSPERITY (2003); Ranjan K. Agarwal, *The Barefoot Lawyers: Prosecuting Child-Labor in the Supreme Court of India*, 21 ARIZ. J. INT'L & COMP. L. 663, 663-64 (2004) ("Transparency International, a German anti-corruption organization, ranks India amongst the most corrupt countries in the world."); C. Raj Kumar, *Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 COLUM. J. ASIAN L. 31, 44 n.55 (2003) ("For a comprehensive commentary in the anti-corruption law in India, see P.V. RAMAKRISHNA, A TREATISE ON ANTI-CORRUPTION LAW IN INDIA 1563 (S.Gogia & Company 9th ed.), 2003."); M.C. Mehta, *The Accountability Principle: Legal Solutions to Break Corruption's Impact on India's Environment*, 21 J. ENVTL. L. & LITIG. 141 (2006) (see particularly page 144 footnote 2); Wolfgang Schürer, *A Geopolitical and Geo-Economic Overview: On the Rise of China and India as Two Asian Giants*, 29 FLETCHER F. WORLD AFF. 145, 158 (2005) ("[T]he new cabinet in New Delhi has an impeccable anti-corruption record and that India is well on its way to building both domestic and international trust in its legal and regulatory climate. On the other hand, China has a long road ahead."); Toral Patel, Comment, *Corrupt Practices in India: No Payoff*, 20 LOY. L.A. INT'L & COMP. L. REV. 389, 389 (1998) ("India's current anti- corruption laws are ineffective."); *Anti-Corruption Bill for Parliament, Says PM*, INDIA POST, Sept. 27, 1996, at A6; John Brademas & Fritz Heimann, *Tackling International Corruption: No Longer Taboo*, FOREIGN AFF., Sept.-Oct. 1998, at 17-18, (describing damage done by bribery scandals to governments in India and other countries); *Corruption in South Asia Dangerous*, DAILY YOMIURI, Nov. 3, 1999, at 8; John Elliot, *India's Slide into Sleaze*, ASIAN WALL ST. J., Nov. 13, 1995; *INDIA: Widespread Corruption in the Public Food Distribution System Causing Starvation Deaths*, ASIAN LEGAL RESOURCE CENTER, May 31, 2007, http://www.alrc.net/doc/mainfile.php/alrc_statements/417 (last visited Nov. 12, 2008); ORGANIZATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, ASIAN DEVELOPMENT BANK, ANTI-CORRUPTION POLICIES IN ASIA AND THE PACIFIC: PROGRESS IN LEGAL AND INSTITUTIONAL REFORM IN 25 COUNTRIES (2006), *available at* http://www.oecd.org/dataoecd/32/31/36832820.pdf; *Prosecutions May Reverse the Tide of Corruption*, INDIA BUS. INTELLIGENCE, Jan. 24, 1996; GURHARPAL SINGH, 2003 GLOBAL CORRUPTION REPORT: SOUTH ASIA 153 (2003), *available at* http://unpan1.un.org/intradoc/ groups/public/documents/APCITY/UNPAN008446.pdf.

For a useful comparison of corruption in China see generally BRUCE DALBRACK, BROKEN DRAGONS: CRIME AND CORRUPTION IN TODAY'S CHINA (2004); TING GONG, THE POLITICS OF CORRUPTION IN CONTEMPORARY CHINA: AN ANALYSIS OF POLICY OUTCOMES (1994); JEFFREY C. KINKLEY, CORRUPTION AND REALISM IN LATE SOCIALIST CHINA: THE RETURN OF THE POLITICAL NOVEL (2006); JULIA KWONG, THE POLITICAL ECONOMY OF CORRUPTION IN CHINA (1997); T. WING LO, CORRUPTION AND POLITICS IN HONG KONG AND CHINA (1994); MELANIE MANION, CORRUPTION BY DESIGN: BUILDING CLEAN GOVERNMENT IN MAINLAND CHINA AND HONG KONG (2004); ANWAR SHAH, PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION (2007); YAN SUN, CORRUPTION AND MARKET IN CONTEMPORARY CHINA (2004); Christine M. Bulger, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 378 (2000) ("Corruption is also widespread in the Chinese judicial system."); Felix W. H. Chan, *Logistics Management and Its Legal Environment in China*, 31 HONG KONG L. J. 497, 523 (2001) ("Anti-corruption measures are significantly undermining the logistics system in China."); Kang Chen, *Fiscal Centralization and the Form of Corruption in China*, 20 EUR. J. POL. ECON. 1001 (2004); Zengke He, *Corruption and Anti-Corruption in Reform China*, 33 COMMUNIST & POST-COMMUNIST STUD. 243 (2000); Zou Keyuan, *Judicial Reform Versus Judicial Corruption: Recent Developments in China*, 11 CRIM. L.F. 323 (2000); Pitman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 LAW & SOC.

Corruption: Everyday Deception and Popular Discontent in Nigeria.[50] He explored the Nigerian people's experience of corruption stating:

> The *ultimate* question is whether ordinary Nigerians' paradoxical position as participants, critics, and victims will provide them leverage to facilitate a long process of positive transformation that gives rise to genuinely accountable institutions of democracy and development, or whether elites are able to continue to manipulate promises of democracy and development to keep wealth and power out of reach for ordinary people.[51]

Research continues on all types of corruption. TI released the Global Corruption Report 2007 on Corruption in Judicial Systems.[52] According to the report:

> It is difficult to overstate the negative impact of a corrupt judiciary: it erodes the ability of the international community to tackle transnational crime and terrorism; it diminishes trade, economic growth and human development; and, most importantly, it denies citizens impartial settlement of disputes with neighbors or the authorities. When the latter occurs, corrupt judiciaries fracture and divide communities by keeping alive the sense of injury created by unjust treatment and mediation. Judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government, starting at the helm of power. In so doing they send a blunt message to the people: in this country corruption is tolerated.[53]

The report provides a list of recommendations including protection for whistleblowers.[54] Included in this report are separate sections about individual

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INQUIRY 465 (2004); Rafael Di Tella & Ernesto Schargrodsky, *The Role of Wages and Auditing During a Crackdown on Corruption in the City of Buenos Aires*, 46 J.L. & ECON. 269, 274 (2003) ("China is a classic example of a country where attempts to control widespread corruption include recurrent anticorruption campaigns. These often include 'exemplary' punishments (including death). One of the characteristics of these episodes is that their effects do not seem to last very long."); Andrea D. Bontrager Unzicker, Note, *From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery*, 7 IND. J. GLOBAL LEGAL STUD. 655, 673 (2000) ("In a two-year anticorruption campaign in China, the party secretary of Beijing was ousted and a number of municipal officials were given the death penalty."); Wei Li, *Corruption and Resource Allocation: Evidence from China* (William Davidson, Working Paper No. 396, 2001), *available at* http://ideas.repec.org/p/wdi/papers/2001-396.html.

[50] DANIEL JORDAN SMITH, A CULTURE OF CORRUPTION: EVERYDAY DECEPTION AND POPULAR DISCONTENT IN NIGERIA (2007).

[51] *Id.* at 231 (emphasis added).

[52] TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007: CORRUPTION AND JUDICIAL SYSTEMS (2007), *available at* http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2007#summary (follow the "download Executive Summary" hyperlink).

[53] *Id.*

[54] *Id.*

countries including India and includes recommendations to improve the climate against corruption (e.g., increase the number of judges, accountability, codes of conduct, court record management, and recruitment, financial and administrative authority).[55]

While many others have written on the topic of corruption, their contributions are more descriptive in nature.[56] The major breakthrough came in the 1990s with the linkage of corruption to poor economic development. We await the next major breakthrough in the continued fight against corruption.

IV. GLOBAL RESTRICTIONS ON PAY-OFFS: INTERNATIONAL EFFORTS TO FIGHT CORRUPTION

A. Organizations Active in the Fight Against Corruption

1. Transparency International

As noted above, TI is an NGO founded in 1993 and dedicated to reducing corruption in politics, public contracting, the private sector, international aid and economic development across the world. It does so by conducting in-depth studies and publishing the results broadly to improve public awareness of these issues.[57]

Two of its efforts in this regard are particularly relevant to this discussion. TI's Corruption Perceptions Index (CPI) is an annual report that ranks more than 180 countries by their perceived level of corruption.[58] This is determined by both opinion surveys and expert assessments. Currently, Haiti ranks last among 163 countries, Iran is 160, the United States is tied with Belgium and Chile at twenty and Finland (tied with New Zealand and Denmark) is at the top of the list. India is ranked seventy-two in the 2007 Survey, tied with China, whereas Hong Kong is ranked fourteenth.[59]

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[55] *Id.* at 214-17 (follow "download page 160-290" hyperlink).

[56] *See generally* sources described *supra* note 20.

[57] Transparency International, Surveys & Indices, http://www.transparency.org/policy_research/surveys_indices/ (last visited Nov. 1, 2008) (introducing various reports on TI's website).

[58] Transparency International, TI Corruption Perceptions Index, http://www.transparency.org/policy_research/surveys_indices/cpi (last visited Nov. 1, 2008).

[59] Transparency International, Corruption Perceptions Index 2007, http://www.transparency.org/policy_research/surveys_indices/cpi/2007 (last visited Nov. 1, 2008); Press Release, Transparency International, Persistent Corruption in Low-Income Countries Requires Global Action: Concerted Efforts Needed in Rich and Poor Countries to Stem Flow of Corruption Monies and Make Justice Work for the Poorest (Sept. 26, 2007), *available at* http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_09_26_cpi_2007_en.

The Bribe Payers Index (BPI) is derived from surveys that evaluate the likelihood of businesses from industrialized countries to bribe abroad.[60] Currently, thirty countries are rated and the United States ranks number nine, tied with Belgium. Switzerland is ranked as the least corrupt and India as the most corrupt on this index in the same cluster with Russia, Turkey and China.[61]

In June, 2006, TI published a report suggesting that only one-third of OECD member states had taken serious action to enforce anti-bribery laws and Britain has yet to pursue a single case under its 2001 law prohibiting bribing of foreign officials.[62] At its 2007 annual conference, the new head of Transparency International warned of an invigorated effort to move the NGO's anti-corruption campaign forward.[63] This call has implications for the global community, including India and China, of course.

2. *Organization for Economic Co-operation and Development (OECD)*

In November, 2007, the OECD marked the tenth anniversary of its landmark *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*[64] (OECD Convention). Adopted after years of discussion and debate, the OECD Convention was signed by all member countries and five non-member states, a move that was significant in several respects. On a policy level, it reflected the first united front in addressing corruption outside the United States. On a practical level, the OECD Convention defined bribery and called for member countries to criminalize it, but it did not address the common practice of permitting bribes to be deducted from taxes as a

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[60] Transparency International, Bribe Payer's Index, http://www.transparency.org/policy_research/surveys_indices/bpi (last visited Nov. 1, 2008).

[61] Press Release, Transparency International, Leading Exporters Undermine Development with Dirty Business Owners (Oct. 4, 2006), *available at* http://www.transparency.org/news_room/latest_news/press_releases/2006/en_2006_10_04_bpi_2006.

[62] TRANSPARENCY INTERNATIONAL, 2006 TI PROGRESS REPORT ON OECD CONVENTION ENFORCEMENT (2006), *available at* http://www.transparency.org/news_room/infocus/2006/oecd_progress (follow the "download the report" hyperlink); *see also* Interview with Mark Pieth, Chair of OECD Working Group on Bribery (Nov. 2007), http://www.defenceagainstcorruption.org/index.php?option=com_content&task=view&id=133&Itemid=136.

[63] Hugh Williamson, *West Warned of Anti-Corruption Pressure*, FIN. TIMES, Nov. 16, 2007, world news, at2.

[64] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Convention]. The OECD Convention was signed on November 21, 1997 by the twenty-six member countries of the Organization of Economic Co-operation and Development and by five non-member countries: Argentina, Brazil, Bulgaria, Chile and the Slovak Republic. *Id.*; *see also* OECD, Fighting Corruption, http://www.oecd.org/topic/0,3373,en_2649_37447_1_1_1_1_37447,00.html (last visited Oct. 23, 2008) (discussing corruption in general).

business expense.[65] It also permits grease or "facilitation" payments, drawing criticism from TI.[66] Nonetheless, all signatories have now adopted laws against corruption, even if enforcement is not uniform.[67]

Under the Convention, signatories agree to regular, in-depth monitoring of efforts made to combat corruption. Although the OECD Convention is modeled on the FCPA, there are significant differences:

> First, unlike the FCPA, the Convention does not address illegal contributions and payments to foreign political parties and candidates. Second, the Convention is not clear as to whether it applies to the bribery of family members of foreign public officials. Through these significant loopholes, signatory countries can escape the limitations of the Convention.[68]

Further, as noted above, the United States amended the FCPA to incorporate specific commitments, resulting in a few, but significant changes.[69] Also, as noted above, the statute now reaches beyond issuers and domestic concerns to make all foreign natural and legal persons in the United States subject to its provisions.[70] The definition of foreign bribery now includes the purpose of "securing any improper advantage," and officials of public international organizations are now under the umbrella of the FCPA.[71]

In May of 2006, the OECD stepped up its efforts against corruption by large companies doing business in less developed nations. It adopted guidelines requiring companies seeking export guarantees from first world governments to declare whether any of their staff have been charged with or convicted of bribing foreign officials. These guarantees, worth approximately sixty billion dollars per year, can be a significant factor in closing a dam project or defense contract, but are often given without any inquiry into the "clean hands" of the recipient.[72]

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[65] Walter Perkel, *Foreign Corrupt Practices Act*, 40 AM. CRIM. L. REV. 683, 704 (2003); Alan M. Field, *Corruption Crackdown*, J. COM., July 10, 2006, *available at* 2006 WLNR 12051116.

[66] Wanlin, *supra* note 10, at 213 (citing The Commentaries on the Convention on Combating Bribery of Foreign Public Officials, http://www.oecd.org/document/1/0,3343,en_2649_34859_2048129_1_1_1_1,00.html (last visited Nov. 4, 2008)).

[67] Field, *supra* note 65.

[68] Posadas, *supra* note 9, at 384 (footnotes omitted).

[69] *See supra* notes 12-31 and accompanying text.

[70] *See id.*

[71] International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified in scattered sections of 15 U.S.C.).

[72] Hugh Williamson & Michael Peel, *OECD Says Companies Must Reveal Record on Bribery*, FIN. TIMES, May 16, 2006, Int'l Economy, at 8.

3. The United Nations

The United Nations spent years struggling to articulate a coherent policy against corruption. Starting in the 1970s and continuing for the next two decades, myriad attempts to develop an agreement regarding illegal payments foundered along the way.[73] A U.N. Declaration on Corruption and Bribery in Transnational Commercial Activities was finally adopted in 1996, laying the groundwork for a more serious and comprehensive approach to the problem.

In 2003, shortly after the OECD effort, the United Nations adopted the U.N. Convention Against Corruption,[74] signaling an even broader consensus that corruption disrupts economic development and will hinder a country's progress. Over 150 countries have signed the U.N. Convention, which is seen as the only global legal anti-corruption instrument. It requires signatories to declare that bribery, embezzlement of public funds, money-laundering, and obstruction of justice are criminal acts and proposes both a "global language about corruption and a coherent implementation strategy."[75]

Then U.N. Secretary General Kofi Annan set forth the costs of corruption that formed the basis for the international consensus. According to Annan, corruption undermines international security, arms control, alleviation of poverty, and, of course, justice, democracy, and human rights.[76]

Of all the signatory countries, approximately eighty have ratified the U.N. Convention, including the United Kingdom, United States, and Russia, which all did so in 2006. Japan, Germany, Italy, India and Canada have so far not done so. This very recent effort has been the topic of much discussion in the popular press, particularly in Asia.[77]

4. The World Bank

The World Bank has emerged as a strong force against corruption on the economic stage. After conducting a serious multi-stakeholder consultative process, the World Bank published a strategy paper, *Strengthening World Bank*

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[73] For a cogent summary of events, see Posadas, *supra* note 9.

[74] *A Glance at UN Convention Against Corruption*, KOREA TIMES, Dec. 10, 2007, *available at* 2007 WLNR 24389530.

[75] *Id.*

[76] Frank Vogl, *The UN Convention Against Corruption: A Milestone on the Road to Curbing Global Bribery*, UN CHRONICLE ONLINE, Nov. 3, 2004, http://www.un.org/Pubs/chronicle/2004/issue3/0304p02.asp.

[77] *See, e.g.*, *A Glance at UN Convention Against Corruption*, *supra* note 74; Press Release, United Nations, Senior UN Official Praises China's Efforts to Curb Corruption (Feb. 15, 2007), *available at* http://www.unodc.org/unodc/en/press/release/2007-02-15.html; Xie Chuanjiao, *Call For Law on Bribing Foreign Officials*, CHINA DAILY, Oct. 20, 2007, *available at* http://www.chinadaily.com.cn/cndy/2007-10/20/content_6192334.htm.

Group Engagement on Governance and Anticorruption,[78] detailing its proposed course of action. The extent of international participation is impressive by any measure: Over 3200 representatives from all stakeholder groups participated in and contributed to the report.[79]

Guided by a set of seven core principles, the World Bank has set the stage for understanding the economic arguments against corruption. These include, in brief, a sense that governance and anti-corruption efforts "follows from its mandate to reduce poverty" because an "accountable state creates opportunities for poor people . . . and improves development outcomes."[80] The World Bank proposes to strengthen the internal efforts of each country to improve governance and promises to search for flexible approaches for each of its affiliated countries. The goal is to "strengthen[] transparency, participation, and third-party monitoring" by engaging stakeholders and empowering them.[81] Because a stronger country system is required for sustained solutions to corruption, the World Bank proposes to improve existing channels rather than creating external systems. Finally, a long-term goal is to "ensure a harmonized approach and coordination based on respective mandates and comparative advantage."[82]

In January, 2008, the World Bank issued an Independent Panel Review of the Department of Institutional Integrity written in part by the Chair, Paul A. Volker (former head of the Federal Reserve).[83] The report, while extolling the "dedicated and competent personnel," outlined a number of structural suggestions including an Advisory Oversight Board, separating the investigation and prevention of corruption, a better remedial plan, more

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[78] *Economic, Social Council Meets with Bretton Woods Institutions, World Trade Organization, U.N. Conference on Trade, Development*, U.S. FED. NEWS, Apr. 16, 2007, *available at* 2007 WLNR 7768184.

[79] The World Bank, Guiding Principles for Strengthening World Bank Group Engagement on Governance and Anticorruption, http://go.worldbank.org/QNKKDXE1N0 (last visited Nov. 4, 2008).

[80] *Id.* at ¶1.

[81] *Id.* at ¶5.

[82] The World Bank, *supra* note 79, at ¶ 7.

[83] WORLD BANK, INDEPENDENT PANEL REVIEW: EXECUTIVE SUMMARY (2007), *available at* http://siteresources.worldbank.org/NEWS/Resources/Volcker_Report_Sept._12,_for_website_FINAL.pdf.

Although this report was issued with a 2007 date, it was impossible to find on the World Bank website until January 2008. The Wall Street Journal reported in an editorial:

> Speaking of transparency, we're pleased the bank has finally seen fit to release the India Report, albeit in a link buried on its Web site. Some in the press reported yesterday that the bank had released it last Friday. That's false. The India Report became public only after we obtained a copy and posted the executive summary on our Web site on Monday.

Editorial, *World Bank Purge*, WALL. ST. J., Jan. 18, 2008, at A12 [hereinafter *World Bank Purge*].

disclosure, move investigations of staff to personnel outside the bank, and develop best practices and be a leader in this area.[84] The Bank had issued a press release about the Volker Report noting, "[t]he Bank President said improving governance and overcoming corruption are critical factors to ensure development resources reach the poor who need them. 'Stealing from the poor is not acceptable, he said.'"[85]

The head of the anti-corruption unit (INT) had completed a review of World Bank Health projects in India and issued a devastating Detailed Implementation Review in two volumes where fraud was found in five projects.[86] The press release noted that "[t]he Government of India will take the lead in pursuing indicators of wrongdoing that emerged in the DIR. As the Ministry of Finance said today in its statement: 'Necessary action under the relevant laws rules and regulations would be taken against those suspected of wrongdoing and, if found guilty, they will be visited with exemplary punishment.'"[87]

Taken as a whole, the framework suggested by the World Bank offers a prism through which to analyze future anti-corruption efforts on the world stage. It is clear that the efforts are more successful on paper than in reality.

B. Asian Development Bank and OECD's Efforts to Fight Corruption

The initial international movement by OECD countries clearly had a ripple effect around the world. In 1998, the Asian Development Bank (ADB)

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[84] *Id.*

[85] Press Release, World Bank President Robert B. Zoellick Welcomes Volcker Panel Review of the World Bank's Institutional Integrity Department, (Sept. 13, 2007), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21469454~pagePK:64257043~piPK:437376~theSitePK:4607,00.html [hereinafter 2007 World Bank Press Release].

[86] Press Release, World Bank, World Bank and Government of India Agree Action to Stamp Out health Project Fraud and Corruption (Mar. 13, 2007), *available at* http://www.worldbank.org.in/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0,,contentMDK:21686068~menuPK:295603~pagePK:2865066~piPK:2865079~theSitePK:295584,00.html.

[87] *Government of India and World Bank Group Join Forces to Stamp Out Corruption in Health Sector Projects*, WORLD BANK, Jan. 11, 2008, http://poverty.developmentgateway.org/uploads/media/poverty/Government%20of%20India%20and%20World%20Bank%20Group%20Join%20Forces%20to%20Stamp%20Out%20Corruption%20in%20Health%20Sector%20Projects.pdf (last visited Nov. 14, 2008). *But see World Bank Purge, supra* note 83 (describing how Suzanne Folsom, who was in part responsible for exposing the corruption in the Indian projects, was harassed at the Bank and is finally leaving for a private sector job. The Wall Street Journal noted in its editorial that "nine of ten dollars are either squandered or stolen by corrupt officials and middlemen, and where filthy, half-built hospitals are certified as completed to project specifications").

introduced the *Anti-corruption Policy*.[88] Subsequently, in 2004, the ADB introduced its so-called *Policy Clarifications*[89] followed two years later by the *Harmonized Definitions of Corrupt and Fraudulent Practices*,[90] an *Operations Manual*, and *Integrity Principles and Guidelines*.[91] Both were the result of increased international discussions. Most recently, in 2007, the ADB passed the *Guidelines on Use of Consultants by ADB and its Borrowers* and *Procurement Guidelines*.[92] This flurry of activity reflects the increased attention the region is focusing on corruption, but unfortunately is not necessarily linked to results or performance.[93]

The ADB has monitored the progress of member countries. In 2006, it issued the *Anti-Corruption Policies in Asia and the Pacific: Progress in Legal and Institutional Reform in 25 Countries*.[94] An exhaustive review, this report was written in concert with OECD staff and covered Australia, Bangladesh, Cambodia, PRC, Cook Islands, Fiji Island, Hong Kong, India, Indonesia, Japan, Republic of Kazakhstan, Republic of Korea, Kyrgyz Republic, Malaysia, Mongolia, Nepal, Pakistan, Palau, Papua New Guinea, the Philippines, Samoa, Singapore, Thailand, Vanuatu and Vietnam. The second such effort, the 2006 report is a long, descriptive document that does not facilitate assessment of progress made by counties, or lack thereof. Indeed, it seems to obfuscate the actual country practice. For example, the report mentions that "[a]s very few of the countries in this report have penalized bribery of foreign public officials, bribes paid on foreign markets can be legally deducted from taxable income."[95] It does not mention which countries have made this not deductible and which have not, thereby neither lauding nor singling out for approbation any particular jurisdiction. Another example of the

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[88] ASIAN DEVELOPMENT BANK (ABD), ANTICORRUPTION POLICY AND STRATEGIES (1998), *available at* http://www.adb.org/Documents/Policies/Anticorruption/anticorruption.pdf.

[89] ADB, ANTICORRUPTION POLICY: PROPOSED CLARIFICATIONS AND RELATED CHANGES TO CONSULTING AND PROCUREMENT GUIDELINES (2004), *available at* http://www.adb.org/Anticorruption/procurement-guidelines.pdf.

[90] ADB, ANTICORRUPTION POLICY: HARMONIZED DEFINITIONS OF CORRUPT AND FRAUDULENT PRACTICES (2006), *available at* http://www.adb.org/Documents/Policies/Anticorruption/definitions-update.pdf.

[91] ADB, INTEGRITY PRINCIPLES AND GUIDELINES (2006), *available at* http://www.adb.org/Documents/Guidelines/Integrity-Principles-Guidelines/integrity-guidelines-procedures-2006.pdf.

[92] ADB, GUIDELINES ON THE USE OF CONSULTANTS BY ASIAN DEVELOPMENT BANK AND ITS BORROWERS (2007), *available at* http://www.adb.org/documents/guidelines/consulting/Guidelines-Consultants.pdf.

[93] *Cf.* 2007 World Bank Press Release, *supra* note 85.

[94] ADB, ANTI-CORRUPTION POLICIES WITH ASIA AND THE PACIFIC: PROGRESS IN LEGAL AND INSTITUTIONAL REFORM IN 25 COUNTRIES (2006), *available at* http://www.adb.org/Documents/Reports/Anticorruption-Policies/anticorruption-policies.pdf.

[95] *Id.* at 28.

incomplete and ineffective nature of the report is evident when India and the "Central Vigilance Act"[96] are discussed. While mentioning that the Act broadened the mandate of the Central Vigilance Commission (CVC), the report explains "[CVC] is now entitled to supervise investigations into corruption cases conducted by the competent Delhi Special Police Establishment and the Central Bureau of Investigation; it may also inquire in to cases where government officials are suspected to have acted in a corrupt manner."[97] What does this mean? Even the description is far from clear; assessing any progress on this dimension is impossible. Obviously, concern for the political sensitivity of the parties is paramount and is predictive of an inability to be straightforward and blunt when necessary.

In 2007, the ADB and OECD jointly issued the *Anti-Corruption Action Plan for Asia and the Pacific Region*[98] and a *Strategy and Work Program 2007-2008*[99] that had been adopted in November 2006 at a meeting in Thailand. This program reflects several important common understandings:

> Convinced that corruption is a widespread phenomenon which undermines good governance, erodes the rule of law, hampers economic growth and efforts for poverty reduction and distorts competitive conditions in business transactions;
>
> Acknowledging that corruption raises serious moral and political concerns and that fighting corruption is a complex undertaking and requires the involvement of all elements of society . . . .[100]

Part of the Strategy and Work Program for 2007-2008 includes recognizing that the reporting templates developed in 2006 will be used to "consolida[te] information for the biennial stocktaking of progress in legal and institutional reform."[101] This is progress, as it is virtually impossible to make comparisons without standardized reporting. In addition to self-reporting, country specific reviews will be much like an audit and will keep the process transparent. The Secretariat will conduct the review, which will include interviews with government officials, business people and NGO representatives. In addition, the Secretariat will perform "thematic reviews" based on the desire of the members. In 2007-2008 the focus is on mutual legal assistance (MLA) including extradition in the "prosecution of corruption and recovery of

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[96] *Id.* at 45.

[97] *Id.*

[98] ADB, ANTI-CORRUPTION ACTION PLAN FOR ASIA AND THE PACIFIC (2007), *available at* http://www.adb.org/documents/books/anti-corruption-policies/appendix.pdf.

[99] ADB, STRATEGY AND WORK PROGRAM 2007-2008 (2007), *available at* http://www.oecd.org/dataoecd/19/26/37876529.pdf.

[100] ADB, *supra* note 98, at 65.

[101] ADB, *supra* note 99, at 4.

proceeds of corruption."[102] Funding this initiative is a problem and will somewhat limit how much the agency can do. The basis of the program is centered on three "pillars of action." These include "developing effective and transparent systems of public service," "strengthening anti-bribery action[s] and promoting integrity in business operations," and "supporting active public involvement."[103]

This Strategy and Work Program builds upon earlier cooperative efforts starting with the launch of the Anti-Corruption Initiative in Seoul, Korea in 2000 and the creation of a Steering Group in 2001. The twenty-eight member anti-corruption group regularly reviews each country's progress. India's MLA extradition and assets recovery framework review was just completed in September 2007 and will be available to the public by the end of 2007.[104]

The OECD on May 16, 2007 offered India along with PRC and Indonesia enhanced engagement programs for the purpose of trying to promote policy convergence that ultimately will aid global economic development and lead to their membership in the OECD. Not mentioned, but of course implicit, is that OECD desires to enforce a level playing field where all economic powers are bound by similar rules and restrictions.

C. Focus on India

Corruption continues to be a problem in India. Several leaders have detailed the problem from their perspective. When asked about corruption, Rajiv Singh, Vice Chairman of DLF (one of the most prominent real estate development companies), noted that:

> Corruption continues to be an issue, principally in areas where there are arbitrary decisions and a lack of accountability. Over the years it has improved immensely, from a time when corruption was pervasive to now, when corruption is only in areas where you need special favors and sanctions. As an organization we stay away from the temptation by not asking for too much. We are patient and compliant, and we don't face that kind of difficulty. However, I am sure that the people who work for us must face some element of difficulty in conducting their day-to-day business.[105]

Similarly, Montek Singh Ahluwalia, the Deputy Chairman of the India's Planning Commission responded to a question about corruption:

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[102] *Id.* at 5.

[103] ADB, *supra* note 98, at 67-69.

[104] E-mail from Frederic Wehrle, Coordinator Asia Pacific, OECD Anti-Corruption Division to Beverley Earle, Professor of Law, Bentley University (Oct. 11, 2007) (on file with author).

[105] Ranjit Pandit, *Putting a Roof over India: An Interview with the Country's Biggest Developer*, McKinsey Q. (2007), http://www.mckinseyquarterly.com/Putting_a_roof_over_India_An_interview_with_the_countrys_biggest_developer_2066 (last visited Nov. 2, 2008).

> Corruption is a huge problem—not just in India, but everywhere. However, India's democratic, free-to-criticize atmosphere generates very strong incentives to hold the light up to any wrongdoing. This is one of our strengths. If there's any corruption in India, somebody will draw attention to it. As a result, we are focusing on ways of eliminating corruption in the functioning of the schemes that are supposed to reach ordinary people.
>
> Take the state of Andhra Pradesh, for example: if you go to its Web site for the National Rural Employment Guarantee Act, you can click on whatever district you want. You can go then to whatever village you want, and it will tell you what projects are under way in that village and, for each project, the people who were paid. Payment of wages is made through postal-bank accounts, eliminating the scope for leakage. As we make things transparent, the democratic process itself will throw off the wrongdoing.
>
> As the process of economic reforms has unfolded, some of the big, concentrated sources of corruption have been systematically eliminated. The central government, for example, does not give any licenses for anyone who wants to produce something somewhere, nor does it give import licenses. You can import whatever you want, provided you can pay the import duty, which is now very moderate. This has eliminated major sources of corruption that existed earlier. But one does hear complaints about local hassles, 'transaction costs' whatever. This is where state government reforms become important.[106]

In 2005, TI commissioned a baseline study of corruption in India that is being updated for 2007.[107] The study was limited to the types of corruption experienced by the common man. The report begins:

> This study does not cover corruption at various other levels such as where a business man pays bribes to an Income Tax official. It also does not cover the mega corruption, the grand larceny, in which hundreds, and thousands of crores of rupees are paid as bribes to corrupt functionaries . . . .[108]

The authors assert that although the amount of money involved in mega-corruption may be larger, the injury is larger in the smaller scale because it "[c]orrodes the moral fiber of . . . society."[109] The hope is that if the petty corruption is addressed and reduced, the grand corruption will also fall. This hypothesis may not be accurate because enforcement of petty corruption is

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[106] Adil S. Zainulbhai, *Clearing the Way for Robust Growth: An Interview with India's Chief Economic Planner*, MCKINSEY Q. (2007), http://www.mckinseyquarterly.com/Clearing_the_way_for_robust_growth_An_interview_with_Indias_chief_economic_planner_2064 (last visited Nov. 2, 2008).

[107] *See* TRANSPARENCY INTERNATIONAL INDIA, INDIA CORRUPTION STUDY 2005 (on file with author) [hereinafter INDIAN CORRUPTION STUDY 2005].

[108] *Id.* at i.

[109] *Id.*

defined as what "citizens are subjected to in order to get one or the other job attended to at the public utilities/services which they are entitled to without hassle and spending the 'extra money.'"[110] The survey found that the police were perceived to be most corrupt of all public services and over 80% of all citizens who had dealings with the police paid bribes.[111] Government hospitals were also perceived as most corrupt within the basic services category.[112] The survey found major differences among the twenty states in terms of corruption.

The report concludes with several recommendations on what should be continued and improved. The Citizens Charters address the rights of individuals in dealing with public service providers, indicating "where to go and how to proceed" when one has a complaint about government services.[113] Additionally, a Citizen Ombudsman[114] (Lok Prahari) exists, as well as both the Right to Information Act of 2005 and the Freedom of Information Act of 2002, which together provide citizens opportunities to monitor government actions. The report notes that these are a "watered down" version of the original draft and may not go far enough in mandating transparency and accountability.[115] The E-government project chronicles the efforts to make government accessible through the internet.[116] It highlights, for example, a website that makes citizen grievances public,[117] and another that offers an opportunity for citizens to register complaints and suggestions.[118]

One especially effective measure featured in the report is Citizen Report Cards[119] (CRC). First started in 1993, these gauge satisfaction with services provided by the government and were widely implemented by a Public Affairs Center created in Bangalore in 1994. The CRC data reveal a dramatic improvement in general satisfaction with all Bangalore services, moving from less than 10% to approximately 70% approval in a ten year period. This result has prompted the Delhi Government to try CRC. Finally, a Department of Administrative Reforms and Public Grievance (DAR & PG) exists where complaints can be made.[120]

The report includes numerous suggestions on how to fight corruption including:

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[110] *Id.* at 6.

[111] *Id.* at 8.

[112] *Id.*

[113] *Id.* at 198.

[114] *Id.* at 200.

[115] *Id.* at 206.

[116] *Id.* at 210.

[117] *Id.* at 198 (citing Citizens' Charters in Government of India, www.goicharters.nic.in (last visited Oct. 23, 2008)).

[118] *Id.* (citing Portal for Public Grievances, http://darpg-grievance.nic.in).

[119] *Id.* at 212.

[120] *Id.* at 214.

(a) Exemplary action against sinners.
(b) Electoral reforms to check the entry of corrupt politicians.
(c) Implementation of Right to Information in government departments.
(d) Privatization (with competition) in the provision of services, like electricity.
(e) Security to honest officials.
(f) Building a people's movement against corruption.
(g) Time-bound and effective implementation of judicial pronouncements.
(h) Provision of Ombudsman in every ministry/department to redress people's grievances.
(i) Overhaul of judicial procedures.
(j) Ending of class-specific favors and privileges (e.g., to journalists).
(k) Insistence on redress of grievances by senior officers.
(l) Giving more powers to anti-corruption departments
(m) Intervention by civil society organizations (e.g., TI India) in cases of victimization of officers.[121]

At the same time, the report acknowledges that these improvements require almost a "magic wand."[122] The report was prepared by Center for Media studies (CMS), an independent research group. While it may appear to be hopeless to think bribery can be eradicated, it certainly is not. The transparency provided by the internet instantly telegraphs events to millions of people, who can affect the outcome by their sudden and sustained attention.[123]

V. IMPLICATIONS FOR BUSINESS

India's growth rate of 9.4% requires business to focus on ways to incorporate India[124] into future marketing plans. No longer just an outsourcing outpost, India is a promising market; companies will have to consider locating there to leverage their presence and tap the growing middle class. McKinsey researchers predict that, by 2025, the Indian middle class will represent 40% of

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[121] *Id.* at 222.

[122] *Id.*

[123] One need only ask George Allen, former Senator from Virginia, about his derogatory comment (macaca) about a young reporter dogging his campaign and how he withdrew from the race for the Republican presidential nomination. *See* Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology: Name Insults Webb Volunteer*, WASH. POST, Aug. 15, 2006, at A01 (Allen made off the cuff comment about Staff person from opposing candidate's campaign who was following Allen with a video camera. He called the young man of India descent "macaca"). For a video of the incident, see http://www.youtube.com/watch?v=r90z0PMnKwI (last visited Nov. 2, 2008).

[124] Adil S. Zainulbhai, *Securing India's Place in the Global Economy*, MCKINSEY Q. (2007), http://www.mckinseyquarterly.com/Economic_Studies/Country_Reports/Securing_Indias_place_in_the_global_economy_2058 (last visited Nov. 2, 2007).

the population compared to 5% today.[125] While reform in India begun in 1991 has not been linear, GDP growth in the last four years has averaged 8.6% and higher levels of growth are expected for the next four years.[126] This, coupled with the fact that India's population is the youngest in the world and that India will outpace China in 2035 as the world's most populated country, positions India as the "market not to miss" in the Twenty First century. These statistics underscore the potential desirability of India as the next "China Syndrome" dream—selling one of anything to every person in India at some regular interval.

Yet, enormous challenges to doing business in India exist and will have to be addressed unless India wants to stagnate and retard its pace of development. Reforms are needed to make the legal environment both more predictable and more hospitable for long term business growth. Businesses are willing to endure lean years and even hardship if there is a promise of a good future, as was the case in the early days of investment in China.

IBM has made a significant investment in India and has a large stake in the development of the legal environment that affects its ability to do business; IBM even held its annual investor briefing in Bangalore in 2006.[127] Recently, Microsoft promised to invest "$1.7 billion and create 3,000 jobs" in India and Cisco pledged a $1.1 billion investment in India.[128] Not surprisingly, other companies are following suit.[129] In addition, India has many home grown companies that are now becoming international players, including Tata Group, Reliance, Infosys, and Ranbaxy.

International companies are not only seeking out a certain, predictable, and stable legal environment; many also try to promote core values within the organization by implementing codes of conduct.[130] Often, these clarify expectations that the company has for its employees and communicate legitimate expectations that the public may have for the corporation. An oft-cited example of the value of a Code is Johnson & Johnson's quick recall of Tylenol bottles that may have been tampered with; management relied upon the

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[125] The McKinsey Quarterly, *India's Executives: Confident in Their Economy and Eager to Hire*, MCKINSEY Q. (2007), http://www.mckinseyquarterly.com/Economic_Studies/Country_Reports/Indias_executives_confident_in_their_economy_and_eager_to_hire_2059 (last visited Nov. 2, 2008).

[126] Zainulbhai, *supra* note 124.

[127] Steve Hamm, *Big Blue Shift: IBM is Reorganizing Its Global Workforce to Lower Costs Without Skimping on Service*, BUS. WEEK, June 5, 2006, at 108 (discussing IBM's strategy).

[128] Brier Dudley, *Gates Touts New Jobs in India*, SEATTLE TIMES, Dec. 28, 2005, at E1 (discussing plans for India).

[129] *Id.*

[130] *See generally* Codes of Conduct/Practice/Ethics from Around the World, http://courses.cs.vt.edu/~cs3604/lib/WorldCodes/WorldCodes.html (last visited Nov. 2, 2008).

precepts of its Credo[131] to place the safety of its customers above all else. The company was again navigated by the lights of its Credo when, on February 12, 2007, Johnson & Johnson announced that it had voluntarily disclosed to both the U.S. Department of Justice and the SEC information that "subsidiaries outside the US are believed to have made improper payments in connection with the sale of medical devices in two (unidentified) small market countries."[132] Johnson & Johnson concluded that this conduct violated both company policies and the FCPA; the Chairman of its Medical Devices and Diagnostics division retired because he was "ultimately responsible" for this violation. Companies with codes may find it easier to navigate the enforcement of both the law and its own code creating an important environment wherein the faucet of bribe "payors" is permanently shut down.

Pressure to report under the FCPA has been increased by the penalties imposed under Sarbanes-Oxley. No doubt, many business people outside the United States are incredulous that individuals and companies report their own alleged wrongdoing and criminal actions to the federal authorities. What is not well understood globally, however, is that if a company fails to do so and is then caught, the penalties under the Federal Sentencing Guidelines can be severe. One need only look to the twenty-year-plus federal prison sentences of first time offenders Bernie Ebbers of WorldCom and Jeffrey Skilling of Enron to understand that fear, not altruism, motivates corporate wrongdoers to self-report and hopefully avoid a similar fate. Codes of conduct are an important way for companies to communicate their commitment to adhere to the law as well as to a higher ethical standard in some cases.

Trace International, an organization that helps support companies as they comply with anti-bribery regulations around the world, recently sponsored an essay contest entitled "Why Bribe?"[133] The winning author, Peter Roberts, is a lawyer who for twenty-six years worked at Unilever in various international postings and now serves as an advisor to an international security company. His remarkable essay on bribery takes the position of TI, which looks at the problem as a two-sided dilemma. Fault lies not just with the corrupt official, but also with the company intermediary who is all too willing to pay off the official. Roberts' advice parallels the policy reflected in many corporate codes

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[131] Johnson & Johnson, *Our Credo*, http://www.jnj.com/our_company/our_credo/index.htm (last visited Nov. 2, 2008) (follow "our credo" hyperlink). The Credo sets forth Johnson & Johnson's business priorities, which are first to the people who use their products, then their employees, next the communities in which the company operates and, finally, the shareholders.

[132] Press Release, Johnson & Johnson, Johnson & Johnson Statement on Voluntary Disclosure (Feb. 12, 2007), *available at* http://www.jnj.com/connect/news/all/20070212_192452.

[133] Trace, *Trace 2007 Essay Contest*, TRACE Q. NEWSL., Summer 2007, at 4, *available at* http://secure.traceinternational.org/news/pdf/tracesummer07.pdf.

of conduct. He recommends that the "[c]ompany has to establish a reputation for not paying bribes"[134] and suggests that, although bribery is often seen as a "quick way to get over a problem," in fact it is never quick and only prolongs the time and expense of resolving a problem.[135]

Roberts notes that "the appetite of corrupt officials (perhaps in collusion with company managers who take a percentage for themselves) will grow with feeding."[136] Indeed, he believes that the only effective approach is the one adopted by his company: "[Y]ou can resist corruption by making it clear that you will never pay it. You then need to fight each demand in order to hold that line." One very practical piece of advice is "in all circumstances and in all countries, it is important not to appear in a hurry." Therein lies the problem—if getting it done yesterday is the directive, a company manager may think he has no option but to bribe. To counteract this pull, both company policy and country law must be definitively clear: Take your time; do it right.

The days of corruption as usual must come to an end. While many oppose capital punishment, the execution of the allegedly corrupt head of China's Food and Drug Administration was a signal that the PRC may be more serious about ending corruption.[137] While not endorsing such extreme measures, countries including India need to make the limiting of bribery both a legislative and public priority.

There are few secrets in today's electronic marketplace. The recent report by Paul Volker on the World Bank's anti- corruption efforts was not specific, but the *Wall Street Journal* noted the loss in India of many millions of dollars on a World Bank drug procurement program.[138] This is presumably only the tip of the iceberg. No doubt, if India wishes to avoid the fate of many African nations, it must quickly address this issue so both multinational and domestic companies are not discouraged from establishing sites in India.

VI. CONCLUSION

India's growth as a democratic country may be more difficult to manage than China's, which can force conformity when the ruling power deems it necessary (e.g., the one child policy). Nevertheless, India is poised to develop dramatically and, in the next twenty-five years, lift an historic number of people out of extreme poverty and into the middle class. This is contingent, however, upon the country's ability to implement necessary changes in the legal infrastructure

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[134] Peter Roberts, *Why Bribe?* (May 1, 2007) (unpublished essay, on file with author).

[135] *Id.*

[136] *Id.*

[137] *See supra* note 1.

[138] Editorial, *Smiling Past Corruption*, WALL ST. J., Oct. 11, 2007, at A20; *see also supra* text accompanying notes 76-87.

and mobilize capital to develop the physical infrastructure. Transparency of the regulatory process and business environment will aid in business creation.

What is needed in India is the recasting of legislation to criminalize bribery of foreign public officials as the OECD Convention would require. India needs to ratify the U.N. Convention against Corruption. Further, India needs to strengthen its national commitment to creating a transparent business climate that abhors the payment of bribes domestically as well. Foreign companies going to India need to appreciate the legal risk they face if they bribe within India's borders.

Transparency International reports that while only eight countries enforced anti-bribery laws in 2005, twelve did in 2006 and fourteen in 2007.[139] While fourteen sounds small, a 75% increase in countries enforcing compliance with international standards is a start worth noting; perhaps this statistic signals a trend. There is a correlation between the predictability and soundness of the legal environment and economic development. Thus, the addition of more stringent anti-bribery legislation goes hand in hand with corporate accountability and disclosure as well as stepped up enforcement. Additionally, protection for whistleblowers must be included as it is an integral part of any anti-corruption campaign.

One may be able to draw parallels between the fight against bribery and corruption and the campaign against drunk driving. In the 1960s, just forty years ago, many drove drunk all over the world and it was deemed an "accident" if someone were injured as a result. Now, in many parts of the world, the same incident will give rise to loss of driving privileges, criminal charges, and possibly a lengthy incarceration.[140] The shift in attitude is dramatic; it would have been unthinkable to predict that in just forty years the public would embrace the concept of a "designated driver." Some suggest that the sea-change is, in part, due to a media campaign launched by Mothers Against Drunk Driving (MADD) that helped to put a face on the costs of this crime.[141] Similarly, TI and other organizations are trying to put a face and a cost on the crime of bribery. Just as a culture can change in two decades from toleration of drunk driving as an inevitable accident to a punishable crime, so too can a country's view of bribery.

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[139] FRITZ HEIMANN & GILLIAN DELL, PROGRESS REPORT 07: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS 6 (2007), *available at* http://www.transparency.org/publications/publications/3rd_oecd_progress_report.

[140] *See generally* http://www.madd.org for information on the history of drunk driving activism beginning in 1980.

[141] *Id.*; *see generally* Alcohol: Problems and Solutions, DWI/DUI Laws of U.S. States, http://www2.potsdam.edu/hansondj/Drivingissues/1104284869.html (last visited Nov. 11, 2008) (for listing of penalties by states).

A more local example involves the control of stray dogs in India. A visit to New Delhi in January 2008 showed an enormous number of stray dogs running everywhere in the city. Residents, if queried, would simply shrug their shoulders and express an attitude that nothing could be done. In Hyderabad, however, during the same period, there were almost no stray dogs in the city. It was a striking contrast. Why the difference? Apparently, the city government, concerned about the health hazard posed by stray dogs that could be rabid and had attacked residents recently, began a program that involved both sterilizing and humanely euthanizing stray dogs.[142] Bribery is akin to the stray dog problem—pervasive and seeming insurmountable. Yet, with effort, resources, legal authority, and public support, the dog problem in Hyderabad was tackled. The bribery problem could be next.

While it may be easy to become discouraged at the seeming insurmountable task of eradicating this ancient way of doing business, one need only examine the history post 1977. This is not a moral crusade, although it most certainly involves ethics. At its core, it is about development. As former President William Jefferson Clinton once said, "it's the economy, stupid." If there is enforcement of laws as well as action to restrict the spigot of money being offered by those business people willing to bribe, change is possible.[143] With unchallenged or sporadically challenged corruption, India will not progress economically to the extent that would be possible if there were agreement to end the practice of bribery. Who would have thought twenty years ago that poor individuals living in isolated villages would have cell phones? So, too, can the culture of bribery give way to a more transparent and fair, albeit not perfect, system.

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[142] *MCH Starts Killing Stray Dogs*, TIMES INDIA, Oct. 13, 2003, *available at* http://timesofindia.indiatimes.com/articleshow/230210.cms; M. Srinivas, *City Dogged by Stray Dog Menace*, HINDU, Aug. 6, 2006, *available at* http://www.hindu.com/2006/08/06/stories/2006080619870200.htm.

[143] Roberts, *supra* note 134. For example, in the winning essay "Why Bribe" by a former Unilever employee, Peter Roberts, described how he and the companies he worked for avoided bribing for over 30 years. He noted the most important step is to unequivocally set up the expectation of no bribing. *Id.* He also noted that it is "important not to appear to be in a hurry." *Id.* Ultimately many will back down from demands. However this may work better when there are petty demand such as roadblocks and not more subtle demands that will influence the award of a contract. *See also* https://www.secure.traceinternational.org (last visited Nov. 12, 2008), for a list of 2008 essay contest winners.

Hawai'i's Masters and Servants Act: Brutal Slavery?

Wilma Sur*

I. INTRODUCTION

The Kingdom of Hawai'i began importing indentured labor in 1852.[1] The primary immigrants were Chinese and Japanese under three-to-five-year contracts designated to work on sugar plantations.[2] Between 1852 and 1896, the number of Chinese and Japanese grew from 364 to 46,023,[3] or from 4.5% to 56.5% of the total population.[4] Although Hawai'i was only one of many sugar venues to use contract labor,[5] it was unique. Hawai'i's planter class had never institutionalized slavery and Hawai'i had never been a formal European colony. Without a slave paradigm and circumscribing laws of a mother country, Hawai'i was free to implement its own laws regulating immigration and the treatment of immigrants. Examination of these laws presents an opportunity to learn how the need for immigrant labor affected the legal system, its integrity, and perhaps the moral fabric of the society at large.

Hawai'i's Masters and Servants Act (Act), passed by the Kingdom's Legislature in 1850, codified contract labor and provided the legal framework within which Hawai'i would receive indentured workers. Although the Act's provisions were more humanitarian than those governing slavery, the Act nevertheless shared the economic goal of slave laws—to harness labor. Hence, the manner in which the Act was implemented by the Board of Immigration (Board) and construed by the Hawai'i Supreme Court illustrates the tension between Hawai'i's liberal leanings and its economic compulsion for labor.

Examination of the Act over its fifty-year history suggests that the Hawaiian government and the court allowed the wealth generated by immigrant labor to infect their ideals. Contract laborers were marginalized despite the Act's liberal

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[1] REPORT OF PRESIDENT OF THE BOARD OF IMMIGRATION TO THE LEGISLATIVE ASSEMBLY OF 1886, at 4 (1886) [hereinafter 1886 REPORT OF BOARD].

[2] *Id.* at 4-5.

[3] ROBERT C. SCHMITT, HISTORICAL STATISTICS OF HAWAI'I 25 (1977).

[4] 3 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1874-1893: THE KALAKAUA DYNASTY 116 (1967).

[5] *See* Stanley L. Engerman, *Contract Labor, Sugar, and Technology in the Nineteenth Century*, 43 J. ECON. HIST. 635, 642 (1983).

provisions, leaving laborers no realistic way to seek redress for their grievances. The court became complicit in ensuring compliant, cheap labor by refusing to acknowledge any contradiction between the indentured labor system and the prohibition of involuntary servitude stated in Hawai'i's Constitutions. As the demand for plantation labor intensified, the Board and the court increasingly abandoned humanitarian interpretations of the Act in favor of economic pragmatism, leaving the contract system physically brutal.

II. THE SLAVE OPTION

Slavery accompanied the development of tropical agriculture in European colonies beginning in the late eighteenth century, guaranteeing cheap production of plantation crops. By the mid-1800's, slaves were the world's major producers of cotton (U.S.), tobacco (U.S.), sugar (Cuba, Brazil), and coffee (Brazil).[6] By the beginning of the nineteenth century, however, slavery began to come under concerted attack. The slave uprising in Saint Domingue (Haiti) at the turn of the century ended slavery on the largest single sugar island.[7] Additionally, some northern states abolished slavery after the Revolutionary War,[8] as did several Spanish-American republics.[9] Britain was the first large empire to abolish slavery when both houses of Parliament passed an emancipation bill in 1833.[10] The right to indenture imported workers was thereafter fought for and won by British West Indies planters stripped of slave labor.[11]

On March 30, 1820, the first missionaries arrived in Hawai'i[12] carrying with them abolitionist ideals cultivated in their Boston churches. Hence, Reverend William Richards influenced King Kamehameha III in promulgating a

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[6] *Id.* at 638.

[7] *Id.* at 637.

[8] JAMES OLIVER HORTON & LOIS E. HORTON, IN HOPE OF LIBERTY: CULTURE, COMMUNITY AND PROTEST AMONG NORTHERN FREE BLACKS, 1700-1860, at 71-75 (1997). Formal abolition of slavery occurred in Vermont in 1777, Pennsylvania in 1780, Massachusetts in 1783, Connecticut in 1783, Rhode Island in 1784, New York in 1799, and New Jersey in 1804, although slavery continued in some states which employed "gradual emancipation." *Id.*

[9] UNESCO, STRUGGLES AGAINST SLAVERY: INTERNATIONAL YEAR TO COMMEMORATE THE STRUGGLE AGAINST SLAVERY AND ITS ABOLITION 58 (2004), *available at* http://unesdoc.unesco.org/images/0013/001337/133738e.pdf. The Spanish American Republics which abolished slavery before Britain were Chile in 1823, Bolivia in 1826 and Mexico in 1829. *Id.*

[10] ADAM HOCHSCHILD, BURY THE CHAINS 347 (2005).

[11] David W. Galenson, *The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis*, 44 J. ECON. HIST. 1, 14 (1984).

[12] GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 64 (1968).

Declaration of Rights in 1839,[13] eight years after William Lloyd Garrison's first issue of the *Liberator* on January 1, 1831.[14] Deemed the Hawaiian Magna Carta, the declaration stated that "God has . . . bestowed certain rights alike on all men, and all chiefs, and all people of all lands. These are some of the rights which he has given alike to every man and every chief, life, limb, liberty, the labor of his hands, and productions of his mind."[15]

In 1840 Hawai'i adopted its first constitution. That constitution also extolled the rights of man:

> "God hath made of one blood all nations of men to dwell on the earth," in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands. These are some of the rights which he has given alike to every man and every chief of correct deportment; life, limb, liberty, freedom from oppression; the earnings of his hands and the productions of his mind, not however to those who act in violation of laws.[16]

Hawai'i had endorsed the inalienable rights of man, implicitly eschewing chattel slavery.

III. MASTERS AND SERVANTS ACT

Without slavery, how was Hawai'i to participate in the world's commercial economy? Although the remarkable growth of Hawai'i's sugar production in the latter part of the nineteenth century was probably not anticipated by the Hawai'i Legislature in 1850, the profits possible in tropical agriculture were visible to all. Besides, the pressure to ensure labor for whatever reason was glaring given the striking demise of the Hawaiian population.[17] In a preliminary meeting of the Royal Hawaiian Agricultural Society in April 1850, William Little Lee, Chief Justice of the Hawai'i Superior (Supreme) Court, introduced "An Act for the Government of Masters and Servants,"[18] which became law on June 21, 1850.[19] The Act created two kinds of "servants": (1) apprentices who would learn an art, trade, profession, or "other employment,"

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[13] 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854: FOUNDATION AND TRANSFORMATION 157-59 (photo. reprint 1947) (1938).

[14] People & Events, William Lloyd Garrison, http://www.pbs.org/wgbh/aia/part4/4p1561.html (last visited Oct. 26, 2008).

[15] 1 KUYKENDALL, *supra* note 13, at 159-60.

[16] KINGDOM OF HAW. CONST. of 1840, *available at* http://www.masterliness.com/a/1840.Constitution.of.the.Kingdom.of.Hawaii.htm.

[17] SCHMITT, *supra* note 3, at 25. The indigenous Hawaiian and part-Hawaiian population fell from 71,019 in 1853 to 39,504 in 1896. *Id.*

[18] 1 KUYKENDALL, *supra* note 13, at 330; EDWARD BEECHERT, WORKING IN HAWAI'I: A LABOR HISTORY 42 (1985).

[19] *See* 1 KUYKENDALL, *supra* note 13, at 330; BEECHERT, *supra* note 18, at 42.

and (2) "[t]hose who engage to serve by the day, week, month, year, or some other fixed time, in consideration of certain wages."[20] The Act provided, in pertinent part, that: (1) any person over the age of 20 could "contract to serve another in any act, trade, profession, or other employment, for any term not exceeding five years";[21] (2) contracts entered into in a foreign country were valid so long as they were not in contravention to the laws of the Kingdom and not longer than ten years;[22] (3) a complaint could be filed by the master with any district or police justice for issuance of a warrant if a laborer deserted,

> and if the complaint were found valid, the justice shall order such offender to be restored to his master, and he shall be compelled to serve double the time of his absence, unless he shall make satisfaction to the master for the loss and injury sustained by such absence: Provided, always, that such additional term of service shall not extend beyond one year next after the end of the original term of service;[23]

(4) if any worker refused to so serve, the court could "commit such person to prison, there to remain at hard labor until he will consent to serve according to law";[24] and (5)

> [n]o contract of service . . . shall bind the servant after the death of his master: Provided, however, that where servants shall be so bound by any company of individuals, the death of any one partner or the change of partners in such company, shall not operate to release such servant from the terms of his contract.[25]

This last provision made clear that enforcement of the Act rested on its penal provisions—imprisonment of a laborer who refused to work—which raised the issue of involuntary servitude. This legal structure necessarily placed a great amount of power in the lower courts.[26] Contract laborers were theoretically covered by the constitution and entitled to full protection of civil liberties by the judicial system.[27] Even under the Act, "cruelty, misusage, or violation of the terms of the contract" invalidated the contract, and masters could be fined

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[20] BEECHERT, *supra* note 18, at 42.

[21] An Act for the Government of Masters and Servants, § 22 (1850), *as reprinted in* PENAL CODE OF THE HAWAIIAN ISLANDS 174 (1850) [hereinafter 1850 PENAL CODE].

[22] *Id.* § 23, at 174.

[23] *Id.* § 24, at 174-75.

[24] *Id.* § 25, at 175.

[25] *Id.* § 29, at 176.

[26] BEECHERT, *supra* note 18, at 45. There were three tiers of courts. The District and Police courts were the lowest level; the Circuit Courts the next level and the Supreme Court the highest. *See* SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW 146-47 (2000).

[27] BEECHERT, *supra* note 18, at 42.

between five and one-hundred dollars.[28] Despite these provisions, charges against masters were rarely brought.[29] It was virtually impossible for a laborer to leave his post to seek redress unless he first deserted his position.[30] Thus, laborers coming before the court were primarily criminal defendants having illegally left their jobs, and only secondarily civil complainants.[31] The crime of desertion became a condition precedent to a legal hearing, severely limiting a laborer's ability to right a wrong.[32] The Act "placed the workers in a category *outside* the law."[33]

The Act explicitly distinguished between immigrant and indigenous labor, allowing ten-year contracts for immigrants, while limiting indigenous labor to five years.[34] Although this stated difference in the terms of the contract was not critical, it symbolized the prejudice against immigrant labor embedded in the law and reflected the Agricultural Society's first option under the Act—to obtain Chinese "coolie" labor:

> In those days [1850s], the difficulty of obtaining labor was very great. From California there was no hope of getting any; none could be procured from Japan; the South Sea islands were considered undesirable on account of expense, and Europe was regarded as being quite out of the question. There was scarcely any choice but to fall back upon China.[35]

The first 180 Chinese laborers arrived on January 3, 1852, earning three dollars per month under three-year contracts, with a six dollar advance "to be refunded in small installments out of their wages."[36] Passage, food, clothing and housing were to be provided.[37] Not surprisingly, these immigrants immediately created a political underclass because they had no voting rights.[38] The 1840 Constitution granted the right to vote to all native-born or naturalized males and denizens, white males who had taken a perfunctory oath of allegiance to the King.[39] Needless to say, Chinese immigrants were not in any of these categories.

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[28] 1850 PENAL CODE, *supra* note 21, § 28, at 175.

[29] MERRY, *supra* note 26, at 98.

[30] *Id.*

[31] BEECHERT, *supra* note 18, at 56.

[32] *Id.*

[33] *Id.*

[34] 1886 REPORT OF BOARD, *supra* note 1, at 4-5.

[35] *Id.* at 4.

[36] *Id.* at 5.

[37] *Id.*

[38] Jon M. Van Dyke, *Population, Voting and Citizenship in the Kingdom of Hawai'i*, 28 U. HAW. L. REV. 81, 86-88 (2005). It was also believed that immigrants would return to their homelands when their contracts expired. *Id.* at 88.

[39] Jon M. Van Dyke, Hawai'i's Constitutions 2 (unpublished manuscript, on file with author).

The 1852 Constitution, promulgated two years after the Act, continued to reflect the missionaries' antislavery zeal with what would turn out to be the strongest statement against slavery of any iteration of the Kingdom's Constitutions. The 1852 Constitution first restated the rights of man:

> God hath created all men free and equal, and endowed them with certain inalienable rights; among which are life, and liberty, the right of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.[40]

It then specifically addressed slavery in Article 12:

> Slavery shall, under no circumstances whatever, be tolerated in the Hawaiian Islands; whenever a slave shall enter Hawaiian territory he shall be free; no person who imports a slave, or slaves, into the King's dominions shall ever enjoy any civil or political rights in this realm; but involuntary servitude for the punishment of crime is allowable according to law.[41]

Given these stated principles, the sentencing structure of the Act reflected the tension between charitable paternalism and harsh exemplary punishment. The original Act provided that a laborer who deserted was to be returned to his master and "be compelled to serve double the time of his absence unless he shall make satisfaction to the master for the loss and injury sustained by such absence."[42] This language changed charitably so that the penal term was "*not to exceed* double the time of his absence," and only "in the *discretion of the court*."[43] The original Act also allowed that if the laborer continued to refuse to work as ordered, the laborer could be committed "to prison, there to remain, at hard labor, until he will consent to serve according to law."[44] An 1860 amendment limited hard labor to "a term not to exceed three months."[45] Although this provision may reflect sympathy toward the worker, it simultaneously conferred a benefit to the planter. The amendment provided that after the laborer served at hard labor, he could be ordered back to his master to fulfill the remainder of his contract *and* "any penal term which may have been added thereto by such

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[40] HAW. CONST. of 1852, art I.

[41] *Id.* art. XII.

[42] 1850 PENAL CODE, *supra* note 21, § 24, at 175.

[43] An Act for the Government of Masters and Servants, § 24 (1868), *as reprinted in* PENAL CODE OF THE HAWAIIAN ISLANDS 232 (1869) [hereinafter 1868 PENAL CODE] (emphasis added). Notations in this publication of the penal code do not indicate exactly when this language changed.

[44] 1850 PENAL CODE, *supra* note 21, § 25, at 175.

[45] 1868 PENAL CODE, *supra* note 43, § 25, at 233.

justice."[46] Rather than continue to incarcerate laborers, the law permitted the planter to procure an appended "penal term."[47]

The Civil War cut off Southern sugar to the Union and Hawaiian sugar exports skyrocketed—from approximately 1.4 million pounds (1860), to 2.5 million (1861), 3 million (1862), 5.2 million (1863), and 10.4 million (1864).[48] As sugar boomed, many missionary families found themselves tied to the plantation business. Morally pure on the slave issue, these missionaries defended the contract system, unwilling to admit any similarity between it and the involuntary servitude prohibited by the Hawai'i Constitution.

The contradiction between the constitution's theoretical guarantee of the rights of man and the reality of exploiting contract labor became the source of heated debate and dissention among missionaries.[49] Not so coincidentally, the statement in the 1852 Constitution that "God hath created all men equal" was deleted in the 1864 Constitution[50] and the strong abolitionist language ("Slavery shall under no circumstances whatever be tolerated") was superseded by a milder statement: "Involuntary servitude, except for crime, is forever prohibited in this Kingdom; whenever a slave shall enter Hawaiian Territory, he shall be free."[51] Huge sugar profits created an unquenchable thirst for immigrant labor. The Board of Immigration was established to slake this thirst.[52]

Created in 1864, the Board was to oversee the importation of contract labor, regulate the contracts, and recruit "free" immigrants.[53] The Board's mission quickly became obtaining labor, any labor, so long as the workers were compliant and cheap.[54] From its inception, it entered into contracts with immigrants in their home country as evidenced in *In re Lewers*:[55]

> It appears by an agreed statement of facts that Pakalo Chow, on the 10th of August, 1865, at Hong Kong, China, entered into a contract with Wm. Hillebrand, M.D., Royal Commissioner of Immigration, and in behalf of the

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[46] *Id.*

[47] *Id.*

[48] 2 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1854-1874: TWENTY CRITICAL YEARS 141 (1953).

[49] Clifford Putney, *God v. Sugar: The Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870*, 37 HAWAIIAN J. HIST. 63, 82 (2003).

[50] Van Dyke, *supra* note 38, at 95; HAW CONST. of 1864, art. I.

[51] HAW. CONST. of 1864, art. XI. The 1864 Constitution also eliminated universal suffrage for indigenous Hawaiians by limiting voting rights to those who had minimum property—$150 of property, $25/year in rental income, or $75 in annual income. Van Dyke, *supra* note 38, at 95.

[52] 2 KUYKENDALL, *supra* note 48, at 178.

[53] *See id.* at 180-81. It was also tasked with "the supplying of human materials for building up the permanent population of the country." *Id.* at 181.

[54] *Id.* at 179-80.

[55] 3 Haw. 21 (1867).

Hawaiian Government, for the term of five years, for certain stipulated wages, and for other consideration set forth in the contract.[56]

The Board was also supposed to be a clearinghouse for laborer complaints, responsible for ensuring minimum standards, including sufficient food and shelter.[57] However, it rarely advocated for the worker in any court of law.[58] Although some planters initially balked at the Board's regulation of contract labor,[59] the Board quickly morphed into the planters' alter ego, a government agency which could speak and negotiate for the "Kingdom" but with the interests of planters clearly at heart. Its characterization was fluid, its ethics unclear.

While planters pocketed large sugar profits, objections to the indenture system grew in the wake of the Civil War. Consonant with Republican reconstruction, Congress in January 1867, condemned the "coolie labor system" as "inhuman, immoral and abhorrent to the spirit of modern international law and policy," by resolution transmitted to the Hawaiian government through the American minister to Hawai'i.[60] Congress passed the Anti-Peonage Act in March 1867, prohibiting involuntary servitude in all states and territories of the United States.[61] The *San Francisco Chronicle* took out after the system, accusing it of being one of "brutal slavery."[62]

In Hawai'i, the first commissioner of the Board, Dr. William Hillebrand, was apprehensive of contract labor, stating: "The difference between a coolie and a slave is only one of degree, not of essence."[63] In 1868, Henry M. Whitney, editor of the *Pacific Commercial Advertiser* began a campaign condemning penal sanctions[64] and Luther Gulick, editor of the Hawaiian language newspaper *Ka Nupepa Kuokoa*, called for the system's total abolishment.[65]

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[56] *Id.* at 21.

[57] BEECHERT, *supra* note 18, at 97.

[58] *Board of Immigration v. Hakalau Plantation*, 7 Haw. 254 (1888), was an exception. The Board joined with the Portuguese immigrant Fernandes as plaintiffs, claiming that the defendant planter was required to pay Fernandes an additional two dollars because the contract between the Board and Fernandes stipulated an additional two dollars in wages if Fernandes had a child. *Id.* at 255. Despite the Board's support, the court held that because Fernandes had his child *after* he executed the contract with the Board and *after* the Board assigned Fernandes' contract to the planter, the planter was not obligated to pay the additional two dollars as stated in the Board-Fernandes contract. *Id.* at 257.

[59] *See* 2 KUYKENDALL, *supra* note 48, at 180.

[60] *Id.* at 186-87.

[61] Anti-Peonage Act, ch. 188, 14 Stat. 546 (1867); DAVID NORTHRUP, INDENTURED LABOR IN THE AGE OF IMPERIALISM: 1834-1922, at 142 (1995).

[62] BEECHERT, *supra* note 18, at 81.

[63] *Id.* at 64; *see also* 2 KUYKENDALL, *supra* note 48, at 186.

[64] 2 KUYKENDALL, *supra* note 48, at 187.

[65] *Id.* at 188.

Ann Gulick, wife of missionary Orramel Gulick and sister-in-law to Luther, wrote her sister on July 23, 1870, asserting that missionary families who had once opposed Southern slavery were being corrupted: "They are under Government pay and not a word have they to say [against] the coolie system a modified form of slavery."[66]

The reciprocity treaty pending before the United States Senate in 1870 exacerbated the split among missionary families.[67] Legislative reforms were proposed in 1870, but were narrowly defeated indicating the planters' hold on political power.[68] Two years later in 1872, the Legislature amended the Act to mandate that contracts be executed before a government official.[69] The official was to be paid fifty cents per contract by the master.[70] If the contract was so certified, it could "be read in evidence without further proof, against any party whose identity has been established; but the said certificate of acknowledgment shall not be conclusive, but may be rebutted by competent testimony."[71] Because the certifying officials were paid by the planters, the government became even more complicit in ensuring enforcement of the contracts. Even though the statute purportedly established only a rebuttable presumption that a certified contract was valid, which presumption could be defeated with "competent testimony,"[72] most workers had no means by which to marshal evidence or retain legal counsel.[73] In practice, the presumption became fact; the amendment tipped the scales of justice once more in favor of the planters.

Another amendment in 1872 provided that where a laborer was imprisoned for desertion and ordered to work beyond the end of the contract term, he had to be paid for the additional time worked.[74] Although one would hope that the Legislature passed this amendment because it was fair and just, such was not the case. This provision was mandated by the Hawai'i Supreme Court in the case of *Wood v. Ho'okina*,[75] one of the earliest cases construing the Act. Wood

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[66] Putney, *supra* note 49, at 83 (quoting Letter from Ann Gulick to Sarah Kittredge (July 12, 1870)).

[67] *See* 2 KUYKENDALL, *supra* note 48, at 189.

[68] *Id.* at 191.

[69] For the Protection of Parties to Contracts Authorized by Section 1417 of the Civil Code, ch. 30, sec. 1416, § 2 (1872) [hereinafter Protection of Parties to Contracts], *reprinted in* COMPILED LAWS OF THE HAWAIIAN KINGDOM 457 (1884).

[70] *Id.* § 3, at 458.

[71] *Id.* § 5, at 458.

[72] *Id.*

[73] MERRY, *supra* note 26, at 208.

[74] To Further Define the Nature and Obligations of the Contracts Authorized by Sections 1417 & 1418 of the Civil Code, ch. 31, sec. 1416, § 2 (1872) [hereinafter Contracts Authorized by Sections 1417 and 1418], *in* COMPILED LAWS OF THE HAWAIIAN KINGDOM , *supra* note 69, at 459.

[75] 3 Haw. 102 (1869).

complained that Ho'okina had willfully deserted.[76] The lower court ordered Ho'okina to return to work for eight months.[77] Ho'okina returned for more than eight months and allegedly deserted again.[78] The planter claimed Ho'okina had to work two hundred and eight days but had only worked one hundred and fifteen days.[79] The question before the court was whether Wood could compel Ho'okina to continue working until Ho'okina fulfilled the alleged sentence, even though Wood had not paid Ho'okina wages for any of the additional time ordered.[80] The planter took the position that because the additional term was a court order and not part of the "contract," he was excused from paying wages.[81] No doubt sensitive to the rising cries of "slavery," the court rejected the planter's argument and held that Wood's failure to pay was a breach nullifying Ho'okina's obligation to continue working. The Legislature thereafter codified the planter's obligation to pay wages for a court imposed term in 1872.[82]

On September 9, 1876, the reciprocity treaty with the United States went into effect for seven years.[83] From that time until June 14, 1900, the treaty remained in effect except for four years of the McKinley Tariff Act.[84] The treaty affected the Hawaiian economy "in a manner somewhat analogous to that of an uninhibited pituitary gland in the human body."[85] By 1890 sugar production expanded to 250,000,000 pounds, ten times the 1875 output of 25,000,000 pounds.[86] Land under sugar cultivation grew from 12,225 acres in 1874 to 125,000 acres in 1898.[87] The unquenchable thirst for immigrant labor became a ravenous addiction.

In 1880, the Legislature amended the Act to provide that all contracts had to be written in both English and Hawaiian where "only one of the parties" was a native Hawaiian.[88] Contracts only written in English would be void,[89]

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[76] *Id.* at 102.

[77] *Id.* at 102-03.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 104.

[81] *Id.*

[82] *See* Contracts Authorized by Sections 1417 and 1418, *supra* note 74, § 2, at 459. The Legislature also provided that no contract could compel work beyond the end of the specified contract term as repayment for any debt or advance made by the master. *Id.* § 3, at 459.

[83] 3 KUYKENDALL, *supra* note 4, at 46.

[84] *Id.* at 47.

[85] *Id.* at 46.

[86] *Id.* at 47.

[87] *Id.* at 62.

[88] To Regulate Contracts Between Masters and Servants, ch. 21, sec. 1416, § 1 (1880) [hereinafter Regulating Contracts Between Masters and Servants], *in* COMPILED LAWS OF THE HAWAIIAN KINGDOM, *supra* note 69, at 456-57.

[89] *Id.* § 1, at 457.

hopefully protecting Hawaiians from being fraudulently induced into contracts with detrimental terms. Furthermore, the Minister of the Interior was authorized to prepare form contracts in both languages.[90] Hawaiians must have been complaining about being held to provisions to which they had not agreed and gained sufficient political support to pass this amendment.

Another amendment changed the sentencing structure once again. The Legislature discarded its prior charity and revoked the three month ceiling for hard labor: "[I]f such refusal [to work] be persisted in, to commit such person to prison, there to remain, at hard labor, until he will consent to serve according to law."[91] If after serving his sentence and ordered to return to work, the laborer continued to refuse to work, he was to be fined "not exceeding five dollars for the first offense and for every subsequent offense thereafter not exceeding ten dollars."[92] The laborer could then be imprisoned and forced into hard labor, with no limitation, until the fine was paid.[93] Pressured by the large number of desertions[94] and the planters' intense need for labor, this amendment revived the Act's original harsh sentencing.

An 1882 amendment provided that contracts could not be penally enforced if the laborer had received an advance of fifteen dollars for a contract of less than one year and twenty five dollars for a contract lasting over one year.[95] This provision gave planters a device by which to exempt certain contracts from penal enforcement and sanctions, undoubtedly contracts with white *lunas* (overseers). The caveat in the statute made clear that immigrant laborers were not encompassed within this provision: "Provided, however, that such restrictions shall not apply to contracts made with immigrants when larger advances are required for the payment of expenses incident to the introduction of such immigrants to the Kingdom."[96] Since the costs of passage for immigrant contract laborers advanced by the planters were not included as an exemption, the courts could continue to penalize immigrants with imprisonment.

Chinese workers were the principal group imported for labor prior to the major Japanese immigration in the 1880's with 1,200 Chinese in 1866; 1,938

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[90] *Id.* § 2, at 457.

[91] For the Government of Masters and Servants, ch. 30, § 1420 (1880) [hereinafter Masters and Servants 1880], *reprinted in* COMPILED LAWS OF THE HAWAIIAN KINGDOM, *supra* note 69, at 461.

[92] *Id.* § 1420, at 462.

[93] *Id.* It is not clear when this provision was promulgated. The notation in the *1884 Compiled Laws of the Hawaiian Kingdom* indicates that the section was amended in 1876 and 1880.

[94] Cases for desertion rose from 2,099 cases in 1876 to a high of 5,876 in 1898, while acquittal rates simultaneously decreased. BEECHERT, *supra* note 18, at 48.

[95] Contracts Authorized by Sections 1417 and 1418, *supra* note 74, § 1, at 459.

[96] *Id.*

in 1872; 6,000 in 1878 and 13,500 in 1882.[97] The Board became increasingly concerned with the high number of single Chinese men and in 1882 instructed its foreign agents to stop signing contracts with Chinese.[98] This coincided with the Chinese Exclusion Act passed by Congress in 1882 and may have put Hawai'i in good standing amongst anti-Chinese nativists.

The Board had been attempting to recruit other groups. In 1868, 148 Japanese laborers arrived in Hawai'i, but their complaints about working conditions caused the Japanese government to forbid further immigration.[99] Pacific Islanders turned out to be too expensive with an insufficient work ethic for the capitalist plantations.[100] Indians from South Asia[101] and blacks from the American South were also considered but rejected.[102] In 1879 Portuguese were introduced, but only after assurances were made to the Portuguese government that the system was not abusive.[103] In 1881 a small group of Norwegians came but a few escaped to San Francisco where they bitterly complained about the system, causing the *San Francisco Chronicle* to decry the system as slavery.[104] And, in 1883, even a small group of Germans were recruited.[105] No source capable of sending large numbers seemed promising.

Finally, in 1885, an agreement for the importation of labor was signed with the government of Japan[106] beginning a remarkable growth in the Japanese population, from 116 in 1884 to 61,111 in 1900.[107] As part of that treaty, Hawai'i's government agreed to inspections by a representative of Japan.[108] Originally highly favorable to the Japanese (to the distress of the planters), planters soon found the Japanese inspectors to be "unassuming, prudent, just and useful."[109] The Board appointed its own Special Commission of Inspection and also allowed other countries to appoint inspectors on behalf of their immigrants.[110] While the Japanese, Norwegians, and Portuguese had recognized nation-states to protect them, at least in theory, Chinese laborers had no strong

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97 1886 REPORT OF BOARD, *supra* note 1, at 162.
98 3 KUYKENDALL, *supra* note 4, at 138.
99 2 KUYKENDALL, *supra* note 48, at 183-84.
100 3 KUYKENDALL, *supra* note 4, at 126-28.
101 *Id.* at 128-32.
102 1886 REPORT OF BOARD, *supra* note 1, at 143-44.
103 *Id.* at 185.
104 *Id.* at 141.
105 *Id.* at 159.
106 BEECHERT, *supra* note 18, at 88.
107 SCHMITT, *supra* note 3, at 25.
108 BEECHERT, *supra* note 18, at 96.
109 *Id.* at 97.
110 *Id.* at 96-97.

home government[111] and were probably the least protected of all the immigrant groups.[112]

Theoretically, the inspectors were supposed to field complaints by the workers and seek remedies.[113] No doubt this practice was put into place to assuage the mounting complaints and subsequent publicity of ill treatment. For instance, complaints of "unwarrantable and frequent acts of violence . . . upon Japanese by overseers" and "lack of medical attendance" had already reached Tokyo.[114] In practice, however, providing inspectors did little to enhance workers' lives. Inspectors operated from Honolulu and Hilo and associated with the urban planter class.[115] They could visit the plantations only upon invitation and therefore could not appear unannounced and hear complaints as they arose.[116] For the most part, inspectors responded to complaints sent to them by mail,[117] so that "inspection" did not necessarily play into their analysis at all.

Economic pressures in the 1880's led planters and their allies to seek increased political control. The 1887 Constitution, the so-called "Bayonet Constitution," changed the voting requirements in favor of the *haole* (white) vote. It provided that in order to vote, one had to be a "taxpaying male resident[,] twenty years of age 'of Hawaiian, American or European birth or descent[,]' who could 'read and comprehend an ordinary newspaper in either Hawaiian, English or some European language[,]' who had resided in the Kingdom for [at least] three years."[118] These requirements had the effect of allowing immigrant laborers from Portugal and Puerto Rico to vote, even if they were not citizens of Hawai'i, while flatly denying Chinese and Japanese the right to vote, including Chinese who had already become naturalized citizens.[119] Chinese and Japanese

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[111] *Id.* at 96.

[112] *Id.* That is not to say that the Chinese government did not lodge protests on behalf of contract laborers. Because leaving China was technically a crime against the Chinese government, it was difficult for the government to exercise any legal leverage on behalf of Chinese workers and, most importantly, difficult for the government to maintain sufficient control to cut off immigration as a sanction as the Japanese had. *See* NORTHRUP, *supra* note 61, at 51-59. Kuykendall, however, does report that the Chinese government prohibited immigration to Hawai'i in 1881 due to complaints of mistreatment of immigrants after their arrival in Hawai'i. *See* 3 KUYKENDALL, *supra* note 4, at 138-39.

[113] BEECHERT, *supra* note 18, at 96-97.

[114] 3 KUYKENDALL, *supra* note 4, at 169.

[115] BEECHERT, *supra* note 18, at 98.

[116] *Id.*

[117] *Id.*

[118] Van Dyke, *supra* note 38, at 96-97 (quoting HAW. CONST. of 1887, arts. LIX, LXII). Also, in order to be a member of the upper House of Nobles, one had to have "$3,000 in taxable property . . . or an annual income of $600." *Id.*

[119] *Id.* at 99-100.

immigrants were prevented from exercising any political power by the introduction of an explicit racial requirement.[120]

Work violations under the Act became an increasingly large part of the lower court dockets. In Hilo, the cases reflected the labor population: largely Hawaiian in 1853, one-half Chinese in 1883, and all Japanese in 1893.[121] "[T]here were an enormous number of cases concerning failure to work or refusal to work in Hilo, whereas the number of cases charging masters with violence could be counted on one hand."[122] These cases revealed ongoing conflicts between bosses and workers, "often with strong racial overtones."[123] For instance, white workers were found not guilty of work violations 20% of the time, Portuguese, 15%, Chinese, 3%, Hawaiian, 3% and Japanese, 1%.[124]

The last legislative session of the Kingdom occurred in 1892 when the Act was amended yet again; this time to provide specific sanctions for repeat offenders. Recall that the 1880 amendment provided that a five dollar fine was to be imposed for the first offense and a ten dollar find for all subsequent offences, the worker to remain in prison at hard labor until the fines were paid.[125] The 1892 amendment retained this structure but limited the ten dollar fine to the second offense, while adding a maximum three month sentence at hard labor for "every subsequent offense thereafter." [126]

The Republic of Hawai'i was established on July 4, 1894.[127] The Republic's Constitution continued to prohibit slavery: "Involuntary servitude, except for crime, is forever prohibited in this Republic. Whenever a slave shall enter the territory of this Republic he shall be free."[128]

In February 1895, the Republic promulgated a law forbidding labor contracts made outside of Hawai'i in order to protect white labor but provided: "[A]ny person, company, partnership or corporation may bring aliens or foreigners into the Hawaiian Islands as aforesaid, upon receiving from the Board of Immigration its written approval of the contracts under which it is proposed to introduce such aliens or foreigners."[129] Written approval for immigrant labor was easily

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[120] *Id.* at 99.

[121] *See* MERRY, *supra* note 26, at 153.

[122] *Id.* at 98.

[123] *Id.* at 172.

[124] *Id.* at 207-08.

[125] Masters and Servants 1880, *supra* note 91, § 1420, at 462.

[126] LAWS OF HER MAJESTY LILIUOKALANI, QUEEN OF THE HAWAIIAN ISLANDS, PASSED BY THE LEGISLATIVE ASSEMBLY AT ITS SESSION 1892, ch. 62152-59 (1892).

[127] *See* DAWS, *supra* note 12, at 281.

[128] HAW. CONST. of 1895, art. IX, *reprinted in* CONSTITUTION OF THE REPUBLIC OF HAWAI'I AND LAWS PASSED BY THE EXECUTIVE AND ADVISORY COUNCIL OF THE REPUBLIC 78 (1895).

[129] An Act relating to the Immigration of Aliens and Foreigners Under Contract, § 1, *in* CONSTITUTION OF THE REPUBLIC OF HAWAI'I AND LAWS PASSED BY THE EXECUTIVE AND ADVISORY COUNCIL OF THE REPUBLIC, *supra* note 128, at 37.

obtained and the Act continued unabated. In fact, as time went on it appeared that government officials increasingly disregarded the rights of immigrant workers. In 1896, the Attorney General remarked that a new jail was needed on Maui because "when strikes occur on plantations, large numbers of men are sometimes sent in at one time."[130] Such imprisonment was without benefit of court hearing and based solely on the word of the *luna* or sheriff.[131]

IV. THE HAWAI'I SUPREME COURT

A. Penal Sanctions

The primary criticism of the contract system was its penal sanctions, which transformed a civil contract for labor into involuntary servitude. The Hawai'i Supreme Court continually rejected the assertion that the system was one of involuntary servitude. In 1870 the court heard *In re Gip Ah Chan*,[132] a petition for habeas corpus brought by a laborer imprisoned for desertion. Although Ah Chan's primary claim was that his contract was not valid because he had been fraudulently induced into the contract,[133] he also asserted that the Act conflicted with Article 11 of the 1864 Constitution prohibiting involuntary servitude.[134] Dodging the evident conundrum between the constitution and the penal sanctions imposed by the Act, the court ruled on narrow jurisdictional grounds and held that the contract was not enforceable due to the death of the original contracting party.[135] Therefore, the lower court had no jurisdiction to imprison the petitioner and Ah Chan was set free.[136] The court reached a humane result without striking down the Act itself.

The constitutionality of the Act was not challenged again until two decades later in *Hilo Sugar Co. v. Mioshi*.[137] Mioshi had executed a contract with the Board in Japan and upon arriving in Hawai'i was sent to Hilo Sugar.[138] Mioshi brought a direct challenge to the constitutionality of the Act.[139] The court rejected Mioshi's challenge by holding that Mioshi had freely entered into the contract and his mere unwillingness or incapacity to fulfill the contract was not fatal to its validity.[140] It then simply proclaimed: "Our labor contract system is

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[130] BEECHERT, *supra* note 18, at 112.
[131] *Id.*
[132] 6 Haw. 25 (1870).
[133] *Id.* at 29.
[134] *Id.* at 27.
[135] *Id.* at 41.
[136] *Id.*
[137] 8 Haw. 201 (1891).
[138] *Id.*
[139] *Id.* at 202.
[140] *Id.* at 205.

not slavery,"[141] using the circular argument that if the Act was one of slavery, surely it would have already been stricken:

> The numerous decisions of this Court on this Act afford ample ground for the expectation that no form of slavery would be held by the Court to be countenanced by the Constitution. We have thus come to the conclusion that the contract of the defendant is not invalid on the ground alleged, and that the law which authorizes it is not repugnant to the Constitution.[142]

Even after the Republic of Hawaii transferred its sovereignty to the United States, the court avoided ruling on the constitutional issue. In *Honomu Sugar Co. v. Sayewiz*,[143] several Austrian laborers were convicted of desertion and sentenced to hard labor.[144] The defendants asserted that the Thirteenth Amendment of the U.S. Constitution prohibited enforcement of the Act.[145] The court sidestepped the issue by stating that the Thirteenth Amendment was not governing law "during the present transition period."[146] The term "transition period" was artful. President McKinley had signed the Joint Resolution of Congress annexing Hawai'i on July 7, 1898.[147] That Joint Resolution mirrored the Resolution unanimously adopted by the Senate of the Republic of Hawai'i on September 9, 1897, wherein the Republic ceded "absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands."[148] The Joint Resolution also provided that:

> The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished [by this resolution,] and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.[149]

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[141] *Id.*

[142] *Id.* at 206. In *Chum v. Kohala Sugar Co.*, 8 Haw. 425 (1892), the court held one of the provisions of the 1887 "Act to Authorize the introduction of Chinese Agricultural Labor [etc.]" unconstitutional. *Id.* The provision at issue required the planter to withhold 25% of the laborer's wages and submit it to the Board until the Board had collected seventy-five dollars. *Id.* at 432. The money was to be used to deport the laborer at the end of his contract. *Id.* The court held this provision unconstitutional "as interfering with the liberty of the person and his right of enjoying and possessing property." *Id.*

[143] 12 Haw. 96 (1899).

[144] *Id.* at 96-97.

[145] *Id.* at 98.

[146] *Id.* at 98.

[147] DAWS, *supra* note 12, at 299.

[148] S.J. Res. 55, 55th Cong., 80 Stat. 750 (1898).

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

Sovereignty was formally transferred from the Republic to the United States on August 12, 1898.[150] *Sayewiz* was submitted to the court on January 19, 1899 and decided on June 8, 1899. The court's declaration that the Thirteenth Amendment was not enforceable in "this transition period" apparently meant that the Act was not "contrary to the Constitution of the United States" and, since the Organic Act establishing the territorial government had not yet been adopted, the court was under no obligation to enforce U.S. constitutional law.[151]

Penal sanctions were kept in place as an integral part of the Act until the Congress specifically prohibited the practice in the Organic Act adopted on June 14, 1900.[152] The Organic Act prohibited penal sanctions by limiting damages for breach of contract to money damages and made all labor contracts for a definite term null and void if entered into under U.S. sovereignty:

> [N]o suit or proceedings shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or service, nor shall any remedy exist or be enforced for breach of any such contract, except in a civil suit or proceeding instituted solely to recover damages for such breach.
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> [C]ontracts made since August twelfth [1898], by which persons are held for service for a definite term, are hereby declared null and void and terminated, and no law shall be passed to enforce said contracts in any way; and it shall be the duty of the United States marshal to at once notify such persons so held of the termination of their contracts.[153]

But for this specific language of the Organic Act, the court probably would have continued to enforce the penal provisions of the Act into the twentieth century.

B. Sale of Labor

Next to penal sanctions, the aspect of the Act most denounced as a marker of slavery was the ability to pass a laborer from one owner to another. Such transfers without the consent of the laborer were commonplace,[154] and critics

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[150] DAWS, *supra* note 12, at 289-93.

[151] By so ruling, the Supreme Court of Hawai'i foreshadowed the majority opinion of the United States Supreme Court in *Hawaii v. Mankichi*, 190 U.S. 197 (1903), wherein a divided court (5-4) ruled that the criminal procedure employed in Hawai'i during the "transition period" did not have to be struck down, even though the procedure clearly violated the Fifth and Sixth Amendments. See Jon Van Dyke, *The Evolving Legal Relationship Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 448-72 (1992), for discussion of U.S. constitutional law in the territories.

[152] Hawaii Organic Act, ch. 339, 31 Stat. 141 (1900).

[153] *Id.* § 10, 31 Stat. at 141.

[154] BEECHERT, *supra* note 18, at 68-69.

like the missionary Orramel Gulick compared the "Hawaiian coolie system" to Southern slavery by focusing on the sale of labor: "It is not unusual . . . to hear in the best society in Honolulu such remarks as the following: 'Yesterday I bought from Mr. A. a young coolie who will make a handy steward. My former coolie I sold to Mr. B. for the Kauai plantation.'"[155]

As the sugar industry grew, plantations were sold lock, stock and barrel, and labor became the most critical ingredient in the purchase of a going concern. Planters therefore sought to bind laborers to the land in serf-like fashion. Caught between the language of the Act requiring contracts between individual masters and servants, and the need to shackle labor to the plantation, the court waffled and split on the transfer issue.

In re Gip Ah Chan, discussed *supra*, set the stage in 1870 by holding that only the individual "master" to the contract could enforce it.[156] Sitting alone on that habeas corpus petition, Justice Hartwell relied on English law for the proposition that contracts under the Act were not assignable:

> Even under the strict apprentice acts of Elizabeth, once in force in the American colonies and some of the states of the United States, and to some extent now in force in the latter, the contract was not assignable; for . . . upon the master's death, the end and design of this personal trust cease.[157]

Seven years later, on January 30, 1877, Justices Allen, Harris and Judd heard *Owners of Waihee Plantation v. Kalapu*,[158] where the planter sued to enforce a contract between "the owners of Waihee plantation," originally Charles C. Harris and Hermann A. Widemann, and the laborer Kalapu.[159] After the contract was executed by Harris, Widemann and Kalapu, Harris sold his interest to Widemann.[160] Widemann, in turn, sold the entire interest to James Makee and John D. Spreckles.[161] As part of the sale agreement from Widemann to Makee and Spreckles, Widemann was to be paid .0075% of the gross proceeds of the plantation:

> [I]n consideration of a reduction made by him in the agreed price of the plantation, and in the further consideration that Mr. Widemann employ and retain the laborers then employed on the plantation under labor contracts, and Mr.

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[155] Putney, *supra* note 49, at 64-65 (quoting Orramel Gulick, *The Hawaiian Coolie System*, *in* THE GULICK PAPERS *65M-183(6) (1873)).

[156] 6 Haw. 25 (1870).

[157] *Id.* at 41.

[158] 3 Haw. 760 (1877).

[159] *Id.* at 761.

[160] *Id.* at 760.

[161] *Id.* at 761.

> Widemann at the same time gave Mr. Makee a power of attorney to manage the labor in his name.[162]

The terms of the sale between Widemann, Makee, and Spreckles were written to evade the Act's requirement that the contract be personal and to fall within the exception that a laborer can remain in the employ of "any company of individuals."[163] The court was being asked to pierce the sham of retaining Widemann as a .0075% owner for the sole purpose of binding the laborers. Rejecting the arguments of the planter, the court held that because Widemann was no longer subject to suffering the losses and liabilities of the plantation, he was not within the "company of individuals" and Kalapu's contract could not be enforced by Makee and Spreckles, strangers to the contract.[164] The court required strict privity of contract; the promises contained in the contract had to be made by the contracting party and could not be assigned.[165]

The holding of *Kalapu* prohibited labor from being a part of the assets of a sale. Thus the sale of a plantation would cancel labor contracts, freeing workers to leave the plantation. One can imagine the planters' consternation over this ruling given the bullish sugar market. The court heard the planters' concerns. Just nine months after *Kalapu*, in September 1877, the court decided *J. Nott & Co. v. Kanahele*.[166] In *Kanahele*, the defendant had refused to work for new owners, alleging that the sale of the plantation annulled the contract under *Kalapu*.[167] Kanahele was prosecuted in the district court and lost, then appealed to the circuit court and won.[168] The Hawai`i Supreme Court then addressed the case. Justice Harris, who sat in *Kalapu* nine months before, together with Justice McCully who did not, ruled that Kanahele's labor contract could be enforced by the successor plantation because the contract contained "an extraordinary clause . . . to the effect that the defendant 'in case of the transfer of the Waiohinu Plantation' will work for the persons to whom such plantation shall be conveyed."[169] The court eviscerated *Kalapu*. It was simple for planters to write such a provision in every contract, particularly since most workers had no access to legal counsel, could not divine the provision's legal implication and often could not read the contract.

Justice Judd, who had joined in *Kalapu*, dissented, arguing that under the Act, the "master" had to be an ascertainable individual and any assignment of the "servant" nullified the contract:

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[162] *Id.*
[163] *Id.* at 760.
[164] *Id.* at 763.
[165] *Id.*
[166] 4 Haw. 14 (1877).
[167] *Id.* at 17.
[168] *Id.*
[169] *Id.* at 15 (McCully, J., concurring).

> [T]hese contracts are not assignable; for if a man could be passed from one to another, like a chattel, by an assignment of his contract, it reduces him at once to a chattel, and this is a form of involuntary servitude which, though for a limited period, is, nevertheless, repugnant to the policy of our institutions and forbidden by Article XI, of the Constitution.[170]

Justice Judd's rationale was consistent with *Kalapu*. The majority's was not—it did not comport with the spirit of the constitution, the language of the Act, or *Kalapu*.

A month later, in November 1877, Widemann, who had lost against Kalapu in January, was again before the court in *Widemann v. Lonoaea*.[171] Widemann had sold the Waihee Plantation, reserving for himself his homestead and a few acres. He also had given a third party (Makee) a power of attorney enabling this "agent" to employ laborers then under contract, another guise by which to bind labor to Waihee Plantation.[172] The laborers refused to work.[173] The lower court held that Widemann could enforce the contract on his own homestead but that the "agent" could not compel the laborer to work on Waihee Plantation.[174]

Widemann asserted on appeal that under *Kanahele*, his power of attorney was valid because his contracts contained language that the laborer would work for Widemann's "agents."[175] Further, if *Kanahele* did not apply, then there was no other law prohibiting Widemann's power of attorney.[176] On the other side, the laborers made two arguments: first, that the contracts were annulled when the Waihee Plantation was sold; second, that the laborers had contracted with the firm of Harris and Widemann, not Widemann personally, and therefore the contract was canceled.[177]

The court split the baby. It rejected the laborers' argument that because the entity with which they had contracted was the firm of Harris and Widemann, not Widemann personally, the contract was annulled.[178] However, it upheld the lower court's decision that Widemann could only enforce the contract for services on his homestead.[179] The court rejected Widemann's argument that under the holding of *Kanahele*, Widemann was free to use a power of attorney to designate an "agent."[180] The court held that the use of the term "agent" in

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[170] *Id.* at 18-19 (Judd, J., dissenting).
[171] 4 Haw. 50 (1877).
[172] *Id.* at 51.
[173] *Id.*
[174] *Id.* at 52-53.
[175] *Id.* at 53.
[176] *Id.* at 51-52.
[177] *Id.* at 54.
[178] *Id.*
[179] *Id.* at 56.
[180] *Id.* at 55.

Widemann's contracts simply referred to agents and overseers within Widemann's employ, not third parties.[181]

The issue of assignment did not come before the court again until 1882, five years later, in two disputes between August Dreier and Hawaiian laborers. The first case, *Dreier v. Kuaa*,[182] was heard in June 1882. The laborers asserted that they did not have to continue working on the Koloa Plantation on Kauai because Dreier had sold the plantation and assigned the labor contracts to an Adolph Haneberg, who in turn, sold and assigned the contracts to Koloa Sugar Company.[183] Dreier had retained a 1/100th interest in the plantation worth one dollar.[184] The court held that the object of retaining such a small interest was to circumvent the Act and disallowed enforcement of the contract consistent with *Kalapu*.[185]

Five months later, in November 1882, the parties were again before the court.[186] Having lost the first case in June, Drier sent the laborers to another plantation which he owned, Eleele.[187] The laborers asserted that their contracts had been nullified because Dreier had illegally "assigned" them to Koloa Sugar.[188] The court held that the assignment to Koloa had not nullified the contract.[189] The laborers were ordered to fulfill their contracts with Drier albeit at a different plantation, making clear that the contracts were personal to the parties.[190] Since the personal master-servant relationship was not implicated, only the work venue, the court deferred to the master.

To get around the prickly issues of assignment and privity of contract, the Board stepped in. It, rather than individual planters, entered into contracts. In 1891 this practice was challenged in *Hilo Sugar Co. v. Mioshi*,[191] discussed above. In *Mioshi*, defendant Mioshi had entered into a contract with the Board in Japan and was sent to Hilo Sugar upon his arrival.[192] Mioshi asserted that the contract was not enforceable because he did not enter into the contract with Hilo Sugar.[193] He argued that any contract with the Board was null and void

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[181] *Id.*
[182] 4 Haw. 534 (1882).
[183] *Id.* at 535.
[184] *Id.*
[185] *Id.* at 535-36.
[186] Dreier v. Kuaa, 4 Haw. 544 (1882).
[187] *Id.* at 546.
[188] *Id.*
[189] *Id.* at 547.
[190] *Id.*
[191] 8 Haw. 201 (1891).
[192] *Id.* 203-04.
[193] *Id.* at 207.

since the Act required that the contract be made with individuals or companies of individuals.[194] The court summarily dismissed Mioshi's argument:

> We dismiss these objections with the remark that there is nothing in the submission to show that the Hawaiian Government does not consider itself bound by the contract, or that the authority of the Board of Immigration to make the contract in the name of the Government is disputed . . . .[195]

Cavalierly, the court simply stated "we have no doubt that the statute allows contracts of service with the Government or the Board of Immigration."[196] The court's majority, Justices Judd, McCully and Bickerton, refused to apply the privity doctrine required by the Act and *Kalapu*. The Act did not specifically forbid the Board from entering into contracts and the planters exploited this for all it was worth.[197] Justice Dole wrote a scathing dissent, arguing that the contract was not enforceable because it was not a contract between the "master" and "servant":

> So we have before us the case of a laborer held for service under a contract, penally enforceable, if enforceable at all, to masters with whom he has never contracted; but he has come into their hands, without having the opportunity of choosing his employers, by a process suspiciously similar to that by which a Honolulu hack, horse and harness are hired out to a driver. The fact that the laborer receives proper wages for his work does not take the case out of that condition of involuntary servitude or semi-slavery which is inconsistent with our Constitution and laws, and with the general tenor of the decisions of this Court, with one or two solitary exceptions.[198]

Dole's dissent was whistling in the wind. Between 1876 and 1900 (nine years after *Mioshi*) the percentage of Chinese and Japanese in Hawai'i increased from 4.5% to 56.5%.[199] There was no way the court was going to derail the Board's long-standing practice. Asian immigration was the lifeblood of sugar.

V. PHYSICAL BRUTALITY

On May 12, 1897, Minutes of the Republic's Executive Council recorded receipt of a complaint regarding the killing of "a certain Chinaman at Lihue, Kauai."[200] The official government response was suggested by the Attorney

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[194] *Id.*

[195] *Id.* at 206.

[196] *Id.* at 207.

[197] *Id.*

[198] *Id.* at 208-09 (Dole, J., dissenting).

[199] 3 KUYKENDALL, *supra* note 4, at 116.

[200] 4 MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL, ser. 423, at 78 (1897).

General and recorded in the Minutes: "[T]he government regretted the occurrence, and that the plantation agents would be notified that no more Chinese would be shipped to them so long as such circumstances existed and that Mr. Wolters [the alleged murderer] would be brought to trial."[201]

This same kind of violence was addressed almost fifty years earlier in *The King v. Greenwell*,[202] just three years after the Act was promulgated. In *Greenwell* the laborer Salai had been severely whipped by the *haole* (white) defendant Greenwell.[203] The defense argued that the whipping was not the cause of Salai's death:

> It is said by the learned counsel for the defense, that there has not been a killing, because though Salai was severely whipped, yet he did not die from this or any other inflicted injury, but in the due course of nature, from long sickness and from his own voluntary exposure for several nights, without food or raiment, to the rain, cold and hunger in the forest. Or at the most, the whipping would not have proved fatal, had it not been for the previous sickness and exposure . . . .[204]

Justice Lee instructed the jury that first, they had to determine "has there been a killing committed . . . or did the deceased come to his death from the visitation of God."[205] If they found that a killing had occurred, then they had to next decide whether the murder was justified:

> But if you should find that there was a killing, the next question to determine will be, whether the accused is justified in inflicting the punishment complained of. It is said that he is; that he whipped the deceased not immoderately; and that a master may legally whip his servant and a planter his coolie, so long as he does not exceed the bounds of moderation. *I am bound to charge you that this is not the law of the land. The whipping of servants or laborers is a custom not tolerated by the laws of this country* . . . .[206]

Despite this strong statement of the purported law in Hawai'i, "[t]he jury after an absence of half an hour returned a unanimous verdict of not guilty."[207] The jury concluded that the laborer had committed suicide by exposing himself to the elements.[208] The defense had introduced evidence that Chinese were prone to suicide; suicide was an everyday occurrence among the Chinese and Chinese committed suicide for "trivial" matters.[209] The rationale in *Greenwell*

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[201] *Id.*
[202] 1 Haw. 85 (1853).
[203] *Id.* at 86.
[204] *Id.*
[205] *Id.*
[206] *Id.* (emphasis added).
[207] *Id.* at 87.
[208] BEECHERT, *supra* note 18, at 74.
[209] *Id.*

was right out of the slave books. In 1736, a slaveholder in New York horse-whipped a runaway slave.[210] The slave died.[211] The coroner's report convinced the jury that "the Correction given by the Master was not the Cause of his Death, but that it was by the Visitations of God."[212]

Some commentators assert that violence, although present, was not an inherent part of the contract labor system.[213] However, taking up on the theme in *Greenwell*, Prince Alexander Liholiho[214] addressed the Agricultural Society a year after the case, in June 1854: "With all [the Chinese] faults and a considerable disposition to hang themselves, they have been found very useful."[215] The defense in *Greenwell*, that Chinese "often" committed suicide[216] and Liholiho's statement that Chinese have "a considerable disposition to hang themselves,"[217] indicate that deaths among Chinese laborers, even those few who were on the Islands in the 1850's, were common enough to be understood by the average person. As in Salai's case, it is not clear what the cause of deaths were in alleged suicides.[218] Were the laborers beaten by their *haole lunas* prior to their "hanging themselves"? Did they actually "hang" themselves? Did they die of exposure, as did Salai, because they were denied medical attention? Did the *lunas* lie to the authorities as to the cause of death? What public officials could communicate with Chinese laborers who spoke neither English nor Hawaiian?

Other indicia support the proposition that whipping was commonplace. The Reverend Elias Bond went into partnership with Samuel Castle and Amos Cooke in Kohala and voiced his strong objection to the methods used by Castle & Cooke in 1866:

> Above all, flogging is to be abandoned. We must train men, and not brutes. A man flogged for stealing and rendered sulky by such treatment, undoubtedly set fire to the carpenter shop recently. This style of management must be abandoned. . . . The plantations are carrying the people back to barbarism with

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[210] JILL LEPORE, NEW YORK BURNING: LIBERTY, SLAVERY, AND CONSPIRACY IN EIGHTEENTH-CENTURY MANHATTAN 80 (2005).

[211] *Id.*

[212] *Id.*

[213] BEECHERT, *supra* note 18, at 49; 2 KUYKENDALL, *supra* note 48, at 186.

[214] Liholiho was heir apparent at the time and took the throne as Kamehameha IV in December 1854.

[215] 1886 REPORT OF BOARD, *supra* note 1, at 8.

[216] *See* BEECHERT, *supra* note 18, at 74.

[217] 1886 REPORT OF BOARD, *supra* note 1, at 8.

[218] *See* NORTHRUP, *supra* note 61, at 127. Suicides may have been more common among Chinese although the reasons for suicide are not at all clear. *Id.*

> fearful speed. The people are treated as mere beasts of burden, even when professing Christians control them, and none dare speak out.[219]

Even James H. Wodehouse, the British Commissioner to Hawai'i stated that although no slavery as such was present, the whip was used.[220]

As late as 1898, the Board acknowledged that workers complained about corporeal punishment.[221] The Board answered the "public impression" that the managers are slave drivers and brutal by claiming that the "brutal *luna* is the exception, that the provocations to displays of temper are great and numerous and that only a self-controlled man can make a successful overseer."[222] The Board concluded that the laborers were as much to blame as the *lunas*.[223] After annexation the federal government, the new sovereign, concluded that physical abuse was certainly a part of the contract system. The United States Bureau of Labor stated in 1902: "Though the courts condemned the practice as illegal, the old ship custom of flogging laborers for disorder or disobedience still obtained on some plantations. It was impossible to secure the conviction of the guilty parties in such cases, because the flogging was not done in the presence of witnesses."[224]

Even though the planters and the judicial system turned a blind eye to the physical abuse of contract laborers, this U.S. Bureau of Labor statement makes plain that physical brutality remained a part of the contract labor system throughout its entire life.

VI. CONCLUSION

International migration of labor always presents problems in receiving countries which "need" labor. This "need" is primarily the need of capitalists, entrepreneurs and the wealthy, who derive the most immediate benefits from cheap labor. Just as European immigrants were exploited by American industrialization in the Northeast, Asian immigrants in Hawai'i were exploited by the planter class.[225] The desires of the planter class affected and infected the legal system to perpetuate this exploitation. One might have thought that Hawai'i, imbued with the rights of man taught by Boston missionaries and free

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[219] BEECHERT, *supra* note 18, at 71.

[220] *Id.* at 81.

[221] REPORT OF THE BUREAU OF IMMIGRATION FOR THE BIENNIAL PERIOD ENDING DEC. 31, 1898 (1899).

[222] *Id.* at 4.

[223] *Id.* at 4-5.

[224] THOMAS KEMPER HITCH, ISLANDS IN TRANSITION: THE PAST, PRESENT, AND FUTURE OF HAWAI'I'S ECONOMY 66 (1992) (quoting U.S. BUREAU OF LABOR, LABOR CONDITIONS IN HAWAII 13-15 (1902)).

[225] This is not to say that immigrants did not ultimately benefit from their immigration.

from the institution of slavery, would have been better able to construe its own laws in accordance with its stated beliefs.

But while strains of compassion and logical legal construction can be found in the case law, the cases became increasingly divorced from Hawai'i's espoused principles. In the end, the court's refusal to engage in balanced legal analysis was blatant. Holdings such as *Hilo Sugar v. Mioshi* [226] reflected a corruption in, and further corruption of, the body politic. The wealthy and powerful are allowed to believe their economic "needs" trump the highest ideals of the state and the letter of the law. The downtrodden lose faith that the legal system can deliver any justice at all.

No political force effectively championed the rights of immigrant contract workers in Hawai'i. Even those cases that were heard by the Hawai`i Supreme Court on the Act were, for the most part, taken on behalf of Hawaiian workers.[227] While all contract workers were marginalized, Chinese and Japanese immigrants were more so. As between those two groups, at least the Japanese had a rising nation-state to negotiate on their behalf. The Chinese had no such luck. They were the ultimate coolie. Despite Hawai'i's professed belief in the universal rights of man, as legal scholar Lawrence Friedman said of indentured servants living at another time in another place, Hawai'i's indentured laborers "were, in short, slaves for the time being."[228]

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[226] 8 Haw. 201, 206 (1891). Contract labor is not involuntary servitude simply because the court had never said so.

[227] MERRY, *supra* note 26, at 173. Whether this is just coincidence, or whether Hawaiians were more able to procure legal services from missionary factions opposed to the contract system, is difficult to know. Perhaps Sally Engle Merry's insight that judges and lawyers were more partial to Hawaiians as fellow Christians is correct. *Id.*

[228] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 85 (2d ed. 1985).

Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts

I. INTRODUCTION

In Guam, even the dead are dying again. At the time of this writing, 432 human remains—the bones of the ancestors of the indigenous Chamoru people buried some 1,500 years ago[1]—sit in a private lab owned by the company the Guam Okura Hotel commissioned to do an archeological survey on its premises.[2] Some two hundred of these are set for shipment, via parcel post, to an undisclosed American lab for scientific study.[3] In boxes marked "fragile,"[4] the bones of our ancients remind the Chamoru people of our dispossession. In Guam, hotel development has become synonymous with desecration. According to the Guam Historic Preservation Office, one hundred sixty other graves were desecrated for a swimming pool at the Nikko Hotel.[5] Five hundred more were violated at the Hyatt.[6] In July 2007, in the ancient village of Gogña,[7] an undisclosed number of graves were gutted to pave the way for a proposed sky-rise and mega-shopping compound.[8]

The sting is sharp. The indigenous people of Guam have a rich tradition of ancestor worship involving the bones of our deceased relatives, particularly skulls.[9] In prehistoric times, we buried our dead beneath the family house and, after the flesh had decomposed, usually after a year, we exhumed the skulls, anointed them with coconut oil, laid them in a basket woven from young coconut leaves and placed them on the equivalent of an altar in the house.[10] We used these skulls to communicate with the spirits of deceased relatives, usually for the purpose of insuring the success of daily activities, particularly

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[1] Telephone Interview with Hope A. Cristobal, Former Guam Senator, Founding Member of the Org. of People for Indigenous Rights & Chairperson of the Coal. for the Prot. of Ancient Cemeteries (Feb. 18, 2007).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] SCOTT RUSSELL, TIEMPON I MANMOFO'NA: ANCIENT CHAMORRO CULTURE AND HISTORY OF THE NORTHERN MARIANA ISLANDS 152 (1998).

[10] *Id.* at 153.

those related to fishing.[11] According to one written account, ancient Chamorus exercised great care to ensure that the skulls were not disturbed during fishing trips for fear that their disturbance would result in a poor catch, or worse, the death of the fishermen.[12] We also consulted them during warfare.[13] Our *makåna*, or shaman, consulted them for deeper spiritual purposes including healing illness, foreseeing future events, and bringing on rain during periods of dry weather.[14] Indeed, painted images and rock carvings in caves throughout the Chamoru archipelago,[15] some dated roughly 2,000 B.C., depict headless human forms, confirming an ancient effort to communicate with the dead.

That hundreds of the ancients now sit in cold boxes in a cold lab ready for export to an unknown location sits in the pit of the Chamoru psyche, ticking, readying an entire people's rage for a new lease of life. Without a single legal instrument at our disposal with which to protect them,[16] with which to demand their return and re-interment, the Chamoru people have no "legitimate" claim to the remains; no way, at law, to wrap our arms around them. Indeed, the one elder to come forward to claim them, on behalf of the whole, was recently threatened by the lawyers for the Guam Okura Hotel with legal action.[17] Because the indigenous Chamoru people are not recognized under U.S. domestic law as a distinct legal entity, i.e., as an indigenous people privy to certain collective rights such as the rights to preserve and protect our cultural integrity and practices, we lack the legal standing necessary to assert rights as an indigenous people. Hence the implacable cold.

This single example highlights the need—the cultural, political, legal, primal need—of the Chamoru people for an expanded rights regime under which to frame our rights claims. While past international instruments have not expressly conferred rights upon the indigenous Chamoru people of Guam, they have granted rights to the "inhabitants" or "people" of Guam, including the right to self-determination, as enshrined in the United Nations Charter,[18] two 1960 resolutions of the United Nations General Assembly,[19] and two 1966

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 156.

[16] Although no case has squarely addressed the issue of whether the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1994) (NAGPRA) applies to the Chamoru people of Guam, the U.S. Department of the Interior has adopted rules stating that NAGPRA protection shall "not [apply] to territories of the United States." 43 C.F.R. § 10.1(b)(2) (2008).

[17] Telephone Interview with Hope A. Cristobal, *supra* note 1.

[18] U.N. Charter art. 1, para. 2; *see also id.* art. 55.

[19] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/4684 (Dec. 14, 1960); Principles Which Should Guide Members

international conventions.[20] The breadth of diversity of opinion regarding the right to self-determination, namely, who holds it,[21] is an article in itself. Instead, this Comment, using the Chamoru people of Guam as a model, seeks to locate hope for indigenous people living under U.S. occupation in a larger political project: using the courts of the colonizer as sites of cultural performance[22] wherein to inject a critical counter-narrative that challenges the colonizer's controlling narrative.

This Comment asserts that though the United States objected to the recently passed Declaration on the Rights of Indigenous Peoples[23] (Declaration), the historic instrument contains bold and emerging international human rights legal norms,[24] which can and should be used by indigenous peoples living under

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in Determining Whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, G.A. Res. 1541 (XV), U.N. Doc. A/4684 (Dec. 15, 1960) [hereinafter Principles Which Should Guide Members].

[20] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[21] *See* Jon M. Van Dyke et al., *Self-determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai`i*, 18 U. HAW. L. REV. 623, 623-24 (1996) (asserting that the people of Guam generally, as well as the indigenous people of Guam specifically, have a separate and distinct claim to self-determination). *But see* Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 19 (suggesting that the right to self-determination belongs to peoples who are subjected to "alien subjugation"); Principles Which Should Guide Members, *supra* note 19 (suggesting that the right to self-determination in the decolonization context is a right available to the people of those territories "geographically separate" and "distinct ethnically and/or culturally from the country administering it"); Joseph F. Ada & Leland Bettis, *The Quest for Commonwealth, the Quest for Change*, *in* ISSUES IN GUAM'S POLITICAL DEVELOPMENT: THE CHAMORRO PERSPECTIVE 196 (1996) (arguing that the United States has always understood that the "people of Guam" who possess the right to self-determination are the colonized, indigenous Chamoru people of Guam); Benjamin F. Cruz, *Chamorro Voting Rights*, *in* ISSUES IN GUAM'S POLITICAL DEVELOPMENT: THE CHAMORRO PERSPECTIVE, at 78-82 (arguing that self-determination is the right of the indigenous inhabitants of Guam inuring from the 1898 Treaty of Paris and the 1945 United Nations Charter, and that Congress has the constitutional authority to restrict the right to vote in a self-determination plebiscite to Guam's indigenous inhabitants and their descendants).

[22] *See generally* 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).

[23] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc A/Res/61/295 (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/en/declaration.html [hereinafter Declaration].

[24] The Declaration can best be described as a normative instrument that exhorts states to behave in certain ways (i.e., with due regard for the rights of indigenous peoples). Because of its normative, as opposed to strictly legal nature, indigenous peoples may selectively invoke certain provisions of the Declaration while distancing themselves from others so as to not lend them legitimacy. This judicious approach may be the most advantageous for indigenous peoples, given that the Declaration as it was adopted by the General Assembly on September 13,

U.S. occupation to challenge the controlling narrative of the occupying government and advance our larger self-determination movements. To illustrate this thesis, this Comment aims to show how asserting rights under the Declaration may advance the larger Chamoru struggle for self-determination, even where those rights are presently unenforceable in courts of law.[25] The principal point of this Comment is that framing rights claims under an expanded dual rights regime (i.e., claims asserting both traditionally cognizable or at least plausible rights as well as unrecognized international human rights legal norms) is legally

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2007, clouded and/or weakened indigenous peoples' rights in, for example, the key areas of demilitarization and self-determination. Earlier versions of the Declaration more fully and unequivocally protected indigenous peoples' rights in these two areas. *See, e.g., id.* art. 30 ("Military activities shall not take place in the lands or territories of indigenous peoples, *unless justified by a relevant public interest* or otherwise freely agreed with or requested by the indigenous peoples concerned.") (emphasis added). *But cf.* U.N. High Comm'r for Human Rights, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, art. 28, U.N. Doc. E/CN.4/Sub.2/1994/56 (Aug. 26, 1994) ("Military activities shall not take place in the lands and territories of indigenous peoples, *unless otherwise freely agreed upon by the peoples concerned.*") (emphasis added) [hereinafter *Draft Declaration*].

The Declaration, in its final form, also clouds the issue of self-determination. In its fourth article, it states that, "[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs . . . ." Declaration, *supra* note 23, art. 4. This provision is troubling for two reasons. First, states may attempt to argue that its placement immediately after the article extending the right to self-determination to indigenous peoples has the effect of qualifying or limiting the right to self-determination, as opposed to being merely illustrative of the right. In the *Draft Declaration*, this provision was placed lower in the text. *See Draft Declaration*, art. 31. Second, although the *Draft Declaration* linked self-determination to autonomy, it did not equate the first with the second. *See id.* ("Indigenous peoples, *as a specific form of exercising their right to self-determination*, have the right to autonomy or self-government in matters relating to their internal and local affairs . . . .") (emphasis added). To date, the U.N. instrument that has received the widest and most enthusiastic approval of the world's indigenous peoples was the 1994 Draft Declaration. E-mail from Maivân Clech Lâm, International Law Advisor, American Indian Law Alliance, and Professor of International Law, Ralph Bunche Institute for International Studies, The Graduate Center, City University of New York, to Julian Aguon (Nov. 24, 2008, 20:52 HST) (on file with author). A selective approach toward the Declaration may also be appropriate in light of the circumstances surrounding its passage in New York in September 2007. While earlier negotiations in Geneva between states and indigenous peoples gave rise to a high degree of consensus around the Declaration, this consultative process did not carry through to New York to the final days of negotiations in September 2007. Telephone Interview with Maivân Lâm, Professor of Int'l Law, Ralph Bunche Inst. for Int'l Studies, The Graduate Center, City Univ. of N.Y. (Dec. 4, 2008). Accordingly, it may be most advantageous to indigenous peoples, who are the beneficiaries of the Declaration, to invoke those provisions that help them and repudiate those that potentially harm them. *Id.*; *see also* American Indian Law Alliance, The General Assembly Adoption of the Declaration of the Rights of Indigenous Peoples (Oct. 17, 2007) (unpublished manuscript, on file with author).

[25] *See generally* Yamamoto et al., *supra* note 22.

strategic and politically valuable for indigenous peoples living under U.S. occupation, even though U.S. courts are unlikely to enforce the latter.

The world's near unanimous passage of the Declaration on the Rights of Indigenous Peoples on September 13, 2007 was a historic event.[26] The Declaration confers a litany of rights upon indigenous peoples living within the jurisdiction of those countries party to it, including, but not limited to, the right to self-determination; the right to be free from any kind of discrimination; and, the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the U.N. Charter, the Universal Declaration of Human Rights and international human rights law.[27] These rights, however, may remain unenforceable in the courts of the United States, which was one of the four countries that did not sign the Declaration.[28] Nonetheless, as this Comment posits, this should not deter indigenous peoples and political lawyers from asserting claims articulated, at least in part, in the language of these international human rights legal norms. Indeed, once in a while, when the political climate is right, a dual rights strategy yields success in court on the human rights claim.[29]

In 2008, the Chamoru people brace for an unprecedented storm of U.S. military buildup, as "all of the Pentagon road maps lead to Guam."[30] U.S. military realignment plans for the region include flooding Guam with a military-related population estimated at 59,000 people, said to include 19,000 military personnel, 20,000 of their dependents, and roughly 20,000 foreign workers on construction contracts.[31] Indeed, the military buildup has begun in terms of multi-million dollar construction contracts already awarded to U.S.-based corporations for development tied to the military buildup.[32] Meanwhile,

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[26] Press Release, United Nations Permanent Forum on Indigenous Issues, Historic Milestone for Indigenous Peoples Worldwide as UN Adopts Rights Declaration, U.N. Doc. A/Res/61/295 (Sept. 13, 2007) [hereinafter United Nations Permanent Forum on Indigenous Issues].

[27] *See* Declaration, *supra* note 23.

[28] The four countries that opposed the Declaration on the Rights of Indigenous Peoples were Canada, Australia, New Zealand, and the United States. *See* United Nations Permanent Forum on Indigenous Issues, *supra* note 26.

[29] *See generally* Aurelio Cal v. Attorney Gen. of Belize [2007], Claim No. 171 & 172 (Belize) (Supreme Court of Belize ruling that the indigenous Maya claimants had a right to their traditional lands and territories under the Declaration on the Rights of Indigenous Peoples and that Belize must recognize those rights).

[30] Joseph Gerson, U.S. Foreign Policy Analyst and Author, Address at the No Military Bases Network Launch Conference (Mar. 5, 2007).

[31] Special Committee on Decolonization, *Guam: Working Paper Prepared by the Secretariat* ¶¶ 42, 54, U.N. Doc. A/AC.109/2008/15 (Mar. 19, 2008), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N08/277/49/PDF/N0827749.pdf?OpenElement [herein-after *Guam: Working Paper Prepared by the Secretariat*].

[32] *See, e.g.*, GlobalSecurity.org, U.S. Department of Defense Office of the Assistant Secretary of Defense (Public Affairs) Contracts: Navy (May 18, 2006), http://www.global

as described above, mass cemeteries continue to be destroyed by private developers for the sake of economic development that fails to reflect indigenous Chamoru values.

It is in this turbulent political context—the United States' growing isolation on the world stage regarding its adverse disposition to the rights of indigenous peoples coupled with the military and corporate agendas driving development in Guam—that the indigenous Chamoru people of Guam struggle to preserve our cultural integrity and an already-tender shard of a self-determination dream. Accenting the deficiency of the U.N.-endorsed decolonization regime for non-self-governing territories,[33] this new wave of militarization in Guam colors the political landscape with a new gravity. Hence the urgency and, now, opportunity for the Chamoru to find strategic ways to assert our rights as the living heirs of a 4,000 year old civilization.

This Comment is divided into four parts. Part II provides the historical background of the development of the legal invisibility of indigenous peoples in contemporary international law; in short, how indigenous peoples came to be non-peoples under international law. It also briefly sketches the history of indigenous activism at the United Nations that produced the working document that became, after two decades, the Declaration adopted by 144 countries.[34] Part III addresses the strategic value to indigenous peoples living under U.S. occupation of asserting international human rights claims in U.S. domestic courts. It demonstrates how the choice of narrow legal strategy (i.e., the assertion only of traditional right claims told in tight legal language) can have devastating political consequences for indigenous peoples. This section also addresses the possibility of a court severing the traditional claim from the human rights claim, granting a motion dismissing the latter. Part IV demonstrates the different ways asserting rights distinctly as an indigenous people may restore the Chamoru people of Guam, giving us—and our long-suppressed counter-narrative about the continuing harms of U.S. colonization—a new lease of life. It lays out a new strategic blueprint for the Chamoru people of Guam that, beyond giving us a chance to legally protect the graves of our

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security.org/military/library/news/2006/05/ct20060518-13073.htm (last visited Dec. 31, 2008) (stating that California based company, EPSILON Systems Solutions, Inc., was awarded a $5.7 million contract to repair and upgrade naval berthing barges in Guam and elsewhere); *$40M for NAVFAC Pacific Environmental Planning Services*, DEF. INDUSTRY DAILY, May 23, 2006, *available at* http://www.defenseindustrydaily.com/40m-for-navfac-pacific-environmental-planning-services-02282/ (stating that Virginia-based company, TEC, Inc. Joint Venture, received a contract worth between $56,000 and $40 million for architect-engineer services for environmental planning in Guam and elsewhere).

[33] *See generally* Carlyle G. Corbin, Mid-Term Assessment of the Level of Implementation of the Plan of Action of the Second International Decade for the Eradication of Colonialism (May 17, 2005) (unpublished manuscript, on file with author).

[34] Declaration, *supra* note 23.

ancestors, brings our inalienable yet still unexercised right to self-determination closer within reach.

Drawing upon insights from critical race theory generally and Professor Eric Yamamoto's Political Lawyering for Human Rights framework[35] particularly, this Comment posits that asserting international human rights in U.S. domestic courts has political value for indigenous peoples engaged in self-determination struggles, even where those rights are presently unrecognized by the United States, and even if litigation ultimately fails in terms of narrow legal outcome.

II. NO PEOPLE HERE: THE INTERNATIONAL LEGAL PERSONALITY OF INDIGENOUS PEOPLES

A. The Long Life of the Doctrine of Discovery and the Legal Invisibility of Indigenous Peoples

Until 2007, indigenous peoples across the planet had no legal personality.[36] It was not until the passage of the Declaration on the Rights of Indigenous Peoples that modern international law finally recognized indigenous peoples as "peoples" entitled to such fundamental rights as the right to self-determination as specified in all the major international rights instruments.[37] Indeed, Western-dominated conceptions of international law regarded indigenous peoples as subjects of the "exclusive domestic jurisdiction of the settler state regimes that invaded their territories and established hegemony during prior colonial eras."[38]

There are theoretical and practical implications of denying international legal status to indigenous peoples, including an inability to access the International Court of Justice and other effective international forums available only to "states," a term that excludes indigenous peoples from its definitional reach.[39] The failure to recognize indigenous peoples as formal subjects of international law's benefits and duties contributes to the undermining of respect and enforceability of the hundreds of treaties between indigenous peoples and Western states.[40]

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[35] Interview with Eric Yamamoto, Professor, William S. Richardson School of Law, in Honolulu, Haw. (Feb. 15, 2008).

[36] Telephone Interview with Mililani Trask, Int'l Human Rights Attorney (Jan. 27, 2008).

[37] *See* Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 665 (1990).

[38] *Id.*

[39] Telephone Interview with Mililani Trask, *supra* note 36.

[40] Williams, *supra* note 37, at 696.

Historically, international legal discourse has been dominated by a conception of indigenous rights derived from the European doctrine of discovery, which holds as its basic tenet that indigenous peoples are unworthy of any legal recognition at all.[41] The most influential elaboration of the doctrine was Chief Justice Marshall's opinion for the United States Supreme Court in the infamous 1823 case, *Johnson v. McIntosh*.[42] In *Johnson*, the Court held that under principles derived from Europe's law of nations, the discovery of territory occupied by Indian tribes in the New World gave to the "discovering" nation "an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest."[43] The conception of indigenous peoples' diminished rights and status derived from the doctrine of discovery "still retains valuable currency in international legal discourse today."[44] European and European-derived settler states have relied on this doctrine to "regulate and legitimate their colonial activities in indigenous peoples' territories."[45]

B. Indigenous Activism at the United Nations and the Draft Declaration on the Rights of Indigenous Peoples

Indigenous peoples have contested the international legal system's continued acquiescence to the assertions of exclusive state sovereignty and jurisdiction over them. Indigenous advocacy at the international level has gone a long way in raising consciousness about the failure of settler state domestic legal systems to protect indigenous rights. The Draft Declaration, as it was called since 1989, was the single most important instrument produced by the United Nations Working Group on Indigenous Populations,[46] whose paramount task was to design a document that would adequately protect those rights most valued by indigenous peoples worldwide. The Declaration effectively trashes the doctrine of discovery, recognizing unequivocally that indigenous peoples are beneficiaries of international legal protection. The Declaration uniquely recognizes a wide array of distinct collective rights of indigenous peoples including, but not limited to, the rights to: (1) exist as culturally autonomous peoples; (2) continue in the peaceful possession of their traditionally occupied territories; and (3) exercise greater self-determining authority over their ways of life.[47] Indigenous peoples have insisted on such collective rights from the earliest days of advocacy as the paramount element of an indigenous rights

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[41] *See generally id.*

[42] 21 U.S. 543 (1823).

[43] *Id.* at 587.

[44] Williams, *supra* note 37, at 667.

[45] *Id.* at 672.

[46] *Id.* at 676.

[47] *See generally* Declaration, *supra* note 23.

regime.[48] Though most of the countries of the world have signed the Declaration, the four that opposed it[49] have some of the largest indigenous populations in the world.[50]

There is currency in asserting claims under the Declaration, even for indigenous peoples living within the four Objector States. As the following section outlines, indigenous peoples living under U.S. occupation have good reason to assert claims under the Declaration even though the United States did not sign the document.

III. INDIGENOUS PEOPLES ASSERTING UNRECOGNIZED HUMAN RIGHTS IN U.S. COURTS MAY LOSE THE BATTLE BUT WIN THE WAR

A. Re-Thinking Rights Litigation: On the Political Currency of a Dual Rights Legal Strategy for Indigenous Peoples Using Courts as Sites of Cultural Performance

Professor Eric Yamamoto, in a landmark article, *Courts and the Cultural Performance*,[51] argues that there are two ways to conceptualize courts and legal process: one narrow, one expansive. Drawing upon and expanding critical race theory, cultural anthropology, and dispute transformation theory, Yamamoto asserts that courts can be battlegrounds wherein indigenous peoples engage a war of contesting political narratives:

> Particularly in a setting of indigenous peoples' claims, court process is a "cultural performance."
>
> . . . [I]ndigenous groups are using the federal and state courts not solely to establish and enforce rights, but also to help focus cultural issues, to illuminate institutional power arrangements and to tell counter-stories in ways that assist larger social-political movements.[52]

For indigenous peoples living under occupation, asserting international human rights in domestic courts reveals the illegitimacy of the occupier's employment of its own established legal norms to define these rights. This process transforms allegedly neutral courts into sites of cultural performance wherein indigenous peoples may inject critical counter-narratives about historic

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[48] Telephone Interview with Mililani Trask, *supra* note 36.

[49] *See supra* note 28.

[50] Telephone Interview with Mililani Trask, *supra* note 36.

[51] Yamamoto et al., *supra* note 22. The basic theses that courts are theaters, and that the performances they produce are as important as their judgments, have been written about by various legal commentators. *See, e.g.*, MILNER S. BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS 42-94 (1981).

[52] Yamamoto et al., *supra* note 22, at 6.

injustice into court process and, ultimately, into public consciousness.[53] The reception into public consciousness of these counter-stories is valuable for peoples who have long been constrained by the narrow confines of traditional, domestic legal claims.[54] Yamamoto argues that the discourse of international human rights, including the rights contained in the new Declaration, enables indigenous groups to frame and express their oppression in global terms as indigenous peoples, thereby linking their isolated political struggles.[55]

As a matter of traditional legal process, however, assertion of international human rights alone will not carry the day. Claims articulated solely in the language of human rights will likely fail to even get an indigenous foot in the courthouse door.[56] Under a dual rights legal strategy, indigenous peoples assert both traditional rights claims (e.g. breach of trust, and implied contract) and claims articulated in international human rights legal norms (e.g. rights to self-determination and maintenance of cultural integrity).

The value of the traditional claim is that it could allow indigenous plaintiffs to survive a motion to dismiss for failure to state a claim upon which relief can be granted.[57] By doing this, the lawsuit acquires the clothing of a traditional legal argument and, likely, legal staying power.

The value of the human rights claim lies in its ability to do three significant things. First, it tells a critical counter-narrative of the particular harms indigenous peoples have suffered, which cannot be told in tight legal language. Second, it puts the government the claim is asserted against on the hot seat regarding democratic legitimacy.[58] Third, it proposes reparatory remedies

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[53] *Id.*

[54] *See* ALFRED L. BROPHY, REPARATIONS PRO & CON 97-141 (2006) (discussing the trend of unsuccessful reparations lawsuits in U.S. courts due to procedural and substantive hurdles including standing, causation, sovereign immunity, and statute of limitations).

[55] Eric K. Yamamoto et al., *Indigenous Peoples' Human Rights in U.S. Courts*, *in* MORAL IMPERIALISM: A CRITICAL ANTHOLOGY 300-19 (Berta Hernandez-Truyol ed., 2002).

[56] *Id.*

[57] FED. R. CIV. P. 12(b)(6).

[58] This point cannot be overstated. For example, the United States' recent objection to the Declaration on the Rights of Indigenous People, especially given the instrument's passage by an overwhelming majority in the General Assembly, imperils an important self-interest of being perceived by the international community as a democratically legitimate state. The international treaty body created by the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, known as The Committee on the Elimination of Racial Discrimination (CERD), has recently indicted the United States for failing to meet international standards of equality. *See* Haider Rizvi, *RIGHTS-US: U.N. Panel Finds Two-Tier Society*, INTER PRESS SERVICE NEWS AGENCY, Mar. 11, 2008, *available at* http://ipsnews.net/news.asp?idnews=41556. The CERD, in its 2008 report to the United States, advised the United States that, despite its position that it is not bound by the Declaration, it should look to the Declaration as a guide to interpret its obligations under the Convention relating to indigenous peoples. U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention:*

colored by a concern for repair and restoration rather than monetary compensation in light of the particular, continuing harms indigenous peoples endure.

The landmark litigation involving the indigenous Ainu people of Japan illuminates the impact of human rights litigation, even when unsuccessful, on larger political strategies to achieve government acceptance of responsibility for historic injustice.[59] In *Kayano v. Hokkaido Expropriation Committee*[60] (*Kayano*), two Ainu landowners who refused to acquiesce to the taking of their land for the construction of a major river dam took the Japanese government to court in a historic[61] lawsuit.[62] The lawsuit was the first in Japanese history to consider the existence of an indigenous people living within Japanese territory.[63] After a lengthy courtroom trial, the Sapporo District Court handed down a landmark decision, which recognized a "long history of unjust deprivations imposed upon the Ainu people by the Wajin and the Japanese nation."[64] Though the Ainu landowners' claims were ultimately denied, a critical counter-story about Japan-sponsored injustice upon the Ainu now had a reception in the legal and public consciousness of Japan. As Professor Mark Levin asserts, the litigation produced fact-finding that garnered enormous attention in the country for its "extensive, detailed, and extraordinarily critical description of the ancient and modern relationships of Wajin and the Japanese nation with the Ainu people."[65]

> [T]he Sapporo district court of Japan, citing human rights norms, detailed the substantial history of oppression of Japan's indigenous peoples. Although ultimately denying substantive relief on Japanese constitutional grounds, the court's lengthy opinion generated a compelling new narrative about the Ainu and the moral foundations of their cultural claims. That narrative has had an impact

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Concluding Observations of the Committee on the Elimination of Racial Discrimination ¶ 29, U.N. Doc. CERD/C/USA/CO/6 (Feb. 18-Mar. 7 2008), *available at* http://www1.umn.edu/humanrts/ CERDConcludingComments2009.pdf.

[59] *See* Yamamoto et al., *supra* note 55, at 314.

[60] Kayano v. Hokkaido Expropriation Comm., 1598 HANREI JIHŌ 33 (Sapporo Dist. Ct., Mar. 27, 1997), *translated in* 38 I.L.M. 394 (1999).

[61] *See* Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL. 419, 422 n.10 (2001) ("When this case was conceived, there were no relevant case precedents and only two academic writings suggesting that minority rights for indigenous peoples existed under Japanese law.").

[62] *Id.* at 422.

[63] *Id.*

[64] *Id.* at 423.

[65] *Id.* at 424.

on emerging Ainu social justice efforts and on future legislative and executive policy initiatives.[66]

The legal strategy in *Kayano* demonstrates the political currency of advancing claims under a dual rights regime. In *Kayano*, legal counsel for the Ainu plaintiffs asserted claims under both traditionally cognizable rights (i.e., Article 13 of the Japan Constitution, which commands respect for all of Japan's people as individuals)[67] and international human rights (i.e., Article 27 of the International Covenant on Civil and Political Rights, which provides that all peoples have the right to enjoy their own culture).[68] Once the traditional claim got the Ainu plaintiffs in the door, the human rights claim did the rest: It aired in the press a new narrative of state-sponsored injustice endured by the Ainu people, whose suffering could now be understood as a direct and inevitable result of racism and colonization. The airing of Japan's dirty laundry—its depriving of the Ainu people their human rights and rights to remedy—ultimately led to a legal affirmation in *Kayano* of Ainu rights. With this newfound, significant shift in public consciousness, the Japan Diet enacted the Law on the Promotion of Ainu Culture and Facilitation of Popular Understanding of Ainu Tradition,[69] inspired in large part by an intentional effort on the part of the Japanese government to address the injustices highlighted by the *Kayano* court and revive international perception of Japan as a democratically legitimate state. Though this and later laws fail to adequately address the unique harms that racism, colonization and economic exploitation has inflicted upon the Ainu people, the shift in consciousness has opened a door for Ainu restoration—a door that activists on the ground will no doubt push further open. Indeed, in June 2008 the Japan Diet unanimously passed a resolution pressing the government to officially recognize the Ainu as an indigenous

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[66] Yamamoto et al., *supra* note 55, at 314.

[67] KENPŌ, art. 13.

[68] International Covenant on Civil and Political Rights (ICCPR), art. 27, 993 U.N.T.S. 3 (1966). The ICCPR applies under Article 98 of the Japanese Constitution, which states that "[t]reaties concluded by Japan and established laws of nations shall be faithfully observed." KENPŌ, art. 98 . Accordingly, in Japan the ICCPR claim could be classified as a traditionally cognizable claim because the Japanese Constitution elevates the legal status of treaties in that country. *See* YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW 299 n.35 (1998) (citing cases in which Japanese courts have directly applied the ICCPR). *See also id.* at 50 (citing a 1993 Tokyo High Court decision stating that the ICCPR has "self-executing force in Japan").

[69] Ainu Bunka no Shinko narabini Ainu no DentEo-tEo ni Kan suru Chishiki no Fukyu oyobi keihatsu ni kan suru Horitsu [Act for the Promotion of Ainu Culture & Dissemination of Knowledge Regarding Ainu Tradition], Law No. 52 of 1997, *translated in* Ainu Shinpou, *Act for the Promotion of Ainu Culture & Dissemination of Knowledge Regarding Ainu Traditions (# 52/1997)*, 1 ASIAN-PAC. L. & POL'Y J. 11 (Masako Yoshida Hitchingham trans., 2000).

people.[70] Hence, that the *Kayano* court ultimately allowed construction on the dam to proceed on the basis that "public interest" compelled its completion fades in importance. Japan's longstanding narrative of national homogeneity had been shattered, and a shadow people gained the light.

The new narrative generated by *Kayano* also pushes the Japanese government into the light of international scrutiny, a politically inopportune place to be as Japan vies for a spot on the U.N. Security Council. Today, Japan is on the hot seat for democratic legitimacy, a political reality exacerbated by recent findings of the U.N. Special Reporter on Racism that today's Ainu people face continuing unequal treatment in housing, education and employment.[71] Consequently, Japan may be unable to convincingly claim the moral authority needed to be a major player on matters of international security and economic development.[72] Indeed, though courts rarely enforce a country's human rights obligations, highly publicized, un-redressed human rights violations sufficiently damage a country's stature as a democracy in the eyes of the international community.[73]

B. A Higher Algebra: For Indigenous Peoples, Lack of Human Rights Enforcement Does Not Diminish the Power of Their Assertion

Asserting international human rights claims in U.S. courts, despite the difficulty of achieving immediate favorable judgments, marks a sophisticated understanding of international human rights law. Research on legal consciousness suggests that aspirational human rights norms asserted legally have been pivotal in galvanizing and shaping domestic political process.[74] Indeed, "over time, international law norms may alter what both government actors and . . . [the public] view as 'right,' 'natural,' 'just,' or 'in their interest.'"[75] From a narrow, formalist conception of rights, the Declaration may fall on its face—at least for indigenous peoples living within the United States, who did not sign the instrument. To formalists, that international human rights law lacks

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[70] *See* Catherine Makino, *Indigenous People: Japan Officially Recognizes Ainu*, INTER PRESS SERVICE NEWS AGENCY, June 11, 2008, *available at* http://ipsnews.net/news.asp?idnews=42738 (stating that the timing of the resolution was politically strategic, coming only weeks ahead of Japan's hosting of the G8 Summit in Hokkaido, held July 7-9, 2008).

[71] Eric K. Yamamoto, Professor, William S. Richardson School of Law, Social Healing Through Justice: A Framework for Indigenous Ainu Reconciliation with the Governments and People of Japan, Address at the Advanced Institute for Law and Politics, Hokkaido University (Apr. 2, 2008) (transcript on file with author).

[72] *Id.*

[73] *Id.*

[74] *See* Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1269 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)).

[75] *Id.*

enforcement mechanisms translates into rights trashing. However, law arguably operates as much by influencing modes of thought as through enforcement by coercive government power.[76] As a constitutive part of culture that shapes and determines social relations and provides a distinct manner of imagining what is morally right and just, the law may indeed compel compliance.[77]

Human rights law, then, summons dimensions of power for which a narrow formalist conception of rights cannot account. For indigenous peoples, asserting international human rights can be profoundly meaningful and politically transformative, even though U.S. domestic courts are reluctant to enforce them. It could be no less than the most important argument of our lives. Because the law has rendered indigenous peoples invisible, to make claims under an indigenous human rights regime is to argue ourselves into existence; to argue our mothers, our children, our dreams into being. Critical race theorist Patricia Williams argues that for legally invisible people, the very act of asserting rights has humanizing and political effects.[78]

The Chamoru people of Guam have been cut, *deeply*, by five centuries of uninterrupted colonization by outside powers. For Chamorus, asserting rights as an indigenous people—apart from rights as the colonized inhabitants of a non-self-governing territory[79]—could begin a process of indigenous restoration. It would enable us to frame human rights claims in relatable language. Hence human rights-assertion for the Chamoru people of Guam is pregnant with humanizing and political potential.

Asserting rights as indigenous peoples confronts the fatalism that colonization has reared in the Chamoru people of Guam, a fatalism evidenced in alarmingly high rates of substance abuse, domestic violence, and violent crime.[80] One mental health counselor in Guam confirms the connection between centuries of colonization and despair among Chamorus:

> I think we are still mourning the loss of [Chamorus] killed. As a culture, I think we're still mourning the fact that we've lost a part of ourselves in being

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[76] Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 57 (2007).

[77] *Id.* (citing Berman, *supra* note 74, at 1281).

[78] *See generally* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (discussing the deeply humanizing and political effects of rights-assertion for African Americans).

[79] *See* Van Dyke et al., *supra* note 21.

[80] *See* Patricia Taimanglo, An Exploratory Study of Community Trauma and Culturally Responsive Counseling with Chamorro Clients 172 (May 1998) (unpublished Ph.D. dissertation, University of Massachusetts, Amherst) (on file with author) (exploring the varied forms and manifestations of unresolved trauma experienced by the Chamoru people of Guam as a result of colonization and dispossession).

> subjugated by the Spanish. We've from that time on been in a period of mourning. We've lost our ability to be who we wanted to be. We've lost the ability to control our destiny ... after the Spanish, then came the Americans, then the Japanese, then the Americans again, and I think we are still in mourning. Maybe not on a conscious level but subconsciously some people are still mourning and we're still in despair.[81]

This speaks to a kind of trauma known as "soul wound," or the core suffering by indigenous peoples who have undergone violent and oppressive colonization for several centuries.[82] Indeed, human rights rhetoric is an effective form of discourse for people who have had an "experience of anonymity, the estrangement of being without a name ... of living in the oblivion of society's inverse, beyond the dimension of any consideration at all."[83]

C. Indigenous Peoples and the Discourse of Human Rights, an Indivisible Match: On How the Narrow Legal Strategy of Asserting Only Traditionally Cognizable Rights Cuts Out the Compelling Core of Indigenous Rights Claims

A basic tenet of issue-framing is that when one group of people is arguing against another, it must not use the other side's language because the language of the latter picks out a frame, and it will not be one the former wants.[84] Language either liberates or imprisons. Taking *tax relief* as but one example, political theorist George Lakoff argues that conservatives have managed to dominate the discourse about taxes in America for one reason only—they framed the debate.[85] Framing the issue as *tax relief* was strategic, Lakoff asserts, because "for there to be *relief* there must be an affliction, an afflicted party, and a reliever who removes the affliction and is therefore a *hero*"[86] and, naturally, those trying to stop the hero (those opposing tax relief) are *villains*.[87] Democrats have lost the debate not because of any inherent weakness in their position but, rather, because they unwittingly accepted the conservative frame.[88]

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[81] *Id.* at 173 (quoting anonymous mental health professional in Guam).

[82] *Id.* at 172 (quoting EDUARDO DURAN AND BONNIE DURAN, NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY 24 (1995)).

[83] Williams, *supra* note 78, at 414.

[84] GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE 3-4 (2004).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

A deadly move according to Lakoff, who argues that "framing is about getting language that fits your worldview"[89] and is therefore and very political.[90]

The same theory applies to the cultural and sociopolitical crises among the Chamoru people of Guam, who live at the bottom of every socioeconomic indicator[91] and who have not been able to overcome the governing narrative of Chamorus as "Happy Little Patriots."[92] In Guam, public discourse is dominated by the *Pacific Daily News* (PDN), a subsidiary of U.S. newspaper giant Gannet Corporation that Chamoru activists argue actively works to dismantle pro-Chamoru-self-determination sentiment.[93] One contemporary example of how the PDN frames public discourse is its near total lack of coverage of the recent, consistent petitioning of Chamoru activists at United Nations decolonization hearings regarding the current militarization of Guam.[94] In 2005, 2006, and 2007, delegations of Chamoru activists and educators raised their own money (through familial donations, karaoke fundraisers and lunch plate sales) to fly to New York to petition the U.N. Special Political and Decolonization Committee to 1) reaffirm that the United States has an international obligation to the Chamoru people of Guam to ensure we exercise our human right to self-determination, and 2) compel the United States to take notice that the massive military buildup of Guam endangers that right.[95] To date, the PDN inappropriately perpetuates the perception that the ever-patriotic Chamoru people overwhelmingly support increased U.S. military presence in Guam.[96] Against this colonizer-driven realpolitik backdrop, framing Chamoru grievances against the United States as a matter of human rights squarely and publicly confronts the cover story of Chamorus as "Happy Little Patriots" and replaces it with a new narrative about an ancient *resisting* people. In this context, the counter-narrative emerges daring, bold and political.

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[89] *Id.*

[90] *Id.*

[91] *See* Taimanglo, *supra* note 80, at 78-79.

[92] *See generally* Anne P. Hattori, The Navy Blues: U.S. Navy Policies on Guam, 1899-1941 (1995) (unpublished manuscript, on file with Hamilton Library, Pacific Collection, University of Hawai'i at Mānoa) (describing U.S. Naval perceptions of Chamoru loyalty, patriotism, and primitiveness).

[93] Telephone Interview with Debtralynne Quinata, Maga'håga, I Nasion Chamoru (Feb. 28 2008).

[94] *Id.*

[95] *Id.*

[96] *See generally* James Viernes, Won't You Please Come Back to Guam?: Media Discourse and Military Buildup on Guam, (Mar. 14, 2007) (unpublished manuscript, on file with author) (detailing how a survey of numerous articles published in the Pacific Daily News reveals the newspaper's position favoring increased military presence in Guam).

The following stories illustrate what happens when indigenous people forsake human rights language that more accurately accounts for the continuing cultural and spiritual harms they suffer under occupation.

Though Native Hawaiians had long expressed that their self-determination is inextricably tied to control over illegally taken ceded lands[97] and had fiercely articulated their rights under international law during the 1990s,[98] recent Hawaiian claims to self-governance over traditional resources have been framed without reference to international law and human rights.[99] In 1994, the Office of Hawaiian Affairs (OHA)—an agency created by the Hawai'i State Constitution to represent Native Hawaiians—along with several of its beneficiaries, filed a breach of trust claim in state court,"[100] accusing the state of "illegally alienating"[101] ceded lands from the original Hawaiian Kingdom and the Hawaiian people to "third persons who are not state entities and without regard for the claims of Hawaiians to those lands."[102] The claimants in *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i*[103] (*OHA*), however, employed a narrow rights framework. First, the *OHA* complaint omitted reference to international human rights law and asserted only a state law breach of trust claim, invoking rights traditionally recognized by the U.S. legal system, e.g. the State's "failure to exercise due care [in discharging its] fiduciary duties."[104]

While recognizing that a classic breach of trust claim[105] was a strategic judgment by the *OHA* attorneys, as the doctrine formed the most promising body of substantive law for blocking the sale of the ceded lands, this choice in legal strategy "came at a price—the loss of human rights norms and rhetoric and possible political support from international human rights and indigenous

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[97] Interview with R. Kekuni Blaisdell, Native Hawaiian Physician, Medical Educator & Self-Determination Activist, in Honolulu, Haw. (Apr. 8, 2008).

[98] *See, e.g.*, Kealoha v. Hee, Civ. No. 94-0118-01 (1st Cir. Haw., filed Feb. 2, 1994) (Native Hawaiians suing the Office of Hawaiian Affairs to forestall a $100 million settlement until the Native Hawaiian people could create a recognized sovereign entity to undertake negotiations framed the legal issue as a violation of their human right to self-determination). One of the most powerful expressions of Native Hawaiians' rights under international law during the 1990s was the 1993 International People's Tribunal, a war crimes tribunal in the tradition of war trials following World War II (e.g., Nuremberg). *See* MILNER S. BALL, CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW 93-94 (2000).

[99] Yamamoto et al., *supra* note 55, at 303.

[100] *Id.* at 304.

[101] *Id.*

[102] *Id.*

[103] Civ. No. 94-4207-11 (Haw. Cir. Ct., filed Nov. 1994).

[104] *See* Yamamoto et al., *supra* note 55, at 306.

[105] *Id.* at 307 ("Well-developed breach of trust doctrines based on domestic law have been the centerpiece of the federal government's Native American policies since the early twentieth century.").

peoples' organizations."[106] Breach of trust claims, however, are "ill-suited to address Native Hawaiian self-determination claims as they fail to embody the cultural, spiritual, and political experiences of indigenous Hawaiians."[107]

The *OHA* litigation, if used to bring into focus the cultural and human rights deprivations at issue, would have seized the legal and public opportunity to tell a critical counter-story about the Native Hawaiian people. Because the initial claim was narrowly framed,[108] a critical counter narrative of Native Hawaiians as "People Of The Land" got lost. Like other indigenous peoples, Native Hawaiians have an indivisible spiritual relationship to their homelands. The land, or *'āina*, is the source of physical and spiritual sustenance; it structures communal relationships.[109] Traditional land, water, and other natural resources were held in common, not owned individually.[110] They were nurtured through group stewardship, or *mālama 'āina*.[111] Without their homelands—their cultural and economic base—self-governance is an "illusion."[112] Hence Native Hawaiians' conviction that the ceded lands controversy at issue in the *OHA* litigation is "at the heart of their existence as a distinct people and their capacity to pursue group development on ancestral lands."[113]

Today, "Native Hawaiians comprise the most economically disadvantaged and otherwise ill-ridden sector of the Islands' population . . . . Native Hawaiians are overrepresented among the ranks of welfare recipients and prison inmates and are underrepresented among high school and college graduates, professionals, and political officials."[114] Of late, Native Hawaiians can barely afford to live in Hawai'i.[115] At the time of this writing, hundreds of Native Hawaiians live in what have been called "tent cities."[116] All along the leeward coastline of the most metropolitan Hawaiian island, O'ahu, dispossessed Hawaiian families line the beach in blue tarp tents, or live in their

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[106] *Id.*

[107] *Id.*

[108] The *OHA* litigation later employed the language and impulse of international human rights, particularly on appeal. *See* Individual Plaintiffs' Closing Argument at 577-81, Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., Civ. No. 94-4207-11 (Haw. Cir. Ct., argued Dec. 17, 2001).

[109] Yamamoto et al., *supra* note 55, at 305.

[110] Interview with R. Kekuni Blaisdell, *supra* note 97.

[111] *Id.*

[112] Yamamoto et al., *supra* note 55, at 305 (citation omitted).

[113] *Id.*

[114] S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 317 (1994).

[115] Telephone Interview with Alice Greenwood, Grassroots Native Hawaiian Anti-Homelessness Activist and Cmty. Organizer (Oct. 23, 2008).

[116] *Id.*

cars.[117] "Plundered by two centuries of Western encroachment and left virtually landless,"[118] Native Hawaiians now make up only twenty percent of Hawai'i's total population.[119] Thus, as with the Chamoru who also can barely afford to live in their own homeland,[120] asserting indigenous human rights for Native Hawaiians may also implicate a restoration beyond the legal realm. It could mark the beginning of a long process of healing the harms that colonialism has caused Native Hawaiians.[121]

Conceived under a dual rights framework, the traditional breach of trust claim could have been coupled with a self-determination claim articulated in the language of international human rights, which, once the traditional claim accorded the lawsuit legal staying power, would have performed three significant functions. First, it would have generated a story of U.S.-endorsed dispossession of the Native Hawaiian people, told today in starkly disparate demographics. Second, it would have put the U.S. government on the hot seat for its failure to follow through on the promise of reconciliation it made to the people of Hawai`i in the 1993 Apology Bill.[122] Third, it would have interpreted the particular group-based harms that U.S. colonialism has caused Native Hawaiians as warranting a reparatory scheme apart from mere monetary compensation.

Two consolidated class actions in the U.S. Court of Federal Claims (Claims Court) involving redress for the indigenous people of the Marshall Islands show that the language of claims can either capture the compelling heart of historic injustice, or cut it out. In *People of Bikini ex rel Kili/Bikini/Ejit Local Government Council v. United States*[123] and *John v. United States*,[124] legal counsel for both the Bikini and Enewetak islanders filed a joint response to an earlier order of the Claims Court, arguing against the U.S. motion to dismiss for lack of jurisdiction based on the appropriateness and ripeness of the Claims Court to

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[117] Today, hundreds of Native Hawaiians live in tents and cars on the leeward coast, most notably, the public beach barks at Lualualei, Nanakuli, and Kea`au. *Id.* Particularly troubling is that though the local police department has publicly announced that homelessness is not a crime, police officers have issued numerous tickets to Hawaiians living on the beach for "illegal camping"—a characterization of their predicament with which many Native Hawaiians take issue. *Id.*

[118] Anaya, *supra* note 114, at 317 (citation omitted).

[119] Interview with R. Kekuni Blaisdell, *supra* note 97.

[120] *See* Gaynor D. Daleno, *Statistics Show Home Prices are Soaring*, PAC. DAILY NEWS, May 5, 2007, at 2-3.

[121] *See* Plaintiffs' Memorandum in Opposition at 9, Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., Civ. No. 94-4207-11 (Haw. Cir. Ct. 1994) (stating that the land in Hawai`i is crucial to Native Hawaiian culture, religion, economic self-sufficiency, health, and wellbeing).

[122] Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

[123] People of Bikini *ex rel* Kili/Bikini/Ejit Local Gov't Council v. United States, 77 Fed. Cl. 744 (2007).

[124] John v. United States, 77 Fed. Cl. 788 (2007).

adjudicate the instant cases.[125] In sum, the legal argument was that because the Nuclear Claims Tribunal (NCT)—the alternative procedure provided for in the Compact of Free Association between the U.S. government and its former ward, the Republic of the Marshall Islands (RMI)—failed to provide just compensation to both groups of Marshallese islanders, the termination of their earlier takings[126] and breach of contract[127] claims gave rise to an action in the Claims Court for compensation.

Though legally adept, takings and breach of contract claims fail to fully, or descriptively account for the nature of the harm suffered by the Marshallese people due to the U.S. Nuclear Testing Program, wherein their Protectorate[128] exploded sixty-seven atomic bombs in their islands over a twelve-year period, intentionally exposed various groups of Marshallese islanders to lethal levels of radiation,[129] and then proceeded to study their radiogenic diseases in such a fashion that international commentators have decried these "studies" as use of the Marshallese people as human guinea pigs.[130]

This got lost in the tight legal framing:

> . . . [I]t will be very interesting to go back and get good environmental data, how many per square mile; what isotopes are involved and a sample of food changes in many humans through their urines, so as to get a measure of the human uptake when people live in a contaminated environment. Now, data of this type has never been available. *While it is true that these people do not live, I would say, the way Westerners do, civilized people, it is nevertheless also true that these people are more like us than the mice.* So that is something which will be done this winter.[131]

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[125] Plaintiffs' Joint Response to the Court's Order of Apr. 24 2007 at 3, People of Bikini v. United States, 77 Fed. Cl. 744 (2007) (No. 06-288C), John v. United States, 77 Fed. Cl. 788 (2007) (No. 06-289L).

[126] *Id.* at 8 ("[Because] the Nuclear Claims Tribunal has been able to award only a tiny fraction of the value of the property taken, the plaintiffs' complaints validly allege a taking of property for which they have not received just compensation under the Fifth Amendment.").

[127] *Id.* at 13-18 (arguing that the United States reneged on a contractual promise made in the Compact of Free Association between the United States and the RMI to provide funds *in perpetuity* to the Marshallese victims of its Nuclear Testing Program) (emphasis added).

[128] *See* Trusteeship Agreement for the Former Japanese Mandated Islands art. 3, July 18, 1947, 61 Stat. 3301, 8 U.N.T.S. 189.

[129] Interview with Tony deBrum, Former Minister of Foreign Affairs, Republic of the Marshall Islands, in Majuro, Marsh. Is. (May 15, 2007).

[130] Interview with Zohl dè Ishtar, Nobel Peace Prize Nominee and Author, in Tamuning, Guam (Aug. 12, 2006). U.S. Secretary of State Henry Kissinger's infamous quote at the time was: "There are only 90,000 people out there. Who gives a damn?" WALTER J. HICKEL, WHO OWNS AMERICA? 208 (1971).

[131] Merril Eisenbud, Remarks at the Meeting of the U.S. Atomic Energy Comm'n Advisory Comm. on Biology & Med. (Jan. 13-14, 1956), *available at* http://www.gwu.edu/~nsarchiv/radiation/dir/mstreet/commeet/meet3/brief3.gfr/tab_f/br3f1m.txt (emphasis added).

More agonizing are the words of the Marshallese themselves, especially the women, who have endured the agony of giving birth to babies that barely look human:

> Now we have this problem, what we call "jelly-fish babies." These babies are born like jellyfish. They have no eyes. They have no heads. They have no arms. They have no legs. They do not shape like human beings at all.[132]

> [W]henever I think about the seven miscarriages I have had, I feel empty. I suspect all my miscarriages were radiation related because several of my stillborns were deformed, and one had only one eye. Each day, I ached with pains, and the legacy of the nuclear testings will continue to haunt me, and all the other survivor victims in the Marshall Islands.[133]

Though the United States hawked that nuclear testing needed to be done in the Marshall Islands for the good of all mankind,[134] the Marshallese people are left with the bill—continuing to die of radioactivity-related cancers at horrific rates.[135] The fund set up to cover the anticipated subsequent medical care is nearly extinguished. As of May 2007, the "perpetual"[136] $150 million fund established by the United States to compensate survivors of its Nuclear Testing Program was down to less than $1 million.[137]

Marshallese claims for redress no doubt belong under an international human rights regime, if not because the United States was the U.N.-approved Trustee of the Marshallese Islanders when it tested nuclear bombs in their islands,[138]

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[132] Zohl dè Ishtar, *A Survivor's Warning on Nuclear Contamination*, 13 PAC. ECOLOGIST 50, 50 (2006-07) (quoting Zohl dè Ishtar, PACIFIC WOMEN SPEAK OUT FOR INDEPENDENCE AND DENUCLEARISATION (Zohl dè Ishtar ed., 1998)), *available at* http://www.pacificecologist.org/archive/13/survivors-nuclear-warning.pdf.

[133] *Id.* at 52-53.

[134] *See* Darlene Keju-Johnson, *For the Good of Mankind*, 2 SEATTLE J. SOC. JUST. 309, 309 (2003).

[135] *See* DIVISION OF CANCER EPIDEMIOLOGY & GENETICS, NATIONAL CANCER INSTITUTE, NATIONAL INSTITUTES OF HEALTH & DEPARTMENT OF HEALTH AND HUMAN SERVICES, ESTIMATION OF THE BASELINE NUMBER OF CANCERS AMONG MARSHALLESE AND THE NUMBER OF CANCERS ATTRIBUTABLE TO EXPOSURE TO FALLOUT FROM NUCLEAR WEAPONS TESTING CONDUCTED IN THE MARSHALL ISLANDS 17 (2004) (prepared for the Senate Committee on Energy and Natural Resources).

[136] People of Bikini *ex rel* Kili/Bikini/Ejit Local Gov't Council v. United States, 77 Fed. Cl. 744, 769 n.6 (2007).

[137] Interview with Bill Graham, Pub. Advocate for the Nuclear Claims Tribunal, in Majuro, Marsh. Is. (May 15, 2007).

[138] Trusteeship Agreement for the Former Japanese Mandated Islands, *supra* note 128. The Trusteeship lasted from 1947-1986, ending when the United States and the new RMI government signed the Compact of Free Association.

then because the scale of dispossession caused by the U.S. Nuclear Testing Program is tantamount to genocide.[139]

For this degree of dispossession, the Marshallese people no doubt have claims under the Declaration on the Rights of Indigenous Peoples, particularly under Article 1 (right to full enjoyment of all human rights and fundamental freedoms as recognized under international human rights law);[140] Article 7 (right to live in freedom, peace and security as distinct peoples and not be subjected to any act of genocide),[141] and Article 25 (right to maintain and strengthen their distinctive spiritual relationship with their traditional lands and waters, and to uphold their responsibilities to future generations in this regard).[142]

The strategic choice to analogize the right to health care (especially when it is already certain that succeeding generations will suffer radiogenic diseases) with the right to just compensation in the U.S. Constitution's Fifth Amendment takings sense is inappropriate. The comparison, even as a legal fiction, is dangerous because it hides the horrific nature of the harm. For everyday Marshallese islanders, concern for the wellbeing of one's children cannot easily be labeled a property interest. Hence, it is hard for the Marshallese people—and their international supporters—to access the language of the claims or use the legal actions to empower ground-level social justice struggle. Alternatively, if the record at least *named* the harm's truer nature, i.e. a crime against humanity, the litigation could add more fuel to a now-fading political fire, one burning in Congress for recognition of the United States' responsibility to provide these people with adequate funding for health care. This is the backdrop against which the indigenous Marshallese people struggle for compensation:

> We know that in the future our children are going to have thyroid problems, have cancer and all that . . . As the coconut crabs pass on their radiation to their small crabs for years and years (because of the oil in the coconut crabs), so will we. It's just like us, the radiation is going to be in them, in their bodies, because we drank the water at that time of [the detonation of the Bravo bomb] and it's still there and we've passed it on to our children and their children. That is why we struggle for the [Section 177 Agreement].[143]

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[139] *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[140] Declaration, *supra* note 23, art. 1.

[141] *Id.* art. 7.

[142] *Id.* art. 25.

[143] Interview with Anonymous 61-Year-Old Nuclear Testing Program Survivor, in Majuro, Marsh. Is. (May 17, 2007).

Politically, the legal strategy that forsakes the communication of a narrative of a harm of this gravity is not, in fact, strategic.[144] And it comes at too precious a price.

The Marshallese islanders in both *People of Bikini* and *John* could have won politically meaningful victories if these actions were pursued under a dual-rights framework. Put plainly, once the takings and breach of contract claims got the plaintiffs past the U.S. government's motion to dismiss, which it did, the claims articulated in the language of human rights would have accomplished what the former could not do: Tell a story of U.S.-government-endorsed crimes against humanity that serves as a powerful challenge to the United States' democratic legitimacy. With these stories aired in the national and international media and the World Court of Public Opinion, the United States could not seriously cast itself as an upholder of human rights until it undertook a reparatory scheme capable of responding to the egregious harms the Marshallese people suffered on its watch.

1. A note on the possibility of a court granting a motion to dismiss on the human rights claim

Even if the court denies the 12(b)(6) motion to dismiss on the traditional claim, it could still potentially grant the motion dismissing the international human rights claim, thereby denying discovery (and other tools of traditional legal process) on all things related to the human rights claim and, in turn, denying the telling of the new narrative. In this scenario, the legal strategy developed in *Ka`ai`ai v. Drake*[145] is instructive. *Ka`ai`ai* involved traditional breach of trust and procedural due process claims brought by trust beneficiaries of the Hawaiian Homelands Trust against the State of Hawai`i, the Homelands commissioners, and others.[146] In brief, the operative facts are as follows. A

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[144] Although the assertion of human rights claims would have communicated a powerful narrative of U.S.-sponsored harm, the legal teams in these cases had good reason to assert the traditional claims they did. Under the Tucker Act, the U.S. Court of Federal Claims has:

> Jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2000). Because these Marshallese claimants could identify, and in fact plead an independent contractual relationship with the United States that provided a substantive right to money damages, Todd v. United States, 386 F.3d 1091, 1094 (Fed. Cir. 2004), their claims fall within the purview of the Tucker Act, and the Claims Court had jurisdiction to adjudicate them. Hence, the legal strategy was sound, though perhaps not the most fully advantageous for the realpolitik struggle of the Marshallese islanders.

[145] No. 92-3742-10 (1st Cir. Haw., filed Oct. 7, 1992).

[146] Yamamoto et al., *supra* note 22, at n.279.

task force created by the State of Hawai`i to facilitate the settlement of claims brought against it by the Department of Hawaiian Homelands had 1) denied Native Hawaiian community organizations' explicit request to participate on the Task Force, and 2) recommended that the Department of Hawaiian Homelands sign a broad release waiving all past and future claims arising from the sale of trust assets.[147] Because the Native Hawaiian groups seeking participation in the task force were comprised of individuals who were beneficiaries of the Homelands trust, they had a direct and irrefutable interest in it. In fact, Native Hawaiian beneficiaries of the trust had no un-conflicted representation; the task force was made up entirely of individuals appointed by the State.[148] Unsurprisingly, the task force grossly undervalued the damage to the trust, recommending a paltry thirty-nine million dollar settlement.[149] Consequently, a lawsuit was filed in federal court asserting breach of trust for the exclusion of Native Hawaiian participation on the Task Force, and the principle of Native Hawaiian self-determination in resolving trust claims against the State.[150] The assertion was vigorously opposed by the State on procedural grounds.[151] The legal team then took advantage of a new pro-Native Hawaiian climate in the state judiciary (only a few days earlier, the Hawai`i Supreme Court had decided *Pele Defense Fund v. Paty*,[152] setting a precedent in favor of expanding recognition of Native Hawaiian rights), and removed the case to state court.[153] Ultimately, the litigation won Native Hawaiians adequate representation on the task force and led to a final settlement of some $600 million, which in turn has allowed for accelerated development of homelands for beneficiaries.[154] Though the case ultimately settled out of court, it "won" a major political victory for the Native Hawaiian people. It successfully linked the issue of the disposition of these trust lands to the human right to self-determination, thereby communicating a powerful narrative about the centrality of those lands to Native Hawaiians' cultural and political restoration.[155]

The strategy employed in the *Ka`ai`ai* litigation instructs that the most effective political lawyering accounts for the full range of procedural and substantive barriers facing native peoples in U.S. domestic courts, and plans accordingly. Hence the strategic promise of couching enough of the

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[147] *Id.*

[148] Interview with Eric Yamamoto, Professor, William S. Richardson School of Law, in Honolulu, Haw. (Aug. 23, 2008).

[149] *Id.*

[150] Yamamoto et al., *supra* note 22, at n.279.

[151] *Id.*

[152] 73 Haw. 578, 837 P.2d 1247 (1992).

[153] Yamamoto et al., *supra* note 22, at n.279.

[154] Interview with Eric Yamamoto, *supra* note 148.

[155] For an insightful account of *Ka`ai`ai v. Drake* and other federal breach of trust actions involving Native Hawaiians, see Yamamoto et al., *supra* note 22, at 28-50.

language—and impulse—of human rights into more traditional rights claim, in order to prepare for a court's potential dismissal of expanded claims of right. Accordingly, Chamoru claimants bringing an action to stop the desecration of the ancestors' graves should also sufficiently link the human rights claims—claims to these remains as "human and genetic resources"[156] and "cultural and spiritual property"[157] and "ceremonial objects" [158] that facilitate the First Amendment-protected practice of religion—to the more traditional claims of right (e.g. common law rights of the graveyard).

IV. OTHER ARMS: THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AS A CROWBAR TO PRY OPEN THE LIDS OF CHAMORU COFFINS[159]

A. Indigenous Rights-Assertion and the Restoration of the Chamoru People[160]

1. The legal-political roots of Chamoru dispossession

Guam is one of the world's last colonies.[161] Guam is an unincorporated territory[162] of the United States. Guam's political relationship with the United States has been and continues to be limiting, oppressive, and amendable only

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[156] Declaration, *supra* note 23, art. 31.

[157] *Id.* art. 11.

[158] *Id.* art. 12.

[159] Although this section contains legal and political information about Guam generally, the subject of this section is primarily the indigenous Chamoru people of Guam.

[160] Indigenous rights assertion for the Chamoru people, taken to its logical conclusion, would encompass the Chamoru people of the northern Mariana Islands, now politically organized as the Commonwealth of the Northern Mariana Islands (CNMI). Guam is the largest and southernmost island in the Mariana archipelago, and was ceded to the United States after the Spanish American War. *See* Treaty of Peace, U.S.-Spain, art. II, Dec. 10, 1898, 30 Stat. 1754. Despite this relatively recent political divide, the Chamoru people of Guam and the CNMI remain one people with one language, culture, and history. *See generally* RUSSELL, *supra* note 9. It should also be noted that both "Chamoru" and "Chamorro" are used to describe the indigenous people of the Mariana Islands.

[161] ROBERT F. ROGERS, DESTINY'S LANDFALL: A HISTORY OF GUAM 2 (1995) ("Guam continues to fulfill the geopolitical role imposed on it by outsiders over four centuries ago.").

[162] Unincorporated territories refer to those insular areas not located on the North American continent and not destined to become states. The only language in the U.S. Constitution that deals with the question of territories is found in Article IV, Section 3, which provides: "The Congress shall have Power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. CONST. art. IV, § 3, cl. 2.

by the United States.[163] Indeed, the United States has either ignored or purposefully denied Guam the political rights Guam has sought.[164] Guam does not have a constitution. Its government was drafted without the input of the Chamoru people and was established by Congress through the Organic Act of 1950.[165] Indeed, the Organic Act grants Guam only the illusion of self-government.[166] In reality, Guam remains under the purview of the U.S. Department of the Interior.[167] Laws made in Guam are completely reversible by Congress.[168] As an unincorporated territory, the U.S. Constitution, on its own, does not apply in Guam.[169] Instead, Congress has broad powers over the unincorporated territories, including the power to choose what portions of the Constitution apply to them.[170] Further, all residents of Guam, indigenous and non-indigenous, are denied both the right to vote in U.S. presidential elections,[171] and effective voting representation in the U.S. Congress.[172] This colonial arrangement bespeaks the democratic deficiency at the heart of U.S.-territorial relations.

The U.S. Supreme Court has consistently interpreted Congress' power under the Territorial Clause[173] broadly, long ago noting: "Congress, in the government of the Territories . . . has plenary power, save as controlled by the provisions of the Constitution."[174] The Court in the Insular Cases[175] established

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[163] Ada & Bettis, *supra* note 21, at 126-29.

[164] *Id.*

[165] Organic Act of Guam 48 U.S.C. §§ 1421-28 (2005 & Supp. 2007).

[166] Ada & Bettis, *supra* note 21, at 128. The authors note:

> Organic Act citizenship is limited in that it does not provide full rights and benefits; it also does not provide full protection of the U.S. Constitution . . . Guam's self-government is limited because the "self" and the "government" came with major qualifications. Washington reserved the power to overturn or undo any law or action taken by the newly-created civilian Government of Guam.

Id.

[167] CIA World Factbook, Guam (territory of the U.S.), https://www.cia.gov/library/publications/the-world-factbook/geos/gq.html (last visited Nov. 22, 2008).

[168] Nat'l Bank v. City of Yankton, 101 U.S. 129, 133 (1880) ("Congress may legislate for [territory within the jurisdiction of the United States not included in any State] as a State does for its municipal organizations.").

[169] *See* Dorr v. United States, 195 U.S. 138, 149 (1904) ("[T]he Constitution does not, without legislation, and of its own force, carry such right to territory so situated.").

[170] *Id.* at 143.

[171] *See* Att'y Gen. of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984) (ruling that the denial to U.S. citizens who were residents of Guam of the right to vote in U.S. presidential elections was not a violation of the U.S. Constitution).

[172] Organic Act of Guam, 48 U.S.C. § 1711 (2005).

[173] U.S. CONST. art. IV, § 3, cl. 2.

[174] Binns v. United States, 194 U.S. 486, 491 (1904).

[175] De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901).

the broad scope of Congress' power under the Territorial Clause to control the political development of its territories:

> Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia . . . it may sell its public lands to individual citizens or may donate them as homesteads to actual settlers. In short . . . *it belongs to the United States, and is subject to the disposition of Congress.*"[176]

Any hope that the United States' disposition toward its territories has evolved was shattered by the U.S. Court of Appeals for the Ninth Circuit in a series of 1980s rulings dealing with the political status of Guam. In *People v. Okada*,[177] the court held that "Congress has the power to legislate directly for Guam, or to establish a government for Guam subject to congressional control."[178] The court unequivocally declared: "*Except as Congress may determine, Guam has no inherent right to govern itself.*"[179] In *Sakamoto v. Duty Free Shoppers, Ltd.*,[180] the court held that Guam "enjoy[s] only such powers as may be delegated to it by the Congress . . . [t]he Government of Guam is in essence an instrumentality of the federal government."[181] In *Ngiraingas v. Sanchez*,[182] the court analogized Guam to a U.S. federal agency, stating that "Guam marches squarely to the beat of the federal drummer; the federal government bestows on Guam its powers and, unlike the states, which retain their sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal statute."[183]

In 1946, the United States placed Guam on the United Nations list of Non-Self-Governing Territories (NSGTs), or colonies awaiting a U.N.-approved exercise of self-determination.[184] Accordingly, the people of Guam have a right to self-determination under international law that the United States, at least in theory, recognizes. The U.N. Charter, which was ratified by the United States in 1945, recognizes in Article 1(2) and Article 55 the "principle of equal rights and self-determination of peoples."[185] Article 73 of the Charter explicitly addresses non-self-governing territories, like Guam, and states that,

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[176] *De Lima*, 182 U.S. at 197 (emphasis added).
[177] 694 F.2d 565 (9th Cir. 1982).
[178] *Id.* at 568.
[179] *Id.* (emphasis added).
[180] 764 F.2d 1285 (9th Cir. 1985).
[181] *Id.* at 1286.
[182] 858 F.2d 1368 (9th Cir. 1988).
[183] *Id.* at 1371.
[184] Ada & Bettis, *supra* note 21, at 195.
[185] U.N. Charter art. 1, para. 2; *see also id.* art. 55.

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government . . . accept as a sacred trust . . . the obligation to promote . . . the well-being of the inhabitants of these territories, and . . . to develop self-government, [and] to take due account of the political aspirations of the peoples."[186]

In 1960, the U.N. General Assembly issued two resolutions giving greater form and substance to the principles articulated in Article 73 of the U.N. Charter. The first, Resolution 1514 (XV), declares "all peoples have the right to self-determination"[187] and that "immediate steps shall be taken . . . to transfer all powers to the peoples of [non-self-governing] territories . . . in accordance with their freely expressed will and desire."[188] The second, Resolution 1541 (XV), sets out three political status options that the United Nations recognizes as full measures of self-government for the non-self-governing territories: independence, free association or integration with an independent State.[189] Put simply, the U.N. recognizes in the colonized people of Guam a right to self-determination that is to be exercised through a self-determination referendum in accordance with international standards.

Two international conventions passed in 1966 affirm the universal right to self-determination. Article 1 of the International Covenant on Civil and Political Rights (ICCPR), which was ratified by the United States in 1992, states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[190] Article 1 of the ICCPR further recognizes the responsibility of states who administer non-self-governing territories to "promote the realization of the right to self-determination,"[191] pursuant to the U.N. Charter. Article 1 of the International Covenant on Economic, Social and Cultural Rights, which the United States has not ratified, shares the exact language as Article 1 of the ICCPR.[192] Though the United States does not recognize the latter convention, the right of all peoples to self-determination is

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[186] *Id.* art. 73.

[187] Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 19.

[188] *Id.*

[189] Principles Which Should Guide Members, *supra* note 19.

[190] International Covenant on Civil and Political Rights, *supra* note 20, art. 1(1).

[191] *Id.* art. 1(3).

[192] International Covenant on Economic, Social, and Cultural Rights, *supra* note 20, art. 1. Unlike the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights has not been ratified by the United States.

generally accepted as a norm of *jus cogens*—a peremptory norm so esteemed under international law that no derogation is permitted.[193]

But today, even the phrase "self-determination" falls heavy on the landscape.

2. Salt to the soul wound: On how the United States' unilateral militarization of Guam challenges its image as a legitimate democracy

In 2008, the United States is readying Guam, its colony, for the largest military buildup in recent history, a buildup in part premised by the United States' concern over any potential altercation with China.[194] The United States plans to transfer to Guam a military-related population estimated at 59,000 people, which includes 19,000 military personnel, 20,000 of their dependents, and roughly 20,000 foreign workers on construction contracts.[195] These 59,000 people will join the roughly 14,000 military-related people already living in Guam,[196] for a total U.S. military-related population of 73,000. Put plainly, by 2014, this population will outnumber the entire indigenous Chamoru population, estimated in 2008 at roughly 65,250.[197] In addition, six nuclear submarines may be added to the three already stationed in Guam.[198] While the U.S. Navy plans to enhance its infrastructure, logistic capabilities, and waterfront facilities,[199] the U.S. Air Force plans to develop a global intelligence, surveillance, and reconnaissance strike hub at Andersen Air Force Base,[200] and the U.S. Army plans to place a ballistic missile defense task force

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[193] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513, 515 (3d ed. 1979); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 133-40 (1995). For a discussion of how an admission by a former Legal Adviser to the U.S. State Department that the Soviet Union's invasion of Afghanistan violated the principle of self-determination of peoples has contributed to the consolidation of self-determination as a norm of *jus cogens*, see *id.* at 137-38.

[194] Al Pessin, *Tiny Guam Key to US Pacific Military Strategy*, VOICE OF AM. NEWS, Aug. 23, 2006, http://www.globalsecurity.org/military/library/news/2006/08/mil-060823-voa12.htm (last visited Nov. 23, 2008).

[195] *Guam: Working Paper Prepared by the Secretariat*, *supra* note 31, at ¶ 42.

[196] *Id.*

[197] CIA World Factbook, Guam (territory of the U.S.), *supra* note 167.

[198] Megan Scully, *Pentagon Begins Military Buildup on Guam*, CONGRESS DAILY, Nov. 17, 2005, *available at* http://www.govexec.com/dailyfed/1105/111705cdam1.htm.

[199] BRIAN J. LEPORE, DEFENSE INFRASTRUCTURE: PLANNING EFFORTS FOR THE PROPOSED MILITARY BUILDUP ON GUAM ARE IN THEIR INITIAL STAGES, WITH MANY CHALLENGES YET TO BE ADDRESSED (2008), *available at* http://energy.senate.gov/public/_files/LeporeTestimony050108.pdf.

[200] *Id.*

in Guam.[201] Although massive, this buildup only complements the impressive Air Force and Navy show of force occupying a third of Guam already.[202]

This military buildup imperils the longstanding struggle of the Chamoru people of Guam to exercise self-determination in accordance with the U.N.-endorsed decolonization process. The dramatic influx of military personnel to Guam will dwarf the indigenous population of Guam, which, as of 2000, already makes up only thirty seven percent of the total population.[203] This enormous demographic change could seriously impede any legitimate exercise of self-determination among the colonized people of Guam, and grave concern remains that the United States will continue to use its control of Guam's immigration as a colonial tool to dilute the voting bloc in the event of a political status referendum.[204]

Under prevailing international law applicable to Guam as a non-self-governing territory, Guam has no case against the United States to stop the alienating processes of militarization. Because Guam is not a state, it cannot bring an action against the United States in any international forum, including the International Court of Justice, which only adjudicates disputes between states. One mental health counselor in Guam describes how, for many Chamorus, self-determination feels so far away:

> [A]lot of people feel defeated and feel like [self-determination will] never take place . . . what I hear is a sense of resignation that people have given up on the hope that [self-determination] will ever happen, so there's kind of like a 'learned helplessness.' I hear a lot of pessimism . . . that it will never come to anything because the United States won't give up that much to the [Chamorus] as a whole. So it won't happen . . . 'dream on, it'll never happen.'"[205]

Enter the mass disinterment of ancient Chamoru graves for the sake of expanding hotels, swimming pools, and shopping malls. It appears that the profane has finally gained too much ground in Guam; her people pushed too far. That many of the ancients remain in the possession of outside researchers sits like a time bomb in the pit of Chamoru psyches. Without a single legal instrument with which to protect our ancestors' remains, the Chamoru people have no legitimate claim to them . . . until now.

Under the Declaration on the Rights of Indigenous Peoples, the Chamoru people have the right to stop the desecration of our ancestors' final resting

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[201] *Id.*

[202] Blaine Harden, *Guam's Young, Steeped in History, Line up to Enlist: U.S. Territory Pays High Cost in War Deaths*, WASH. POST FOREIGN SERVICE, Jan. 27, 2008, at A15.

[203] CIA World Factbook, Guam (territory of the U.S.), *supra* note 167.

[204] See Hope Cristobal, Statement before the United Nations Special Political and Decolonization Committee: Chamoru Self-Determination Pa'go (Oct. 4, 2006), available at http://www.geocities.com/minagahet/pinagatopir.

[205] Taimanglo, *supra* note 80, at 141 (quoting an anonymous study participant).

places. Article 8(1) of the Declaration provides that "[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."[206] Article 8(2) provides that "[s]tates shall provide effective mechanisms for prevention of, and redress for . . . [a]ny action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities. . . ."[207] Article 11 provides that indigenous peoples have the right to practice and revitalize their cultural traditions and customs, which includes the right to "maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites . . . [and] ceremonies."[208] Article 11 then confers upon states the affirmative duty to provide redress through effective mechanisms, which may include restitution "developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[209] Article 12 expressly provides that indigenous peoples have the right to manifest, practice, develop, and teach their spiritual and religious traditions as well as the right to maintain, protect, and have access in privacy to their religious and cultural sites.[210] In addition, Article 12 provides for the right to the repatriation of human remains.[211]

But there is no telling whether the courts in Guam, ultimately under U.S. authority, will import these international human rights legal norms. Indeed, this is unlikely, as the United States did not sign the Declaration.

Enter the dual rights legal strategy proposed herein. Under this expansive rights approach, the legal strategy would be the assertion of both a traditionally cognizable, or at least plausible claim, and another claim articulated in the language of international human rights legal norms.

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[206] Declaration, *supra* note 23, art. 8.
[207] *Id.*
[208] *Id.* art. 11.
[209] *Id.*
[210] *Id.* art. 12.
[211] *Id.*

B. Theory in Action: Employing the Dual Rights Legal Strategy to Stop the Desecration of Ancestral Remains

1. The traditionally plausible claim: The Chamoru people of Guam have rights at common law to access the graves of ancestors buried at the Guam Okura Hotel and to prevent desecration of same[212]

The traditional claim could be filed under the common law right to access the graves of one's ancestors, and the corollary right to protect said graves from desecration—rights that work in tandem to protect graves and the right to visit them. While it is true that these rights, for which the common law provides an independent cause of action, are rarely exercised or even discussed, they are recognized by many states in this country either by statute[213] or case law,[214] and they remain invaluable to those who choose to exercise them. Professor Alfred Brophy has written in depth on this topic,[215] but it suffices for purposes here that the common law in this country has harmonized certain property rights such as the right to exclude with other overlapping proprietary interests such as the right to access the graves of one's ancestors:

> In cemeteries that are located on private property . . . meet two ancient, powerful ideas: the right of property owners to exclude and the veneration of age and of ancestors. That conflict between the right of worship at our ancestors' graves and the right to exclude appears with increasing frequency these days, as landowners seek to develop land where cemeteries are located and descendants of people buried in the cemeteries seek to reclaim something of their heritage.[216]

Brophy traces the revived tension between these two classes of proprietary interests to a nineteenth century feud between two Kentucky families, one refusing access to the graves of the other's deceased family members, located on its property.[217] The feud, Brophy asserts, illuminates an "ancient—and rarely discussed—right of families of people interred in cemeteries, and the

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[212] The analysis contained in this section draws heavily upon Professor Alfred Brophy's analysis of common law rights of the graveyard. *See generally* Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 B.Y.U. L. REV. 1469 (2006).

[213] *Id.* at 1482 ("Approximately eleven states . . . [in the U.S.] provide by statute for a right of access by relatives of people buried on private property.").

[214] *See, e.g.*, Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911); Davis v. May, 135 S.W.3d 747, 750-51 (Tex. App. 2003); Dep't of Fish & Wildlife Res. v. Garner, 896 S.W.2d 10, 12-14 (Ky. 1995); Mingledorff v. Crum, 388 So. 2d 632, 635-36 (Fla. Dist. Ct. App. 1980); Heiligman v. Chambers, 338 P.2d 144, 147-50 (Okla. 1959).

[215] *See* Brophy, *supra* note 212.

[216] *Id.* at 1470.

[217] *Id.* at 1472.

ways those rights limit what we think of as central rights of property owners."[218]

Descendants of people buried in cemeteries on private property have a common law right to access that property to visit these graves.[219] This right, which is akin to an implied easement in gross,[220] is "recognized by statute in about a fifth of states and by case law in many others."[221] Professor Alfred Brophy asserts that, "[a]t base, the right is an easement in gross to cross private property to access a cemetery . . . held by the relatives of the person buried in the cemetery [which] descends by operation of law but is neither devisable nor alienable."[222] Because an express reservation for such an easement for access is a rarity, U.S. courts employ several fictions to deal with the lack of explicit reservation of an easement to access cemeteries on private property.[223]

The most recent comprehensive discussion of this ancient right of access comes from the Texas Court of Appeals case *Davis v. May*,[224] decided in 2003. The *Davis* court interpreted the rights of Marsha May to visit her great-grandfather and a few other relatives on family land that had been sold to others without a reservation for the cemetery.[225] Over time and after some intermediate conveyances, the property came into the hands of Emmit and Debra Davis, who refused May access.[226] The court held that the property owner, by permitting the burials, took on the obligation of holding the property in trust for the family members of the people buried there—an obligation that included allowing the family members access to and reasonable upkeep of the graves.[227] The court adopted the legal conclusion of an early twentieth century Tennessee Supreme Court case, *Hines v. State*,[228] which held that subsequent purchasers of a cemetery take it subject to the implied easement for access and further burial.[229] Finally, the next of kin hold a quasi-property right in the body

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[218] *Id.*

[219] *See* cases cited *supra* note 214.

[220] Brophy, *supra* note 212, at 1472.

[221] *Id.*

[222] *Id.*

[223] *See id.* at 1479-82 (describing some of the legal fictions that U.S. courts employ to deal with the lack of an explicit reservation of an easement to access cemeteries on private property); *see also* PERCIVAL E. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES 133-34 (1950) (describing how U.S. courts created the legal fiction of dead bodies as "quasi-property" in order to recognize a property interest in a corpse subject to a trust, usually to facilitate the next of kin in their fulfillment of the duty of burial).

[224] 135 S.W.3d. 747 (Tex. App. 2003).

[225] *Id.* at 748.

[226] *Id.*

[227] *Id.* at 750.

[228] 149 S.W. 1058 (Tenn. 1911).

[229] *Id.* at 1059.

of the deceased,[230] including the "right the law recognizes to undisturbed repose in the grave which usually prohibits acts in violation of sepulture."[231]

The right of access is one of the few implied rights of access to private property that limits a core property right: the right to exclude.[232] Thus, it offers a way of getting access to property without facing a takings claim. Indeed, U.S. courts have long recognized notable limitations of the rights of private property owners, including the rights to alienate,[233] to use as the owner chooses,[234] and to exclude others.[235]

Another key common law right, working in conjunction with the right of access to an ancestor's grave, is the right to protect that grave against desecration.[236] As Brophy asserts, if the owner of land upon which a cemetery is located were allowed to destroy it, then there is little left of the right to visit a grave that no longer exists.[237] Thus, this right is considered the other part of the affirmative easement that exists on cemeteries.[238] Further, that the gravesite on the grounds of the Guam Okura Hotel is ancient also does not necessarily diminish the argument that it is protectable at law. Other cases have found liability for desecration of cemeteries more than a century old. In one 1987 case, *Whitt v. Hulsey*,[239] the Alabama Supreme Court upheld a jury award of punitive damages for grave desecration for a cemetery that dated to at least 1853.[240] According to Brophy, *Whitt* provides for a private cause of action against those who destroy a cemetery as long as the cemetery is still identifiable.[241] Given that the gravesite at the Guam Okura Hotel is arguably identifiable further strengthens the argument that it is protectable against unlawful desecration.

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[230] *In re* Johnson, 612 P.2d 1302, 1305 (N.M. 1980).

[231] *Id.*

[232] *See generally* Brophy, *supra* note 212.

[233] *See, e.g.*, Pritchett v. Turner, 437 So. 2d 104, 198 (Ala. 1983) (upholding forfeiture restraint on alienation to one family member).

[234] *See, e.g.*, Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) (granting an injunction for plaintiffs living next to defendant's cement plant that constituted a nuisance); Morison v. Rawlinson, 7 S.E.2d 635, 638 (S.C. 1940) (enjoining church services that constituted a public nuisance).

[235] *See, e.g.*, State v. Shack, 277 A.2d 369, 372 (N.J. 1971) (recognizing the right of tenants to reasonable visitors even where owner of property did not want them); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974) (recognizing in members of the public a right of access to Florida's beaches that necessarily limited private property owners' right to exclude).

[236] Brophy, *supra* note 212, at 1494-95.

[237] *Id.*

[238] *Id.* at 1495.

[239] 519 So. 2d 901 (Ala. 1987).

[240] *Id.* at 906.

[241] Brophy, *supra* note 212, at 1496.

Typically, courts allow actions by family members and descendants of the people buried when cemeteries are disturbed.[242] Relatives and descendants are permitted a full range of relief including monetary damages and injunctions.[243] One of the most recent cases to interpret the action of desecration is *Rhodes Mutual Insurance Co. v. Moore*,[244] which permitted recovery by a remote descendant of a deceased person.[245] *Rhodes* illustrates the generally expansive view of the right to prevent desecration and to recover for it when it occurs.[246] Indeed, *Rhodes* may be most significant for the proposition that U.S. jurisprudence in the law of the graveyard is evolving toward an expansion of the class of those legal persons in whom standing is recognized to assert these common law rights.

Accordingly, the Chamoru people may assert a traditionally cognizable or at least plausible claim rooted in the ancient common law right to access the graves of ancestors, and the corollary right to prevent their desecration. That present-day Chamorus, in order to survive the procedural hurdle of standing, must win on the legal issue of whether we come within the definition of "next of kin" to which these rights apply, is not necessarily fatal. Beyond acquiring the clothing of a traditional legal argument, such a common law claim of right would present for Guam courts a case of first impression, which would strengthen its chance of surviving a motion to dismiss. While such a claim might superficially appear to be novel, it is in fact consistent with deeply held human beliefs that have been recognized in every society back to the Greeks and Romans.[247]

Once such an action is accorded legal staying power, the tools of traditional legal process arrive gallantly. Use of pleadings, discovery motions, and the possibility of trial and appeal all become aspects of traditional legal process that provide openings for the new counter-narrative to be aired in the public.

2. The international human rights claim: The Chamoru people of Guam have rights under the Declaration on the Rights of Indigenous Peoples to maintain, protect, and have access in privacy to our religious and cultural sites;[248] *to use and control our ceremonial objects;*[249] *to the repatriation of*

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[242] *See, e.g.*, N. E. Coal Co. v. Pickelsimer, 68 S.W.2d 760, 763 (Ky. Ct. App. 1934) (allowing recovery by next of kin for unwarranted interference with the grave of a deceased); Michels v. Crouch, 150 S.W.2d 111, 113 (Tex. Civ. App. 1941) (allowing recovery by plaintiff father of children buried in cemetery where defendant's plowing damaged a headstone).

[243] Brophy, *supra* note 212, at 1496.

[244] Rhodes Mut. Life Ins. Co. v. Moore, 586 So. 2d 866 (Ala. 1991).

[245] *Id.* at 868-69.

[246] Brophy, *supra* note 212, at 1496.

[247] *See* JACKSON, *supra* note 223, at 101-05.

[248] Declaration, *supra* note 23, art. 12.

[249] *Id.*

our human remains;[250] *to not be subject to forced assimilation or ethnocide*[251] *or any form of violence;*[252] *to physical and mental integrity;*[253] *to our human and genetic resources;*[254] *and, to require that development projects affecting our lands, territories, or other resources be subject to our free, prior, and informed consent.*[255]

After the first claim, framed tightly in traditional legal language, enables the lawsuit to survive a motion to dismiss, the second claim, articulated in the language of those international legal norms contained in the Declaration, would then carry the rest of the weight. Do the heavy lifting. First, it would tell a critical counter-narrative of a people whose longstanding self-determination struggle has been strategically thwarted by the country internationally recognized as its Administering Power. The new narrative would tell of the varied forms of psychological trauma the Chamoru people suffer as a direct result of five hundred years of uninterrupted colonization. It would also situate the current U.S. military buildup of Guam as the latest in a long line of unilateral decision-making effectively dispossessing Chamoru people from our traditional lands and resources and from our indigenous centers. It would allow the Chamoru people an opportunity to make meaning of our suffering as a deeply colonized people, to name and interpret our malady.[256] Second, as

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[250] *Id.*

[251] *Id.* art. 18.

[252] *Id.* art. 7.

[253] *Id.*

[254] *Id.* art. 31.

[255] *Id.* art. 32.

[256] Part of the psychological trauma indigenous peoples presently or formerly occupied by another Power experience is the very real and profound conflict of fighting and dying for the Occupier/Colonizer. Part of repairing the harm U.S. colonization has inflicted upon the Chamoru people (and other Micronesian islanders over whom the United States was also the internationally-recognized Trustee) is acknowledging those who have died and telling a counter-story about their deaths (i.e., a narrative that challenges or, at least, complicates the United States' controlling narrative that these islanders died for their country, and for freedom). In the current war, we in Micronesia have killed-in-action rates up to five times the U.S. average. Harden, *supra* note 202. To date, twenty-nine sons of Micronesia have lost their lives since the War on Terror began in 2001. I write their names here so they will not be forgotten and because we honor our dead: Jude Rivera Wesley, 26, Guam. Killed on December 8, 2003 when the Stryker infantry carrier he was in rolled into a canal (Iraq); Michael Aguon Vega, 42, Guam. Died on March 20, 2004 after sustaining injuries from a roadside bomb (Iraq); Yihjyh "Eddie" Lang Chen, 31, Saipan. Killed on April 4, 2004 after an attack on his unit (Iraq); JayGee Meluat, 24, Palau. Killed on September 13, 2004 by "enemy" fire (Iraq); Skipper Soram, 23, Pohnpei. Died on September 22, 2004 after an explosion near his security post (Iraq); Ferdinand Ibabao, 35, Guam. Killed on October 14, 2004 by a suicide bomber (Iraq); Jonathan Pangelinan Santos, Guam. Killed on October 15, 2004 when his vehicle hit a land mine (Iraq); Steven Bayow, 42, Yap. Killed on February 2, 2005 when a bomb hit the vehicle he was in

explained above, the new narrative would hurl the U.S. government onto the hot seat for failing to comply with and implement the recommendations and resolutions of the U.N. General Assembly and Special Committee of Decolonization regarding Guam as a non-self-governing territory. Third, it would likely lead to a conclusion that more than one hundred years of strategic dispossession of the Chamoru people warrants a reparatory scheme beyond mere monetary compensation. The next section reveals the enormous—and enormously critical—counter-narrative that would be forsaken if Chamoru claimants bringing an action to stop the desecration of ancestral graves choose a narrow legal strategy of asserting only traditionally cognizable rights (e.g. common law rights for the undisturbed repose of dead bodies).

Using courts as sites of cultural performance under a dual rights legal strategy, the Chamoru people can focus the cultural issues at issue in Guam today and openly contest the longstanding master narrative of Chamorus as "Happy Little Patriots."[257] If the litigation helped only to focus cultural issues, it would be of great value to the Chamoru people:

> [T]he sad part is that people are becoming more aware of the fact that we need to deal with certain things but they are not aware of what it is they need to deal with or how to deal with it. All they know is that there is a problem and it goes back [is linked to the past]. They don't know what exactly it is. They are trying to do all sorts of things such as demonstrations, protests, letters, but not too many of

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(Iraq); Derence Jack, 31, and Wilgene Lieto, 28, Saipan. Both killed on October 30, 2005 in a roadside bomb attack (Iraq); Richard DeGracia Naputi Jr., 24, Guam. Killed on December 21, 2005 when a bomb detonated during combat operations (Iraq); Kasper Allen Camacho Dudkiewicz, 23, Guam. Killed on January 15, 2006 in a vehicle collision (Iraq); Henry Paul, 24, Pohnpei. Died on September 26, 2006 from injuries he received after a vehicle collision (Iraq); Jesse Castro, 22, Guam. Killed on December 6, 2006 from a roadside explosion (Iraq); Adam Quitugua Emul, 20, Saipan. Killed on January 29, 2007 while conducting combat operations (Iraq); Lee Roy Apatang Camacho, 27, Saipan. Died on February 9, 2007 from wounds he sustained from an explosion (Iraq); Gregory D. Fejeran and Christopher Fernandez, both 28, Guam. Killed on March 6, 2007 when the vehicle they were in rolled over (Ethiopia); John D. Flores, 21, Guam. Killed on May 3, 2007 after an attack on his unit (Iraq); Victor Michael Fontanilla, 23, Tinian. Killed on May 17, 2007 in a bomb blast (Iraq); Iosiwo Uruo, 27, Chuuk. Died on May 24, 2007 from wounds resulting from an attack on his unit (Iraq); Meresebang Ngiraked, 21, Palau. Died on June 10, 2007 from injuries sustained in an explosion. (Iraq); Jose Charfauros Jr., 33, Rota. Killed along with thirteen other soldiers (Iraq); Henry Ofeciar, 37, Guam. Died on August 27, 2007 from an attack on his unit (Afghanistan); Joseph Gamboa, 34, Guam. Died on March 29, 2008 from injuries sustained after indirect fire (Iraq); Christopher A. Quitugua, 28, Guam. Killed on June 19, 2008 after the vehicle he was in flipped after a tire blowout (Iraq); Samson A. Mora, 28, and Brian S. Leon Guerrero, 34, Guam. Killed on July 10, 2008 when the vehicle they were in hit an improvised explosive device (Afghanistan); Anthony "Tony" Carbullido, 25, Guam. Killed on August 8, 2008 when the vehicle he was in hit an improvised explosive device (Afghanistan).

[257] *See generally* Hattori, *supra* note 92.

> them are able to really talk about the massive horrors, deaths, the despair and the feeling that maybe this is the last generation that would ever really want or have the will power to address these issues from the past.[258]

Rights litigation conceived expansively performs humanizing and politically significant functions for the Chamoru people including disrupting the dominant news stories of the *Pacific Daily News,* which strategically avoids any reference to human rights.[259] Though a lawsuit to protect our ancestral remains will neither stop nor stall the current military buildup of Guam, it would have a much-needed polarizing effect—drawing public attention to how this militarization is being done entirely without the input of the Chamoru people. This singular (and strategically avoided) fact impresses upon a long-colonized, deeply disempowered people the starkness of the "us-them" sociopolitical reality that remains intact from the early years of U.S. Naval rule of Guam;[260] a reality that the Chamoru people, suffering an array of unresolved psychological trauma, have been unwilling or unable to face.[261]

From a mental health perspective, the release of suppressed, minimized, or denied rage is itself a critical step in the restoration of the Chamoru people, whose rage-suppression is a symptom of centuries of unresolved oppression.[262] Several mental health concerns plague the Chamoru people including high rates of alcohol and other substance abuse, violent crimes, and suicides.[263] Though minorities in our homeland, Chamorus are disproportionately overrepresented in adult correctional facilities, and the juvenile court system in Guam.[264] Because politically, religiously, socially and economically, the power and control that has shaped our current existence has been held by non-Chamorus, to now assert rights as an indigenous people—and not merely as a colonized group—plants Chamoru restoration in a promising soil. Indeed, the U.S. colonial enterprise in Guam has fostered deep disempowerment in the Chamoru people:

> We are still in mourning. You can look at the school systems here, the political systems, we're playing a white man's game. We are brown people playing a white man's game . . . brought in from the States and we're not very good players at it . . . we're still in the process of trying to find out who we are as individuals, as a culture, but we're using somebody else's tools. Sometimes those tools don't

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[258] Taimanglo, *supra* note 80, at 180 (citation omitted).

[259] Viernes, *supra* note 96, at 8-9.

[260] *See* Hattori, *supra* note 92, at 6.

[261] Taimanglo, *supra* note 80, at 120-21 (describing the tendency among Chamoru clients to avoid talking about their trauma, and how the Chamoru peoples' need to feel strong likely interferes with their desire to seek help to resolve their trauma).

[262] *Id.*

[263] *Id.* at 78.

[264] *Id.* at 78-79.

> work. And when we don't have things worked out, using these tools, we become very frustrated and filled with hopelessness . . . we would say, 'it's Gov Guam so, what do you expect?' There's this famous expression, 'Only on Guam.' It's derogatory and it's fatalistic, [suggesting that] it can't get any better. It cannot change.[265]

According to Dr. Taimanglo, Chamorus suffer from unresolved trauma related to centuries of outside efforts to annihilate us, not just by one set of colonizers or oppressors, but three.[266] Chamoru peoples' more recent experiences of trauma relate to Japan's three-year occupation of Guam during World War II, when Chamorus were often forced to participate in atrocities against other Chamorus.[267] The following story, as told by Dr. Taimanglo, illuminates this unresolved trauma:

> He and other Chamoru men were forced to dig a hole; then one among the group was arbitrary selected and forced to kneel in front of the newly dug hole; the man's neck was slashed and a second Chamorro was forced to kick his friend's body into the hole, after which all the other men were forced to cover the injured man up. As the men shoveled dirt onto their friend, they could hear him call out that he was not dead and not to bury him.[268]

Unresolved wartime experience has also caused trauma in the author's family. In July of 1944, thirty of the most educated, literate Chamorus from the southernmost village of Malesso were marched by the Japanese army into an area called Tinta.[269] Twenty-five men and five women were forced inside a cave into which Japanese soldiers then lobbed a series of hand grenades.[270] Chamoru bodies still moving afterward were stabbed with bayonets.[271] My mother's uncle, Joaquin Barcinas, was one of the fourteen to survive the Tinta massacre.

The fact that many Chamoru elders have died waiting for war reparations and acknowledgement of their suffering during World War II, and that legislative attempts at war reparations have languished in Congress for more than twenty years, deepens our trauma.[272] This delayed recognition of Guam's wartime suffering re-traumatizes a people already reeling from the psychologically damaging effects of the U.S. government's "lack of attention to crucial issues

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[265] *Id.* at 182 (quoting anonymous study participant).

[266] *Id.* at 172-74 (describing the "soul wound" trauma that the Chamoru people have suffered as a result of nearly 500 years of successive invasions and colonization).

[267] *Id.* at 82.

[268] *Id.*

[269] *See* JULIAN AGUON, THE FIRE THIS TIME: ESSAYS ON LIFE UNDER U.S. OCCUPATION 113 (2006).

[270] *Id.*

[271] *Id.*

[272] Taimanglo, *supra* note 80, at 81.

of [Chamoru people's] citizenship, political status, population control, and, of the recognition of the existence of [Chamoru] people as a distinct ethnic group."[273] Dr. Taimanglo maintains that Chamoru people suffer from intergenerational transmission of Posttraumatic Stress Disorder akin to that of World War II Nazi Holocaust survivors,[274] the important difference being that the latter suffering has been publicly acknowledged while the former has not.[275] According to Taimanglo, any therapist working with Chamoru clients must account for the history of ethnocide perpetrated against the Chamoru people, lest they invalidate their clients' trauma and inadvertently "blam[e] the victim."[276]

Alienation of the Chamoru people from our traditional lands for military use arguably constitutes a violation of our rights under the Declaration.[277] Indeed, the U.N. General Assembly repeatedly affirms that the larger militarization of Guam poses a potentially "major" impediment to the implementation of the decolonization mandate for the island.[278] The Declaration extends the fundamental right to self-determination, as articulated in both the ICCPR and the ICESCR, to indigenous peoples, providing: "Indigenous Peoples have the right to self-determination [and b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[279] Article 4 of the Declaration provides: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[280]

Implicit in asserting human rights under the Declaration is a threshold struggle over collective memory. If won, this struggle would arm the Chamoru people with a valuable resource in the fight for self-determination. Collective memory in the context of social justice struggle involves the question: "Who frames injustice in the law's eye and the public's mind?"[281] Given that the

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[273] *Id.* at 84.

[274] *Id.*

[275] *Id.*

[276] *Id.* at 304.

[277] Declaration, *supra* note 23, art. 30 ("Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.").

[278] *See* G.A. Res. 43/42, ¶ 5, U.N. Doc. A/RES/43/42 (Nov. 22, 1988), *available at* http://www.un.org/documents/ga/res/43/a43r042.htm ("*Reaffirm[ing] its strong conviction* that the presence of military bases and installations in the Territory [of Guam] could constitute a major obstacle to the implementation of the Declaration [on the Granting of Independence to Colonial Countries and Peoples] . . . .") (emphasis added).

[279] *Id.*

[280] *Id.* art. 4.

[281] Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*,

historical lens is socially and politically constructed, "'remembering' the past is neither innocent nor objective."[282] For Chamorus, this truism is endowed with political power. Once we accept that "a way of seeing is a way of not seeing"[283] and "a way of remembering is a way of forgetting, too,"[284] the concept that truth itself is power emerges like a phoenix on the political landscape of Chamoru self-determination. Indeed, the struggle over collective memory is a "struggle over the supremacy of world views, of colliding ideologies"[285] through which "we have the potential to remake our, and society's, understandings of justice—for good or ill."[286]

Bringing an action to stop the desecration of our ancestors' remains is not only about protecting the dead; it is about calling the living back to life. It is about forcing a narrative of our wild resilience onto the record to challenge the neurodegenerative diseases of cynicism and despair that cripple so many in the community. All this we would forsake if we choose a narrow legal strategy and assert only traditional legal claims. By choosing to assert only a traditionally recognized legal claim, we relinquish the powerful and more appropriate discourse of human rights. We lose the opportunity to tell a valuable and humanizing story about a people's long walk to freedom. Also, we leave in control a narrative of endless patriotism, which only exacerbates our trauma. Narrow legal victories cannot afford to come at this price.

V. CONCLUSION

Today, the Chamoru people of Guam struggle for self-determination against a storm of unilateral U.S. decisions made without regard for our human rights. Our colonizer's militarist agenda destroys what remains of the life-affirming values that have reared our people for the last four millennia. On the ground, then, the Declaration on the Rights of Indigenous Peoples arrives as the opportunity to inject a critical counter-narrative onto the legal and public record about who we were, are, and can still be. Asserting unrecognized human rights against the United States challenges its narrative of unflinching Chamoru support for the hyper-militarization of Guam and its employment of its own established legal norms to define our rights. In short, we may win larger political victories even where we lose narrower legal ones. Asserting only claims articulated in international legal norms, however, is not a promising

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47 UCLA L. REV. 1747, 1756 (2000).

[282] *Id.* at 1762.

[283] *Id.* (quoting Peter Burke, *History as Social Memory*, *in* MEMORY: HISTORY, CULTURE AND THE MIND 97, 103 (Thomas Butler ed., 1989)).

[284] *Id.*

[285] *Id.* at 1764.

[286] *Id.*

legal strategy. Indeed, the only way such expanded claims of right get "air time" is if another claim—one wearing traditional legal clothes—gets the action as a whole past an inevitable motion to dismiss, as exampled in the Nibutani dam litigation. The strategic blueprint,[287] then, is the assertion of both traditional and human rights claims, each one performing its own critical function.

The Chamoru people have swallowed enough of our trauma. Ready the crowbars.

Julian Aguon[288]

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[287] This article does not suggest that litigation is the only or even the best strategy to ensure the survival of the Chamoru people. This article takes for granted that the ultimate victory in liberation struggle always concerns the decolonization of mind.

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From Anti-Injunction to Radical Reform: Proposing a Unifying Approach to Class-Action Adjudication

I. INTRODUCTION

In his timeless essay on Innovations[1] the seventeenth century English statesman, philosopher, and essayist Sir Francis Bacon wrote that "he that will not apply New Remedies must expect New Evils: For Time is the greatest Innovatour." Bacon's observation cautions us that solutions of the past are often incompatible with innovations of the present. As applied to our tradition of separate and independent state and federal courts, the class-action lawsuit has offered new opportunities and created new challenges.

The promise of class-action adjudication is two-fold. First, it can greatly increase judicial efficiency by reducing the number of unnecessary, duplicative actions.[2] Second, it can empower individual plaintiffs, who may otherwise lack the effective strength to bring single actions, to seek legal redress for legitimate claims.[3] However, inherent conflicts between Originalist notions of federalism and the realities of class-action litigation can undermine these opportunities. This tension warrants a fundamental rethinking of our traditional judicial paradigm.

The 1966 amendments to the Federal Rules of Civil Procedure sought to enhance economies of time, effort, and expense, promote uniformity of decision among persons similarly situated, and maintain procedural fairness.[4] Although this enhanced access to justice had the desired effect of dramatically increasing public law litigation,[5] the subsequent evolution of the class mechanism has given rise to undesirable side effects—especially in the context of mass-tort actions seeking large monetary damages.[6]

In 2005, Congress enacted the Class Action Fairness Act (CAFA), which enhanced federal court jurisdiction and removal power over class-actions in

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[1] FRANCIS BACON, BACON'S ESSAYS, 71 (Alfred S. West ed., Cambridge University Press Warehouse 1908) (1897)); *see also* Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 FORDHAM L. REV. 253 (1988) (referring to Francis Bacon's famous quote and applying it to comments on judicial reform).

[2] Ann Bloom, *Access to Justice: The Economics of Civil Justice: From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 725 (2006).

[3] *Id.*

[4] *See* Amchem Prods. v. Windsor, 521 U.S. 591, 615 (1997).

[5] *See* Bloom, *supra* note 2, at 725-26; *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[6] *See* Bloom, *supra* note 2, at 726.

diversity, and imposed a consumer bill of rights on class settlements.[7] Although CAFA was designed to address "dueling"[8] class actions, attorney abuses, and inequitable settlements, the Act also serves as a device of tort reform meant to promote commercial and economic interests by shifting more class actions into federal court.[9]

This shift in the balance of federalism raises questions about the nature of federal courts and the tools with which they can shape state court proceedings. One tool of concern involves the use of inter-court injunction, whereby a federal court enjoins state action when a threat to the adjudication or judgment of the federal action is perceived. Although the U.S. Supreme Court narrowly defined the circumstances under which federal courts may enjoin state actions, the use of inter-court injunction has increased with the rise of class-action adjudication.

The prevalence of inter-court injunction bespeaks two underlying conflicts which this article seeks to illuminate. The first conflict involves a split of jurisprudence which has evolved around the exceptions to the Anti-Injunction Act[10] (AIA)—the statute enacted in 1948 to limit the use of inter-court injunction. The second conflict involves a fundamental misbalance between the traditional notions of federalism and comity inhering to our dual-court system, and the contemporary ideals of fairness and efficiency inhering to the class-action mechanism.

While CAFA largely succeeded in channeling more class-actions into federal court and curbing various abuses that triggered universal outrage, it failed to address or even acknowledge the fundamental incompatibilities between the dual-court paradigm and the realities of class-adjudication. This article argues that in the post-1966 era of class-action litigation, the traditional dual-court paradigm should be relaxed in order to unify certain state and federal actions within a common procedural framework. Such a framework could be accomplished by creating a special Article III court with exclusive purview to adjudicate, implement, and enforce the preclusive effect of federal class-action lawsuits involving diverse membership.

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[7] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005); *see* Sarah Day Hurley, *The Class Action Fairness Act of 2005: Procedural Reforms for Interstate Class Actions*, 17 S.C. LAW. 24, 24 (2006).

[8] Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000); *see also* Andrew S. Weinstein, Note, *Avoiding the Race to Res Judicata: Federal Antisuit Injunctions of Competing State Class Actions*, 75 N.Y.U. L. REV. 1085 (2000).

[9] *See infra* notes 35-43 and accompanying text.

[10] 28 U.S.C. § 2283 (2000).

II. EVOLUTION OF THE CLASS-ACTION MECHANISM

The class-action lawsuit is a legal mechanism built around the notion of judicial efficiency, whereby the common claims of many plaintiffs are collectively adjudicated by representative parties[11] and class counsel[12] who represent on behalf of the entire class. Judicial efficiency not only reduces the cumulative time and cost of litigation, but often serves as a practical necessity. In 1991, the Judicial Conference Ad Hoc Committee on Asbestos Litigation summarized the disadvantages of individually litigating mass torts:[13]

> [D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.[14]

In addition to improving judicial efficiency by eliminating unnecessary duplicative actions, the modern class-action lawsuit can allow groups of people, who individually would be without effective judicial recourse, an opportunity to vindicate their rights.[15]

The modern era of class-action litigation began with the 1966 amendments to the Federal Rules of Civil Procedure, which included changes designed to promote civil rights[16] by expanding the impact of public law litigation.[17] To accomplish this goal the amended rules permitted class actions to be brought for injunctive and declaratory relief.[18] Additionally, the remodeled Rule 23 included a "most adventuresome"[19] innovation whereby plaintiffs whose small recoveries did not warrant solo action could proceed collectively.[20]

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[11] Fed. R. Civ. P. 23(a)(4); *see also* Hansberry v. Lee, 311 U.S. 32 (1940).

[12] FED. R. CIV. P. 23(g)(1)(A).

[13] A "mass tort" is defined as "[a] civil wrong that injures many people." BLACK'S LAW DICTIONARY 1526 (8th ed. 2004). "Examples include toxic emissions from a factory, the crash of a commercial airliner, and contamination from an industrial-waste-disposal site." *Id.*

[14] Amchem Prods. v. Windsor, 521 U.S. 591, 598 (1997) (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-3 (1991)).

[15] *See* Bloom, *supra* note 2, at 725.

[16] *See* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 12 (2000) ("According to John Frank, a member of the Advisory Committee, the committee's deliberations were powerfully affected by the social upheavals of the 1960s . . . .").

[17] *See* Bloom, *supra* note 2, at 725-26; *see also* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989); Chayes, *supra* note 5; Abram Chayes, *The Supreme Court, 1981 Term: Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

[18] FED. R. CIV. P. 23(b)(2).

[19] *Amchem Prods*, 521 U.S. at 614-15.

[20] *See* Fed. R. Civ. P. 23(b)(3).

The 1966 amendments led to a dramatic increase in the prevalence of class-action lawsuits by the mid-1970s and heralded an era of public law litigation whereby consumer-rights and civil-rights were often enforced through class-actions.[21] At that time, however, the unwritten rule was that class-action adjudication was inappropriate for personal injury claims seeking large monetary damages resulting from mass torts,[22] but was permissible for cases seeking injunctive and declaratory relief.[23] This perception changed in the mid-1980s.

In 1984 chemical companies paid $180 million into a fund to settle the claims of some 2.4 million people affected by the use of Agent Orange during the Vietnam War.[24] This class-action settlement was groundbreaking in that it was the largest mass-tort case and settlement to date and represented a turning point in favor of certifying global class actions.[25] Throughout the 1980s and 1990s the number of mass-tort cases seeking large monetary damages increased dramatically leading to unexpected complications that threatened both the coveted efficiency dividend and the traditional boundaries of federalism and comity.

Particularly troubling was the explosion of nationwide mass-tort litigations carried out concurrently in state and federal courts and addressing the same facts and circumstances. Increasingly, federal courts ordered inter-court injunctions against parallel state actions when such actions challenged either the adjudication or the implementation of federal class actions. Prior to 2005, state courts were often enjoined from adjudicating these competing, or so-called "dueling," class actions.[26] The ease with which parallel class actions could be maintained in state court derived largely from the stringent removal requirements that precluded many class actions in diversity from obtaining federal jurisdiction prior to 2005.[27]

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[21] *See* Bloom, *supra* note 2, at 725.

[22] *See* HENSLER ET AL., *supra* note 16, at 24.

[23] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344-53 (1995).

[24] *See* HENSLER ET AL., *supra* note 16, at 727.

[25] *Id.*

[26] *See* Weinstein, *supra* note 8, at 1085; Wasserman, *supra* note 8, at 461; Timothy Kerr, *Cleaning up One Mess to Create Another: Duplicative Class Actions, Federal Courts' Injunctive Power, and the Class Action Fairness Act of 2005*, 29 HAMLINE L. REV. 218, 225 (2006).

[27] Prior to CAFA's amending of 28 U.S.C. § 1331 in 2005, the same requirements for removal to federal court that applied to individual lawsuits also applied to nationwide class-action lawsuits. That is, "complete diversity" was required such that all plaintiffs must have different citizenship from all defendants. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

In 2005, Congress enacted CAFA,[28] which enhanced federal court jurisdiction and removal power over national class actions[29] and imposed a consumer bill of rights[30] on class settlements. CAFA aimed to reduce competing class actions, halt abuses associated with lawyer collusion and inequitable awards,[31] and address procedural disparities between federal and state class actions that purportedly worked against out-of-state defendants.[32] By shifting more mass-tort class actions into federal court—where it is generally perceived[33] that federal judges apply stricter standards to pre-trial motions and certification[34]—CAFA is also a device of tort reform.[35]

Indeed, CAFA was the culmination of an eight year campaign to affect tort reform through procedural legislation designed to discourage the adjudication of multistate class actions at the state level.[36] Not surprisingly, commercial interests played a prominent role in both shaping and enacting this law.[37] Corporate defendants complained that plaintiffs' attorneys were exploiting so-called "magnet venues"[38] (also called "judicial hellholes"[39]) where state judges

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[28] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4; *see also* Hurley, *supra* note 7, at 24.

[29] *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 595 (2006).

[30] *See, e.g.*, Jennifer Gibson, Development, *New Rules for Class Settlements: The Consumer Class Action Bill of Rights*, 39 LOY. L.A. L. REV. 1103 (2006); *see also* Hurley, *supra* note 7, at 27-28.

[31] *See* Weinstein, *supra* note 8, at 1090-93.

[32] *See* Willging & Wheatman, *supra* note 29, at 594.

[33] *Id.* at 599 ("Our data, however, lend little support to the view that state and federal courts differ greatly in how they resolve class actions.").

[34] *Id.* at 593.

[35] *Id.*

[36] *See* Coby Warren Logan & Margie Alsbrook, *Not Fair at All: The Class Action Fairness Act of 2005 is Based on Flawed Reasoning and Will Harm Both Federal and State Courts*, 41 ARK. LAW. 10, 11 & nn.7-10 (2006).

[37] *See, e.g.*, Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1659-60 (2006) ("According to Public Citizen, a consumer rights group, at least 100 major companies and pro-business associations had at least 475 lobbyists on Capital Hill from 2000 through 2002 to promote their class action agenda."); Jerome Ringler, *The Unfairness of the Class Action Fairness Act*, 29 L.A. LAW. 52, 52 (2006) ("It should come as no surprise that principal supporters of CAFA are large corporations (and political contributors) that find themselves accused of wrongdoing.").

[38] *See* Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1595 (2006).

[39] *See* Victor E. Schwartz et al., *Taking a Stand Against Lawlessness in American Courts: How Trial Court Judges and Appellate Justices Can Protect Their Courts from Becoming Judicial Hellholes*, 27 AM. J. TRIAL ADVOC. 215 (2003).

were more likely to certify class actions and juries were perceived as biased against businesses.[40]

Proponents argued that innocent businesses were choosing outright settlement instead of litigation to avoid the risk of inordinate judgments awarded by local juries.[41] Moreover, the alleged economic impact[42] of these frivolous settlements justified the invocation of Congress's power to regulate interstate commerce.[43] Using this power, Congress shifted the balance of federalism by expanding the federal courts' jurisdiction to hear interstate class-action lawsuits, and by eliminating certain obstacles to removal that formerly applied to all diversity cases.[44] Ironically, while this transfer of jurisdiction to federal courts precludes state courts from adjudicating many class actions in diversity, it does not prevent state courts from having a profound impact on the *implementation* of interstate class action judgments and settlements.

Although CAFA largely succeeded in preventing the phenomenon of dueling class actions of diverse membership that had prompted controversial[45] inter-court injunctions before 2005, it failed to address other circumstances leading the inter-court conflict. One example involves the preclusive effect of nationwide class-action settlements or judgments (collectively, instruments). When different state courts interpret the terms of a nationwide class-action instrument differently, the result is that class members may be treated differently depending upon their individual citizenship. Such disparity can prompt a federal court to enjoin state action. CAFA failed to address the difficult issues underlying the federal injunction of parallel state actions

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[40] *See* Sherman, *supra* note 38, at 1595.

[41] Anna Andreeva, Article, *Class Action Fairness Act of 2005 The Eight-Year Saga is Finally Over*, 59 U. MIAMI L. REV. 385, 398 (2005); *see also* S. REP. NO. 109-14, at 21 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21 ("[W]hen plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success.").

[42] Members of Congress claimed that frivolous class action suits were imposing a "Tort Tax" on the U.S. economy amounting to three percent of the gross domestic product. Andreeva, *supra* note 41, at 398-99 (citing 151 CONG. REC. H741 (2005) (statement of Rep. Hastert) & 149 CONG. REC. H5282 (2003) (statement of Rep. Sensenbrenner)).

[43] *See* S. REP. NO. 109-14, at 29-30 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 29 ("[T]he Committee believes that such abuses hurt consumers by resulting in higher prices and less innovation, and that they undermine the principles of diversity jurisdiction, which were established by the Framers to promote interstate commerce."); *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(3), 119 Stat. 4, 5 (in passing CAFA, Congress's purpose was, *inter alia*, to "benefit society by encouraging innovation and lowering consumer prices").

[44] *See* Hurley, *supra* note 7, at 26-27.

[45] *See* Kara M. Moorcroft, *The Path of Preclusion: Federal Injunctive Relief Against Nationwide Classes in State Court*, 54 DUKE L.J. 221, 222 (2004); *see also* Kerr, *supra* note 26, at 234-35.

occurring subsequent to the judgment or settlement of a federal class-action lawsuit.

Congress was reluctant to enhance the federal courts' authority to enjoin parallel state actions because of the traditional restraints under equity, comity, and federalism.[46] Nevertheless, parties often seek federal injunction of competing state actions to enforce the terms of class-action instruments. This approach has two inherent problems: (1) the law surrounding the AIA is applied inconsistently, leading to the disparate use of inter-court injunction; and (2) such injunctions impair judicial comity by adversely affecting both litigant-court and inter-court relations. These effects are plainly evident in the Ninth Circuit's 2005 opinion in *Sandpiper Village Condominium Ass'n v. Louisiana-Pacific Corp.*,[47] which will serve as the backdrop for this article.

III. CASE STUDY: *SANDPIPER VILLAGE CONDOMINIUM ASS'N V. LOUISIANA-PACIFIC CORP.*

Sandpiper illustrates the difficulties faced by a federal court implementing a nationwide class action, and how these can lead to inter-court injunction.

The origins of the case involved a nationwide products liability class action against Louisiana-Pacific (L-P) over its marketing of a defective building product known as Inner-Seal Siding (hereinafter referred to as the L-P litigation).[48] Three independent class action lawsuits were consolidated to the U.S. District Court for the District of Oregon, where a national settlement was brokered in 1995, and finalized in 1996.[49] The settlement agreement provided for an open-ended implementation period,[50] and reserved in the district court:

> *[E]xclusive and continuing jurisdiction* over the Actions and Parties, including all members of the Class, the administration and enforcement of the settlement, and the benefits to the Class, including for such purposes as supervising and *implementation, enforcement, construction, and interpretation of the Settlement Agreement.*[51]

Under the settlement agreement, class members[52] released their claims against both L-P and its chain of distribution.[53] Members of L-P's chain of distribution

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[46] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[47] 428 F.3d 831 (9th Cir. 2005).

[48] *See* HENSLER ET AL., *supra* note 16, at 339-42.

[49] *See id.* at 343-49; *Sandpiper*, 428 F.3d at 834 ("Pursuant to the settlement agreement and order, L-P agreed to finance a settlement fund and, in exchange, class claims related to the failure of Inner-Seal Siding were released.").

[50] 428 F.3d at 834 n.1.

[51] *Id.* at 835 (emphasis added).

[52] Class members included the final customers at the end of the chain of distribution—such as homeowners and business owners. *Id.*

were not represented in the class, however, and were free to pursue separate claims against L-P.

Consequently, in March of 2000 Lester Building Systems and Lester's of Minnesota, Inc. (collectively, Lester) sued L-P in Minnesota state court seeking damages relating to defective Inner-Seal Siding.[54] Among various claims, Lester sought repair costs on behalf of its customers, many of whom were covered under the class-action settlement agreement.[55] Lester argued that its moral and business obligations required it to remove and replace the Inner-Seal Siding installed on every building that it constructed, "*even if the owner of the building had received at least some compensation in the prior settlement with L-P.*"[56]

Arguing that a substantial portion of Lester's claims were res judicata under the class-action settlement, L-P moved the Minnesota trial court for partial summary judgment on claims relating to the failure of Inner-Seal Siding.[57] After denying L-P's repeated motions, the trial court instructed the jury that only repair costs falling outside the scope of the settlement agreement were recoverable in the state action.[58] Thus, the trial court allowed the jury to interpret the terms and preclusive effect of the nationwide class-action settlement, which was still being implemented by the Oregon district court.[59] Following deliberation, the jury awarded Lester $29.6 million, of which $13.2 million covered the repair of customer buildings.[60] In essence, the jury determined that none of the repair costs were barred by the class-action settlement.[61]

In November 2002, following the jury verdict in favor of Lester, L-P moved the Oregon district court to enjoin the Minnesota court from entering a judgment tantamount to double recovery on the portion of the verdict already awarded under the class-action settlement.[62] Finding that the Minnesota jury wrongly included damages expressly encompassed in and precluded by the nationwide class-action settlement, the district court enjoined the state court from entering judgment on the offending portion of the jury's verdict.[63] Both

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[53] *See id.*

[54] *Id.* at 836.

[55] *In re* Louisiana-Pac. Inner-Seal Siding Litig., 234 F. Supp. 2d 1170, 1174-75 (D. Or. 2002), *rev'd*, *Sandpiper*, 428 F.3d 831.

[56] *Sandpiper*, 428 F.3d at 837 (emphasis added).

[57] *Id.* at 836.

[58] *Id.* at 837-38.

[59] *See also* Lester Bldg. Sys. v. Louisiana-Pac. Corp., No. 43-C6-00-000335, 2004 WL 291998, at *3 (Minn. Ct. App. Feb. 17, 2004).

[60] *Sandpiper*, 428 F.3d at 838.

[61] *Id.*

[62] *Id.* at 839.

[63] *Id.* at 839 n.10.

L-P and Lester then pursued tangential appeals in the respective state and federal jurisdictions.

One immediate consequence of the inter-court injunction was that it rendered L-P's state appeal non-justiciable. Although the Minnesota Court of Appeals found that the jury failed to differentiate the amount it awarded from the amount covered by the class action,[64] the court refused to address the issue of Lester's double recovery because that award was enjoined by the federal court.[65] On the other hand, Lester's appeal to the Ninth Circuit Court of Appeals met with success in the form of the three-judge opinion in *Sandpiper*.

In October 2005, the Ninth Circuit held that the injunction violated the AIA and vacated it.[66] Once again L-P found itself appealing to the Minnesota Court of Appeals for its prompt review of Lester's double-recovery award. In February 2008, more than five years after L-P moved the district court to enjoin the trial court, the Minnesota Court of Appeals reversed the portion of the jury's verdict that was already covered under the settlement agreement.[67]

Sandpiper reveals that inter-court injunction is no magic bullet for vindicating the preclusive effect of a class-action instrument and can be a double-edged sword fomenting conflict and inefficiency. Any apparent utility is further diminished by the fact that the AIA is applied inconsistently around the country.

A. The All Writs Act and the Anti-Injunction Act

The basis for a federal court's authority to enjoin state action is the All Writs Act (AWA).[68] The AWA provides federal courts[69] with statutory power to "issue all writs necessary or appropriate in aid of their respective jurisdictions."[70] However, this power is qualified by the AIA.

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[64] *Lester Bldg. Sys.*, 2004 WL 291998, at *3.

[65] *Id.* at *8 ("Because the $11.2 million for repair costs is not currently part of the judgment, LP is currently not aggrieved by the judgment and cannot appeal it. Therefore, this court need not address the issue.").

[66] *Sandpiper*, 428 F.3d at 853.

[67] Lester Bldg. Sys. v. Louisiana-Pac. Corp., No. 43-C6-00-000335, at *11-12 (Minn. Ct. App. Feb. 5, 2008) ("Because the district court erroneously allowed the issue of Lester's repair-cost damages to go to the jury even though Lester's customers had released Lester from any legal obligation to repair their barns, we reverse the jury's award of $11.2 million in repair-cost damages and interest."), *available at* http://www.lawlibrary.state.mn.us/archive/ctapun/0802/opa070155-0205.pdf.

[68] 28 U.S.C. § 1651 (2000).

[69] In general, state courts lack the power to enjoin federal courts unless the injunction is for the purpose of protecting jurisdiction over property already in the custody and control (in rem) of the state court. *See* Donavan v. City of Dallas, 377 U.S. 408, 412 (1964).

[70] *See* 28 U.S.C. § 1651(a).

Under the AIA,[71] a court of the United States may not enjoin State proceedings unless one of three exceptions applies: (1) the *Statutory Exception* applies when injunction is expressly authorized by an Act of Congress,[72] (2) the *Jurisdiction Exception* applies where necessary in aid of the federal court's jurisdiction,[73] and (3) the *Relitigation Exception* authorizes injunction to protect or effectuate the federal court's judgments.[74] The Act only applies to state actions that have already been initiated.[75] Thus, a federal court may enjoin the *initiation* of a threatened state action even when no exception applies.

The U.S. Supreme Court has construed the AIA in a manner consistent with Congress' intent to balance the inherent tensions within our dual system of federal and state courts.[76] By discouraging federal court intervention, the Act avoids inevitable conflicts between federal and state courts that would otherwise occur.[77] Under the Court's notion of federalism and state independence, state courts should be allowed to proceed without federal intervention subject to appellate review at the state level and ultimately by the Supreme Court if necessary.[78]

The Court has cautioned that the exceptions under the AIA are to be narrowly construed and "should not be enlarged by loose statutory construction."[79] Moreover, any doubts should be resolved in favor of permitting state actions to proceed to finality.[80] Just because an injunction *may* be ordered under the AIA does not mean that it *must*.[81] Federal courts have considerable discretion in deciding whether to enjoin state action.[82]

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[71] 28 U.S.C. § 2283 (2000) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.").

[72] *Id.*; *see* Mitchum v. Foster, 407 U.S. 225, 238 (1972) ("The [test is] . . . whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.").

[73] 28 U.S.C. § 2283.

[74] *Id.*

[75] Dombrowski v. Pfister, 380 U.S. 479, 484-85 n.2 (1965) ("This statute and its predecessors do not preclude injunction against the *institution* of state court proceedings, but only bar stays of suits already instituted." (emphasis added)); *see also In re* Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985).

[76] Choo v. Exxon Corp., 486 U.S. 140, 146 (1988).

[77] *Id.* (quoting Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 630-31 (1977)).

[78] Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 287 (1970).

[79] *Id.*

[80] *Id.* at 297. *But see In re* BankAmerica Corp. Secs. Litig., 263 F.3d 795, 804 (8th Cir. 2001) (the Eight Circuit Court of Appeals took an alternative view of this rule when it stated that "it is precisely this concern for an orderly resolution of the federal claims" in a class action controversy "that supports the issuance of an injunction here").

[81] *Choo*, 486 U.S. at 151.

[82] *In re* Louisiana-Pac. Inner-Seal Siding Litig., 234 F. Supp. 2d 1170, 1178 (D. Or. 2002)

Under the Court's rigid interpretation, a federal court may not ignore the limitations of the AIA merely because a state action threatens to interfere with protected federal rights or areas preempted by federal law—"even when the interference is unmistakably clear."[83] Instead, the Act strictly prohibits the injunction of state action unless one of the three exceptions applies.[84] "This prohibition applies whether [the injunction is sought] to enjoin the *parties* to the action or the *state court* itself."[85]

Although the Supreme Court narrowly interpreted the exceptions under the AIA, federal courts often struggle with this strict interpretation. This is especially true for the Jurisdiction and Relitigation Exceptions when applied in the context of class-action lawsuits. Consequently, application of inter-court injunction under these exceptions varies widely among the circuits.

B. Courts Apply the Jurisdiction Exception Inconsistently

Under the Jurisdiction Exception, a federal court may only grant an injunction to stay proceedings in a state court "where necessary in aid of its jurisdiction."[86] The Jurisdiction Exception allows a federal court to enjoin state courts in cases where: (1) state action threatens to "seriously impair the federal court's flexibility and authority to decide [a] case . . . ,"[87] or (2) state action "threatens to 'render the exercise of the federal court's jurisdiction nugatory.'"[88] There is considerable variation among the circuits as to the overall scope and import of this exception.

In the L-P litigation, the Oregon district court deemed the Jurisdiction Exception applicable to enjoin Lester's double recovery award because the Minnesota state court allowed the jury to disregard the settlement agreement.[89] The district court reasoned that the state court's action seriously impaired the integrity of the Settlement Order by interfering with the supervision, implementation, enforcement, and interpretation of the class-action settlement

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(citing Blalock Eddy Ranch v. MCI Telecomm's Corp., 982 F.2d 371, 375 (9th Cir. 1992)), *rev'd*, Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831 (9th Cir. 2005).

[83] *Atl. Coast*, 398 U.S. at 294.

[84] *Id.* at 286.

[85] *In re* GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 144 (3d Cir. 1998) (emphasis added) (citing *Atl. Coast*, 398 U.S. at 287).

[86] 28 U.S.C. § 2283 (2000).

[87] *Atl. Coast*, 398 U.S. at 297.

[88] Bennett v. Medtronic, Inc., 285 F.3d 801, 806 (9th Cir. 2002) (quoting Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202 (7th Cir. 1996)) (internal quotations omitted).

[89] *In re* Louisiana-Pac. Inner-Seal Siding Litig., 234 F. Supp. 2d 1170, 1180 (D. Or. 2002), *rev'd*, Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831 (9th Cir. 2005).

over which the district court had expressly retained jurisdiction.[90] The Ninth Circuit Court of Appeals disagreed.

1. The debate over the in personam limitation

In assessing the applicability of the Jurisdiction Exception, the degree of "impairment" to a federal court's jurisdiction is often a secondary consideration to the "nature" of the court's jurisdiction. Under traditional doctrine, this exception typically applies to cases removed to federal court or cases in which the federal court possesses in rem jurisdiction.[91] In these situations the court must exercise exclusive governance or jurisdiction over the case.[92] The in rem requirement derives from the settled rule that after a court imposes in rem jurisdiction over a particular res other courts are precluded from exercising parallel jurisdiction over the same res.[93] In the L-P litigation, however, the district court retained only in personam[94] jurisdiction over the parties.[95]

Under the traditional rule, when a trial court's jurisdiction is strictly in personam, parallel actions may simultaneously proceed in other courts adjudicating the same issues because concurrent action does not directly disrupt the original court's jurisdiction; nor does it delay, obstruct, or lead to conflicting authority.[96] Therefore, some courts deem the Jurisdiction Exception inapplicable unless the federal court possesses in rem jurisdiction or some other form of exclusive jurisdiction.[97]

Other circuits depart from this traditional view and find that the Jurisdiction Exception provides federal courts with sufficient flexibility to deal adequately and equitably with situations as they arise.[98] This flexibility has justified

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[90] *Id.*

[91] *In re* GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 145 (3d Cir. 1998) (citing 1975 Salaried Ret. Plan v. Nobers, 968 F.2d 401, 407 (3d Cir. 1992)).

[92] *Id.*

[93] Alton Box Bd. Co. v. Esprit de Corp., 682 F.2d 1267, 1272 (9th Cir. 1982) (citing Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 134-36 (1941)).

[94] Kline v. Burke Constr. Co., 260 U.S. 226, 230-32 (1922) (explaining that an in personam action involves a controversy over liability rather than a controversy over possession of a thing).

[95] *Inner-Seal Siding Litig.*, 234 F. Supp. 2d at 1176-77.

[96] *See* Donovan v. City of Dallas, 377 U.S. 408, 412 (1964); Kline v. Burke Constr. Co., 260 U.S. 226, 230-32 (1922); Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831, 844 (9th Cir. 2005).

[97] *See, e.g.*, *Kline*, 260 U.S. at 230; Alton Box Bd. Co. v. Esprit de Corp., 682 F.2d 1267, 1272 (9th Cir. 1982); Rath Packing Co. v. Becker, 530 F.2d 1295, 1306 n.15 (9th Cir. 1975); *see also* 17 C. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4225, at 335 (1978).

[98] *See e.g.*, James v. Bellotti, 733 F.2d 989, 993 (1st Cir. 1984).

expansion beyond the traditional in rem and removal[99] limitations in complex litigation and civil rights cases.[100]

In *Swann v. Charlotte-Mecklenburg Board of Education*,[101] for example, the Fourth Circuit upheld an injunction ordered under the Jurisdiction Exception against a competing state suit despite the federal court's in personam jurisdiction. The injunction terminated a state action in which white students sued their local Board of Education, arguing that it had violated state law by using a racial quota.[102] The federal district court justified its injunction on the ground that the issues being litigated in the state proceeding were identical to those in the federal case, and could result in the courts issuing contradictory orders on the Board.[103]

In civil rights cases,[104] overriding federal interests and constitutional concerns justify the invocation of the Jurisdiction Exception, regardless of the traditional in rem limitation.[105] An overriding interest in judicial economy, on the other hand, has justified similar flexibility in the context of class-action lawsuits.

A "complex multi-state litigation"[106] exception to the traditional in personam limitation has been applied by various circuits.[107] In the case of *In re Baldwin-United Corp.*,[108] for example, the District Court for the Southern District of New York enjoined thirty-one states from bringing competing state actions, which related to federal class actions consolidated in multidistrict litigation. The Second Circuit upheld the injunction under the Jurisdiction Exception to prevent the state actions from unraveling a settlement agreement that the district court brokered after two years of painstaking negotiations.[109]

While acknowledging that the mere existence of a parallel lawsuit in state court does not in itself justify inter-court injunction,[110] the court of appeals held

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

[100] *See* Kerr, *supra* note 26, at 244.

[101] 501 F.2d 383 (4th Cir. 1974).

[102] *Id.* at 383.

[103] *Id.* at 383-84.

[104] *See, e.g.*, Oliver v. Kalamazoo Bd. of Educ., 510 F. Supp. 1104, 1108 (W.D. Mich. 1981) ("[W]hen a federal court is involved in desegregating a school district, it must be permitted to prevent a state tribunal from interfering with its continuing jurisdiction by making contrary rulings.").

[105] *See* Kerr, *supra* note 26, at 245.

[106] *In re* Bayshore Ford Truck Sales, Inc., 471 F.3d 1233, 1251 (11th Cir. 2006).

[107] *See, e.g., id.*; Ret. Sys. v. J.P. Morgan Chase & Co., 386 F.3d 419, 426-28 (2d Cir. 2004); Newby v. Enron Corp., 338 F.3d 467, 474 (5th Cir. 2003); *In re* Diet Drugs Prods. Liab. Litig., 282 F.3d 220, 234 (3d Cir. 2002); Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202 (7th Cir. 1996).

[108] 770 F.2d 328, 338 (2d Cir. 1985).

[109] *Id.* at 332.

[110] *Id.* at 336.

that "the potential for an onslaught of state actions" threatened to seriously impair the federal court's ability to flexibly resolve the multi-district litigation.[111] Moreover, injunction under the Jurisdiction Exception was justified because the jurisdiction of a multidistrict court is analogous to that of in rem or civil rights actions—in which it is intolerable to have conflicting orders from different courts.[112]

Under this novel rationale, the action before the federal court was so far advanced that it was *the virtual equivalent of a res* over which the district judge required full control.[113] Consequently, the court concluded that inter-court injunction was justifiable under the Jurisdiction Exception.[114]

More recently, the Second Circuit clarified that *Baldwin* "did not create a blanket rule or presumption that a federal court in any multidistrict action may enjoin parallel state proceedings."[115] Instead, *Baldwin* countenances inter-court injunction under the Jurisdiction Exception only when the federal class-action court seeks to prevent an actual or impending settlement from being undone or thwarted by parallel state action.[116] Nevertheless, federal courts in other circuits have embraced and applied *Baldwin's* "virtual res" analogy in a more general sense to protect their jurisdiction over class-action lawsuits.

For example, in the case of *In re Diet Drugs Products Liability Litigation* the Third Circuit applied the complex litigation exception to affirm a federal injunction against a competing state action that threatened a pending nationwide settlement.[117] In that case a sub-class of plaintiffs threatened the settlement during the opt-out period by remanding their cases to Texas state court and attempting to opt-out as a group.[118] In upholding the inter-court injunction under the Jurisdiction Exception, the Third Circuit Court of Appeals held that where a complex class action is sufficiently developed the presence of duplicative state actions may threaten the court's jurisdiction over the "virtual res" and justify injunction.[119]

In the L-P litigation, the Oregon district court justified its order in part because such injunctions have been approved where federal courts had retained

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[111] *Id.* at 337 (citing Atl. Coast Line R.R. Co. v. Bhd. Of Locomotive Eng'rs, 398 U.S. 281, 295 (1970)).

[112] *Id.* at 337 (quoting 17 C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4225, at 105 n.8 (Supp. 1985)).

[113] *Id.*

[114] *Id.* at 338; *see also* Standard Microsystems Corp. v. Texas Instruments, Inc., 916 F.2d 58, 60 (2d Cir. 1990); *In re* Joint E. & S. Dist. Asbestos Litig., 134 F.R.D. 32, 36-37 (E.D.N.Y. & S.D.N.Y. 1999).

[115] Ret. Sys. v. J.P. Morgan Chase & Co., 386 F.3d 419, 427-28 (2d Cir. 2004).

[116] *Id.* at 428.

[117] 282 F.3d 220, 234-35 (3d Cir. 2002).

[118] *Id.* at 227.

[119] *Id.* at 234.

jurisdiction over a nationwide or global settlement.[120] As authority, the district court cited the Ninth Circuit's decision in *Flanagan v. Arnaiz*.[121] *Flanagan* upheld an injunction against state action under the AIA[122] because allowing the parallel action to litigate the same issues would potentially frustrate the district court's expressly-retained jurisdiction to enforce the settlement agreement.[123]

As in *Flanagan*, the Oregon district court expressly retained "exclusive and continuing jurisdiction"[124] over the settlement agreement. The district court reasoned that the rule in *Flanagan* applied to the present facts because the Minnesota action threatened to circumvent the settlement order thereby jeopardizing the court's "ability to supervise, implement, enforce, construe and interpret the class action settlement agreement."[125] Without specifically addressing the in personam limitation, the district court concluded that inter-court injunction was authorized under the Relitigation *and* Jurisdiction Exceptions of the AIA.[126] This ruling, however, was abrogated by the court of appeals.

On appeal, the Ninth Circuit acknowledged that a limited exception to the in personam rule exists in the context of certain class actions.[127] Nevertheless, the court of appeals refused to apply it to justify injunction under the Jurisdiction Exception in this case because the federal class action had settled and therefore the jurisdiction of the district court could not be threatened.[128] Other circuits, however, have applied the limited exception to the in personam rule to uphold injunctions otherwise foreclosed under the traditional Jurisdiction Exception.

The Eleventh Circuit case of *Battle v. Liberty National Life Insurance Co.* presents an application of the complex litigation exception that is more

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[120] *In re* Louisiana-Pac. Inner-Seal Siding Litig., 234 F. Supp. 2d 1170, 1178 (D. Or. 2002), *rev'd*, Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831 (9th Cir. 2005).

[121] 143 F.3d 540 (9th Cir. 1998).

[122] Although the court justified its injunction under the Relitigation Exception, *id.* at 546, the court also acknowledged that similar circumstances may also warrant injunction under the Jurisdiction Exception. *Id.* at 545 (citing United States v. Am. Soc'y of Composers, 442 F.2d 601, 603 (2d Cir. 1971)).

[123] *Id.* at 545-46; *see also* Hanlon v. Chrysler, 150 F.3d 1011, 1025 (9th Cir. 1998) (federal court had power to issue an injunction against continued state proceedings to ensure control over the integrity of the settlement approval process).

[124] *See supra* text accompanying note 51.

[125] *Inner-Seal Siding Litig.*, 234 F. Supp. 2d at 1180.

[126] *Id.* ("[T]he injunction LP requests is proper under the Anti-Injunction Act and is necessary both in aid of this court's continued jurisdiction and to protect and effectuate this court's Order, Final Judgment and Decree."). *But see* Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831, 844 (9th Cir. 2005) (arguing that the holding in *Flanagan* is limited to its particular facts).

[127] *Sandpiper*, 428 F.3d at 844 n.20.

[128] *Id.* at 844.

analogous[129] to the attempted use in the L-P litigation.[130] After seven years of litigation in both state and federal courts the parties reached a settlement affecting approximately one million insurance policyholders.[131] As in the L-P litigation, the federal class-action court expressly retained jurisdiction to resolve any future disputes among the settling parties regarding the terms of the settlement.[132] However, following entry of final judgment, some policy holders initiated competing state actions involving issues that had been resolved under the terms of the settlement.[133] The district court responded by enjoining these lawsuits under the Jurisdiction Exception.[134]

On review, the Eleventh Circuit affirmed the permanent injunction against the subsequent state class actions because they threatened to undermine the district court's jurisdiction over the parties and waste the time and effort expended to broker the resolution.[135] Later, in the case of *In re Bayshore Ford Truck Sales, Inc.*, the Eleventh Circuit emphasized that it makes sense to treat a complex class-action lawsuit like a "res to be administered."[136] In other words, the class-action court's jurisdiction was still retained, was still exclusive, and should be allowed to continue without interference from subsequent, duplicative actions involving the same res.[137]

In *Sandpiper*, however, the Ninth Circuit Court of Appeals took a different view. The court held that the Jurisdiction Exception was inapplicable because the class-action lawsuit had long since been resolved and therefore the litigation was "over."[138] Thus, state action in no way threatened to interfere with the federal court's administration and disposition of the class-action claims.[139] Under this rationale, a point is reached during the implementation of a class-

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[129] *Battle* is analogous because the "threat" to the settlement occurred during the implementation period. *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985) and *In re Diet Drugs Products Liability Litigation*, 282 F.3d 220 (3d Cir. 2002), involved threats that occurred during the finalization and approval of the settlement, but before the implementation period began. *Sandpiper* is distinguished from *Battle* because Lester, the party who challenged the settlement agreement in the L-P litigation, was not a "party" to the settlement agreement. *See Sandpiper*, 428 F.3d at 848.

[130] 877 F.2d 877 (11th Cir. 1989).

[131] *Id.* at 879-80.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 881-82.

[136] 471 F.3d 1233, 1252 (11th Cir. 2006) (quoting *Battle*, 877 F.2d at 882).

[137] *See* Alton Box Bd. Co. v. Esprit de Corp., 682 F.2d 1267, 1272 (9th Cir. 1982) (under the *in rem* exception, "the court first obtaining jurisdiction over the *res* may proceed without interference from parallel actions involving the same res").

[138] Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831, 844 (9th Cir. 2005).

[139] *Id.*

action lawsuit where the class-action court loses its jurisdiction regardless of the express terms of the settlement agreement.[140]

2. The debate over "exclusive and continuing" jurisdiction

Under *Sandpiper*, the district court's jurisdiction was terminated when the class membership was fixed, the rights and obligations of the class members were resolved, and claims were being paid from the settlement fund.[141] It was irrelevant that the L-P settlement agreement called for "exclusive and continuing jurisdiction over the . . . implementation, enforcement, construction and interpretation"[142] of the agreement for an open-ended[143] period of time. The court of appeals enforced the traditional view[144] that an injunction cannot be ordered to restrain a parallel state action merely because it involves the same subject matter as a federal class action.[145] Other jurisdictions, however, have embraced a tangential view depending upon the language of the settlement agreement.

According to the Third Circuit Court of Appeals, for example, it is now settled that a judgment pursuant to a class-action settlement may preclude later claims based on allegations relating to the settled action, even if the precluded claim was never presented, nor could have been presented, in the class action itself.[146] In *Prudential Insurance* the federal district court approved a large class-action settlement agreement between the defendant insurance company and over eight million policyholders resolving claims of fraudulent and deceptive sales practices.[147] The settlement agreement not only retained exclusive jurisdiction but also contained a specific claims-release[148] clause:

> The terms of the Stipulation of Settlement and of this Final Order and Judgment . . . shall forever be binding on, and shall have res judicata and claim preclusive effect in all pending and future lawsuits maintained by or on behalf of,

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[140] *But see Battle*, 877 F.2d at 881; United States v. Am. Soc'y. of Composers, Authors and Publishers, 442 F.2d 601 (2d Cir. 1971) (upholding an injunction prohibiting a state court challenge to a proposed fund distribution pursuant to a twenty-year-old federal final judgment because it interfered with the federal district court's retained jurisdiction over the case).

[141] *Sandpiper*, 428 F.3d at 844.

[142] *See supra* text accompanying note 51.

[143] *Sandpiper*, 428 F.3d at 835 n.1.

[144] *See supra* text accompanying note 96.

[145] *Sandpiper*, 428 F.3d at 844 (quoting Alton Box Bd. Co. v. Esprit de Corp., 682 F.2d 1267, 1272 (9th Cir. 1982)).

[146] *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 261 F.3d 355, 366 (3d Cir. 2001); *see also* TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982).

[147] *Prudential*, 261 F.3d at 358-59.

[148] *See* Grimes v. Vitalink Commc'ns Corp., 17 F.3d 1553, 1563 (3d Cir. 1994).

> the plaintiffs and all other class members, as well as their heirs, executors and administrators, successors and assigns.[149]

During the opt-out period, two class members, each holding multiple insurance policies covered under the settlement, excluded two of these policies from the settlement while maintaining the others as part of the class.[150] Ten months after the district court certified the class and approved the nationwide settlement, these members sued in Florida state court to vindicate the claims for their excluded policies.[151] The members also sought to rely upon facts and evidence from the class-action proceedings as a basis of their state claims for punitive and compensatory damages.[152]

As L-P had done in *Sandpiper*,[153] Prudential argued that the members were seeking to relitigate the same claims in state court that were already covered under the class-action settlement agreement.[154] The district court agreed with Prudential that permitting the plaintiffs to adjudicate the opted-out claims in state court by using evidence drawn from the class action would inappropriately impair the finality of the class settlement and essentially allow the plaintiffs to relitigate the issues.[155] The court enjoined the plaintiffs from undertaking any state action relating to or involving the facts and circumstances underlying the class-action settlement agreement.[156]

On appeal the Third Circuit Court of Appeals affirmed that a federal court retaining jurisdiction over a complex class-action settlement has the power to enforce an ongoing order against relitigation.[157] Consequently, the district court's authority to enforce the express terms of the settlement agreement continued beyond the final order and judgment.[158] Moreover, inter-court injunction is permissible[159] even when the federal court lacks jurisdiction to adjudicate disputed claims that are released as part of the settlement.[160] The court of appeals explained that this "anomalous" rule promotes judicial

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[149] *Prudential*, 261 F.3d at 360 (emphasis added).

[150] *Id.* at 361.

[151] *Id.*

[152] *Id.* at 363.

[153] The facts in *Sandpiper* are analogous to the facts in *Prudential* because Lester was arguably suing for damage claims "on behalf of" its customers, and these claims were arguably covered under the L-P settlement agreement. *See infra* section III.C.2. The comparable claims in *Prudential* were clearly covered under the "claims release" clause. *See supra* note 149 and accompanying text.

[154] *Prudential*, 261 F.3d at 363.

[155] *Id.*

[156] *Id.*

[157] *Id.* at 367-68.

[158] *Id.* at 368.

[159] *Id.* at 369-70.

[160] *Id.* at 366.

economy by allowing parties to enter into comprehensive settlements which preclude the piecemeal relitigation of questions at the core of the class action.[161]

3. Summary: The uncertain application of the Jurisdiction Exception

In the context of class-action lawsuits, the Jurisdiction Exception is applied inconsistently among the federal circuits for at least two reasons. First, the traditional in personam limitation is rigidly embraced by some circuits (precluding injunction) and more relaxed by others (allowing injunction).[162] Second, the duration of a federal court's continuing jurisdiction over a global settlement varies among the circuits, with some circuits holding that jurisdiction terminates when "the settlement fund had been established and claims [are] being paid"[163] (precluding later injunction), and other circuits measuring jurisdiction against the specific language of the class-action instrument regardless time (allowing later injunction).[164]

Although the Jurisdiction Exception has been narrowly construed by the Supreme Court,[165] the federal-circuit courts interpret this exception differently in class-action lawsuits. Therefore, class-action instruments implemented in some federal circuits may be enforced by federal injunction of state actions challenging the terms of the instrument, while in other circuits state courts may interpret federal class-action instruments without input or oversight from the implementing court. When different state courts apply the terms of the same instrument, they may render different interpretations, possibly creating disparate treatment for subsets of class members.[166]

The Relitigation Exception is also subject to varying interpretations further complicating the implementation of federal class-actions in diversity.

C. The Relitigation Exception is Applied Inconsistently

Under the Relitigation Exception, "[a] court of the United States may not grant an injunction to stay proceedings in a State court except . . . to protect or

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[161] *Id.* (quoting TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982)).

[162] *See supra* Section III.B.1.

[163] Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831, 844 (9th Cir. 2005).

[164] *See supra* Section III.B.2.

[165] *See* Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 287 (1970).

[166] *Sandpiper*, 428 F.3d at 857 (Reinhardt, J., dissenting) ("In effect, the majority condones a double recovery by a sub-group of class members in direct contravention of the settlement agreement and encourages the proliferation of similar sub-groups and similar lawsuits in other states.").

effectuate its judgments."[167] This exception is grounded in the well-recognized concepts of res judicata and collateral estoppel[168] and is intended to prevent successful federal litigants from being harassed by repetitious state litigation.[169] However, because the federal circuits adjudicating actions in diversity may be required to apply different flavors of preclusion jurisprudence, the application of inter-court injunction under the Relitigation Exception can vary depending upon local jurisprudence.

1. Local privity jurisprudence may affect the application of preclusion doctrines

A successful res judicata defense precludes the parties *and their privies* from relitigating claims that were, or could have been, raised in a previous action resulting in a final judgment on the merits.[170] However, the applicability of res judicata and collateral estoppel—and thus, the Relitigation Exception—is less certain when a third-party plaintiff seeks damages "on behalf of" class members who themselves are covered under a class-action instrument.

In the L-P litigation, for example, the settlement agreement released the class members' claims against both L-P and members of its chain of distribution.[171] As a distributor for L-P, Lester was therefore exculpated of any liability relating to the settled class-action lawsuit. Nevertheless, in the subsequent Minnesota proceeding Lester sought damages on behalf of its customers even if they had already received compensation under the prior settlement.[172]

The U.S. District Court for the District of Oregon agreed with L-P that, by permitting Lester to pursue claims already covered by the settlement agreement, the state court in essence allowed Lester to relitigate issues already decided in the Oregon class action.[173] Therefore, the court applied the Relitigation Exception and enjoined the corresponding damages awarded by the Minnesota jury[174]—despite the fact that Lester was neither a class member nor a formal agent for its class-member customers.[175]

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[167] 28 U.S.C. § 2283 (2000).

[168] *See* Choo v. Exxon Corp., 486 U.S. 140, 147 (1988).

[169] Montana v. United States, 440 U.S. 147, 153-54 (1979); Amwest Mortgage Corp. v. Grady, 925 F.2d 1162, 1164 (9th Cir. 1991).

[170] Cromwell v. Country of Sac, 94 U.S. 351, 352 (1876).

[171] *See supra* note 53 and accompanying text.

[172] *See supra* note 56 and accompanying text.

[173] *In re* Louisiana-Pac. Inner-Seal Siding Litig., 234 F. Supp. 2d 1170, 1180 (D. Or. 2002), *rev'd*, Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831 (9th Cir. 2005).

[174] *See supra* note 63 and accompanying text.

[175] *Inner-Seal Siding Litig.*, 234 F. Supp. 2d at 1177.

On appeal, the Ninth Circuit held that the Relitigation Exception was inapplicable because Lester's state claim was not res judicata.[176] Lester, the court of appeals pointed out, was neither named as a class member nor was his interest sufficiently comparative so that privity could be implied.[177] As a "stranger" to the Oregon class-action proceedings, nothing prevented Lester from suing L-P in state court for its own injuries.[178] The fact that Lester's award was tantamount to double recovery did not affect the reasoning of the court of appeals.

A third party is said to be in "privity" with a class member when the class member "represents precisely the same right in respect to the subject matter involved."[179] Over the years, however, some jurisdictions have applied the privity concept more flexibly, and courts have found the existence of privity in different circumstances that would not have come within the traditional definition.[180] These exceptions have been summarized under the doctrine of "virtual representation."[181]

When *Sandpiper* was decided, for example, a non-party to a federal action in the Ninth Circuit could be bound by the litigation choices made by his virtual representative if:

> (1) A close relationship, substantial participation, and tactical maneuvering all support a finding of virtual representation; and
> (2) Identity of interests and adequate representation supported the finding of virtual representation.[182]

Applying these five factors, the majority in *Sandpiper* disagreed with the dissent that Lester was virtually represented by its class-member customers.[183] However, other federal circuits may have ruled differently depending upon their local flavors of privity.

The Ninth Circuit itself characterized the law applying virtual representation as "episodic" and "lacking any clear pattern."[184] At the time that *Sandpiper*

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[176] *Sandpiper*, 428 F.3d at 848-49.

[177] *Id.* at 848.

[178] *Id.* at 849.

[179] Headwaters Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052-53 (9th Cir. 2005) (quoting United States v. Schimmels, 127 F.3d 875, 881 (9th Cir. 1997)) (internal quotation marks omitted).

[180] *See* Kourtis v. Cameron, 419 F.3d 989, 996 (9th Cir. 2005) (citing *Headwaters*, 399 F.3d at 1053), *abrogated by*, Taylor v. Sturgell, 128 S. Ct. 2161 (2008).

[181] *Id.*; *see also* Richards v. Jefferson County, 517 U.S. 793, 798 (1996).

[182] *Headwaters*, 399 F.3d at 1053-54 (quoting Irwin v. Mascott, 370 F.3d 924, 929-30 (9th Cir. 2004)).

[183] *Sandpiper*, 428 F.3d at 848 n.25.

[184] *Kourtis*, 419 F.3d at 996; *see also Headwaters*, 399 F.3d at 1054 n.5 ("[T]he virtual representation concept is amorphous, [and] illustrates the harm that can be done when a catchy

was decided other circuits around the country varied "widely" in their approaches to this doctrine.[185] For example, the Eighth, Ninth, and D.C. Circuits each applied multifactor tests that broadly exceeded the normal bounds of traditional privity.[186] By contrast, the Fourth, Fifth, Sixth, and Eleventh Circuits constrained the scope of virtual representation by imposing a "legal relationship" requirement between the nonparty and the putative representative.[187] At the opposite end the Seventh Circuit refused to accept any expansion beyond traditional privity.[188]

In 2008, the U.S. Supreme Court finally put its foot down and endeavored to "resolve the disagreement among the Circuits over the permissibility and scope of preclusion based on 'virtual representation.'"[189] In *Taylor v. Sturgell* the Court recognized six categories of exceptions to the rule against non-party preclusion,[190] and specifically rejected the multifactor balancing approaches which tended to complicate the task of the lower federal courts.[191] However, because the Court limited its holding to federal actions decided under federal-question jurisdiction the overall affect on federal class actions in diversity is less certain.

While recommending that federal courts discontinue their use of the term "virtual representation," the Court held that "[t]he preclusive effects of a judgment *in a federal-question case decided by a federal court* should instead be determined according to the" six categories of exceptions articulated in the opinion.[192] The Court's silence as to the preclusive effects of a judgment rendered by a federal court in diversity is not surprising because it already spoke to this issue in 2001.

In *Semtek International Inc. v. Lockheed Martin Corp.*, the Supreme Court held that the preclusive effect of a judgment from a federal district court exercising diversity jurisdiction is normally determined by the law of the state

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phrase is used to describe a perfectly sensible result, and cast[s] more shadows than light on the problem to be decided." (internal citations omitted) (quoting Tice v. Am. Airlines, 162 F.3d 966, 970-71 (7th Cir. 1998))).

[185] *Taylor*, 128 S. Ct. at 2169.

[186] *Id.* at 2173.

[187] *Id.* at 2170.

[188] *Id.*

[189] *Id.*

[190] *Id.* at 2172-73 (describing the exceptions as: (1) by agreement to be bound by action; (2) by pre-existing substantive legal relationships, i.e. traditional privity; (3) by adequate representation; (4) by assumed control over the litigation; (5) by acting as a proxy, designated representative, or agent; or (6) by statutory preclusion, e.g. finality of probate).

[191] *Id.* at 2176-77 ("Preclusion doctrine, it should be recalled, is intended to reduce the burden of litigation on courts and parties.").

[192] *Id.* at 2178 (emphasis added).

in which the federal court sits.[193] Only in situations where the state rule is incompatible with federal interests may a federal district court overlook the local laws of preclusion.[194]

Thus, even in the post-*Taylor* era, if the state in which the district court is located employs an expansive standard for non-party preclusion, then the district court may be obliged to apply that standard to protect its judgments in diversity. It follows that the court may also employ the Relitigation Exception of the AIA to enjoin a subsequent state action involving a non-party who was a virtual privy under state law.[195] Some states do in fact appear to apply non-party preclusion beyond the traditional boundaries of privity.[196]

Local flavors of privity can still affect a federal court's ability to enforce the preclusive effect of a class-action instrument under the Relitigation Exception. However, this effect will undoubtedly be far-less pronounced with the advent of *Taylor*. Nevertheless, the importance of the privity requirement may be attenuated in other contexts relating to inter-court injunction.

2. *The strict privity requirement might not apply to non-parties enjoined under the All-Writs Act, or non-parties specifically precluded under a class-action instrument*

The nature of the AIA complicates the traditional res judicata analysis followed by the Ninth Circuit Court of Appeals in *Sandpiper*. It is unclear whether the privity requirement applies to inter-court injunctions in all circumstances. For instance, the AIA merely *qualifies* a federal court's power to enjoin state action, but it is not the ultimate authority for the equitable remedy. That authority derives from the AWA, and the general rule is that it authorizes injunctions against non-parties.[197]

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[193] 531 U.S. 497, 508-09 (2001) ("This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits.").

[194] *Id.* at 509.

[195] *Cf.* Lexington Ins. Co. v. Thrasher Eng'g, Inc., No. 1:06CV21, 2008 WL 4525014, at *5 (N.D.W.Va. Sept. 30, 2008) (refusing to apply the Relitigation Exception based upon West Virginia law of virtual representation, but only because the state "[relied] upon federal case law in developing state collateral estoppel rules").

[196] *See, e.g.*, Bender v. Peay, 433 N.E.2d 788, 796 (Ind. App. 1982); Bourque v. Cape Southport Assocs., LLC, 800 N.E.2d 1077, 1081 (Mass. App. Ct. 2004); Knowlton v. Ripley County Mem'l Hosp., 743 S.W.2d 132, 135 (Mo. Ct. App. 1988); Cook v. Sullivan, 829 A.2d 1059, 1064 (N.H. 2003); *In re* Estate of Head, 165 S.W.3d 897, 901 (Tex. App. 2005); Stevens County v. Futurewise, No. 26038-1-III, 2008 WL 2546176, at *8 (Wash. Ct. App. June 26, 2008).

[197] *See* United States v. Int'l Bhd. of Teamsters, 907 F.2d 277, 281 (2d Cir. 1990) ("We believe that the All Writs Act requires no more than that the persons enjoined have the

In *United States v. New York Telephone Co.*,[198] the Supreme Court held that the AWA conferred federal courts with the power to enjoin or affirmatively compel non-parties who "are in a position to frustrate the implementation of a court order or the proper administration of justice."[199] In the context of a class-action lawsuit, however, this authority has only been exercised during the pre-judgment stage of litigation, when suits by non-parties threatened either certification or the final negotiations.[200]

The issue of privity is further complicated by the fact that class-action courts have approved settlement agreements specifically precluding non-parties from bringing actions on behalf of class members. For example, in *Prudential Insurance* the class-action settlement agreement reserved "res judicata and claim preclusive effect in all pending and future lawsuits maintained by *or on behalf of*[] the plaintiffs and all other class members."[201] The settlement agreement did not define the scope of the "on behalf of" term.

Although the Third Circuit did not address whether the Relitigation Exception could be used to enjoin a non-privy like Lester from suing on behalf of class members in a subsequent state action,[202] the court expressed a willingness to bend, if not exceed, the normal rules of preclusion to promote judicial efficiency in class-actions.[203] Had the facts in the L-P litigation been presented to the Third Circuit in the context of this claims-release provision, it seems possible, if not probable, that the inter-court injunction would stand in spite of the absence of strict privity.

The question remains whether the traditional tenets of non-party preclusion should limit the application of the Relitigation Exception when the terms of a

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'minimum contacts' that are constitutionally required under due process." (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[198] 434 U.S. 159 (1977).

[199] *Id.* at 174; *see also* Weinstein, *supra* note 8, at 1097 n.63. *But cf.* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 33 (2002) (holding that because the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441) (overruling in part *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993)).

[200] *See, e.g.*, *In re* Baldwin-United Corp., 770 F.2d 328, 338 (2d Cir. 1985).

[201] *See supra* text accompanying note 149.

[202] *See In re* Louisiana-Pac. Inner-Seal Siding Litig., 234 F. Supp. 2d 1170, 1177 (D. Or. 2002), *rev'd*, Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831 (2005) ("While Lester may not have been engaged as a formal agent for its end user customers, . . . Lester was asserting damages claims that belonged to the end users.").

[203] *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 261 F.3d 355, 366 (3d Cir. 2001) ("Admittedly, it 'may seem anomalous at first glance . . . that courts without jurisdiction to hear certain claims have the power to release those claims as part of a judgment.' However, we have endorsed the rule because it 'serves the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements that "prevent relitigation of settled questions at the core of a class action."'" (citations omitted)).

class-action instrument specifically preclude claims brought "on behalf of" class members. The answer will likely depend not only on the facts of the case, but also upon the local jurisprudence and discretion of the federal court being asked to enjoin state action.

Another issue of uncertainty affecting the Relitigation Exception involves the definition of what constitutes a "final" judgment.

3. Uncertainty exists about the "finality" of class-action settlements and state-court rulings

In order for a competing claim to be res judicata, a final judgment on the merits must have been rendered by the original court.[204] However, circuits disagree whether a "settled" claim constitutes the requisite "final judgment" under claim preclusion. Since the enactment of the AIA in 1948, authorities have debated whether the Relitigation Exception applies a broader or narrower preclusive effect than common law res judicata.[205] Under the narrower interpretation, a federal court lacks the authority to enjoin state actions seeking to relitigate claims that were "settled" rather than "decided" by the federal court.[206]

For example, in *Santopadre v. Pelican Homestead & Savings Ass'n* the Fifth Circuit held that the Relitigation Exception only applies when the trier of fact actually resolves an issue that the parties to the original action disputed.[207] The First[208] and Eleventh[209] Circuits adopted similarly restrictive views of the Relitigation Exception's preclusive effect. While it is true that the predominance requirement of certain class-action lawsuits naturally qualifies the preclusive effect of their resulting instruments,[210] that doctrine is distinguished

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[204] Cromwell v. County of Sac, 94 U.S. 351, 352 (1877).

[205] *See* Wasserman, *supra* note 8, at 516-17; *compare* Staffer v. Bouchard Transp. Co., 878 F.2d 638, 643 (2d Cir. 1989) (restricting the Relitigation Exception), *superseded by statute*, 28 U.S.C.A. 1367 (West, Westlaw through 2008), *and* Deus v. Allstate Ins. Co., 15 F.3d 506, 527 (5th Cir. 1994) (same), *with* W. Sys., Inc. v. Ulloa, 958 F.2d 864, 870-71 (9th Cir. 1992) (expanding the Relitigation Exception); *see also* George A. Martinez, *The AIA: Fending off the New Attack on the Relitigation Exception*, 72 NEB. L. REV. 643, 645 (1993) (arguing that the Relitigation Exception to the AIA should be construed to permit federal courts to protect the full claim preclusive effect of their judgments); Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717 (1977) (arguing that the Relitigation Exception was specifically added by Congress in 1948 to expand the res judicata effect of federal judgments).

[206] *See* Wasserman, *supra* note 8, at 516-17.

[207] 937 F.2d 268, 273 (5th Cir. 1991).

[208] Sanchez v. Sea Containers, Ltd., 874 F.2d 66, 68 (1st Cir. 1989).

[209] Delta Air Lines, Inc. v. McCoy Rest., Inc., 708 F.2d 582, 586 (11th Cir. 1983).

[210] *See* FED. R. CIV. P. 23(b)(3); Wasserman, *supra* note 8, at 489-90; *e.g.*, Hilliard v. Shell W. E & P., Inc., 885 F. Supp. 169, 173 (W.D. Mich. 1995) ("[A] class action settlement should not bar all claims that could have been litigated between the parties but only those claims that were actually litigated.").

from the *Santopadre* rationale which affects a per se limitation on the preclusive effect of a settlement.[211] The split of authority concerning the preclusive effect of class-action settlements engenders uncertainty as to the finality of some class-action claims, and therefore uncertainty about the applicability of the Relitigation Exception.

Another significant split of authority affecting the Relitigation Exception concerns the finality of res judicata defenses brought in state court. The Full Faith and Credit Act ("FFCA") provides that the "judicial proceedings of any court . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions."[212] Thus, a federal court may not consider the preclusive effect of a federal class-action instrument over a state claimant, nor enjoin the state action under the Relitigation Exception, if the state court has already rendered its "final ruling" on the merits over a comparable res judicata defense. However, what constitutes a "final ruling" under the FFCA is an issue on which the federal circuits often disagree.

In the L-P litigation, Lester argued that injunction under the Relitigation Exception was precluded by the FFCA because the Minnesota state court had already ruled with finality on L-P's res judicata defense.[213] Since the state court denied L-P's motions for partial summary judgment and directed verdict on its res judicata defense,[214] Lester contended that the Minnesota court had already issued its final ruling. The Oregon district court disagreed. It pointed out that the state court denied L-P's motions based on fact questions as opposed to its consideration of the merits, and that the state court rulings were still the subject of pending motions.[215] Thus, the district court held that the Minnesota court rulings were not "final" judgments for the purposes of the FFCA, and therefore federal injunction of precluded claims was justified under the Relitigation Exception.[216]

The Supreme Court addressed this issue in *Parson Steel Inc. v. First Alabama Bank*.[217] In doing so the Court first rejected the argument that the AIA supersedes the requirements of FFCA by granting a federal court exclusive jurisdiction over the preclusive effect of its judgments.[218] Such a notion ignores the values of federalism and comity underlying the FFCA.[219] The

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[211] *Santopadre*, 937 F.2d at 273.

[212] 28 U.S.C. § 1738 (2000).

[213] *In re* Louisiana-Pac. Inner-Seal Siding Litig., 234 F. Supp. 2d 1170, 1180-81 (D. Or. 2002), *rev'd*, Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831 (9th Cir. 2005).

[214] *Id.* at 1173, 1175.

[215] *Id.* at 1181.

[216] *Id.*

[217] 474 U.S. 518 (1986).

[218] *Id.* at 522.

[219] *Id.* at 523.

Court held that after the state court has "finally" rejected a claim of res judicata the federal court must respect the FFCA and apply state law to assess the preclusive effect of the state court's decision.[220] That is, the federal courts must afford state court decisions the same preclusive effect that applies to other courts within the same state.[221]

In the context of the L-P litigation this meant that the Oregon district court was required to apply Minnesota laws of preclusion to determine whether any of the state court's rulings constituted a "final" judgment on L-P's res judicata defense. If so then the federal court had no authority to enjoin state action under the Relitigation Exception of the AIA. Otherwise the district court was free to determine if Lester's claims were res judicata under the terms of the class-action settlement.[222]

In *Sandpiper* the concurrence strongly advocated an alternative Full Faith and Credit analysis advocated by the Seventh Circuit.[223] In *Ramsden v. AgriBank, FCB*, the Seventh Circuit enforced a more liberal interpretation of when a state court ruling on a res judicata defense is "final" for the purposes of the *Parsons Steel* analysis.[224] Under this approach, a federal court may not invoke the Relitigation Exception to enjoin state action after the state court "expressly and unambiguously" decides a res judicata defense—regardless of whether the court's ruling on the claim is strictly "final."[225] The court of appeals reasoned that the affront of federal court intervention is greatly magnified after a state court has considered a res judicata defense.[226]

Under *Ramsden*, a point in a state litigation is reached when traditional notions of federalism and comity outweigh ideals of judicial efficiency.[227] Moreover, while inter-court injunction may be cost-effective, "*inefficient simultaneous litigation in state and federal courts on the same issue*" is "*one of the costs of our dual court system*"[228]—"*except in the most extraordinary circumstances.*"[229] Although the Seventh Circuit failed to expound upon which circumstances would be "extraordinary," it is noteworthy that most of the cases

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[220] *Id.* at 524.

[221] *Id.* at 525.

[222] *See* First Ala. Bank, N.A. v. Parsons Steel, Inc., 825 F.2d 1475, 1480 (11th Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988).

[223] Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831, 854-55 (9th Cir. 2005) (Silverman, J., concurring).

[224] 214 F.3d 865 (7th Cir. 2000); *see supra* text accompanying notes 217-21.

[225] *Id.* at 870.

[226] *Id.*

[227] *Id.* at 871.

[228] *Id.* at 872 (emphasis added) (quoting Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 524-25 (1986)).

[229] *Id.* at 871 (emphasis added).

relying on *Ramsden* were, like *Ramsden*, not decided in the context of complex class-action lawsuits.[230]

In the L-P litigation, the Oregon district court justified its injunction under the Relitigation Exception because the Minnesota court allowed the jury to circumvent the settlement agreement such that a subclass of class members would "enjoy special treatment not available to other class members."[231] In reversing, the court of appeals found nothing extraordinary about the nature of a nationwide class-action implementation,[232] and added that the costs of our dual-court system forbid injunction "even where a state court mistakenly rejects the res judicata effect of a prior federal judgment."[233]

Other circuits, however, favor a relaxation of traditional constraints in order to promote the efficient and final resolution of expensive and time-consuming class-action proceedings when the costs of our dual-court system may be too high.[234]

4. Summary: The uncertain application of the Relitigation Exception

Application of the Relitigation Exception throughout the country is inconsistent because of differences in jurisprudence among the various circuits. This presents challenges to the implementation of a class-action lawsuit for several reasons. First, it may be uncertain whether the terms of a class-action instrument, which may explicitly preclude the claims of non-parties acting on behalf of class members,[235] will be enforceable against non-privies like Lester.[236] Second, the preclusive effect of a class-action "settlement" (as opposed to "judgment") can vary depending upon local jurisprudence.[237] Third, the circuits are split on exactly when a state court ruling is tantamount to a "final judgment" for purposes of the Full Faith and Credit Act.[238]

The inconsistencies and discordance in the application of inter-court injunction under the AIA can negatively impact the efficient and final resolution of class actions. In the words of Justice Reinhardt, "[i]t renders federal court orders and judgments vulnerable to further litigation in state courts on a state-by-state basis, litigation that can reopen what are intended to

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[230] *See* Brother Records, Inc. v. Jardine, 432 F.3d 939 (9th Cir. 2005); Glenayre Elecs., Inc. v. Jackson, No. 02 CV 0256, 2007 WL 2492105 (N.D. Ill. Aug. 30, 2007).

[231] *In re* Louisiana-Pac. Inner-Seal Siding Litig., 234 F. Supp. 2d 1170, 1180 (D. Or. 2002), *rev'd*, Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831 (9th Cir. 2005).

[232] *Sandpiper*, 428 F.3d at 856 (Silverman, J., concurring).

[233] *Id.* at 850 (citing *Parsons Steel*, 474 U.S. at 525).

[234] *See, e.g.*, *supra* text accompanying notes 106, 107, 123, 136, 146, 157.

[235] *See supra* Section III.C.2.

[236] *See infra* text accompanying note 253.

[237] *See supra* text accompanying notes 206-11.

[238] *See supra* text accompanying notes 213-30.

be final damage awards and undermine the orderly implementation of complex national settlement agreements."[239] This justifies a fundamental rethinking of our dual-court tradition of separate and independent state and federal courts in the context of the class mechanism.

IV. TOWARDS A UNIFYING APPROACH TO FEDERAL CLASS-ACTION ADJUDICATION

The class-action lawsuit is the best means available to achieve economies of time, effort, and expense, and to promote uniformity of decision as to persons similarly situated,[240] particularly when parties seek to adjudicate nationwide mass torts. Absent an effective means to consolidate such claims to a single proceeding, "[d]ecisions concerning thousands of deaths, millions of injuries, and billions of dollars [can become] entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses."[241]

In spite of its many advantages, however, the class-action mechanism is not immune from the "costs of our dual-court system."[242] As the Second Circuit pointed out, "the finality of virtually any class action involving pendant state claims [can] be defeated by subsequent suits brought by the states asserting rights derivative to those released by class members . . ." or by others "on behalf of the plaintiffs or by anyone else."[243] *Sandpiper* illustrates that inter-court injunction is an inconsistent and often ineffective means to vindicate a class-action instrument. Moreover, it confounds the very essence of comity by inciting an adversarial relationship between federal and state courts.

A more rational approach to federal class-action litigation is to relax the traditional dual-court tension in order to unify related state and federal actions within a common procedural framework. Congress could provide this unifying approach by creating[244] a single Article III[245] court (Class Court) with exclusive

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[239] Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831, 856 (9th Cir. 2005) (Reinhardt, J., dissenting).

[240] Amchem Prods. v. Windsor, 521 U.S. 591, 615 (1997).

[241] *Id.* at 632 (Breyer, J., dissenting) (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-13 (1991)).

[242] *See supra* note 228.

[243] *In re* Baldwin-United Corp., 770 F.2d 328, 336-37 (2d Cir. 1985).

[244] *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also id.* art. I, § 8, cl. 9 (Congress has the power "To constitute Tribunals inferior to the supreme Court").

[245] *See* Commodity Futures Trading Comm'n. v. Schor, 478 U.S. 833, 853-54 (1986) (explaining that Article III designation is appropriate where private, common law rights are involved; whereas Article I designation is appropriate when only public rights are involved); Glidden Co. v. Zdanok, 370 U.S. 530, 552 (1962) (explaining that a federal court should be

and continuing jurisdiction over all federal class-action lawsuits of diverse membership. The Class Court should possess both exclusive purview to interpret and enforce the preclusive effect of its class-action instruments as a matter of procedure, and a limited personal jurisdiction over non-parties who raise precluded claims or issues in subsequent state or federal proceedings. The Class Court itself should define the terms and duration of its ongoing jurisdiction over class-action instruments, and should be capable of conducting web-based adjudication from a single, centralized location.

A. An Article III "Class Court"

The effective duration of a class-action court's jurisdiction varies among the circuits, with some circuits holding that jurisdiction terminates upon entry of the final order and judgment and other circuits measuring jurisdiction against the specific language of the class-action instrument.[246] The Class Court should possess both exclusive[247] and continuing[248] jurisdiction over the adjudication of its class-action instruments, including the interpretation, implementation, and enforcement of open-ended instruments.

In the L-P litigation, the Oregon district court argued that allowing the Minnesota trial court to interpret the terms of an ongoing and dynamic class-action instrument threatened its continuing implementation.[249] Such conflicts can be avoided by acknowledging the extraordinary[250] nature of global class actions, and by defining the Class Court's jurisdiction over the res as exclusive, and thus analogous, to in rem jurisdiction.

Some federal circuits already agree that "'it makes sense' to consider so complicated a case, in which both the court and the parties have invested considerable time and resources, like a 'res to be administered.'"[251] Although

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recognized as an Article III court if: (1) the subject matter jurisdiction over the dispute is authorized by Article III, and (2) the judges are independent and the judgments are final).

[246] *See supra* Section III.B.2.

[247] "Exclusive" jurisdiction would preclude the phenomenon of dueling class actions by preventing parallel courts from simultaneously adjudicating claims already under the Class Court's purview. *See supra* text accompanying notes 26 & 27.

[248] "Continuing" jurisdiction refers to the continuance of the Class Court's jurisdiction over the interpretation, implementation and enforcement of the class action instrument following settlement or judgment. *See supra* Section III.B.2.

[249] Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831, 839 (9th Cir. 2005); *In re* Louisiana-Pac. Inner-Seal Siding Litig., 234 F. Supp. 2d 1170, 1180 (D. Or. 2002), *rev'd*, *Sandpiper*, 428 F.3d 831.

[250] *See supra* text accompanying notes 229-30.

[251] *In re* Bayshore Ford Truck Sales, Inc., 471 F.3d 1233, 1252 (11th Cir. 2006) (quoting Battle v. Liberty Nat'l Life Ins. Co., 877 F.2d 877, 882 (11th Cir. 1989)); *see generally supra* Section III.B.1.

this legal fiction has been used to justify inter-court injunctions, it should not be used to provide the Class Court with a Convenience Exception[252] to the AIA. Instead, it should reduce the need for inter-court injunctions by providing the Class Court with exclusive purview to enforce its class-action instruments.

State courts faced with deciding the preclusive effect of a nationwide class-action instrument may provide contrasting interpretations under local law. Such disparities can lead to the inequitable treatment of subgroups of diverse class members depending upon their citizenship.[253] A procedural framework should be devised allowing the Class Court *alone* to enforce the preclusive effect of its class-action instruments[254] in a uniform and timely fashion.[255] Under this framework, when issues of preclusion arise in a parallel or subsequent state proceeding the overseeing court would defer that question to the Class Court, which would apply uniform rules of non-party preclusion[256] and choice-of-law[257] to decide the issue.

It is by no means a novel idea that the court best situated to decide the import of a class-action instrument is the court that approves and enforces it.[258] Providing the Class Court with exclusive purview would prevent other courts from subsequently attempting to dictate the scope and terms of settlement,[259] and would remove the necessity for inter-court injunction. Such a construct could resolve issues of preclusion in a fair, timely, and consistent manner. In the L-P litigation, by contrast, the attempted use of injunction to vindicate the preclusive effect of the L-P settlement ultimately delayed the resolution of the issue by several years.[260]

The Class Court system could improve inter-court relations by minimizing the use of inter-court injunction and could promote greater efficiency and

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[252] *See* Ret. Sys. v. J.P. Morgan Chase & Co., 386 F.3d 419, 430 (2d Cir. 2004).

[253] *Sandpiper*, 428 F.3d at 856-57 (Reinhardt, J., dissenting).

[254] Under the Class Court regime, class-action "settlements" and "judgments" should both be considered "final" for the purposes of the preclusion doctrines. *See supra* Section III.C.3.

[255] *But see* Pelt v. Utah, 539 F.3d 1271, 1285 (10th Cir. 2008) ("It is well settled that a court adjudicating a class action cannot predetermine the res judicata effect of its own judgment; that can only be determined in a subsequent suit." (citing Taunton Gardens Co. v. Hills, 557 F.2d 877, 878 (1st Cir. 1977)). Hence, the proposed procedural framework would represent a sea change from current preclusion doctrine as well a radical shift away from the Framers' notion of "Our Federalism." *See* Younger v. Harris, 401 U.S. 37, 44-45 (1971) (describing the concept of "Our Federalism").

[256] *See* Taylor v. Sturgell, 128 S.Ct. 2161, 2172-76 (2008) (enumerating and describing six exceptions to the rule against non-party preclusion).

[257] *See infra* Section IV.B.

[258] *In re* "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1431 (2d Cir. 1993), *overruled on other grounds by* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28 (2002).

[259] *In re* GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 145 (3d Cir. 1998).

[260] *See supra* note 67 and accompanying text.

expand the public's access to justice by addressing the ideological and legal disparities that exist between federal and state courts.

B. Enhancing Efficiency and Public Access to Nationwide Class Actions by Appointing Impartial Judges and Providing Greater Flexibility in Choice-of-Law

Although CAFA was designed to channel more class actions into federal court, it fails to address the perceived differences[261] in judicial philosophy and jurisprudence between the state and federal courts. These disparities often impel plaintiffs' attorneys to seek adjudication in state court, while defendant attorneys attempt to remove such actions to federal court.[262] In the context of class-action adjudication this phenomenon discourages attorneys from bringing suits involving nationwide classes in diversity and thus diminishes efficiency. Congress and the President[263] can mitigate this problem by creating a less political, merit-based appointment process for Class Court judges.

It is widely acknowledged that plaintiffs consider federal judges to be increasingly biased in favor of defendants and corporate interests.[264] Although these perceptions are often attributable to the "stricter" culture of the federal courts,[265] as opposed to empirical evidence of bias,[266] they are continuously reinforced by the political nature[267] of the federal appointment process and the realization that a judge's values and philosophies can have a tremendous impact on judicial policy.[268]

Over the past thirty years the lower-court appointment process has become increasingly politicized,[269] leading several states and their Senators to institute

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[261] *See* Willging & Wheatman, *supra* note 29, at 593, 599.

[262] *Id.* at 593.

[263] *See* Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 CARDOZO L. REV. 463, 463 (2005) ("The Constitution confers on the President the power to appoint federal judges 'by and with the Advice and Consent of the Senate.'" (quoting U.S. CONST. art. II, § 2, cl. 2.)).

[264] *See* Willging & Wheatman, *supra* note 29, at 595; Edward F. Sherman, *Complex Litigation: Plagued by Concerns over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 598 (2004).

[265] *See* Symposium, *Shifting Powers in the Federal Courts*, 39 VAL. U. L. REV. 755, 780-81 (2005).

[266] *See* Willging & Wheatman, *supra* note 29, at 593.

[267] *See* Johnsen, *supra* note 263, at 463-67.

[268] *Id.* at 466, 475; *see also* Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter?*, 48 ARIZ. L. REV. 225, 228 (2006).

[269] *See* Elliot E. Slotnick, *A Historical Perspective on Federal Judicial Selection*, 86 JUDICATURE *13, *14 (2002), *available at* Westlaw, WESTLAW LAWPRAC INDEX; Slotnick, *supra* note 268, *passim*; *see, e.g.*, Joan Biskupic, *Bush's Conservatism to Live Long in the U.S. Courts*, USA TODAY, Mar. 14, 2008, *available at* http://www.usatoday.com/news/

politically balanced and merit-based nomination procedures. For example, both Wisconsin[270] and Hawai'i[271] have created nomination commissions whose membership is politically balanced and flexible based upon exigent political realities. These systems were established to assist in the search for "well-qualified, knowledgeable, and experienced individuals" to serve as federal judges,[272] and to reduce or eliminate both the perception and reality of ideological[273] bias on the federal bench.

The nomination of Class Court judges should follow a similar merit-based approach using a politically balanced commission staffed with appropriate individuals who are selected by Senators from around the country. "The electorate should know on what basis Presidents and Senators choose those to whom they give lifetime judicial appointment. And while changed circumstances might warrant changed criteria, those criteria should not change dramatically with which party holds political power."[274]

The choice-of-law rules employed by the Class Court should be similarly uniform to ensure that non-frivolous federal class actions are certified and adjudicated to settlement or final judgment. The drafters of the 1966 amendments to Rule 23 believed that class actions would not generally be appropriate for nationwide mass torts because common issues of fact and law might not predominate,[275] and because choice-of-law principles[276] might subject the victims' claims to different state tort doctrines.[277] In fact, certification of multistate class actions (of diverse membership) often depends upon choice-of-law considerations.[278]

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washington/2008-03-13-judges_n.htm.

[270] *See* WISCONSIN FEDERAL NOMINATING COMMISSION CHARTER (1995), *available at* http://www.judicialselection.us/uploads/documents/WI_charter_D88C3BA6A5469.pdf.

[271] HAWAII FEDERAL JUDICIAL SELECTION COMMISSION (2006), *available* at http://www.judicialselection.us/uploads/documents/HI_FJSC_charter_DFA1FE5BF22BE.pdf.

[272] *Id.* § 1.

[273] *Cf.* Johnsen, *supra* note 263, at 468 ("[T]he debate over judicial selection would benefit if we were to stop using the word ideology entirely.").

[274] *Id.* at 475 (footnotes omitted).

[275] FED. R. CIV. P. 23(b)(3).

[276] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

[277] *See* HENSLER ET AL., *supra* note 16, at 24.

[278] *See, e.g.*, *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002) (the need to apply multiple states' laws was among the considerations that rendered certification of nationwide classes improvident); *see also* David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM & MARY L. REV. 1247, 1282-83 (2007); *see also* Barbara Ann Atwood, *The Choice-of-Law Dilemma in Mass Tort Litigation: Kicking around* Erie, Klaxon, *and* Van Dusen, 19 CONN. L. REV. 9, 38-40 (1986); Russell J. Weintraub, *Choice-of-law as an Impediment to Certifying a National Class Action*, 46 S. TEX. L. REV. 893, 894-96 (2005); Ryan Patrick Phair, Comment, *Resolving*

By the mid-1990s the issue of choice-of-law became a "central battleground"[279] with federal courts routinely failing to certify—or even decertifying—multistate mass tort class actions.[280] Consequently, plaintiffs' attorneys began to abandon federal courts and tailored their class actions for state fora.[281] This shift in strategy was an instrumental factor leading to the enactment of CAFA,[282] as a veiled device of tort reform.[283]

The goal of the Class Court mechanism, on the other hand, should be to encourage the certification of nationwide mass tort class actions by streamlining choice-of-law decisions, and by providing the tools necessary to fairly and efficiently carry out localized (multiple-state) trials if necessary. Among the various strategies used to address choice-of-law issues,[284] the most widely accepted[285] default rule applies a single state's law to the entire class or subclass based on the defendant's principal place of business (PPB), as long as adequate contacts exist between the claims asserted and the forum state.[286] Congress[287] should apply the PPB default rule to Class Court proceedings where the sufficient contacts requirement is met, in order to simplify the certification and litigation of federal class actions in diversity.[288]

When applying the PPB rule is not feasible, the Class Court—in contrast to Multidistrict Litigation (MDL) courts[289]—should have the capability to

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the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions, 67 U. CHI. L. REV. 835, 835-36 (2000).

[279] *See* Marcus, *supra* note 278, at 1284.

[280] *Id.* at 1306-08.

[281] *Id.* at 1285-86.

[282] *Id.*; *see also* Jed J. Borghei, Note, *Class Action Fairness A Mature Solution to the 23(b)(3) Choice of Law Problem*, 95 GEO. L.J. 1645, 1648-49 (2007) (describing how choice-of-law problems can lead to denials of 23(b)(3) certification as well as the political and legal implications).

[283] *See* Marcus, *supra* note 278, at 1280 ("CAFA['s] . . . supporters believe that the statute will result in fewer certified classes. This result would mean fewer settlements and verdicts in plaintiffs' favor, which in turn would limit the regulatory reach of the sorts of state laws often enforced by way of class actions."); *see also supra* text accompanying notes 33-37.

[284] *Id.* at 1283-84.

[285] *Id.* at 1301; *see, e.g.*, Simon v. Phillip Morris Inc., 124 F. Supp. 2d 46, 70 (E.D.N.Y. 2000); *In re* Kirschner Med. Corp. Sec. Litig., 139 F.R.D. 74, 83-84 (D. Md. 1991).

[286] *See Kirschner*, 139 F.R.D. at 84.

[287] Because the Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right" the U.S. Supreme lacks the authority under the Rules Enabling Act to impose a PPB default rule as a matter of procedure. 27 U.S.C. § 2072(b) (2000).

[288] *See also* Lisa Litwiller, *Why Amendments to Rule 23 are Not Enough: A Case for the Federalization of Class Actions*, 7 CHAP. L. REV. 201 (2004) (arguing that Congress should place multi-state class actions within the exclusive jurisdiction of federal courts; justifying this conclusion because, *inter alia*, inconsistent choice-of-law decisions lead to anomalous results).

[289] *See* HENSLER ET AL., *supra* note 16, at 23 (in Multidistrict Litigation, "the transferee judge is supposed to manage the cases only through the pretrial period; if the case are not settled, they

effectively manage localized (multiple-state) trials. In order to execute localized trials and the day-to-day management of all federal class actions from a central location, the Class Court will need a powerful web-based capability.

Under the proposed system, the Class Court would adjudicate, implement, and enforce all federal class actions in diversity from a single location. In theory it could fulfill these responsibilities by utilizing a web-based interface to: (1) allow remote hearings, paperless proceedings, and streamlined notice/opt-out procedures; and (2) provide details about the terms and status of class-action implementations and the Class Court's ongoing jurisdiction.

The advantages of using a single, centralized venue for federal class-action adjudication cannot outweigh the burdens if the parties in pendant proceedings are required to physically appear before the Class Court. A web-based interface could mitigate these burdens[290] by allowing the electronic submission of legal documents, the administration of proceedings via an online calendar, and the performance of remote hearings with parties (and perhaps class members)[291] in different locations around the country. The interface could also increase the effectiveness of, and reduce the time and expense required to satisfy, the notice requirements[292] for class certification by using electronic communications.

The status of the Class Court's exclusive jurisdiction, the terms of class-action instruments, and specific details about the progress of implementation should be promulgated on a database or "Registry."[293] When the Class Court decided that the implementation period had concluded the Registry would be updated to reflect the Class Court's surrender of its exclusive and continuing jurisdiction. This would allow other federal and state courts in pendant proceedings to enforce the preclusive effect of the instrument in a traditional, dual-court fashion. When feasible, the terms of class-action instruments and the status of implementation would be available to the public in order to increase public awareness[294] and confidence in the judicial system, and to improve accountability to absent class members.

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are to be sent back to their original districts for trial, and plaintiff and defense attorneys must bear the burden of trying them in multiple, dispersed locations"); 28 U.S.C. § 1407(a) (2000) ("Each action . . . shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .").

[290] *See* HENSLER ET AL., *supra* note 16, at 118 (describing the "fairness hearings" conducted in five cities as part of the *Agent Orange* litigation).

[291] *See id.*

[292] *See* FED. R. CIV. P. 23(c)(2).

[293] *See* Wasserman, *supra* note 8, at 524-28.

[294] *See* HENSLER ET AL., *supra* note 16, at 5 ("Why don't we know more about class actions? Studying this form of litigation is extraordinarily difficult. No national registry exists that can tell us how many class actions there are, or what types of situations lead to them.").

If the Class Court mechanism had existed during the implementation of the L-P class-action settlement, then the inter-court injunction would not have been ordered and the settlement agreement would have been enforced in a more timely and consistent manner.

C. Class Court Mechanism as Applied to Sandpiper

In *Sandpiper* the Ninth Circuit Court of Appeals reversed the district court's injunction in part because "allowing L-P to lose on the merits in state court, yet run to federal court for an injunction just days before the state court decision achieved preclusive status, offends the very 'principles of equity, comity, and federalism' that undergird the Anti-Injunction Act."[295] This dynamic could have been avoided under the Class Court mechanism.

Had the *Sandpiper* scenario arisen under the Class Court system, the Minnesota court would not have decided L-P's res judicata defense but would have deferred this decision to the Class Court as a matter of procedure. Under this procedure, counsel for the parties would have remained at the Minnesota venue and conducted their interactions with the Class Court via the web-based interface. The Class Court would render a fair and equitable judgment consistent with similar rulings relating to other state proceedings and based upon current information about the class-action implementation. Finally, L-P could not engage in judge or law-shopping because its res judicata defense would be decided by the Class Court.

Under the Class Court mechanism, the use of inter-court injunction would be avoided absent a "strong and unequivocal showing that such relief is necessary."[296] Such a situation could theoretically arise after the Class Court surrendered its exclusive and continuing jurisdiction over the L-P class-action instrument, or if the Minnesota court disregarded the deferral procedure. However, following the Class Court's express renunciation of jurisdiction over class-action implementation the case for injunction under the AIA would be weak, and relief from error, if any, would best be accomplished through the state appellate courts or ultimately the U.S. Supreme Court.[297]

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[295] Sandpiper Vill. Condo. Ass'n v. Louisiana-Pac. Corp., 428 F.3d 831, 851 (9th Cir. 2005).

[296] *Id.* at 842 (quoting Bechtel Petroleum, Inc. v. Webster, 796 F.2d 252, 253-54 (9th Cir. 1986)) (internal quotations omitted).

[297] Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 287 (1970).

V. CONCLUSION: A UNIFYING APPROACH TO CLASS-ACTION ADJUDICATION

Roughly 400 years ago, Francis Bacon counseled us that new remedies are the key to longevity because time is the greatest innovator.[298] In this vein, the innovation of class-action adjudication has provided both unique opportunities for judicial improvement, and significant challenges to the dual-court paradigm first articulated[299] by Congress in 1793. The use of inter-court injunctions to protect the preclusive effect of class-action instruments, thereby promoting fairness and judicial economy, can ultimately disrupt inter-court relations and delay the final resolution of disputes for many years.

Congress should provide a unifying approach to class-action adjudication by creating a single Article III "Class Court" with exclusive and continuing jurisdiction over all federal class-action lawsuits in diversity, and with exclusive purview to interpret and enforce the preclusive effect of federal class-action instruments as a matter of procedure. Web-based technologies can allow the Class Court to operate from a single location without disrupting the parties in pendant lawsuits that might be affected by the inter-court procedural requirements.

The use of a transparent and neutral, merit-based procedure for appointing Class Court judges could reduce or eliminate the perceived differences in judicial philosophy and jurisprudence between the state and federal courts, thus leading to the increased use of nationwide class actions and fewer duplicative suits. Furthermore, applying the PPB default choice-of-law rule to Class Court proceedings, when the "sufficient contacts" requirement is met, could simplify the certification and litigation of federal class actions in diversity.

Modern American jurisprudence must be willing to shape itself to meet modern challenges. The ideals of federalism and comity must not serve as immovable barriers, but instead must guide the evolution of federal courts and modern procedure towards achieving realistic goals emphasizing the interests and rights of litigants. Radical reform is sometimes necessary not only to deal with new exigencies, but also to preserve those treasured notions that would otherwise preclude such reform.

Christopher D. Bayne[300]

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[298] *See* BACON, *supra* note 1, at 71.

[299] *See* Judiciary Act of 1793, ch. 22, 1 Stat. 333 (1793).

[300] J.D. Candidate 2009, William S. Richardson School of Law, University of Hawai'i at Mānoa. I wish to acknowledge Professor Calvert G. Chipchase, Esq. (Cades Schutte LLP) and Professor Eric K. Yamamoto (Professor of Law, William S. Richardson School of Law) for their generous support and assistance with this article.

Propagating Cultural *Kīpuka*: The Obstacles and Opportunities of Establishing a Community-Based Subsistence Fishing Area

"I guess the saying is, if you teach a man to fish, he going eat for the rest of his life. I think what we want to change the saying down in Mo'omomi to, if you teach a man the right way to fish, he going eat for generations."[1]

I. INTRODUCTION

In Hawaiian tradition, *kīpuka* are known as islands of life spared from destruction within a sea of hardened lava.[2] The vegetation and life preserved within *kīpuka* are precious resources from which new life may regenerate and multiply. Similarly, cultural *kīpuka* are islands of culture spared from rapid political, social, and economic change caused by colonization and modernization.[3] Cultural *kīpuka* exist today within numerous districts across the state where native Hawaiian traditional and customary practices remain active.[4] These cultural *kīpuka* are valuable resources to perpetuate the Hawaiian culture and offer valuable lessons about living in harmony with Hawai'i's land and sea.

The ancient Hawaiians had a deep connection with the rhythms, conditions, and cycles of the land and sea.[5] This intimate relationship developed because of their dependence on the land and sea for subsistence.[6] Native Hawaiians believed the land, sea, animals, and plants were of the same order as people.[7] In addition, they were said to embody the spirit of an *'aumakua* or ancestral spirit, or even an *akua* or god.[8] Accordingly, native Hawaiians treated the land, plants, and all living creatures with utmost respect while they used the

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[1] Videotape: Mālama o Mo'omomi: Community Conservation (Juniroa Productions 1997) (on file at UH Mānoa: Sinclair AV Center) (quoting Wayde Lee, Director of Hui Mālama o Mo'omomi).

[2] MARY KAWENA PUKUI & SAMUEL H. ELBERT, NEW POCKET HAWAIIAN DICTIONARY 62 (1975).

[3] DAVIANNA PŌMAIKA'I MCGREGOR, NA KUA'ĀINA: LIVING HAWAIIAN CULTURE 24 (2007).

[4] *Id.* at 8.

[5] *See* Kelson K. Poepoe et al., *The Use of Traditional Knowledge in the Contemporary Management of a Hawaiian Community's Marine Resource*, *in* FISHERS' KNOWLEDGE IN FISHERIES SCIENCE AND MANAGEMENT 119-20 (Nigel Haggan, Barbara Neis & Ian G. Baird eds., 2007).

[6] *Id.*

[7] *See* HAWAIIAN FISHING LEGENDS xv (Dennis Kawaharada ed., 1992); *see generally* LILIKALĀ KAME'ELEHIWA, NATIVE LAND AND FOREIGN DESIRES (1992) (detailing the Hawaiian worldview and accounts of native Hawaiian history).

[8] HAWAIIAN FISHING LEGENDS, *supra* note 7, at xiv-xv.

resources to live.[9] These values informed the ancient *kapu* system and remain alive today within cultural *kīpuka* where native Hawaiians still efficiently and sustainably use the land and sea's natural resources for subsistence.[10]

The Hawai'i State Legislature acknowledged that native Hawaiian fishing practices and management techniques offer lessons for fishery conservation and management today. The Senate Committee on Ways and Means recognized that "Hawaiians were great fishermen and established the *kapu* system to preserve the ocean's resources."[11] Other committees encouraged the preservation of subsistence fishing because "there are communities where subsistence fishing is necessary for the economic viability of its residents."[12] As a result, in 1994, the legislature promulgated Act 271 "to provide native Hawaiians with the opportunity to . . . guide Hawai'i and the world in fishery conservation,"[13] and "ensure that subsistence fishing areas continue to be available for use by native Hawaiians."[14]

Act 271 allows the Department of Land and Natural Resources (DLNR) to designate areas as Community Based Subsistence Fishing Areas (CBSFA), where community members assist DLNR to create management strategies based on native Hawaiian values.[15] Act 271 created the means for the state to uphold the state's constitutional duties to "protect the public's use and enjoyment of the reefs,"[16] and "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a* tenants who are descendents of native Hawaiians."[17] CBSFAs also allow communities to participate in managing the marine resources they depend on for survival.[18] Currently, nineteen communities across the state are interested or involved in creating CBSFAs.[19] Only two areas, however, are permanently designated CBSFAs.[20]

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[9] *Id.*

[10] *See* Poepoe, *supra* note 5.

[11] S. REP. NO. 2965, 17th Leg. (Haw. 1994) (Standing Comm.).

[12] S.J. REP. NO. 2713, 17th Leg. (Haw. 1994) (Standing Comm.).

[13] S. REP. NO. 2965, 17th Leg.

[14] H.R. REP. NO. 441-94, 17th Leg. (Haw. 1994) (Standing Comm.).

[15] *See, e.g.*, HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9 (2005 & Supp. 2007).

[16] HAW. CONST. art. XI, § 6.

[17] *Id.* art. XII, § 7.

[18] *See* R. S. POMEROY & R. RIVERA-GUIEB, FISHERY CO-MANAGEMENT: A PRACTICAL HANDBOOK 16-17 (2006) (analyzing community stewardship and co-management techniques in rural communities throughout the world and how to implement successful management systems).

[19] Telephone Interview with Debbie Gowensmith, Dir., Haw. Cmty. Conservation Network (Mar. 4, 2008).

[20] *Id.*

This paper analyzes the problems DLNR and communities face in implementing the CBSFA management scheme. Section II reviews Hawai'i's history of fishery management and the evolution of fishery management laws that led to the creation of the CBSFA management scheme. Section III examines the obstacles that communities face in implementing the CBSFA management scheme by examining the challenges the Mo'omomi, Miloli'i, and Hā'ena communities faced during the designation and rulemaking processes.

II. THE EVOLUTION OF FISHERY MANAGEMENT IN HAWAI'I AND THE EMERGENCE OF THE COMMUNITY BASED SUBSISTENCE FISHING AREA

With the passage of Act 271 in 1994, the Hawai'i State Legislature established a process to designate CBSFAs.[21] Act 271, which is now codified as Hawaii Revised Statutes (H.R.S.) section 188-22.6, was promulgated to "provide native Hawaiians with an opportunity to educate and . . . guide Hawaii and the world in fishery conservation."[22] Act 271 section (a) provides:

> The department of land and natural resources may designate community based subsistence fishing areas and carry out fishery management strategies for such areas, through administrative rules adopted pursuant to chapter 91, for the purpose of reaffirming and protecting fishing practices customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion.[23]

H.R.S. section 188-22.6 permits DLNR to designate certain nearshore areas as CBSFAs.[24] After a CBSFA is designated, section 188-22.6 requires DLNR to partner with subsistence communities to "carry out fishery management strategies" using formal rulemaking procedures under chapter 91.[25] Unlike other fishery management schemes, CBSFAs provide communities the opportunity to participate in managing the marine resources they depend on for survival.[26] The rules developed for the CBSFA must uphold native Hawaiian traditional and customary fishing practices "for subsistence, cultural, and religious purposes."[27]

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[21] H.R. 3446, 17th Leg., Reg. Sess. (Haw. 1994) (Comm. Rep.).

[22] S. REP. NO. 2965, 17th Leg. (Haw. 1994) (Standing Comm.).

[23] HAW. REV. STAT. § 188-22.6 (2005).

[24] *Id.*

[25] *Id.*

[26] POMEROY, *supra* note 18, at 16-17.

[27] *See, e.g.*, HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9 (2005 & Supp. 2007).

A. The Evolution of Fishery Management in Hawai'i

1. The significance of fishing in ancient Hawai'i

Long before the refrigerator or grocery store became essential for survival in modern life, the native Hawaiians directly depended on the land and sea for nourishment.[28] The native Hawaiian diet consisted of vegetable food, and meat or marine animals;[29] however, fish and other marine animals were the main source of protein for Hawaiians because the surrounding sea was both an accessible and bountiful resource.[30]

A rich fishing tradition developed due to native Hawaiians' particular dependence on the sea.[31] Specialized fishing methods and gear were passed down through generations, and specific tools were used to catch certain types of marine life.[32] For instance, nets were used to catch *'opelu* or mackerel, hook and line were used to catch *ahi* or tuna, and baskets were used to catch shellfish such as lobster.[33] Fishermen honored various gods and practiced specialized religious ceremonies at *heiau* or altars.[34] Fishing methods even explain how the Hawaiian Islands were created.[35] A popular Hawaiian legend tells of a famous fisherman named Maui who "fished the islands up from the ocean with the magic fishhook," and created the Hawaiian Island chain.[36]

2. Early marine conservation practices

Traditional fishing practices maintained fish stocks at similar levels to fish stocks that are afforded full protection under current laws.[37] Prior to western contact, Hawai'i's "fisheries were resilient and healthy," despite the native

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[28] *See generally* PATRICK VINTON KIRCH, FEATHERED GODS AND FISHHOOKS 199 (1985) (analyzing ancient fishhooks and fishing gear).

[29] HAWAIIAN FISHING LEGENDS, *supra* note 7, at xi. Domestic animals, including pigs and dogs, were not eaten on a daily basis. *Id.*

[30] KIRCH, *supra* note 28. These animals were eaten during rituals and considered "status foods." *Id.*

[31] *See generally* A.D. Kahaulelio, *Fishing Lore*, KA NUPEPA KUOKOA, Feb. 28 – July 4, 1902, *reprinted in* A.D. KAHAULELIO, FISHING LORE (Mary K. Pukui trans., 1902) (describing personal fishing stories about effective customary fishing methods); DAVID MALO, HAWAIIAN ANTIQUITIES, (Nathaniel B. Emerson trans., 2d ed. 1951) (detailing specialized fishing methods, gear, religious ceremony, and beliefs surrounding fish and fishing).

[32] MALO, *supra* note 31, at 8.

[33] *Id.*

[34] *Id.*

[35] *See* MCGREGOR, *supra* note 3, at 24.

[36] *Id.*

[37] CHARLES BIRKELAND ET AL., THE IMPORTANCE OF REFUGES FOR REEF FISH REPLENISHMENT IN HAWAI'I 8 (2d ed. 2002).

Hawaiian population reaching an estimated one million people and "nearly every member . . . regularly participat[ing] in some form of fishing."[38]

Native Hawaiians sustained marine resources because the ancient land divisions and social system provided for the efficient and sustainable use of the resources.[39] The islands were divided into land divisions called *ahupua'a*, which typically ran from the mountain to the sea.[40] Within the divisions, upland community members exchanged food crops they cultivated such as *kalo* or taro with lowland members who possessed fish and other goods gathered in the coastal marine area.[41] The divisions defined and distributed the resources available,[42] and delineated boundaries where *hoa'āina*, the *ahupua'a* residents, could enter to access needed resources.[43]

The *kapu*, or a prohibition system, allowed *ali'i* or chiefs, and the *konohiki* that supervised the *hoa'āina*, to reinforce and coordinate conservation practices.[44] Fishing *kapu* restricted or prohibited fishing according to season, area, or type of harvested marine resource.[45] For instance, *konohikis* imposed a nearshore *kapu* that banned the taking of fish, seaweeds, and shellfish in the

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[38] KUMU PONO ASSOCS., KA HANA LAWAI'A A ME NA KO'A O NA KAI 'EWALU iii (Kamehameha Schools Land Assets Div. ed., 2003) (compiling accounts from native Hawaiian elders, government communications, and historical accounts of marine fisheries and traditional and customary fishing practices).

[39] MCGREGOR, *supra* note 3, at 27.

[40] RICHARD H. KOSAKI, HAWAII LEGISLATURE LEGISLATIVE REFERENDUM BUREAU, KONOHIKI FISHING RIGHTS 1 (Leg. Rep. No. 1, 1954) (reviewing the evolution and status of remaining konohiki fishing rights). In some areas, independent tracts located outside the *ahupua'a* called *'ili kūpono* or *'ili lele* were reserved for *ahupua'a* residents' use. Alan Murakami, Konohiki *Fishing Rights and Marine Resources*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 173, 173 (Melody Kapilialoha MacKenzie ed., 1991) (detailing the evolution of *konohiki* fishing rights from ancient Hawai'i to U.S. statehood and beyond).

[41] Davianna Pōmaika'i McGregor, *An Introduction to the Hoa'aina and Their Rights*, 30 HAW. J. HIST. 1, 5-6 (1996) (discussing the ancient Hawaiian worldview and the rights of native Hawaiians today).

[42] *See* MCGREGOR, *supra* note 3, at 27.

[43] *Id.* at 26.

[44] *See generally* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008) (detailing the legal and cultural history of Hawai'i); MCGREGOR, *supra* note 3, at 23-29; HAWAIIAN FISHING LEGENDS, *supra* note 7, at xii. *Kapu* also provided the *ali'i* and *konohiki* the means to survive. *See* MCGREGOR, *supra* note 3, at 23-29. The *ali'i* retained the right to have a share of the marine foods gathered for the first couple of days after the *kapu* was lifted. *Id.* Then, the *konohiki* were allowed to share the catch. HAWAIIAN FISHING LEGENDS, *supra* note 7, at xiv. Only after both the *ali'i* and *konohiki* were served, was the area declared *noa*, or free or open. *Id.* at xiii.

[45] HAWAIIAN FISHING LEGENDS, *supra* note 7, at xii–iv. *Kapu* applied to marine resources as well as land resources such as fish found in fresh water streams, which were harvested during the winter and banned during the summer. *See id.* at xii.

nearshore area to allow the resources to replenish.[46] When nearshore fishing was prohibited, *konohikis* allowed deep sea fishing.[47] Another *kapu* alternated fishing closures between sections of shoreline.[48] The *kapu* was lifted only after the *konohiki* inspected the area and determined the marine life was mature and ready for use.[49]

Kapu also allowed specific marine life populations to replenish by prohibiting fishing during species' spawning seasons.[50] For instance, *aku* or skipjack tuna was free for fishing when *aku* was "fat and plentiful" during the winter, and *kapu* during its spawning season in the summer.[51] The legend of Paumalū demonstrates the belief that breaking *kapu* would result in sickness or death.[52] According to the legend, a shark killed a woman after she broke *kapu* by taking more fish than she could consume.[53] In the ancient days, the land divisions and the alternating fishing closures kept the amount of marine resources taken by native Hawaiians within sustainable levels.

3. Kapu *transitioned into law*

Ancient fishing practices were codified into law when Kamehameha III[54] enacted the Law of Kamehameha III on June 7, 1839, which was later amended by Chapter III of the Laws of 1842 section 8.[55] The laws defined fishing rights when it sanctioned the *konohikis'* right to regulate fishing grounds through *kapu*, recognized the people's right to access the fisheries, and reserved certain marine species for the king.[56]

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[46] *Id.*

[47] *Id.*

[48] JEAN SCOTT MACKELLAR, HAWAII GOES FISHING 153 (1968) (detailing ancient *kapu* system and other fishing traditions).

[49] HAWAIIAN FISHING LEGENDS, *supra* note 7, at xiii.

[50] *Id.* at xii–xiv.

[51] *Id.* at xiv. A *kapu* was also placed on certain species of fish. BIRKELAND ET AL., *supra* note 37, at 6. Most of the Hawaiian populations were not allowed to eat *ulua* or jack fish, *kumu* or goatfish, or *honu* or sea turtles. *Id.* In addition, only the *ali'i* or chiefs could eat *moi* or threadfish. *Id.*

[52] HAWAIIAN FISHING LEGENDS, *supra* note 7, at xv-xvi.

[53] *Id.* at xvi.

[54] MCGREGOR, *supra* note 3, at 31-33. Kamehameha III, or Kauikeaouli, was the son of King Kamehameha who had established absolute rule over the Hawaiian Islands. *Id.* As *kuhina nui*, the executive officer during the monarchy, Kamehameha III initiated steps to create a constitutional monarchy, private property, and a process to naturalize foreigners as citizens of Hawai'i. *Id.*

[55] Murakami, *supra* note 40, at 174.

[56] *Id.*

The *kapu* system survived at least until the Māhele of 1848.[57] An 1851 amendment to the organic acts of 1845–46, which established the kingdom's governmental structure, however, drastically changed fishing rights and the *kapu* system.[58] The 1851 revision "granted all fishing grounds . . . belonging to the government to the people for free and equal use of all persons."[59] Between 1850-1900, the Hawai'i Supreme Court struggled to define the scope of remaining *konohiki* fishing rights within the private property system and the people's right to use the fishing grounds owned by the government.[60]

Fishing rights further changed following the annexation of Hawai'i to the United States as a Territory in 1898.[61] In 1900, Congress passed Hawai'i's Organic Act, which established the government's structure as a new territory.[62] The Organic Act expressly intended "to destroy, so far as it is in its power to do so, all private rights of fishery and to throw open the fisheries to the people."[63] Accordingly, section 95 of the Organic Act repealed all exclusive fishing rights except for those rights that were "vested."[64] Section 96 detailed that grounds were "vested" if owners "established" the fishing rights by filing a petition and proving the claim in circuit court within a two year period.[65] In addition, section 96 allowed the "condemnation of property for public use" upon payment of "just compensation" for fishing rights that had vested.[66] From 1900 to 1959, Territorial courts clarified the meaning of "vested" fishing rights.[67] The exact number of *konohiki* fisheries that once existed remains

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[57] *See id.* The Māhele of 1848 allowed *hoa'āina* to obtain fee-simple ownership of land they lived and actively cultivated. *Id.* To obtain the lands known as *kuleana* lands, *hoa'āina* were required to submit personal testimonies to verify their residency and land use practices. *Id.* The documentation recorded during the Māhele reflects that at least 1,233 claims for fishery resources were recorded in the Register and Testimony Volumes of the Land Commission. *Id.*

[58] Murakami, *supra* note 40, at 177.

[59] *Id.*

[60] *See id.* at 175-77.

[61] *Id.*

[62] *Id.* at 175; *see also* Hawaii Organic Act, ch. 339, 31 Stat. 141 (1900).

[63] *In re* Fukunaga, 16 Haw. 306, 308 (1904).

[64] Murakami, *supra* note 40, at 177, 189 n.32; *see also* Hawaii Organic Act § 95 (providing that "all laws of the Republic of Hawaii which confer exclusive fishing rights . . . are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond . . . shall be free to all citizens of the United States, subject however, to vested rights; but no such vested right shall be valid after three years from the taking effect of this Act unless established as hereinafter provided").

[65] Murakami, *supra* note 40, at 177, 189 n.33 (citing Hawaii Organic Act section 96).

[66] *Id.* at 178-84.

[67] *See id.* The Territorial Courts construed vesting narrowly and limited the survival of such fishing rights. *Id.* However, the courts tended to view *konohiki* rights as a legitimate form of property ownership protected by due process. *Id.*

unknown.[68] Of 300 to 400 privately owned fisheries identified in 1900, however, only 101 were registered by thirty-five owners in 1939.[69]

Upon attaining statehood in 1959, the State of Hawai'i "reaffirmed the federal policy of opening the fisheries to all," yet continued to recognize "vested rights" of *konohiki* fisheries.[70] The 1978 Constitutional Convention produced Article XI section 6 of the Hawai'i Constitution, which incorporated the 1900 Organic Act by declaring "[a]ll fisheries in the sea waters of the State . . . shall be free to the public, subject to vested rights and the right of the State to regulate the same."[71]

B. Marine Management Today

1. Current state powers to regulate Hawai'i's marine resources

The State Constitution designated the State of Hawai'i to assume the role of both the *ali'i* and *konohiki* of ancient days, as the managing agent responsible for caring for the land, sea, and natural resources, and ensuring the wellbeing of its residents. Article XI, section 6 of the Constitution mandates, "[t]he State shall have the power to manage and control the marine, seabed and other resources located within the boundaries of the State."[72] Article XI, section 6 imposed an affirmative duty to "protect the public's use and enjoyment of the reefs."[73] Accordingly, the Hawai'i State Legislature handed DLNR broad authority to manage "all water and coastal areas of the State," including the taking of aquatic life, "boating, ocean recreation, and coastal areas programs."[74] Through a subdivision known as the Division of Aquatic Resources (DAR), DLNR regulates and limits access to fishing areas for their protection.[75]

The state's management authority and police powers[76] extend over Hawai'i's nearshore areas including the "upper reaches of the wash of the wave on shore

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[68] *Id.*

[69] *Id.*

[70] *See, e.g., id.* at 184; HAW. REV. STAT. § 187A-23 (2005).

[71] HAW. CONST. art. XI, § 6.

[72] *Id.*

[73] *Id.*

[74] HAW. REV. STAT. § 26-15(b) (2006). Furthermore, the legislature repeated that "all fishing grounds . . . belonging to the government . . . shall be and are forever granted to the people, for the free and equal use by all persons," but "for the protection of these fishing grounds, the [DLNR] may manage and regulate the taking of aquatic life." HAW. REV. STAT. § 187A-21 (1993).

[75] *See* HAW. REV. STAT. § 187A-2(7) (2005). DLNR also has the duty to "gather and compile information and statistics concerning the habitat and character of . . . aquatic resources in the State." *Id.* § 187A-2(6).

[76] HAW. REV. STAT. § 199-4(a) (2005) (providing that "[p]ersons appointed and

seaward"[77] to about three miles offshore.[78] The federal government manages ocean resources beyond three miles to about 200 miles in an area known as the Exclusive Economic Zone (EEZ).[79] International law governs the sea beyond two hundred miles offshore under the United Nations Law of the Sea Convention.[80]

2. *Current approaches to fishery management in Hawai'i*

Through rulemaking, DLNR "formulate[s] and from time to time recommend[s] . . . additional legislation" to implement the law's conservation objectives.[81] DLNR uses five main techniques to regulate nearshore marine resources: (1) size limits; (2) bag limits; (3) open and closed fishing seasons; (4) gear restrictions; and (5) restrictions on types of bait used and the conditions for entry into areas for taking aquatic life.[82] These techniques are applied either as a species-specific regulation, or as a blanket restriction within specific areas or throughout all state waters.[83]

DLNR administers six main marine management areas.[84] The regulations applied within each area address the area's specific needs.[85] The categories are: (1) marine life conservation districts (MLCD);[86] (2) fishery management areas

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commissioned" to exercise DLNR's police powers "may exercise all of the powers and authority of a police officer, including the power of arrest").

[77] HAW. REV. STAT. § 188-22.5 (2005 & Supp. 2007).

[78] *See* 43 U.S.C. § 1312 (West, Westlaw through 2008). The federal government gave the states "title to and ownership of" the land and natural resources under the Federal Submerged Lands Act. *See* Brooke Kumabe, Comment, *Protecting Hawai'i's Fisheries: Creating an Effective Regulatory Scheme to Sustain Hawai'i's Fish Stocks*, 29 U. HAW. L. REV. 243, 250 (2006) (analyzing current laws that regulate Hawai'i's fisheries).

[79] United Nations Convention on the Law of the Sea, arts. 56-57, Dec. 10, 1982, 1833 U.N.T.S. 397.

[80] *Id.*

[81] HAW. REV. STAT. § 187A-2(8) (2005).

[82] *Id.* § 187A-5; *see also* HAW. CODE. R. §§ 13-49 to -52 (2008), *available at* http://hawaii.gov/dlnr/dar/admin_rules.html.

[83] *See id.* §§ 13-28 to -100.

[84] *See generally* Denise Antolini et al., *Hawai'i's Marine Protected Areas: Governance Framework*, *in* 1 HAWAI'I MARINE PROTECTED AREAS GOVERNANCE STUDY (2003) [hereinafter Antolini et al., *Marine Protected Areas*] (on file with author) (providing legislative history and background information on MLCDs, FMAs, NARS, BFRAs, and other marine protected areas); HAW. CODE R. §§ 13-49 to -52 (listing the six main marine management areas and specific examples); Denise Antolini, *Marine Reserves in Hawai'i: A New Call for Community Stewardship*, 19 NAT. RESOURCES & ENV'T 36, 37-40 (2004) [hereinafter Antolini, *Marine Reserves*] (examining the six marine management areas).

[85] *See* Antolini, *Marine Reserves*, *supra* note 84, 37-40.

[86] HAW. REV. STAT. § 190-1 (2005).

(FMA);[87] (3) fisheries replenishment areas (FRA);[88] (4) natural area reserves (NARS);[89] (5) bottom fish restricted fishing area (BRFA);[90] (6) CBSFA;[91] and (7) miscellaneous areas for various purposes including, but not limited to, conservation.[92]

The first and most restrictive area is the MLCD.[93] Established in 1955, MLCD rules prohibit the fishing or taking of any marine life, or the altering of any "geological feature" within designated areas.[94] Originally, MLCDs were created to preserve certain marine environments that were considered valuable as an "underwater park" or educational tool.[95] For instance, a popular tourist destination, Hanauma Bay on the southeastern shore of O'ahu is a well-known MLCD that was established in 1967.[96] Others include Kealakekua Bay on Hawai'i Island and Pūpūkea on the North Shore of O'ahu.[97] The legislature, DLNR, or the public nominates potential MLCD sites.[98] DLNR has the authority to declare an area an MLCD or modify the boundaries of existing districts.[99] Currently, eleven MLCDs exist on four islands.[100]

The second type of regulated area is the FMA, which was created in 1981.[101] Within an FMA, specialized regulations are adopted either to resolve conflicts among marine users, or allow the resources to replenish by protecting marine species.[102] There are currently seventeen FMAs on six islands.[103]

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[87] HAW. REV. STAT. § 188F (2005).

[88] *Id.* § 188F-4.

[89] HAW. REV. STAT. § 195 (2005).

[90] HAW. CODE R. § 13-94-1 (2008), *available at* http://hawaii.gov/dlnr/dar/admin_rules.html.

[91] *See, e.g.*, HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9 (2005 & Supp. 2007).

[92] *See* Antolini, *Marine Reserves*, *supra* note 84, at 40.

[93] *See* Antolini et al., *Marine Protected Areas*, *supra* note 84, at 1.1.

[94] *See id.*; *see also* HAW. REV. STAT. § 190-1 (2005) (providing also that "[n]o person shall fish for or take any fish, crustacean, mollusk, live coral, algae . . . rock, coral, sand or other geological feature").

[95] Antolini, *Marine Reserves*, *supra* note 84, at 37-38.

[96] *Id.*

[97] *See, e.g.*, HAW. CODE R. §§ 13-29; -34 (2008), *available at* http://hawaii.gov/dlnr/dar/admin_rules.html.

[98] *See* Denise Antolini et al., *Pūpūkea Marine Life Conservation District: Designation Process and Constituency Identification*, *in* 2 HAWAI'I MARINE PROTECTED AREAS GOVERNANCE STUDY 2 (2003).

[99] *See id.*

[100] HAW. CODE R. §§ 13-28 to -38.

[101] Antolini et al., *Marine Protected Areas*, *supra* note 84, at 1.2-1.3.

[102] *See* Antolini, *Marine Reserves*, *supra* note, 84 at 38.

[103] *See* HAW. CODE. R. §§ 13-28 to -100 (2008).

An example of an FMA is the West Hawai'i Regional FMA[104] (WHFMA).[105] Prior to the WHFMA's designation in July 1998, a booming aquarium fish market and the dramatic disappearance of ornamental fish along the western coastline of Hawai'i Island sparked conflict between commercial dive and snorkel tour operators and aquarium fish collectors.[106] To resolve the conflict, the legislature consulted with the community to identify nine FRA along the West Hawai'i coast.[107] These FRAs formed the WHFMA to regulate ornamental fish harvesting and recreational coastline use.[108]

The fourth type of regulated area is NARS.[109] Created in 1970, NARS preserve areas declared "unique natural resources . . . that are highly vulnerable to loss by the growth of population and technology."[110] NARS studies, protects, and restores rare plants and animals by encouraging a healthy ecosystem.[111] NARS is implemented through a "statewide advisory committee that establishes the criteria" to guide the selection of potential sanctuaries and refuges.[112] Selected sites are admitted into a statewide natural area reserve system with its own set of management policies.[113] Of the nineteen NARS statewide, only 'Āhihi-Kīna'u on Maui includes a marine component.[114]

BRFA is the fifth management area, which was created in 1998.[115] There are nineteen BRFAs in Hawai'i including well-known areas such as Kāne'ohe bay, Makapu'u Point, and Barbers Point on O'ahu.[116] BRFAs are directed to conserve and manage bottom fish resources by incorporating area, species, and

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[104] HAW. REV. STAT. § 188F-2 (2005).

[105] Denise Antolini et al., *West Hawai'i Regional Fishery Management Area: Designation Process and Constituency Identification*, *in* 1 HAWAI'I MARINE PROTECTED AREAS GOVERNANCE STUDY, (2003) (on file with author) (analyzing West Hawai'i Regional Fishery Management Area's designation process).

[106] *Id.*

[107] *Id.*

[108] *See id.* Another example of an FMA is the Manele Harbor FMA on Lana'i, created in 1984. HAW. CODE R. § 13-53 (Weil 2003). Regulations imposed within that FMA preserve pole and line fishing but banned net fishing. *Id.* The law was passed after conflict arose between those two fishing groups who sought the same stocks of seasonal baitfish schools including *ama'ama* or mullet, *'oama* or young goatfish, and *halalu*, otherwise known as young *akule* or bigeye scad. Antolini, *Marine Reserves*, *supra* note 84, at 38.

[109] Antolini et al., *Marine Protected Areas*, *supra* note 84, at 1.4-1.5.

[110] HAW. REV. STAT. § 195-1 (2005).

[111] State of Hawaii Department of Land & Natural Resources, Managing the NARS, http://hawaii.gov/dlnr/dofaw/nars/managing-the-natural-area-reserves (last visited Nov. 15, 2008) [hereinafter *Managing the NARS*].

[112] Antolini, *Marine Reserves*, *supra* note 84, at 39.

[113] *Managing the NARS*, *supra* note 111.

[114] Antolini, *Marine Reserves*, *supra* note 84, at 39.

[115] Antolini et al., *Marine Protected Areas*, *supra* note 84, at 1.6-1.7.

[116] *Id.* at 1.7.

gear restriction methods.[117] For example, bottom fishing is banned within BRFAs;[118] however, in non-BRFAs, commercial bottom fishing is restricted through gear restrictions,[119] and non-commercial bottom fishing is restricted through bag limits.[120]

The sixth type of regulatory scheme was created in 1994 and is the CBSFA.[121] Unlike any other management scheme, CBSFAs are designed to protect native Hawaiian subsistence fishing practices that are traditionally and customarily exercised.[122] First, an area must be designated a CBSFA.[123] Then, communities are allowed to propose restrictions and "suggest methods of evaluation, monitoring, funding, and enforcement."[124]

The last management technique imposes restrictions for various purposes, including, but not limited to, conservation.[125] First, the taking of any aquatic life is prevented in the Hawai'i marine laboratory refuge that is used and maintained by the University of Hawai'i.[126] The reefs of Moku o Lo'e, or Coconut Island, in Kāne'ohe Bay is an example of a laboratory refuge.[127] Military buffer zones are another type of restricted area for purposes other than conservation.[128] For example, the eleven mile buffer zone surrounding Kāne'ohe Marine Corps Base Hawai'i on O'ahu is set aside to protect the public.[129] There are also area restrictions due to navigation purposes, such as the restrictions placed within Honolulu and Hilo harbors.[130] Lastly, an offshore protective zone surrounds Kaho'olawe to protect the public from unexploded ordinance.[131]

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[117] HAW. CODE R. § 13-94 (2008).

[118] *Id.* § 13-94-8.

[119] *Id.* § 13-94-6 (noting that using a "trap, trawl, bottomfish longline or net" to take bottom fish is prohibited within BRFAs unless nets are used to bring a fish onto a vessel).

[120] *Id.* § 13-94-7 ("[T]o conserve bottomfish resources . . . it is unlawful for any person, without a current commercial marine license . . . to take or possess more than five onaga, five ehu, or a combined total of five of both.").

[121] *See, e.g.*, HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9 (2005 & Supp. 2007); *see also* Antolini et al., *Marine Protected Areas*, *supra* note 84, at 1.8.

[122] *See, e.g.*, HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9.

[123] *See* Antolini, *Marine Reserves*, *supra* note 84, at 40.

[124] *Id.*

[125] *Id.*

[126] HAW. REV. STAT. § 188-36 (2005).

[127] *Id.*

[128] Antolini, *Marine Reserves*, *supra* note 84, at 40.

[129] *Id.*

[130] *Id.*

[131] *Id.*

In addition to the area restrictions, DLNR imposes gear and other restrictions designed to protect specific fish species.[132] Twenty-nine marine fisheries and resources are regulated with size, seasonal, and catch limitations.[133] For instance, it is unlawful to "posses with the intent to sell, or offer for sale," or "spear any or possess any speared ahi less than three pounds in weight."[134]

To enforce this comprehensive collection of laws and regulations, DLNR is afforded full police power to enforce laws and regulations in its jurisdiction.[135] DLNR designated the Division of Conservation and Resources Enforcement (DOCARE) the enforcement agency responsible for enforcing its regulations.[136]

C. The Emergence of the CBSFA

Known for its abundant resources and strategic location between O'ahu and Maui, Moloka'i was a land that was highly sought after by traditional chiefs.[137] Western trading and whaling ships, however, viewed the land as unsuitable for trade and agricultural business, and passed the island for more lucrative shores.[138] As a result, Moloka'i people became largely secluded from the rapid economic changes the other islands faced.[139] Moloka'i communities have endured more than twenty years of economic instability starting from the closure of Moloka'i's last pineapple company in 1987,[140] to the closure of the

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[132] *See, e.g.*, HAW. CODE R. §§ 13-75, -95, -49 (2008), *available at* http://hawaii.gov/dlnr/dar/admin_rules.html.

[133] *See* HAW. CODE R. § 13-95-4 to -71 (Weil 2003).

[134] *Id.* § 13-95-17. DLNR also manages Hawai'i's marine resources through restrictions on certain types of fishery uses. *Id.* § 13-74. For instance, DLNR has imposed a general ban on all longline fishing within state waters and even a ban on selling marine life taken as a result of longline fishing. *See id.* § 13-94-2, -6. Also, a permit must be obtained to fish for commercial purposes and to sell any marine animal or product. *Id.* § 13-74-20.

[135] *See* HAW. REV. STAT. § 187A-2(7) (2005) ("[DLNR shall][e]nforce all laws relating to the protecting, taking, killing, propagating, or increasing of aquatic life within the State and the waters subject to its jurisdiction.").

[136] *See generally id.* § 199; State of Hawaii, Department of Land and Natural Resources, Division of Conservation and Resources Enforcement, http://hawaii.gov/dlnr/docare/index.html (last visited Nov. 15, 2008). DOCARE officers also have the authority to investigate complaints and violations, gather evidence, issue citations, and conduct searches and seizures. HAW. REV. STAT. § 199. DOCARE officers enforce regulations related to: aquatic life, protection of caves, historic preservation, and the Kaho'olawe Island Reserve, as well as several city and county ordinances. *Id.*; HAW. REV. STAT. §§ 6D, 6E, 6K (2006 & Supp. 2007); HAW. REV. STAT. § 199-4 (2006).

[137] MCGREGOR, *supra* note 3, at 193.

[138] *Id.* at 196.

[139] *Id.*

[140] MOLOKA'I SUBSISTENCE TASK FORCE, GOVENOR'S MOLOKA'I SUBSISTENCE TASK FORCE FINAL REPORT 4 (1994) [hereinafter TASK FORCE].

Moloka'i ranch in 2008.[141] Subsistence activities provided a reliable source of support during these rough economic times.[142]

In 1993, Governor John Waihe'e appointed the Moloka'i Subsistence Task Force to "document how important subsistence is to Moloka'i families."[143] Because Moloka'i communities remain geographically secluded or cannot access other forms of subsistence, the island was an appropriate subject for the study on subsistence.[144] Moloka'i's unemployment rate and the amount of seafood consumed by communities indicated the people primarily relied on subsistence activities to survive.[145] In 1993, the unemployment rate on Moloka'i was 8.1 percent while the average statewide rate was 4.7 percent.[146] About half of the residents on Moloka'i that were interviewed by the Task Force indicated they fished.[147] Estimates suggest that an average household on Moloka'i consumes about twenty-five pounds of seafood each week.[148] Seafood consumption in these Moloka'i communities are nearly ten times higher than the amount consumed by the average household on O'ahu.[149] The report acknowledged that "[w]ithout subsistence as a major means for providing food, Moloka'i families would be in a dire situation."[150]

Besides the economic importance of subsistence, the Task Force acknowledged that "[s]ubsistence has also been critical to the persistence of traditional Hawaiian cultural values, customs, and practice."[151] The Task Force found that subsistence activities and other community based endeavors "bind together the social elements necessary for cultural perpetuation."[152] Thus, as part of its action plan, the Task Force recommended a subsistence fishing pilot project be established.[153]

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[141] *See, e.g., id.*; Curt Sanburn, *The Biggest Little Island in the Pacific: A Report from Moloka'i*, HONOLULU WKLY., Apr. 9-15, 2008, at 7, *available at* http://www.scribd.com/doc/2522029/A-Report-from-Molokai.

[142] TASK FORCE, *supra* note 140, at 4.

[143] *Id.*

[144] *See id.* at 6.

[145] *Id.* at 20.

[146] *Id.*

[147] *See* TASK FORCE, *supra* note 140, at 46 (indicating fifty-one percent of the residents responded they fished an average of forty-five days throughout the year).

[148] *See* Poepoe et al., *supra* note 5, at 124.

[149] HUI MĀLAMA O MO'OMOMI, PROPOSAL TO DESIGNATE MO'OMOMI COMMUNITY-BASED SUBSISTENCE FISHING AREA 2 (1995) [hereinafter HUI MĀLAMA PROPOSAL] (on file with the State of Hawai'i Department of Land and Natural Resources).

[150] TASK FORCE, *supra* note 140, at 4.

[151] *Id.* at 20.

[152] *Id.* at 13.

[153] HUI MĀLAMA PROPOSAL, *supra* note 149, at 10.

In 1994, the same year the Task Force completed its final report, the legislature created a procedure to designate CBSFAs by enacting Act 271.[154] Concerned with the "depletion of the ocean resources that native Hawaiians have traditionally depended on for subsistence," the House Committee on Hawaiian Affairs supported the measure to "provide a mechanism to ensure that subsistence fishing areas continue to be available for use by native Hawaiians."[155] Consequently, the legislature enacted Act 271, which created a procedure to establish CBSFAs. In addition, Act 271 mandated that DLNR establish a subsistence fishing pilot demonstration project at Kawa'aloa and Mo'omomi Bays on Moloka'i.[156] The pilot project was meant "to provide native Hawaiians with the opportunity to educate and perhaps guide Hawai'i and the world in fishery conservation."[157]

III. THE OBSTACLES AND OPPORTUNITIES OF ESTABLISHING A COMMUNITY-BASED SUBSISTENCE FISHING AREA

CBSFAs are unique tools that the State of Hawai'i may use to protect native Hawaiian rights and conserve Hawai'i's precious marine resources. In addition, subsistence communities have a new system to protect their traditions, customs, and lifestyle. The CBSFA laws, however, are difficult to implement. This section explores the procedural and substantive obstacles DLNR and communities face in implementing CBSFAs by analyzing the experiences of the Mo'omomi, Miloli'i, and Hā'ena communities.

A. Barriers to Designation

Attaining CBSFA designation is the first obstacle faced in establishing a CBSFA. Designation may be achieved by seeking approval from DLNR[158] or prompting new legislation from the Legislature.[159] Designation signifies that the community within the area is officially bestowed the authority to participate in fishery management, and it mandates DLNR to work with the community to establish fishery management rules.[160]

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[154] S. REP. NO. 71-94, 17th Leg. (Haw. 1994) (Standing Comm.).

[155] H.R. REP. NO. 441-94, 17th Leg. (Haw. 1994) (Standing Comm.). Other legislative committees acknowledged "the invaluable use of subsistence fishing" and encouraged the continued practice of subsistence fishing because "there are communities where subsistence fishing is necessary for the economic viability of its residents." S. REP. NO. 2713, 17th Leg. (Haw. 1994) (Standing Comm.).

[156] S. REP. NO. 71-94, 17th Leg. (Haw. 1994) (Standing Comm.).

[157] *Id.*

[158] HAW. REV. STAT. § 188-22.6 (Supp. 2007).

[159] *See, e.g., id.* §§ 188-22.7, -22.9.

[160] Telephone Interview with Francis Oishi, Program Manager, State of Haw. Dep't of Land

Nineteen communities throughout the state are currently involved in establishing CBFSAs.[161] Mo'omomi failed to attain permanent designation after the CBSFA pilot project concluded in 1997.[162] Currently, only Miloli'i and Hā'ena have attained permanent CBSFA designation.[163] The pilot project's failure to achieve permanent designation and the small number of designated CBSFAs compared to the amount of communities interested in establishing CBSFAs demonstrate that achieving designation is difficult and opportunistic.

1. DLNR designation

Act 271, which is codified as H.R.S. section 188-22.6, provides that "[DLNR] may designate community based subsistence fishing areas . . . for the purposes of reaffirming and protecting fishing practices customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion."[164] To obtain designation from DLNR, applicants are required to compile and submit a proposal.[165] Section 188-22.6 identifies the basic information needed,[166] and requires a proposed management plan, which describes the specific activities planned for the area, monitoring processes, funding, and enforcement methods.[167] Lastly, project proposals must "meet community based subsistence needs and judicious fishery conservation and management practices."[168]

At the designation stage, compiling this information is an overwhelming task because communities initiate the designation process without DLNR's involvement and with little guidance.[169] Several consultants and non-profit organizations such as The Nature Conservancy and the Community

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& Natural Res., Div. of Aquatic Res. (Mar. 5, 2008).

[161] Telephone Interview with Debbie Gowensmith, *supra* note 19. The following lists the communities that are involved in establishing CBSFAs by island. On Kauai: Hā'ena, Waipā, Hanalei; on O'ahu: Pūpūkea-Waimea, He'eia fishpond, Maunalua, 'Ewa Beach, Wai'anae; on Moloka'i: Mo'omomi, Kaloko'eli fishpond; on Maui: Honolua Bay, Hāna, Kīpahulu, 'Āhihi Kīna'u, Kīhei; on Hawai'i: Kealakekua Bay, Hōnaunau, Ho'okena, Miloli'i.

[162] *Id.*

[163] *Id.*

[164] HAW. REV. STAT. § 188-22.6(a).

[165] *Id.* § 188-22.6(b).

[166] *Id.* Communities must describe the community, the location for the proposed area, and justify the need for a CBSFA. *Id.*

[167] *Id.*

[168] *Id.*

[169] Telephone Interview with Francis Oishi, *supra* note 160 (explaining that DLNR is willing to rely on the community group's knowledge of their subsistence needs and conservation requirements; however, proposals are decided on a case-by-case basis); Telephone Interview with Debbie Gowensmith, *supra* note 19.

Conservation Network[170] (CCN) offer support for communities seeking to attain CBSFA designation.[171] Communities, however, still bear the burden of formulating a management plan and collecting the necessary information before designation is granted.[172]

The failure to permanently designate Mo'omomi, on the Northwestern shores of Moloka'i, as a CBSFA demonstrates the difficulties communities will face in seeking designation. While the community administered the pilot demonstration project in April 1995, Hui Mālama o Mo'omomi submitted a proposal to permanently designate five miles of shoreline on the Northwest coast.[173] The pilot project was initially planned for waters along five miles of shoreline but was limited to one mile by DLNR.[174] The proposal for permanent designation requested the original five miles because the area contained all the subsistence fishing areas traditionally used by the community and the areas most heavily fished.[175] The management plan proposed management zones and techniques based on traditional methods.[176] Nevertheless, the proposal was rejected because the area proposed was too broad and the community became "too involved" in the pilot project.[177]

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[170] *See* COMMUNITY CONSERVATION NETWORK, PROPOSAL TO THE U.S. FISH & WILDLIFE SERVICE PACIFIC ISLANDS COASTAL PROGRAM: PROPOSED SCOPE OF WORK AND BUDGET FOR CREATING A COMMUNITY-BASED MARINE MANAGED AREA IN HĀ'ENA, KAUA'I 2 (2007) [hereinafter COMMUNITY CONSERVATION NETWORK PROPOSAL]. CCN regularly meets with communities each year to build a network to support their efforts to become more active in managing their marine resources. *Id.* Currently, "CCN is actively supporting the Miloli'i, Ho'okena, Honaunau, Hā'ena, and Pūpūkea communities pursue marine management in their areas." *Id.*

[171] Jill Komoto et al., GETTING INVOLVED IN CARING FOR HAWAI'I'S COASTAL RESOURCES: A COMMUNITY HANDBOOK 7 (2006), *available at* http://www.conservationpractice.org/ (providing a detailed guidebook entitled, "Getting Involved in Caring for Hawai'i's Natural Resources, A Community Guidebook," "to assist communities that want to take action in a particular coastal area . . . [e]ven in cases where the communities are not yet organized to take action").

[172] *See* HAW. REV. STAT. § 188-22.6.

[173] S. REP. NO. 71-94, 17th Leg. (Haw. 1994) (Standing Comm.).

[174] *See, e.g.*, H.R. 3446, 17th Leg., Reg. Sess. (Haw. 1994); HUI MĀLAMA PROPOSAL, *supra* note 149, at 1, 2, 23-24. The pilot project was initially planned for waters along five miles of shoreline between Nihoa Flats and 'Ilio Point, but was limited to the areas between Kawa'aloa and Mo'omomi Bays, which constitutes one mile of shoreline and one half mile offshore. *See* Denise Antolini et al., *Mo'omomi Community Based Subsistence Fishing Area: Designation Process and Constituency Identification*, *in* 1 HAWAI'I MARINE PROTECTED AREAS GOVERNANCE STUDY 13 (2003) (reviewing Mo'omomi Community Based Subsistence Area's designation process).

[175] *See* HUI MĀLAMA PROPOSAL, *supra* note 149, at 11, 24 (requesting the designation of five miles of shoreline between Nihoa Flats and 'Ilio Point and two miles offshore, instead of between Kawa'aloa and Mo'omomi Bays).

[176] *See id.* at 12-24.

[177] Telephone Interview with Francis Oishi, *supra* note 160.

The circumstances surrounding the proposal supported its approval. Legislative policy strongly supported Act 271 and the pilot project at Mo'omomi bay.[178] For instance, the House Committee on Hawaiian Affairs endorsed the creation of the pilot project to "provide a mechanism to ensure that subsistence fishing areas continue to be available for use by native Hawaiians."[179] The pilot project occurred at two bays contained in the area the Hui sought for permanent designation.[180] Furthermore, the areas requested were fishing areas the Hui traditionally fished. Thus, despite legislative support, the Hui's familiarity with the CBSFA process, and the Hui's detailed knowledge of the area, the proposal was rejected.

Moloka'i is one example of a community that failed to achieve designation through DLNR. Since the law's passage in 1994, no community has managed to obtain permanent designation from DLNR under H.R.S. section 188-22.6.[181] To alleviate the burdens communities face, further guidance is needed regarding how proposals for designation are determined.

2. *Legislative designation*

The second option to attain designation is through legislative designation. Miloli'i and Hā'ena are the only two permanently designated CBSFAs and both areas achieved designation through the legislative designation process.[182] Legislative designation may allow communities to achieve designation, free from any constraints imposed by DLNR. Both Miloli'i and Hā'ena CBSFAs cover about five miles of shoreline,[183] the same length of shoreline DLNR failed to designate on the northwest coast of Moloka'i. Also, designation is attained before the community attempts to draft a management plan; thus, communities avoid wasting their effort on proposals that DLNR will not designate.[184] The major downfall in seeking legislative designation, however, is surviving the legislative process.[185]

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[178] *See, e.g.*, S. REP. NO. 71-94; S.REP. NO. 2713, at 1082 (Haw. 1994) (Standing Comm.); H. REP. NO. 441-94, at 1031 (Haw. 1994) (Standing Comm.).

[179] H.R. REP. NO. 441-94, 17th Leg. (Haw. 1994) (Standing Comm.).

[180] *See* HUI MĀLAMA PROPOSAL, *supra* note 149, at 1, 10.

[181] Telephone Interview with Petra McGowen, Assistant Program Manager, State of Haw. Dep't of Land & Natural Res., Div. of Aquatic Res. (Mar. 5, 2008).

[182] Telephone Interview with Debbie Gowensmith, *supra* note 19.

[183] *See* COMMUNITY CONSERVATION NETWORK PROPOSAL, *supra* note 170, at 3.

[184] Telephone Interview with Debbie Gowensmith, *supra* note 19; Telephone Interview with Francis Oishi, *supra* note 160.

[185] *See generally* H. MAJORITY STAFF OFFICE, STATE H.R., THE LEGISLATIVE PROCESS, A PROCESS OF THE PEOPLE 11-4 (6th ed. 2008), *available at* http://www.capitol.hawaii.gov/site1/info/guide/2008CitizensGuide.pdf (reviewing the hurdles and deadlines of the legislative process that measures must meet before becoming law).

Hā'ena's journey to attain legislative designation demonstrates that the experience is opportunistic. A group called Hui Ku'ai 'Āina o Hā'ena laid the foundation for community stewardship when it designated the valley above the Hā'ena shoreline a State Conservation District and created a park, now known as Limahuli Garden and Preserve of the National Tropical Botanical Gardens.[186] The Park allowed families in the area to restore *lo'i*, or taro patches.[187] In addition, key native Hawaiian community members formed the Hui Maka'āinana o Makana in 1998 to restore stewardship practices and Hawaiian values in managing Hā'ena's natural resources.[188] Before the community sought legislative designation for a CBSFA, Hā'ena residents were already involved in managing the area's natural resources.[189]

Following the Hui's formation in 1998, numerous vacation rentals started to sprout rapidly in the Hā'ena area and Hā'ena's fish populations drastically depleted.[190] The State Park and the nearby trailhead for the popular Nā Pali Coast bring about 500,000 visitors to the Hā'ena area annually.[191] These factors motivated community members to push for CBSFA designation.[192]

In 2006, Representative Ezra Kanoho (Democrat, District 15, Lihue—Koloa) was in his last year in political office.[193] The Hui saw this as an opportunity for the representative to sponsor a bill that would be viewed as his legacy.[194] Representative Kanoho's retirement helped win the support of legislators despite controversy over CBSFAs, particularly from the commercial fishing lobby that strongly opposed any restriction on their right to fish.[195]

Hā'ena and Miloli'i are the only two communities that have achieved designation. The legislature enacted Act 271 to "provide a mechanism to ensure that subsistence fishing areas continue to be available for use by native Hawaiians."[196] Seeking designation, however, is currently a formidable barrier that prevents interested communities from establishing a CBSFA. The state

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[186] *See* National Tropical Botanical Garden, Limahulu Garden & Natural Preserve, History, http://ntbg.org/gardens/limahuli-history.php (last visited Nov. 17, 2008).

[187] *Id.*

[188] *See* COMMUNITY CONSERVATION NETWORK PROPOSAL, *supra* note 170, at 2.

[189] Telephone Interview with Maka'ala Kaaumoana, Dir., Hanalei Watershed Hui (Feb. 14, 2008).

[190] *See id.*

[191] COMMUNITY CONSERVATION NETWORK PROPOSAL, *supra* note 170.

[192] Telephone Interview with Maka'ala Kaaumoana, *supra* note 189.

[193] *Id.*

[194] *Id.*

[195] *See id.* House Bill 1848, known as the "right to fish bill," progressed through the legislature soon after Hā'ena's bill passed into law in 2007. *Id.* This bill would have established a Fishery Task Force and was criticized as a product of the commercial fishermen lobby. *Id.*

[196] H.R. REP. NO. 441-94, 17th Leg. (Haw. 1994) (Standing Comm.).

may fulfill its affirmative duty to manage Hawai'i's marine resources and "protect the public's use and enjoyment of the reefs" [197] by utilizing this management scheme more successfully.

B. The Rulemaking Hurdle

Once a CBSFA area is designated, the CBSFA statutes require DLNR to "carry out fishery management strategies for such areas, through administrative rules adopted pursuant to chapter 91."[198] Known as the Hawai'i Administrative Procedure Act, H.R.S. Chapter 91 governs the formal process state agencies[199] must undertake to adopt rules[200] that implement the laws mandated by the state legislature. At the rulemaking stage, DLNR and CBSFA communities must overcome substantive and procedural challenges to formulate their rules. This section examines some of the challenges DLNR and communities will face in creating CBSFA rules.

1. Substantive rulemaking obstacles: Defining traditional and customary subsistence practices

During rulemaking, DLNR and CBSFA communities are challenged to formulate appropriate rules that define the activities allowed in a CBSFA pursuant to the statutes' requirements. The CBSFA statutes require that rules adopted to manage the CBSFA's fishery resources to uphold traditional and customary fishing practices for subsistence, cultural, and religious purposes.[201] The rules also must meet "judicious fishery conservation and management practices."[202] This section explores the complexities DLNR and communities will face in defining these concepts in creating CBSFA rules.

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[197] HAW. CONST. art. XI, § 6.

[198] *See, e.g.*, HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9 (2005 & Supp. 2007).

[199] HAW. REV. STAT. § 91-1(1) (2007) (defining an agency as a "state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches").

[200] *See* HAW. REV. STAT. § 91-1(4) (defining the term "rule").

[201] *See, e.g.*, HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9.

[202] *See, e.g., id.* § 188-22.6; HAW. REV. STAT. § 188-22.7 (Supp. 2007); *see also* HAW. REV. STAT. § 188-22.9(c)(1) (designating Hā'ena as a CBSFA and requiring DLNR to work with communities to define "fishing practices that are customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion in the fishing area").

2. Overview of traditional and customary rights that are protected under the constitution and statutes

Hawai'i has a unique collection of laws that recognize and protect native Hawaiian traditional and customary rights. Article XII, section 7 of the Hawai'i Constitution places an affirmative duty on the state to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by . . . descendents of native Hawaiians."[203] In drafting this section, delegates of the 1978 Constitutional Convention were hesitant to relegate "Hawaiian children . . . to visit the Bishop Museum or see a tourist show . . . to learn about their Hawaiian culture, values and identity."[204] Thus, Article XII, section 7 was considered "an important and indispensible tool in preserving the small remaining vestiges of a quickly disappearing culture and in perpetuating a heritage that is unique and an integral part of our State."[205]

Operating alongside the Constitution, several statutes protect traditional and customary rights. H.R.S. Chapter 1-1 adopted the English common law "to be the law of the State of Hawaii."[206] However, H.R.S. Chapter 1-1 reserved and protected the customs unique to Hawai'i that are "fixed by Hawaiian judicial precedent, or established by Hawaiian usage."[207] Thus, the "Hawaiian usage" exception protected those traditions and customs that were inappropriately addressed under English common law.

A second statute that preserves Hawaiian traditions and customs was founded in the Kuleana Act of 1850, which granted private property to *maka'āinana* or commoners.[208] Now codified as H.R.S. Chapter 7-1, the law reserved the native Hawaiian "right to take firewood, house timber, aho cord, thatch, or *ki* leaf, from the land on which they live," even "[w]here the landlords have obtained . . . allodial titles to their lands."[209] Thus, native Hawaiian access rights to gather specific natural resources for traditional and

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[203] HAW. CONST. art. XII, § 7.

[204] COMM. OF THE WHOLE REP. No. 12, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, 1016 (1980).

[205] *Id.* Delegates on the Hawaiian Affairs Committee also specifically recognized that the ancient Hawaiian social and economic systems were "based on a division of land known as an ahupua'a, ruled by a chief and managed by a konohiki, on which the hoa'āina . . . engage[d] in subsistence gathering and hunting activities that consumed but did not deplete the natural resources." CONVENTION DOCUMENTS, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 640 (1980) (emphases omitted).

[206] HAW. REV. STAT. § 1-1 (2006).

[207] *Id.*

[208] HAW. REV. STAT. § 7-1 (2006).

[209] *Id.*

customary purposes were reserved under H.R.S. Chapter 7-1 even on "privately owned land."

3. The nature and scope of traditional and customary rights and practices defined in recent court cases

The constitutional and statutory provisions and the policy underlying those provisions provide a solid basis for protecting native Hawaiian traditional and customary rights. A series of important cases clarified the scope and character of these rights and defined the methods to prove a claim for traditional and customary rights.[210] While these cases did not explicitly discuss the rights that exist in the nearshore marine area, the cases defined the character of traditional and customary rights on land, which must be upheld above any development and private property interests.[211]

First, the Hawai'i Supreme Court laid the foundation for discussing the parameters of traditional and customary rights in *Kalipi v. Hawaiian Trust Co.*[212] Plaintiff William Kalipi sought to exercise his native Hawaiian access and gathering rights on private land that neighbored an *ahupua'a* where he resided.[213] The Hawai'i Supreme Court looked to H.R.S. section 7-1, which reserved the right to gather specific resources, and held that "lawful occupants of an ahupuaa may, for the purpose of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupuaa to gather those items enumerated."[214] After balancing its obligation to preserve native Hawaiian rights with private property and development interests, however, the court limited the exercise of traditional and customary gathering rights to "undeveloped lands."[215] In addition, the court recognized that "there have continued in certain ahupuaa a range of practices associated with the ancient way of life which required the utilization of the undeveloped property of others and which were not found in § 7-1."[216] The "customary rights which continued to be practiced and which worked no actual harm upon the recognized interests

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[210] *See, e.g.*, Ka Pa'akai O Ka'Aina v. Land Use Commission, 94 Hawai'i 31, 7 P.3d 1068 (2000); State v. Hanapi, 89 Hawai'i 177, 970 P.2d 485 (1998); Public Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Hawai'i. 425, 903 P.2d 1246 (1995); Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982).

[211] *See* cases cited *supra* note 210.

[212] 66 Haw. 1, 656 P.2d 745.

[213] *Id.* at 5-6, 656 P.2d at 748.

[214] *Id.* at 7-8, 656 P.2d at 749.

[215] *See id.* at 7-9, 656 P.2d at 749-50.

[216] *Id.* at 10, 656 P.2d at 751.

of others," were rights guaranteed under the Hawaiian usage provision of H.R.S. section 1-1.[217] These customary rights were also protected.[218]

In 1992, the Hawai'i Supreme Court extended the rights protected in *Kalipi* in its *Pele Defense Fund v. Paty*[219] (*PDF*) decision. In *PDF*, the court clarified that traditional and customary practices exist regardless of residence in an *ahupua'a* or land division.[220] The plaintiff challenged the exchange of state land, which included NARS land, with land owned by a private landowner, by opposing the exclusion of its native Hawaiian members from accessing NARS for subsistence, cultural, and religious purposes.[221] Even if the members were not "lawful occupants" within the NARS land, the court held, "native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[222] Thus, protections extended to those rights that were based on "the traditional access and gathering patterns of native Hawaiians," not on land ownership or lawful occupancy.[223]

In 1995, the Hawai'i Supreme Court reaffirmed the state's duty to protect traditional and customary rights in *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*[224] (*PASH*). On behalf of its native Hawaiian members, plaintiff Public Access Shoreline Hawaii sued the Hawai'i County Planning Commission (Commission) after the Commission allowed defendant Nansay Hawai'i Inc. to develop a resort complex on 450 acres of shoreline, and subsequently exclude PASH's members from accessing and exercising their gathering rights on the shoreline.[225] The court reaffirmed native Hawaiian gathering rights by ordering the Commission, as a state agency, to determine whether gathering rights have been customarily and traditionally practiced on the land that is proposed for development.[226] If gathering rights were practiced, the agency must preserve those rights to the extent feasible.[227] In addition, while the court ruled that the state's duty to preserve native Hawaiian rights extends to "undeveloped" or not "fully developed" lands, it clarified that "the State does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence."[228]

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[217] *Id.* at 12, 656 P.2d at 752.

[218] *Id.*

[219] 73 Haw. 578, 837 P.2d 1247 (1992).

[220] *Id.*

[221] *Id.* at 584, 837 P.2d at 1253.

[222] *Id.* at 620, 837 P.2d at 1272.

[223] *Id.* at 618-19, 837 P.2d at 1271.

[224] 79 Hawai'i 425, 903 P.2d 1246 (1995).

[225] *Id.* at 429, 903 P.2d at 1250.

[226] *Id.* at 451, 903 P.2d at 1272.

[227] *Id.*

[228] *Id.* In *PASH*, the court also clarified that the protection of native Hawaiian traditional

In 2000, the Hawai'i Supreme Court created a three-pronged framework for state agencies to apply in fulfilling their duty to uphold traditional and customary Hawaiian rights in *Ka Pa'akai O Ka 'Aina v. Land Use Commission*[229] (*Ka Pa'akai*). The court held that the State Land Use Commission (LUC) "failed to satisfy its statutory and constitutional obligations" to protect traditional and customary rights when "the LUC's findings of fact and conclusions of law [were] insufficient to determine whether it fulfilled its obligation."[230] As a result, the court remanded the case to the LUC to:

> 1. identify "valued cultural, historical, or natural resources" in the area the developer seeks to develop and the extent that traditional and customary rights were exercised;
> 2. determine the extent that the resources and traditional and customary practices will be affected by the proposed action; and
> 3. determine a feasible action to execute that protects native Hawaiian rights if those rights are found to exist.[231]

In summary, these cases reveal the court's analysis in determining traditional and customary rights and clarify the scope and character of those rights. First, the court will balance the state's obligation to protect native Hawaiian traditional and customary rights with its obligation to protect development and private property interests.[232] If rights are found to exist, the state must protect traditional and customary rights on "undeveloped" or not "fully developed" land, to the extent feasible.[233] To prove the state fulfilled its obligation to protect traditional and customary rights, state agencies must apply the three-pronged framework detailed in *Ka Pa'akai*.[234] Traditional and customary rights may extend beyond an *ahupua'a* where one resides if the rights exercised are based on "traditional access and gathering patterns."[235] These cases provide

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and customary rights is not limited to claims from individuals with at least fifty percent or more blood quantum. *Id.* at 448-49, 903 P.2d at 1269-70. Instead, the court declared that persons who are "descendants of native Hawaiians who inhabited the islands prior to 1778," and "who assert otherwise valid customary and traditional Hawaiian rights under H.R.S. § 1-1, are entitled to protections regardless of blood quantum." *Id.* at 449, 903 P.2d at 1270. Blood quantum was deemed immaterial because "[c]ustomary and traditional rights in these islands flow from native Hawaiians' pre-existing sovereignty." *Id.*

[229] 94 Hawai'i 31, 7 P.3d 1068 (2000).

[230] *Id.* at 53, 7 P.3d at 1090.

[231] *Id.*

[232] *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982).

[233] *Public Access Shoreline Hawaii*, 79 Hawai'i at 451, 903 P.2d at 1272.

[234] 94 Hawai'i 31, 7 P.3d 1068.

[235] Pele Def. Fund v. Paty, 73 Haw. 578, 618-19, 837 P.2d 1247, 1271 (1992).

guidance in defining the traditional and customary native Hawaiian rights that exist in the nearshore marine area.[236]

4. The state's interests in the nearshore marine area

The series of cases above guide the analysis concerning what traditional and customary practices in the nearshore marine area must be recognized and upheld in implementing a CBSFA.[237] In addition, these traditional and customary rights cases study the interplay between balancing the state's duty to protect traditional and customary rights on land and the state's duty to accommodate private property and development interests.[238] Defining traditional and customary rights and practices in the nearshore marine area involve a different set of state interests and analysis.[239] For instance, determining the rights that exist on land identifies the types of activities that must be preserved over the private property right to exclude.[240] On the other hand, determining the rights that exist in the nearshore marine area identifies the types of activities that must be preserved over the public's right to freely access and use the marine resources.[241]

Defining the scope and character of traditional and customary rights in the nearshore marine area requires the state to resolve several competing constitutional duties. Three constitutional protections intersect when the state regulates Hawai'i's nearshore marine resources.[242] First, Article XI, section 6 declares that, "[a]ll fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same."[243] Thus, the state must acknowledge and uphold the public's right to access and use Hawai'i's fisheries in any regulation it imposes.

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[236] In addition to the four cases outlined above, the Hawai'i Supreme Court decided a fifth case involving native Hawaiian traditional and customary rights. In *State v. Hanapi*, defendant Alapai Hanapi's claim that "stewardship" constituted a native Hawaiian traditional and customary practice was rejected due to insufficient evidence introduced to support the claim. 89 Hawai'i 177, 187, 970 P.2d 485, 495 (1998). As a result, the Hawai'i Supreme Court upheld Hanapi's conviction for criminal trespass when Hanapi attempted to stop a landowner from grading and filling two fishponds on his Moloka'i property. *Id.*

[237] *See, e.g.*, *Ka Pa'akai*, 94 Hawai'i 31, 7 P.3d 1068; *Hanapi*, 89 Hawai'i 177, 970 P.2d 485; *Public Access Shoreline Hawaii*, 79 Hawai`i 425, 903 P.2d 1246; *Pele Def. Fund*, 73 Haw. 578, 837 P.2d 1247; *Kalipi*, 66 Haw. 1, 656 P.2d 745.

[238] *See* cases cited *supra* note 237.

[239] *See id.*

[240] *See id.*

[241] *See id.*

[242] *See, e.g.*, HAW. CONST. art. XI, §§ 1, 6; *id.* art. XII, § 7.

[243] *Id.* art. XI, § 6.

While Article XI, section 6 protects the fisheries as "free to the public," the law reserves the state's right and duty to regulate the fishery resource.[244] In the course of executing this duty to regulate Hawai'i's fishery resources, the state must uphold two additional constitutional protections. The state has a duty to "conserve and protect Hawaii's natural beauty."[245] In addition, Article XII, section 7 imposes the state's duty to "[affirm] and . . . protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes."[246] In sum, the fishery resources are "free to the public."[247] The state, however, has a right to limit the public's access and use of the fishery resources to uphold its duty to conserve fisheries and protect traditional and customary fishing practices.[248] In rulemaking, DLNR must balance these three constitutional protections to formulate any rule that is promulgated for a CBSFA.

5. The difficulty of survival under the statutory definition of "subsistence"

Limiting traditional and customary fishing practices to fishing for subsistence purposes may cause conflict during the rulemaking process. The CBSFA statutes direct DLNR and the community members involved in rulemaking to limit fishing activities allowed within designated CBSFAs to "fishing practices customarily and traditionally exercised for purposes of native Hawaiian subsistence, culture, and religion."[249] The limitation was intended to impose a limit on consumption to prevent the "depletion of the ocean resources that native Hawaiians have traditionally depended on for subsistence."[250] The terms "culture" and "religion" are not explicitly defined in the statutes.[251] However, H.R.S. section 188-22.6 explicitly defines "subsistence" as "the customary and traditional native Hawaiian uses of renewable ocean resources for direct personal or family consumption or sharing."[252] This definition imposes unnecessary burdens on the ability to survive and practice traditional and customary practices.

Today, survival is difficult under the current definition of "subsistence." In the ancient days, the land divisions and social structure may have allowed individuals to subsist when limited to harvesting resources for "direct personal

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[244] *Id.*

[245] *Id.* art. XI, § 1.

[246] *Id.* art. XII, § 7.

[247] *Id.* art. XI, § 6.

[248] *See, e.g., id.* art. XI, §§ 1, 6; *id.* art. XII, § 7.

[249] HAW. REV. STAT. § 188-22.9(c) (Supp. 2007); *see also id.* §§ 188-22.6,-22.7.

[250] H.R. REP. NO. 441-94, 17th Leg. (Haw. 1994) (Standing Comm.).

[251] *See, e.g.*, HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9 (2005 & Supp. 2007).

[252] HAW. REV. STAT. § 188-22.6(c)(2) (2005).

or family consumption or sharing."[253] *Ali'i* divided the land to provide the *hoa'āina* sufficient resources for subsistence and the resources were sustained through *kapu*.[254] The individuals and *'ohana* residing near to the ocean and in the mountains relied on each other to gather the necessary food and goods for subsistence.[255] Furthermore, the *'ohana* included immediate relatives and members of the greater community who resided in the *ahupua'a*.[256]

Modern land use schemes and social structure no longer allow individuals to subsist if limited to harvesting resources for "direct personal or family consumption or sharing."[257] First, without a functioning *ahupua'a* and the manpower required to harvest and maintain the resources, individuals and *'ohana* do not have the means to gather the resources needed for survival.[258] Second, the dynamic of Hawai'i's communities continues to change and residents have become unwilling to share the resources found on their private property.[259] As such, individuals may be required to prove that their traditional and customary gathering and access rights exist before having access to areas that contain the resources needed for subsistence.[260] This further obstructs the endeavor to subsist within "direct personal or family consumption" limits.[261] Moreover, even individuals with valid and established traditional and customary gathering rights may not have legal access to all areas within former *ahupua`a* boundaries that become fully developed, which contain the resources needed for subsistence.[262] As the Hawai'i Supreme Court stated in *Kalipi*, the traditional subsistence economy and land division are now "remnants of an economic and physical existence largely foreign to today's world."[263]

The limitation on the exchange of goods to "sharing" also fails to uphold traditional and customary fishing practices. "Sharing" undercuts ancient practices and does not accommodate current subsistence needs. In ancient

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[253] *Id.*

[254] *See* MCGREGOR, *supra* note 3, at 26.

[255] *Id.* at 5.

[256] *Id.*

[257] HAW. REV. STAT. § 188-22.6(c)(2).

[258] *See generally* JON M. VAN DYKE, *supra* note 44; KAME'ELEHIWA, *supra* note 7; Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Hawai`i 31, 7 P.3d 1068 (2000); State v. Hanapi, 89 Hawai`i 177, 970 P.2d 485 (1998); Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Hawai'i 425, 903 P.2d 1246 (1995); Pele Def. Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982).

[259] *See, e.g.*, *Ka Pa'akai*, 94 Hawai'i 31, 7 P.3d 1068; *Hanapi*, 89 Hawai'i 177, 970 P.2d 485; *Public Access Shoreline Hawai'i*, 79 Hawai'i 425, 903 P.2d 1246; *Pele Defense Fund*, 73 Haw. 578, 837 P.2d 1247; *Kalipi*, 66 Haw. 1, 656 P.2d 745.

[260] *See Hanapi*, 89 Hawai'i 177, 970 P.2d 485.

[261] HAW. REV. STAT. § 188-22.6(c)(2) (2005).

[262] *See* cases cited *supra* note 259.

[263] *Kalipi*, 66 Haw. at 7, 656 P.2d at 749.

days, *'ohana* survived by exchanging goods; for instance *'ohana* residing near to the ocean exchanged goods they harvested and maintained with *'ohana* residing in the mountains.[264] This transaction does not resemble "sharing"; instead it resembles "barter." Black's Law Dictionary defines barter as "the exchange of one commodity for another without the use of money."[265] The limitation on the exchange of goods should be amended to include barter because it encompasses ancient practices more appropriately.

Others have developed definitions for "subsistence" that may guide a possible amendment to the definition detailed under H.R.S. section 188-22.6. For instance, in its 1994 final report, the Moloka'i Subsistence Task Force stated that subsistence on Moloka'i included barter, sharing, and customary trade.[266] The Task Force specifically stated that subsistence included:

> [T]he customary and traditional uses by Moloka'i residents of wild an[d] cultivated renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, transportation, culture, religion, and medicine; for *barter, or sharing,* for personal or family consumption and for *customary trade.*[267]

This definition encompasses ancient practices, including the exchange of goods necessary for subsistence.

A different approach to impose limits on consumption that prevents the "depletion of the ocean resources,"[268] focuses on the values that underlie traditional and customary practices. Davianna McGregor, Professor of Ethnic Studies at the University of Hawai'i and a historian of Hawai'i and the Pacific, advised that traditional and customary subsistence practices involve:

1. using ancestral knowledge that is guarded and not given away,
2. honoring the akua by refraining from gathering things that are sacred, unless the practice allows it,
3. sharing things gathered with 'ohana and kūpuna,
4. taking care of the resources gathered,
5. and practicing the custom in an area traditionally used by 'ohana, or where permission is granted.[269]

Instead of imposing quantifiable limits, this approach fosters proper education and stresses the values that underlie a traditional and customary

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[264] *See generally* McGregor, *supra* note 41, at 5-6; MCGREGOR, *supra* note 3, at 26-29.
[265] BLACK'S LAW DICTIONARY 160 (8th ed. 2004).
[266] TASK FORCE, *supra* note 140, at 2.
[267] *Id.* (emphasis added).
[268] H.R. REP. NO. 441-94, 17th Leg. (Haw. 1994) (Standing Comm.).
[269] *See* McGregor, *supra* note 41, at 15-17.

practice. Respecting these values will prevent "depletion of the ocean resources that native Hawaiians have traditionally depended."[270]

6. Procedural barriers: Enduring the lengthy rulemaking process

Aside from its substantive challenges, rulemaking's procedural challenges further hamper efforts to implement a CBSFA. First, the community begins an informal rulemaking process even before the Chapter 91 procedures begin.[271] The community's process takes about one and a half years to complete and entails many meetings to develop draft rules.[272] After the draft rules are reviewed and approved by the State Attorney General's Office, the rulemaking process begins, which may take several more years to complete.[273]

Whenever a state agency seeks to affect the rights of individuals, formal rulemaking procedures under Chapter 91 ensures that all persons interested have a means to participate in the rulemaking process.[274] DLNR must hold a public hearing to "[a]fford all interested persons opportunity to submit data, views, or arguments, orally or in writing," before a rule is adopted.[275] DLNR must give at least thirty days notice prior to the hearing.[276] After public comments are gathered, DLNR is mandated to "fully consider all written and oral submissions respecting the proposed rule."[277] After notice and comment, the rules are subject to approval or denial by the governor.[278] Finally, all rules formulated and adopted must be made available for public inspection.[279] The entire process takes years to complete.[280]

On March 30, 2008, a public hearing was held regarding the Miloli'i CBSFA's draft rules.[281] The hearing resulted in a consensus to "do nothing"

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[270] H.R. REP. NO. 441-94, 17th Leg. (Haw. 1994) (Standing Comm.).

[271] Telephone Interview with Petra McGowen, *supra* note 181. First, a "core group" of community members involved in the initial effort to designate the CBSFA meet to discuss their rule-drafting strategy. Telephone Interview with Debbie Gowensmith, *supra* note 19. This "core group" goes door-to-door to encourage other community members to participate or discuss residents' views on managing their fishery resources. *Id.* Then, the group meets to prioritize and discuss the items that must be incorporated in the CBSFA's draft rules. *Id.*

[272] *See* Telephone Interview with Debbie Gowensmith, *supra* note 19.

[273] *See id.*

[274] *See* HAW. REV. STAT. § 91-3(a)(2) (2007).

[275] *Id.*

[276] *Id.* § 91-3(a)(1).

[277] *Id.* § 91-3(a)(2).

[278] HAW. REV. STAT. § 91-3(c) (Supp. 2007).

[279] *Id.* § 91-2(a)(3).

[280] Telephone Interview with Francis Oishi, *supra* note 160 (commenting that the process is complex and takes years because "the devil is in the details").

[281] Miloli'i's draft rules included:

(1) limiting fishing activities allowed in the area to subsistence fishing, and prohibiting

with the draft rules and start the rulemaking process over.[282] Miloli'i's rulemaking process demonstrates the procedural difficulties faced during the rulemaking stage.

Three years since Miloli'i was designated a CBSFA in 2005, DLNR chairperson, Laura Thielan announced, "[t]he Department has been working with Miloli'i residents and . . . are now seeking comments from others . . . on draft rules to manage fishing and other commercial activities in the area."[283] The notice opened the floodgates and attracted "anyone with a nexus" to attend the hearing who viewed the CBSFA rules as another restriction on their right to fish.[284]

Certain groups who attended the hearing opposed the draft rules because they were excluded from the rule drafting process.[285] One Miloli'i resident and commercial fishermen commented that "[t]he people of the community were supposed to participate, but this would have been a done deal if I didn't stumble upon this . . . We fishermen . . . feel like this is being rammed down our throats."[286] Fishermen who attended voiced substantive concerns; for example, they challenged the proposed sanctuaries' sizes, the requirement that fishing practices be limited to traditional methods, and the definition of "subsistence" fishing.[287] One fisherman thought that limiting fishing to traditional methods meant that he and other fishermen were required to purchase a canoe to fish in the area.[288]

The composition of the "community" that must participate in the CBSFA process is unclear under the CBSFA statutes. Chapter 91 mandates that DLNR "fully consider" the views of "all interested persons" that are afforded the

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any commercial activity within the Miloli'i CBSFA except for petitioning non-profit organizations, and the use of certain gear types such as spears during the night that were longer than eight feet or along with a breathing apparatus and nearly all types of nets;
(2) establishing ko'a fishing grounds where the operation of thrill crafts were banned; and
(3) set aside areas as pu'uhonua or refuges to allow fish stocks to replenish.

HAW. CODE R. § 13-60.4 (Ramseyer Draft 2007).

[282] Bobby Command, *No Consensus on Miloli'i Fishing Rules*, WEST HAWAI'I TODAY, Apr. 4, 2008, at 1A.

[283] Press Release, Department of Land and Natural Resources, DLNR Holds Public Meeting to Discuss Miloli'i Subsistence Fishing Area (Mar. 18, 2008), *available at* http://hawaii.gov/dlnr/chair/pio/nr/2008/08-N027.pdf/view (follow "08-N027.pdf" hyperlink).

[284] Telephone Interview with Francis Oishi, State of Haw. Dep't of Land & Natural Res., Div. of Aquatic Res. (Apr. 25, 2008). One Miloli'i resident and commercial fisherman called everyone he could to let them know about the public hearing. *See* Bobby Command, *New Fishing Rules for Miloli'i Causing Concern*, WEST HAWAI'I TODAY, Feb. 28, 2008, at 1A.

[285] *See* Command, *supra* note 284.

[286] *Id.*

[287] *See id.*

[288] *Id.*

opportunity to submit "data, views, or arguments."[289] The CBSFA statutes, however, allow community members to submit proposals for designation without qualifying who and what interests must be represented by these members.[290] The statutes only require that management plans "meet community based subsistence needs and judicious fishery conservation and management practices," and protect "fishing practices customarily and traditionally exercised."[291]

Ambiguities concerning who the CBSFA statutes intends to include may allow Chapter 91's broad mandate to include "all interested persons" to permit an excessively narrow or broad group of participants to influence a CBSFA's rules.[292] If "all interested persons" is applied narrowly, minority groups may promulgate rules that mischaracterize traditional and customary fishing practices. On the other hand, if "all interested persons" is applied broadly, rules that are an accurate representation of traditional and customary fishing practices may be diluted. In addition, the procedure may allow rules that were an accurate characterization of the community's wishes that reside within the CBSFA to reflect the views of any person that reside outside the area. For instance, fishermen from Honolulu may be allowed to influence the rules created for the Miloli'i CBSFA. As such, Chapter 91's requirement that "all interested persons" be afforded the opportunity to participate in the rulemaking process risks contradicting the CBSFA statutes' requirements and intent.

IV. CONCLUSION

The creation of the CBSFA fishery management scheme is a significant step toward propagating cultural *kīpuka* to preserve Hawaiian culture and Hawai'i's fishery and marine resources. Currently, Miloli'i and Hā'ena are the only areas designated as CBSFAs, and these communities have not managed to promulgate their rules to implement their CBSFA.[293] The state must alleviate the difficulties communities' face in designating and implementing CBSFAs to realize the full benefits that the CBSFA management scheme offers. Only through the state's active and enduring support may the CBSFA management scheme fulfill its intent to "provide native Hawaiians with an opportunity to

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[289] *See* HAW. REV. STAT. § 91-3(a)(2) (Supp. 2007).

[290] *See, e.g.*, HAW. REV. STAT. §§ 188-22.6, -22.7, -22.9 (2005 & Supp. 2007).

[291] *Id.*

[292] *See* HAW. REV. STAT. § 91-3(a)(2).

[293] *See* Telephone Interview with Debbie Gowensmith, *supra* note 19; Telephone Interview with Francis Oishi, *supra* note 160; Telephone Interview with Francis Oishi, *supra* note 284.

educate and perhaps guide Hawaii and the world in fishery conservation,"[294] and "ensure that subsistence fishing areas continue to be available."[295]

Jodi Higuchi[296]

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[294] S. REP. NO. 2965, 17th Leg. (Haw. 1994) (Standing Comm.).

[295] S.J. REP. NO. 2713, 17th Leg. (Haw. 1994) (Standing Comm.).

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Habeas Corpus, Equitable Tolling, and AEDPA's Statute of Limitations: Why the *Schlup v. Delo* Gateway Standard for Claims of Actual Innocence Fails to Alleviate the Plight of Wrongfully Convicted Americans

"The problem of finality in criminal law raises acute tensions in our society . . . . [O]ur instinct is that we must be sure before we proceed to the end, that we will not write an irrevocable finis on the page until we are somehow truly satisfied that justice has been done."[1]

I. INTRODUCTION

Legal and scientific studies clearly establish that the conviction and execution of innocent Americans does occur.[2] "[O]ur system of criminal justice, for all its protections, is sufficiently fallible that innocent people are convicted. . . ."[3] Furthermore, the number of exonerations of the wrongfully convicted can only be a fraction of the actually innocent, because most exonerations are DNA-based and many crimes do not have exonerating DNA evidence.[4]

The enactment of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") in 1996 exacerbated the plight of the "actually innocent"[5] by

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[1] Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 441 (1963).

[2] *See* Jake Sussman, Comment, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 377 n.154 (2002) (citing numerous articles and commentaries that discuss the frequency and causes of wrongful convictions in the American justice system); C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 62, 53-61 (1996).

[3] Sussman, *supra* note 2, at 377 n.154 (quoting United States v. Quinones, No. S3-00-CR.761, 2002 WL 724231, at *3 (S.D.N.Y. Apr. 25, 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002)).

[4] *See* Stuart Taylor, Jr., *Innocents in Prison: Many Thousands of Wrongly Convicted People are Rotting in Prisons and Jails Around the Country*, NAT'L J., Aug. 6, 2007, *available at* http://www.nacdl.org/public.nsf/defenseupdates/innocence138 ("The kind of DNA evidence that can conclusively prove innocence or guilt is available only in a small fraction of cases, mainly rapes and rape-murders in which sperm is recovered.").

Consider, for example, the mistaken eyewitness identification of a bank robber: In such a situation, there will likely be no DNA left at the scene. Even if there were some residual DNA, DNA tests would not necessarily prove that the defendant was not the bank robber (the wrongfully identified defendant might be a frequent customer of the bank). Thus, even if the defendant could pursue DNA testing, it would be irrelevant to proving his innocence.

[5] *See, e.g.*, Nicholas Berg, Comment, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 AM. CRIM. L. REV. 121, 122 (2005) ("In the criminal context, legal innocence means that not enough proof of guilt was introduced at trial to establish that a

severely restricting their ability to seek habeas corpus review. AEDPA imposed a one-year statute of limitations on the ability to file a petition,[6] making it next to impossible for the average claimant to have his or her claim reviewed on the merits, even in cases of actual innocence. The statute of limitations does provide for tolling during periods where the petitioner is seeking state post-conviction review,[7] but the nature of this tolling is still unclear and both the federal circuits and United States Supreme court continue to debate its application.[8]

Many, if not most, prisoners are indigent and must file their habeas petitions pro se because they are not entitled to appointed counsel for most stages of post-conviction relief.[9] Navigating the AEDPA procedural rules is extremely difficult for indigent and pro se prisoners. Confusion over the running and tolling of AEDPA's statute of limitations also extends to prisoners assisted by counsel. Equitable tolling of the statute of limitations is theoretically available, but only in the most extraordinary and extreme circumstances.[10]

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defendant is guilty beyond a reasonable doubt. In contrast, actual innocence means simply that the defendant did not commit the offense in question."). "Actual innocence" is distinct and separate from "legal innocence." *Id.*

[6] 28 U.S.C. § 2244(d)(1) (1996) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.").

[7] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217 (codified at 28 U.S.C. § 2244).

28 U.S.C. § 2244(d)(2) provides in relevant part: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

[8] *See, e.g.*, Carey v. Saffold, 536 U.S. 214 (2002) (5-4 decision answering in the affirmative whether the word "pending" under §2244(d)(2) covers the time between a lower state court's decision and the filing of a notice of appeal to a higher state court during state collateral review, and whether that interpretation would apply similarly to California's "unique" state collateral review system- which does not involve a "notice of appeal"); Lawrence v. Florida, 549 U.S. 327, 127 S. Ct. 1079, 1084 (2007) (holding that a habeas petition is not considered "pending" after a state court's post conviction review is complete). The *Lawrence* court recognized that its holding could result in what the petitioner argued as "awkward situations in which state prisoners have to file federal habeas applications while they have certiorari petitions from state postconviction proceedings pending before [the Supreme] Court." *Id.*

[9] *See* Pennsylvania v. Finley, 481 U.S. 551 (1987) (holding that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of "meaningful access" requires a state to appoint counsel for indigent prisoners seeking state post conviction relief); *see also* Murray v. Giarratano, 492 U.S. 1 (1989) (clarifying that the *Finley* rule also applies to death penalty cases).

[10] *See, e.g.*, Spencer v. Sutton, 239 F.3d 626, 629-30 (4th Cir. 2001) (holding that equitable tolling is appropriate only when "extraordinary circumstances beyond [the petitioner's] control

Recently, some federal courts have begun to recognize that a petitioner who brings a valid "actual innocence" claim should be entitled to equitable tolling of an otherwise time-barred habeas petition.[11] In these cases, the federal courts rely on the pre-AEDPA decision *Schlup v. Delo*.[12] The *Schlup* "actual innocence" standard requires the petitioner to show an "extraordinary" circumstance based on new exculpatory evidence not presented at trial, such that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[13]

Before enactment of AEDPA's one-year limitations period, the *Schlup* standard might have been adequate, but post-AEDPA the *Schlup* standard is far too restrictive. The reality is that most factually innocent prisoners with valid claims of innocence who cannot access new scientific data, such as DNA, or do not have the investigatory resources to do exculpatory analysis will not be able to meet the *Schlup* standard.

In Section II, this article will examine the history of habeas corpus and AEDPA, concluding that habeas review was not conceived to be subject to a statute of limitations before the enactment of AEDPA. This article next looks at the injustices done to prisoners, especially the indigent and pro se, who attempt to navigate the habeas corpus system under the restrictions of AEDPA.

The arguments for and against an "actual innocence" exception for claims that would otherwise be time-barred are examined in Section III, and it is argued that equitable tolling of time-barred habeas petitions is necessary in cases of actual innocence. This article then considers in Section IV the development of "actual innocence" standards before and after AEDPA and analyzes the recent trend of federal courts in adapting the *Schlup* standard for time-barred habeas claims.

This article concludes in Section V that the *Schlup* standard for actual innocence adopted by federal courts fails to alleviate the injustice done to prisoners and fails to fulfill the purpose of the Great Writ. This article further suggests in Section VI that another standard should be adopted, one of "reasonable probability of innocence," which would satisfy both the public interests in justice and the fundamental values of habeas corpus.

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prevented him from complying with the statutory time limit") (alteration in original) (citation omitted); *see also* House v. Bell, 547 U.S. 518, 538 (2006) ("[The] *Schlup* standard is demanding and permits review only in the 'extraordinary case.'" (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)).

[11] *See infra* notes 140-45 and accompanying text.

[12] 513 U.S. 298 (1995). Portions of *Schlup*'s holding with regard to second or successive petitions have clearly been superseded by statute after enactment of the Anti-Terrorism and Effective Death Penalty Act. *See infra* note 136 and accompanying text.

[13] *Id.* at 327.

II. THE ROLE OF THE GREAT WRIT AS A FUNDAMENTAL AND EQUITABLE REMEDY, AND THE HISTORICAL ABSENCE OF A STATUTE OF LIMITATIONS

"[H]abeas corpus is, at its core, an equitable remedy."[14]

It is clear from the history and jurisprudence of habeas corpus that the "equitable remedy"[15] which restores liberty to the unjustly incarcerated was not subject to statutes of limitations. The fundamental purpose of habeas corpus is to correct miscarriages of justice and until the enactment of AEDPA, statutes of limitations were not an impediment to this goal.

A. "The Great Writ": Statutes of Limitations Under English Common Law

The roots of habeas corpus go at least as far back as the early days of English common law,[16] during which the doctrine was never subject to a statute of limitations. Wrongfully convicted prisoners have, for centuries, invoked the power of habeas corpus, referred to as the "Great Writ," to challenge the legality of their incarceration.[17] The Great Writ functioned to require sufficient legal cause for detaining or jailing a person.[18] As Justice Brennan stated, the history of habeas corpus is "inextricably intertwined with the growth of fundamental rights of personal liberty . . . . [I]ts function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints."[19]

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[14] *Id.* at 319.

[15] *Id.*

[16] *See* Peter Sessions, Note, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1514 (1997) (citing various references providing a history of habeas corpus, including specifically, William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978)).

[17] Aaron G. McCollough, Note, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 370 n.30 (2005) (citing 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.3 (4th ed. 2001) (discussing the history and usage of habeas corpus)).

[18] *See* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1087 (1995).

[19] Fay v. Noia, 372 U.S. 391, 401-02 (1963) (holding that state prisoner's failure to appeal from his conviction of felony murder was not an intelligent and understanding waiver of his right to appeal and did not justify withholding of federal habeas corpus relief), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977), *abrogated by* Coleman v. Thompson, 501 U.S. 722 (1991).

The English Habeas Corpus Act of 1679 clarified and codified the law of habeas.[20] The act stated: "*[W]hensoever* any person . . . shall bring any habeas corpus claim" before a court, the court shall "certify the true causes of his detainer or imprisonment . . . ."[21] There were limitations on the scope of the habeas doctrine during this period,[22] but legal historians generally accept that there was no imposition of specific time limitations.[23] Thus, it is probable that the "remedy by which a man is restored again to his liberty,"[24] and the "[certification of] the true causes of his detainer or imprisonment,"[25] was not conceived to be subject to a statute of limitations.[26]

B. Habeas Statutes of Limitations in the Eighteenth and Nineteenth Centuries

During the eighteenth century, the American colonists enacted the Great Writ into the United States Constitution, providing that: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[27]

After the Civil War, Congress enacted the Habeas Corpus Act of 1867, "which gave state prisoners the right to file habeas petitions in federal court."[28] No statutes of limitations were imposed during this development of habeas corpus jurisprudence. A prisoner who was "restrained of his or her liberty in

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[20] Forsythe, *supra* note 18, at 1096 n.79 (citing PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1427 (2d ed. 1973)).

[21] Habeas Corpus Act of 1679, 31 Car. 2, c.2, § 58 (Eng.) (emphasis added).

[22] *See* Forsythe, *supra* note 18, at 1095-98 (providing an in-depth discussion of the "significant limitations" of the Act).

[23] *See* Sessions, *supra* note 16, at 1534.

[24] Preiser v. Rodriguez, 411 U.S. 475, 485 (1973).

[25] Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 58 (Eng.).

[26] *See* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 476 (1990-91) ("To apply a statute of limitations to habeas corpus would violate the principle underlying the writ— that it is never too late to discover the truth which would release a person confined either for a cause for which no person should be restrained or by a process by which no person should be convicted.").

[27] U.S. CONST. art. I, § 9, cl. 2.

[28] Daniel M. Bradley, Jr., Schlup v. Delo: *The Burden of Showing Actual Innocence in Habeas Corpus Review and Congress' Efforts at Reform*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 463, 465 n.20 (1997) (quoting Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1868)). The Habeas Corpus Act of 1867 states, in relevant part: "[T]he several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution . . . ." *Id.* at 465 n.20 (quoting Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1868)).

violation of the constitution"[29] could seek redress in federal court, buttressed by the protection that except in very limited and unusual circumstances, the "Privilege of the Writ of Habeas Corpus shall not be suspended."[30]

C. Pre-AEDPA Habeas Corpus Jurisprudence in the Twentieth Century

The scope of habeas review over state convictions largely expanded during the mid-twentieth century.[31] The Warren Court decisions "dramatically shifted the balance of power with respect to habeas corpus law from the states to the federal government."[32] Consequently, federal habeas corpus acquired "enormous flexibility and power."[33]

This expansion, however, came with a subjective price, as a "rash" of habeas corpus petitions inundated the federal judiciary.[34] Despite this increase in habeas petitions, the Supreme Court continued to hold that habeas corpus is an "equitable remedy mandated by justice."[35] The Court consistently followed the proposition that the writ of habeas corpus should be available to those who are "unjustly wronged."[36]

The writ of habeas corpus remained free from statutes of limitations during this expansion period. The Supreme Court held that habeas corpus provides a remedy "without limit of time."[37] In noting that extensive delays sometimes occur in habeas cases, the Court was also clear in explaining that despite any delay, a statute of limitations should not apply to habeas petitions.[38] Although the government has a legitimate interest in finality, the Supreme Court ruled that these "conventional notions of finality of litigation have no place where life

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[29] Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1868).

[30] U.S. CONST. art. I, § 9, cl. 2.

[31] McCollough, *supra* note 17, at 371 & n.35 (citing Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 343-44 (1983) ("describing the Warren Court era as the 'zenith' of the writ's expansion")).

[32] Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 340 (1997).

[33] *See* Rosenn, *supra* note 31, at 353.

[34] *Id.* at 354 (citing a federal survey that shows an increase from 1408 petitions filed 1962, the year prior to *Fay v. Noia*, to 9063 petitions by 1970).

[35] Bradley, *supra* note 28, at 468 (citing Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986)).

[36] *Id.*

[37] Sessions, *supra* note 16, at 1533 (quoting United States v. Smith, 331 U.S. 469, 475 (1947)).

[38] *Id.* at 1533 (citing Chessman v. Teets, 354 U.S. 156, 164-65 (1957)). The court in *Chessman* held that "the history of this case presents a sorry chapter in the annals of delays in the administration of criminal justice." *Id.* (quoting *Chessman*, 354 U.S. at 164). However, the *Chessman* court also noted that even such an extreme delay "cannot . . . deter us from withholding relief so clearly called for." *Id.* (quoting *Chessman*, 354 U.S. at 164-65).

or liberty is at stake and infringement of constitutional rights is alleged."[39] The Supreme Court also explained that the Court owes its greatest responsibility to the constitution, "no matter how late it may be that a violation of the Constitution is found to exist."[40] Therefore, the court "must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late."[41]

Thus, it is clear that throughout its history, habeas corpus was not subject to any statute of limitations or time limit. The Anti-Terrorism and Effective Death Penalty Act, in turn, represented a distinct milestone and change in direction for the function of habeas.

D. The Anti-Terrorism and Effective Death Penalty Act of 1996

For brevity, this article will not "replow [the] ground,"[42] as the provisions and constitutionality of AEDPA have been discussed and debated in detail.[43] A brief review of its purpose and provisions is necessary, however, to understand its role in modifying habeas corpus jurisprudence and its detrimental effect on wrongfully convicted prisoners seeking federal review of their actual innocence claims.

AEDPA, signed into law on April 24, 1996,[44] is described as "[a]n Act to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes,"[45] and in subsequent Supreme Court cases AEDPA's habeas reforms were described as furthering "the principles of comity, finality[] and federalism."[46]

Regardless of whether AEDPA's purpose to "streamline"[47] the writ of habeas corpus was a political response to the terrorist attacks in Oklahoma

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[39] *Id.* at 1533-34 (quoting Sanders v. United States, 373 U.S. 1, 8 (1963)).

[40] *Id.* at 1534 (quoting *Chessman*, 354 U.S. at 165).

[41] *Id.* at 1534 (quoting *Chessman*, 354 U.S. at 165).

[42] John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 270 (2006).

[43] *Id.* at 270 n.63 (citing articles that discuss AEDPA); *see, e.g.*, 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.3 (4th ed. 2001); Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103 (1998); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

[44] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214 (relevant parts codified at 28 U.S.C. § 2244).

[45] *Id.* 110 Stat. at 1214.

[46] *See* Duncan v. Walker, 533 U.S. 167, 178 (2001) (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000)).

[47] *See generally* Brooke N. Wallace, Comment, *Uniform Application of Habeas Corpus Jurisprudence: The Trouble with Applying Section 2224's Statute of Limitations Period*, 79 TEMP. L. REV. 703, 706-07 (2006).

City,[48] or whether it constituted some other illegitimate[49] purpose, the changes that the Act made are clear: AEDPA severely restricted prisoners' access to federal habeas corpus review.[50] Most significant to this comment, under AEDPA there is a one-year statute of limitation to file for habeas corpus relief.[51] This statute of limitation can be "tolled," however. Under AEDPA, the limitation period shall run from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.[52]

The statute of limitations does not reset after each filing: Instead, it runs continuously after each final judgment. Determining when a habeas statute of

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[48] *See* Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CAL. L. REV. 2101, 2111 (2002). For a description of the legislative history of AEDPA, see generally Thomas C. Martin, Note, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201 (1996).

[49] It is important to recognize that the words "streamlining" and "lending finality" can be calculated choices to cover up the severe truncation of a fundamental right.

[50] *See generally* Zheng, *supra* note 48, at 2112 (discussing all of AEDPA's changes to habeas corpus evidentiary standards and law). For example, AEDPA added special habeas corpus procedures in capital cases, elevated the evidentiary standard by which "actual innocence" claims would be adjudicated from "more likely than not" to "clear and convincing" in cases of second or successive petitions, and increased restrictions on the availability of evidentiary hearings in federal habeas corpus proceedings. *Id.*

[51] Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101, 110 Stat. 1214, 1217 (codified in scattered sections of 28 U.S.C.). 28 U.S.C. § 2244 provides in part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court . . . .
>
> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2) (1996).

[52] 28 U.S.C. § 2244(d)(1)(A)-(D).

limitations is "tolled" is therefore complicated, and courts continue to debate on the interpretation of each of these factors. The legal research required to determine if a federal circuit recognizes a particular interpretation is difficult for an attorney; for an incarcerated indigent prisoner with minimal access to resources it would seem close to impossible.

After the one-year time period expires, courts are extremely reluctant to consider a petition for habeas relief. A petitioner barred from habeas relief under AEDPA's statute of limitations must pursue equitable tolling.[53] The doctrine of equitable tolling allows a court to toll a statutory deadline when a rigid application of the time limitation would be fundamentally unfair.[54] As succinctly observed in a comment on equitable tolling of AEDPA's statute of limitations, however, equitable tolling is not available in most cases.[55] Federal courts have generally restricted equitable tolling to cases where a habeas petitioner can prove "extraordinary circumstances beyond his control" in preventing him from complying with the statute of limitations.[56]

Additionally, a showing of extraordinary circumstances is not sufficient—the petitioner must also show diligence[57] in pursuing federal relief, which requires demonstrating "a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing."[58]

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[53] *See* Capital Defense Network, http://capdefnet.org/hat/ contents/current_developments/aedpa1.htm (last visited November 14, 2008) (discussing current AEDPA cases listed by topic).

The website points to cases in federal courts that have recognized equitable tolling, including Neverson v. Farquharson, 366 F.3d 32 (1st Cir. 2004); McClendon v. Sherman, 329 F.3d 490 (6th Cir. 2003); Helton v. Dep't of Corr., 259 F.3d 1310 (11th Cir. 2001); Kreutzer v. Bowersox, 231 F.3d 460 (8th Cir. 2000); Smith v. McGinnis, 208 F.3d 13 (2d Cir. 2000); Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999); Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998); Miller v. N.J. State Dep't of Corr., 145 F.3d 616 (3d Cir. 1998); Miller v. Marr, 141 F.3d 976 (10th Cir. 1998); Calderon v. U.S. Dist. Court, 128 F.3d 1283 (9th Cir. 1997).

[54] *See* McCollough, *supra* note 17, at 384 & n.108 (citing Irwin v. Dep't of Veteran Affairs, 498 U.S. 89, 96 (1990) (explaining the purpose of equitable tolling)).

[55] Virginia E. Harper-Ho, Comment, *Tolling of the AEDPA Statute of Limitations:* Bennett, Walker *and the Equitable Last Resort*, 4 CAL. CRIM. L. REV. 2, 26 (2001) (quoting *Calderon*, 128 F.3d at 1288, *overruled in part on other grounds by* 163 F.3d 530 (9th Cir. 1998)).

[56] *Id.* (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)); *see also* Valverde v. Stinson, 224 F.3d 129, 133 (2d Cir. 2000).

[57] Harper-Ho, *supra* note 55, at 27 (citing Fisher v. Johnson, 174 F.3d 710, 713, 715-16 (5th Cir. 1998)). The court in *Fisher* rejected an equitable tolling request based on ignorance of the law because once the prisoner learned of the statute of limitations, he still had 322 days to complete a habeas application, which he did not. *See Fisher*, 174 F.3d at 715 (citing Covey v. Arkansas River Co., 865 F.2d 660 (5th Cir. 1989) (holding that "equity is not intended for those who sleep on their rights")).

[58] *Id.* (quoting *Valverde*, 224 F.3d at 134 & n.4).

In sum, AEDPA's statute of limitations presents a large and complicated obstacle to filing for federal habeas corpus review, a barrier not historically faced by prisoners seeking relief from unjust restraints of liberty. The statute of limitations has become problematic for prisoners (especially ones working pro se), and therefore many time-barred prisoners with claims of actual innocence wind up attempting to navigate the further complicated field of equitable tolling.

III. COURTS MUST RECOGNIZE AN ACTUAL INNOCENCE EXCEPTION FOR WRONGFULLY CONVICTED AMERICANS BARRED FROM SEEKING HABEAS CORPUS REVIEW UNDER AEDPA'S STATUTE OF LIMITATIONS

"The innocent . . . [h]ave no enemy but time."[59]

One of the most "glaring error[s] in judgment" of AEDPA's lawmakers was the "lack of attention to the plight of pro se prisoners," as many prisoners must file a habeas corpus petition within the statute of limitations without the aid of counsel or investigative resources.[60]

A. The Injustice of AEDPA's Statute of Limitations

AEDPA's statute of limitations has unequivocally resulted in an injustice to prisoners. First, it is extremely unclear when tolling begins and ends for the one-year period. It is evident that "[t]he contours of § 2244(d)(2)'s 'loophole' have been the subject of the greatest debate regarding the interpretation of the one-year limitation."[61] This includes the meaning of "state post-conviction review," what constitutes a "properly filed application" sufficient to toll the statute, the meaning of "other collateral review," whether federal habeas petitions constitute "other collateral review" for tolling purposes, and whether a petition is tolled during a petition for certiorari to the state supreme court.[62] Thus, there are many situations where a petitioner could legitimately believe that the habeas time limitation is tolled, when in fact it would be running down by the minute.

Most indigent and pro se prisoners also find that meeting the short one–year deadline is extremely difficult or impossible.[63] AEDPA's statute of limitations

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[59] WILLIAM BUTLER YEATS, SELECTED POEMS AND THREE PLAYS 129-30 (M.L. Rosenthal ed., MacMillan Pub. Co. 3d ed. 1962) (excerpt from a poem entitled, "In Memory Of Eva Gore-Booth and Con Markievicz").

[60] Sussman, *supra* note 2, at 360.

[61] Harper-Ho, *supra* note 55, at 7.

[62] *See id.* at 7-9 (discussing interpretation of AEDPA's tolling provisions).

[63] *See, e.g.*, Blume, *supra* note 42, at 288-92.

therefore bars many indigent and pro se prisoners seeking habeas review. Commentator Limin Zheng, in a thorough discussion of why actual innocence is necessary as a gateway to habeas review, offers compelling reasoning:

> One year is insufficient time for a confined inmate to prepare and file a meaningful habeas corpus petition that would escape the fatal traps of the exhaustion doctrine, the procedural-default doctrine, and the second and successive petitions doctrines. Many inmates are uneducated, mentally impaired, or both. . . . For most inmates, "attempting to read a law book would be akin to attempting to read a book written in a foreign language." . . . It is both unrealistic and unfair to expect an inmate to fully understand the legal remedies [that] he might have . . . . [Even if a prisoner is educated or receives assistance of counsel, reinvestigation is crucial] where the claims must rely on new evidence. . . . [F]ew inmates have access to the outside resources necessary to engage in further factfinding [for claims of ineffective assistance of counsel or prosecutorial misconduct] . . . [and m]ost of these attorneys [who assist in investigation] represent prisoners on a pro bono basis.[64]

Furthermore, exhausting state remedies is frequently an "arduous, time-consuming task."[65] Tolling of the habeas limitations period does not begin until a post-conviction petition in the state is "properly filed," and therefore it is easy for pro se or even counseled petitioners to exhaust most or all of the one-year limitations period in investigation, research, and drafting of the initial state post-conviction petition.[66] Additionally, after post-conviction claims are exhausted in the state courts, the time remaining in the AEDPA limitations period is usually not long enough also to seek certiorari from the U.S. Supreme Court before the one-year limitations period runs out, as this period of review is not included in the tolling process.[67] As a result, "unjustly wronged"[68] pro se and indigent petitioners with little or no time left on their one-year statute of limitations are likely to be denied their last resort and access to an "equitable remedy mandated by justice."[69]

Prisoners who are time-barred from filing habeas petitions only possess the option to seek equitable tolling of their limitations period. Under AEDPA,

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[64] Zheng, *supra* note 48, at 2129-30 (citations omitted).

[65] Diane E. Courselle, *AEDPA Statute of Limitations: Is it Tolled When the United States Supreme Court is Asked to Review a Judgment from a State Post-Conviction Proceeding?*, 53 CLEV. ST. L. REV. 585, 587 (2005-06). There are numerous difficulties petitioners face in attempting to understand AEDPA's tolling provisions. *See id.* at 587-88.

[66] *Id.* at 588.

[67] *Id.* at 588; *see also* Lawrence v. Florida, 549 U.S. 327, 127 S. Ct. 1079 (2007) (holding that one-year statute of limitations for seeking federal habeas corpus relief from a state-court judgment was not tolled during the pendency of petition for certiorari to the United States Supreme Court seeking review of denial of state postconviction relief).

[68] Bradley, *supra* note 28, at 468 (citing Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986)).

[69] *Id.* at 468-70 (citing *Kuhlmann*, 477 U.S. at 447).

federal courts deem equitable tolling generally appropriate in only two distinct situations: When a petitioner is "prevented from asserting her claims by some kind of wrongful conduct on the part of the government,"[70] and when "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time."[71] Establishing these "extraordinary circumstances" is extremely difficult, considering that "a petitioner's ignorance of the law, lack of legal training or representation, incapacitating illness, illiteracy, and counsel's error in failing to timely file have all been deemed insufficient to justify equitable tolling of [AEDPA's statute of limitations.]"[72]

B. Recognizing an Actual Innocence Exception for Time-Barred Prisoners

Since the enactment of AEDPA, commentators have steadfastly argued that federal courts should recognize an actual innocence exception to hear habeas petitions for prisoners with valid claims after AEDPA's one-year statute of limitations has passed.[73] Primarily, because the writ of habeas corpus is considered "the best and only sufficient defen[s]e of personal freedom," [74] recognizing "[a]n actual-innocence exception to the AEDPA's statute of limitations would enable the courts to continue to redress the most egregious injustice that can occur under our criminal justice system: the incarceration of an innocent person by an unconstitutional process."[75] Furthermore, depriving the innocent of life and liberty completely undermines the public's confidence in our criminal justice system,[76] and as the Supreme Court has recognized, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[77]

Equitable tolling seems to be the best possible way to recognize the actual innocence exception. Federal courts have already recognized that a statute of limitations can be "equitably tolled" in cases of "extraordinary

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[70] Sussman, *supra* note 2, at 361 (quoting Seattle Audubon Soc'y v. Robertson, 931 F.2d 590, 595 (9th Cir. 1991), *rev'd on other grounds*, 503 U.S. 429 (1992)).

[71] *Id.* at 362 (quoting Calderon v. U.S. Dist. Court, 163 F.3d 530, 541 (9th Cir. 1998)).

[72] *Id.* at 362-63. Sussman discusses and cites to situations where federal courts have not recognized the applicability of equitable tolling to AEDPA's statute of limitations. *Id.*

[73] *See, e.g.*, Zheng, *supra* note 48; Harper-Ho, *supra* note 55; Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 36 (2004).

This article does not address the broader, and perhaps more fundamental argument that AEDPA does not survive constitutional scrutiny.

[74] Zheng, *supra* note 48, at 2132 (quoting *Ex Parte* Yerger, 75 U.S. 85, 95 (1868)).

[75] *Id.* at 2132.

[76] *Id.* at 2136.

[77] *Id.* at 2136 (quoting Schlup v. Delo, 513 U.S. 298, 325 (1995)).

circumstances."[78] On the other hand, some commentators believe that "[h]istorically, the doctrine of equitable tolling had nothing to do with innocence."[79] The recent trend of courts, however, to bring innocence into the equitable tolling analysis[80] suggests that courts view innocence as highly relevant to habeas corpus claims.[81]

Some critics argue that an actual innocence exception in general would encourage petitioners to re-argue old facts, manufacture new evidence, intimidate victims and witnesses, and simply bring dressed-up attempts to argue the evidence again.[82] Justice O'Connor has noted that "'the federal courts will be deluged with frivolous claims of actual innocence' by prisoners who, refusing to accept the jury's verdict, demand[] a hearing in which to have [their] culpability determined once again."[83] Other commentators note, however, that the argument that actual innocence exceptions lead to abuse is unfounded.[84] In fact, the Supreme Court has noted that actual innocence claims in habeas petitions are infrequently encountered by federal courts.[85]

Arguments for "comity and federalism" explain that "states should be trusted to adjudicate federal-rights claims."[86] According to one year-long study in 1995, however, before AEDPA restrictions were enacted, "only 1% of federal habeas corpus petitions were granted and another 1% were remanded to state courts."[87] Therefore, "[a]t the very least, these low figures show that permitting federal habeas corpus review of time-barred petitions on the basis of actual innocence will not lead to any significant encroachment on states[']rights."[88]

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[78] *See, e.g.*, Dunlap v. United States, 250 F.3d 1001, 1008 (6th Cir. 2001) (discussing the "extraordinary circumstances" requirement and other circuits which have recognized it).

[79] Sussman, *supra* note 2, at 364.

[80] For a discussion of equitable tolling, see *infra* Section IV.

[81] *See* Sussman, *supra* note 2, at 365.

[82] *See, e.g., The Streamlined Procedures Act of 2005: Hearing on H.R. 3035 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Thomas Dolgenos, Assistant Dist. Att'y, Phila. Dist. Atty's Office), *available at* http://www.constitutionproject.org/pdf/ dolgenos_10_11_05_testimony1.pdf [hereinafter Testimony of Thomas Dolgenos].

[83] *Id.* at 13 (quoting Herrera v. Collins, 506 U.S. 390, 419-20, 426-27 (1993) (O'Connor, J. concurring) (brackets in original)).

[84] *See* Bellamy, *supra* note 73, at 36.

[85] *Id.* at 39 (citing Schlup v. Delo, 513 U.S. 298, 324 (1995)); *see also* Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 378-79 (1993).

[86] Zheng, *supra* note 48, at 2137.

[87] *Id.* at 2137 (citing ROGER A. HANSON & HENRY W. K. DALEY, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 17 (1995), *available at* http://www.ojp. usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf).

[88] *Id.*

Another legitimate concern is finality. The Supreme Court has raised the concern that the writ of habeas corpus entails significant costs.[89] The court believes that habeas review can extend the ordeal of trial and undermine the principles of finality.[90] Finality, however, should not supersede a miscarriage of justice, because public fear and distrust arises as a result of incarcerating the innocent.[91] Moreover, "even those gravely concerned about conservation of judicial resources have acknowledged that the 'policy against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation.'"[92]

IV. THE STANDARD OF ACTUAL INNOCENCE IN HABEAS CORPUS JURISPRUDENCE

"[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence. . . . [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."[93]

Before the enactment of AEDPA, the Supreme Court developed a standard of actual innocence for habeas corpus petitions in a distinct series of cases.[94] After the enactment of AEDPA, however, with the resulting injustice done to prisoners who can no longer seek habeas relief, it is unclear as to which standard applies or should apply to an actual innocence claim for time-barred petitions.

A. Standards for "Actual Innocence" Before the Enactment of AEDPA

The past thirty-five years have seen "an intimate coupling" of habeas and innocence, and innocence is "now unquestionably relevant to federal habeas corpus review."[95] A detailed summary of this jurisprudence can be found in other articles, however, a concise summary is presented here to explain the relationship.

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[89] *See* Engle v. Isaac, 456 U.S. 107, 126 (1982).

[90] *Id.*

[91] *See, e.g.*, Zheng, *supra* note 48, at 2137-38.

[92] *Id.* at 2138 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

[93] Schlup v. Delo, 513 U.S. 298, 324-25 (1995) (quoting *In re.* Winship, 397 U.S. 358, 372 (1970)) (internal quotation marks omitted).

[94] *See infra* notes 97-135 and accompanying text.

[95] Sussman, *supra* note 2, at 378 (discussing emergence of innocence issues in the habeas corpus doctrine).

In *Sanders v. United States*,[96] the U.S. Supreme Court held that a successive petition must be heard when required by the "ends of justice."[97] In *Wainwright v. Sykes*,[98] the Court adopted an exception to procedurally barred habeas petitions under the concept of "cause and prejudice,"[99] to "afford an adequate guarantee . . . that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."[100] *Engle v. Isaac*[101] held that petitioners should not suffer a "fundamental miscarriage of justice" and that in appropriate cases "the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration."[102]

The *Wainwright* and *Engle* courts used the "cause and prejudice" standard to protect procedurally barred petitioners, defining the term "cause" as some external source that prevented conformity with a state rule or a reason for not bringing a petition earlier, and defining "prejudice" as the actual harm that results from the alleged constitutional violation.[103] Justice O'Connor also noted in *Engle* that the "cause and prejudice" test is flexible,[104] and therefore "in appropriate cases . . . [the state's interest in finality] must yield to the imperative of correcting a fundamentally unjust incarceration."[105]

At the end of the twentieth century, the Supreme Court "adopted the actual-innocence doctrine as a gateway through which petitioners who were able to show probable innocence could bring their . . . claims."[106] Notably, the Court differed in its approach to the standard, depending on the context of the claim.

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[96] 373 U.S. 1 (1963).

[97] *Id.* at 11 n.5.

[98] 433 U.S. 72 (1977).

[99] *Id.* at 87.

[100] *Id.* at 91.

[101] 456 U.S. 107, 135 (1982).

[102] *Id.* at 135.

[103] *See* Bradley, *supra* note 28, at 469 (citing *Wainwright*, 433 U.S. at 87-91); *see also Engle*, 456 U.S. at 129 ("[W]hen a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice.").

[104] *Engle*, 456 U.S. at 135 ("The terms 'cause' and 'actual prejudice' are not rigid concepts . . . .").

[105] *Id.* at 135; *see also* Sussman, *supra* note 2, at 381 ("[T]he Court never viewed 'cause' and 'prejudice' as entirely rigid concepts, due to the fact that any such rigid conception might result in barring an innocent prisoner from collaterally attacking her conviction due to a procedural error.").

[106] Zheng, *supra* note 48 at 2118-19 (discussing the development of the actual innocence doctrine as a gateway through procedural barriers).

In *Kuhlmann v. Wilson*,[107] the Supreme Court looked to *Sanders v. United States*[108] and held that a prisoner can prove an "ends of justice" exception when "the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[109] Under *Kuhlmann*, a prisoner makes a "colorable showing of factual innocence" when "the prisoner . . . '[shows] a fair probability that, in light of all the evidence . . . the trier of the facts would have entertained a reasonable doubt of his guilt.'"[110]

In *Murray v. Carrier*,[111] the Supreme Court addressed a habeas petition alleging that a procedural barrier to habeas review due to ineffective assistance of counsel should be overlooked, even though ineffective assistance of counsel does not meet the "cause and prejudice" standard. The Court expanded on the "cause and prejudice" test enunciated in *Engle*, noting that "for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard,'"[112] but did not "pretend that this will always be true."[113] The *Carrier* court accordingly held that "in an extraordinary case, where a constitutional violation has *probably* resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."[114]

In contrast, the Supreme Court in *Sawyer v. Whitley*[115] addressed the issue of whether a petitioner bringing "a successive, abusive, or defaulted federal habeas claim has shown he is 'actually innocent' of the death penalty to which he has been sentenced so that the court may reach the merits of the claim."[116] The *Sawyer* court held that a habeas petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."[117]

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[107] 477 U.S. 436 (1986) (holding, *inter alia*, that the ends of justice must be considered when determining whether the court should exercise discretion to consider a barred habeas corpus petition, and that the ends of justice require that federal courts only should hear that petition when the prisoner supplements his constitutional claim with a colorable showing of factual innocence).

[108] 373 U.S. 1 (1963).

[109] *Kuhlmann*, 477 U.S. at 454.

[110] *Id.* at 454-55 n.17 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970)).

[111] 477 U.S. 478 (1986); *see also* Bradley, *supra* note 28, at 480 (discussing *Carrier* and its procedural posture).

[112] *Carrier*, 477 U.S. at 497-96 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)).

[113] *Id.* at 496.

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

[115] 505 U.S. 333 (1992).

[116] *Id.* at 335.

[117] *Id.* at 336.

In *Herrera v. Collins*,[118] the Supreme Court elaborated on the distinction between the "miscarriage of justice" exception and claims based on pure "innocence of fact." Sentenced to death for murder, petitioner Herrera filed a second habeas petition ten years after his conviction, alleging his innocence and that his brother had in fact committed the crime.[119] The Supreme Court held that Herrera's claim of actual innocence was not proper because the "existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."[120]

As the foregoing discussion illustrates, "the view of habeas corpus as an ever-available remedy for innocent prisoners remained constant during the course of the changes wrought on habeas [during the last third of the twentieth century]."[121] The standard of actual innocence that should apply to a time-barred habeas claim, however, remains an open question of law.

B. Schlup v. Delo—*Establishing a Standard for Gateway Review of Actual Innocence Claims*

A year before the enactment of AEDPA, the Supreme Court addressed the issue of which standard applies to actual innocence claims in *Schlup v. Delo*.[122] Petitioner Schlup, a Missouri prisoner sentenced to death,[123] filed a second federal habeas corpus petition alleging constitutional error, including that ineffective assistance of counsel, such as failure to call exonerating witnesses, deprived the jury of critical evidence that would have established his innocence.[124]

The *Schlup* court first explained the difference between Schlup's claim of actual innocence and the claim of actual innocence asserted in *Herrera*: "In *Herrera*, the petitioner advanced his claim of innocence to support a novel substantive constitutional claim . . . . Schlup's claim of innocence, on the other hand, is procedural, rather than substantive."[125] In contrast, Schlup's claim was "based not on his innocence, but rather on his contention that the ineffectiveness of his counsel and the withholding of evidence by the prosecution denied

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[118] 506 U.S. 390 (1993).

[119] *See* Matthew J. Mueller, Comment, *Handling Claims of Actual Innocence: Rejecting Federal Habeas Corpus as the Best Avenue for Addressing Claims of Innocence Based on DNA Evidence*, 56 CATH. U. L. REV. 227, 239 (2006) (discussing the pertinent facts of *Herrera*).

[120] *Id.* at 239 (quoting *Herrera*, 506 U.S. at 398).

[121] Sussman, *supra* note 2, at 387.

[122] 513 U.S. 298 (1995).

[123] *See generally* James G. Clessuras, Note, Schlup v. Delo: *Actual Innocence as Mere Gatekeeper*, 86 J. CRIM. L. & CRIMINOLOGY 1305 (1996) (providing an in-depth analysis of the facts and each Justice's opinion in *Schlup*).

[124] *Schlup*, 513 U.S. at 301, 306.

[125] *Id.* at 314 (citation omitted).

him the full panoply of protections afforded . . . by the Constitution.[126] Therefore, Schlup's evidence of innocence did not have to carry as large a burden.[127]

The *Schlup* court then went on to reason that "the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy."[128] It stressed the principle that actual innocence exceptions should remain unusual:

> To ensure that the fundamental miscarriage of justice exception would remain "rare" and would only be applied in the "extraordinary case," while at the same time ensuring that the exception would extend relief to those who were truly deserving, [the Supreme Court in cases such as *Carrier*] explicitly tied the miscarriage of justice exception to the petitioner's innocence.[129]

The *Schlup* court held that *Carrier* and *Kuhlmann* expressed the standard of proof that should govern the consideration of an actual innocence claims.[130] The *Schlup* court compared this standard to the *Sawyer* "extraordinary circumstances" requirement and concluded that because "the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case,"[131] *Carrier*, rather than *Sawyer*, is the appropriate standard when the claimed error is one of actual innocence.[132] The *Schlup* court then explained that a crédible claim of actual innocence requires

> [a] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, *claims of actual innocence are rarely successful.*[133]

Schlup concluded that to satisfy the *Carrier* gateway standard, "a petitioner must show that it is more likely than not that no reasonable juror would have

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

[127] *Id.* at 316.

[128] *Id.* at 319.

[129] *Id.* at 321.

[130] *Id.* at 322-23. The court noted that "[i]n *Carrier*, for example, the Court stated that the petitioner must show that the constitutional error 'probably' resulted in the conviction of one who was actually innocent." *Id.* at 322. The court also noted that "[t]he *Kuhlmann* plurality, though using the term 'colorable claim of factual innocence,' elaborated that the petitioner would be required to establish, by a 'fair probability,' that 'the trier of the facts would have entertained a reasonable doubt of his guilt.'" *Id.* (quoting Kuhlmann v. Wilson, 477 U.S. 436, 454, 455, n.17 (1986)).

[131] *Id.* at 324.

[132] *Id.*

[133] *Id.* at 324 (emphasis added).

found petitioner guilty beyond a reasonable doubt."[134] The Supreme Court determined that this standard ensures that a petitioner's case is "truly extraordinary."[135]

C. The Current Trend in Recognizing an Actual Innocence Gateway Standard for Time-Barred Habeas Petitions Under AEDPA

Since the enactment of AEDPA, it remains a question what standard for actual innocence applies to certain habeas claims. The plain language of the statute shows that AEDPA superseded *Schlup* and imposed a "clear and convincing evidence" standard on actual innocence claims in "successive" petitions.[136] It is unclear, however, what standard applies to actual innocence claims in petitions barred under AEDPA's statute of limitations. AEDPA provisions are silent as to if or what type a standard of actual innocence should apply to time-barred petitions.

More recently, the Supreme Court has affirmed that *Schlup* remains the reviewing standard of *general* gateway innocence claims. In *House v. Bell*,[137] the Court held that in order for a death row inmate to obtain review of his procedurally barred claims, he had to meet the *Schlup* standard by introducing new and substantial evidence that the jury was not able to examine at trial.[138]

The Supreme Court has not decided, however, whether the statute of limitations is subject to equitable tolling, nor has it addressed whether "actual innocence" is grounds for equitable tolling of the AEDPA statute of limitations. The Court has recently recognized that, assuming without deciding that the one-year statute of limitations provision of AEDPA was subject to equitable tolling, the habeas petitioner must establish "(1) that he has been pursuing his rights diligently, and (2) that some 'extraordinary circumstance stood in his way' and prevented timely filing."[139]

Since the start of the decade, federal circuits have begun to recognize that establishing "actual innocence" is a ground for equitable tolling of the AEDPA statute of limitations. Specifically, three circuits have expressly recognized that "actual innocence" is a valid argument for equitable tolling of a time-barred habeas petition.[140] Five other circuits have so far refused to decide the issue,

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[134] *Id.* at 327.

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

[136] *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (2000).

[137] 547 U.S. 518 (2006).

[138] *Id.*

[139] *See* Lawrence v. Florida, 549 U.S. 327, 127 S. Ct. 1079, 1085 (2007) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

[140] *See* Souter v. Jones, 395 F.3d 577 (6th Cir. 2005) (petitioner, on case of first impression, satisfied the *Schlup* standard of presenting a credible claim of actual innocence which will

finding instead that the petitioner would not have met the burden of proof of "actual innocence" in that specific case, and thus not reaching whether the statute of limitations is entitled to equitable tolling.[141] Only three circuits have expressly rejected equitable tolling of time-barred petitions for "actual innocence" claims.[142]

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equitably toll the statute of limitations period); Majoy v. Roe, 296 F.3d 770, 775 (9th Cir. 2002). *Majoy* held that the defendant:

> [M]ay be able to muster a plausible factual case meeting the exacting gateway standard established by the Supreme Court in *Schlup* for overriding a petitioner's clear failure to meet deadlines and requirements for filing a timely petition in federal court. Under *Schlup*, a petitioner's "otherwise-barred claims [may be] considered on the merits . . . if his claim of actual innocence is sufficient to bring him within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'"

Id. (quoting Carriger v. Stewart, 132 F.3d 463, 477 (9th Cir. 1997)); *see also* Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) ("AEDPA's one-year statute of limitations is subject to equitable tolling but only 'in rare and exceptional circumstances.' Equitable tolling would be appropriate, for example, when a prisoner is actually innocent . . . ." (citation omitted)).

[141] *See* Fields v. Johnson, No. 7:06-CV-00701, 2007 WL 45641, at *3 (W.D. Va., Jan. 5, 2007) (unpublished memorandum decision) ("Neither the Supreme Court nor the United States Court of Appeals for the Fourth Circuit have held that actual innocence is a ground for equitable tolling of the § 2244(d)(1) limitations period."); Horning v. Lavan, No 04-4609, 2006 WL 2805608, at *3, *4 (3d Cir. Sept. 11, 2006) ("[E]quitable tolling is proper . . . when the principles of equity would make [the] rigid application [of a limitation period] unfair. . . . However, we have yet to hold that the AEDPA statute of limitations can be equitably tolled on the basis of actual innocence." (alteration in original) (citation omitted)); Doe v. Menefee, 391 F.3d 147, 160 (2d Cir. 2004) ("We have specifically reserved the question of whether a claim of actual innocence based on newly discovered evidence constitutes an extraordinary circumstance that merits equitable tolling, however, as well as the question of whether the Constitution would require equitable tolling for actual innocence."); Sibley v. Culliver, 377 F.3d 1196, 1205 (11th Cir. 2004). The *Sibley* court, in refusing to address the petitioner's argument that equitable tolling should apply to a claim of actual innocence, held that its "precedent prohibits us from reaching this question in this case . . . . '[T]he factual issue of whether the petitioner can make a showing of actual innocence should be first addressed, before addressing the constitutional issue of whether the Suspension Clause requires such an exception for actual innocence.'" *Id.* (quoting Wyzykowski v. Dep't of Corr., 226 F.3d 1213, 1218 (11th Cir. 2000)) (alteration in original); *see also* Flanders v. Graves, 299 F.3d 974, 976-78 (8th Cir. 2002) ("[W]e have declined to address the question of whether a petitioner's 'actual innocence' is a circumstance sufficient to toll the statute of limitations . . . . We do not hold that actual innocence can never be relevant to a claim that the habeas statute of limitations should be equitably tolled." (citation omitted)).

[142] *See* Escamilla v. Jungwirth, 426 F.3d 868, 872 (7th Cir. 2005) ("Prisoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action."); David v. Hall, 318 F.3d 343, 347 (1st Cir. 2003) (holding that assertion of an actual innocence claim does not override the AEDPA statute of limitations); Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002). *Cousin* held that:

> The one-year limitations period established by § 2244(d) contains no explicit exemption for petitioners claiming actual innocence of the crimes of which they have been convicted.

More importantly, the trend in the federal circuit is towards adoption of the *Schlup* gateway standard for deciding whether the petitioner can have his time-barred claim equitably tolled. Of the three circuits that have recognized equitable tolling for "actual innocence" claims, two have expressly adopted the *Schlup* standard.[143] Furthermore, of the five circuits that have refused to decide the issue, three circuits have at least recognized that *Schlup* should be the standard applied.[144] Thus, it appears that in the future *Schlup* may be the accepted standard by which petitioners with "actual innocence" claims could have their time-barred habeas petitions heard.[145]

> As a consequence, a petitioner's claims of actual innocence are relevant to the timeliness of his petition if they justify equitable tolling of the limitations period. We have previously held that they do not.

Id. at 849 (citing Felder v. Johnson, 204 F.3d 168, 171 (5th Cir. 2000)).

[143] *See Souter*, 395 F.3d at 599; *Majoy*, 96 F.3d at 775.

[144] *See* Doe v. Menefee, 391 F.3d 147, 161 (2d. Cir. 2004) ("Because the interests that must be balanced in creating an exception to the statute of limitations are identical to those implicated in the procedural default context, we see no reason not to apply the Schlup standard in the tolling context."); *Fields*, No. 7:06-CV-00701, 2007 WL 45641, at *3 ("At a minimum, to state a claim of actual innocence sufficient to excuse procedural default, a petitioner must show 'it is more likely than not that no reasonable juror would have convicted him' of the underlying crime if jurors had received specific, reliable evidence not presented at trial.") (citation omitted); Sibley, 377 F.3d at 1207 ("Even accepting Sibley's factual allegations at face value, they do not meet the standard articulated in Schlup for making a finding of actual innocence.").

[145] *See* Neuendorf v. Graves, 110 F. Supp. 2d 1144, 1157 (E.D. Iowa 2000). The District Court of Iowa, Eastern Division, cited to several other federal district courts that have assumed that "actual innocence" would excuse non-compliance with AEDPA's statute of limitations, specifically:

> Silvestre v. United States, 55 F. Supp. 2d 266, 268 (S.D.N.Y. 1999) (concluding that, even if a claim of "actual innocence" permitted habeas review for a federal prisoner pursuant to § 2241, where an action pursuant to § 2255 was time-barred, the petitioner could not establish his "actual innocence," owing to the overwhelming level of proof presented by the government); Eisermann v. Penarosa, 33 F. Supp. 2d 1269, 1273 (D. Haw. 1999) (reading [*Schlup*] to require equitable tolling of AEDPA's statute of limitations upon a showing of "actual innocence," but noting that the petitioner had not asserted his "actual innocence"); . . . United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1101-02 (C.D. Cal. 1998) (concluding in a § 2255 action that, under [*Schlup*], the AEDPA's one-year statute of limitations would not apply to a defendant's claims if the defendant could avail himself of the "miscarriage of justice gateway" by making a "colorable showing of factual innocence," but finding no sufficient showing of "actual innocence"), *aff'd on other grounds*, 209 F.3d 1095 (9th Cir. 2000); Thomas v. Straub, 10 F. Supp. 2d 834, 836 (E.D. Mich. 1998) (even if "actual innocence" excuses an otherwise untimely petition, the petitioner had failed to show "actual innocence") (emphasis omitted).

V. ADOPTING THE *SCHLUP* GATEWAY STANDARD OF ACTUAL INNOCENCE FOR EQUITABLE TOLLING OF TIME-BARRED PETITIONS FAILS TO ALLEVIATE THE EXTREME INJUSTICE DONE TO WRONGFULLY CONVICTED AMERICANS

"The danger to the criminal justice system lies in the absolute divorce of law from morality. Any positive law that blinds judges to the truth and perpetuates injustice to the innocent is a threat to a society with a conscience."[146]

Although there is a trend towards the general recognition that "actual innocence" is grounds for equitable tolling of the AEDPA statute of limitations period, the standard articulated in *Schlup*[147] is far too restrictive and fails to alleviate the injustice done to time-barred prisoners with valid claims of innocence.

First, *Schlup* was decided a year before the enactment of AEDPA. Contextually, *Schlup* did not consider a restrictive statute of limitations. As discussed previously, although there have been some procedural limitations, no statute of limitation has ever been imposed on the doctrine of habeas corpus. Arguably, the statute of limitations is the one of the most restrictive provisions of AEDPA and on habeas corpus in general.

A standard of actual innocence that "ensures that petitioner's case is truly extraordinary"[148] cannot be reconciled with a provision that ensures that the majority of pro se prisoners will be time-barred from seeking habeas corpus review. Under *Schlup*, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[149] This exception, based on the "fundamental miscarriage of justice," seeks to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."[150] When such a severe statute of limitations is imposed, however, the standard cannot "properly strike[]that balance."[151]

In the past, most prisoners who were "restrained of his or her liberty,"[152] or "grievously wronged,"[153] were able to bring their claim before federal habeas

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[146] Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. CIV. RTS. L.J. 233, 263 (2002).

[147] Schlup v. Delo, 513 U.S. 298 (1995).

[148] *Id.* at 327 (citation omitted).

[149] *Id.*

[150] *Id.* at 324.

[151] *Id.* (alteration in original).

[152] Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1868).

[153] Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (citation omitted).

review.[154] Now, requiring that a prisoner's circumstances be "extraordinary" simply to enter the court and hear his or her constitutional claims, may effectively eliminate a significant number of those prisoners whose cases do not appear as clear or compelling in petition. One commentator argues that "the most egregious situation that may occur when a prisoner's habeas corpus action is denied based on untimely filing would be the inability of a prisoner to have a claim of actual innocence heard on its merits."[155]

Second, *Schlup* has unjustly lived up to its mantra in functioning as a gateway in only the most "extraordinary"[156] and "rare"[157] cases. In *House v. Bell*,[158] former prosecutors and professors of criminal justice filed an amici curiae brief in support of the petitioner House, in the interests of "maintaining the legitimacy of the criminal justice system as a fair and effective means of punishing the guilty and freeing the innocent."[159] In *House*, the issue presented to the Supreme Court included what standard habeas petitioners must establish to assert innocence as a gateway for defaulted claims.[160] Amici argued in support of *Schlup* as a standard for reviewing actual innocence claims. In their argument, the amici reviewed the adjudication of *Schlup* claims electronically available on Westlaw or LexisNexis in the federal courts for a period of ten years (from 1995, the year of the *Schlup* decision, until 2005). This review concluded, however, that:

> [S]uch decisions were issued by only 338 federal habeas courts (143 circuit courts, and 195 district courts). In 31 of those cases — 9.2 percent of the total — the courts found that the petitioners had presented sufficiently powerful claims of actual innocence to warrant consideration of their otherwise procedurally-barred constitutional claims.[161]

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[154] *See* Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 80 (2005).

[155] Bellamy, *supra* note 73, at 36 (citing Wyzykowski v. Dep't of Corr., 226 F.3d 1213, 1215 (11th Cir. 2000). *Wyzykowski* raised the issue of "how the court should deal with the introduction of evidence obtained from technological advancements, particularly DNA testing, that might prevent the continued incarceration of a prisoner based on a compelling demonstration of actual innocence." *Id.*

[156] *Schlup*, 513 U.S. at 327 (citation omitted).

[157] *Id.* at 321, 324 (emphasizing that "in the vast majority of cases, claims of actual innocence are rarely successful").

[158] 547 U.S. 518 (2006).

[159] Brief for Former Prosecutors and Professors of Criminal Justice as Amici Curiae Supporting Petitioner at 1, House v. Bell, 547 U.S. 518 (2006) (No. 04-8990), 2005 WL 2367033 [hereinafter House Amicus Brief].

[160] *House*, 547 U.S. at 536-40.

[161] House Amicus Brief, *supra* note 159, at 10.

Only twenty of these cases were sufficiently meritorious as to result in immediate or eventual relief from the petitioner's conviction or sentence.[162]

It is alarming that the *Schlup* gateway standard permits less than ten percent of procedurally-barred habeas claims to be reviewed on the merits, when considering that "thousands"[163] of petitioners have been barred from filing habeas claims because of their failure to meet the statute of limitations. One conservative study estimated that almost ten thousand citizens per year, or 0.5%[164] of all defendants convicted each year, are actually innocent of their crimes. This conservative study also concluded that "[t]he further a case progresses in the system, the less chance there is that an error will be discovered and corrected, unless it involves a basic issue of constitutional rights and due process."[165]

If the purpose of the "miscarriage of justice" standard in habeas corpus is to balance the rights of the prisoner's interest in justice with the rights of the state in finality and comity,[166] then in light of AEDPA's statute of limitations, *Schlup* does nothing else but skew that balance. A fairer standard is necessary to ensure that prisoners with valid and reasonable claims of actual innocence are afforded their last resort and greatest equitable remedy—habeas corpus review.

Third, *Schlup* mandates an extensive evidentiary burden that most pro se prisoners cannot meet. The *Schlup* standard requires that a petitioner must support "allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[167] It would appear very difficult for pro se prisoners, while incarcerated, to satisfactorily perform witness investigations, secure post-conviction DNA testing, or analyze physical evidence.

Fourth, the interpretation of *Schlup*'s evidentiary standard varies from circuit to circuit. For example, circuits disagree whether the *Schlup* standard requires

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[162] *Id.*

[163] *See* Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 349-350 (2006) ("[T]housands of prisoners [are barred] from review of their constitutional claims because, without counsel, they could not timely file their pleadings.").

[164] *See* C. RONALD HUFF ET. AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 62, 53-61 (1996) (describing a ten-year research study of case samples and survey data of prosecutors, judges, public defenders, and police officers resulted in a "conservative" estimation of 9,969 wrongful convictions in 1993, or 0.5% of the total convictions that year).

[165] *Id.* at 144.

[166] *See* Schlup v. Delo, 513 U.S. 298, 324 (1995). The "miscarriage of justice" exception is recognized to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Id.*

[167] *Id.*

"newly discovered" evidence or merely "newly presented" evidence.[168] In a forthcoming comment on the circuit split, it is argued that "[r]equiring only newly presented evidence gives a habeas petitioner more latitude when submitting evidence to the court. In contrast, the newly discovered standard has the additional requirement of unavailability at the time of trial."[169] Adopting the stricter standard of "newly discovered" evidence, however, carries even more unjust results: Wrongfully convicted prisoners are not able to bring forth evidence of actual innocence that was available at trial, but not presented for various reasons. For example, the trial court could suppress the evidence, trial counsel could omit it for strategic reasons, or counsel might not present it due to ineffective assistance. The forthcoming comment offers a compelling argument that the *Schlup* court intended to adopt the more restrictive evidentiary standard.[170] If the circuit split is eventually resolved in this stricter direction, it is probable that more wrongfully convicted Americans will be excluded from habeas review.

Fifth, in a study of the relationship between finality, innocence, and habeas corpus, Professor Todd E. Pettys offers reasoning against the use of the "miscarriage of justice" concept from which *Schlup* derives its standard. It has resulted in an "innocence gap."[171] This "gap" is exemplary when looking at "the amount of exculpatory evidence sufficient to generate a profound sense of public discomfort with a prisoner's punishment [and undermine finality]" compared to the "amount sufficient to trigger the [federal courts'] willingness to forgive a prisoner's procedural [mistakes] and [address] the merits of his or her constitutional claims."[172]

Professor Pettys provides a lucid example:

> Suppose . . . the best a death row prisoner can show with new evidence is that there is a fifty-fifty chance that no reasonable juror would have convicted him. A federal court applying the *Schlup* standard would refuse to forgive any procedural defects that had saddled the prisoner's efforts to secure habeas relief,

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[168] *See* Jennifer G. Case, Comment, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. (forthcoming 2008) (manuscript at 14) (quoting Wright v. Quarterman, 470 F.3d 581, 591 (5th Cir. 2006), *available at* http://ssrn.com/abstract=1117358 (last visited Nov. 16, 2008); Jay Nelson, Note, *Facing up to Wrongful Convictions: Broadly Defining "New" Evidence at the Actual Innocence Gateway*, 59 HASTINGS L. J. 711 (2008).

[169] *See* Case, *supra* note 168, (manuscript at 19).

[170] *See generally* Case, *supra* note 168 (arguing that "newly discovered" evidence, and not newly presented evidence, was the standard the *Schlup* court intended to be used when assessing claims of actual innocence).

[171] *See* Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2344, 2348 (2007).

[172] *Id.* at 2348.

> and would refuse to adjudicate the merits of the prisoner's constitutional claims. Yet a large segment of the public undoubtedly would feel profoundly disquieted if they believed there was a fifty-fifty chance that a person whose constitutional rights may have been violated, and who was about to be executed, was actually innocent of any crime. Indeed, the constitutional requirement that a person's guilt be proven at trial beyond a reasonable doubt is based, in part, on the need to assure the public that those who have been convicted are deserving of punishment . . . .[173]

The reasoning behind *Schlup*, however, seems to contradict this example. The Supreme Court, in explaining the purpose of the *Schlup* standard, noted that "[i]t is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do."[174] It would seem illogical to require judges to make determinations about the thought processes of the "reasonable" juror during trial, rather than make an independent decision based on the evidence presented in the habeas petition, the entire record, and in context of the public's interests in finality and justice.

At least one other commentator has noted *Schlup*'s illogical standard of requiring judges to make judgments about the thought processes of jurors.[175] In fact, the *Schlup* standard of actual innocence does not relate to factual innocence at all, instead, it relates to "legal innocence," or whether a court would find the defendant guilty beyond a reasonable doubt.[176] Thus, the more likely interpretation of the *Schlup* standard asks: "If this new evidence had been available at trial, could a reasonable jury still have convicted the defendant?"[177] Following the *Schlup* standard strictly necessitates that the judge conduct a mental retrial without the benefit of seeing the original witnesses in person.[178] As explained below in Section VI, a fairer standard of "reasonable probability that the prisoner did not commit the offense,"[179] would ask the judge to consider the issues of factual innocence instead of performing a hypothetical retrial.

In sum, Professor Pettys emphasizes that "[a] miscarriage-of-justice exception that does not account for the public's response to newly discovered

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[173] *Id.* at 2350.

[174] Schlup v. Delo, 513 U.S. 298, 329 (1995).

[175] *See* Joseph M. Ditkoff, Note, *The Ever More Complicated "Actual Innocence" Gateway to Habeas Review:* Schlup v. Delo, *115 S. Ct. 851 (1995)*, 18 HARV. J.L. & PUB. POL'Y 889, 900 (1995).

[176] *Id.* at 900.

[177] *Id.*

[178] *Id.* at 900-01.

[179] *See infra* note 207 and explanatory text; *see also* Ditkoff, *supra* note 175, at 900-01.

exculpatory evidence is poorly calculated to assure the public that 'the ends of justice' have been achieved and that habeas relief has been extended to those who are 'truly deserving.'"[180] Therefore, when there are situations where doubts as to a prisoner's guilt are strong enough to undercut finality, but not strong enough to satisfy a miscarriage of justice exception, courts will carelessly cite finality as the principal rationale for refusing to hear habeas petitions.[181]

Sixth, as evidenced by the history and jurisprudence of habeas corpus, courts should not deny the ultimate equitable remedy to citizens unjustly deprived of their liberty. As the Supreme Court has recognized, habeas corpus is a protection against convictions that violate fundamental fairness.[182] Furthermore, "in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."[183] Thus, the law should not allow courts to hide the true purpose of the writ as a remedy for unjust imprisonments.[184] The standard of *Schlup*, in light of AEDPA's restrictive and unjust statute of limitation, does not further the function of habeas corpus as a fundamental and equitable remedy. Instead it obscures the purpose of it under the facade of finality, comity, and judicial efficiency.

VI. COURTS SHOULD ADOPT A STANDARD OF "REASONABLE PROBABILITY OF INNOCENCE" TO EQUITABLY TOLL TIME-BARRED HABEAS PETITIONS

"In appropriate cases [the] principles [of comity and finality] must yield to the imperative of correcting a fundamentally unjust incarceration."[185]

At the time of *Schlup*, the Supreme Court felt that the *Carrier* standard correctly balanced the "finality, comity, and conservation of judicial resources,"[186] with the "overriding individual interest in doing justice in the extraordinary case[.]"[187] In light of the restrictive statute of limitations, when a habeas petitioner brings forth an actual innocence claim the standard no longer

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[180] Pettys, *supra* note 171, at 2352 (citation omitted).

[181] *Id.*

[182] *See* Engle v. Isaac, 456 U.S. 107, 126 (1982) (citing Wainwright v. Sykes, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)).

[183] Fay v. Noia, 372 U.S. 391, 402 (1963), *overruled in part by Wainwright*, 433 U.S. 72 (1977), *abrogated by* Coleman v. Thompson, 501 U.S. 722 (1991).

[184] *See id.*

[185] *Engle*, 456 U.S. at 135.

[186] Schlup v. Delo, 513 U.S. 298, 322 (1995).

[187] *Id.* at 322 (citations and internal quotations omitted).

provides justice to time-barred petitioners with valid claims. Therefore, this article proposes that federal courts, after first recognizing that actual innocence is a valid reason for equitably tolling time-barred habeas petitions, should adopt a standard that is less restrictive than *Schlup*. This standard would be adequate in addressing the individual and public interests of justice, and fair in balancing finality, comity, and judicial efficiency.

A. Purposes of Habeas Corpus

"Fairness, finality, and federalism are considered the touchstone principles that guide and shape habeas jurisprudence."[188] The court must evaluate these principles to determine "what burden of proof is proper to prevent a 'fundamental miscarriage of justice.'"[189] The interest of fairness requires "[c]onformity to truth, fact, or sound reason"[190] led by the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[191] Likewise, the "very nature of the writ demands that it be administrated with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected."[192]

Finality and comity, on the other hand, are "society's interest[s] in the efficiency of the criminal justice process," in that the process will "swiftly and certainly punish one who violates the law" and ensure the "accuracy of judgments."[193] Federalism, to the extent that the federal government must safeguard "the kind of injustice that can result" in the state's trial system, is also important.[194] At the same time, "federal courts are not forums in which to relitigate state trials[;]"[195] and "state criminal proceedings . . . [are] the paramount event[s] for determining the guilt or innocence of the defendant."[196] A standard of proof for actual innocence that acts as a gateway for habeas review in the equitable tolling context must properly balance all of these concerns.

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[188] Bradley, *supra* note 28, at 483 (citing Withrow v. Williams, 507 U.S 680, 697 (1993) (O'Connor, J., concurring in part and dissenting in part)).

[189] *Id.* at 483. Bradley further argues that *Schlup* satisfies these requirements. *Id.* at 483-87.

[190] *Id.* at 483 (alteration in original) (citing AMERICAN HERITAGE DICTIONARY 694 (2d ed. 1985)).

[191] *Id.* at 483-84 (quoting *Schlup*, 513 U.S. at 325).

[192] Harris v. Nelson, 394 U.S 286, 291 (1969).

[193] Bradley, *supra* note 28, at 485-86 (citation omitted).

[194] *Id.* at 487.

[195] Barefoot v. Estelle, 463 U.S. 880, 887 (1983), *superseded by statute as stated in* Slack v. McDaniel, 529 U.S. 473 (2000).

[196] Herrera v. Collins, 506 U.S. 390, 416 (1993).

B. The Standard of Proof Used in Post-Conviction DNA Testing Legislation is a Sufficient Standard to Claim Actual Innocence and to Legitimately Undermine the Interests of Finality

One current trend in state legislatures is the enactment of "post-conviction DNA testing" legislation. As of 2005, at least thirty-eight states and the federal government have passed statutes specifically providing for post-conviction DNA testing of biological evidence relating to an offender's conviction.[197]

Generally, the statutes require a showing that: The identity of the perpetrator (or accomplice) was an issue at trial; the evidence to be tested is relevant to the identity of the perpetrator; the evidentiary criteria have been met; and exculpatory DNA results, had they been introduced at trial, likely would have resulted in a different outcome at trial.[198]

The Federal Innocence Protection Act of 2004[199] is a general example of the standard of proof that post-conviction statutes require to grant DNA testing. The applicant must certify that the proposed testing may produce "new material evidence" to support the applicant's "theory of defense" and would raise a "reasonable probability that the applicant did not commit the offense."[200] Most state statutes allow the petition to be filed at any time,[201] although the Innocence Protection Act has a time limitation that an inmate must meet, unless "he or she can demonstrate a good reason for failing to apply within the required time period."[202]

Most prisoners, however, will not be able to produce exculpatory DNA evidence due to the length of time passed after conviction or other evidentiary factors at trial.[203] What is significant is the "reasonable probability" gateway: Compared to the *Schlup* standard, it is far easier to present a miscarriage of justice to the court through the "reasonable probability" of post-conviction

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[197] SETH AXELRAD & JULIANA RUSSO, AMERICAN SOCIETY OF LAW, MEDICINE, AND ETHICS, SURVEY OF POST-CONVICTION DNA TESTING STATUTES 1, *available at* http://www.aslme.org/dna_04/grid/GuideConviction.pdf.

[198] *Id.* at 1.

[199] *See* Innocence Protection Act of 2004, 18 U.S.C. § 3600 (2004).

[200] Michael E. Kleinert, Note, *Improving the Quality of Justice: The Innocence Protection Act of 2004 Ensures Post-Conviction DNA Testing, Better Legal Representation, and Increased Compensation for the Wrongfully Imprisoned*, 44 BRANDEIS L.J. 491, 502 (2006) (quoting 18 U.S.C. § 3600(a)(8)).

[201] *See, e.g.*, HAW. REV. STAT. § 844D-123 (2005); CAL. PENAL CODE § 1405 (2004); LA. CODE CRIM. PROC. ANN. arts. 924 – 926.1 (2001); GA. CODE ANN. § 5-5-41 (2003); ARIZ. REV. STAT. ANN. § 13-4240 (2000).

[202] Kleinert, *supra* note 200, at 502 (citing 18 U.S.C. § 3600(a)(10)).

[203] *See* Nelson, *supra* note 168, at 722-23 (discussing the impracticality of obtaining new evidence years after conviction).

DNA testing than it is to seek relief under *Schlup* and obtain access to the habeas corpus system.

The functions of the two standards are the same: Both exist to allow wrongfully convicted prisoners to get their "day in court" and prevent a "miscarriage of justice." The standards differ, however, in their approach: The *Schlup* standard requires that the petitioner's case be "extraordinary" and only grants access to habeas review in the most "rare" cases.[204] Due to AEDPA's statute of limitations, however, courts are more likely to deny an actually innocent person the benefit of habeas under this standard, for by definition most cases will *not* be rare. In contrast, the standard to obtain access to state post-conviction review simply requires a "reasonable probability that the person did not commit the offense."[205]

The standard for post-conviction DNA testing seems far closer to addressing the concerns of the "fifty-fifty" dilemma which Professor Pettys articulated: "[W]hen doubts about a prisoner's guilt are sufficiently strong to undercut finality,"[206] the standard of "reasonable probability that the person did not commit the offense" should suffice to meet the concerns of "the public that 'the ends of justice' have been achieved and that habeas relief has been extended to those who are 'truly deserving.'"[207] The *Schlup* standard, on the other hand, raises the level of "probability" to the extreme height of "extraordinary" and "rare," and thus creates the "innocence gap" that Professor Pettys warned about. The fact that most state legislatures have recognized that "reasonable probability of innocence" is sufficient to undermine finality in a state judgment is evidence of a national consensus on what merits a "truly deserving" review of justice.

Thus, a petitioner should be able to provide exculpatory evidence to the habeas court, such as witness recantations, prosecutorial and police misconduct, or admissions of guilt by some other third party. Exculpatory evidence could also be shown through DNA testing, or some other available non-scientific evidence that was either not available at trial or was available at trial but for some legitimate reason was not admitted. If the petitioner can show there is a "reasonable probability" that he or she is innocent, this should be sufficient to undermine the interests in finality and merit a review of the case in the interests of justice.

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[204] Schlup v. Delo, 513 U.S. 298, 324 (1995) (emphasizing that "in the vast majority of cases, claims of actual innocence are rarely successful").

[205] *See* Kleinert, *supra* note 200, at 502 (quoting 18 U.S.C. § 3600(a)(8)(B)).

[206] Pettys, *supra* note 171, at 2352.

[207] *Id.* (citation omitted). Specifically, "[i]n *Schlup*, the Court explained that the miscarriage-of-justice exception should be cast in a manner that recognizes the states' strong interest in finality, while still ensuring that habeas relief remains available for those who are 'truly deserving.'" *Id.* at 2347 (quoting *Schlup*, 513 U.S. at 321).

VII. CONCLUSION

The enactment of AEDPA and its statute of limitations has exacerbated the already unfortunate plight of the wrongfully convicted. It is clear from the history of habeas corpus that every person deserves their "just remedy" regardless of time limit and that habeas corpus functions fundamentally to correct unjust incarcerations. Although the courts have developed a gateway standard for the actually innocent in the past, considering the severe restrictions placed on habeas corpus by AEDPA, the *Schlup* standard no longer functions to ensure that justice is correctly applied.

Theoretically, courts should correct a fundamental "miscarriage of justice"[208] even if a petition fails to show "cause and prejudice."[209] The terms "cause" and "prejudice" are not rigid concepts; instead they "take their meanings from the principles of finality . . . . In appropriate cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration."[210] Thus, courts consider when application of the "cause and prejudice" test results in a "fundamental miscarriage of justice."[211] The overall inquiry into justice considers "cause and prejudice" such that it does not "become so rigid that it would foreclose a claim of this kind."[212]

The concept of "finality," on which *Schlup* was based, has changed since the Supreme Court first developed the theory.[213] Today, a statute of limitations exists that severely restricts many prisoners from reviewing their claims, ensuring that courts consider most claims of actual innocence "final" before they rightfully should be. Therefore, it is clear that the "cause and prejudice" standard has become more restrictive than it was thirty-five years ago. At its contextual core, however, the *Schlup* standard of a "miscarriage of justice" no longer adequately functions as an exception to the "cause and prejudice" concerns that are present today.

Presenting a viable claim to a habeas court that there is a "reasonable probability of innocence" would meet the purposes of fairness, finality, and federalism, and therefore this standard would satisfactorily function as an exception to a failure to show "cause and prejudice." No prisoner with a valid and reasonable claim of innocence would be denied a chance to review his

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[208] For a discussion of this term see *supra* Section IV.

[209] *See, e.g.*, Smith v. Murray, 477 U.S. 527, 537 (1986).

[210] Engle v. Isaac, 456 U.S. 107, 135 (1982).

[211] *Smith*, 477 U.S. at 537-38 (quoting *Engle*, 456 U.S. at 135).

[212] Murray v. Carrier, 477 U.S. 478, 504 (1986) (discussing *Engle*).

[213] *See* Schlup v. Delo, 513 U.S. 298, 324 (1995) (holding that the miscarriage of justice exception is recognized to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case").

claim, habeas review of such a claim would meet society's interest in the efficiency of the criminal justice process, and federal courts would not become a forum in which to relitigate state trials. A standard of "reasonable probability of innocence" would far better serve the purposes of habeas corpus as an equitable remedy, and strengthen the public's confidence in the viability of our justice system.

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RLUIPA and the Individualized Assessment: Special Use Permits and Variances Under Strict Congressional Scrutiny

I. INTRODUCTION

The First Amendment to the United States Constitution provides, "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."[1] Otherwise known as the Free Exercise Clause, this proscription applies to the states through the Fourteenth Amendment.[2] In the view of Congress, however, the states have been derelict in adhering to the Free Exercise Clause with regard to certain land use regulations.[3] Enter the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.[4] In part, RLUIPA provides the means to challenge any state-sanctioned individualized assessment on land use that substantially burdens the free exercise of religion.[5]

The "individualized assessments" to which RLUIPA refers can potentially encompass many types of land use regulations.[6] However, this paper focuses on zoning exceptions—specifically, the special use permit and the variance. Decisions regarding special use permits and variances are typically made on a case-by-case basis, thereby triggering the individualized assessment jurisdiction of RLUIPA.[7] This jurisdictional trigger activates RLUIPA's substantial burden provision, which is tantamount to a version of strict scrutiny.[8] The substantial burden provision initially requires a plaintiff to prove that a special use permit or variance decision resulted in a substantial burden on religious exercise.[9] If successful, the burden of persuasion falls to the government to demonstrate that its regulation is the least restrictive means of furthering a compelling governmental interest.[10]

The absence of a United States Supreme Court opinion on the matter leaves some uncertainty about the interpretation of the individualized assessment

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

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

[3] *See* 146 CONG. REC. S7774, S7775 (2000) (joint statement of Sen. Hatch, sponsor, and Sen. Kennedy, co-sponsor) (explaining that there was "massive evidence" that free exercise rights were frequently violated by zoning codes and discretionary land use regulations).

[4] 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

[5] *See id.* § 2000cc(a).

[6] *See id.* § 2000cc(a)(2)(C).

[7] *See id.*

[8] *See id.* § 2000cc(a)(1).

[9] *See id.* § 2000cc-2(b).

[10] *See id.*; *see also id.* § 2000cc(a)(1).

jurisdictional trigger, as well as the meaning and scope of the substantial burden provision. This Comment attempts to resolve these uncertainties through a critical reading of RLUIPA's language and legislative history, alongside and in the context of relevant case law. Part II discusses the significant events leading to the enactment of RLUIPA and introduces the tension between RLUIPA and the Supreme Court's Free Exercise jurisprudence. Part III analyzes, interprets, and defines the individualized assessment jurisdictional trigger and the substantial burden provision. Part IV contains concluding remarks.

II. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

In *Sherbert v. Verner*,[11] the Supreme Court introduced the proposition that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[12] The Court delineated the scope of this proposition in *Employment Division* v. *Smith* by explaining that "[t]he *Sherbert* test . . . was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[13] The individualized assessment in *Sherbert* had to do with the denial of unemployment compensation to people whose religious beliefs prohibited them from working on Saturdays.[14] This "lent itself to the individualized governmental assessment" of the validity of religious beliefs, which could only be justified by a compelling reason.[15] Hence, *Smith* clarified that cases applying *Sherbert* heightened scrutiny "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[16] However, the Court also explained:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of

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[11] 374 U.S. 398 (1963).

[12] Employment Div. v. Smith, 494 U.S. 872, 883 (1990) (citing *Sherbert*, 374 U.S. at 402-03).

[13] *Id.* at 884.

[14] *See Sherbert*, 374 U.S. at 399-401.

[15] *See Smith*, 494 U.S. at 884.

[16] *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

> his beliefs, "to become a law unto himself[]"—contradicts both constitutional tradition and common sense.[17]

In light of this statement, Congress concluded that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ."[18] This interpretation of *Smith* meant laws that invited "individualized governmental assessment" were subject to *Sherbert* heightened scrutiny, while neutral laws of general applicability that just happen to burden religious exercise were not.[19]

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act (RFRA) of 1993.[20] RFRA attempted to expand the application of *Sherbert* heightened scrutiny by mandating that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ."[21] According to RFRA, a substantial burden on religious exercise could only be justified by a compelling governmental interest furthered by the least restrictive means.[22]

Within five years of RFRA's enactment, its constitutionality was questioned in *City of Boerne v. Flores*.[23] In *Boerne*, a city ordinance required administrative approval for all construction affecting landmarks or buildings within a historic district.[24] Saint Peter's Catholic Church, which fell within a historic district, applied for a permit to expand its facilities to accommodate its growing congregation.[25] City officials denied the permit.[26] The Archbishop of San Antonio responded by filing suit on behalf of the Church, claiming, in part, that the denial of the Church's permit triggered RFRA.[27] The permit denial was an individualized assessment by a governmental entity, which, according to the precedent set in *Sherbert* and *Smith*, justified the application of *Sherbert*

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[17] *Id.* at 885 (citations omitted).

[18] 42 U.S.C. § 2000bb(a)(4) (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[19] *Smith*, 494 U.S. at 884-85, 886 n.3.

[20] 42 U.S.C. §§ 2000bb-2000bb-4.

[21] *Id.* § 2000bb-1(a).

[22] *Id.* § 2000bb-1(b).

[23] 521 U.S. 507 (1997).

[24] *Id.* at 512.

[25] *Id.* at 511-12.

[26] *Id.* at 512.

[27] *Id.*

heightened scrutiny.[28] However, the Court did not address that possibility; instead, it handled the case as a challenge to RFRA's constitutionality.[29]

The central issue in *Boerne* was whether RFRA was a valid exercise of Congress' Fourteenth Amendment enforcement power.[30] Congress' enforcement power encompasses the ability to enforce the prohibitions of the Free Exercise Clause.[31] This power, however, is limited to being remedial or corrective in nature.[32] "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[33] Moreover, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[34] Without "congruence and proportionality," legislation does not enforce, but rather re-defines constitutional rights.[35] Applying these principles to RFRA, the Court found that "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry."[36] Unlike other valid exercises of the enforcement clause, RFRA offered no evidence "reflecting ... subsisting and pervasive discriminat[ion]" that necessitated the use of "strong remedial and preventive measures to respond to widespread and persisting deprivation of constitutional

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[28] *See* Employment Div. v. Smith, 494 U.S. 872, 884-85 (1990); *see also* Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1073-74 (D. Haw. 2002) (discussing how Hawaii's special use permit scheme "requires a strict scrutiny analysis for religious institutions" regardless of RLUIPA).

[29] *See Boerne*, 521 U.S. at 512 ("The complaint contained various claims, but to this point the litigation has centered on RFRA and the question of its constitutionality.").

[30] *See id.* at 517; *see generally* U.S. CONST. amend. XIV, § 5 (enumerating Congress' enforcement power).

[31] *See Boerne*, 521 U.S. at 517, 519.

[32] *See id.* at 517, 525.

[33] *Id.* at 519. The United States Supreme Court retains the power to interpret the federal Constitution.

> When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. Marbury v. Madison, [5 U.S. (1 Cranch) 137, 177 (1803)]. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

Id. at 536.

[34] *Id.* at 520.

[35] *See id.* at 519.

[36] *Id.* at 530.

rights . . . ."[37] While giving deference to Congress' finding of widespread religious discrimination in land use regulations,[38] the Court also explained,

> RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. . . . Remedial legislation under § 5 [of the Fourteenth Amendment] should be adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against.
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> RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. . . . RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.[39]

Boerne essentially held RFRA unconstitutional, as applied to the States,[40] for four reasons: 1) RFRA attempted to define constitutional rights and not simply enforce them; 2) RFRA's legislative record lacked evidence of the widespread discrimination alleged; 3) RFRA was not remedial or preventive in nature; and 4) RFRA employed means that were out of proportion to the injury sought to be remedied.

In response to the invalidation of RFRA, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000.[41] RLUIPA contains two parts. The first deals with religious exercise by institutionalized persons,[42] which the Supreme Court has already declared constitutional.[43] The constitutionality of the second part, dealing with land use regulations,[44] has yet

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[37] *Id.* at 525-26.

[38] *See id.* at 531-32 (citing Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (Harlan, J., concurring in part and dissenting in part)).

[39] *Id.* at 532 (internal quotation marks, brackets, and citations omitted).

[40] *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 n.1 (2006).

[41] *See* 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

[42] *Id.* § 2000cc-1.

[43] Cutter v. Wilkinson, 544 U.S. 709, 719-20 (2005).

[44] 42 U.S.C. § 2000cc.

to be decided.[45] However, with one exception,[46] the lower federal courts have consistently upheld its constitutionality.[47]

As it pertains to land use regulations, the overall purpose of RLUIPA is similar to that of RFRA: the protection of religious liberty.[48] This similarity notwithstanding, Congress attempted to fix the constitutional infirmities that plagued RLUIPA's predecessor.[49] Congress tailored RLUIPA's subsections to "closely track[] the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability."[50] Congress also submitted evidence tending to support the claim of widespread religious discrimination in land use regulations.[51] Finally, to insure that RLUIPA stayed within the bounds of a remedial or preventive purpose, Congress modified it to have better proportion to the alleged harm that existed.[52]

RLUIPA represents a major reworking of RFRA with the specific aim of surviving constitutional challenges. One of the few parts of RFRA carried over to RLUIPA verbatim was the language of the substantial burden provision.[53] As applied to land use regulations, Congress narrowed the scope of this provision by permitting its application only when government action pulls any of three jurisdictional triggers:[54] the Spending Clause trigger, the Commerce

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[45] *See Cutter*, 544 U.S. at 716 n.3 ("[The land use section] of RLUIPA is not at issue here. We therefore express no view on the validity of that part of the Act.").

[46] *See* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), *rev'd mem.*, 187 F. App'x 718 (9th Cir. 2006).

[47] *See infra* note 61.

[48] *Compare* 42 U.S.C. § 2000bb(b) (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), *with* 146 CONG. REC. E1563, E1564 (2000) (statement of Rep. Canady, sponsor) (discussing the sections of RLUIPA enacted as 42 U.S.C. § 2000cc-3(a) and 42 U.S.C. § 2000cc-3(b)).

[49] *See* Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 985-86 (9th Cir. 2006).

[50] 146 CONG. REC. S7774, S7775 (2000) (joint statement of Sen. Hatch, sponsor, and Sen. Kennedy, co-sponsor); *see* Freedom Baptist Church of Del. v. Twp. of Middletown, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002).

[51] *See* 146 CONG. REC. E1564, E1564-67 (2000) (statement of Rep. Hyde); 146 CONG. REC. at S7774-75 (statement of Sen. Hatch, sponsor); 146 CONG. REC. S6678, S6689-90 (2000) (statement of Sen. Kennedy, co-sponsor).

[52] *See* 146 CONG. REC. at S7775 (joint statement of Sen. Hatch, sponsor, and Sen. Kennedy, co-sponsor) (justifying the substantial burden provision in RLUIPA's land use section as a "proportionate and congruent response[] to the problems documented in [the] factual record").

[53] *Compare* 42 U.S.C. § 2000bb-1 (containing RFRA's substantial burden provision), *with* 42 U.S.C. § 2000cc (containing RLUIPA's land use substantial burden provision).

[54] Prater v. City of Burnside, 289 F.3d 417, 433 (6th Cir. 2002) ("[T]he Church may not rely upon RLUIPA unless it first demonstrates that the facts of the present case trigger one of the bases for jurisdiction provided in that statute." (citing Dilaura v. Ann Arbor Charter Twp., 30 F. App'x 501, 509-10 (6th Cir. 2002))).

Clause trigger, or the individualized assessment trigger.[55] The individualized assessment trigger is particularly noteworthy because it is the most commonly used method of attaining RLUIPA jurisdiction over special use permit and variance decisions. An individualized assessment occurs in cases where:

> [A] substantial burden [on religious exercise] is imposed in the implementation of a land use regulation or system of regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.[56]

Pulling the individualized assessment trigger activates RLUIPA's substantial burden provision, which allows the government to justify a substantial burden on religious exercise by showing that its actions were the "least restrictive means" of furthering a "compelling governmental interest."[57]

RLUIPA's legislative history confirms that Congress intended the substantial burden provision to codify the Supreme Court's Free Exercise jurisprudence.[58] However, this jurisprudence does not contain an overt "least restrictive means" requirement.[59] By incorporating such a requirement within RLUIPA, Congress may have again exceeded its Enforcement Clause authority by defining

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[55] *See* 42 U.S.C. § 2000cc(a)(2).

[56] *Id.* § 2000cc(a)(2)(C).

[57] *Id.* § 2000cc(a)(1). The substantial burden provision provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

Id.

[58] *See* 146 CONG. REC. S7774, S7775 (2000) (joint statement of Sen. Hatch, sponsor, and Sen. Kennedy, co-sponsor) ("The land use sections of the bill have a third constitutional base: they enforce the Free Exercise and Free Speech Clauses as interpreted by the Supreme Court.").

[59] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) ("To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and be *narrowly tailored* in pursuit of those interests." (emphasis added) (internal quotation marks omitted)); Wisconsin v. Yoder, 406 U.S. 205 (1972) (deciding the case without expressly applying a least restrictive means requirement); *see also infra* text accompanying notes 244-47 (discussing the absence of a least restrictive means requirement in the jurisprudence RLUIPA purports to codify). *But see* Employment Div. v. Smith, 494 U.S. 872, 907 (1990) (Blackmun, J., dissenting) ("[A] statute [that burdens religious exercise] may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means."); Sherbert v. Verner, 374 U.S. 398, 407 (1963) ("[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.").

constitutional protections in violation of the principals announced in *Marbury v. Madison* and affirmed in *Boerne*.[60] Nevertheless, the lower federal courts have not held this way. They have instead concluded that the substantial burden provision is a valid exercise of Congress' enforcement power.[61]

III. RLUIPA'S SUBSTANTIAL BURDEN PROVISION APPLIED TO SPECIAL USE PERMITS AND VARIANCES

RLUIPA challenges to special use permit and variance decisions are predominantly made through the individualized assessment jurisdictional trigger[62] and the substantial burden provision. While the definition, interpretation, and application of these components of RLUIPA may appear straightforward, in actuality, they are highly nuanced. For guidance, the lower federal courts have not only looked to RLUIPA's statutory language and legislative history, but also to the Supreme Court's free exercise jurisprudence.[63] The result is a reading of RLUIPA that strikes a balance between congressional mandate and judicial precedent.

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[60] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803); City of Boerne v. Flores, 521 U.S. 507, 518-19 (1997); *id.* at 524 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary."). *But see* Freedom Baptist Church of Del. v. Twp. of Middletown, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002) ("RLUIPA's limitations and proscriptions codify firmly-established Supreme Court rights under its Free Exercise and Equal Protection jurisprudence, it does not 'attempt a substantive change in constitutional protections' . . . that came to constitutional grief in *City of Boerne*." (citing *Boerne*, 521 U.S. at 532)).

[61] *See, e.g.*, Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 993 (9th Cir. 2006); Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 898 (7th Cir. 2005); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1236 (11th Cir. 2004); Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *10 (E.D. Mich. Jan. 3, 2007); *Freedom Baptist*, 204 F. Supp. 2d at 874. *But see* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1095 n.6, 1096-1102 (C.D. Cal. 2003) (finding that the least restrictive means requirement is not present in the free exercise jurisprudence that RLUIPA purported to codify and holding that the substantial burden provision exceeds Congress' Enforcement Clause authority), *rev'd mem.*, 187 F. App'x 718 (9th Cir. 2006).

[62] *But cf.* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 354 (2d Cir. 2007) (finding no error in a district court's conclusion that a church's expansion project pulled the Commerce Clause trigger).

[63] *See, e.g.*, Living Water Church of God v. Charter Twp. of Meridian, 258 F. App'x 729, 733-37, 741 n.6 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008).

A. The Individualized Assessment Jurisdictional Trigger for the Substantial Burden Provision

There are two common ways of obtaining reprieve from the generally applicable restrictions of a zoning district: the special use permit and the variance.[64] Special use permits, sometimes referred to as special exemptions or conditional use permits, "allow[] certain uses, specified in [a] zoning ordinance, provided the applicant meets all conditions specified in the ordinance."[65] The distinguishing characteristic of a special use permit is that it deals with a use of land previously determined by a legislative body as allowable under certain stated conditions.[66] In contrast, a variance confers an individual exception for a use of land otherwise prohibited by a zoning district.[67]

The first issue that arises with special use permits and variances is whether they are "individualized assessments" that trigger RLUIPA's substantial burden provision.[68] RLUIPA treats anyone "acting under color of State law" along with any county, municipality, or other entity created under the authority of a State, as part of the "government" and subject to the restrictions of RLUIPA.[69] Thus, the decisions of administrative bodies, which often have authority over special use permits and variances, can constitute individualized assessments. With special use permits, an administrative body normally assesses whether a proposed use is included in any of the statutorily provided exceptions, and whether any additional conditions are required.[70] With variances, an administrative body examines the merits of the proposed departure from the zoning district and makes a determination based on those findings.[71] These administrative proceedings are usually fact-intensive, turning on questions of whether the requested use is contrary to the public interest and whether strict enforcement of zoning regulations would result in any unnecessary hardship.[72]

The courts have also played a role in defining the individualized assessment jurisdictional trigger. The resulting definition is not as intuitive as the plain language of RLUIPA may imply. *Lighthouse Community Church of God v. City of Southfield*[73] identifies one of the most important facets of this definition.

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[64] *See* 8 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 43.01[2] (Eric Damian Kelly ed., 2006).

[65] *Id.* § 43.01[3][b].

[66] *Id.*

[67] *Id.*; *see also id.* § 43.01[3].

[68] *See* 42 U.S.C. § 2000cc(a)(2)(C) (2000).

[69] *Id.* § 2000cc-5(4)(A).

[70] *See* 8 ROHAN, *supra* note 64, § 43.01[3][b].

[71] *See id.* § 43.01[2]-[3].

[72] *See id.* § 43.01[3]; *see also id.* § 43.01[3][b].

[73] No. 05-40220, 2007 WL 30280 (E.D. Mich. Jan. 3, 2007).

In *Lighthouse*, the zoning district at issue permitted churches.[74] However, before commencing operations, churches were still required to obtain certificates of occupancy.[75] For this particular plaintiff-church, the major obstacle to receiving a certificate of occupancy was the number of parking spaces on its property.[76] The required number of parking spaces was determined through the interpretation of various parking regulations.[77] Attempting to remedy its parking problem, the church applied for a variance only to have its application denied.[78]

In *Lighthouse*, the court treated the interpretation of the parking regulations and the denial of the parking variance as two separate events for the purpose of determining an individualized assessment.[79] The court found that the interpretation and application of the parking regulations did not amount to an individualized assessment because the church was "not being singled out or treated differently than other entities," and because the process only involved "a numerical application with no subjective element."[80] On the other hand, the court held that the denial of the parking variance was an individualized assessment because it was "a determination that [was] 'at least partially subjective in nature.'"[81] The court noted that the parking variance was a "land use regulation [that could] be applied differently in different circumstances," with the power to grant or deny left to the discretion of the zoning board.[82] This element of subjectivity made the denial of the parking variance an individualized assessment that triggered RLUIPA's substantial burden provision.[83]

By requiring an element of subjectivity, *Lighthouse* narrows the scope of RLUIPA's individualized assessment trigger. While a variance decision is by nature subjective, the same is not necessarily true for a special use permit.[84] The decision to approve or deny a special use permit depends on the special use exceptions listed in a particular zoning ordinance.[85] If these exceptions are

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[74] *Id.* at *1.

[75] *Id.* at *2.

[76] *Id.*

[77] *See id.* at *6 ("Adding up the spaces required for all the uses of the Rutland building including the worship space, Sunday school classrooms, and administrative offices, yields a total of 95 parking spaces."); *see also id.* at *9 (discussing how the number of required parking spaces was dependent upon the number of worship seats in the church).

[78] *Id.* at *3, 6-7.

[79] *Id.* at *6-7.

[80] *Id.* at *6.

[81] *Id.* at *7 (citing Living Water Church of God v. Charter Twp. of Meridian, 384 F. Supp. 2d 1123, 1130 (W.D. Mich. 2005), *rev'd*, 258 F. App'x 729 (6th Cir. 2007)).

[82] *Id.*

[83] *Id.* at *7.

[84] *See supra* text accompanying notes 65-67.

[85] *See id.*

detailed to the degree that they require no discretionary interpretation, a special use permit decision becomes a purely objective "numerical or mechanistic assessment" that does not trigger RLUIPA.[86]

Other federal courts will probably concur with *Lighthouse* to the extent that an individualized assessment requires an element of subjectivity. In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, for instance, the Ninth Circuit considered if the denial of a conditional use permit was an individualized assessment.[87] The court began its analysis by confirming that "RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use."[88] The Eleventh Circuit has similarly concluded that an individualized assessment occurs when administrative officials make subjective determinations regarding a particular use of land.[89] As these cases indicate, a certain amount of subjectivity is generally required for there to be an individualized assessment.[90] This element of subjectivity underscores the difference between "individualized and discretionary" decisions made on a case-by-case basis, as with variances and some special use permits,[91] and the generally applicable restrictions of a zoning district to which the individualized assessment trigger does not apply.[92]

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[86] *See Lighthouse*, 2007 WL 30280, at *5-6.

[87] Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 986-87 (9th Cir. 2006).

[88] *Id.* at 986.

[89] *See* Konikov v. Orange County, 410 F.3d 1317, 1323 (11th Cir. 2005) (discussing how officials were required to determine whether a use of land constituted an "organization" in violation of the zoning code).

[90] *See* Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 541-42 (S.D.N.Y. 2006) ("The general rule that emerges from the case law is that the determination of whether the governmental action is an 'individualized assessment' depends on whether the decision was subjective in nature . . . ." (quoting Living Water Church of God v. Charter Twp. of Meridian, 384 F. Supp. 2d 1123, 1130 (W.D. Mich. 2005), *rev'd*, 258 F. App'x 729 (6th Cir. 2007))), *aff'd*, 504 F.3d 338 (2d Cir. 2007).

[91] *See Guru Nanak*, 456 F.3d at 987 n.9 (explaining that the permitting process at issue imposed individualized and discretionary regulations that constituted the type of individualized assessments referred to in RLUIPA's legislative history); Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, 430 F. Supp. 2d 1296, 1317 (S.D. Fla. 2006) (holding subjective findings made on a case-by-case basis triggers RLUIPA), *partial summary judgment granted by* 436 F. Supp. 2d 1325 (S.D. Fla. 2006), *later proceeding at* 254 F. App'x 769 (11th Cir. 2007).

[92] *See Guru Nanak*, 456 F.3d at 987 ("RLUIPA does not apply directly to land use regulations, such as the Zoning Code here, which typically are written in general and neutral terms. However, when the Zoning Code is applied to grant or deny a certain use to a particular parcel of land, that application is an 'implementation' under 42 U.S.C. § 2000cc(2)(C) [2000]."); *see also* Freedom Baptist Church of Del. v. Twp. of Middletown, 204 F. Supp. 2d 857, 868-69 (E.D. Pa. 2002).

B. The Definition of Substantial Burden on Religious Exercise

The presence of an individualized assessment triggers RLUIPA's substantial burden provision.[93] The first step in applying this provision is to determine if the individualized assessment has resulted in a substantial burden on religious exercise.[94] Although RLUIPA lacks a precise definition of "substantial burden on religious exercise,"[95] it provides some assistance by describing "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," including "[t]he use, building, or conversion of real property for the purpose of religious exercise . . . ."[96] Thus, according to RLUIPA, "religious exercise" covers virtually every act (and the property thereon)[97] that can be linked to a sincere religious belief.[98] Despite the broadness of this definition,[99] courts have placed some limitations on what constitutes a "religious exercise." For example, the mere ownership of property is not a religious exercise.[100] A religious exercise may not even arise from the religious use of property if the purpose behind the use is comparable to that of a secular institution.[101]

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[93] 42 U.S.C. § 2000cc(a).

[94] *Id.* § 2000cc(a)(2)(C).

[95] *See id.* § 2000cc-5.

[96] *Id.* § 2000cc-5(7)(B).

[97] *But see id.* § 2000cc-5(5) (defining a "land use regulation" as used in RLUIPA's substantial burden provision as a zoning or landmarking law that "restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest").

[98] *See* 146 CONG. REC. E1563, E1564 (2000) (statement of Rep. Canady, sponsor) ("[The definition of "religious exercise" in 42 U.S.C. § 2000cc-5(7)] does not change the rule that insincere religious claims are not religious exercise at all, and thus are not protected."); *see also* Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 663-64, 664 n.10 (10th Cir. 2006) (discussing a jury instruction that required "religious exercise" to be sincere), *aff'd on reh'g*, 451 F.3d 643 (2006).

[99] *See Grace United*, 451 F.3d at 663 ("[W]hatever the substantial burden test required prior to the passage of RLUIPA, the statute substantially modified and relaxed the definition of 'religious exercise.'").

[100] *See* Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 675 N.W.2d 271, 279 (Mich. Ct. App. 2003), *later proceeding at* 739 N.W.2d 664 (2007), *vacated*, 746 N.W.2d 105 (Mich. 2008), *aff'd on reh'g*, No. 272357, 2008 WL 3914605 (Mich. App. Aug. 26, 2008).

[101] *See* Cambodian Buddhist Soc'y of Conn. v. Planning and Zoning Comm'n of Newtown, 941 A.2d 868, 888 (Conn. 2008) ("[RLUIPA's] statutory provisions are in contrast to existing first amendment jurisprudence, which holds that 'building and owning a church is a desirable accessory of worship, not a fundamental tenet of . . . religious belief[] and, therefore, [does] not constitute the exercise of religion within the meaning of the free exercise clause." (quoting Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983))); *Shepherd Montessori*, 675 N.W.2d at 279; *see also Cambodian Buddhist*

Although RLUIPA provides some guidance in interpreting "religious exercise," Congress left the definition of "substantial burden" entirely to the courts.[102] The federal circuits have thus far applied varying definitions. The most cited definition originates from the Seventh Circuit: A substantial burden is something that has "direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."[103] Without committing to a set definition, the Second Circuit has interpreted "substantial burden" as a reference to regulations that coerce religious belief.[104] The Third and Tenth Circuits, after considering the matter, have yet to settle on a definition.[105] The Ninth Circuit has held that a regulation constitutes a substantial burden on religious exercise if it is "oppressive to a significantly great extent" or if it imposes a "significantly great restriction or onus upon [religious] exercise."[106] The Eleventh Circuit has equated a substantial burden to "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[107] The Sixth Circuit, in contrast to its sister circuits, has adopted a "framework" for analysis, which asks, "does the government action place substantial pressure on a religious institution to violate

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Soc'y, 941 A.2d at 889 n.20 ("Our research . . . has revealed no pre-*Smith* cases supporting the proposition that the construction and use of a place of worship constitutes the exercise of religion per se. Indeed, the weight of authority is to the contrary.").

[102] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226-27 (11th Cir. 2004) ("The Supreme Court's definition of 'substantial burden' within its free exercise cases is instructive in determining what Congress understood 'substantial burden' to mean in RLUIPA. The Court's articulation of what constitutes a 'substantial burden' has varied over time." (citations omitted)).

[103] Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) [hereinafter *CLUB*], *cert. denied*, 541 U.S. 1096 (2004); *see also* Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (citing the *CLUB* definition and adding that in "interpreting the First Amendment, the Supreme Court has found a 'substantial burden' to exist when the government put 'substantial pressure on an adherent to modify his behavior and to violate his beliefs'" (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141(1987))).

[104] Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348-51 (2d Cir. 2007) (referring to Supreme Court and other federal precedent to explain its understanding of substantial burden on religious exercise).

[105] *See* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 662 (10th Cir. 2006); Albanian Associated Fund v. Twp. of Wayne, No. 06-cv-3217, 2007 WL 2904194, at *9 (D.N.J. Oct. 1, 2007).

[106] Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 988-89 (9th Cir. 2006) (internal quotation marks omitted) (quoting San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)); *see also id.* at 989 n.12 (explaining that the Ninth Circuit did not adopt the *CLUB* definition of substantial burden in *San Jose Christian*).

[107] *Midrash*, 366 F.3d at 1227 (clarifying further that "a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct").

its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion?"[108]

The United States Supreme Court has yet to rule on the definition of substantial burden in a RLUIPA land use case.[109] However, in the context of a Free Exercise challenge, the Court has indicated that *Sherbert* heightened scrutiny is not triggered by regulations that "have no tendency to coerce individuals into acting contrary to their religious beliefs . . . ."[110] Considering the facts of *Sherbert*, the term "coercive tendency" is analogous to a "substantial burden" on religious exercise.[111] Thus, while the Supreme Court will probably agree with the Seventh Circuit's definition in *Civil Liberties for Urban Believers v. City of Chicago* (CLUB)[112] insofar as a substantial burden can arise when religious conduct is effectively prohibited,[113] it is also likely to

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[108] Living Water Church of God v. Charter Twp. of Meridian, 258 F. App'x 729, 737 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008).

[109] *See* Cutter v. Wilkinson, 544 U.S. 709, 716 n.3 (2005).

[110] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988). In *Sherbert*, the Court explained the situation that gave rise to a coercive tendency:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert v. Verner, 374 U.S. 398, 404 (1963); *see* Thomas v. Review Bd., 450 U.S. 707, 717 (1981) ("Here, as in *Sherbert*, the [plaintiff] was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on [the plaintiff] is indistinguishable from *Sherbert* . . . .").

[111] *See Sherbert*, 374 U.S. at 403-06. The Supreme Court has continued to connect the terms "coercive tendency" and "substantial burden" after *Sherbert*.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a *burden* upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless *substantial*.

Thomas, 450 U.S. at 717-18 (emphasis added); *see also Midrash*, 366 F.3d at 1226-27 (discussing the Free Exercise cases where the Supreme Court associated a substantial burden on religious exercise with coercion of religious beliefs).

[112] 342 F.3d 752, 761 (7th Cir. 2003).

[113] *See* U.S. CONST. amend. I ("Congress shall make no law . . . *prohibiting* the free exercise [of religion] . . . ." (emphasis added)). In *Cantwell*, the Supreme Court discussed the free exercise provision of the First Amendment.

> [T]he [Free Exercise and Establishment Clauses of the First] Amendment embraces two concepts[]—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the

hold that a substantial burden can result from regulations that are coercive towards religious beliefs.[114]

In the abstract, the multiple definitions of substantial burden seem to be in relative harmony, but in application, complexity arises. The difficulty with applying the substantial burden standard is that it inevitably calls for a fact-intensive analysis.[115] This is where the courts have found flexibility. Depending on the situation, the definition of substantial burden can remain rigid, providing maximum protection for religious exercise, or it can be relaxed, conferring greater latitude to land use regulators.

A series of cases from the Sixth Circuit best demonstrates how the subtle differences in the definition of substantial burden either expand or reduce religious protection. The first of these cases is *DiLaura v. Township of Ann Arbor*.[116] In *Dilaura*, the plaintiff, the Apostolate for the Eucharistic Life, received a donation of property subject to the condition that it be used to "host[] guests for religious prayer and contemplation."[117] To operate this prayer and contemplation "religious retreat," the plaintiffs sought and received a bed-and-breakfast permit.[118] The bed-and-breakfast variance came with a restriction requiring the charging of fees to guests of the facility, as well as prohibiting the serving of alcohol and meals other than breakfast and light snacks.[119] These variance restrictions "interfere[d] with the plaintiffs' plan to provide services for free and to serve lunch, dinner, and communion wine."[120]

> enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee.

Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (footnote omitted).

[114] *See Lyng*, 485 U.S. at 450 ("It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."); *Cantwell*, 310 U.S. at 303-04.

[115] *See* 146 CONG. REC. S7774, S7775 (2000) (joint statement of Sen. Hatch, sponsor, and Sen. Kennedy, co-sponsor) ("The compelling interest test [in the part of RLUIPA dealing with institutionalized persons] is a standard that responds to facts and context."); *see also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006) ("[In deciding *Cutter v. Wilkinson*, 544 U.S. 709 (2005),] [w]e had 'no cause to believe' that [RLUIPA's institutionalized persons] compelling interest test 'would not be applied in an appropriately balanced way' to specific claims for exemptions as they arose. Nothing in our opinion suggested that courts were not up to the task." (citation omitted)).

[116] 471 F.3d 666 (6th Cir. 2006), *cert. denied*, 128 S. Ct. 651 (2007).

[117] *Id.* at 668.

[118] *Id.* at 669; DiLaura v. Twp. of Ann Arbor, 112 F. App'x 445, 446 (6th Cir. 2004), *later proceeding at* 471 F.3d 666 (6th Cir. 2006).

[119] *DiLaura*, 471 F.3d at 669.

[120] *Id.*

The court held that the failure to waive these restrictions by issuing a use variance, constituted a violation of RLUIPA.[121]

In *DiLaura*, the Sixth Circuit did not commit itself to a definition of substantial burden.[122] However, the court noted, "designation as a bed and breakfast would have *effectively barred* the plaintiffs from using the property in the exercise of their religion and, hence, the defendants' refusal to allow a variance constituted a substantial burden on that exercise."[123] Because the property in *DiLaura* was subject to a condition requiring its use as a "religious retreat," forcing the plaintiffs to adhere to the restrictions of the bed-and-breakfast permit not only prevented religious use of the property, but it effectively precluded any use of the property whatsoever.[124] It was the combination of the "religious retreat" condition and the permit restriction that created the substantial burden. Subtract either from the equation and the substantial burden ceases to exist. Thus, *DiLaura* demonstrates how the substantial burden inquiry accounts for all factors that may contribute to an alleged burden, and how the collective impact of those factors can give rise to a substantial burden.[125]

In *Dilaura*, the Sixth Circuit construed "substantial burden" as a regulation that effectively barred the religious use of property,[126] which is somewhat similar to the "effectively impracticable" standard of *CLUB*.[127] This may explain why the *CLUB* definition was cited, and arguably applied, in *Lighthouse Community Church of God v. City of Southfield*.[128] Under the *CLUB* definition, a substantial burden only exists if a regulation has "direct, primary, and fundamental" responsibility for rendering religious exercise "effectively impracticable."[129] The "direct, primary, and fundamental" nexus

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[121] *See DiLaura*, 112 F. App'x at 446; *see also DiLaura*, 471 F.3d at 668-69.

[122] *See* Living Water Church of God v. Charter Twp. of Meridian, 258 F. App'x 729, 736 (6th Cir. 2007) (citing *DiLaura*, 112 F. App'x at 446).

[123] *Dilaura*, 112 F. App'x at 446 (emphasis added).

[124] *See Living Water*, 258 F. App'x at 736 (discussing *DiLaura*, 112 F. App'x at 446).

[125] *See DiLaura*, 112 F. App'x at 446).

[126] *Id.*

[127] *Compare id.* (defining substantial burden as something that "effectively barred" the religious use of property), *with* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) ("[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.").

[128] *See* Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *7 (E.D. Mich. Jan. 3, 2007) (citing to the Seventh Circuit definition of substantial burden promulgated in *CLUB* in 2003); *see also id.* at *8-9 (supporting its holding by citing to the Seventh Circuit case, Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 899-901 (7th Cir. 2005)).

[129] *CLUB*, 342 F.3d at 761.

of *CLUB* makes it one of the more difficult standards under which a plaintiff may attempt to prove a substantial burden on religious exercise.[130]

The burden-imposing regulation in *Lighthouse* was a zoning board's denial of a parking variance.[131] Without this variance, the plaintiff-church was unable to get a certificate of occupancy, which precluded the religious use of its property.[132] The court held that the denial of the parking variance was a substantial burden because it was "a land use regulation which prevent[ed] or burden[ed] [the plaintiff-church] from using its building for religious exercise."[133]

There is no question that the variance denial in *Lighthouse* burdened the religious use of property. However, it is debatable whether that regulatory act had "direct, primary, and fundamental" responsibility for rendering the church's exercise of religion "effectively impracticable."[134] The parking variance requirement surfaced because of the government's conclusion that "[ninety-five] parking spaces [were] required to adequately cover the projected use of the building."[135] This figure was determined by "adding up" the parking demands for each of the property's uses, including those corresponding to worship services, Sunday school classes, and administrative offices.[136] Abiding by the then effective parking regulations, there was only room for forty-eight spaces on the church's property.[137]

Technically, adherence to the parking regulations would still allow some religious use of the church's property.[138] Because the property fell within a zoning district that permitted churches as of right,[139] the variance denial did not forbid all religious use. The denial only subjected the property to an otherwise applicable density control,[140] quantified as forty-eight parking

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[130] *See also* Living Water Church of God v. Charter Twp. of Meridian, 258 F. App'x 729, 735 (6th Cir. 2007) (discussing how it is more difficult to prove that a regulation makes religious exercise effectively impracticable than it is to prove that it created delay, uncertainty, and expense).

[131] *See Lighthouse*, 2007 WL 30280, at *1-2.

[132] *See id.* at *2-3.

[133] *Id.* at *8.

[134] *See id.* at *7 (citing the *CLUB* definition of substantial burden).

[135] *Id.* at *2 (citing the government's argument).

[136] *Id.* at *6; *see also id.* at *9 (discussing how the number of required parking spaces was partially contingent upon the number of worship seats in the church).

[137] *Id.* at *2.

[138] *See id.* at *1 ("Prior to the purchase of the Rutland building, at least a portion of the building was used by the Evangelistic Holiness Church and the AME Zion Church. The parties disagree about the extent the building was used by the earlier churches."); *see also id.* at *3 (discussing how other variances for setback and landscaping were approved).

[139] *See id.* at *1 (describing the zoning district as one where "churches are a permissible use").

[140] *See supra* text accompanying note 67 (explaining that a variance confers an exception to generally applicable zoning restrictions).

spaces.[141] When considering this regulatory burden in connection with the circumstances and the locality,[142] it did not appear to have direct, primary, and fundamental responsebility for rendering the church's exercise of religion effectively impracticable.[143]

The Sixth Circuit addressed the inconsistency in *Lighthouse*, albeit indirectly, in *Living Water Church of God v. Charter Township of Meridian*.[144] In *Living Water*, a church wanted to operate a school in a residential district.[145] To accomplish this, the church needed two special use permits: one to operate a school in a residential district and another to allow the construction of buildings that would exceed 25,000 square feet.[146] The Township granted both permits.[147] However, those permits eventually expired due to delays in construction and the Township's refusal to grant permit extensions.[148] When the church re-applied, it received a permit to operate a school, but it was denied a permit to construct any new buildings that would result in a gross floor area of more than 25,000 square feet.[149] Similar to the situation in *Lighthouse*, the substantial burden alleged by the church stemmed from the "scale" of its desired use.[150] Nothing prevented the church from exercising its religious beliefs through the operation of a religious school. The church was only restricted in the size of the school's buildings. Unlike the decision in *Lighthouse*, the court in *Living Water* determined that the restriction on size did not constitute a substantial burden on religious exercise.[151]

The definition of substantial burden applied in *Living Water* is perhaps the most frustrating, yet perhaps the most complete offering to date. This definition, dubbed a "framework to apply to the facts," asks:

> [T]hough the government action may make religious exercise more expensive or difficult, does the government action place substantial pressure on a religious

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[141] *See supra* note 136 and accompanying text.

[142] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926) (discussing how regulations should be viewed "in connection with the circumstances and locality").

[143] *Compare supra* text accompanying notes 128-29, *with Lighthouse*, 2007 WL 30280, at *9 (describing the surrounding areas and the effect of inadequate parking on those areas).

[144] 258 F. App'x 729 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008).

[145] *Id.* at 730.

[146] *Id.*

[147] *See id.* at 730-31.

[148] *Id.*

[149] *Id.* at 732.

[150] *See id.* at 741 ("[The church] has demonstrated only that it cannot operate its church on the *scale* it desires.").

[151] *Id.* at 739, 741-42.

> institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion?[152]

Living Water clarifies the Sixth Circuit's definition of substantial burden by building upon the precedent set in *DiLaura*. The *Living Water* framework reveals that a substantial burden may not only arise from prohibitive regulations that effectively bar the religious use of property,[153] but that it may also stem from coercive regulations that pressure individuals to violate their religious beliefs.[154] Although the "direct, primary, and fundamental" nexus of *CLUB* is not necessarily required, the *Living Water* definition still demands that a plaintiff show an "actual" link between a government regulation and the burden alleged.[155]

In *Living Water*, the framework analysis produced a rational result. The court observed, "RLUIPA cannot stand for the proposition that a construction plan is immune from a town's zoning ordinance simply because the institution undertaking the construction pursues a religious mission."[156] RLUIPA was "not intended to operate as 'an outright exemption from land-use regulations.'"[157] Thus, the court did not simply ask whether there was an "actual" burden on religious exercise. It also examined the severity of the alleged burden to determine if it reached the threshold of "substantial":

> The Township's denial does not preclude the church from moving its school to the church property; it does not require the church to forgo providing religious education; it does not preclude the church from enrolling students in its school; it does not prevent church members from entering the property and conducting worship or prayer services; it does not preclude the church from running religious

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[152] *Id.* at 737.

[153] *Compare id.* (stating that a substantial burden can arise when there is an effective bar to the religious use of property), *with* Dilaura v. Twp. of Ann Arbor, 112 F. App'x 445, 446 (6th Cir. 2004) (holding that a substantial burden arises when the religious use of property is effectively barred), *aff'd in part and rev'd in part*, 471 F.3d 666 (6th Cir. 2006).

[154] *See Living Water*, 258 F. App'x at 737;*see generally id.* at 736 (identifying substantial burden definitions from other courts); *supra* notes 110-14 and accompanying text.

[155] *Compare Living Water*, 258 F. App'x at 737 ("Here, we must determine what *actual burden* the Township has imposed on [the church's] religious exercise" (emphasis added)), *and id.* at 738 ("The question before us here is whether the Township's denial substantially burdens [the church's] religious exercise *now*—not five, ten or twenty years from now—based on the facts in the record."), *with* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (requiring a direct, primary, and fundamental nexus between a regulation and the burden alleged), *and supra* text accompanying notes 138-43 (explaining how the *CLUB* nexus, if it was in fact applied in *Lighthouse*, would be inconsistent with the case's holding).

[156] *Living Water*, 258 F. App'x at 736; *see* 146 CONG. REC. S6678, S6688 (2000) (statement of Sen. Hatch, sponsor) ("It is important to note that this legislation does not provide a religious assembly with immunity from zoning regulation.").

[157] *Living Water*, 258 F. App'x at 737 (quoting *CLUB*, 342 F.3d at 762).

> programs and meetings in the evenings and on weekends; it does not preclude the church from accepting new members into its congregation. Moreover, the township's decision does not prevent the church from building a 14,075 square-foot facility to house the school (taking it up to the 25,000 square-foot ceiling).[158]

While the limits placed on the church's religious exercise made things "more expensive or difficult," there was no effective bar on religious conduct and no coercion of religious belief.[159] The court explained:

> The fact that [the church's] current facility is too small does not give [it] free reign to construct on its lot a building of whatever size it chooses, regardless of limitations imposed by the zoning ordinances . . . . [W]e are hard-pressed to conclude that [the church] will be unable to carry out its church missions and ministries without [the building expansion], nor do we believe that mere inconvenience equates to a substantial burden.
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> . . . RLUIPA does not protect the church from all land use regulation, but only from those regulations that substantially burden its religious exercise.[160]

In reaching its conclusion, the court also confirmed that the substantial burden inquiry must not ignore context.[161] The burden on the church did not arise solely from the permit denial, but also from the Township's unexpected decision to stop the practice of granting permit extensions.[162] At one point, the church actually had a valid permit to construct buildings that exceeded the 25,000 square foot limit.[163] The expiration of that permit and the refusal to allow an extension is what forced the church to apply for a second permit, which was ultimately denied.[164] The court recognized that these procedural hurdles were burdensome.[165] However, it also determined that "context must

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[158] *Id.* at 738.

[159] *See id.* at 738-39. This appears to conflict with the reasoning in *Lighthouse*, where the court held:

> The burden here was substantial. The Church could have searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense. That the burden would not be insuperable would not make it insubstantial.

Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *8-9 (E.D. Mich. Jan. 3, 2007) (citing Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005)).

[160] *Living Water*, 258 F. App'x at 739 (citation omitted).

[161] *See id.* at 740.

[162] *Id.*

[163] *Id.* at 730.

[164] *Id.* at 730-32.

[165] *Id.* at 739-40.

include the course of dealings in its entirety—not simply from [the church's] point of view."[166] There was no evidence that the Township discontinued its practice of allowing permit extensions because of animus towards the church or towards religious institutions in general.[167] In fact, the Township consistently applied its policy of refusing permit extensions both before and after denying the church's extension.[168] While this examination of "context" is more extensive than that in *DiLaura* or *Lighthouse*, it is also particularly even-handed. Reviewing "the course of dealings in its entirety"[169] and not just from the perspective of those alleging a religious burden, provides the government with some ability to offset burdens—burdens that might otherwise reach the threshold of substantial—by a uniform and consistent exercise of its regulatory power.

In *Living Water*, the government's multiple regulatory decisions did not amount to a substantial burden.[170] However, it is possible that a series of regulatory hurdles, although individually benign, can collectively impose a substantial burden on religious exercise.[171] The Ninth Circuit dealt with such a situation in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*.[172] In *Guru Nanak*, a church sought a conditional use permit to build a temple.[173] In the church's first permit application, it proposed to build its temple in an area zoned single family residential.[174] The County Planning Commission denied the permit because of neighbor complaints over potential noise and traffic.[175] "[The church] predictably responded to these voiced complaints by attempting to locate its temple on property far from residents who would be bothered by noise and traffic."[176] Under the impression that "[it] needed to find more acreage to set up [its] facility,"[177] the church acquired property in an agricultural district and applied for a permit a second time.[178] The Planning

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[166] *Id.* at 740.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* at 740-42.

[171] *See* 42 U.S.C. § 2000cc(a)(2)(C) (2000) (explaining that the substantial burden provision applies to "the implementation of a land use regulation or system of land use regulations").

[172] 456 F.3d 978 (9th Cir. 2006).

[173] *Id.* at 983.

[174] *Id.* at 989.

[175] *Id.*

[176] *Id.*

[177] *Id.* at 990 n.16 (emphasis omitted).

[178] *Id.* at 990; *see generally* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) ("[O]nce the organization has bought property reasonably expecting to obtain a permit, the denial of the permit may inflict a hardship on it." (citing Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 898-900 (7th Cir. 2005))), *cert. denied*, 128 S. Ct. 914 (2008).

Commission again denied the permit, this time because it would contribute to "leapfrog development."[179]

The court viewed the Planning Commission's reasons for both permit denials with disapproval. The first denial, based on noise and traffic, was not in itself improper.[180] However, it was overbroad when placed in the context of the County's General Plan, which stated, "'residences of *all types*' are grouped together as being noise sensitive."[181] This would effectively allow neighbors in both high and low density residential districts to prohibit churches from their areas by complaining about potential noise.[182] As a result, the church's future applications for a temple in any residential district "could be denied for the exact same broad reasons as its first . . . application."[183] The Planning Commission denied the church's second permit, not because of potential noise, but because of it would contribute to "leapfrog development."[184] Recognizing that numerous other church buildings already existed on agriculturally zoned land, including another temple less than one mile away, the court held that the Commission was applying its concern over leapfrog development inconsistently.[185] Furthermore, the court noted that an investigative committee had recommended approval of both permit applications, and that the church had agreed to every condition proposed to mitigate its facility's negative impact.[186]

The government's regulatory actions in *Guru Nanak* were held to have substantially burdened the plaintiff-church's exercise of religion.[187] This substantial burden did not necessarily arise from any single regulation, but rather from their "net effect."[188] The court explained, "[w]e 'cannot view the

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[179] *Guru Nanak*, 456 F.3d at 990.

[180] *See id.* at 989 n.15.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.* at 990.

[185] *Id.* at 990-91; *see also* Petra Presbyterian Church v. Vill. of Northbrook, No. 03 C 1936, 2003 WL 22048089, at *10 (N.D. Ill. Aug. 29, 2003) ("[A] zoning code that merely restricts the location of religious practice and conduct does not substantially burden the free exercise of religion."), *later proceeding at* 409 F. Supp. 2d 1001 (N.D. Ill. 2006), *aff'd*, 489 F.3d 846 (7th Cir. 2007).

[186] *Guru Nanak*, 456 F.3d at 989-91.

[187] *Id.* at 991-92.

[188] *Id.* The court explained how the net effect of the regulatory burdens violated the Ninth Circuit's "significantly great extent" substantial burden standard.

> The net effect of the County's two denials—including their underlying rationales and disregard for Guru Nanak's accepted mitigation conditions—is to shrink the large amount of land theoretically available to Guru Nanak under the Zoning Code to several scattered parcels that the County may or may not ultimately approve. Because the County's actions have to a significantly great extent lessened the prospect of Guru Nanak being able to

denial of the second [permit] application 'in isolation'; rather, 'it must be viewed in the context of [the church's] permit process history.'"[189] This is the same type of factual inquiry used in *Living Water*.[190] However, while the multiple regulatory hurdles in *Living Water* did not impose a substantial burden, in *Guru Nanak* they did.[191] Thus, *Guru Nanak* establishes what *Living Water* implies: Multiple individualized assessments can constitute a "system of land use regulations," which collectively result in a substantial burden on religious exercise.[192]

Assembling the previously discussed holdings provides an ideal result: an interpretation of "substantial burden" that gives maximum effect to the purposes of RLUIPA, while remaining true to Free Exercise jurisprudence.[193] The *Living Water* framework is the most appropriate vehicle towards this end because it provides a method of analyzing regulations that are either coercive towards religious belief or prohibitive towards religious conduct.[194] The framework also requires a religious burden to have an "actual" link[195] to a challenged regulatory act, which balances religious liberty with the need for regulatory efficacy. Finally, the framework sides with equity in directing us to consider all circumstances from the perspectives of both the plaintiff and the government, including the collective impact of multiple individualized assessments and regulatory hurdles.[196]

C. The Compelling Governmental Interest Furthered by the Least Restrictive Means

If a plaintiff successfully demonstrates a substantial burden on religious exercise, the government is required to prove that its regulation is the least

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construct a temple in the future, the County has imposed a substantial burden on Guru Nanak's religious exercise.

Id.

[189] *Id.* at 991 (citing Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 548 (S.D.N.Y. 2006)), *aff'd*, 504 F.3d 338 (2d Cir. 2007)) (internal brackets altered).

[190] *Compare id.*, *with* Living Water Church of God v. Charter Twp. of Meridian, 258 F. App'x 729, 740 (6th Cir. 2007) ("We do not quarrel with the district court's considering context [in *Living Water*, 384 F. Supp. 2d 1123] . . . .").

[191] *Compare Living Water*, 258 F. App'x at 741-42, *with Guru Nanak*, 456 F.3d at 992.

[192] *See* 42 U.S.C. § 2000cc(a)(2)(C) (2000); *see also supra* text accompanying notes 161-66 (discussing the court's consideration of context in *Living Water*).

[193] *See* 42 U.S.C. § 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.").

[194] *See supra* text accompanying notes 152-154.

[195] *See supra* text accompanying note 155.

[196] *See supra* text accompanying notes 166-69, 188-92.

restrictive means of furthering a compelling governmental interest.[197] RLUIPA does not define "compelling governmental interest" or "least restrictive means." However, RLUIPA's legislative history suggests that Congress intended these terms to codify the compelling interest test found in the Supreme Court's Free Exercise jurisprudence.[198] Specifically, RLUIPA's legislative history refers to two cases: *Employment Division v. Smith*[199] and *Lukumi Babalu Aye, Inc. v. City of Hialeah*.[200] Neither case provides straightforward definitions. However, both cases support the proposition that the compelling interest and least restrictive means analyses are fact-driven rather than dependent on any categorical rule.[201]

1. The interpretation of compelling governmental interest

Nearly every discussion of whether a land use regulation is supported by a compelling governmental interest must begin with the police power. The

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[197] *See* 42 U.S.C. § 2000cc-2(b); *see also id.* § 2000cc(a)(1).

[198] *See* 146 CONG. REC. E1563 (2000) (statement of Rep. Canady, sponsor) ("The phrase 'in furtherance of a compelling governmental interest' is taken directly from RFRA, which was enacted in 1993; the phrase was and is intended to codify the traditional compelling interest test."); *see also* 42 U.S.C. § 2000bb(b) (1993) ("The purposes of this chapter [of RFRA] are—(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ."), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[199] 494 U.S. 872 (1990).

[200] 508 U.S. 520 (1993); *see* 146 CONG. REC. S7774, S7775-76 (2000) (statement of Sen. Hatch, sponsor, and Sen. Kennedy, co-sponsor) ("Where government makes such individualized assessments, permitting some uses and excluding others, it cannot exclude religious uses without compelling justification." (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537-38 (1993); Employment Div. v. Smith, 494 U.S. 872, 884 (1990))).

[201] *See Lukumi Babalu*, 508 U.S. at 538 ("*[W]hen there are no persuasive indications to the contrary*, . . . a law which visits 'gratuitous restrictions' on religious conduct[] seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." (emphasis added) (citation omitted)); *Smith*, 494 U.S. at 888 ("[W]e cannot afford the luxury of deeming *presumptively invalid* . . . every regulation of conduct that does not protect an interest of the highest order."); *see also id.* at 899 (O'Connor, J., concurring) (discussing how the "sounder approach" is to apply the compelling interest test on a case-by-case basis so that it can properly account for the burden on plaintiffs and the interests asserted by the state); *see generally* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (explaining that under the Free Exercise Clause, limitations on religious exercise have been upheld when they "invariably posed some *substantial* threat to public safety, peace or order") (emphasis added); JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 10.19(C), at 700 (2d ed. 2007) ("[T]here can be no hard and fast list of what is and what is not a compelling interest since the decision turns on the facts of each case, particularly the nature of the surrounding uses.").

police power is commonly articulated as the government's ability to regulate in the interest of public health, safety, and welfare.[202] The administrative decisions regarding special use permits and variances represent a particular application of the police power.[203] While reviewing courts typically give some deference to these administrative decisions,[204] the deference tends to vary in degree.[205] This variation in deference is attributable, at least in part, to the particular prong of the police power upon which the administrative body bases its special use permit or variance decision. There is a generally accepted police power hierarchy, wherein upper-tier health and safety regulations tend to receive more favorable treatment than lower-tier welfare regulations.[206]

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[202] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 148 n.11 (1978) ("It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals."); Berman v. Parker, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."); 6 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 35.02[3] (Eric Damian Kelly ed., 2003) ("It is now well-settled in the law that to be within the scope of the power delegated to the local governing body, zoning regulations, as do all other exercises of police power, must have a reasonable relation to the public health, safety, morals or general welfare."); 1 EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:2 (2005) ("Courts have universally held that [the police power] includes within its scope all manner of laws deemed necessary by the legislature to promote public health, safety, morals, or the general welfare.").

[203] *See* 6 ROHAN, *supra* note 202, § 35.02[1] ("Whenever zoning power is validly exercised by any governmental entity, that entity is exercising a form of inherent or delegated police power."); 1 ZIEGLER, ET AL., *supra* note 202, § 1:2 ("Police power in the land-use control context encompasses zoning and all other government regulations which restrict private owners in their development and use of land.").

[204] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality."); 3 ZIEGLER, JR., ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:2 (2006) ("The decision of a body whose administrative or quasi-judicial determination is challenged comes to the court with a presumption that it was arrived at fairly, on proper motives, and upon valid reasons.").

[205] One of the policy-oriented reasons for this variation in deference is the lack of expertise of the administrative bodies that have authority over variances and special use permits.

> The variance and the special permit provisions have generated a vast body of law, probably for four major reasons: . . . fourth, recognizing the inadequacies of [zoning] boards, courts are not as willing to defer to [their] judgments as they are to more expert administrative bodies, and this lack of deference invites a judicial rehash of the issues involved.

JUERGENSMEYER & ROBERTS, *supra* note 201, § 5.3, at 217-18.

[206] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 904 (Cal. Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

> If there is a hierarchy of interests the police power serves—and both logic and prior cases suggest there is—then the preservation of life must rank at the top. Zoning restrictions seldom serve public interests so far up on the scale. . . . When land use regulations seek to advance what are deemed lesser interests such as aesthetic values of the community they frequently are outweighed by constitutional property rights. Nonetheless, it should be noted even these lesser public interests have been deemed sufficient to justify zoning which diminishes—without compensation—the value of individual properties.[207]

In the compelling interest analysis, the police power hierarchy manifests as either a relaxed or a heavy evidentiary burden, which the government must satisfy in order to prove its asserted police power rationale for a special use permit or variance decision constitutes a compelling interest.[208]

An illustration of how the compelling interest analysis relaxes evidentiary burdens for certain police power regulations occurs in *Peace Lutheran Church & Academy v. Village of Sussex*.[209] While *Peace Lutheran* is a state case, decided under the protections afforded by a state constitution, the test applied is nearly identical to that of RLUIPA's substantial burden provision.[210] In *Peace Lutheran*, a church received a variance to construct a school building as an attachment to one of its pre-existing buildings.[211] One condition of this variance was that the church retrofits its pre-existing building with a sprinkler system that adhered to the Village fire code.[212]

The church claimed that the sprinkler system regulation would cause pipes to be conspicuously visible throughout its building, which would thereby disturb worshippers.[213] The church also argued that the regulation dictated what items were required in a sacred space, which infringed upon its free exercise of religion.[214] The court determined that the impact of the regulation did not amount to a substantial burden, technically ending the analysis.[215] However, a desire for "judicial completeness" led the court to address the other requirements of the substantial burden test, including whether the sprinkler regulation was supported by a compelling governmental interest.[216]

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

[208] *See* 42 U.S.C. § 2000(a)(1)(A) (2000); *supra* text accompanying notes 202-03.

[209] 631 N.W.2d 229 (Wis. Ct. App. 2001).

[210] *Compare id.* at 235 (describing the test applied), *with* 42 U.S.C. § 2000cc(a) (containing RLUIPA's substantial burden provision).

[211] *Peace Lutheran*, 631 N.W.2d at 231.

[212] *Id.* (explaining that the church was otherwise exempt from the sprinkler system requirement because of a variance it had obtained years earlier).

[213] *Id.* at 233.

[214] *Id.*

[215] *Id.* at 237.

[216] *Id.*

The compelling interest for the sprinkler regulation was "the saving of lives and the preservation of property."[217] Both saving lives and preserving property find support in the health, safety, or welfare prongs of the police power.[218] The evidence that these interests were compelling consisted of a conclusory passage in the Village fire code[219] and testimony that sprinkler systems have "a proven track record in saving lives and property."[220] This evidence would have been sufficient for the government to prove that it had a compelling interest.[221] While the burden to prove a compelling interest is generally much greater than this,[222] the relaxed evidentiary burden in *Peace Lutheran* is understandable given that one of the government's asserted interests, the preservation of life, is firmly rooted in the health and safety prongs of the police power.[223]

The government's interest in *Peace Lutheran*, the saving of lives, fell into the upper-tier of the police power hierarchy, which explains why the government benefited from a relaxed evidentiary burden. In contrast, when a regulation finds support in a lower-tier police power, the government typically faces a much heavier burden of proof. An example of the heavier (or less relaxed) burden of proof for lower-tier police power interests exists in *Elsinore*

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[217] *Id.*

[218] *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 904 (Cal. Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

[219] *Peace Lutheran*, 631 N.W.2d at 237; *see id.* at 237 n.6 ("'The general purpose of the Village's Fire Prevention Code is the 'safeguarding, to a reasonable degree, life and property from the hazards of fire . . . .'" (citation omitted)).

[220] *Id.* at 237; *see also id.* at 233, 238 (discussing the Fire Chief's reasons for denying the variance including his concern that the building would be used as an educational facility, and the fire chief's testimony and presentation to the Village's Board of Fire Appeals).

[221] *See id.* at 237.

[222] *See* City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) ("The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'watered down' but 'really means what it says." (citing Employment Div. v. Smith, 494 U.S. 872, 888 (1990)) (internal brackets and ellipses omitted)).

[223] *See First English*, 258 Cal. Rptr. at 904 ("The zoning regulation challenged in the instant case involves this highest of public interests—the prevention of death and injury."); *cf.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990) (discussing the constitutionality of allowing a state's interest in preserving life to take precedent over an incapacitated patient's alleged desire to refuse life-sustaining medical treatment); *In re* Severns, 425 A.2d 156, 158-59 (Del. Ch. 1980) ("[T]he so-called right to privacy, such as the right to decline medical treatment, is not absolute and must yield to a compelling State interest in the general preservation of life, such as the prevention of suicide, the prevention of injury to innocent third parties, *particularly minors* . . . ." (emphasis added)).

Christian Center v. City of Lake Elsinore.[224] In *Elsinore*, a church attempted to move to a location occupied by a discount food store that was renting the property as a month-to-month tenant.[225] The owner of the property agreed to evict the food store and sell the property to the church.[226] The church's only problem was that to operate on the property, it needed a conditional use permit.[227] Even though an administrative report recommended permit approval, the City's Planning Commission denied the church's application and the City Council did the same on appeal.[228] The asserted compelling interests for the denial included the maintenance of property tax revenue and the curbing of urban blight.[229]

In *Elsinore*, the court held that the generation or maintenance of tax revenue was not a compelling interest.[230] In theory, the generation or maintenance of taxes finds support in the welfare prong of the police power, given the broad definition of public welfare:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within 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.[231]

Nevertheless, even if the welfare prong of the police power supported a maintenance-of-taxes regulation, it still would not qualify as compelling. The court explained "if a city's interest in maintaining property tax levels constituted a compelling governmental interest, the most significant provision of RLUIPA would be largely moot, as [the] decision to deny a religious assembly use of land would almost always be justifiable on that basis."[232] This reveals one of the more practical reasons for not relaxing the evidentiary burden for lower-tier welfare regulations: to guard against administrative abuses of power.[233] Without additional evidence, the court was unwilling to hold that the

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[224] 291 F. Supp. 2d 1083 (C.D. Cal. 2003), *rev'd mem.*, 187 F. App'x 718 (9th Cir. 2006).

[225] *Id.* at 1086.

[226] *Id.*

[227] *Id.* (explaining that the both church and food store were located in a blighted area zoned neighborhood commercial, which allowed the operation of churches subject to permit approval).

[228] *Id.* at 1086-87.

[229] *Id.* at 1093.

[230] *Id.*

[231] Berman v. Parker, 348 U.S. 26, 33 (1954) (citation omitted).

[232] *Elsinore*, 291 F. Supp. 2d at 1093.

[233] *See id.* at 1093 ("[RLUIPA's] drafters were concerned that where, as here, a church is required to seek a permit, 'the zoning board does not have to give a specific reason for denying the permit.'" (citation and brackets omitted)); *see also* JUERGENSMEYER & ROBERTS, *supra* note 201, § 5.14, at 263 ("Suspicions about abuses of the variance power lead some courts to review the granting of variances closely, and grants of variances are subjected to closer scrutiny than

maintenance of taxes was a compelling interest.[234] Unlike the higher-tier police power interests in *Peace Lutheran*, the government's lower-tier welfare interest received next to no deference.[235]

The second compelling interest asserted in *Elsinore* was the curbing of urban blight, which included the preservation of a low-income community's sole food market and the jobs that it provided.[236] This interest finds some support in the welfare prong of the police power.[237] The evidence offered to show that curbing urban blight was a compelling interest included a legislative finding that the area was in fact blighted[238] and existing precedent holding that preserving the quality and improving the vitality of urban life were important considerations in land use regulations.[239] While far from overwhelming, this evidence, especially the legislative finding, is stronger than the evidence offered in *Peace Lutheran*. Without deciding the matter, the court implied that this evidence was sufficient to prove a compelling interest, which indicates the use of a slightly relaxed evidentiary burden.[240] The slightly relaxed evidentiary burden gave proper deference to the police power interest,[241] while guarding against the risk of administrative abuses of power, which tend to be more prevalent in lower-tier welfare and non-police-power regulations.[242]

2. *The interpretation of least restrictive means*

For an individualized assessment to survive RLUIPA's substantial burden provision, the compelling governmental interest must be furthered by the least

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denials."); *id.* § 5.25, at 286 ("While some flexibility [in special use permit decisions] is a good thing, there are limits. To the extent discretion is uncontrolled, the potential for arbitrariness increases, and due process concerns arise.").

[234] *See Elsinore*, 291 F. Supp. 2d at 1093.

[235] *Compare supra* text accompanying notes 217-23 (discussing the upper-tier police power interest in *Peace Lutheran*), *with Elsinore*, 291 F. Supp. 2d at 1093 (discussing the lower-tier maintenance-of-tax interest), *and* sources cited *supra* note 233.

[236] *Elsinore*, 291 F. Supp. 2d at 1093-94.

[237] *See Berman*, 348 U.S. at 33-35; *see also* Kelo v. City of New London, 545 U.S. 469, 485 n.13 (2005) (citing *Berman*, 348 U.S. at 34-35) (discussing, in an eminent domain proceeding, whether curbing urban blight is a "public purpose").

[238] *See Elsinore*, 291 F. Supp. 2d at 1094 (explaining that the area was declared "blighted" by a legislative body and thus conclusively presumed to be blighted under California law).

[239] *See id.* at 1093 ("[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1976))); *see also id.* at 1094 ("[C]oncerns regarding the vitality of city life are of paramount importance in land use planning.").

[240] *See id.* at 1093-94.

[241] *See generally* First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 904-06 (Cal. Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

[242] *See also Berman*, 348 U.S. at 34-35.

restrictive means.[243] While RLUIPA does not provide a definition of "least restrictive means," its legislative history provides some guidance. In using the term "least restrictive means," Congress intended to codify Free Exercise jurisprudence.[244] Unfortunately, RLUIPA's least restrictive means requirement, which was carried over from RFRA,[245] "was not used in the pre-*Smith* jurisprudence RFRA purported to codify . . . ."[246] In fact, pre-*Smith* jurisprudence tended towards a requirement of "narrow tailoring" rather than "least restrictive means."[247] On the other hand, language that contradicts this position exists in *Sherbert*, which is technically part of pre-*Smith* jurisprudence: "[I]t would plainly be incumbent upon the [government] to demonstrate that *no alternative forms of regulation* would combat such abuses without infringing First Amendment rights."[248] Despite the dissonance surrounding the least restrictive means requirement, courts have interpreted it to be a constitutional part of RLUIPA's substantial burden provision.[249]

One of the most thorough analyses of the least restrictive means requirement occurs in *Murphy*, where a court examined a zoning commission's cease and

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[243] *See* 42 U.S.C. § 2000cc(a)(1)(B) (2000).

[244] *Compare* 146 CONG. REC. S7774, S7774 (2000) (statement of Sen. Hatch, sponsor, and Sen. Kennedy, co-sponsor) ("[RLUIPA] applies the standard of the Religious Freedom Restoration Act, 42 U.S.C. [§] 2000bb-1 (1994) [sic]: if government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means."), *with* sources cited *supra* note 58, 198 (explaining that RFRA was intended to codify Free Exercise jurisprudence).

[245] *See supra* note 53 and accompanying text.

[246] City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

[247] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32, 546 (1993) (describing the compelling interest test used in Wisconsin v. Yoder, 406 U.S. 205 (1972), as requiring narrow tailoring); Employment Div. v. Smith, 494 U.S. 872, 882-84 (1990) (describing *Sherbert* heightened scrutiny without mentioning a least restrictive means requirement); *see also Yoder*, 406 U.S. 205 (deciding the case without expressly applying a least restrictive means requirement).

[248] Sherbert v. Verner, 374 U.S. 398, 407 (1963) (emphasis added); *see also* Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (explaining that the government *may* justify a regulation by showing that it represents the least restrictive means).

[249] *See* Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *9-10 (E.D. Mich. Jan. 3, 2007) (applying the least restrictive means requirement); Freedom Baptist Church of Del. v. Twp. of Middletown, 204 F. Supp. 2d 857, 873-74 (E.D. Pa. 2002) (holding RLUIPA's land use section is constitutional on its face); Murphy v. Zoning Comm'n of New Milford, 148 F. Supp. 2d 173, 187 n.13, 190 (D. Conn. 2001) (presuming the constitutionality of RLUIPA and applying its least restrictive means requirement), *later proceeding at* 289 F. Supp. 2d 87 (D. Conn. 2003), *vacated on ripeness grounds*, 402 F.3d 342 (2d Cir. 2005). *But see* Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006) (explaining that in a Free Exercise challenge, the strict scrutiny test requires narrow tailoring, but failing to discuss the requirements under RLUIPA).

desist order for prayer group meetings in a single-family residential district.[250] The court held that the commission's order imposed a substantial burden on religious exercise.[251] The court also found that the government had a compelling interest in protecting the health and safety of a community by limiting traffic in a residential area.[252] Turning to RLUIPA's least restrictive means requirement, the court held that the cease and desist order was not the least restrictive means of furthering the government's interest.[253] The court reasoned that while the order restricted the number of people present at prayer meetings, it did not address the amount of traffic in the area.[254] As a result, the order did not have the requisite connection to the government's stated interest in regulating traffic.[255]

The zoning commission's cease and desist order could potentially have passed a least restrictive means test. The commission's intent was merely to enforce a zoning regulation that prohibited large gatherings of people.[256] The problem with excessive traffic only arose because the plaintiff violated this zoning regulation.[257] To remedy the traffic problem, the commission addressed its underlying cause by attempting to stop further zoning violations. This was the only practical way for the commission to prevent traffic in the residential district from reaching unsafe levels. However, the court was unable to rule as such because RLUIPA requires the government to prove that it has employed the least restrictive means.[258] In *Murphy*, the government "did not argue that no less restrictive alternatives existed for accomplishing [its] interest in protecting the safety of the neighborhood."[259] Based on that fact and "the incongruity between the [government's] actions and the expressed governmental interest,. . . the court [could not] find that [the government had] a valid defense to the claim [that it] violated [RLUIPA]."[260] If the government had simply stated that it had employed the least restrictive means, and offered a modicum of proof to support that position, the outcome in *Murphy* may have been different.

On the other end of the spectrum, *Lighthouse* represents a much more demanding interpretation of the least restrictive means requirement. In

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[250] *Murphy*, 148 F. Supp. 2d at 178, 190.

[251] *Id.* at 187-88.

[252] *Id.* at 190.

[253] *Id.*

[254] *Id.*

[255] *Id.* at 190.

[256] *Id.* at 178; *see also id.* at 179 ("In this situation, the Commission found that "too large" was 25 or more people.").

[257] *See id.* at 178-79, 190.

[258] *See id.* at 190-91; 42 U.S.C. § 2000cc(a)(1)(B) (2000); 42 U.S.C. § 2000cc-2(b).

[259] *Murphy*, 148 F. Supp. 2d at 191.

[260] *Id.*

Lighthouse, the asserted compelling interest was the prevention of parking and traffic problems[261] in an "Education Research Office" zoning district.[262] Similar to the situation in *Murphy*, this interest arose because of the plaintiff-church's extensive use of its property.[263] The government addressed its parking and traffic concerns by denying the plaintiff-church a parking variance.[264] The court determined that enforcement of the parking regulations (i.e., the denial of the church's parking variance) was not the least restrictive means.[265] The court cited the government's failure to establish the necessary connection between the restrictions imposed and its stated interest.[266] The court also explained that the practice of allowing short-term parking on nearby streets gave rise to a presumption that churchgoers who parked in the area would not create traffic problems.[267] This was further compounded by the church's assertion that it would be willing to "shuttle people" to and from its building, which to some extent, would negate the need for additional parking spaces and reduce roadway traffic.[268]

Lighthouse reveals the stricter connotations that can be drawn from the phrase "least restrictive means." In interpreting "least restrictive means," courts may not only insist that the government prove a direct link between its regulation and a compelling interest,[269] but they may also require the government to overcome any evidence, including mitigation proposals made by a plaintiff, which suggest the existence of a less burdensome alternative.[270]

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[261] Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *9 (E.D. Mich. Jan. 3, 2007).

[262] Lighthouse Cmty. Church of God v. City of Southfield, 382 F. Supp. 2d 937, 939 (E.D. Mich. 2005), *later proceeding at* No. 05-40220, 2007 WL 30280 (E.D. Mich. Jan. 3, 2007).

[263] *Compare Murphy*, 148 F. Supp. 2d at 176-78, 190, *with Lighthouse*, 2007 WL 30280, at *6, *8-9.

[264] *Lighthouse*, 2007 WL 30280, at *2-3, *9.

[265] *Id.* at *9.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *See id.* at *9 ("[The government has] failed to provide evidence demonstrating that preventing Plaintiff from using [its] building for worship *is necessary* in order to promote the . . . interests in parking and traffic." (emphasis added)).

[270] *See id.* at *9 ("Given [the government's] lack of evidence demonstrating that if Plaintiff used [its] building for worship, there would be overflow parking that would hurt the local traffic situation, an outright prohibition of the use of the . . . building for worship is simply an excessive means to accomplish the [government's] stated traffic interest."); Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 553 (S.D.N.Y. 2006) (holding that because the impact on traffic could have been mitigated in multiple ways, the government "failed to carry [its] burden of demonstrating that no alternatives other than an outright denial could protect [its] interests relating to traffic."), *aff'd*, 504 F.3d 338 (2d Cir. 2007).

IV. CONCLUSION

The Supreme Court has yet to affirm the constitutionality of RLUIPA's land use section. However, if the opinions of the numerous federal courts that have considered the issue are any indication, such affirmation is likely forthcoming. Within these federal cases exists an underlying struggle to interpret RLUIPA in a way that reconciles Congress' intent with constitutional proscriptions. While the federal circuits do not agree on every aspect of RLUIPA's individualized assessment jurisdictional trigger or its substantial burden provision, the body of case law generated thus far identifies a workable and refined interpretation.

The individualized assessment trigger requires that a special use permit or variance decision contain an element of subjectivity.[271] This interpretation adheres to the Free Exercise dictates of *Smith*, which counsel against the application of strict scrutiny to neutral laws of general applicability.[272] At the same time, it also acknowledges Congress' concern over land use regulations that interfere with religious exercise.[273] The result is an interpretation of the individualized assessment trigger that balances the judiciary's power to define the scope of constitutional protections and the Congress' Fourteenth Amendment power to enforce them.

The interpretation of the substantial burden provision also harmonizes judicial precedent with legislative intent. The question of whether there has been a "substantial burden on religious exercise" is best answered by the Sixth Circuit's "framework" for analysis, which recognizes that a land use regulation (or a system of regulations) can violate free exercise rights through either coercion or prohibition.[274] The framework also demands an actual nexus between the government's regulation and the alleged burden on religious exercise.[275] By examining these factors as part of a fact-intensive inquiry,[276] the framework integrates RLUIPA's "substantial burden on religious exercise" into the Free Exercise strict scrutiny jurisprudence of the Supreme Court.[277]

The courts have defined "compelling governmental interest" according to common law tendencies.[278] They have frequently applied a sliding-scale approach in which the government's evidentiary burden ranges from relaxed to

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[271] *See supra* text accompanying note 90.

[272] *See supra* notes 13-19 and accompanying text.

[273] *See supra* notes 48, 51 and accompanying text.

[274] *See supra* text accompanying notes 152-54.

[275] *See supra* note 155 and accompanying text.

[276] *See supra* note 115 and accompanying text.

[277] *Compare supra* text accompanying notes 152-54 (discussing the *Living Water* framework), *with supra* notes 112-14 and accompanying text (discussing the Supreme Court's understanding of substantial burden on religious exercise).

[278] *See supra* note 198 and accompanying text.

heavy depending on whether its asserted interests are rooted in the upper or lower tiers of the police power.[279] This coincides with the open-ended language of RLUIPA,[280] while maintaining the integrity of the police power, which is indispensable for effective land use regulation. Finally, courts have applied the "least restrictive means" requirement as written.[281] While enforcement of this requirement varies in terms of strictness, at a minimum, the government must state that its regulation represents "the least restrictive means" of furthering a compelling interest.[282] Because this interpretation conforms to a broad reading of *Sherbert*, RLUIPA's least restrictive means requirement can be understood as an accurate codification of the Supreme Court's Free Exercise case law.[283]

There are definite tensions between RLUIPA, the Constitution, and the judiciary's power "to say what the law is."[284] The lower federal courts have responded to this tension by carefully balancing various competing interests. They have essentially had their "say" on the matter, promulgating a reasonable interpretation of RLUIPA's individualized assessment trigger and substantial burden provision. Although this interpretation remains subject to the Supreme Court's review, until then, RLUIPA persists as a form of strict congressional scrutiny over religious burdens imposed by the special use permit and variance.

Tyson Tamashiro[285]

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[279] *See supra* text accompanying notes 202-08.

[280] *See* 42 U.S.C. §2000cc-5 (2000) (failing to define "compelling governmental interest").

[281] *See supra* notes 244-49 and accompanying text (discussing whether "least restrictive means" is an accurate codification of the Supreme Court's Free Exercise Clause jurisprudence).

[282] *See* 42 U.S.C. § 2000cc(a)(1)(B); *see supra* text accompanying notes 158-59.

[283] *See supra* text accompanying note 248.

[284] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

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A History of Revision: The Constitutional Convention Question in Hawai'i, 1950–2008

I. INTRODUCTION

If men were able to identify and successfully to codify for all time the truly fundamental aspects of a democratic society, methods of constitutional change would be of little importance but, unfortunately, this is not the case. Errors of judgment are made constantly, the future is seen only darkly, developments are anticipated too poorly. Thus constitutional change is inevitable.[1]

Although they have disagreed about how frequently constitutional change should occur, the drafters of America's state and federal constitutions have agreed that change is inevitable.[2] Thomas Jefferson,[3] for instance, believed people should review their form of government every twenty years "so that it may be handed on, with periodical repairs, from generation to generation, to the end of time, if anything human can so long endure."[4] James Madison, on the other hand, believed that such frequent change would "engender pernicious factions" and "agitate the public mind more frequently and more violently than might be expedient."[5] The drafters of the federal constitution adopted Madison's philosophy toward constitutional change, allowing Congress or a constitutional convention to introduce amendments, which must then ratified by a supermajority of the country.[6] Although more than 9,000 amendments to the

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[1] John P. Wheeler, Jr., *Changing the Fundamental Law*, *in* SALIENT ISSUES OF CONSTITUTIONAL REVISION 49, 49 (John P. Wheeler, Jr. ed., 1961).

[2] *But see generally* RICHARD B. BERNSTEIN WITH JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? (1993) (expressing skepticism about the purposes behind constitutional change).

[3] Jefferson was not a delegate to the 1787 Constitutional Convention but was an author of the Declaration of Independence and the Virginia Constitution. RICHARD B. BERNSTEIN, THOMAS JEFFERSON 36-37, 71 (2005).

[4] ALBERT L. STURM, TRENDS IN STATE CONSTITUTION MAKING 1966–1972, at 1 (1973) (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *reprinted in* THE COMPLETE JEFFERSON 292 (Saul K. Padover ed.,1943)).

[5] LAURA J. SCALIA, AMERICA'S JEFFERSONIAN EXPERIMENT: REMAKING STATE CONSTITUTIONS, 1820-1850, at 4 (1999).

[6] *See* U.S. CONST. art. V. Some legal historians have argued that Article V's burdensome revision provisions were necessary to preserve the balance of political power between states achieved in the Constitution. *See* Gerald Benjamin & Tom Gais, *Constitutional Convention-phobia*, 1 HOFSTRA L. & POL'Y SYMP. 53, 68 (1996) ("Constitutions, like treaties, preserved the terms of the compromise between warring groups . . . . For very delicate issues, the tactics of constitutionalism appeared essential. Otherwise, slight changes in political power could upset the compromise." (quoting Lawrence Freidman)). For a history of how Article V was drafted, see generally BERNSTEIN WITH AGEL, *supra* note 2, at 14-20.

federal constitution have been proposed, only twenty-six amendments have been ratified since 1787,[7] and no national convention has been held since the first one.[8]

State constitutions, however, are much easier to alter. As "Jeffersonian experiments,"[9] states have altered or replaced constitutions frequently. Every state allows legislators to propose amendments, while a few allow citizens to introduce ballot initiatives themselves.[10] Legislative amendments and initiatives can amend only parts of the constitution, but the best known method for revising or rewriting the constitution in its entirety is the constitutional convention.[11]

Explicitly provided for in forty-one state constitutions, constitutional conventions (con cons)[12] have been held in every state.[13] Con cons are often described as an American invention,[14] the embodiment of popular sovereignty.[15] The author of the first treatise on American constitutional conventions said it is simplest to view con cons as a branch of government by which a "political society[] works out its will in relation both to itself and to the citizens of which it is composed."[16] Others argue that constitutional conventions are independent branches of government, a form of super-legislature to make and re-make a state's fundamental law.[17] Like other forms

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[7] Benjamin & Gais, *supra* note 6, at 56.

[8] *Id.* at 54.

[9] SCALIA, *supra* note 5.

[10] *See generally* Gerald Benjamin, *Constitutional Amendment and Revision*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177, 181-91 (G. Alan Tarr & Robert F. Williams eds., 2006) (providing an overview of the revision and amendment processes throughout the United States). Eighteen states have some form of an initiative. John Dinan, *State Constitutional Developments in 2006*, *in* THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES 3 (2007).

[11] Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM 57, 81 (1982). This Note will use "revise" when discussing large-scale alterations to the constitution, and "amend" when describing single-issue changes to the constitution.

[12] This note will use the terms "con con" and "constitutional convention" interchangeably.

[13] *See* Dinan, *supra* note 10, at 14.

[14] ELMER E. CORNWELL, JR. ET AL., STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES 13 (1975). To date, states have held more than 220 constitutional conventions to write and to revise their constitutions. *See* ALBERT L. STURM, MODERNIZING STATE CONSTITUTIONS 1966–1972, at 8 (1973).

[15] Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 3 (1996).

[16] ROGER SHERMAN HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 90 (1917) (quoting JOHN A. JAMESON, CONSTITUTIONAL CONVENTIONS 315 (4th ed., 1887)).

[17] HOAR, *supra* note 16, at 90 (quoting a report by the Judiciary Committee of New York's 1894 Constitutional Convention that said, "A Constitutional Convention is a legislative body of the highest order. It proceeds by legislative methods. Its acts are legislative acts. Its function is not to execute or interpret laws, but to make them").

of lawmaking, constitutional conventions reflect the political and social forces at work in society.[18]

In Hawai'i, the state constitutions and the constitutions for the Kingdom and Republic that preceded the state "have been shaped largely by the loyalties and prejudices of the individuals who wrote them, whether those individuals were kings, missionaries, white oligarchs, or freely elected representatives."[19] Hawai'i's constitutions have been written, revised, and repealed in response to perceived weaknesses in existing documents.[20] At the critical constitutional convention that prepared the document that would take Hawai'i from annexed territory to an American state, the drafters enshrined provisions to allow both for legislative amendments to the constitution and a periodic referendum on the necessity of further con cons.

In November 2008, more than thirty years after the state's last constitutional convention, Hawai'i voters went to the polls to decide whether to hold the state's fourth constitutional convention. The measure failed by a margin of nearly two to one, eliminating the use of the con con—at least for the time being—as a mechanism for a thoughtful review and debate of the constitution. This note describes Hawai'i's mechanism for periodically polling the electorate on the question of a state constitutional convention, shows how it has been used in the last half-decade, and proposes revisions to make it a more viable tool for increasing public deliberation.

II. HAWAI'I AS A CONSTITUTIONAL MONARCHY

Hawai'i is the only American state to have once been a constitutional monarchy, a republic, and annexed territory.[21] Under the monarchy, the islands had five constitutions, which were "written and then abandoned as part of the struggle over what kind of society Hawai'i would become and who would control it."[22] The revised constitutions expanded and contracted the power of people relative to the king and reflected the tension between the monarch's interests and those of other economically powerful groups. Although constitutions were amended and even replaced without major upheaval or

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[18] *See* NORMAN MELLER, WITH AN UNDERSTANDING HEART: CONSTITUTION MAKING IN HAWAII 1 (1971).

[19] Sean Aloysius Kelleher, The Politics of Constitutional Revision in Hawaii, 1968, at 33 (June 1973) (unpublished Ph.D. dissertation, Brown University) (on file with Law Library, University of Hawai'i at Mānoa).

[20] *See* ANNE FEDER LEE, THE HAWAII STATE CONSTITUTION: A REFERENCE GUIDE 2 (1993).

[21] Holt v. Richardson, 238 F. Supp. 468, 470 (D. Haw. 1965), *vacated sub nom.* Burns v. Richardson, 384 U.S. 73 (1966).

[22] RICHARD C. PRATT WITH ZACHARY SMITH, HAWAI'I POLITICS AND GOVERNMENT: AN AMERICAN STATE IN A PACIFIC WORLD 88 (2000).

unrest,[23] conflict over constitutional revision hastened the end of the Hawaiian monarchy.[24] Rumors of changes in the Constitution sparked the overthrow of Hawai'i's final monarch, setting the islands on a path towards annexation into the United States and, eventually, statehood.

A. Constitutions Between 1840 and 1887

Hawai'i's first constitution has its roots in 1839, when King Kamehameha III and his *ali'i*,[25] under the guidance of American missionary William Richards, drafted the Declaration of Rights and Laws of 1839.[26] Hawai'i's first constitution, promulgated on October 8, 1840, incorporated this Declaration of Rights.[27]

A dozen years passed, during which time the sugar and pineapple trade increased foreigners' influence and changed the topography and economy of Hawai'i dramatically.[28] The 1840 constitution "came to be looked upon as out-of-date and inadequate—a flimsy and outworn garment that needed to be replaced by one more ample and more in keeping with the spirit of the age."[29] The House of Representatives proposed a three-member commission to revise the Constitution, with the King, House of Nobles, and House of Representatives each selecting a commissioner.[30] The representatives' appointee, Hawai'i Supreme Court Justice William Lee, dominated the commission and brought a heavy American influence.[31] The commission's proposal dropped property requirements for voting, defined the roles of the three branches of government, and placed greater checks on the monarchy.[32] This new constitution took effect in 1852.[33]

Kamehameha V opposed the absence of property qualifications for voting in the 1852 Constitution.[34] Upon assuming the throne after the death of his

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[23] *See* Ralph S. Kuykendall, *Constitutions of the Hawaiian Kingdom*, 21 PAPERS HAWAIIAN HIST. SOC'Y (1940) (providing a detailed history of the amendments made to the constitution under the monarchy).

[24] *See* LILIUOKALANI, HAWAI'I'S STORY BY HAWAI'I'S QUEEN 237 (1898), *available at* http://digital.library.upenn.edu/women/liliuokalani/hawaii/hawaii.html.

[25] *Ali'i* is a Hawaiian word meaning "chief, ruler, noble." MARY KAWENA PUKI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY (rev. enlarged ed. 1986).

[26] *See* HENRY E. CHAMBERS, CONSTITUTIONAL HISTORY OF HAWAII 11-12 (1896); Kuykendall, *supra* note 23, at 8.

[27] CHAMBERS, *supra* note 26, at 13.

[28] *See* Kuykendall, *supra* note 23, at 15.

[29] *Id.*

[30] PRATT WITH SMITH, *supra* note 22, at 95.

[31] *Id.*

[32] *See id.*

[33] *Id.*

[34] *See* CHAMBERS, *supra* note 26, at 20; *see also* PRATT WITH SMITH, *supra* note 22, at 95.

younger brother,[35] he declined to take an oath to support the constitution because he believed "that the Crown had too little authority" under it.[36] He refused to convene the legislature in 1864,[37] and instead he called for a constitutional convention.[38] That convention, comprised of the king, the fifteen members of the House of Nobles, and twenty-six elected delegates, was charged with "correcting some of the 'excesses' of democracy in the 1852 Constitution."[39] Of these "excesses," the suffrage provisions produced the convention's most contentious debate. The elected delegates would not accept a property requirement for voting, and the king and the nobles would not abandon it.[40] At an impasse, the king disbanded the convention, and for several days in the summer of 1864, Hawai'i was without a constitution.[41]

On August 20, 1864, Kamehameha V introduced his own constitution.[42] The document withdrew universal suffrage and strengthened the monarch's control by abolishing the office of *kuhina nui*,[43] creating a unicameral legislature, and granting the king veto power over legislation.[44] With this constitution, the king accomplished his purpose to make "'the influence of the Crown' pervade 'every function of the government.'"[45] By abrogating the previous constitution and promulgating another without the convention, Kamehameha "clearly establish[ed] a right in the throne to make and unmake constitutions at the will of the King."[46] Despite its unpopularity among the business class, the 1864 Constitution was in effect longer than any other constitution of the Hawaiian Kingdom. The resentment it spurred, however, would lead to a constitutional crisis.

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[35] *See* JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 110 (2002). Throughout his reign, Kamehameha IV struggled with the legislature to amend the constitution without success. *See id.* at 105-08.

[36] *See* CHAMBERS, *supra* note 26, at 20; *see also* PRATT WITH SMITH, *supra* note 22, at 95.

[37] *See* Kuykendall, *supra* note 23, at 27; *see also* OSORIO, *supra* note 35, at 110.

[38] *See* OSORIO, *supra* note 35, at 117.

[39] PRATT WITH SMITH, *supra* note 22, at 96.

[40] *Id.*

[41] *Id.* at 96-97.

[42] *Id.* at 97.

[43] "The Kuhina Nui was a unique position in the administration of Hawaiian government, and had no equivalent in western governments of the day. Erroneously translated as 'premier' or 'prime minister,' the office effectively, at least in its earlier years, was that of co-regent. The Kuhina Nui held equal authority to the king in all matters of government, including the distribution of land, negotiating treaties and other agreements, and dispensing justice." Department of Accounting & General Services, Kuhina Nui, 1819-1864 (2007), *http://hawaii.gov/dags/archives/centennial/kunina-nui* (last visited Dec. 20, 2008).

[44] *See* PRATT WITH SMITH, *supra* note 22, at 97.

[45] Kuykendall, *supra* note 23, at 40.

[46] W.R. Castle, *Sketch of Constitutional History in Hawaii*, 23 ANN. REP. HAWAIIAN HIST. SOC'Y 13, 19 (1915).

B. 1887 Constitution–The Bayonet Constitution

King Kalakaua came to power in 1874, after the brief reign of Lunalilo.[47] The business community, comprised mostly of foreigners of American and British descent, was determined to make its political power reflect its economic strength.[48] Kalakaua, however, called the business leaders "white invaders" and "determined that they should have no further voice in the administration of affairs."[49] In June 1887, a group of businessmen known as the Hawaiian League and a mob numbering in the hundreds gathered to demand concessions from the King.[50] The League's objective was "Constitutional Representative Government in Hawaii by every available means."[51] Lacking support from his troops, Kalakaua acquiesced to the mob's demands[52] and appointed a new cabinet, comprised mostly of League members. The cabinet drafted a new constitution and Kalakaua signed it on July 6.[53]

The so-called "Bayonet Constitution"[54] stripped Kalakaua of powers granted under the 1864 Constitution and "reduce[d] him to the status of a ceremonial figure somewhat like the sovereign of Great Britain."[55] It restored and expanded the legislature's powers that had been removed by the 1864 constitution.[56] Most significant, however, were the changes the constitution made in the electoral system. The Bayonet Constitution replaced the 1864 Constitution's universal male suffrage with voting rights limited to male

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[47] CHAMBERS, *supra* note 26, at 22.

[48] PRATT WITH SMITH, *supra* note 22, at 97–98.

[49] CHAMBERS, *supra* note 26, at 23.

[50] *See* LEE, *supra* note 20, at 4; OSORIO, *supra* note 35, at 238-39.

[51] Castle, *supra* note 46, at 23.

[52] *See* LEE, *supra* note 20, at 4; PRATT WITH SMITH, *supra* note 22, at 98.

[53] OSORIO, *supra* note 35, at 193.

[54] *See, e.g.*, Francis M. Hatch, *The Constitutional Convention of 1894*, 23 ANN. REP. HAWAIIAN HIST. SOC'Y 50, 58 (1915) ("The constitution of 1887, although the Kingdom was in a state of profound peace, was extorted at the point of the bayonet.").

[55] Kuykendall, *supra* note 23, at 46; *see also* OSORIO, *supra* note 35, at 240.

> For the king, this constitution meant the abrupt and nearly total termination of any executive power or royal authority. For haole, it meant not only an enhanced representation in the legislature and control of the executive, it also retrieved their ability to define the nation and membership in it. For kānaka, the Bayonet Constitution was much more than a change in voting rights or the king's powers and prerogatives. It was the final demonstration of their helplessness with regard to the haole, and that their own government and their sense of national identity counted for little.

Id. *Haole* has been translated as "White person, American, Englishman, Caucasian . . . formerly, any foreigner . . . ." PUKI & ELBERT, *supra* note 25, at 58. *Kānaka* means "the Native people, the Hawaiians." *See* OSORIO, *supra* note 35, at xi; *see also* PUKI & ELBERT, *supra* note 25, at 127.

[56] *See* PRATT WITH SMITH, *supra* note 22, at 98.

residents of Hawaiian, American, or European descent.[57] The House of Nobles, although elected, required delegates to hold a high level of property, thus virtually assuring that foreign-born businessmen would control the legislature's upper house.[58]

C. The Overthrow of the Monarchy and the 1894 Constitution

Queen Lili'uokalani opposed the constitution in place when she came to power.[59] When she ascended to the throne in 1891, she prepared to proclaim a new constitution that would restore many powers of the monarchy.[60] Lili'uokalani justified the promulgation of a new constitution, saying that "two-thirds of my people declared their dissatisfaction with the old one; as well they might, for it was a document originally designed for a republic, hastily altered when the conspirators found that they had not the courage to assassinate the king."[61] The queen's proposed constitution would eliminate elections for the House of Nobles, give the monarch greater authority over the Cabinet, exempt all Native Hawaiians from paying taxes, and refuse voting rights for all whites except those married to native women.[62] It would have expanded the queen's authority over the military and given her veto power over the legislature.[63] The queen's constitution never became law. On January 17, 1893, a group tied to the Honolulu League called upon the queen to abdicate her throne.[64] Fearing bloodshed, Queen Lili'uokalani surrendered control to the United States government in what she believed was a temporary move.[65] The constitutional monarchy never returned.

D. 1894 Constitutional Convention

A provisional government took control of Hawai'i and petitioned the United States for annexation.[66] In the meantime, it also called a constitutional

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[57] *See id.* at 99.

[58] *See id.* at 98-99.

[59] *Id.* at 99.

[60] *See id.*; *see also* CHAMBERS, *supra* note 26, at 31-32.

[61] LILIUOKALANI, *supra* note 24, at 237.

[62] *See* CHAMBERS, *supra* note 26, at 28. This new constitution can be found in the report of Commissioner Blount, a special envoy of the United States. *See* 2 FOREIGN RELATIONS OF THE UNITED STATES 1894: AFFAIRS IN HAWAII 1047-55 (1895).

[63] CHAMBERS, *supra* note 26, at 31-32.

[64] *See* 2 FOREIGN RELATIONS OF THE UNITED STATES 1894, *supra* note 62, at 865-66.

[65] *See* PRATT WITH SMITH, *supra* note 22, at 99; *see also* LILIUOKALANI, *supra* note 24, at 243; 2 FOREIGN RELATIONS OF THE UNITED STATES 1894, *supra* note 62, at 866.

[66] PRATT WITH SMITH, *supra* note 22, at 100.

convention for March 15, 1894.[67] Elections were held for eighteen seats, but the elected delegates would constitute a minority, because the provisional government chose nineteen other delegates.[68] The provisional government further assured its control by creating the voting requirements such that it could "make certain that [the voters] were supporters of the regime."[69] This convention produced a constitution that was promulgated on July 4, 1894, without being ratified by the people, thereby creating the Hawaiian Republic.[70]

On July 7, 1898, President William McKinley authorized the annexation of Hawai'i.[71] He appointed three members of Congress and two citizens of Hawai'i, W.F. Frear and Sanford B. Dole, the president of the republic, to draft legislation for governing Hawai'i.[72] Congress later adopted the legislation proposed by this commission; the result—the Organic Act of 1900—would become Hawai'i's basic law until statehood more than a half century later.[73]

III. 1950 CONSTITUTIONAL CONVENTION

In the decades following annexation, the Hawaiian territorial legislature repeatedly petitioned Congress for statehood rights.[74] In 1947, after repeated failures to gain recognition, the legislature approved Act 334, which called for a constitutional convention.[75] Rather than waiting for permission from Congress, the convention drafted a constitution and then asked Congress to approve the constitution as the basis for admission to statehood.[76] After some delay, the tactic worked: Hawai'i became the fiftieth state in 1959.[77]

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[67] *Id.*

[68] Robert C. Schmitt, Demographic Characteristics of Hawai'i's Constitutional Conventions 1 (Jan. 29, 1980) (unpublished manuscript, on file with the Hawai'i State Library).

[69] *See id.* (quoting RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY 183 (1961)). The appointed members were all from Oahu. Although Caucasians accounted for less than seven percent of the population, they comprised more than three-quarters of the delegates, while Hawaiians and part Hawaiians were severely under-represented. Individuals of Chinese or Japanese descent, who comprised nearly forty percent of the population, were excluded entirely, as were women. *Id.* (manuscript at 2).

[70] CHAMBERS, *supra* note 26, at 34.

[71] PRATT WITH SMITH, *supra* note 22, at 100.

[72] Kelleher, *supra* note 19, at 28.

[73] *See* PRATT WITH SMITH, *supra* note 22, at 100-01.

[74] *See* Hebden Porteus, *The Constitutional Convention of Hawaii of 1968*, 42 ST. GOV'T 97, 97 (1969).

[75] *See* LEE, *supra* note 20, at 7.

[76] *See* MELLER, *supra* note 18, at 4. This tactic, while not the traditional route to statehood, had been attempted by fifteen other territories. *Id. See also* Kelleher, *supra* note 19, at 30.

[77] *See* HAROLD S. ROBERTS, *Preface to* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950 v, xi (1960). Hawai'i and Alaska were admitted in the same year, 1959, although Alaska held its constitution convention later than Hawai'i did, in 1955-56. John S. Whitehead & William S. Schneider, *The Singular Event and the Everyday Routine:*

The 1950 convention's focus on statehood was clear from the décor of the Honolulu Armory, where sixty-three delegates convened under a banner proclaiming "HAWAII—49th State."[78] In May 1950, draped in lei at desks festooned with native flora, the drafters set about their historic task. No new state constitutions had been drafted since the making of the New Mexico and Arizona constitutions in 1912.[79] Hawai'i's constitutional drafters drew upon the experience of other states and the emerging academic discipline of political science.[80] They looked at a variety of documents, including the federal constitution and the Model State Constitution, trying to take the best from each.[81] The drafters relied on researchers at the University of Hawai'i's Legislative Reference Bureau, who produced background materials that later were incorporated in a 396-page manual used at the convention.[82] The bureau also contributed to drafting the constitution, which drew praise for its "unusually good readability and style."[83]

The 1950 constitution was "at once both liberal and conservative,"[84] and guaranteed the right of labor to organize and the protection of civil and equal rights.[85] The constitution framed the structure of government in Hawai'i, by defining intergovernmental relations between state, federal, and county

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The Interplay of History and Culture in the Shaping of Memory, 15 ORAL HIST. REV. 43, 45-46 (1987).

[78] Photograph: Delegates Convening Under Banner at 1950 Constitutional Convention (Honolulu Star-Bulletin 1950) (on file with Hawai'i State Archives); *see also* MELLER, *supra* note 18, at 61.

[79] S. Gale Lowrie, *Hawaii Drafts a Constitution*, 20 U. CIN. L. REV. 215, 219 (1951).

[80] *See id.*

[81] *See* ROBERTS, *supra* note 77, at ix-x; *see also* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 154 (1998). The late Norman Meller, director of the Legislative Research Bureau and long-time University of Hawai'i political science professor, described the influence that mainland political thought would have on Hawai'i's constitution:

> The Territory of Hawaii in the scope of its governmental functions and the conduct of its governmental affairs has long followed the traditional American pattern. Hawaii's constitution as a state will reflect this tutelage by the incorporation of fundamental concepts common to all state constitutions, but the nuances and overtones which will embellish its final form will be as truly indigenous as the hula of the Islands and their traditional spirit of Aloha.

Norman Meller, *A New Constitution for Hawaii*, 23 ST. GOV'T 129, 132 (1948).

[82] FRANK P. GRAD, THE DRAFTING OF STATE CONSTITUTIONS: WORKING PAPERS FOR A MANUAL ch. 5, at 34 (1967).

[83] *Id.* at 37; *see also* Henry Wells, *Constitutional Conventions in Hawaii, Puerto Rico, and Alaska*, *in* MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 52, 64 (W. Brooke Graves ed., 1960) ("[T]he constituent assemblies of Hawaii, Puerto Rico, and Alaska all deserve high marks. Their constitutions are well drafted, even readable!").

[84] Robert J. Morris, *Re-Identifying American State Democracy: Implications for Same-Sex Marriage and the Nonfungibility of Hawai'i in the Exotic 1950 Statehood Constitution*, 22 U. HAW. L. REV. 1, 3 (2000).

[85] *Id.* at 8 n.45.

governments[86] and by limiting the number of departments, boards, and commissions.[87] Experts on state government and academics praised the document's brevity[88] and remarked that it was proof "'that it is still possible for a modern state to write a short basic law in the classic tradition.'"[89] Most important, this "Hope Chest" constitution did become effective, with few alterations, when Hawai'i was granted statehood.[90]

The convention's Committee on Revision, Amendments, and Initiative was tasked with evaluating the proposals for how to change the constitution in the future. Like the framers of the federal constitution, the committee recognized that an amendment process that was too easy "impairs the respect of the public for its basic law, tends to unduly lengthen and burden the constitution with legislative matters and minutiae, and encourages attempts by visionaries and selfish pressure groups to advance impracticable schemes and proposals."[91] But on the converse, the committee believed that the process for constitutional change should not be so difficult as to make the constitution impossible to change when necessary.[92] The convention delegates proposed three routes to initiating constitutional change: (1) by legislative amendments, (2) by constitutional conventions, and (3) by the "direct democracy" provisions of initiative, referendum, and recall.[93]

The committee easily agreed that the legislature should be able to propose amendments, because nearly every state in the union had such a provision at the time[94] and it was a frequently used practice.[95] Delegates also agreed that a

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[86] *Id.*

[87] *See also* ROBERTS, *supra* note 77, at x.

[88] *See* MELLER, *supra* note 18, at 85 ("The document was commendably short, some 14,000 words, and represented the victory of those who held for sketching the structure of government, positing its powers in general language, and leaving out everything specific that was not essential by way of overcoming negative legal interpretations or protecting the rights of the people.").

[89] John E. Bebout, *The Central Issue: Constitutional Revision–What For?*, *in* SALIENT ISSUES OF CONSTITUTIONAL REVISION 165, 169 (John P. Wheeler ed., 1961) (quoting TEMPORARY COMMISSION ON THE REVISION & SIMPLIFICATION OF THE CONSTITUTION, FIRST STEPS TOWARD A MODERN CONSTITUTION (1959)); *see also* ROBERTS, *supra* note 77, at x (quoting Bebout as saying, "You have demonstrated that it is perfectly possible in the 20th Century as it was in the 18th Century to write a constitution that is confined to fundamentals").

[90] *See* ROBERTS, *supra* note 77, at xi.

[91] Standing Comm. Rep. No. 48, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, *supra* note 77, at 186 (1960).

[92] *Id.*

[93] *See id.*

[94] *But see* Gerald Benjamin, *The Mandatory Constitution Convention Question Referendum: The New York Experience in National Context*, 65 ALB. L. REV. 1017, 1020 n.20 (2002), *reprinted in* 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 145 (G. Alan Tarr & Robert F. Williams eds., 2006). New Hampshire did not allow for legislative amendments until 1964. Prior to that, a constitutional convention was required to amend the constitution. *Id.*

convention was an acceptable method of constitutional change.[96] Opinions diverged, however, over the procedure for holding the convention. Several delegates proposed that the new constitution not only permit future con cons but require them.[97] Another proposal would make con cons optional, having citizens vote periodically on whether to hold them.[98] This proposal was eventually adopted by the convention.[99] Initiative, referendum, and recall were not adopted but would resurface at later con cons.[100]

The periodic constitutional convention referendum was hardly a new invention, appearing in the eighteenth century in the Massachusetts, New Hampshire, and Kentucky constitutions[101] and in the Model State Constitution.[102] Harold Roberts, a University of Hawai'i business professor and delegate, explained that a periodic review would require voters "to examine their Constitution, to examine the interpretations, and find out whether or not the Constitution at that stage is still the kind of constitution they want."[103] Some delegates felt it was important that the electorate could vote to hold a con con "whether the legislature wants it or not."[104] One delegate, a proponent of a mandatory convention, wanted a mechanism to overcome the possibility that the legislature "may not act for 20, 30 or 40 years."[105]

Also suggested were still more ways to bypass the legislature to amend the constitution; these were the more controversial proposals of initiative, referendum, and recall (IRR).[106] IRR, their proponents argued, were measures to "overcome obstructionist interests and intransigent judges, and thereby secure the enactment of popular reform legislation."[107] The committee assigned to evaluate the possible use of IRR, however, voted six-to-five to exclude them

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[95] *See* NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 106 (6th ed. 1963). More than ninety-five percent of proposed amendments are generated by the legislature. *Id.*

[96] Standing Comm. Rep. No. 48, *supra* note 91, at 187.

[97] Delegate Trude Akau proposed a mandatory convention to be held every ten years. Proposition No. 104, 1950 Constitutional Convention (1950) (statement of Del. Trude Akau) (on file with Hawai'i State Archives). Another delegate, Chuck Mau, proposed a mandatory convention as an amendment during floor debates. Comm. Whole Debates, *in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950 748 (1961) (statement of Del. Chuck Mau) [hereinafter 1950 Debates].

[98] *See* Standing Comm. Rep. No. 48, *supra* note 91, at 187.

[99] 1950 Debates, *supra* note 97, at 780.

[100] *See id.* at 779.

[101] Benjamin, *supra* note 94, at 1018.

[102] NATIONAL MUNICIPAL LEAGUE, *supra* note 95, at 20, 108.

[103] 1950 Debates, *supra* note 97, at 748.

[104] *See id.*

[105] *Id.* at 749.

[106] *See* TARR, *supra* note 81, at 151. The progressive National Municipal League, a predecessor the Council of State Governments included initiative and constitutional conventions in its Model State Constitution. NATIONAL MUNICIPAL LEAGUE, *supra* note 95, at 19–21.

[107] JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 32 (2006).

from the article on constitutional change.[108] Emphasizing "the limitless value of experimentation" and the collective wisdom of the voting public, IRR proponents argued to the full convention that the possibility that IRR could be used would "serve constantly to apprise our legislature and our legislators of their responsibilities to the people."[109] Ultimately, the full delegation voted nineteen to thirty-nine against hearing the initiative proposal.[110]

In addition to discussing the methods for introducing constitutional changes, the committee also discussed methods for ratifying them. The committee quickly agreed that all changes to the constitution should be ratified by the people, not by the state legislature.[111] More discussion ensued when the committee discussed how to split power between urbanized Oahu and the rural outer islands.[112] In the end, the convention agreed to a plan that gave the outer islands a veto on apportionment issues.[113]

The provision submitted to the voters read:

> The Legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question to be voted on at the first general election following the expiration of such period.
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> The convention shall provide for the time and manner in which the proposed constitutional provisions shall be submitted to a vote of the electors of the state, but no such proposal shall be effective unless approved, (a) at a general election, by a majority of all of the votes tallied upon the question, constituting at least 35 per cent of the total vote cast at such election, or (b) at a special election, by a majority of the total number of registered voters; provided, that no constitutional provision altering this proviso or the representation from any senatorial district in the Senate shall become effective, unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties.[114]

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[108] *See* Mins. of the Comm. on Revision, Amendment, Initiative, Referendum, and Recall, May 25, 1950, 1950 Constitutional Convention (1950) (on file with Hawai'i State Archives) [hereinafter Mins. of the Comm. on Revision].

[109] Minority Standing Comm. Rep. No. 49, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, *supra* note 77, at 189 (1961).

[110] 1950 Debates, *supra* note 97, at 779.

[111] *See* Standing Comm. Rep. No. 48, *supra* note 91, at 187.

[112] *See* Mins. of the Comm. on Revision, *supra* note 108.

[113] 1950 Debates, *supra* note 97, at 763-64.

[114] Comm. Whole Rep. 9, *in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, *supra* note 97, at 313.

In the half-century since this provision was introduced, subsequent constitutional conventions have revised the language after litigation and debate. The words chosen have shaped when and how these conventions have been held. By establishing the wording of the question as it must be presented to voters ("Shall there be a convention . . . ?"), the 1950 Convention limited options of later legislatures to prescribe the agenda of future con cons.[115] The question duplicated the language of the National Municipal League's Model State Constitution.[116] The intermission between votes was shorter than that proposed in the Model State Constitution.[117] The ten-year span between referendums likely represented a compromise between the twenty years first proposed and more assertive measures for constitutional change, such as the initiative or mandatory con cons.[118] The provision for ratification, however, is uniquely Hawaiian, the product of a long debate over how to balance the power between populous Oahu and less-populated, rural neighbor islands.

Voters soon emphatically endorsed the constitution.[119] The International Longshoremen's and Warehousemen's Union provided the only organized opposition, not because it disfavored statehood but because it objected to the lack of IRR provisions, as well as other provisions.[120]

IV. 1968 CONSTITUTIONAL CONVENTION

Hawai'i's first convention following statehood would be held not under the mandated convention call but through a call by the legislature, encouraged by the U.S. Supreme Court. In 1964, the Court announced its "one man, one vote" decision in *Reynolds v. Sims* and companion cases, which held that many states' reapportionment provisions were unconstitutional under the federal Equal Protection Clause.[121] These decisions led to a "reapportionment revolution" across the country, spurring many states to hold con cons in the late 1960s.[122] Hawai'i held its second con con to address reapportionment

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[115] *See infra* Part VII.B.1.

[116] *See* NATIONAL MUNICIPAL LEAGUE, *supra* note 95, at 108.

[117] *See id.* The model constitution called for fifteen years between asking voters to affirm their desire to hold a con con. *Id.*

[118] *See* 1950 Debates, *supra* note 97, at 748. Said one delegate, "[W]e felt that this was a good concession to the people in general, so that they would be sure that at every ten years they had a right to vote on whether they wanted a convention or not, to consider revisions to the Constitution." *Id.*

[119] All but one of the delegates approved the Constitution, and when submitted to the voters, three out of four voters ratified the document. *See* LEE, *supra* note 20, at 9; MELLER, *supra* note 18, at 5.

[120] Lowrie, *supra* note 79, at 217.

[121] Reynolds v. Sims, 377 U.S. 533 (1964).

[122] DINAN, *supra* note 107, at 10.

problems, but a University of Hawai'i political scientist noted that but for "political ineptitude," such a meeting could have been avoided.[123]

After *Reynolds*, the Hawai'i Supreme Court concluded that the state's apportionment was unconstitutional, but also that it could not delay the 1964 elections.[124] A special session of the legislature called to resolve the apportionment issue "ended disastrously" without an agreement between the two houses.[125] The federal district court in Hawai'i, which had delayed a ruling on a preliminary injunction to await the outcome of the special session, expressed disappointment in the legislature and declared the Senate's apportionment scheme unconstitutional.[126] The court also invalidated part of Article XV because it was "so closely tied in with the admittedly invalid scheme of senatorial apportionment" and because it gave rural counties an effectual veto over reapportionment of the Senate.[127] The federal court ordered the state to put the question of whether to hold a con con on the ballot, because the legislature did not create an amendment in time to be ratified by the 1964 general election and because the Senate must be reapportioned prior to the 1966 election.[128] In the interim, the court said that any state legislation was void, except for legislation that was necessary to organize the constitutional convention.[129]

The federal court, because it understood that a convention would be expensive, changed its ruling to allow the legislature to meet again to create a provisional apportionment plan.[130] After developing a provisional plan for the 1966 elections, the legislature planned to submit it for court approval, but withdrew it from a conference committee when it was clear that the plan's "grossly lumpy apportionment of senators" would not be approved.[131] The court reiterated that a constitutional amendment, from the legislature or from a constitutional convention, was necessary to remedy Hawai'i's significant malapportionment.[132]

The U.S. Supreme Court, however, disagreed with the district court and held that the legislature's temporary apportionment plan would suffice for the 1966

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[123] *See* MELLER, *supra* note 18, at 6.

[124] *See* Guntert v. Richardson, 47 Haw. 662, 664, 394 P.2d 444, 446 (1964).

[125] MELLER, *supra* note 18, at 6.

[126] Holt v. Richardson, 238 F. Supp. 468, 478 (D. Haw. 1965), *vacated sub nom.* Burns v. Richardson, 384 U.S. 73 (1966).

[127] *Id.* at 472.

[128] *Id.* at 478.

[129] *Id.* at 479.

[130] *See* Holt v. Richardson, 240 F. Supp. 724, 726 (D. Haw. 1965), *vacated sub nom.* Burns v. Richardson, 384 U.S. 73 (1966).

[131] *See id.*

[132] *See id.* at 732.

elections.[133] The Court said that an immediate special election for a con con was not necessary, and it nodded instead to the referendum on the 1966 general election ballot.[134] The Court suggested that the legislature's plan should be superseded by a constitutional amendment, either proposed by the legislature or a convention, after the election.[135] The Court emphasized that the district court would retain jurisdiction to take action if a plan were not instituted.[136] "[W]hile not requiring it, [the Court] appeared to take for granted a constitutional convention as necessary for implementing a permanent plan."[137]

Hawai'i's citizens voted in November 1966 in favor of a constitutional convention.[138] Not surprisingly, the purpose of the convention influenced who ran for and who ultimately was elected to serve as delegates.[139] The delegate elections "attracted many political unknowns into a venture for which they were poorly prepared and had little chance of success."[140] About seventy percent of the candidates were political neophytes,[141] and the experienced legislators prevailed at the election.[142] The 1968 Constitutional Convention included eleven state senators, including majority and minority leaders; thirty-one state representatives including the speaker, majority leader, two majority floor leaders, and a retired speaker as well as five legislative staff members; two state Supreme Court Justices; four judges; three Honolulu City Councilmen; two professional lobbyists; two deputy attorneys general; and two members of the elected State Board of Education.[143] Seven delegates and two legal advisors had worked on the 1950 convention.[144] Fifty-one percent of delegates either were or had once been legislators.[145]

Despite the heavy percentage of legislators among the delegates, the greatest cleavage was not between the nonlegislators and legislators, but rather between reformers and defenders of the status quo.[146] Often, however, little distinction could be seen between those groupings. The nonlegislators resisted the established politicians' efforts to limit the convention's work to

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[133] *Burns*, 384 U.S. at 97.

[134] *See id.* at 97.

[135] *Id.*

[136] *Id.*

[137] MELLER, *supra* note 18, at 7.

[138] Richard H. Kosaki, *Constitutions and Constitutional Conventions of Hawaii*, 12 HAW. J. HIST. 120, 124 (1978).

[139] *See* CORNWELL ET AL., *supra* note 14, at 69.

[140] MELLER, *supra* note 18, at 35.

[141] *Id.* at 40.

[142] *See id.* at 46.

[143] Kelleher, *supra* note 19, at 48. For a detailed account of the delegates' professions and political leanings, see *id.* at 38–59.

[144] *Id.* at 48–49.

[145] PRATT WITH SMITH, *supra* note 22, at 105.

[146] *See* Kelleher, *supra* note 19, at 134.

reapportionment,[147] while legislators worked hard to discourage changes to the legislative branch.[148] Because of the numerical strength of legislators, the convention defeated the unicameral legislature, proposals to strengthen the governorship, and greater home-rule for counties, which would reduce centralized control. It, however, approved measures to lengthen the legislative year and to increase legislators' salaries.[149] The legislators' personal agendas and substantial time constraints "conspired to discourage" massive changes to the constitution.[150]

The product of the convention, noted one political observer, was "more confirmatory than novel, more amendatory than revolutionary, and more concerned with the details of implementation than the broad sweep of philosophic formation."[151] The convention's president later noted that the lack of changes to the 1950 document was the result of a lengthy decision-making process, because "[r]eviewing an entire instrument requires a positive or affirmative decision not to change a provision as well as one to change a provision."[152] Proposals approved by the convention eliminated the literacy requirement for voting, granted collective bargaining rights to public employees, raised legislators' salaries, recognized new privacy rights, and provided counsel for indigent defendants.[153] In all, the delegates made 325 proposals,[154] most were of the "pruning and grafting variety."[155]

Of these proposals, eleven affected Article XV's provisions on ratification of the constitution.[156] The proposals struck words introduced in the 1950 convention that required a majority of voters in a majority of counties to approve amendments, because the veto power it gave the outer islands violated equality principles set forth in *Reynolds*.[157] The elimination of these words constituted the only change to Article XV, despite the fact that other suggestions were made. Harold Roberts, a delegate at both the 1950 and 1969

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147 CORNWELL ET AL., *supra* note 14, at 23.

148 Kosaki, *supra* note 138, at 125.

149 CORNWELL ET AL., *supra* note 14, at 141–42.

150 *See* Kosaki, *supra* note 148, at 125. Because the convention used the campuses of two schools–Kapiolani Community College and McKinley High School–the convention's activity had to be completed before school came back in session. *Id.*

151 MELLER, *supra* note 18, at 86.

152 Porteus, *supra* note 74, at 100.

153 *See* Kelleher, *supra* note 19, at 123; MELLER, *supra* note 18, at 96-115.

154 Kelleher, *supra* note 19, at 90.

155 MELLER, *supra* note 18, at 148.

156 Standing Comm. Rep. No. 49, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 218 (1973).

157 *See* Standing Comm. Rep. No. 44, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, *supra* note 156, at 210-11; *see also* Hearing of Comm. Revision & Amend. Aug. 9, 1968, 1968 Constitutional Convention 4 (1968) (statement of Harold S. Roberts).

conventions, argued that the large number of legislator-delegates undermined the convention as an alternative to the legislative channel for proposing amendments.[158] As a solution, he suggested two alternatives he had opposed in 1950: denying legislators the opportunity to sit as delegates and adding a provision for a direct constitutional initiative.[159] Neither suggestion was approved, but they both surfaced again a decade later.[160]

At the close of the convention, the delegates set about garnering public support for their proposals. Mindful that voters in other states recently had rejected con con's proposals,[161] the delegates put forth a "relatively modest" $40,000 public education campaign in the six weeks between the close of the convention and the general election.[162] Their efforts, combined with the "novel and ingenious way" that the amendments were proposed, resulted in almost all of the convention's proposals being approved.[163] Rather than ask voters to approve or disapprove the constitution as a whole, the ballot grouped the proposed changes into twenty-three amendments.[164] Voters could vote "yes" to approve all changes, "no" to reject all changes, or "yes but," to approve all changes except for those designated.[165] By dividing the ballot in this way, the convention overcame the problem that most amendments "were not attention-getting by nature" and could, if presented separately, fail to garner the minimum votes required to be cast in the election as a whole.[166] Only the provision to lower the voting age failed.[167]

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[158] Hearing of Comm. Revision & Amend. Aug. 9, 1968, *supra* note 157, at 7.

[159] *Id.* at 7-8.

[160] Standing. Comm. Rep. No. 44, *supra* note 157, at 211 ("After a thorough discussion on the matter, your Committee finds no pressing need to include these measures [IRR] in the constitution."); Standing Comm. Rep. No. 49, *supra* note 156, at 218-19.

[161] *See* Kelleher, *supra* note 19, at 31-32. William N. Cassella, assistant director of the National Municipal League, discussed the voters' disapproval of draft constitutions in Maryland, New York, and Rhode Island and stressed the importance of public opinion. *Id.* Hawai'i's nearly-full endorsement of the convention was "remarkable" given that five contemporaneous conventions failed completely. CORNWELL ET AL., *supra* note 14, at 141.

[162] Kelleher, *supra* note 19, at 124-25.

[163] Kosaki, *supra* note 148, at 125.

[164] *Id.*

[165] *Id.*; *see also* STURM, *supra* note 14, at 34. The rejection of con con proposals in other states "dampened enthusiasm (among Hawai'i delegates) for the general revision presented to the voters in a single package." *Id.*

[166] *See* MELLER, *supra* note 18, at 122.

[167] Kelleher, *supra* note 19, at 127. Although it became moot with the adoption of the Twenty-Sixth Amendment, failure of the voting provision was attributed to backlash against student protests. Shortly before the convention, student protestors destroyed an R.O.T.C. building at the University of Hawai'i. *Id.*

V. 1978 CONSTITUTIONAL CONVENTION

Hawai'i's third constitutional convention, like the second, came about with the threat of intervention by the courts. In 1975, the lieutenant governor asked whether he should put the con con question on the ballot.[168] Based on a literal reading of Article XV, the mandatory call for a convention would not occur in 1976 because the 1976 general election would fall a few days before the ten-year period had elapsed.[169] The attorney general advised against holding the convention, but the League of Women Voters sued.[170] In response, the Legislature agreed to put the question on the ballot.[171]

Despite the sentiment that there was no overriding issues that required a convention, voters in 1976 supported a con con by a three-to-one margin.[172] Several reasons have been suggested for the high voter approval: Perhaps it was a desire to send a message to the state legislature because of controversies over legislative pensions and state salaries, an attempt of special interest groups to insert their viewpoints into the Constitution, or an overall post-Watergate distrust of government.[173] What is certain is that a number of political and social movements joined together to support a convention. For example, Republicans, who had been out of power for more than twenty years, wanted a con con to "restore the balance" and to introduce measures that they could not push through the Democrat-controlled legislature.[174] The environment, open government, fiscal responsibility, and the Hawaiian renaissance movements also "marinated" the 1978 convention with ideas.[175]

A special election for delegates brought out a candidate "smorgasbord"—an overwhelming number of candidates and a broad range of platforms.[176] Candidates represented virtually every facet of the Hawai'i community: Retirees and homemakers, university students and legislative staff members, community volunteers and business people, a city bus driver and a sugar

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[168] Comm. Whole Debates, *in* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 107 (1980) [hereinafter 1978 Debates].

[169] *Id.*

[170] *See* League of Women Voters of Haw. v. Doi, 57 Haw. 213, 552 P.2d 1392 (1976).

[171] *See id.* at 214, 552 P.2d at 1393.

[172] *See* LEE, *supra* note 20, at 15.

[173] *See id.*; Norman Meller & Richard Kosaki, *Hawaii's Constitutional Convention–1978*, 69 NAT'L CIVIC REV. 248, 248 (1980).

[174] *See* Jerry Burris, *GOP, Some Groups Backing it, Odds Seem Against '77 Con Con*, HONOLULU ADVERTISER, July 9, 1975, at A10.

[175] Rep. Jim Shon, Editorial, *New Con Con Not a Good Idea*, HONOLULU ADVERTISER, Oct. 15, 1996, at A8.

[176] Douglas Woo, *Election of Delegates to Con Con Offers Smorgasbord of Candidates*, HONOLULU ADVERTISER, Feb. 5, 1978, at A1. There were more than 500 candidates vying for 102 seats. *Id.*

plantation president.[177] The University of Hawai'i student government recruited students, some of whom took a class that simulated a constitutional convention.[178] Unions, including the ILWU, the Hawai'i Government Employees Association, and United Public Workers, also recruited some candidates and endorsed others.[179] Many candidates had tiny campaign budgets and campaign staff comprised of friends and family members.[180] Despite the number of candidates, voter turnout was a record low.[181]

The elected delegates differed greatly from those at the 1968 Con Con. The number of delegates had been raised from 82 in 1968 to 102 in 1978.[182] Where the 1968 Con Con included many state politicians, only three were elected to the 1978 meeting.[183] There were, however, four younger relatives (two daughters, one son, and one nephew) of sitting politicians.[184] Only one member of the convention, Teruo Ihara, had been a delegate in 1950.[185] Demographically, the 1978 convention was younger, included more women, and more accurately reflected the islands' racial and ethnic diversity.[186] For these reasons, the 1978 convention was dubbed the "People's Con Con."

Early in 1978, a public opinion poll showed many people favored few changes to the constitution.[187] Conventional wisdom presumed, based on theplatforms of the delegates, that few changes would be made.[188] To the contrary, the

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[177] *See Con-Con '78 Candidates*, SUNDAY STAR-BULLETIN & ADVERTISER, May 14, 1978. This pull-out supplement describes the platform of each candidate and reports their responses to a questionnaire listing possible issues.

[178] Woo, *supra* note 176, at A1.

[179] *See id.* Sixty-nine of the 102 delegates were endorsed by one or more unions. Douglas Boswell, *Aided by Low Turnout, Unions Display Power at Polls*, HONOLULU STAR-BULLETIN, May 22, 1978, at A1.

[180] *See, e.g.*, CAPT. BRUCE I. YAMASHITA, FIGHTING TRADITION: A MARINE'S JOURNEY TO JUSTICE 76 (2003). The campaign committee for Yamashita, a University of Hawai'i student, consisted of two people: his sister, Margaret, and his cousin, Scott. *Id.*

[181] LEE, *supra* note 20, at 16.

[182] *See* Grace Feliciano, *Constitution Delegate Count Set at 102*, HONOLULU STAR-BULLETIN, Apr. 9, 1977, at A2.

[183] *See* Douglas Woo, *Political Pros Are Scarce in '78 Con Con*, HONOLULU ADVERTISER, May 22, 1978, at A3. Although popular sentiment weighed against legislators running for delegate, they could not be prohibited running under the constitution. *See* 75 Op. Haw. Att'y Gen. 10 (Sept. 29, 1975).

[184] *See* Woo, *supra* note 183, at A3.

[185] *See* Gregg K. Kakesako, *Delegate Ihara Is Veteran of First Convention*, HONOLULU STAR-BULLETIN, May 22, 1978, at A8. His nephew Les was also a delegate. *Id.*

[186] Schmitt, *supra* note 68, at 10, 12.

[187] *See* PUBLIC AFFAIRS ADVISORY SERVICES, INC., FINAL REPORT OF A POLL OF HAWAII PUBLIC OPINION CONCERNING THE 1978 HAWAII CONSTITUTIONAL CONVENTION PREPARED FOR THE FIRST HAWAIIAN BANK AND CONDUCTED ON JANUARY 28-FEBRUARY 1978, at i (1978). Of roughly 3,300 people surveyed, fifty-two percent felt the a few changes were necessary, while eleven percent thought no changes Constitution were necessary. *Id.*

[188] *See* Gerry Kett, *Outlook for Con Con: Few Changes in Store*, HONOLULU ADVERTISER,

delegates introduced 835 proposals.[189] The convention proposed nearly forty additional sections, giving constitutional status to new subjects.[190] Many proposals also served to add Hawaiian features to the "bare-bones" document of the 1950 convention.[191] These provisions include the creation of "a right to a clean and healthful environment,"[192] an explicit right to privacy,[193] and greater recognition of native Hawaiian rights. Delegates approved the creation of the Office of Hawaiian Affairs[194] as well as other changes to demonstrate Hawaiian culture. The con con added the "law of the splintered paddle"[195] to the constitution, adopted Hawaiian as an official state language,[196] and altered the Preamble to acknowledge the unique spirit of the islands.[197]

In the area of constitutional revision, delegates made several proposals meant to limit the role of the legislature. One proposal, framed as "a very little change," called for a mandatory convention.[198] Another proposal called for the creation of a constitutional commission.[199] Still another delegate argued for a

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May 22, 1978, at A1.

[189] Lee Gomes, *Issues Are Set, 835 Proposals Face Con Con*, HONOLULU STAR-BULLETIN, Aug. 1, 1978, at A1.

[190] LEE, *supra* note 20, at 18.

[191] *See* June Watanabe, *Con Con's "Hawaii Emphasis" Lauded*, HONOLULU STAR-BULLETIN, Sept. 21, 1978, at A2.

[192] HAW. CONST. art. XI, § 9.

[193] *Id.* art. I, § 6.

[194] *Id.* art. XII, § 5.

[195] *Id.* art. IX, § 10 ("The law of the splintered paddle, mamala-hoe kanawai, decreed by Kamehameha I—Let every elderly person, woman and child lie by the roadside in safety—shall be a unique and living symbol of the State's concern for public safety.").

[196] *Id.* art. XV, § 4.

[197] *Id.* at pmbl. The preamble reads:

> We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, "Ua mau ke ea o ka aina i ka pono."
>
> We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.
>
> We reaffirm our belief in a government of the people, by the people and for the people, and with an understanding and compassionate heart toward all the peoples of the earth, do hereby ordain and establish this constitution for the State of Hawaii.

Id. The 1978 Preamble added to the 1950 version the Hawaiian language motto and the second paragraph, which "amplified . . . the concerns of Hawaii's people today." Comm. Whole Rep. No. 4, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1001 (1980).

[198] Comm. on Revision, Amend. & Other Provisions, 1978 Constitutional Convention (Haw. Aug. 9, 1978) (testimony of Helene Hale) (advocating for a mandatory convention).

[199] *See* Comm. on Revision, Amend. & Other Provisions, Aug. 8, 1978, 1978 Constitutional Convention (1978) (testimony of Alan Kimball); *id.* (testimony of Jean Snodgrass); *id.* (testimony of Thomas Hamilton) (advocating for constitutional commission); Comm. on Revision, Amend. & Other Provisions, Aug. 10, 1978, 1978 Constitutional Convention (1978) (testimony of Norman Meller).

twenty-year intermission between votes on whether to hold con cons, saying that the expense of the convention should be incurred less frequently.[200] Only one change was made to the article on constitutional revision, however. In response to the *League of Women Voters* case, the convention amended the constitutional article on conventions to require the convention referendum to be held nine years.[201] With this change, Hawai'i now has the shortest time between periods when a convention vote is mandated among all the states that require such a vote.[202]

Notably absent from the amendments put to voters, however, were initiative, referendum, and recall. Public opinion polls showed that, among those who had an opinion, members of the public favored initiative and referendum.[203] These ideas found proponents in independent delegates such as Bruce Barnes. He explained the failure as a major philosophical struggle between delegates who trusted voters to vote on initiatives, and those who wanted to retain power at the legislature.[204] Initiative came down to a very emotional, racially-charged debate. Some in the majority faction of delegates opposed initiative because it represented a challenge to the established political order.[205] Other delegates, who supported "Palaka Power," a platform of localism named for the cloth worn by immigrant plantation workers, opposed initiative because of fears that newcomers would use it to take over the islands and remake them in a more mainland image.[206] Others worried that initiative would be used by big-money

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[200] *See* Comm. on Revision, Amend. & Other Provisions, Aug. 8, 1978, 1978 Constitutional Convention (1978) (testimony of Richard Sasaki).

[201] *See* HAW. CONST. art. XVII, § 2. Because of new provisions added to the constitution. the article on constitutional revision and amendment procedures was renumbered from Article XV to Article XVII.

[202] *See* G. Alan Tarr & Robert F. Williams, Foreword, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1079 (2005). In eight states with a mandatory referendum, the period between calls for convention is twenty years; in four states, it is ten years; and in Michigan, it is sixteen years. *Id.* Currently these fourteen states have periodic votes on whether to have a constitution: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, New Hampshire, New York, Ohio, Oklahoma, and Rhode Island. DINAN, *supra* note 107, at 312 n.119.

[203] *See* PUBLIC AFFAIRS ADVISORY SERVICES, *supra* note 187, at 47. Of those surveyed in early 1978, 38.7 percent favored initiative, while less than ten percent opposed. Forty-four percent had not decided whether they supported initiative. *Id.*

[204] *See* Interview with Bruce Barnes, Delegate to 1978 Constitutional Convention & Assoc. Professor, Univ. of Haw., in Honolulu, Haw. (Apr. 21, 2008).

[205] *See* Sandra S. Oshiro, *Paty Advises Convention to Bury "Racism" Dispute*, HONOLULU ADVERTISER, Aug. 11, 1978, at A1.

[206] *See* Les Gomes, *Con Con Rocked by "Explosive" Topic*, HONOLULU STAR-BULLETIN, Aug. 11, 1978, at A2. Newer residents generally had more favorable opinions of initiative than did long-time residents. *See* PUBLIC AFFAIRS ADVISORY SERVICES, *supra* note 187, at 49.

to introduce controversial proposals such as gambling or greater development.[207] In the end, initiative lost in a narrow vote.[208]

In all, the 1978 convention approved 116 proposals. They were grouped into thirty-four amendments, loosely arranged by subject, and then presented to voters.[209] As in 1968, voters could approve all, some, or none of the thirty-four amendments. The convention had revised more of the constitution than thirty-four amendments might suggest, yet it did not want to put the whole constitution before the voters on an all-or-nothing basis, and thereby risk that voters would reject all changes because they objected to particular amendments.[210] Once the convention closed, delegates set about getting approval, which would allow them "to counter an image that they fought more among themselves than over the issues."[211] The convention spent $36,000 out of its $2.5 million budget to run television and radio ads.[212] It also placed print advertisements in the major newspapers on every island, urging voters to "[d]o something really important"—study the ballot and the explanatory materials.[213] Much of the discussion urged voters to "vote selectively."[214] Convention supporters urged voters not to reject the entire convention platform over dissatisfaction with certain proposals, or, in the case of those who favored initiative and referendum, the lack of proposals.[215] All the amendments were approved by voters, but they have not all been included in the constitution.[216]

VI. UNANSWERED CALLS TO CONVENTION

Four times since the 1978 Constitutional Convention—in 1986, 1996, 1998, and 2008—Hawai'i voters have been asked whether to hold another con con. Voters, however, have rejected the con con, sometimes despite the campaigning of public officials but sometimes in concert with other powerful voices, such as

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[207] *See* Interview with Jim Shon, Delegate to 1978 Constitutional Convention & Former Member of the Haw. House of Representatives, in Honolulu, Haw. (Apr. 25, 2008).

[208] 1978 Debates, *supra* note 168, at 837.

[209] Meller & Kosaki, *supra* note 173, at 256-57.

[210] *Id.* at 257.

[211] Sandra S. Oshiro, *Con Con's Triumph Total: All OK'd*, HONOLULU ADVERTISER, Nov. 8, 1978, at A1.

[212] Lee Gomes, *Convention Opens Drive for Ratification*, HONOLULU STAR-BULLETIN, Oct. 14, 1978, at A2.

[213] *See* Advertisement, *Con Con is Important to Everybody*, SUNDAY STAR-BULLETIN-ADVERTISER, Oct. 29, 1978, at Supp.

[214] *See* Gomes, *supra* note 212, at A2.

[215] *Id; see also Con Con Items: Who Back What*, HONOLULU ADVERTISER, Nov. 6, 1978, at A6 (listing the position of fourteen organizations).

[216] *See* Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979) (rejecting several amendments because voter education materials did not adequately describe the meaning of the proposed amendment as it appeared on ballot).

prominent special interests groups. Advocates for the constitutional conventions have argued that the convention would give a "fresh new look" at constitutional issues[217] and would bring more people into politics, while a range of complaints, particularly concerns about substance and cost, have sidelined the conventions.

A. The 1986 Vote on Whether to Hold a Constitutional Convention

The issue of whether to hold a con con was put on the ballot in 1986, according to the mandate contained in the Hawaii Constitution itself. Unlike in 1968, no issues seemed to require constitutional attention, and unlike in 1978, special interest groups made little to no effort to draw attention to the convention.[218] Several of the delegates from the 1978 convention argued against it.[219] When one of Honolulu's daily newspapers reported the final tally, there were 98,887 yes votes, 134,850 no votes, and 19,243 blank votes.[220]

There was nearly a consensus that the vote against the 1986 constitutional convention was in part a "backlash against the 1978 Constitutional Convention" and its changes.[221] State Representative David Hagino, the author of the 1978 Palaka Power manifesto,[222] said it would be "premature" to hold a convention in 1988 because many of amendments made in 1978 had not been carried out. Convention chairman Bill Paty, although not rejecting a 1988 convention outright, agreed, saying, "[S]ome of these things are still hanging. They should digest the last one first."[223] Union head Tommy Trask said ILWU opposed the convention because it might approve right-to-work rules rejected by the 1968 Convention.[224] The business community was reported to be upset with some changes made by the 1978 convention, such as the water code and the status of agricultural lands,[225] but it was also concerned that a convention

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[217] *See, e.g., Should There be a 1998 Constitutional Convention?*, HONOLULU ADVERTISER, Sept. 29. 1996, at A2 (quoting John Waihe'e).

[218] LEE, *supra* note 20, at 21; *see also* Stirling Morita, *Voters Must Decide on a New Constitutional Convention*, HONOLULU STAR-BULLETIN, Oct. 22, 1986, at A1.

[219] *See* Morita, *supra* note 218, at A1.

[220] *Charter, Constitutional Changes Approved, Rejected by Voters*, HONOLULU STAR-BULLETIN, Nov. 5, 1986, at A7. It is interesting that, in addition to yes, no, and blank votes, the Star-Bulletin provided a number of "Total no votes" that added blank votes to no votes. How blank votes would be considered would be important in the next con con election. *See infra* Part VI.B.

[221] Editorial, *A New Con-Con, Danger that Single-Issue Foes Could Make it a Battleground*, HONOLULU ADVERTISER, Oct. 4, 1996, at A12.

[222] David Hagino, Palaka Power (1978) (unpublished manuscript, on file with Hamilton Hawaiian Library, University of Hawai'i at Mānoa).

[223] Morita, *supra* note 218, at A1.

[224] *Id.*

[225] Complicating the business community's understanding of the status of agricultural lands is *Kahalekai v. Doi*, which threw out an amendment to preserve some lands for agriculture

"might open it up for further problems."[226] In short, the lack of vocal advocates in favor of the convention as well as the absence of specific issues and of public interest led to the negative vote.[227]

B. The 1996 Vote on Whether to Hold a Constitutional Convention

Ten years later, in 1996, the lieutenant governor again put the con con question on the ballot as required by the constitution. This time around, however, the convention gained more support. Supporters had a broad range of interests: "They foresaw an opportunity to revisit proposals not passed in the two previous conventions, such as conversion to a unicameral legislature, or adoption of statewide initiative and referendum. Some had looked forward to dealing with specific issues they had unsuccessfully championed through their elected representatives, such as same-gender marriage."[228] The Honolulu City Council advocated for the 1996 convention, citing "a number of shortcomings in the current state constitution . . . particularly in the area of state fiscal controls."[229] Both candidates for mayor of Honolulu favored a convention,[230] as did former Governor John Waihe`e.[231] The League of Women Voters[232] and Governor Ben Cayetano opposed the convention,[233] as did *The Honolulu Star-Bulletin*[234] and *The Honolulu Advertiser*.[235] They cited the cost, which it was estimated might be as high as $12 million, including $2 million to cover the cost of a special election of delegates, during poor financial times.[236] Governor Cayetano said the convention would be too costly and that the work done in

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because of the inadequate description of the plan provided in voters' materials. *See* 60 Haw. 324, 590 P.2d 543 (1979).

[226] *See* Morita, *supra* note 218, at A1 (quoting Al Konishi, legislative counsel for the Chamber of Commerce of Hawai'i).

[227] *See* Jerry Burris, *Voters Reject Proposal for Another 'Con-Con' in 1988*, HONOLULU ADVERTISER, Nov. 5, 1986, at A7.

[228] PRATT WITH SMITH, *supra* note 22, at 109.

[229] *Council OKs Convention on State Constitution*, HONOLULU ADVERTISER, Feb. 15, 1996, at A3.

[230] Angela Miller, *Constitutional Reform Push, Legislative Inertia Stalling Process, Citizen Group Charges*, HONOLULU ADVERTISER, Oct. 28, 1996, at B1.

[231] Jim Witty, *The 'Con Con' Question Arises Anew*, HONOLULU ADVERTISER, Oct. 22, 1996, at A1.

[232] Mike Yuen, *Voters League Recommends "No" on Con Con Question*, HONOLULU STAR-BULLETIN, Oct. 2, 1996, at A11.

[233] *See, e.g.*, *Should There be a 1998 Constitutional Convention?*, *supra* note 217, at A2.

[234] Editorial, *State Con Con*, HONOLULU STAR-BULLETIN, Oct. 3, 1996, at A18.

[235] Editorial, *Endorsements: A Paper's View of Politics and Our Picks for Election '96*, HONOLULU ADVERTISER, Nov. 3, 1996, at B2.

[236] *See, e.g.*, *Should There be a 1998 Constitutional Convention?*, *supra* note 217, at A2.

1978 had sufficiently complicated government to the point that he was not interested in seeing what another convention would do.[237]

It has been suggested that budget concerns were largely a smokescreen for more divisive interests.[238] A prevalent fear was that single-issue groups would dominate discussions and risk "plung[ing] the convention into a highly charged emotional food fight."[239] 1978 Convention Chairman Bill Paty warned that a full review of the constitution would "open up a Pandora's box of other issues such as term limits for office holders, initiative, Hawaiian rights, county rights[,] and so forth."[240] Opponents also pointed to amendments on the 1996 ballot as proof that the Legislature could propose necessary changes through its regular sessions.[241]

Those in favor of the 1996 convention expressed skepticism about the Legislature's ability to craft needed amendments[242] because of "obstructionist leaders."[243] Backers of a convention accused their opponents of protecting the status quo. They argued that by removing the Legislature's purview, the convention could resolve jurisdictional issues between state and local governments and might provide for greater home rule in Hawai'i's four counties.[244] Same-sex marriage opponents also supported the convention.[245]

The 1996 vote was so close that early returns had the opponents winning.[246] When the returns were in, the number of blank votes was greater than the margin of victory by those in favor of a convention.[247] In fact, only one percent—fewer than 4,000 votes—separated the number of voters voting "yes"

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[237] *See* PRATT WITH SMITH, *supra* note 22, at 109.

[238] *See, e.g.*, Interview with Bruce Barnes, *supra* note 204.

[239] *See* Shon, *supra* note 175, at A8.

[240] Bill Paty, Letter to the Editor, *Constitutional Convention Should Be Avoided*, HONOLULU STAR-BULLETIN, Apr. 17, 1996, at A19.

[241] *See* Angela Miller, *New Constitutional Convention Coming?*, HONOLULU ADVERTISER, Sept. 29. 1996, at A1.

[242] *See* Angela Miller, *Constitutional Reform Push*, HONOLULU ADVERTISER, Oct. 28, 1996, at B1; Frank Ortiz, Letter to the Editor, *Cost Isn't a Reason Not to Have Con Con*, HONOLULU ADVERTISER, Nov. 3, 1996, at B3.

[243] *See* Rep. Gene Ward, Editorial, *Trust Hawaii's People with Another Con Con*, HONOLULU ADVERTISER. Oct. 24, 1996, at A12.

[244] *Should There be a 1998 Constitutional Convention?*, *supra* note 217, at A2 (quoting Honolulu Mayor Jeremy Harris); *see also* A.A. Smyser, *Hawaii Needs a Constitutional Convention*, HONOLULU STAR-BULLETIN, Apr. 4, 1995, at A8 (quoting former state planning director Harold Masumoto).

[245] Mike Yuen, *Same-Sex Foes Push for Con Con*, HONOLULU STAR-BULLETIN, Oct. 24, 1996, at A14.

[246] *Compare* Darren Pai, *Voters Defeat Convention Call*, HONOLULU ADVERTISER, ISLAND ED., Nov. 6, 1996, at A2, *with* Darren Pai, *Early Vote Says Yes to Convention*, HONOLULU ADVERTISER, FINAL ED., Nov. 6, 1996, at A2.

[247] *See* STATE OF HAWAI'I OFFICE OF ELECTIONS, STATEWIDE GENERAL ELECTION SUMMARY REPORT 5 (1996), *available at* http://hawaii.gov/elections/results/1996/general/96swgen.pdf.

from "no" voters, while twelve percent of voters left the question blank.[248] This presented the state's attorney general with a question: How should the blank votes be tallied? Her response was that they should not be tallied at all.[249]

1. The first legal challenge to the 1996 vote

The state AFL-CIO, which had opposed the convention, brought a lawsuit against Dwayne Yoshina, the director of elections.[250] The union maintained that the election commissioner should include blank votes in the total number of votes cast, which would have the effect of interpreting them as a "no" vote.[251] The election commissioner argued that reading "ballots cast" in such a way would require the convention question to receive "an extraordinary majority" for passage.[252] The Hawai'i Supreme Court said there was nothing in the language of the constitution or in its history, nor would it be inconsistent, to require a constitutional convention to be called by more than a simple majority.[253] The union's argument prevailed as the union claimed a statutory interpretation that the words "ballots cast" included blank ballots and over-votes.[254] This meant that convention supporters, although barely outnumbering those who explicitly rejected a convention, did not comprise a majority of "ballots cast" in the election.[255]

The Hawai'i Supreme Court's decision was met with a substantial backlash. One Republican lawmaker accused the court of allegiance with the governor, which appointed them, or with union members, and said that the court's "semantic gymnastics" demonstrated a favoritism of the political establishment.[256] Others said the supreme court's decision was nonsensical and compared blank votes to people who stayed at home.[257] Mark Bennett, a prominent attorney who would later become the state's attorney general, called it ironic that a court that valued civil-rights would issue such a ruling.[258]

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[248] *Id.* Compare this to the experience of the 1997 New York convention referendum in which a plurality of the citizens who came to the polls–almost 1.7 million of them–did not vote on the constitutional convention question. *See* Benjamin, *supra* note 94, at 1018.

[249] *See* Mike Yuen, *Con Con Opinion Likely to be Challenged*, HONOLULU STAR-BULLETIN, Nov. 21, 1996, at A1.

[250] Haw. State AFL-CIO v. Yoshina, 84 Hawai'i 374, 935 P.2d 89 (1997).

[251] *See id.* at 275, 935 P.2d at 90.

[252] *See id.* at 382, 935 P.2d at 97.

[253] *Id.*

[254] *Id.*

[255] *Id.* at 383, 935 P.2d at 98.

[256] Gene Ward, Editorial, *High Court Reversed Itself*, HONOLULU ADVERTISER, Mar. 30, 1997, at B3.

[257] *See* Mary George, Editorial, *"Humpty Dumpty" Logic*, HONOLULU ADVERTISER, Mar. 30, 1997, at B3.

[258] Mark Bennett, Editorial, *Voters Should Have Been Told How Votes Would Be Counted*,

2. The second legal challenge to the 1996 vote

Bennett, representing a pro-convention group called Let the People Decide and some individual plaintiffs, sued Yoshina in federal court claiming that the Hawai'i Supreme Court's interpretation of blank votes violated voters' substantive due process and free speech rights.[259] Some of the plaintiffs said they abstained on the convention question but would have voted differently if they had known that a blank ballot would have the same effect as voting "no."[260] District Court Judge David A. Ezra ordered a new election.[261] Both sides appealed: Bennett and others wanted Ezra to have certified the election results, discarding blank ballots as the attorney general had initially advised.[262] The State of Hawai'i wanted the election to be certified and no convention slated, and certainly, the state did not want to deal with the expense of another election.[263]

Bennett ultimately lost his appeal in the Ninth Circuit Court of Appeals.[264] He argued that the inclusion of the blank ballots, despite an Office of Elections "fact sheet" told voters that blank votes would not be counted, departed from election practices so much that it denied voters' substantive due process rights.[265] He claimed further that the Hawai'i Supreme Court rewrote blank votes as "no," effectively "coerce[ing]" speech in violation of the First Amendment.[266] The Ninth Circuit rejected both the First Amendment and due process claim and vacated Judge Ezra's call for a new election.[267]

C. The 1998 Vote on Whether to Hold a Constitutional Convention

Rather than continue with the court battle, the Legislature put the measure on the general election ballot in November 1998. Such an action was thought necessary to offset "the growing feeling of powerlessness among Hawaii's voters."[268] The measure, however, was overshadowed by other measures on the

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HONOLULU ADVERTISER, Mar. 30, 1997, at B3.

[259] Bennett v. Yoshina, 140 F.3d 1218, 1221-22 (9th Cir. 1998).

[260] *Id.* at 1223.

[261] *Id.*

[262] *Id.*

[263] *See* William Kresnak & Ken Kobayashi, *ConCon Vote to Cost $2.1 Million*, HONOLULU ADVERTISER, July 15, 1997, at A1. State election officials grappled with whether to hold a $2.1 million walk-in election or the state's first mail-in ballot for $1.5 million. *Id.*

[264] *Bennett*, 140 F.3d at 1222.

[265] *See id.* at 1222.

[266] *Id.* at 1225.

[267] *Id.* at 1228.

[268] *See* Editorial, *Convention Ruling: Political Confidence at Stake*, HONOLULU ADVERTISER, Mar. 26, 1997, at A10.

No matter how sound the high court's ruling is, it will be interpreted as further evidence

ticket, including the governor's race and a constitutional amendment against same-sex marriage.[269] The state Civil Rights Commission opposed the convention, fearful that it would roll back civil rights protections,[270] as did the Hawaii State Teachers Association.[271] These groups "found an effective theme by citing the estimated $12 million to $15 million cost of such a gathering."[272] The Office of Hawaiian Affairs also focused on the expense,[273] spending more than $150,000 to campaign against the meeting.[274] While opposition to the convention waned somewhat in the two months leading up to the election,[275] the provision lost soundly in the general election.[276]

Linda Lingle, the Maui County mayor who had supported the convention, was narrowly defeated by incumbent governor Ben Cayetano, who wavered on the con con, first opposing the convention because of costs and then favoring it so long as it had popular support.[277] The constitutional amendment against same-sex marriages, whose backers also backed the Con Con,[278] was adopted

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> that the "system" is unwilling to accept any influence or input from those not in power. Critics will note that the strongest opponents of a Constitutional Convention were those already in power: public worker unions, legislative leaders[,] and others. It would have been the powerless and the outsiders, they'll say, who would able benefited most from a convention.

Id.

[269] Jean Christensen, *ConCon Was Low-Profile Issue in '98 Campaign*, HONOLULU ADVERTISER, Nov. 1, 1998, at A25.

[270] Mike Yuen, *Civil Rights Panel Got Ethics Board OK to Take a Stand on 2 Ballot Measures*, HONOLULU STAR-BULLETIN, Oct. 20, 1998, at A4.

[271] *HSTA Urges "No" Votes on Con-Con Amendment*, HONOLULU STAR-BULLETIN, Oct. 1, 1998, at A3.

[272] Jean Christensen, *ConCon Support Slips in Poll, Convention Proposal Loses Ground Since 1996 Election*, HONOLULU ADVERTISER, Oct. 27, 1998, at A1. One estimate reached as high as $20 million for the convention. *See* Christensen, *supra* note 269, at A25.

[273] *See, e.g.*, Advertisement, *Are you Confused?*, HONOLULU ADVERTISER, Oct. 27, 1998, at A8.

[274] Pat Omandam, *OHA Trustees Defend Expenses to Oppose Con Con*, HONOLULU STAR-BULLETIN, Oct. 27, 1998, at A3.

[275] *See* Mike Yuen, *Poll: More Voters Would Rather Not Have Con Con*, HONOLULU STAR-BULLETIN, Oct. 30, 1998, at A3.

[276] *See* STATE OF HAWAI'I OFFICE OF ELECTIONS, STATEWIDE GENERAL ELECTION SUMMARY REPORT 4 (1998), *available at* http://hawaii.gov/elections/results/1998/general/98swgen.pdf. Roughly thirty-four percent of voters voted in favor of holding a con con, while fifty-nine percent voted against. *Id.*

[277] *Compare Cayetano: Highlights of Proposals*, HONOLULU ADVERTISER, Nov. 1, 1998, at A5, *with Cayetano and Lingle Both Favor Con Con*, HONOLULU ADVERTISER, Oct. 22, 1998, at A3. Lingle ran again for governor in 2002, defeating Lieutenant Governor Mazie Hirono. *See* STATE OF HAWAI'I OFFICE OF ELECTIONS, STATEWIDE GENERAL ELECTION SUMMARY REPORT 1 (2002), *available at* http://hawaii.gov/elections/results/2002/general/02swgen4.pdf.

[278] Mike Yuen, *Advocacy Groups Say Con Con Needed, Decries "Fear campaign,"* HONOLULU STAR-BULLETIN, Oct. 13, 1998, at A5.

overwhelmingly.[279] These other issues on the ballot took away attention and campaign resources from the convention.[280] "Between the traditional-marriage amendment and the governor's race, they sucked most of the energy, attention[,] and money away from the Con Con," Cam Cavasso, executive director of a pro-convention people's group, said.[281]

D. The 2008 Vote on Whether to Hold a Constitutional Convention

On November 4, 2008, Hawai'i voters were again asked whether a constitutional convention should be held. By a vote of almost 61.9 percent to 33.5 percent, voters rejected the con con.[282] In the days leading up to the election, the Hawai'i Alliance, an anti-convention group, raised more than $832,000, including contributions from the Office of Hawaiian Affairs, the Hawai'i Government Employees Association, and the National Education Association Ballot Measure Fund.[283] Additionally, the state Democratic Party opposed the convention, while the Republicans supported it.[284]

Supporters of the convention did not find "a compelling set of issues to bring people together," particularly one that resonated more than other issues on the ballot.[285] "Between someone from Hawai'i running for president and the rail issue coming to a head, I think it's easy to see why something more abstract and theoretical like a Con[]Con could get pushed to the side," one Hawai'i Pacific University professor told *The Honolulu Advertiser*.[286] In the absence of galvanizing issues for convention proponents, opponents hinted at what a con con could do.[287] The Hawai'i Alliance ran television, radio, and newspaper

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[279] *See* STATE OF HAWAI'I OFFICE OF ELECTIONS, *supra* note 276, at 5. Almost seventy percent of voters approved a constitutional amendment permitting the legislature "to reserve marriage to opposite-sex couples." *Id.*; HAW. CONST. art. I, § 23.

[280] *See* Christensen, *supra* note 269, at A25.

[281] Mary Adamski, *Voters Soundly Reject the Need for a Con Con*, HONOLULU ADVERTISER, Nov. 4, 1998, at A11.

[282] *See* STATE OF HAWAI'I OFFICE OF ELECTIONS, STATEWIDE GENERAL ELECTION FINAL SUMMARY REPORT 3 (2008), *available at* http://hawaii.gov/elections/results/2008/general/files/histatewide.pdf.

[283] Derrick DePledge, *ConCon Foes Backed Effort with Money*, HONOLULU ADVERTISER, Nov. 8, 2008, at A1.

[284] Mary Vorsino, *ConCon Debate Targets Changes, Costs*, HONOLULU ADVERTISER, Oct. 15, 2008, at A1.

[285] Rick Daysog, *Constitutional Convention*, HONOLULU ADVERTISER, Nov. 5, 2008, at A7.

[286] Derrick DePledge, *Call for Constitutional Convention*, HONOLULU ADVERTISER, Oct. 12, 2008, at A1.

[287] Often during the campaigning for or against the con con, proponents and opponents of the con con frame the referendum question for voters. Con con proponents have paraphrased the question as, "Should we review the Constitution?" while opponents ask "What changes need to be made?" *See, e.g.*, Anne Feder Lee, *Voters Must Weigh Decision to Call ConCon*, HONOLULU ADVERTISER, Dec. 28, 2007, at A18, *available at* http://the.honoluluadvertiser.

advertisements speculating that the convention might jeopardize existing constitutional provisions, such as collective bargaining or Hawaiian rights.[288] Unless the legislature calls for one sooner, it will be ten years before the possibility of another con con vote in Hawai'i.

VII. LESSONS FROM THE REJECTED CONSTITUTIONAL CONVENTION REFERENDA

Despite holding two constitutional conventions in its first two decades as a state, Hawai'i voters have rejected proposed con cons four times in the past thirty-two years. Hawai'i voters are not alone, however, in their rejection of conventions. Since 1970, only four conventions—including Hawai'i's 1978 convention—have been held after a mandatory referendum.[289] Between the founding of the nation and 1969, there have been seventy-two votes under state constitutions' automatic convention referendum provisions, but only twenty conventions as a result.[290] More often than not, when constitutions have forced states to ask voters whether a con con should be held, voters answered "no."

In the 1990s, New Hampshire, Alaska, Ohio, and Michigan all rejected their periodic calls for conventions.[291] In fact, voters have not approved a convention under an automatic call provision in the fourteen states that have them since 1984.[292] Con cons have been on the decline since the late 1960s,[293] and far fewer conventions were held in the twentieth century than in the nineteenth.[294] It would be premature, however, to say that the end of constitutional conventions has come, but states seem increasingly reluctant to employ them.[295] As a result of "conventionphobia," recent constitutional

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com/article/2007/Dec/28/op/hawaii712280335.html ("While it might be worthwhile to try to bring government closer to the governed, that is not a compelling purpose for a ConCon. ConCons should be called only to fix problems with our Constitution.").

[288] *See* DePledge, *supra* note 283, at A1.

[289] Benjamin, *supra* note 94, at 1020. New Hampshire held two conventions, while Rhode Island held one. *Id.*

[290] *Id.* at 1019-20. Michigan, Missouri, New Hampshire, New York, and Ohio held conventions. New Hampshire, where until recently the convention was the only way to amend the constitution, has held the most con cons. *Id.*

[291] Benjamin & Gais, *supra* note 6, at 69.

[292] *See* Benjamin, *supra* note 94, at 1020. Only one state held a constitutional convention in the 1990s, but it was not called by voters and the voters refused to ratify the convention's proposals. *See* TARR, *supra* note 81, at 137.

[293] *See* DINAN, *supra* note 107, at 9-10. Many states had constitutional conventions in the 1960s to deal with the problem of apportionment. The 1860s saw the largest burst of con con activity. This activity was related to the Civil War, when Southern states held conventions to secede and rejoin the Union, to grapple with rights of former slaves, and to recognize federal supremacy. *See id.*; *see generally* SCALIA, *supra* note 5.

[294] Benjamin & Gais, *supra* note 6, at 69.

[295] *Id.* at 69-70.

change in the United States has come largely through the amendment and, increasingly, the initiative processes.[296] Constitutional initiatives account for more than fourteen percent of proposals in the 1990s, despite the fact that almost two-thirds of states do not have the initiative.[297]

A. Reasons to Revive the Constitutional Convention as a Revising Tool

While the lack of con cons may make Hawai'i's mandatory constitutional convention question seem like a mid-twentieth century anachronism, con cons still provide the best mechanism for initiating wholesale revisions in constitution for three reasons. First, a constitutional convention is most attractive because "it maximizes the opportunities for popular participation in the process of constitution-making."[298] As such, the constitutional convention has greater popular legitimacy than other measures, such as a commission system that will be discussed below. Second, the convention as a fourth "branch" of government can balance the power of the legislature in ways that a single ballot initiative or appointed body cannot. Finally, Hawai'i's constitutional conventions have brought talented political leaders to the scene and could do so in the future.

1. Constitutional conventions provide direct public involvement in political process

A con con, being a meeting of popularly-elected delegates who deliberate publicly and submit their conclusions to the public for ratification, has the most popular legitimacy of any mechanism for constitutional change. The process for calling a convention and ratifying its results requires more public input than simple ratification of an amendment proposed by the legislature, a ballot initiative, or a commission. With those choices, voters typically vote once—for or against the final proposition presented for ratification. Contrast that with a con con. "The use of a constitutional convention usually relies on three expressions of popular will: deciding the question whether there should be a convention, electing the delegates, and voting on whether to ratify the convention's recommendations."[299] If voters choose to hold a convention, they

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[296] *See* DINAN, *supra* note 107, at 10. Benjamin and Gais coined the phrase "Conventionphobia" in their article discussing objections to constitutional conventions on the state and national level. *See* Benjamin & Gais, *supra* note 6, at 54.

[297] Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMP. L. REV. 1291, 1299 (1995).

[298] Harold G. Loomis, *Amending the State Constitution*, KA LEO HANA, Sept. 2007, at 3 (quoting G. Alan Tarr), *available at* http://www.lwv-hawaii.com/kaleohana/pdfs/klh0709.pdf.

[299] Williams, *supra* note 15, at 3.

dictate the agenda in some way by selecting delegates. Individuals can further contribute to the process by running as candidates for delegate positions. Moreover, the convening of delegates represents the "closest institutional approximation of a gathering of the entire population to deliberate on its constitutional future."[300] Hawai'i's People's Con Con brought together 102 individuals from all professions and political persuasions to discuss the constitution. The result was a lively debate that could not be approximated by a handpicked commission or duplicated by a voter alone in a voting booth with an initiative ballot.

Moreover, the meetings of delegates would be publicized, giving more people the opportunity to observe. The last Con Con was held before the age of the Internet. With additional access to information, however, would come the challenge of deciphering and disseminating the torrent of opinions and facts to other delegates. Delegates in the Information Age might find themselves swamped with too much information, so that a constitutional commission might be a more appropriate mechanism for augmenting the research work done.

2. Constitutional convention has unique powers as a super-legislature

Proponents of the con con in the 2008 elections suggested a number of topics that could have been on the agenda, including development and environmental sustainability, campaign finance reform, sunshine laws, and legislative ethics.[301] One state senator, a former con con delegate, noted that the legislature will not discuss some issues because of the legislators' self-interests and because changes might conflict with how legislators operate.[302] At both the 1968 and 1978 conventions, for example, proposals were introduced to make the Hawai'i legislature unicameral.[303] Although these proposals were rejected at the convention, they received considerable support.[304] Legislators, particularly those seeking another term, would not consider a unicameral legislature if it

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[300] Loomis, *supra* note 298, at 3.

[301] *See generally* Editorial, *ConCon Would Help Hawai'i Chart Future Course More Clearly*, HONOLULU ADVERTISER, June 24, 2007, at B2; Della Au Bellati, 25th Dist. Representative, Haw. House of Representatives, Forum at Univ. of Haw. Law School (Apr. 3, 2008); Telephone Interview with Les Ihara, Delegate to the 1978 Constitutional Convention & Majority Policy Leader of the Haw. State Senate (Apr. 28, 2008).

[302] *See* Telephone Interview with Les Ihara, *supra* note 301.

[303] Digest of Proposals Offered by Delegates, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, *supra* note 156, at 388, 390; Digest of Proposals Offered by Delegates, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, *supra* note 197, at 865, 868, 870, 905 (1980).

[304] Standing Comm. Rep. No. 46, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, *supra* note 156, at 211; Standing Comm. Rep. No. 46, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, *supra* note 197, at 600-01.

meant elimination of their legislative seats. Areas where the Legislature has an entrenched interest would be perfect subject matter for a convention's review.

3. Constitutional conventions provide a gateway to political office

Hawai'i's conventions have given neighborhood leaders and activists—many with little interest in future political office—the opportunity be involved in constitution-making.[305] They have also given Hawai'i a long list of delegates who have become political leaders.[306] Two delegates, George Ariyoshi of the 1968 convention and John Waihe`e of the 1978 convention, went on to become governors.[307] The lieutenant governor's post also has been held by three convention delegates: Nelson Doi of the 1950 convention, Ariyoshi, and Waihe`e. Delegate Frank Fasi and Jeremy Harris, from the 1950 and 1978 conventions respectively, became mayors of the City and County of Honolulu. Patricia Saiki, an alumna of the 1968 convention, served as a U.S. Representative, and Hiram Fong, vice president of the 1950 convention, became the state's first U.S. Senator.[308]

The 1978 convention, in particular, shows how the convention can be used as a springboard to political office. While many of the delegates returned to careers as attorneys, bankers, and secretaries, thirty-one delegates ran for other

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[305] *See, e.g.*, Interview with Bruce Barnes, *supra* note 204; Telephone Interview with Dona Hanaike, Delegate to 1978 Convention (Apr. 28, 2008). Hanaike and Barnes sat on the newly established neighborhood boards in Kane'ohe and Makiki, respectively.

[306] The list of delegates turned state officials might have been even longer had Congress immediately acceded to Hawai'i's petitions for statehood. Samuel King, president of the 1950 con con, would have likely been the state's first governor. Delegate William Heen was pegged as a likely U.S. Senator, but he was defeated in the 1950 primary, with the seat ultimately going to fellow delegate Hiram Fong. Hebden Porteus, a 1950 delegate and president of the 1968 convention, said he might himself have been elected to the House of Representatives but decided in 1959 not to run for the seat. Whitehead & Schneider, *supra* note 77, at 58.

[307] John Waihe'e went into the convention a virtual unknown and emerged as the leader of the "Young Turks," a group consisting mainly of University of Hawai'i law students and recent alumni. YAMASHITA, *supra* note 180, at 77. "He had it all: education, good looks, political instincts, and charisma," remembered one delegate. "He was a rising political star." *Id.* at 80. Midway through the convention, Waihe`e had become the *de facto* leader of the majority, due in part to the fact that other would-be majority leaders, such as Sen. Donald Ching, majority leader in the state senate, had a re-election campaign that drew some of his attention away from the convention. *See* Sandra S. Oshiro, *Waihee Called Shots in Convention: Young Turk Emerges at Con Con*, HONOLULU ADVERTISER, Sept. 20, 1978, at A1. Convention President Bill Paty was Waihe`e's campaign manager and cabinet member. *See* Jerry Burris, *Con-Con Alumni Meet Today*, HONOLULU ADVERTISER, May 20, 1988, at A3.

[308] *See* Whitehead & Schneider, *supra* note 77, at 58. Fong told an historian in 1986 that his success in the senate elections was not directly linked to his involvement in the convention. As such, "[h]is 1959 senate victory . . . marked the beginning of a new episode in his career, not the direct continuation of an earlier political role." *Id.*

office in 1978.[309] State Representative Barbara Marumoto ran that year and said that the convention gave her name recognition, making her "like an incumbent."[310] Some people have suggested that the 1978 Con Con was "less about changing the constitution than it was about changing the guard."[311] They said the convention served as a symbolic way for older members of the Democratic Party, which wrested control of state politics from the Republicans in 1954, to "pass the torch" to a younger generation.[312] Ten years after the 1978 convention, when the delegates gathered for a reunion at Washington Place, the governor's mansion and then-home to alumnus Waihe`e, three delegates were serving in the state senate and eleven were serving in the house.[313] Now, three decades later, few delegates remain in professional politics.[314]

B. Solutions

With the benefits of con cons, why are they on the decline, particularly in states like Hawai'i that still have automatic referendums? Political scientists have put forth several theories. First, because of timing, the con con vote could occur when no constitutional problems are evident or when too many other political issues occupy voters' minds. In Hawai'i, this phenomenon can be seen in the 1990s referendum votes, when same-sex marriage dominated the headlines, and in the most recent referendum, when a presidential election, mayoral races, and Honolulu's mass-transit issue crowded out the ballot.[315] Second, when the automatic votes require an unlimited convention, as Hawai'i's constitution does, voters often oppose the ballot measure on the basis that the hypothetical convention might change parts of the constitution they do not want changed. Even those who recognize that some constitutional changes are needed may hesitate to approve a con con when they do not know what will be discussed,[316] and legislatures are hesitant to give wide berth to something they cannot control.

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[309] Lee Gomes, *Con Con Enters Last 2 Weeks*, HONOLULU STAR-BULLETIN, Sept. 5, 1978, at A1.

[310] Telephone Interview with Barbara Marumoto, Delegate to 1978 Constitutional Convention & Member of the Haw. House of Representatives (Apr. 24, 2008).

[311] Jerry Burris, *"Con-Con": '78 Watershed*, SUNDAY STAR-BULLETIN & ADVERTISER, May 22, 1988, at B2.

[312] *See* Interview with Jim Shon, *supra* note 207.

[313] Burris, *supra* note 307, at A3.

[314] Among the legislators who were once Con Con delegates are Senators Les Ihara and Carol Fukunaga; and Representatives Barbara Marumoto and Joe Souki. *See id.*

[315] *See* Christensen, *supra* note 269, at A25; DePledge, *supra* note 286, at A1.

[316] *See* Gais & Benjamin, *supra* note 297, at 1304.

The rejection of the con con nationwide, and in Hawai'i in particular, is likely a poor indicator about how people feel about their state constitutions. The way that people vote on the convention question often reflects how they feel about other things. It could be considered a referendum on how they feel about the political establishment, an opinion poll on the existing legislature, a survey on voters' confidence in the economy,[317] or an expression of patience that politicians will live up to their promises.[318] In light of the fact that the mandatory convention call is such a poor indicator of public sentiment on the constitution, several changes should be made to encourage more thoughtful consideration of the Constitution's role in the state. Two possible solutions are: (1) make the language of Article XVII more flexible to allow for limited conventions, and (2) institute a constitutional review commission.

1. A limited convention would remove conversation-stopping topics from consideration at convention

Voters hesitate to authorize a convention whose deliberations they cannot control.[319] For example, one need only point to Hawai'i's most recent conventions. Then, people interested in Native Hawaiian rights actively campaigned against the convention because they were apprehensive that a convention, if called, could roll back gains made at prior con cons.[320] Gerald Benjamin, an expert on state constitutional law, said that the conventional ballot question should be open, explicitly authorizing both limited and unlimited constitutions.[321] "Specifying the convention question in the constitution in a way that requires that any convention have an unlimited agenda is a major barrier to a

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[317] The high cost of holding con cons has been used as a major plank of opposition campaigns. The 2008 con con vote, held during "one of the worst budget situations . . . in recent history," is an example. One estimate put the cost of the convention between $2 million and $11 million, while another said the con con could cost up to $41.7 million. *See* Vorsino, *supra* note 284, at A1.

[318] *See* STURM, *supra* note 14, at 33; *see also* Mikul Kaleikini, Letter to the Editor, *It's Premature to Hold Another Con Con in State*, HONOLULU STAR-BULLETIN, Oct. 29, 1996, at A3, *available at* http://starbulletin.com/96/10/29/editorial/letters.html ("To reopen this question seems, at least a decade premature. This is NOT the year for a Constitutional Convention. The works of the last one must be digested and absorbed before they can be, once again, rearranged.").

[319] *See* STURM, *supra* note 14, at 33; Tarr & Williams, *supra* note 202, at 1080.

[320] *See, e.g.*, DePledge, *supra* note 283, at A1. In 1998, the Office of Hawaiian Affairs spent more than $157,00 to run television and print ads against the con con. Most of the ads focused, however, on the price of the convention and not the effect it could have on OHA. *See, e.g.*, *Are You Confused?*, *supra* note 273, at A8; Pat Omandam, *supra* note 274, at A3.

[321] GERALD BENJAMIN, FORMAL STATE CONSTITUTIONAL CHANGE PROCESSES 12 (2004), *available at* http:// www-camlaw.rutgers.edu/statecon/subpapers/gerald.pdf.

convention being called," he explained.[322] As it stands now in Hawai'i and eight other states, the language of the convention question does not allow for limited constitutional conventions.[323] The question provided in the Hawai'i constitution "constitutes a mandatory one, with respect to both its form and its substance."[324] Therefore, the legislature lacks authority to limit the power of constitutional conventions. The legislature has many choices about how to control the convention, but it does not have that power to determine the agenda through a limited referendum question; in fact, "it is not legally empowered to submit it in any form other than that prescribed in the language appearing in the [Constitution]."[325]

A limited constitution might give voters an idea of the scope of the convention. *The Honolulu Advertiser* remarked in 1996:

> It's a pity that Hawaii voters will be faced with just a "yes-no" option when they are asked in November whether they want a constitutional convention . . . .
>
> How much better it would be if voters could say not only if they want a convention, but what they want it to address.[326]

While a limited constitution question will not allow voters to define the agenda of the convention, it will allow them to reject constitutions that have topics they do not want to see or, conversely, encourage them to vote if they see topics they do want addressed. The legislature, which passes the enabling legislation for conventions today, would likely specify the wording of the questions.

Is a limited convention even feasible? Other states have held limited conventions.[327] A limited convention has been brought up as a way to overcome objections to holding a federal convention—to discuss balancing the budget, for example—but it has been rejected because is not clear that constitutional conventions are limitable.[328] This was seen on the federal level when the delegates to the first Constitutional Convention, called for the limited purpose of revising the Articles of Confederation, went beyond the scope of their appointments to write the Constitution.[329] Because the convention represents "[t]he whole people in their sovereign capacity," as such the

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[322] Benjamin, *supra* note 94, at 1049.

[323] *Id.* at 1021 n.31; *see also* 61 Op. Haw. Att'y Gen. 12 (Jan. 25, 1961).

[324] 61 Op. Haw. Att'y Gen. 12.

[325] *Id.*

[326] Editorial, *supra* note 221, at A12.

[327] *See* Williams, *supra* note 15, at 7.

[328] *See* James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1021 (2007).

[329] *See* JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 35 (1992).

convention "may do what they will with their own frame of government, . . . even though the frame of government attempts to prohibit such action."[330] As with unlimited conventions, a limited convention would have to seek ratification from the public. If delegates went beyond the limits set their proposed changes might face rejection at the ballot box. Even if constitutional conventions could in theory be limited, Hawai'i cannot explore limited conventions until the language in Article XVII is changed. In order to do that, such a change must go through the legislature or a con con.

2. A constitutional revision commission would provide thorough review and expertise

State constitutional law scholars have long suggested that constitutional commissions are a needed tool for constitutional revision.[331] Some have suggested that appointed, permanent commissions might replace the convention as the primary means for revising the constitution or approach could be partnered with the convention and used to augment and focus a constitutional convention's discussions.[332]

Commissions have been utilized in a handful of states, yet have received constitutional status only in Florida.[333] The use of a constitutional commission does have some precedent in Hawai'i: A three-member commission revised the monarchy's 1852 constitution, the territorial legislature appointed a commission to examine issues of governance in advance of statehood, and the Legislative Research Bureau provided commission-like functions prior to the 1968 and 1978 conventions.[334] The 1978 Con Con rejected a proposal to establish a commission in the constitution, but recommended that the legislature investigate creating one by statute.[335]

Commissions are similar to con cons in several important ways: They operate independently of the legislature and have the task of reviewing the whole constitution, rather than proposing individual amendments. The big advantage that commissions have over constitutional conventions is time.

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[330] *See* HOAR, *supra* note 16, at 15.

[331] *See* Benjamin & Gais, *supra* note 6, at 74-75; MELLER, *supra* note 18, at 148.

[332] *See* Williams, *supra* note 15, at 23 n.102. Others, however, believe that the decline of the con con led to the initiative becoming the "preferred mechanism for ensuring that the governments reflect the popular will." G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, *in* DEMOCRACY: HOW DIRECT? 87, 97 (Elliott Abrams ed., 2002).

[333] Williams, *supra* note 15, at 6.

[334] *See generally* Ira Rohter, *Hawaii, Get Ready for 2010 Con Con*, HONOLULU STAR-BULLETIN, May 6, 2007, at E4, *available at* http://archives.starbulletin.com/2007/05/06/editorial/special.html (describing planning done by the Legislative Research Bureau and others prior to the 1968 convention).

[335] 1978 Debates, *supra* note 168, at 109-12.

Because of its small size, a commission can meet for longer periods at lower cost than a constitutional convention.[336] Time constraints, including deadlines to vacate the meeting locations and to place proposals on a ballot, limited discussion at the 1968 and 1978 conventions. These constraints tended to sabotage the deliberative process. "A lot of the times the changes were made without enough thought," Joe Souki, a 1978 delegate who later served in the Legislature, told *The Honolulu Advertiser*. "We were there for 90 days, it was mostly lay people like myself, and we sometimes did not understand the ramifications of the changes we were making."[337] The lack of deliberation was a reason why Thomas Hamilton, a delegate and former president of the University of Hawai'i, supported the commission in 1978. He told other delegates then:

> Fairly early in the Convention I found myself due at three committee meetings at the same time, not having read hundreds of proposals, trying to write proposals of my own, and all this while answering telephone calls from constituents.
>
> It occurred to me that this was a hell of a way to run a railroad, let alone amend a constitution.[338]

With fewer members, a commission can discuss issues in-depth but make recommendations quickly.[339] The fact that the members are appointed and not elected is both an advantage and a drawback. The legislature is free to appoint the community's most brilliant and thoughtful, but it may not chose to do so and could instead handpick commissioners who share their interests or who will be beholden to the legislators who appointed them.[340]

Commissions might also be less successful than a convention in generating public involvement because they are less visible.[341] While states are relying more on these advisory bodies, only Florida's constitutionally mandated commission can put issues directly on the ballot without the legislature's approval.[342] Absent the ability to put measures on the ballot, a commission cannot bypass the legislature. In effect, a commission thus acts only as an auxiliary of the legislature, which can exercise its constitutional power to propose amendments for ratification. By substituting a revision commission for a convention, states miss the opportunity to bypass the legislature.

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[336] *See* Williams, *supra* note 15, at 20.
[337] Miller, *supra* note 241, at A1.
[338] 1978 Debates, *supra* note 168, at 110.
[339] *See* STURM, *supra* note 14, at 33.
[340] *See id.*
[341] *See id.*
[342] Benjamin, *supra* note 10, at 191.

VIII. CONCLUSION

Constitutional conventions have gained mythic status as "the personification of the sovereign people assembled for the discharge of the solemn duty of framing their fundamental law."[343] Pressures of time, money, and politics, however, have diminished their potential as a deliberative force in Hawai'i. Single-interest groups, powerful lobbies, and voter disinterest have led Hawai'i voters to reject the con con four times in the last thirty-two years.

Despite the large margin between con con opponents and proponents in the 2008 election, the mandatory question neither provides a clear verdict on how Hawai'i voters feel about the constitution or the current legislature nor does it present a clear agenda of what changes people want to discuss. By altering the mechanisms for constitutional change to include an active study commission, the state could have more information about what voters really think about the constitution. When coupled with the procedural changes mentioned above, Hawai'i could revive the deliberative process as envisioned by Jefferson and placed in Hawai'i's "Hope Chest" constitution a half century ago.

Amy K. Trask[344]

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[343] Harvey Walker, *Myth and Reality in State Constitutional Change*, *in* MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 315 (W. Brooke Graves ed., 1960) (quoted in Williams, *supra* note 15, at 23 n.102).

[344] J.D. Candidate, December 2008, University of Hawai'i at Mānoa. The author extends her appreciation to Anne Feder Lee for her comments and to her family, especially Carl and Grace.

Book Review

Honoring the Law and Restoring a Nation

WHO OWNS THE CROWN LANDS OF HAWAI'I? By Jon M. Van Dyke. Honolulu: University of Hawai'i Press. 2008. Pp. vii, 485. $28.00.

Reviewed by Kekailoa Perry* & Jon Kamakawiwoole Osorio**

I. INTRODUCTION

Professor Van Dyke's book[1] is one of those unusual literary works that has all of the elements of good scholarship—solid research, a clear focus, rational and credible theory as well as a compassionate approach to a significant issue for the indigenous people of Hawai'i—and still ends up being a pretty fair disappointment. While acknowledging that some critics will charge that the ceded lands belong to the American residents of the State of Hawai'i and that Van Dyke is at the same time misrepresenting the law and helping to foment a divisive political climate in the Islands, we argue that his research points to a substantially different conclusion than he presents.

We will acknowledge first our limitations. Only one of us, Professor Perry, has a law degree and neither of us has ever practiced law. On the other hand, Van Dyke is not a trained historian, nor is he versed in Hawaiian (*'Ōiwi*) cultural practice, including Hawaiian language. These caveats are important as we critique the author's reading of law while holding him accountable for his read of *'Ōiwi* society.

Van Dyke needs to be accountable because this book is not just a legal analysis but a prescription for settling a long-standing conflict between the Hawaiian Kingdom (Kingdom) and the United States over the colonization of Hawai'i in 1900 and the theft of over two million acres of Kingdom lands in 1898. It is the prescriptive nature of this work that really deserves our attention

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[1] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008).

notwithstanding the extreme value of Van Dyke's research and explanations of law.

As to the value of this research, we would point out that there simply is no other textbook that provides such a comprehensive history of legislation and judicial review of land in Hawai'i. In most cases Van Dyke provides careful and well-reasoned analysis of how property is created and conveyed, relying heavily on good *Kanaka Maoli*[2] scholarship as well as a very thorough review of court and legislative documents. His judicious analysis of the United States Court of Claims' dismissal of Queen Lili'uokalani's claim to the Crown Lands as well as his opinion about the failure of the U.S. Supreme Court to properly understand *Kanaka Maoli* legal history in *Rice v. Cayetano*[3] are worth reading and teaching.

II. THE CONVENIENCE OF LAW AND THE ABSENCE OF THE *'ŌIWI*

Van Dyke does considerably better when he confines his analysis to the courts' actual deliberations rather than trying to really account for *Kanaka Maoli* actions. For instance, his dismissal of Ruth Ke'elikōlani's "sale" of her share of the Crown Lands to Claus Spreckles as an "odd episode"[4] really misses the point that the Princess, at that point, was already the largest single landowner in the Kingdom with a cavalier attitude toward money and western possessions. Suggestions that she was not herself a true heir of Kamehameha and that she was wholly inappropriate to be the ruler would have only encouraged her to embarrass the King, the government, and the *haole*[5] financial operatives—and make a little money on the side while she did it—all with one brilliant maneuver. Van Dyke's suggestion that "she didn't understand the details of the sale or the claim"[6] sounds exactly like the charge that she was not very bright because of her refusal to speak English. She was smart enough to amass more land than anyone but King Lunalilo I and to leave it intact for Princess Bernice Pauahi Bishop and the generations that Pauahi would serve.[7]

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[2] Although the Hawaiian Language Dictionary describes "*Kanaka Maoli*" as a "[f]ull-blooded Hawaiian person," rather few people in Hawai'i understand the word that way. *Kanaka Maoli* today means anyone of Hawaiian ancestry regardless of things like physical appearance or blood quantum. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127 (rev. ed. 1986).

[3] 528 U.S. 495 (2000).

[4] VAN DYKE, *supra* note 1, at 110.

[5] "*Haole*" is a "[w]hite person, American, Englishman, Caucasian." PUKUI & ELBERT, *supra* note 2, at 58. *Haole* is also considered a foreigner or having a Western perception.

[6] VAN DYKE, *supra* note 1, at 106.

[7] Princess Pauahi, through various land acquisitions, amassed 375,500 acres and set up one of the largest private land trusts in the country called The Bishop Estate, now known as Kamehameha Schools. Kamehameha Schools, Ke Ali'i Bernice Pauahi Paki Bishop (1881-

But we do not mean to be harsh. In arguing that the Crown Lands, and not the government lands, are legally, morally, and politically the property of the *Kanaka Maoli* people, we know that Van Dyke wants real justice to be a part of whatever settlement takes place between the United States and *Kanaka Maoli.* Considering what many of us Hawaiian nationals fear, that a federal recognition bill will likely come with a land base limited to the Hawaiian Homelands[8] and Kaho`olawe,[9] Van Dyke's argument that close to a million acres of Crown Lands *and* perhaps the *Ali`i* trust lands[10] should be considered the property of the *Kanaka Maoli* might frame as unreasonable the assertion that all of the ceded lands belong to the Hawaiian nation.

But we need to ask: What part of law may we dispense with when law is inconvenient? Van Dyke believes, as do we, that the constitutional government of the Kingdom was designed and approved by Kauikeaouli[11] and the chiefs in order to protect the *ea*, the sovereignty, of the *lāhui*, the nation. He argues convincingly that a large part of the motivation for legislating the Māhele was

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1834), http://www.ksbe.edu/pauahi (last visited Nov. 9, 2008).

[8] The Hawaiian Homelands are approximately 200,000 acres set aside by the federal government for homesteading by Native Hawaiians. Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921), *reprinted in* HAW. REV. STAT. §§ 202-206 (1993).

[9] Kaho`olawe is the smallest of the eight main volcanic islands of Hawai'i. In 1993, the Kaho`olawe Island Reserve was established by the Hawaii state legislature which provides in pertinent part that:

> Upon [Kaho'olawe's] return to the State, the resources and waters of Kaho'olawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.

HAW. REV. STAT. § 6k-9 (2007); *see also* WALTER RITTE JR. & RICHARD SAWYER, NA MANAO ALOHA O KAHOOLAWE xi-xiii, 27 (1978).

Kahoolawe became a focal point for the native Hawaiian spiritual, cultural and political reawakening during the Hawaiian Renaissance of the 1970's. The struggle culminated around the native Hawaiian belief that land is the ancestor of the people and must be protected from desecration by US military bombing practices. Many native Hawaiians suffered great pains to stop the bombing but perhaps none more than leaders George Helm and Kimo Mitchell who lost their lives accessing the island while it was still an active firing range for the US military.

While the bombing has ended, the words of George Helm continue to guide us into the future:

> It is my moral responsibility to attempt an ending to this desecration of our sacred 'aina, [Kahoolawe]. Each bomb dropped adds further injury to an already wounded soul. The truth is, there is man and there is environment. One does not supersede the other. The breath in man is the breath of Papa (the earth). Man is merely the caretaker of the land and maintains his life and nourishes his soul. Therefore 'aina is sacred . . . My duty is to protect Mother Earth, who gives me life.

Id. at 27.

[10] The *Ali'i Nui* made the Native Hawaiian people beneficiaries of their trusts out of "concern and aloha." VAN DYKE, *supra* note 1, at 343.

[11] King Kamehameha III.

to protect property if international recognition of our nation was not sufficient to protect us from foreign adventurism. Citing the 1993 Apology Resolution,[12] he states (somewhat less forcefully than we would), "if the overthrow of the Kingdom was illegal, then the subsequent transfer of Hawai'i's 'public domain' must also have been of questionable legality."[13] Knowing this, what should *Kanaka Maoli* perceptions of the takeover and the federalization of our government lands and the property of our monarchs be except that the United States cared nothing about law?

The inconvenient truth about the Kingdom is that the chiefs, rulers, and people of these islands created a constitutional monarchy, participated as democratically elected legislators, appointed officials and judges, and made decisions about the Crown Lands that by law they were entitled to make. Yes, even if the Lunalilo Trust was improperly administered by trustees intent on selling his estate and with the complicity of a Supreme Court Justice who should have recused himself;[14] even if it was a poorly written or executed will, it was the Kingdom's problem to deal with, and the Kingdom certainly possessed the legislative and judicial authority to do so. But by what law did the U.S. Court of Claims have juridical power over the Crown Lands of Hawai'i when it ruled that Lili`uokalani had no claim to those lands after being deposed?[15]

Even as Van Dyke acknowledges that the law becomes hazy when political opportunity enters into the picture, he falls into that trap himself when he suggests in his last chapter that the *Ali`i* trusts might also be considered a part of a reorganized Hawaiian nation. One wonders, then, if only participants in that "Hawaiian entity" would be beneficiaries of the trusts, and if those Hawaiian nationals who refused to participate would be excluded. When the *Ali`i* made their wills there was no distinction between Native Hawaiian and Hawaiian citizen, and only the illegal seizure of our Kingdom and centuries of U.S. obsession with race created such legal havoc here in trying to determine who are the legitimate beneficiaries of the trusts.

While we do find significant areas of departure, there is value in Van Dyke's Crown Lands analysis and even more usefulness in his attempt to counter the misconceptions developed over the years by the U.S. judicial system, especially as it relates to the recently certified case of *Hawaii v. Office of Hawaiian Affairs*[16] relating to Hawaiian ceded lands.

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[12] Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

[13] VAN DYKE, *supra* note 1, at 235.

[14] *Id.* at 331.

[15] *Id.* at 231-35.

[16] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 117 Hawai`i 174, 177 P.3d 884 (2008), *cert. granted sub nom.* Hawaii v. Office of Hawaiian Affairs, 2008 WL 1943423 (U.S. Oct. 1, 2008) (No. 07-1372).

III. CROWN LANDS AND THE MYTH OF HAWAI'I'S PUBLIC LANDS

The Crown Lands of the Kingdom are stolen lands. The Crown Lands were established by the Great Māhele of 1848, legally managed as a life estate for the *mō'ī*[17] and later snatched and commingled with the Kingdom by an illegal overthrow in 1893.[18] The theft was challenged on several occassions but fell victim to the political will and greed of the puppet regimes that maintained power over the Kingdom, namely, the provisional government and Republic of Hawai'i.[19]

The subsequent prolonged, belligerent occupation of Hawai'i[20] by the United States contributed to the repackaging of the Crown Lands into a new myth that essentially charactarized the lands as seized and controlled through the forces of imperialism for the noble purpose of serving the needs of the U.S. government and its people.[21]

The myth of the Crown Lands steers many lay scholars and academics toward a legal and political debate over its status as government or public lands. The problem with such a debate is that the law becomes an enabling tool for a political maneuver that takes away from a much more intimate *'oiwi* review of the status of the Hawaiian government and its lands.

Working within the new myth places the dialogue on Hawaiian land tenure and political status into the arms of further U.S. occupation. Understandably, discussions relating to land tenure in Hawai'i are complex. Nevertheless, a complete examination is possible and attempts have been made to expand the analysis beyond the layers of colonial propaganda and legal debris that now clutter the shelves of Hawaiian history and politics. Unfortunately, in most cases the analysis has a tendency to focus on the dominant ideology that the lands stolen during the overthrow have now somehow transitioned into a body of legitimate, government controlled, public lands.

Challenges to the prevailing legal and political scholarship on Hawaiian land tenure are too often couched into a debate on "sovereignty and self-determination" or "Hawaiian rights" or cast aside as poor, extreme and emotional rants. Once marginalized, the greater debate is unheard.[22] Yet, the

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[17] "*Mō'ī*" is a "[k]ing, sovereign, monarch, majesty, ruler, [or] queen." PUKUI & ELBERT, *supra* note 2, at 251.

[18] LILIKALĀ KAME'ELEIHIWA, NATIVE LANDS AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 15-16 (1992); SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW (2000).

[19] David Keanu Sai, *A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison Between Hawaiian State Sovereignty and Hawaiian Indigeneity and its use and Practice in Hawaii Today*, 10 J.L. & SOC. CHALLENGES 68, 101, 109 (2008).

[20] *Id.* at 127-29.

[21] *Id.* at 103, 117; *see generally* KAME'ELEIHIWA, *supra* note 18.

[22] Haunani-Kay Trask, *From a Native Daughter*, *in* FROM A NATIVE DAUGHTER 113-15,

silence presents a new occassion or test for many to step out beyond the safety of the prevailing attitudes. Unfortunately for some, the addage that there is "safety in numbers" lessens any chance to challenge the myth, broaden the debate, and deligitimize the theft of the Crown Lands.

Thus, the power of the Crown Lands myth prohibits any meaningful dialogue and directs many into the well tred comfort zone of political and legal precedent in Hawai'i holding us hostage from developing a more thorough answer to the questions posed in Van Dyke's well developed book.

IV. THE UNASSUMING COUNTER NARRATIVE

Van Dyke's analysis of the Crown Lands is a valuable tool. It is a counter narrative[23] to the onslaught of "*puka*" scholarship[24] developed in vacuums that use incomplete historical evidence or legal rationale to justify a blanket theft of the Crown and Kingdom lands and their subsequent transformation into a "public use" regime. Retired Chief Justice of the Supreme Court of Hawai'i,

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121 (1993); Haunani-Kay Trask, *Racism against Native Hawaiians at the University of Hawai'i: A Personal and Political Point of View*, *in* FROM A NATIVE DAUGHTER 151.

Professor Trask argues that Western value systems imposed in Hawai'i through U.S. colonialism celebrates Western dominance while devaluing, and thereby silencing, the Hawaiian voice, rendering much of Hawaiian politics and history an untold story. Trask also notes that engaging the counter narrative often times forces the native to purposefully resist hegemonic scholarship through public debate which leads to censure of the "outspoken" native. *See also*, Williamson B. C. Chang, *The Wasteland in the Western Exploitation of Race and the Environment*, 63 U. COLO. L. REV. 849, 850-53 (1992) (asserting that there is an inability to find solutions to racism and environmental destruction and other cultural models of justice because Western thought impedes on meaningful analysis with circulatory and self-referencing arguments).

[23] Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, *in* CRITICAL RACE THEORY: THE JUDICIAL ISOLATION OF THE "RACIALLY" OPPRESSED 311 (E. Nathaniel Gates ed., 1997). The article argues that the law, as it applies to native cultures, introduces a conflicting system of meaning that "renders" the native meaning and understanding of the world "unintelligible." *Id.* at 315. Van Dyke, in various attempts throughout his book, assists the native voice politically by telling important aspects of the Hawaiian story that are ignored or severely marginalized by the present courts. Van Dyke thereby creates a counter narrative yet he does not fully relinquish the power wielded by the myth of U.S. colonial control over Hawai'i.

[24] Here we use a term embraced by Professor Perry to describe a style of persuasive story telling and narrative utilized by Western academics (and in this case the U.S. Supreme Court in the *Rice* decision) that conveniently extrapolates only the most relevant episodes of history in order to conjure a more flattering tale of American superiority and rationality in their performance as a benevolent political savior in Hawai'i. The "*puka*" or hole references the absence of the aboriginal voice and the retelling of Hawai'i's political history through a very limited window of understanding and an unfinished patchwork of historical events.

William S. Richardson,[25] suggests as much in his foreward to the book when he states that "the challenge of bringing coherence to the law that governs Hawai'i remains unfinished, largely because the claims of the Native Hawaiian people remain unresolved. This book should move this process forward, because it explains with clarity and detail what has happened to the Crown Lands and why the Native Hawaiians still have a srong claim to all of these lands."[26]

Van Dyke himself claims that the book serves as "a resource for those concerned about how to bring about a fair resolution of some of the disputes haunting Hawai'i," and it is hoped that "a review and re-examination of the rich historical tapestry that has led to the present conundrum might help to promote the 'reconciliation' called for by the U.S. Congress in the 1993 'Apology Resolution.'"[27]

The issue here is not the status of the Crown Lands itself but the effort this book makes to challenge the foundation set by the Supreme Court relating to the status of our government and nation. Therein lies the value of Van Dyke's narrative: He succinctly exposes the political motivation of the Justices (less the dissenting opinions of Justices Ginsburg and Stevens) to complete Hawai'i's transformation from an occupied, indoctrinated nation to a cosmopolitan, racially integrated extension of democratic America.

For our analysis, it is important to note how the book takes the U.S. Supreme Court to task by distinguishing its lackluster scholarship of Hawaiian political and cultural history and filling the "*puka*" that leaves much of the *Rice v. Cayetano*[28] decision inaudible to any half-knowing reader of Hawaiian history. Understanding the Court's language and Van Dyke's counter prose should prove useful during the next round of legal gamesmanship in the *Hawaii v. Office of Hawaiian Affairs* deliberation.

The almost complete absence of Hawai'i's complex and compelling political history in the *Rice* decision (and other similarly significant cases laid out in Van Dyke's analysis) forecloses any reasonable ability for the Hawaiian story to be told. More importantly, the book's critique of the key judicial opinions in chapters twenty-three and twenty-four "permitted only a limited kind of cultural vision, one from the perspective of the dominant culture."[29] Van Dyke's analysis, then, "articulates cultural differences" and distinguishes the dominant

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[25] Chief Justice of the Hawai'i Supreme Court from 1966 to 1982. *See* William S. Richardson School of Law, About William S. Richardson, http://www.hawaii.edu/law/site-content/about-us/about-william-s-richardson/index.html (last visited Nov. 7, 2008).

[26] VAN DYKE, *supra* note 1, at ix.

[27] *Id.* at 375 (citing Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993)).

[28] 528 U.S. 495 (2000).

[29] *See* Torres & Milun, *supra* note 23, at 318.

application of U.S. hegemony, via its laws and incindiary political history against the integrity of the Hawaiian nation state.[30]

Of course, Van Dyke's approach is more benign than many and takes issue with the Supreme Court in subtle terms when he notes that "[a]lthough one can point out serious problems with many of the details listed in the Court's historical summary and the way it presented them, it is significant nonetheless that the Court's majority acknowledged the enormous social dislocation that Native Hawaiians experienced."[31] And, in a valiant effort to see the Court's opinion as "half-full," Van Dyke also posits that the majority's decision in *Rice* provided Hawaiians a "road map" to follow for future success in the legal arena.[32]

As hopeful as we are of a just outcome in *Hawaii v. Office of Hawaiian Affairs*, the *Rice* road map comes with a genealogy of meaningless laws and unfulfilled dreams. Perhaps a large part of our pessimism is due to the limited flexibility of the law when applied in this situation. Yet Van Dyke seems to gush with optimism when he interprets the precedent set in the *Rice* majority decision as providing "the essential underpinning for the conclusion that Native Hawaiians are entitled to the same legal status as other native people within the United States and that rational-basis . . . judicial review "should apply to programs for Native Hawaiians."[33]

Unfortunately, the hopeful exuberance of the book is clouded by our understanding of how the anti-discrimination principles of the Fourteenth Amendment become constitutive elements of U.S. dominance, limits native discourse and furthers the subjugation of Hawaiians in the first place.[34]

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[30] ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 44, 90-97 (1999). Generally, Yamamoto asserts that "[c]ulture also plays a closely related representational role in racial oppression. Through language, particularly social narratives, culture constructs societal 'truths' about groups which in turn legitimate public and private actions." *Id.* at 95. In his book, Van Dyke exposes the language of the Supreme Court's history in *Rice* and juxtaposes it with the language of the Kingdom's laws. In the quest for reconciliation, Van Dyke shows, rather unintentionally, how the Court's exposé is a rhetoric of subjugation and continued cultural annihilation.

[31] VAN DYKE, *supra* note 1, at 276-77 (citations omitted).

[32] *Id.* at 278.

[33] *Id.* at 279. Van Dyke also provides a plausible but unlikely argument suggesting that Hawaiian claims to land and political recognition are sufficient rationale to overcome the Strict Scrutiny test of the Fourteenth Amendment. *Id.* at 290-93. Nevertheless, it should be noted that Chief Justice Roberts made those arguments on behalf of the Office of Hawaiian Affairs as OHA's lead attorney in *Rice* and thus it may be argued that his court may be better suited to entertain such a stance. *Id.*

[34] *See generally* Cornel West, *forward* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxv (Kimberlè Williams Crenshaw ed., 1995). The authors argue that racial power is "a product of judicial decision making and the sum total of the pervasive ways in which law shapes and is shaped by 'race relations' across the social plane." The aboriginal

Through this lens, we realize that the discriminating power of the Court, as evidenced by its decision in *Rice*, can be produced even from within a quasi-centrist discourse painstakingly laid out in Justice Kennedy's majority opinion.

The most telling point of Van Dyke's legal argument is, in fact, political. He notes that, overall, the *Rice* majority opinion was cognizant of the Hawaiian need to be a politically recognized, self-determining people. Van Dyke comes to this conclusion by pointing out that the Court recognized a wrong had been done to the Hawaiian nation and that a constitutional remedy should be found.[35]

Van Dyke further states that it "would be too absurd to conclude that the Court has imposed a 'Catch-22' situation on the Native Hawaiians whereby any effort to address the taking of their lands and sovereignty would violate the U.S. Constitution."[36] Yet, the silence of the Court in the *Rice* decision essentially opened the door to further lawsuits against both public and private Hawaiian trusts, motivated the State of Hawai'i to allow non-Hawaiians to run for Office of Hawaiian Affairs (OHA) elected office, and created a shivering effect with respect to publicly funded Hawaiian programs.

In essence, Hawaiians are asked to assert their rights in cases like *Rice* and *Hawaii v. Office of Hawaiian Affairs* to change what we consider to be an oppressive situation only to place ourselves under further misinterpretation and dominance of that judicial and/or political body. In sum, the potential for change is both created and limited by the legitimacy we give to the Court and the U.S. legal system.[37] The question is how far do we intend to bend to maintain our self-dignity and survival without giving up our soul and nation.

Born from the legal remedy comes the political remedy: to gain federal recognition through the Akaka Bill.[38] As the book clearly directs, all roads lead to the melding of Hawaiian claims for sovereignty through the distorted legal and political history most acceptable to the courts and Congress, and by extension, the State of Hawai'i.

Hawaiian arguments made in *Rice* and subsequent federal cases have urged the courts to identify Hawaiians as having a "political status" likening them to American Indians. While the argument was lucrative in the 1970's and 80's, the political tide has changed to represent the larger social need to rein in the political claims such as those made by Hawaiians.

[35] VAN DYKE, *supra* note 1, at 284.

[36] *Id.*

[37] Kimberlè Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 34, at 112.

[38] Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (2007). *Kanaka Maoli* advocates of the Akaka Bill are optimistic of the Bill's passing this session (2009) in light of Hawai'i Senator Daniel K. Inouye's acquisition of the powerful Senate Appropriations Committee chairmanship, his political support for the Bill and the current majority of Democrats in the Legislative and the Executive branches of government.

Van Dyke provides a greater historical and political reference for the courts to honor and adopt in the legal principles that will undoubtedly change the political landscape of Hawaiian institutions and people. The research is both thorough and insightful. However, Van Dyke suggests a limited, almost indifferent approach as a solution: an approach that would have Hawaiians celebrate civil rights gains through federal recognition while accepting our continued subordination as a legally recognized political subclass or native ward of the U.S. in our own homeland.

V. CONCLUSION

Neither of the authors will argue that nothing less than the restoration of our Kingdom and the immediate departure of all agents of the United States from our shores is the only possible just solution. However, we likewise cannot accept the suggestion of a solution that is not rooted in some respect for law. Unarmed and outnumbered in our homeland, law is the only power we can still wield. Indeed, while some people may find the insistence on the restoration of the Kingdom difficult to understand, the simple truth is that it is the clearest path to an end that actually honors the law.

In the end, this book succeeds in some very important ways. It is unlikely that Van Dyke could have done such thorough research and taken such a broad approach to this study if he was not trying to frame his own political vision. We cannot belittle his work for that vision, and we certainly believe that its scope and detail make it a most worthy enterprise. However, we will teach it with some important caveats. Like so much scholarship written about and for Native peoples by a well-meaning and well-informed outsider, this book contains important information, but ultimately it is our history and our nation that is at stake. *Kanaka Maoli* will find Van Dyke's book useful, regardless of whether we find his ultimate propositions satisfactory.

Book Review

A Very Durable Myth: A Critical Commentary on Jon Van Dyke's *Who Owns the Crown Lands of Hawai'i?*

WHO OWNS THE CROWN LANDS OF HAWAI'I? By Jon M. Van Dyke. Honolulu: University of Hawai'i Press. 2008. Pp. vii, 485. $28.00.

Reviewed by Paul M. Sullivan[1]

I. INTRODUCTION

The title question of Professor Jon Van Dyke's recent book *Who Owns the Crown Lands of Hawai'i*[2] does not require a book to answer. The answer is simple and not seriously contested, even in Professor Van Dyke's book. Some of the Crown Lands with which the book is concerned[3] are owned by the United States Government,[4] and the rest are owned by the State of Hawai'i.[5]

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Portions of this article were originally published in Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99 (1998) [hereinafter Sullivan, *Customary Revolutions*], and Paul M. Sullivan, *"Recognizing" the Fifth Leg: The "Akaka Bill" Proposal to Create a Native Hawaiian Government in the Wake of* Rice v. Cayetano, 3 ASIAN-PAC L. & POL'Y J. 308 (2002), *available at* http://www.hawaii.edu/aplpj/articles/APLPJ_03.2_sullivan.pdf [hereinafter Sullivan, *"Recognizing" the Fifth Leg*].

[2] JON VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008).

[3] Some of the original Crown Lands were sold at various times and are now in private hands, but those lands are not the focus of Professor Van Dyke's book.

[4] The title of the United States derives from the cession of the Crown Lands and other government lands of the former Kingdom of Hawai'i by the successor Republic at the time of annexation. Through the Newlands Resolution, Act of July 7, 1898, 30 Stat. 750, Congress accepted the cession by the Republic of Hawai'i to the United States of "the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining." Act of July 7, 1898, 30 Stat. 750; United States v.

They are former lands of the Hawaiian monarchy—about 940,000 acres in extent or about one-quarter of the lands within the state's boundaries[6]—ceded

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Mowat, 582 F.2d 1194, 1206 (9th Cir. 1978), *cert. denied*, 439 U.S. 967 (1978); *see also* Bishop v. Mahiko, 35 Haw. 608 (1940). This grant was subject to the proviso:

> That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Act of July 7, 1898, 30 Stat. 750; *see also* Arakaki v. Lingle, 477 F.3d 1048, 1057 (9th Cir. 2007).

[5] The State of Hawai'i's title derives from the Hawai'i Admission Act, Hawai'i Admission Act of 1959, Pub. L. No. 86-3, § 1, 73 Stat. 4 (codified as amended at 48 U.S.C. § 491), by which the Territory of Hawai'i was admitted as a State of the United States. Subsection 5(b) of the Act provides:

> Except as provided in subsections (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as 'available lands' by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

Id. § 5(b), 73 Stat. at 5. Subsections (c) and (d) of the Act provided for the reservation or setting aside of certain portions of the ceded lands for the United States. *Id.* § 5(c), 73 Stat. at 5. Subsection (g) of the Act confirms that the term "lands and other properties" as used in the Act:

> [I]ncludes public lands and other public property, and the term public lands and other public property means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898, or that have been acquired in exchange for lands or properties so ceded.

Id. § 5(g), 73 Stat. at 6.

The title of the State of Hawai'i is subject to a trust obligation set out in subsection 5(f) of the Admission Act as follows:

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such 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 said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Id. § 5(f), 73 Stat. at 6.

[6] VAN DYKE, *supra* note 2, at 216.

to the United States at annexation in 1898 and in part further transferred to the State of Hawai'i at statehood in 1959.[7]

Instead of answering its title question, Professor Van Dyke's book offers passionate advocacy for its answer to a different question: Who should own Hawai'i's Crown Lands? Even for this question, however, a book is not needed to state or explain Professor Van Dyke's proposed answer. The book's concise thesis is that the Crown Lands should not be owned by the federal or state government, but instead should be placed in the hands of a Native Hawaiian nation or government (presumably by the state and federal owners and without compensation to either government) for the use and benefit of "the Native Hawaiian People."[8] The book presents a wealth of information on

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[7] Strictly speaking, there are no longer any "Crown Lands." The term is used for convenient reference, but the former Crown Lands of the monarchy were merged with the other public lands of the kingdom and ceded to the United States when Hawai'i was annexed to the United States in 1898, and they have the same legal status as other ceded lands. For information on the ceded lands in the context of Native Hawaiian claims such as those asserted in Professor Van Dyke's book, see 1 NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 333-70 (1983), *available at* http://wiki.Grassrootinstitute.org/mediawiki/index.php?title=Native_Hawaiians_Study_Commission_Report (report made pursuant to Native Hawaiians Study Commission Act, Pub. L. NO. 96-565, 94 Stat. 3321 (1980) (codified at 42 U.S.C. § 2991a), and concluding that Native Hawaiians had no valid legal claims)). *But see* dissenting view in 2 NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 7-11, 80-99 (1983) (proposing moral rather than legal bases for reparations).

[8] Strictly speaking, there is no "Native Hawaiian People" except in the sense of a racial group whose members are defined as having at least one pre-contact Hawaiian ancestor; that is, one ancestor approximately nine generations ago who lived in the Hawaiian islands. A person could qualify for this group with as little as 1/512 pre-contact ancestry. *See* Rice v. Cayetano, 528 U.S. 495, 527 (Breyer, J., concurring); *see also infra* note 130 and accompanying text.

The legal classifications "native Hawaiian," "Hawaiian" and "Native Hawaiian" are creatures of statute. In 1921, Congress passed the Hawaiian Homes Commission Act (HHCA), Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921), which created a Territorial homesteading program for "native Hawaiians" (note the lower case "n" in "native"), defined in HHCA section 201(7) as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Id.* § 201(7), 42 Stat. at 108. The term appears again in the Hawaii Admission Act which lists "the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended" as one among five permissible uses of certain lands transferred from the United States to the newly-formed State of Hawai'i. Hawaii Admission Act of 1959, § 5(f), 73 Stat. at 6. A similar definition of "native Hawaiian" appears in the Hawaii Revised Statutes as it related to the Office of Hawaiian Affairs which defines "Native Hawaiian" as:

> [A]ny descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Hawai'i's constitutional and legal history, but nearly all of that is peripheral to its simple and straightforward argument that (1) in the mid-nineteenth century, when Hawai'i's land was being divided among the King, the government, the chiefs and the commoners, the lands allocated to commoners under the law of the kingdom were less than their proper share under the custom of the kingdom; (2) that the lands reserved by the king at that time as his private property, called the Crown Lands under the monarchy and owned now by the United States or the State of Hawai'i, were held by him and by the succeeding Hawaiian monarchs in trust for the kingdom's native commoners; and (3) that these lands should now be made available to the Native Hawaiian People, defined solely by race, perhaps through a newly-formed Native Hawaiian government, to redress this asserted historical error.

Professor Van Dyke's book does not state that all or any individual Native Hawaiians today have straightforward claims to the Crown Lands which could and should be adjudicated in a court. If there had been any valid claims of this sort, it might be supposed that they would have long ago have been presented and adjudicated. No argument is presented that chains of title, or adverse possession, or any other traditional legal grounds for judicial resolution of issues of title to real property prove, or even suggest, that most or all persons of Hawaiian ancestry have current valid claims to these lands.[9]

Instead, while the book speaks much of law and history, it advocates a political change. One might grumble that it lacks the rigorous discipline and balance of a legal treatise or a work of historical scholarship, but that is not the book's purpose, and its real shortcoming is not that it is unscholarly, but that its

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HAW. REV. STAT. § 10-2 (1993 & Supp. 2007).

"Hawaiian" is defined as: "[A]ny descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.*

The term "Native Hawaiian" (upper case "N") is used in federal law and usually defines "Native Hawaiian" as anyone with at least one pre-contact Hawaiian ancestor. *See, e.g.*, Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000); Apology Resolution of 1993, Pub. L. No. 103-150, 107 Stat. 1510.

In these definitions, the operative test is purely one of race, or as the Court put it in *Rice v. Cayetano*, ancestry used as a proxy for race. There are no other nonracial or race-neutral criteria such as membership in a tribe, residence within a geographic region or adherence to a particular religion or lifestyle which makes one a "Native Hawaiian."

[9] At pages 292-94 of his book, Professor Van Dyke argues that Native Hawaiians have a "collective property right that is cognizable under U.S. law," VAN DYKE, *supra* note 2, at 292-94, but this concept is not developed and there is no discussion which indicates that a lawsuit seeking recognition of this "collective property right" would have any likelihood of success. Two possible bases of such collectivist claims deriving from federal law concerning American Indians—aboriginal title and recognized title—were examined in detail in the 1983 Native Hawaiians Study Commission report and found to be inapplicable. 1 NATIVE HAWAIIANS STUDY COMMISSION, *supra* note 7, at 333-45.

advocacy does not withstand probing examination. What the book proposes is a giveaway of state and federal public property in a race-conscious manner in order to radically change a 160 year old race-neutral land reform program with which the United States had nothing to do, conducted by a foreign government —the Kingdom of Hawai'i—pursuant to its own validly-enacted laws, which achieved very legitimate objectives for the kingdom and its populace largely through the benevolent supervision of a visionary monarch. Professor Van Dyke's book simply does not show that either the federal government or the State of Hawai'i has any reason or any authority to pursue such an endeavor.

The book does show that there was some unfairness in the kingdom's original division of its lands, but this unfairness consisted for the most part of individual acts of misfeasance, fraud or favoritism, both by native leaders and some immigrants, contrary to the law of the kingdom, toward individual claimants or groups of claimants and had nothing to do with the racial background or ancestry of any of the participants or any action or inaction by the United States.[10] It also shows that nearly all of the lands distributed in the original partition went into native hands (noble or commoner), and while a significant part eventually found its way thence, over time, into the hands of American and European immigrants, a great part of the most valuable of lands of the kingdom remains under Native Hawaiian control today.[11] Ironically, it even shows that contrary to the book's own thesis, Native Hawaiians do *not* have and never had any valid claim to the Crown Lands or other ceded lands, before or after the termination of the monarchy in 1893.[12]

II. A BRIEF HISTORICAL BACKGROUND

Professor Van Dyke's book provides a fascinating, broad-ranging survey of Hawai'i's legal and constitutional history. There is a romantic and sometimes sad character to that history which has influenced the development of both Kingdom law and United States law concerning the islands. Professor Van Dyke's book captures well these elements of the islands' history.

Hawai'i's first known contact with Western civilization occurred when Captain James Cook, exploring the Pacific for the British government, made landfall in the islands in 1778.[13] The story that followed was not one of

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[10] *See, e.g.*, VAN DYKE, *supra* note 2, at 32-50.

[11] *See, e.g., id.* at 307-15. Of the lands under Native Hawaiian control today, Kamehameha Schools "control[s] the largest collection of lands in Hawai'i except for those administered by the State Government," *id.* at 315, and other *ali'i* trusts. *Id.* at 324-43.

[12] *See infra* notes 54-79 and accompanying text.

[13] 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 12 (1938). Professor Kuykendall's three-volume work is the standard historical work on the Hawaiian monarchy. Other important historical works on the subject include JON J. CHINEN, THE GREAT MAHELE, HAWAII'S LAND

invasion and domination by European powers, but a story of immigration and assimilation on the part of both the pre-contact[14] inhabitants and the immigrants and visitors following Captain Cook.[15]

A. Societal and Governmental Changes After Western Contact

The first century or more after initial Western contact was deeply disruptive for many of Hawai'i's people.[16] Nevertheless, during the nineteenth century a remarkable transformation took place in which the pre-contact society of the islands undertook to change itself from an essentially stone-age Polynesian culture with an absolute monarchy and a feudal system of land management into a Western-style constitutional monarchy recognized as a political equal by the great powers of Europe and America. Within 75 years, literally everything which normally constitutes "culture" changed. All of the pre-contact concepts of religion, language, governance, education and economic relations were replaced or were modified to such an extent as to be wholly new.[17]

The revolutionary changes were not forced on the monarchs by either foreign invaders or the native populace. Instead, it was the monarchs and their most trusted advisors, both foreign and native, who led the transition. In 1819, it was the then-reigning monarch, Kamehameha II, together with some of the kingdom's highest-ranking women and the high priest, who decreed the abandonment of the religious *kapu* system and ordered the destruction of the temples and statues of the gods.[18] This change predated the arrival of Christian missionaries. However, when the missionaries did arrive a year later, they began their own quiet revolution by introducing Christianity to the islands, by giving Hawaiians a written form of their previously oral language, and by beginning a work of public education of all social classes.[19] The early kings found foreign teachers and advisors for themselves and foreign teachers for their royal children so that they and their successors would not be at a disadvantage in dealing with the naval and commercial visitors from powerful

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DIVISION OF 1848 (1958), and A. GROVE DAY, HAWAII AND ITS PEOPLE (1955).

[14] As used in this review, "pre-contact" refers to the inhabitants of the Hawaiian Islands before the discovery of the islands by English explorer Captain James Cook in 1778.

[15] *See generally* ELEANOR C. NORDYKE, THE PEOPLING OF HAWAI'I 18-27 (1989); GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS (1968); 1 KUYKENDALL, *supra* note 13.

[16] NORDYKE, *supra* note 15, at 18-27.

[17] Sullivan, *Customary Revolutions*, *supra* note 1.

[18] 1 KUYKENDALL, *supra* note 13, at 65-70. This element of the revolutionary changes of the 19th century was not peaceful. Chief Kekuaokalani, a cousin of Kamehameha II, organized an armed opposition to the abolition of the *kapu*. He was defeated in battle at Kuamo'o by the forces of Kamehameha II. *Id.* at 69.

[19] DAY, *supra* note 13, at 195-98.

European (and later Asian) nations.[20] This program of both royal and public education gave Hawai'i, by the mid-nineteenth century, a populace literate in Hawaiian and, increasingly, in English.[21] Economically, the pre-contact system of barter and subsistence agriculture was quickly supplemented and soon replaced by a money economy.[22]

Along with these societal transformations, the law changed radically, inspired and led once again by the monarchs and the kingdom's high chiefs, under the advice (but not the control) of immigrants who had adopted Hawai'i as their home.[23] In 1839, King Kamehameha III promulgated a written Declaration of Rights, grounded in Western ideals of equality of all under the law and tempering the hitherto unbridled discretion of the upper classes (*ali'i*) to use and abuse the commoners.[24] The kingdom's first constitution, promulgated in 1840 by Kamehameha III, had both Western and Hawaiian elements and was followed by a code of laws grounded in the concept of the rule of law and a transformation of governance from absolute monarchy to a constitutional monarchy, including a system of courts and a bicameral

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[20] *Id.* at 195-98; *see also* 1 KUYKENDALL, *supra* note 13, at 104-13; JON J. CHINEN, THEY CRIED FOR HELP 20 (2002).

[21] DAY, *supra* note 13, at 195-98.

[22] *See generally* THEODORE MORGAN, HAWAII: A CENTURY OF ECONOMIC CHANGE: 1778-1876 (1948).

[23] *See generally* 1 KUYKENDALL, *supra* note 13, at 65-70. The transition was explained thus by the Kingdom's Supreme Court:

> In the year 1839 began that peaceful but complete revolution in the entire polity of the Kingdom which was finally consummated by the adoption of the present Constitution in the year 1852. His Majesty Kamehameha III began by declaring protection for the persons and private rights of all his people from the highest to the lowest. In 1840 he granted the first Constitution by which he declared and established the equality before the law of all his subjects, chiefs and people alike. By that Constitution, he voluntarily divested himself of some of his powers and attributes as an absolute Ruler, and conferred certain political rights upon his subjects, admitting them to a share with himself in legislation and government. This was the beginning of a government as contradistinguished from the person of the King, who was thenceforth to be regarded rather as the executive chief and political head of the nation than its absolute governor. Certain kinds of public property began to be recognized as Government property, and not as the King's. Taxes which were previously applied to the King's own use were collected and set apart as a public revenue for Government purposes, and in 1841 his Majesty appointed a Treasury Board to manage and control the property and income of the Government. But the political changes introduced at that period did not affect in the least the King's rights as a great feudal Chief or Suzerain of the Kingdom. He had not as yet yielded any of those rights.

In re Estate of His Majesty Kamehameha IV, 2 Haw. 715, 719 (1864); *see also* Sullivan, *Customary Revolutions*, *supra* note 1.

[24] VAN DYKE, *supra* note 2, at 26-27.

legislature with a lower house in which commoners were represented.[25] These changes involved a dramatic transfer of governmental participation from the king to his subjects, not just to the upper classes (*ali'i*) but also to the commoners (*maka'ainana*).

III. LAND REFORM IN THE HAWAIIAN KINGDOM

Inevitably, the control of land also changed, and it is with these changes that Professor Van Dyke's book is concerned.

Professor Van Dyke's book envisions the time before, and shortly after, Western contact as one where wise and generous kings and noble chiefs administered the kingdom's land with deference to their spiritual and political advisors, in a relationship of interdependence and cooperation with the commoners, and all in a spirit of righteousness.[26] Native historians of the period describe a far less benign social and political environment, at least as far as the commoners were concerned.[27] Less than a decade before the *Mahele*, the

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[25] *See* CHINEN, *supra* note 20, at 22; *see generally* 1 KUYKENDALL, *supra* note 13, at 167-69.

[26] VAN DYKE, *supra* note 2, at 13-15.

[27] For a record of that time we have the writings of two remarkable men, David Malo and Samuel Kamakau, native-born but educated by the newly-arrived missionaries, who lived during the transition from the old order to the new and chronicled it with candor and ability. Here is how David Malo described the pre-constitutional period:

> The king, however, had no laws regulating property, or land, regarding the payment or collection of debts, regulating affairs and transactions among the common people, not to mention a great many other things. Every thing [sic] went according to the will or whim of the king, whether it concerned land, or people, or anything else—not according to law. All the chiefs under the king, including the *konohiki* who managed their lands for them, regulated land matters and everything else according to their own notions. There was no judge, nor any court of justice, to sit in judgment on wrong-doers of any sort. Retaliation with violence or murder was the rule in ancient times. To run away and hide one's self was the only recourse for an offender in those days, not a trial in a court of justice as at the present time. If a man's wife was abducted from him he would go to the king with a dog as a gift, appealing to him to cause the return of the wife—or the woman for the return of the husband—but the return of the wife, or of the husband, if brought about, was caused by the gift of the dog, not in pursuance of any law. If any one had suffered from a great robbery, or had a large debt owing him, it was only by the good will of the debtor, not by the operation of any law regulating such matters that he could recover or obtain justice. Men and chiefs acted strangely in those days.

DAVID MALO, HAWAIIAN ANTIQUITIES 57-58 (Nathanial Emerson trans., 1951). David Malo lived from 1795 to 1853.

To like effect is Samuel Kamakau (1815-1876):

> If a chief became angry with a commoner he would dispossess him and leave him landless, but the commoners submitted to the chiefs and consented afterwards to endure hard labor and work like slaves under the chiefs. It was not for a commoner to do as he liked as if what he had was his own. If a chief saw that a man was becoming affluent, was

absolute power of the monarch to do as he wished with any property within the kingdom was unquestioned,[28] subject only to the sanction of revolution.[29] David Malo recorded that "[o]nly a small portion of the kings ruled with kindness; the large majority simply lorded it over the people."[30]

Between 1839 and 1850, however, Kamehameha III, the successor to both the absolute governmental power and the ownership of the lands in the islands,[31] voluntarily divested himself of most of that control. The process gave fee simple titles not only to the nobles of the kingdom, but also to commoners and even to foreigners.[32] At the same time, the arbitrary power of the *ali'i* over the commoners was restricted, the commoners were given rights under the new laws, and a broad program of land reform was undertaken.[33]

Throughout these changes, the monarchs and leading chiefs of the islands remained in charge of both the nation and the processes of change. These changes were not like the Magna Carta, imposed on an unwilling monarch

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a man of importance in the back country, had built him a good house, and had several men under him, the chief would take everything away from him and seize the land, leaving the man with only the clothes on his back. Men feared in old days being driven away and having to take to the highway, or even to have suspicion fasten upon them and be killed, as often happened in the old days.

SAMUEL KAMAKAU, RULING CHIEFS OF HAWAII 229 (rev. ed. 1992).

[28] *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715. The court noted:

At the death of Kamehameha I, his son, Liholiho, Kamehameha II, was recognized as King in accordance with his father's express will. Along with the Crown, Kamehameha II inherited all his father's rights as an absolute sovereign and as suzerain or lord paramount of all the lands in the Kingdom, which rights, unimpaired, descended with the Crown to Kamehameha III.

Id. at 719-20. Ralph Kuykendall made essentially the same point a century later:

Long after the death of Kamehameha I, at a time when the council of chiefs had become very powerful, it was declared in the constitution of 1840 that, though "all the land from one of the Islands to the other" belonged to Kamehameha, "it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I was the head, and had the management of the landed property." In practice, however, it made little difference to such a ruler as Kamehameha I whether he owned the land outright or merely in a representative capacity; in either case, he disposed of it as he saw fit, and probably it never occurred to him to theorize about it.

1 KUYKENDALL, *supra* note 13, at 269 (citation omitted).

[29] VAN DYKE, *supra* note 2, at 16; Sullivan, *Customary Revolutions*, *supra* note 1, at 107-08.

[30] MALO, *supra* note 27, at 61.

[31] *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715.

[32] 1 KUYKENDALL, *supra* note 13, at 269-98. Foreigners were early admitted to share in the governance of the kingdom, first as advisors to the monarch and eventually, as subjects with equal status with the other subjects of the monarchy. *See* Patrick W. Hanifin, *To Dwell on the Earth in Unity:* Rice, Arakaki, *and the Growth of Citizenship and Voting Rights in Hawaii*, 5 HAW. B. J. 15, 18 (2001).

[33] *See generally* 1 KUYKENDALL, *supra* note 13.

under threat of force,[34] but they were indubitably revolutionary. What made them truly remarkable is that the revolution was managed by the government.[35]

As often happens with revolutionary change, some things nobly conceived failed to work out as planned. Professor Van Dyke's book focuses on two of these—the distribution of land to commoners, and the King's reservation of a portion of the kingdom's land as his own individual property. He concludes that there was unfairness to the commoners, and he proposes a vast redistribution of the former lands of the monarch, now owned by the state and federal governments, to reverse these alleged errors in the kingdom's judgment.

IV. ISSUES OF FAIRNESS IN THE ALLOCATION OF LAND TO COMMONERS

The kingdom's land revolution was in part an exercise of the King's pre-constitutional absolute authority to redistribute lands of the kingdom and in part one of the earliest creations of the post-constitutional system of written laws in a participatory legislative environment. It was under and through that new system of laws that Kamehameha III crafted the division of the kingdom's land among himself, the kingdom's chiefs, its commoners, and its government.

The approach of the King and the kingdom to this redistribution of land was not by arbitrary fiat, but by legislation, in 1845, which established a commission to "settle land titles."[36] The responsibility of the commission was broad, however, and as much creative as adjudicatory.

> Claims of one character and another to the possession of land had grown up, but there was no certainty about them, and all was confusion; and finally, after years of discussion had between the King, the chiefs and their foreign councillors[sic], the plan of a Board of Commissioners to Quiet Land Titles was evolved, and finally established by law, for the purpose of settling these claims and affording an opportunity to all persons to procure valid paper titles emanating from the government representing the sovereignty, the source of all title to land in this Kingdom, to the land which they claimed.[37]

In 1846, a Declaration of Principles adopted by the Board of Commissioners recognized three classes of people having customary rights[38] in the land or its

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[34] 59 CONG. REC. 7451 (1920) (statement of Del. Kalaniana'ole); *see* VAN DYKE, *supra* note 2, at 26.

[35] Sullivan, *Customary Revolutions*, *supra* note 1, at 112-22.

[36] VAN DYKE, *supra* note 2, at 32-36.

[37] Thurston v. Bishop, 7 Haw. 421, 428 (1888).

[38] As noted previously, the existence and protection of "rights" depended much on the temperament of landlords. *See supra* notes 27-30 and accompanying text. Such rights as tenants possessed were also offset by obligations to furnish labor and other taxes to landlords and the king. PRINCIPLES ADOPTED BY THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES IN THEIR ADJUDICATION OF CLAIMS PRESENTED TO THEM (1846), *reprinted in* WHO OWNS THE

products: the King or government (these terms are used interchangeably), the landlords, and the tenants. The commission proposed to the King that each group should be granted one-third of the kingdom's lands.[39]

Not unexpectedly, the aspirations of the Land Commission were not all achieved. There was an understandable reluctance on the part of the *ali'i* to surrender their land and their prerogatives.[40] Much debate took place in the development of laws during, and shortly, after, the *Mahele*.[41] The 1850 Kuleana Act,[42] specifically designed to put land into the hands of the *maka'ainana*, limited awards to commoners to the lands the claimants did actually "occupy and improve."[43] The *maka'ainana* received less than one percent by acreage, and while these lands (nearly all in active cultivation because that was what entitled a claimant to a *kuleana* award) were among the most valuable in the kingdom,[44] the division certainly seems not to have conformed to the division by thirds originally proposed.[45] Even the king received less than a third.[46]

CROWN LANDS OF HAWAI'I ?, *supra* note 2, app. 1, at 385.

[39] *Id.* at 385-96.

> Ancient practice, according to testimony, seems to have awarded to the tenant less than justice and equity would demand, and to have given to the King more than the permanent good of his subjects would allow. If the King be disposed voluntarily to yield to the tenant a portion of what practice has given to himself, he most assuredly has a right to do it; and should the King allow to the landlord one third, to the tenant one third, and retain one third himself, he, according to the uniform opinion of the witnesses, would injure no one unless himself; and in giving this opinion, the witnesses uniformly gave it against their own interests.

Id. at 387.

[40] 1 KUYKENDALL, *supra* note 13, at 274.

[41] VAN DYKE, *supra* note 2, at 32-51; 1 KUYKENDALL, *supra* note 13, at 278-98.

[42] Kuleana Act (Enactment of Further Principles) (1850), *reprinted in* WHO OWNS THE CROWN LANDS OF HAWAI'I ?, *supra* note 2, app. 3, at 422-23.

[43] Even the original concept of the *Mahele* seemed to restrict awards to the *maka'ainana* to lands they actually cultivated and occupied. *See* LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 295 (1992).

[44] Kuykendall observed that:

> [N]early all of the kuleanas were lands very valuable for native agriculture as long as the appurtenant water rights were assured to them, while extensive areas of crown, government and chiefs' lands were useless mountain wastes or lava strewn deserts or were covered with forests which benefited all by conserving the water supply.

1 KUYKENDALL, *supra* note 13, at 294.

[45] The precise amounts of land distributed to each of the classes of recipients are not clear. Kuykendall and Chinen report the following estimates:

Crown lands:	Somewhat less than 1,000,000 acres
Government lands:	Nearly 1,500,000 acres
Chiefs' lands:	A little more than 1,500,000
Kuleana awards:	A little less than 30,000 acres.

1 KUYKENDALL, *supra* note 13, at 294; CHINEN, *supra* note 20, at 72. In general, *Mahele* awards

Even under the 1850 law, specifically intended to protect native tenants, tenant claims were not always made, and those made did not always succeed.[47] In some cases, through ignorance on the part of potential claimants or through selfish decisions on the part of both native and immigrant governmental officials, nobles, and others, claimants failed to receive even the land actually cultivated.[48]

Professor Van Dyke's book argues that the *maka'ainana* as a class were unfairly treated in the allocation of land by not receiving the one-third of the kingdom's land recommended by the Land Commission.[49] The authorities cited, however, indicate that under either the old or the new order, the Land Commission's recommendation was just that—a recommendation—and that the decisions of the King and the legislature to adopt a different standard of division was legitimate whether viewed from the old or the new perspective. The division by thirds raised expectations on the part of the commoners that were not fulfilled, and their discontent persists in some of their descendants to this day. Nevertheless, as Professor Van Dyke's book itself points out, Kamehameha III, like his predecessors, had the right and power under ancient tradition to redistribute the kingdom's land at will, a right called *kalai'aina*.[50] To the extent that he departed from the recommendations of the Land Commission, he was entirely justified by custom and tradition in so doing, and his subjects had no basis under customary traditional law to complain. A departure from the recommendation was also justifiable under the new administration of the King, the Privy Council and the new legislature under the new western-style constitution and a code of generally-applicable written laws. The commoners had access to the King and in fact petitioned both King and legislature for relief from what they saw as unfair treatment.[51] Professor Van Dyke does not suggest that the constitutional government lacked the constitutional power to enact new laws that departed from the Land Commission recommendation. Indeed, such a constitutional defect could have been corrected simply by the King's will; even under the kingdom's constitution, the constitution was the King's to give, take away, or modify.[52]

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and *kuleana* awards were to native Hawaiians. *See generally* KAME'ELEIHIWA, *supra* note 43.

[46] 1 KUYKENDALL, *supra* note 13, at 294.

[47] *See generally* CHINEN, *supra* note 20; *see also* KAME'ELEIHIWA, *supra* note 43, at 295-98.

[48] 1 KUYKENDALL, *supra* note 13, at 274 ("One great obstacle which stood in the way of a change in the land system was the reluctance of the chiefs to surrender the hold on the common people secured to them by the feudal tenures and the related labor system.").

[49] *See* VAN DYKE, *supra* note 2, at 50.

[50] *See id.* at 17; *see also* CHINEN, *supra* note 20, at 17-18.

[51] CHINEN, *supra* note 20, at 24; KAME'ELEIHIWA, *supra* note 43, at 193-98.

[52] Sovereignty, in the kingdom, resided in the monarch, not the "people," and that sovereignty included the right to establish, amend, and repeal the constitution and laws of the Kingdom. This point was clearly articulated by the Hawaiian Kingdom's Supreme Court in the

To treat the Land Commission recommendation for division by thirds as having greater weight or dignity than the King's exercise of traditional authority or the constitutional government's enactment of new laws elevates a simple report of customary practice and a recommendation for a change to the status of super-constitutional mandate. The Land Commission recommendation may have raised the expectations of the commoners that they would be treated better than they were, but Professor Van Dyke's book provides no basis to conclude that

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case of *Rex v. Booth*, 2 Haw. 616 (1863). A law of the kingdom prohibited sales of liquor to "native subjects" of the Kingdom, but not to other inhabitants or visitors. Booth was charged with violating this law, and in his defense, he argued that the law was unconstitutional under the Kingdom's 1852 Constitution because it was discriminatory or that it was "class legislation." *Id.* at 618-19. Booth asserted that in constitutional governments, legislative authority emanates from the people, and that the legislature acts as agent of the people, and that "it is against all reason and justice to suppose . . . that the native subjects of this Kingdom ever entrusted the Legislature with the power to enact such a law as that under discussion." *Id.* at 629-30. The court responded:

> Here is a grave mistake—a fundamental error—which is no doubt the source of such misconception . . . . The Hawaiian Government was not established by the people; the Constitution did not emanate from them; they were not consulted in their aggregate capacity or in convention, and they had no direct voice in founding either the Government or the Constitution. King Kamehameha III originally possessed, in his own person, all the attributes of absolute sovereignty.

Id. at 630. The court reviewed Kamehameha III's promulgation of the 1840 Constitution and its 1852 successor and explained that by these documents the King had voluntarily shared with the chiefs and people of the Kingdom, to a limited degree, his previously absolute authority. The court explained:

> Not a particle of power was derived from the people. Originally the attribute of the King alone, it is now the attribute of the King and of those whom, in granting the Constitution, he has voluntarily associated with himself in its exercise. No law can be enacted in the name, or by the authority of the people. The only share in the sovereignty possessed by the people, is the power to elect the members of the House of Representatives; and the members of that House are not mere delegates.

Id. at 630-31. It was understood that this sharing of sovereignty could be revoked or modified by the ruling monarch. In 1864, Kamehameha V promulgated a new Constitution on his own authority when the Kingdom's legislature was unable to agree on one. *See* 2 KUYKENDALL, THE HAWAIIAN KINGDOM 1854-1874: TWENTY CRITICAL YEARS 132 (1953). Kamehameha announced:

> As we do not agree, it is useless to prolong the session, and as at the time His Majesty Kamehameha III gave the Constitution of the year 1852, He reserved to himself the power of taking it away if it was not for the interest of his Government and people, and as it is clear that that King left the revision of the Constitution to my predecessor and myself therefore as I sit in His seat, on the part of the Sovereignty of the Hawaiian Islands I make known today that the Constitution of 1852 is abrogated. I will give you a Constitution.

Id. Queen Lili'uokalani likewise stated in her memoir: "Let it be repeated: the promulgation of a new constitution, adapted to the needs of the times and the demands of the people, has been an indisputable prerogative of the Hawaiian monarchy." LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 21 (1898).

the kingdom's differing implementation of those recommendations deprived the commoners of anything to which they were entitled under either the old or new order of the kingdom.

There were certainly shortcomings, errors and even some wrongdoing involved in the land reform process, but there was nonetheless a major shift of landownership in favor of the commoners; over 28,658 acres of arable land of the kingdom was awarded to 8,421 *kuleana* claimants.[53] The commoners' awards were in addition to awards of roughly 1,500,000 acres to native chiefs (*ali'i* and *konohiki*) and just under 1,000,000 acres to Kamehameha III, the native monarch.[54] The process was solely the creation of the Hawaiian Kingdom's government. Foreign-born advisors played an important role, but they did not control the process.

It is easy to fault the *Mahele* and its working out from today's perspective. Nevertheless, viewed as the earliest efforts of a nation seeking to pass from absolutism to constitutionalism, it deserves respect. More to the point, Professor Van Dyke's book provides no basis to reopen it now to make a race-conscious change or any change at all; it does not show that the process was unfair to all or most persons of Hawaiian ancestry at the time, or that there was any race-based injustice or other enduring societal wrong that deserves a race-linked remedy, or any remedy, now.

V. THE CROWN LANDS

It is not obvious why the property of the United States and the State of Hawai'i should be offered up today to change the outcome of this land reform program of a foreign government. Professor Van Dyke's book finds a basis in another element of the land reform program that also did not work out as originally intended: The apportionment of land to the King.

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[53] VAN DYKE, *supra* note 2, at 48. Lilikala Kame'eleihiwa points out that:

> With only 8,421 *kuleana* awards given to a population of 88,000, it may have been that only heads of households were granted awards. And, if there were ten or eleven people in each family residence (extended families lived together), the number of awards might have been a fair representation of the populace . . . .

KAME'ELEIHIWA, *supra* note 43, at 296. She adds that "the idea seems far-fetched," but the logic makes sense. *Id.* It should also be noted that not all natives would be farmers. Some natives were fishermen; others worked at various jobs in the developing urban areas, or joined the crews of passing ships. *See* DAY, *supra* note 13, at 294-304; *see also* 1 KUYKENDALL, *supra* note 13, at 95-97.

[54] *See supra* note 52 and accompanying text.

A. The Apportionment of Lands to the Crown

The second essential point of Professor Van Dyke's thesis is that, assuming there was unfairness, the Crown Lands should be drawn upon to correct it.[55] His argument is not new; it is the same argument, with a few adjustments and additional candor, made by Prince Jonah Kuhio Kalaniana'ole. Prince Kuhio was Hawai'i's Territorial delegate to Congress and in 1920 and 1921 he argued to obtain passage of the Hawaiian Homes Commission Act (HHCA).[56] Prince Kuhio argued that the commoners should have been granted the one-third of the kingdom's land recommended in the Principles of the Land Commission, and since they did not, HHCA's homesteading program would help to make things right. Prince Kuhio asserted that the Crown Lands were a sort of residue of the *Mahele* which "reverted to the Crown, presumably in trust for the people," and should be used to correct the unfairness of the *Mahele* division.[57] The Act as passed created a homesteading program, not for all persons of Hawaiian ancestry, but only for those of 50% or greater Hawaiian "blood."[58]

The Prince's description of the origin of the Crown Lands was wholly inaccurate. As Professor Van Dyke's book makes clear, the Crown Lands originally were set aside purposefully for the King and expressly *not* for any other person or group in the islands.[59] After the 1865 legislation making the Crown Lands inalienable, the proceeds were dedicated to the King and (except for the payment of certain debts) *not* to any other person or group in the islands. Nevertheless, the common view in Congress became that the *maka'ainana* of Hawai'i were badly treated by their own government and that it had somehow become the obligation of the United States, by a rough (and inappropriate)[60] analogy to the Government's treatment of Indian tribes, to take steps, using the Crown Lands and perhaps other ceded lands, to correct that mistreatment.[61]

Along the way, class became confused with race. At the time of the *Mahele*, over 1,500,000 acres of land were distributed to the Native Hawaiian *ali'i* and *konohiki* in addition to the 30,000 or so acres allotted to the *maka'ainana*.[62] Some natives did well in the division, many did not, but there was no racial

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[55] VAN DYKE, *supra* note 2, at 10. Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34 § 201(a)(7) 42 Stat. 108 (1921).

[56] *See generally* VAN DYKE, *supra* note 2, at 237-53.

[57] *Id.* at 241.

[58] Hawaiian Homes Commission Act of 1920, § 201(a)(7).

[59] VAN DYKE, *supra* note 2, at 52, 71-88.

[60] For a discussion of a similar and unsuccessful Indian analogy see *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000).

[61] *See id.* at 245.

[62] *See supra* note 52 and accompanying text.

component to the *Mahele*.[63] The debate on the HHCA, however, focused only on the *maka'ainana*, and yet referred throughout to "native Hawaiians" as victims of the *Mahele* and as proper beneficiaries of the HHCA. This was all done without any acknowledgment that many of the *ali'i* and *konohiki* had received extensive awards of land, sometimes at the expense of the tenants on those lands.

Prince Kuhio and the supporters in Congress of the HHCA focused on the Indian analogy as a justification for giving preferential homesteading opportunities to a racially defined subset of a larger racial class.[64] Professor Van Dyke's book takes a somewhat different approach and argues instead that the Crown Lands were actually held by the monarchs for the benefit of the native subjects of the kingdom. He describes a concept of *noblesse oblige* assertedly held by the kingdom's rulers and nobles toward the commoners and grounded in respect for the gods and for righteous behavior. Thus, he argues, the Crown Lands were held by the monarch under a sense of trust, if not a declaration of trust, that they be used for the benefit of the common people.

The difficulty with this theory is that Professor Van Dyke's book shows no support for that position from the time of which he speaks. It identifies nothing in the document separating out the Crown Lands from the other lands of the kingdom as the King's own,[65] or in the kingdom's subsequent legislation or judicial decisions concerning the Crown Lands,[66] or in the actions of the monarch or anyone else, that showed the slightest intention that the Crown Lands were in some way intended to benefit anyone besides the King. Neither Native Hawaiians nor members of any other group within or outside the kingdom were entitled to the Crown Lands. Only the ruling monarch had such an entitlement, either at the time of the *Mahele* when the Crown Lands were intended to benefit the monarch as a private owner or after the 1865 legislation when the Crown Lands were placed under a commission with the proceeds dedicated to the monarch and his successors. In particular, nothing in the key decision of the Kingdom's Supreme Court concerning the Crown Lands[67] mentions anything about any right or acknowledged claim of the *maka'ainana* to those lands.

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[63] There was considerable transfer of land from natives to foreign-born inhabitants after the *Mahele*. *See generally* KAME'ELEIHIWA, *supra* note 43, at ch. 10 (offering a variety of explanations for these transfers and the likelihood that many did not reflect sound business judgment on the part of the sellers or mortgagors).

[64] VAN DYKE, *supra* note 2, at 244-46.

[65] An Act Relating to the Crown, Government and Fort Lands (1848), *reprinted in* WHO OWNS THE CROWN LANDS OF HAWAI'I?, *supra* note 2, app. 2, at 397-421.

[66] *See, e.g.*, *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864); Act Rendering the Crown Lands Inalienable (1865), *reprinted in* WHO OWNS THE CROWN LANDS OF HAWAI'I?, *supra* note 2, app. 5, at 433-34.

[67] *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715.

It must therefore be concluded that to the extent that any of the monarchs used a part of the proceeds of these lands for the benefit of subjects of the kingdom,[68] they did so as a matter of grace, not because of any legal, moral, or cultural obligation of any sort. Indeed, when Queen Lili'uokalani, years after the revolution, sued in the U.S. Court of Claims for compensation for the loss of her entitlement to the income from the Crown Lands, her claim was for deprivation of a private-property "vested equitable life estate" in the use of, and income from, these lands for her life.[69] Her claim was not as a trustee on behalf of others, but for herself.

Professor Van Dyke's book provides no convincing historical analysis to support the notion that there was a general culturally-binding obligation on the part of the King and *ali'i* toward the commoners. It does, however, provide substantial evidence to the contrary. For example, Jon Chinen's book *They Cried for Help*,[70] cited frequently in Professor Van Dyke's book,[71] documents in detail how many of the *ali'i*, for a variety of reasons, took terrible advantage of the trust or helplessness of the commoners to deprive them of their rights.[72] Unquestionably the monarchs were generous with themselves and others. It was precisely the extravagant sale and encumbrance of the Crown Lands by Kamehameha III and Kamehameha IV, confirmed as the King's prerogative by the kingdom's court,[73] that led the legislature of the kingdom, with the King's approbation, to place these lands under the control of a board of commissioners and to make them inalienable.[74] It was not done for the use by the *maka'ainana,* but to prevent the monarch himself from becoming a public charge.[75]

Finally, Professor Van Dyke's book makes clear that when the monarchs and *ali'i* wanted to place their lands under genuine trust obligations enforceable under the kingdom's law, they knew exactly how to go about it. King Lunalilo

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[68] Professor Van Dyke quotes Lili'uokalani to the effect that the Crown Lands were used to generate revenues so that "the reigning sovereign . . . might care for his poorer people," although she asserted at the same time that the Crown Lands were "my own property at this day." VAN DYKE, *supra* note 2, at 227-28 (quoting LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 260 (photo. reprint 1997) (1898)).

[69] *Id.* at 230; Liliuokalani v. United States, 45 Ct. Cl. 418 (1910).

[70] *Id.*

[71] *See, e.g.*, VAN DYKE, *supra* note 2, at 34-51.

[72] *Id.* at 85-97.

[73] *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864).

[74] Act Rendering the Crown Lands Inalienable, *supra* note 66, app. 5, at 433-34.

[75] *Id.*; *see also* VAN DYKE, *supra* note 2, at 89-92. Professor Van Dyke offers some speculation that the king's assent to the statute reflected the traditional pre-contact system and the traditional *Malama Aina* system, *id.* at 92, but the dramatic difference between the king's absolute control over all real property in the pre-contact period and his powerlessness following the enactment of the 1865 law suggest that the speculation is not well founded.

in 1874, Queen Emma in 1884, and Queen Lili'uokalani in 1909 all established formal charitable land trusts which persist to this day; the first two under the law of the kingdom and the last under Territorial law.[76] The Kamehameha Schools, one of the wealthiest trusts in the nation with assets estimated at more than $9 billion,[77] was established by Princess Bernice Pauahi Bishop in 1884 and still continues its work exclusively for the benefit of Native Hawaiians.[78] It is unquestionable that these *ali'i* sought to provide for others in need, but they took the formal, public measures best calculated to define their objectives and ensure the wise application of their bounty long into the future.

This same care to define both the objectives and the administrative provisions of a trust is reflected in the statute of 1865 which rendered the Crown Lands inalienable and devoted their proceeds in part to the liquidation of the King's debts and in part to the "use and benefit of the Reigning Sovereign" and the "heirs and successors of the Hawaiian Crown forever." The end of such legislation was that the original purpose of those lands—i.e., maintaining the "Royal State and Dignity"—not be defeated.[79]

It must therefore be concluded on the basis of Professor Van Dyke's book's own evidence that when the Crown Lands were ceded to the United States in 1898, they came as they were held under the monarchy, as public lands, free of any encumbrance by any interest or legitimate claim of either the kingdom's commoners or its subjects of pre-contact ancestry.[80]

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[76] *Id.* at 324-43.

[77] Press Release, Kamehameha Schs., Kamehameha Schs. Releases Fiscal Year 2007 Report (Feb. 9, 2008), http://www.ksbe.edu/article.php?story=20080209123413641 (last visited Oct. 13, 2008).

[78] VAN DYKE, *supra* note 2, at 307-23.

[79] Act Rendering the Crown Lands Inalienable, *supra* note 66, app. 5, at 433-34.

[80] Professor Van Dyke's book relies heavily on the so-called Apology Resolution of 1993, Pub. L. No. 103-150, 107 Stat. 1510, and various conclusory statements in the preambles to that and other legislation, to show that Native Hawaiians have continuing valid claims to the Crown Lands. *See, e.g.*, VAN DYKE, *supra* note 2, at 17 n.49 and accompanying text; *id.* at ch. 24, n. 109-10 and accompanying text. The fact that Congress has made factual findings concerning the basis for a statute, however, does not establish either the truth of those findings or their legal sufficiency to support the legislative enactment to which they relate. *See* United States v. Morrison, 529 U.S. 598 (2000).

Congress may make laws, but they cannot make or unmake historical facts. With specific reference to the Apology Resolution, there is substantial evidence that the recitations therein are largely inaccurate. *See* THURSTON TWIGG-SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? ch. 10 (1996); BRUCE FEIN, HAWAII DIVIDED AGAINST ITSELF CANNOT STAND (2005), *available at* http://www.angelfire.com/hi5/bigfiles3/AkakaHawaiiDividedFeinJune2005.pdf.

It would have been helpful for Professor Van Dyke to have at least noted these dissenting viewpoints. The Supreme Court in *Rice v. Cayetano* set perhaps the best example of dealing with the Apology Resolution; it noted the existence of the Apology Resolution but made no

VI. THE PAINFUL REALITY OF RACE

Even if the thesis of Professor Van Dyke's book were not flawed as a matter of historic interpretation, the remedy proposed would almost certainly be unachievable as a matter of constitutional law. Its premise is that land owned by the United States and the State of Hawai'i—both entities subject to constitutional mandates that race-conscious decisions meet standards of strict scrutiny[81]—should be devoted exclusively for the benefit of a group defined exclusively by race. No serious argument can be made that the classification "Native Hawaiian" is not racial. The Supreme Court made the racial character of that classification unmistakably clear in *Rice v. Cayetano*[82] and held that a Hawai'i state law excluding non-Hawaiians from the right to vote for officials of the state's Office of Hawaiian Affairs (OHA) violated the Fifteenth Amendment.[83] Before the Court, the State of Hawai'i sought to justify its discriminatory treatment by analogy to federal policy fostering self-government and self-determination of Indian tribes.[84] The Court rejected the argument, pointing out that OHA is not a tribe but a creature of state law, subject to constitutional constraints on state action.[85] The remedy suggested in Professor Van Dyke's book would likewise involve discretionary action by state and federal governments in disposing of public property for the sole use and benefit of a racial group.

Rice is an immense obstacle for any governmental action for or against Native Hawaiians as a group. An entire chapter of Professor Van Dyke's book—Chapter 24—is devoted to the *Rice* case. That chapter deserves special review because it goes to extreme lengths to argue away the plain holding of *Rice* and even to find within that decision, by novel twists of logic, some support for the book's thesis.

Strangely (because the book's general tone is respectful of individuals with differing views) the chapter twice suggests that the *Rice* Court's majority was motivated by personal political considerations not related to the merits of the case.[86] Even more strangely, the chapter contents itself with simply making the

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further reference to it as legal or historical authority, preferring other sources which it apparently found more credible. 528 U.S. 495, 505 (2000).

[81] Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).

[82] 528 U.S. 495 (2000).

[83] *Id.*

[84] *Id.* at 518-22.

[85] *Id.*

[86] *See* VAN DYKE, *supra* note 2, at 275, 281. Early in his discussion of the majority opinion in *Rice*, Professor Van Dyke states:

> Perhaps because it was blinded by a lack of enthusiasm about affirmative action programs, the Supreme Court's majority failed to appreciate that when the people of Hawai'i established OHA as a vehicle to facilitate Native Hawaiian self-determination

accusations; it offers no discussion as to how and whether these political considerations, if they existed, were identified and how they affected the legitimacy of the court's decision.

In the substantive analysis of *Rice*, Professor Van Dyke engages in a striking level of "positive thinking" to argue not just that *Rice* was wrongly decided, but that it actually support's the book's thesis. To do this, however, the analysis reads far more into that decision than Justice Kennedy's straightforward language can support. It states, for example, that the majority decision "provided a road map for Native Hawaiians to follow"[87] in advancing their claims, and that it "acknowledged that the outcome of the Rice case would have been different if the native Hawaiians had formed a 'quasi-sovereign' political entity and had conducted elections of their leaders themselves, because it was on this basis that Justice Kennedy distinguished the OHA election from the many elections across the country in which natives select their leaders."[88] These statements mischaracterize the court's decision.

In the section of the *Rice* decision referred to, the court rejected the State of Hawai'i's argument that the OHA election was like elections within Indian tribes. Further, it never "acknowledged" or even hinted that the outcome would have been different if Native Hawaiians had formed some separate entity outside the State government. In its discussion of *Morton v. Mancari*,[89] the court expresses grave doubts whether Native Hawaiians could ever qualify as a tribal entity[90] and said that such an argument would raise questions of "considerable moment and difficulty"[91] and involve "some beginning premises not yet established in our case law."[92] If there is any "road map" in *Rice* for

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they were acting consistently with steps the United States has taken for many of its native people and consistently with its obligation under international law.

Id. at 275. At the end of his discussion of the majority opinion in *Rice*, Professor Van Dyke notes the Court's criticism of the Office of Hawaiian Affairs racial qualifications for voting as "demeaning" and "would give rise to the same indignities, and the same resulting tensions and animosities [that] the [Fifteenth] Amendment was designed to eliminate." VAN DYKE, *supra* note 2, at 281. He then continues:

> This characterization appears to have been based either on an ideological perspective that rejects the value of diversity in our pluralistic country and the obligation to rectify the injustices or on a complete misunderstanding of the careful balance that has been achieved in Hawai'i—based on the respect and honor that all races have toward the Native Hawaiians—and the widespread support that exists in Hawai'i for a just resolution of the claims of the Native Hawaiian people.

Id.

[87] *Id.* at 278.

[88] *Id.*

[89] 417 U.S. 535 (1974).

[90] *See infra* notes 111-114 and accompanying text.

[91] Rice v. Cayetano, 528 U.S. 495, 518 (2000).

[92] *Id.*

Native Hawaiian claims, it arguably shows a dead end street rather than a highway.

In another twist of legal analysis, Professor Van Dyke dismisses the central point of *Rice*—that the classifications "Hawaiian" and "native Hawaiian" are racial—as dicta;[93] as if the point were collateral to the court's holding and therefore not binding precedent for future decisions. In fact, *Rice* addressed and decided two central issues; first, that the classifications in question were racial, and second, that because they were racial, they were impermissible grounds for denial of the right to vote in the Hawai'i statewide elections. The holding that the classifications were racial was entirely separate, as a matter of law and as a matter of logic, from the consequent holding that the denial of the franchise based on those classifications was unconstitutional. It stands alone, independent of its application to the question of the franchise, as compelling precedent in future challenges under the Fourteenth Amendment or the Due Process clause of the Fifth Amendment to governmental decisions based on Hawaiian ancestry.[94]

Professor Van Dyke's book further stretches the language of *Rice* at page 277 where it states that "Justice Kennedy explained that the people of the State of Hawai'i established the Office of Hawaiian Affairs in 1978 pursuant to their fiduciary duties—duties that had been transferred in part from the United States to the State in the 1959 Admission Act." This sentence implies that Justice Kennedy had affirmed that the people of the State of Hawai'i did in fact have fiduciary duties to Native Hawaiians under the Admission Act. Even a casual

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[93] VAN DYKE, *supra* note 2, at 279.

[94] Professor Van Dyke also argues that *Rice* is somehow limited to its Fifteenth Amendment context. He quotes Judge David Ezra (whose decision in the district court was resoundingly overruled by the Supreme Court) for the proposition (following remand) that the Supreme Court's decision "was a narrow one, restricted to the single issue of state-sponsored Hawaiian-only elections." VAN DYKE, *supra* note 2, at 279 (quoting "Transcript of Proceedings before Chief United States District Judge David Alan Ezra at 7-8," Rice v. Cayetano (D. Haw. Apr. 7, 2000)). He further cites *AFL-CIO v. United States* to the effect that "*Rice* only dealt with the right to vote." 195 F. Supp. 2d 4, 19 (D.D.C. 2002). For the reasons noted above, the Court's decision that the classifications "Hawaiian" and "native Hawaiian" were racial were not only central to the *Rice* decision, but it set the standard for future decisions concerning these classifications and others like them that distinguish among people based on ancestry. The point has not been lost on other courts which have cited *Rice* in Fourteenth Amendment contexts. *See* Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 731 (9th Cir. 2003) ("A racial preference violates equal protection guarantees unless it is 'narrowly tailored' to 'further compelling governmental interests.' [Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)]; *see also* Rice v. Cayetano, 528 U.S. 495 (2000) (striking down a race-based voting limitation)."); *see also* Malabed v. N. Slope Borough, 335 F.3d 864 (9th Cir. 2003) (holding Borough's employment preference for Native Americans unconstitutional under Alaska constitution's equal protection clause and citing *Rice* in limiting scope of *Morton v. Mancari*, 417 U.S. 535 (1974)).

reading of *Rice* shows that all Justice Kennedy did was to describe what some official documents had recited as the purpose of the creation of OHA;[95] he did not at any point declare these recitations to be accurate statements of fact or law. It should be noted that the claim of a federal trust relationship deriving from the Hawaiian Homes Commission Act of 1920,[96] which provides homesteading opportunities to those of 50% Hawaiian "blood," was rejected in *Han v. Department of Justice*.[97] In his concurring opinion in *Rice*, Justice Breyer bluntly stated that "there is no 'trust' for Native Hawaiians here"[98] and that the ceded lands trust is for "*all* of Hawai'i's citizens."[99]

Professor Van Dyke's book further overextends the *Rice* majority opinion when it asserts that the majority opinion "provides the essential underpinning for the conclusion that Native Hawaiians are entitled to the same legal status as other native people within the United States, and that rational-basis (rather than strict scrutiny) judicial review should apply to programs for Native Hawaiians."[100] He bases this conclusion on his observation that the *Rice* majority:

> [R]epeatedly acknowledges that Native Hawaiians are indigenous, aboriginal, and native by referring regularly and without qualification or limitation to "the native Hawaiian people," "the native Hawaiian population," and "the native population." Justice Kennedy also acknowledged that these "people" share a common "culture and way of life," that they have experienced a common "loss" that has had effects that have "extend[ed] down through generations," and that it has been appropriate for the State of Hawai'i "to address these realities."[101]

The conclusion that the quoted elements of *Rice* support any special status or privileges for Native Hawaiians is simply insupportable. The cited references in Justice Kennedy's opinion to "the native Hawaiian people" and "the native population"[102] all refer to native inhabitants of the islands in the nineteenth century or earlier. The reference to "the native Hawaiian population"[103] was to Congress' consideration of the Hawaiian Homes Commission Act in 1920 and 1921 for the benefit, not of everyone of Hawaiian ancestry, but only those of 50% Hawaiian "blood"[104]—a criteria which that same Rice majority found to

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[95] *Rice*, 528 U.S. at 507-08.

[96] Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921).

[97] 824 F. Supp. 1480 (D. Haw. 1993), *aff'd on other grounds*, 45 F.3d 333 (9th Cir. 1995).

[98] *Rice*, 528 U.S. at 525 (Breyer, J., concurring).

[99] *Id.*

[100] VAN DYKE, *supra* note 2, at 279.

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

[102] *Id.* (citing *Rice*, 528 U.S. at 506, 524).

[103] *Id.* (citing *Rice*, 528 U.S. at 507).

[104] *Rice*, 528 U.S. at 507-08.

be a racial classification.[105] There is no hint that the majority believes there is a "Native Hawaiian People" today defined in any way other than by race, or entitled to any governmental treatment as a group except as strict scrutiny might permit in the context of a racial preference. The reference to a "culture and way of life"[106] was likewise to the culture and way of life of pre-contact inhabitants of the islands with no implication that there is a common culture and way of life today that differentiates Native Hawaiians from other island inhabitants or entitles them to the constitutional status of tribal Indians. The only "effect" that the opinion refers to as having "[extended] down through generations"[107] is a "sense of loss,"[108] with no necessary implication that remedying such a "sense of loss" is a "compelling government interest."

What the *Rice* decision *does* say is that in addressing that "sense of loss" the government must act within constitutional bounds.[109] What it *does* say about whether Native Hawaiians are entitled to be treated like tribal Indians is:

> If Hawaii's [racial voting] restriction were to be sustained under [*Morton v. Mancari*][110] we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting [in the Hawai'i Admission Act] the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. We can stay far off that difficult terrain, however.[111]

As noted earlier, when this paragraph is read together with the Court's denunciation of racial discrimination by government,[112] its narrow construction of *Morton v. Mancari* (and its emphasis on that decision's focus on tribal status

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[105] *Id.* at 517.

[106] This reference was to *Rice v. Cayetano*.

[107] VAN DYKE, *supra* note 2, at 279 (citing *Rice*, 528 U.S. at 524).

[108] *Id.*

[109] *Rice*, 528 U.S. at 524. In an almost certainly unintended sense, Professor Van Dyke's book is correct in its point (incorrectly linked to the majority opinion in *Rice*) that "Native Hawaiians are entitled to the same legal status as other native people within the United States," VAN DYKE, *supra* note 2, at 279, because even persons of American Indian ancestry are not entitled to special treatment or consideration solely because of that ancestry; only tribal status provides an exemption from the strict scrutiny standard. Morton v. Mancari, 417 U.S. 535 (1974).

[110] 417 U.S. 535.

[111] *Rice*, 528 U.S. at 518-19.

[112] *Id.* at 517.

rather than ancestry as the basis for the special relationship),[113] and the concurring views of Justices Breyer and Souter that "OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe,"[114] it cannot logically be said that *Rice* offers any support of any sort for race-conscious special treatment for persons of pre-contact Hawaiian ancestry.

Taken as a whole, Chapter Twenty-four's optimistic view that *Rice* supports preferential governmental treatment for Native Hawaiians stretches logic past the breaking point. It seems to reflect not a healthy confidence, but a desperate denial of the obvious. "It is like the thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions."[115]

Professor Van Dyke's book continues on in Chapter Twenty-four to argue that even if its proposal for a race-based disposition of the Crown Lands were tested under the strict scrutiny standard applicable under both state and federal law,[116] it would pass because the state and federal governments both have a compelling interest[117] in protecting Native American lands and fostering tribal self-governance and self-determination.[118]

On this argument, Professor Van Dyke's book forfeits an essential point by failing to address the fundamental weakness of the Indian analogy, which is that there is no Indian tribe in Hawai'i, and there never has been one. From Kamehameha I's unification of the islands in 1810 until the present, there has been only one government (or governmental system)[119] at any one time for all the people of Hawai'i. Additionally, from the time of Kamehameha I, the people of Hawai'i have included increasing numbers of persons not descended from pre-contact inhabitants of the islands and the government has been a government of all the people, not one of, by, or for those of pre-contact ancestry alone.[120] Native Hawaiians, defined (as they are in Professor Van Dyke's book) by race alone, do not share the characteristics of a tribe, whether we apply the

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[113] *Id.* at 519-22.

[114] *Id.* at 525.

[115] Eugene R. Fidell, *Maritime Transportation of Plutonium and Spent Nuclear Fuel*, 31 INT'L LAW. 757, 769 (1997) (quoting A.P. HERBERT, UNCOMMON LAW 28 (3d ed. 1937)).

[116] *See* Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).

[117] It is of interest that the "compelling interests" proposed by Professor Van Dyke's book do not appear to be tied to the alleged unfairness of the *Mahele*. He refers (without citation to authority) to the "loss of land and resources" as a compelling interest. VAN DYKE, *supra* note 2, at 291. However, it would appear from subsequent pages that he is referring to the cession of the Crown and government lands at annexation, not to the individual instances during the *Mahele* when claimants were allegedly not treated fairly.

[118] VAN DYKE, *supra* note 2, at 290-97.

[119] The United States and the State of Hawai'i are legitimately treated as one governmental system for purposes of this analysis.

[120] Hanifin, *supra* note 32, at 15.

standards used by the Department of the Interior in evaluating applications of mainland Indian tribes[121] or the standards applied by the Supreme Court under what might be called the common-law definition of "tribe."[122]

Without a link to a true tribe, Native Hawaiians would not have the "special relationship" with the United States which insulates preferences for tribal members from equal protection or due process challenge.[123]

The Supreme Court's decision in *Morton v. Mancari*[124] explains the significance of this distinction. In *Morton*, the Court upheld an employment preference for Indians in the Bureau of Indian Affairs. In upholding the preference against a challenge that it constituted racial discrimination, the Court noted that preferences for Indians are "political" in nature and would be upheld if they were "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." The court made clear, however, that Congress' "unique obligation" is not to individuals defined by ancestry, but to tribes or "tribal Indians."[125]

Professor Van Dyke's book presupposes that there is, or imminently will be, a Native Hawaiian governing entity with at least the powers which a federally-recognized Indian tribe would have, and it proposes that the Crown Lands be entrusted to this entity for the benefit of the racially defined Native Hawaiians.[126] There are, however, grave problems with this proposal which Professor Van Dyke's book does not address. Most importantly, the book provides no evidence that any Native Hawaiian "tribe" exists. It does not identify or even suggest any unifying group character to "Native Hawaiians" (as defined in Professor Van Dyke's book) other than race, no "Hawaiian" government, and as the late George Kanahele pointed out, no "distinctly Hawaiian community" (geographical or social) maintaining an existence

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[121] *See* 25 C.F.R. § 83 (2008); Price v. Hawaii, 764 F.2d 623, 626-27 (9th Cir. 1985).

[122] *See, e.g.*, Montoya v. United States, 180 U.S. 261, 266 (1901) ("By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.").

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

[124] 417 U.S. 535 (1974).

[125] *Id.* The Court explained that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. Later the opinion stated:

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

Id. at 554 n.24.

[126] *See, e.g.*, VAN DYKE, *supra* note 2, at 10, 53, 253, 273, 383.

separate from other elements of Hawai'i's population.[127] Nor does the book establish that there is today a "Native Hawaiian People"[128] or Native Hawaiian nation, or that the legislation which has been pending in Congress since 2000 to establish one has a credible chance of being passed and surviving judicial scrutiny.[129] One case which considered a claim by a purported Hawaiian tribe indicates that Hawaiians would be unlikely to establish such tribal status under the standards applied by the Bureau of Indian Affairs to mainland groups, even if those standards could legally be applied to groups in Hawai'i.[130]

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[127] George S. Kanahele, *The New Hawaiians*, 29 SOC. PROCESS HAW. 21 (1982).

[128] Professor Van Dyke's book does not define this term, but context suggests that it is used in the sense defined in Webster's Third New International Dictionary (Unabridged) as "a body of persons that are united by a common culture, tradition, or sense of kinship though not necessarily by consanguinity or by racial or political ties and that typically have a common language, institutions, and beliefs." MERRIAM-WEBSTER, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1673 (1993). Used in this sense, the term does not describe a group in Hawai'i today. The term "Native Hawaiian" is a purely racial classification and except insofar as "Native Hawaiian people" refers only to that racial grouping, the term does not relate to an existing "people" in the dictionary sense. As one prominent Hawaiian scholar recently put it:

> These are the modern Hawaiians, a vastly different people from their ancient progenitors. Two centuries of enormous, almost cataclysmic change imposed from within and without have altered their conditions, outlooks, attitudes, and values. Although some traditional practices and beliefs have been retained, even these have been modified. In general, today's Hawaiians have little familiarity with the ancient culture.
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> Not only are present-day Hawaiians a different people, they are also a very heterogeneous and amorphous group. While their ancestors once may have been unified politically, religiously, socially, and culturally, contemporary Hawaiians are highly differentiated in religion, education, occupation, politics, and even their claims to Hawaiian identity. Few commonalities bind them, although there is a continuous quest to find and develop stronger ties.

Kanahele, *supra* note 127, at 21.

[129] With respect to the likelihood of the so-called Akaka Bill (Native Hawaiian Government Reorganization Act, S. 310/H.R. 505, 110th Congress (2007)) becoming law or surviving constitutional challenge, see Patrick W. Hanifin, Rice *is Right*, 3 ASIAN-PAC. L. & POL'Y J. 283 (2002); Sullivan, *"Recognizing" the Fifth Leg*, *supra* note 1.

[130] Price v. Hawaii, 764 F.2d 623 (9th Cir. 1985). The Department of the Interior has promulgated regulations which establish how a group claiming to be an Indian tribe can seek Federal recognition, and what standards will be applied by the Bureau of Indian Affairs in evaluating any such application. *See* 25 C.F.R. § 83 (2008). These regulations, however, by their own terms, apply only to tribes "indigenous to the continental United States," *id.* § 83.3(a), and the regulations define the "continental United States" as the "contiguous 48 states and Alaska." *Id.* § 83.1. In *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), this exclusion of Hawaiian groups from seeking recognition under the Bureau of Indian Affairs regulations was justified by the Ninth Circuit as being based on statutes meeting the "rational basis" test generally applied to Congress' decisions under the Indian Commerce clause.

Nor does Professor Van Dyke's book address the question whether, if there is no Native Hawaiian tribe, a group of Native Hawaiians could form an organization and obtain constitutionally-valid congressional or state recognition as a "tribe" under the "special relationship." Case law indicates that it could not. However broad Congress' power with respect to Indian tribes might be, it falls short of entitling Congress to create a tribe where none previously existed. In *U.S. v. Sandoval*,[131] the Supreme Court considered whether the Pueblo Indians could be brought by Congress within the "special relationship." It found sufficient facts to answer the question in the affirmative and it noted that "in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."[132] It added, however, that "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe."[133] An effort by a newly-formed race-based organization of Native Hawaiians seeking recognition from Congress as a "tribal government" is likely to be seen only as another attempt by a racial group to obtain disproportionate political control, and would likely meet the same fate as the effort of the city of Tuskegee, Alabama when it sought (unsuccessfully) to secure racial control within its borders by readjusting those borders into a "strangely irregular twenty-eight sided figure" to exclude black voters.[134]

In short, Professor Van Dyke's book proposes a race-conscious remedy using public land for a supposed wrong that had nothing to do with race, which took place under a foreign government that seems to have done the best it could for its people under extraordinarily difficult circumstances, over 150 years ago. This is the core of the book, and given the potentially dramatic impact on the State of Hawai'i if this proposal is adopted, the difficulties with it—historical, logical, and moral—and the competing points of view deserved broader development.

There is, of course, much more material in the book. A large part of it is not strictly relevant to the book's focus on Native Hawaiian claims to the Crown Lands[135] and provides little or no support for the book's conclusions and proposals. Much is said of the growing influence of foreigners over the Hawaiian monarchy during the nineteenth century and the eventual revolution

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[131] 231 U.S. 28 (1913).

[132] *Id.* at 46.

[133] *Id.*

[134] Gomillion v. Lightfoot, 346 U.S. 339 (1960).

[135] The chapter on the British crown lands, for example, offers little information of value on how the former Hawaiian Crown Lands, now merged with the other public lands of the United States or the State of Hawai'i , should be administered under our democratic state and federal constitutions.

in 1893 that in turn led to annexation in 1898; but those events, too, are not relevant to Native Hawaiian claims to the Crown Lands in the absence of some showing that Native Hawaiians, as a racial class, had claims to those lands, a point on which Professor Van Dyke's book is unconvincing. Some parts of the book, including portions of the chapter "Before the Mahele," actually support contrary conclusions and inferences from those offered by the author. It is all interesting and of value. The book casts its net widely and will be a valuable resource for those exploring Hawaiian history.

VII. CONCLUSION

Professor Van Dyke's book fails to convince that today's descendants of the pre-contact inhabitants of the Hawaiian Islands have any claim—moral, legal, historical or otherwise—to the former Crown Lands of the kingdom. It does, however, reflect the views of many people in the islands and elsewhere. Many legislative and judicial decisions concerning Native Hawaiians as a class have accepted the appropriateness of special treatment, the applicability of the Indian analogy, and the legitimacy of race-conscious decision-making.[136] Most recently, the Hawai'i Supreme Court, relying uncritically on the Apology Resolution, enjoined the state from disposing of any of the ceded lands until the claims of Native Hawaiians to those lands have been resolved.[137] Contrary views have had their successes, including the watershed decision in *Rice v. Cayetano*[138] and the failure of the Native Hawaiian Government Reorganization bill of 2005 to survive a cloture motion after full and open debate in the Senate.[139] The debate continues, and Professor Van Dyke's book provides much information for that discussion.

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[136] *See, e.g.*, Doe v. Kamehameha Schs., 470 F.3d 827 (9th Cir. 2006); Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Hawai'i 425, 903 P.2d 1246 (1995) *cert. denied sub nom.* Nansay Haw., Inc. v. Pub. Access Shoreline Haw., 517 U.S. 1163 (1996); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000); The Native American Programs Act of 1974, 42 U.S.C. § 2991 (2000); Native Hawaiian Education Act, 20 U.S.C. §§ 7511-7517 (Supp. 2005); The Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. §§ 11701-11714 (2000).

[137] Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 117 Hawai'i 174, 177 P.3d 884 (2008), *cert. granted sub nom.* Hawaii v. Office of Hawaiian Affairs, 2008 WL 1943423 (U.S. Oct. 1, 2008) (No. 07-1372).

[138] 528 U.S. 495 (2000).

[139] *See* 152 CONG. REC. S5510, S5554 (2006).