University of Hawai'i Law Review

Volume 34 / Number 1 / Winter 2012

ARTICLES

ISSN: 1942-9223

University of Hawai'i Law Review

Volume 34 / Number 1 / Winter 2012

We strive to view issues pertinent to Hawai'i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai'i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai'i me ke kuana'ike laulā. Ho'okomo mākou i nā 'atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā 'atikala waiwai e ho'ololi ana i nā mea kū kānāwai ma Hawai'i a ma nā 'āina 'ē, me ke kālele 'ana i nā kumuhana like 'ole e like me nā kānāwai pū'ali koa, ka mālama 'āina, nā kānāwai ona 'āina, a nā pono o nā po'e 'ōiwi.

Translation by Pauahi Ho'okano

University of Hawai'i Law Review

Volume 34 / Number 1 / Winter 2012

The University of Hawai'i Law Review would like to express its appreciation to the administration, faculty, and staff of the William S. Richardson School of Law. Special thanks to Ms. Julie Suenaga.

A Modest Proposal for Determining Class Member Damages: Aggregation and Extrapolation in the *Kalima v. State* Breach of Homelands Trust Class Action

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PROLOGUE

Upon retirement, Aunty Alice Aiwohi returned to Moloka'i, the island of her birth. Aunty Alice hoped to live on Hawaiian homestead lands.[1] After 50 years on the Homelands wait list the State Department of Hawaiian Home Lands (DHHL) awarded her a parcel in upcountry Ho'olehua. But the Department prohibited her from residing there – no electricity or sewers and insufficient funds to install them.[2] Unbowed, this kupuna and her seventy-five year old husband had friends move an empty Safeway-type shipping container onto her lot.[3] With a generator, outhouse, and

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[1] Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 895 (1997).

[2] *Id.* at 895-96.

[3] *Id.* at 896.

hand-carried water, she taught Hawaiian language and history to the area keiki, raised vegetables and flowers at her homestead until she passed at the age of 81.[4]

Aunty Alice's life is an uplifting story diminished by hard reality. Aunty Alice moved onto her long-awaited Homelands parcel in defiance of the DHHL and the law. The government "required" her to wait indefinitely until the Department developed the infrastructure for her Ho'olehua homestead – a wait she surely would not have survived.

Aunty Alice's story is a variation on the story of many Native Hawaiian families. Many of the 26,170 wait-listed applicants for Hawaiian Homelands leases share similar feelings of anger and enthusiasm, despondency and hope.[5] They desire a home on Hawaiian Homelands and a restoration of an ancestral connection to the 'āina. And yet they wait.

I. INTRODUCTION

From a western perspective, land is a commodity, a bundle of property rights—to sell, lease, use, and exclude.[6] By contrast, from a native perspective, land is more than a possession.[7] Land is an elder sibling to which Hawaiians traditionally "bore a cultural, economic, and spiritual connection."[8] In the years leading to what Congress later acknowledged as the illegal overthrow of the sovereign Hawaiian nation,[9] Hawaiians became increasingly separated from ancestral lands.[10] The ongoing struggle to

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[4] *Id.* at 895-96.

[5] State of Hawai'i Dep't of Hawaiian Home Lands, *Annual Report 2010-2011*, 47 (2011), http://www.hawaiianhomelands.org/wp-content/uploads/2011/11/HHL_AR_2011.pdf.

[6] *See, e.g.*, Kaiser Aetna v. U.S., 444 U.S. 164, 176, (1979) (referring to the "bundle of rights that are commonly characterized as property").

[7] LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI?, 23-25 (1992) (describing the spiritual-familial relationship the Hawaiian people had with the land).

[8] NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 3, (2004)); Susan K. Serrano et al., *Restorative Justice for Hawai'i's First People: Selected Amicus Curiae Briefs in Doe v. Kamehameha Schools*, 14 ASIAN AM. L.J. 205 (2007). *See generally*, Melody Kapilialoha MacKenzie, Susan K. Serrano, Koalani Laura Kaulukukui, *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, NAT. RESOURCES & ENV'T (Winter 2007).

[9] *See generally*, NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004); TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAI'I (1998); Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. HAW. L. REV. 261 (1998).

[10] *See* MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK, 3-5

return Hawaiian lands to Hawaiian hands is a story of "sadness, loss, and betrayal," but also of rebirth and hope.[11]

By enacting the Hawaiian Homes Commission Act in 1921, Congress sought to create a public trust to return Hawaiians to the land and prevent the further devastation of the Hawaiian people.[12] However, from inception through the 1980s, the Federal and State governments, as Homelands trustees, failed to fund infrastructure and home construction, misappropriated Homelands for government and private usage, and deprived the trust of operating funds.[13] As a result of this mismanagement, the waitlist grew, even after the new State of Hawai'i assumed the role of Homelands Trustee in 1959.

After years of frustration, Native Hawaiians turned to the courts to enforce the Homelands trust and hold the State government accountable for breaches of trust.[14] Despite numerous filings, procedural maneuvers by the government almost always blocked the courts from reaching the merits of the claims.[15]

(Melody Kapilialoha MacKenzie ed., 1991) (describing the predicament in which Native Hawaiians found themselves in the early 1900s, a native people devastated by the dispossession of lands, extinguishment of culture, and decimation of their population by poverty and disease).

[11] Ashley Obrey, *Broken Promise? A Brief Update on the U.S. Role in Native Hawaiian Reconciliation Since the 1993 Apology*, KA HE'E, Issue 3 (Aug. 2007), *available at* http://www2.hawaii.edu/%7enhlawctr/article3-6.htm. *See generally* Rebecca Tsosie, *Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations*, in REPARATIONS: INTERDISCIPLINARY INQUIRIES (Jon Billingsley and Rahul Kuma eds. 2007).

[12] *See* discussion *infra* Part II.A. *See generally* Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai'i's Plantations to Congress – Puerto Rico's Claims to Membership in the Polity*, 20 S. CAL. L. & SOC. JUST. J. 353 (2011).

[13] *See* discussion *infra* Part II.C.

[14] *See generally* Eric K. Yamamoto, Moses Haia & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 28-29 (1994) (discussing Native Hawaiians' use of the courts as a forum "to communicate an emerging narrative about the centrality of . . . [Homelands] to Native Hawaiians' cultural and political resurrection."). *See, e.g.*, Ahuna v. Dep't. of Hawaiian Home Lands, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982) (challenging DHHL's refusal to award an adjacent agricultural lot after being court ordered to award the closest land available); Aki v. Beamer, No. 76-1044 (D. Haw. Feb. 21, 1978) (finding the use of a gubernatorial executive order to create a county park on Kaua'i illegal); Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216 (9th Cir. 1978) (challenging the illegal transfer of twenty acres of Hawaiian Homelands to the County of Hawai'i, reversing the trial court determination and dismissing on procedural grounds); Nelson v. Hawaiian Homes Comm'n, 246 P.3d 369 (Haw. Ct. App. 2011) *cert. granted* SCWC-30110, 2011 WL 2245766 (Haw. June 6, 2011) (contesting the sufficiency of the legislative funding provided for the Department of Hawaiian Homelands).

[15] *See* Yamamoto, Haia & Kalama, *supra* note 14, at 29.

In the face of mounting pressure by Hawaiian justice advocates, the State legislature created an administrative claims process to address past mismanagement of the Hawaiian Homelands.[16] After the administrative process stalled, the *Kalima* plaintiffs ("*Kalima*" or "*Kalima* class members") brought a class action in circuit court in 1999.[17] In 2006, the Hawai'i Supreme Court determined that the *Kalima* class members, as wait-listed beneficiaries of the Homelands Trust, had established their right to sue.[18] On remand in a bifurcated trial, Judge Hifo found that breaches of trust by the State and its Department of Hawaiian Home Lands caused eligible Native Hawaiians to remain on the waitlist and that those waitlist applicants suffered damages as a result.[19] Judge Hifo then called for further proceedings to determine a method for fairly calculating the waitlist applicants' damages.

Six years after Judge Hifo's ruling, the class action has reached a crucial procedural impasse. Two rounds of competing proposals for calculating and apportioning damages for class members have been rejected by Circuit Court Judge Virginia Crandall, the latest in October 2011.[20] A third round of divergent proposals is unlikely to produce a meeting of the minds. And, given the sharp disagreements and flurry of inconsistent filings, one or both of the parties will likely pursue an interlocutory appeal to the Hawai'i Supreme Court challenging whatever method the circuit court adopts.[21]

With this backdrop, this article offers a creative yet grounded approach both for breaking the *Kalima* class action litigation impasse and for shaping

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[16] *See* discussion *infra* Part II.D.

[17] *See* discussion *infra* Part III.B.

[18] Kalima v. State of Hawai'i, 111 Haw. 84, 112, 137 P.3d 990, 1018 (2006).

[19] *See* discussion *infra* Part III.D.

[20] *See* discussion *infra* Part III.E.

[21] *See, e.g.*, Plaintiffs' Motion to Direct Notice to Waiting List Subclass and Right to Opt-out Before Court's Decision on Damages Model, Kalima v. State, Civil No. 99-4771-12 VLC (Class Action) (Cir. Ct. Haw. 2000), *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SNmIxMDczOTEtMWZmNS00NjE1LTk4YWItZTcyMzUwNzYyZWNh/edit?pli=1; Plaintiffs' Motion for Partial Summary Judgment on Financial Qualification Requirements Imposed on Beneficiaries Seeking Homestead Awards, Kalima v. State, Civil No. 99-4771-12 VLC (Class Action) (Cir. Ct. Haw. 2000), *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SYzk0NDlhM2YtYjA5YS00OGIxLWE3MzctZTlhNTUwMjkzOTQ2/edit; Defendants' Motion for Adoption of Specific Rules to Govern Computation of Damages (Part 1), Kalima v. State, Civil No. 99-4771-12 VLC (Class Action) (Cir. Ct. Haw. 2000), *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SZTFkMGJmYTYtM2ZmMS00YmQzLWJjODEtNzYwODIzZTliMzI2/edit; Defendants' Motion for Adoption of Specific Rules to Govern Computation of Damages (Part 2), Kalima v. State, Civil No. 99-4771-12 VLC (Class Action) (Cir. Ct. Haw. 2000), *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SZmY0MmJmMDctNDlhNC00NG IyLWFiOGQtZGQ1NTA3MDJmZmE1/ edit.

the assessment methods employed in other "damages" class actions. We propose a tailored aggregation method for calculating the class members' losses.[22] With careful application, inferential statistics can be employed to aggregate and then interpolate *Kalima* class members' damages and provide a reasonably accurate cost-effective approach to the final calculation-apportionment phase of the class action litigation.[23]

The proposed aggregation method is drawn from federal cases and employs methods that courts have generally determined comport with due process.[24] It is broadly applicable to class action damage assessments particularly in cases involving public trust breaches and land misappropriation actions.[25] Most specifically, it aims to provide a much-needed procedural movement through the *Kalima* stalemate. And it offers a promising opportunity for both the State and Native Hawaiians to repair important aspects of the damage of past trust breaches and to jointly continue revitalization of the Hawaiian Homelands program.

The final stages for the decades-old *Kalima* litigation are significant not only because they promise long-awaited redress for the Native Hawaiians on the waitlist. They are also significant for all in Hawai'i because they are emblematic of Native Hawaiians' ongoing struggles to hold the State fully accountable to laws embraced by Hawaii's populace and to thereby repair the damage to Hawaiian people for whom figuratively "to wait is to die."[26]

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[22] The Hawai'i appellate courts have not ruled on the utility or propriety of an aggregation and extrapolation method for ascertaining class member damages. *See generally* Nakamura v. Countrywide Home Loans, Inc., 122 Haw. 238, 225 P.3d 680 (Haw. Ct. App. 2010); Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982); Levi v. Univ. of Hawai'i, 67 Haw. 90, 679 P.2d 129 (1984).

[23] *See generally* Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992).

[24] *See* discussion *infra* Part V.

[25] *See* Edward F. Sherman, *Segmenting Aggregate Litigation: Initiative and Impediments For Reshaping the Trial Process*, 25 REV. LITIG. 691, 692 (2006) (citing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976)) (noting the emergence of the public law litigation model that involves "multiple parties, a sprawling and amorphous structure, need for discovery of large amounts of information, lengthy pre-trial preparation, and complex forms of relief." Increasingly, cases require innovative solutions and judges that organize and manage the parties and their counsel, as well as masters, experts, and oversight personnel.).

[26] Hawai'i Advisory Commission to the U.S. Commission on Civil Rights, A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians, 30 n.79 (1991), *available at* http://www.law.umaryland.edu/Marshall/usccr/documents/cr12h313z.pdf [hereinafter Advisory Committee Report] (citing Mahealani Kamau'u, testimony before Senate Select Committee on Housing and Hawaiian Programs (Hawai'i legislature), Feb. 16, 1990)

Part II of this article explains the historical background of the Hawaiian Homelands Trust. Part III discusses the procedural history of the *Kalima* litigation. Part IV provides a synopsis and detailed description of the proposed aggregation method. The legal authority and scholarly support for the method is explained in Part V.

II. HISTORICAL OVERVIEW OF THE HAWAIIAN HOMELANDS TRUST

The Homelands program has placed Native Hawaiians on homesteads and has done so in increasing numbers in recent years.[27] Yet the Homelands waitlist still exceeds 26,000,[28] and Homelands Trust administration remains a source of controversy and grief for many Native Hawaiians. The following section provides a historical overview of the creation of the Homelands Trust, its successes and many failures, and the trust beneficiaries' struggles to hold the Federal and State governments accountable for breaches of trust.

A. Federal Government Attempts to Rehabilitate Native Hawaiians Through the Hawaiian Homes Commission Act

Congress enacted the Hawaiian Homes Commission Act ("HHCA") of 1921 in an attempt to rectify the devastating effects of colonization;[29] to restore the Hawaiians' severed ties to homelands;[30] and to rehabilitate what

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(Mahealani Kamau'u is the former executive director of the Native Hawaiian Legal Corporation).

[27] *See* Leila Fujimori, *State agency seeks new ways to place Hawaiian families*, HONOLULU STAR-ADVERTISER, May 9, 2011, http://www.staradvertiser.com /news/20110509_State_agency_seeks_new_ways_to_place_Hawaiian_families.html?id=121 485608 (listing the running total of existing Hawaiian Homestead leases for the past decade, starting at 7,192 in 2001 and increasing to 9,836 in 2010). *See also* Gordon Y.K. Pang, *More are realizing Homestead Dreams*, THE HONOLULU ADVERTISER, Feb. 11, 2007, http://the.honoluluadvertiser.com/article/2007/Feb/11/ln/FP702110352.html (noting that "only 5,941 lots had been awarded in the 82-year history of the Hawaiian Home Lands program prior" to 2002); State of Hawai'i Dep't of Hawaiian Home Lands, *Annual Report 2010-2011*, 52-53 (2011), http://www.hawaiianhomelands.org/wp-content/uploads/ 2011/11/HHL_AR_2011.pdf (reporting 9,922 Homestead leases statewide as of June 30, 2011).

[28] *See* State of Hawai'i Dep't of Hawaiian Home Lands, *Annual Report 2010-2011*, 47 (2011), http://www.hawaiianhomelands.org/wp-content/uploads/2011/11/HHL_AR_2011. pdf (reporting a total of 26,170 applicants for the Hawaiian Homelands program as of June 30, 2011).

[29] *See generally* JONATHAN K. OSORIO, DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002).

[30] *See generally* LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA

Congress called a "dying race."[31] For these reasons, the Homelands "reflect . . . both a sacred relationship between Hawaiians and the environment and a potential political and economic base for Hawaiian self-governance."[32] Eligible native Hawaiians receive the benefits of homesteading through 99-year leases at the annual rate of one dollar for residential, agricultural, or pastoral use.[33] Congress sought to facilitate self-sufficiency by returning Hawaiians to the land, providing access to adequate amounts of water and resources, and assisting Hawaiians in farming operations.[34] In this way, the United States envisioned a beginning remedy for the effects of the overthrow of the Hawaiian nation (including the confiscation of sovereign lands) through the preservation of and support for native life and culture.[35]

Powerful economic forces dominated native interests from the start. In drafting the HHCA, Congress designated lands on each of the five major Hawaiian Islands as "available."[36] But the large sugar industry in Hawai'i,

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LA E PONO AI? HOW SHALL WE LIVE IN HARMONY? (1992).

[31] *See* Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921). *See also* Hearings on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawai'i before the House Committee on the Territories, H.R. Rep. No. 839, 66th Cong., 2d Sess., at 4 (1920) (Sen. John H. Wise testified, "The Hawaiian people are a farming people and fishermen, out-of-door people, and [being] frozen out of their lands . . . is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them."). *See also* Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 336 n.10, 640 P.2d 1161, 1167 (1982); Yamamoto, Haia & Kalama, *supra* note 14, at 11 n. 32; Eric K. Yamamoto & Catherine Corpus Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of Rice v. Cayetano*, *in* RACE LAW STORIES 541, 546-47 (Rachel F. Moran et al. eds., 2008).

[32] Yamamoto, *supra* note 1, at 896. *See generally* Davianna MacGregor, Na Kua'aina: Living Hawaiian Culture (2006); D. Kapua'ala Sproat, *Changing Conceptions of Water Law: Wai Through Kanawai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127 (2011); Melody Kapilialoha MacKenzie, *Native Hawaiians and the Law: Struggling with the He'e*, 7 ASIAN-PAC. L. & POL'Y J. 79 (2006).

[33] *See* Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, §§ 207(a), 208(2), 42 Stat. 108 (1921). Eligibility to apply for a homestead lease is based on the fulfillment of two criteria: (1) An applicant must be at least 18 years of age, and (2) must be a "native Hawaiian," defined 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, 208.

[34] *See* Advisory Committee Report, *supra* note 26, at 1 (citing Federal-State Task Force Report on the Hawaiian Homes Commission Act: Report to the United States Secretary of the Interior and the Governor of the State of Hawai'i (Honolulu, Hawai'i, Aug. 15, 1983), p.V).

[35] *See id.*

[36] *See* Yamamoto, Haia & Kalama, *supra* note 14, at 11 n.35.

comprised of interlocking Western corporations,[37] sought to protect their vast leased agricultural land holdings.[38] The sugar planters supported the HHCA but insisted that "all cultivated sugarcane lands" and any lands under an existing contract be exempted from the "available lands" set aside for homesteads.[39] Congress acceded to the sugar industry's demands and ultimately designated that "available lands" exclude most of the best agricultural lands originally contemplated.[40] Much of the homestead lands have poor soils and are in remote locations with low rainfall and lack of prospects for irrigation.[41] Thus, since inception, the trust was poorly equipped to achieve one of its primary purposes—providing Native Hawaiians with suitable lands for agricultural homesteading.

The Homelands Trust was at its creation and continues now to be comprised of approximately 200,000 acres of "government-owned" land held in trust for Native Hawaiians.[42] At inception, the United States served as the sole trustee for the Homelands trust.[43] Upon statehood in 1959, the State of Hawai'i became the successor trustee.[44]

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[37] *See generally* LAWRENCE H. FUCHS, HAWAI'I PONO (1984).

[38] *See* Advisory Committee Report, *supra* note 26, at 1. *See also* RALPH S. KUYKENDALL & A. GREEN DAY, HAWAII: A HISTORY FROM POLYNESIAN KINGDOM TO AMERICAN STATEHOOD, 203-209 (1948).

[39] J. KEHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 70 (Duke Univ. Press 2008) (The interests of the sugar industry in protecting their agricultural leases directly conflicted with Native Hawaiian interests. These two factors greatly influenced the laws prior to and surrounding the creation of the HHCA.). For a comprehensive overview, *see* Marylyn M. Vause, *The Hawaiian Homes Commission Act, 1920: History and Analysis* (1962) (unpublished Master's thesis, University of Hawai'i) (on file in the University of Hawai'i at Manoa Hamilton Library).

[40] *See* Kalima v. State of Hawai'i, 111 Haw. 84, 87, 137 P.3d 990, 993 (2006) (explaining the reality of the land designation despite the honest efforts of Senator John Wise and Prince Jonah Kuhio Kalaniana'ole to secure land properly suited for Hawaiian homesteads). *See also* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I, 248-50 (2008) (summarizing the original "available" land designations in a series of tables).

[41] *See* MacKenzie, *supra* note 10, at 51-52 (1991). *See also* Advisory Committee Report, *supra* note 26, at 1.

[42] The designated Homelands represent only a fraction of the 1.8 million acres of crown and government lands previously ceded by the territorial government of Hawai'i to the United States upon annexation. *See* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I, 237 (2008); Yamamoto, Haia & Kalama, *supra* note 14, at 11 n.32.

[43] Yamamoto, Haia & Kalama, *supra* note 14, at 10 n.32.

[44] Yamamoto, Haia & Kalama, *supra* note 14, at 10 n.32.

B. Hawaiian Homelands Trust is Transferred to the State of Hawai'i

The State of Hawai'i covenanted to accept title and trust responsibility for the Homelands under the U.S. Admissions Act in 1959.[45] The State incorporated the federal-State compact in the Admissions Act into its Constitution.[46] As the current trustee, the State owes a fiduciary duty of care to the Native Hawaiian trust beneficiaries.[47] Management and administration of the HHCA is the responsibility of the Department of Hawaiian Homelands (DHHL),[48] with oversight by the federal government (particularly for land exchanges).[49] For over sixty years, first the federal government and then the state government breached their fiduciary trust duties.

C. Persistent Breaches Lead to a Broken Trust

For some, despite recent progress, the Homelands program has become a "symbol of continuing governmental misfeasance in the treatment of Native Hawaiians."[50] The controversies surrounding the HHCA first emerged in the 1970s and 1980s.[51] Largely in response to Hawaiian advocates

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[45] *See* Admission Act of 1959, Pub. L. No. 86-3, §§ 4-5, 73 Stat. 4 (1959). The State also accepted responsibility for the Public Land Trust as a condition of Statehood under the Admissions Act. The Public Land trust is comprised of the former Crown and Government lands previously "ceded" to the United States during annexation in 1898. *See also* Yamamoto, Haia & Kalama, *supra* note 14, at 11 n.35; HAW. CONST. art. XII, §§ 4-6.

[46] *See* HAW. CONST. art. XII §§ 1-2 (stating that "the Hawaiian Homes Commission Act, 1920, enacted by the Congress . . . is hereby adopted as a law of the State"). *See also* MACKENZIE, *supra* note 10, at 49 (1991).

[47] *See* Ahuna v. Dep't. of Hawaiian Home Lands, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982) (citing Seminole Nation v. U.S., 316 U.S. 286, 296-97 (1942)). In *Ahuna*, the Hawai'i Supreme Court evaluated the State's trust duties, holding the State to "the most exacting fiduciary standards," basically judged by the same strict standards for a trustee of a private trust.

[48] Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, § 202, 42 Stat. 108 (1921).

[49] *See* Advisory Committee Report, *supra* note 26, at 8. The Advisory Committee concluded that by refusing to "monitor compliance, investigate complaints, and take appropriate legal action," the federal government has failed its trust obligations to the beneficiaries of the HHCA and "abandoned any interest in protecting the trust." *Id.* at 43.

[50] Yamamoto, *supra* note 1, at 896.

[51] *See* Advisory Committee Report, *supra* note 26, at 3. In 1979, the Hawai'i Advisory Committee to the United States Commission on Civil Rights began receiving complaints from concerned citizens regarding the management, administration, and enforcement of the Homelands trust. *Id. See also* Yamamoto, Haia & Kalama, *supra* note 14, at 28 (noting that Native Hawaiians looked to the courts from late 1970s through the early 1990s to reclaim wrongfully alienated Hawaiian Homelands and Ceded Lands). For examples of Native

demands for a public accounting, several agencies participated in oversight assessments and publicized investigative reports.[52] The investigations focused public officials and the general public on long neglected HHCA problems.[53]

The Hawai'i Advisory Committee to the United States Commission on Civil Rights' final report reiterated the findings of the prior reports, including the lack of a homelands inventory, lack of useable lands, lack of infrastructure on useable lands, lack of funding sources, and improper use/sale/exchange of homelands by federal, state and county governments.[54] The Advisory Committee ultimately found that the Homelands program "has provided very few tangible benefits for beneficiaries of the trust."[55]

The Hawaiian Homelands trust had been drastically underfunded. Financial support directly from the Federal Government was nonexistent.[56] For the first 30 years after the State accepted responsibility for the trust it too failed to provide funding, leaving the program to generate its own operating costs through the lease of homelands to non-beneficiaries.[57] In 1978, the Hawai'i populace amended the Hawai'i Constitution to require the State to provide "sufficient sums . . . for the administration and

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Hawaiian land reclamation lawsuits *see supra* note 14.

[52] *See, e.g.*, Advisory Committee Report, *supra* note 26, at 4-5 (referencing several reports including: The Native Hawaiian Study Commission, Report on the Culture, Needs, and Concerns of Native Hawaiians, vol. 1, 1983; The Review of Hawaiian Homes Commission Programs, U.S. Dept. of the Interior, Office of the Inspector General, Audit Report (September 1982) (finding the DHHL accounting system "inauditable" and the maintenance of land inventory records "inadequate" in 1982); The Native Hawaiian Land Trust Task Force, The Native Hawaiian: Culture, Needs, and Concerns, vol. 1 (1983).

[53] *See* Advisory Committee Report, *supra* note 26, at 4. *See also* Kalima v. State of Hawai'i, 111 Haw. 84, 88, 137 P.3d 990, 994 (2006). Based on the prior reports, the Secretary of the Interior and the Governor of Hawai'i, with strong encouragement from the Advisory Committee, established a Federal-State investigative task force to review the HHCA. The resulting Task Force Report presented a comprehensive and detailed analysis of the HHCA, which included both findings and recommendations. Advisory Committee Report, *supra* note 26, at 3-4.

[54] *See* Kalima v. State of Hawai'i, 111 Haw. 84, 88, 137 P.3d 990, 994 (2006). *See also* Advisory Committee Report, *supra* note 26, at 3.

[55] Advisory Committee Report, *supra* note 26, at II.

[56] *See* Advisory Committee Report, *supra* note 26, at 14 (noting that during the territorial government's administration of the Homelands trust from 1921 to 1959, under the purview of the U.S., no adequate mechanism for funding the program was ever established); *Id.* at 8 (citing Melody MacKenzie, senior staff attorney, Native Hawaiian Legal Corporation, testimony before the United States Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs, Aug. 8, 1989, p.2).

[57] *See* MACKENZIE, *supra* note 10, at 54 (noting that the state legislature "finally appropriated state general revenues to fund one-half of the department's administrative staffing budget" in 1987).

operating budget of [DHHL]."[58] The State, however, largely ignored the Constitutional mandate.[59]

In order to survive the absence of legislative funding, revenue from general leases to non-beneficiaries often provided the only income.[60] Yet instead of negotiating leases at fair market value, the DHHL historically improperly leased homelands to agribusiness and politicians for little to no compensation.[61] Territorial and state governors also illegally transferred over 30,000 acres of trust lands by executive order to Federal and State governments and to county agencies for schools, roads, airports and military use.[62]

These State abuses of the trust severely depleted trust resources and increased delays in determining eligibility and issuing awards.[63] The lack of funding and overall mismanagement of the trust contributed to the exponential growth of the waitlist to the currently over 26,000 beneficiaries.[64]

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[58] HAW. CONST. ART. XII § 1. *See* MACKENZIE, *supra* note 10, at 54 (reporting that the purpose of the constitutional amendment was "to provide the DHHL with monies for administrative and program costs, thereby eliminating the need to general-lease lands for revenues . . . and allowing the DHHL to focus on leasing to beneficiaries.").

[59] *See* MACKENZIE, *supra* note 10, at 54. The Supreme Court of Hawai'i recently decided a case on whether the legislature has provided sufficient funding for DHHL over the last 33 years. *See* Nelson v. Hawaiian Homes Comm'n, 127 Haw. 185, 277 P.3d 279 (2012) (finding what constitutes "sufficient sums" under article XII, section 1 of the Hawai'i State Constitution to be subject to judicial review, but what constitutes "sufficient funds" under the same Constitutional provision to be a nonjusticiable political question.).

[60] For DHHL's authority to issue general leases, *see* Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, § 204, 42 Stat. 108 (1921) (providing that land not needed for homesteading may be leased to the public through general leases subject to the same terms, conditions, restrictions, and uses applicable to the disposition of public lands).

[61] *See* Advisory Committee Report, *supra* note 26, at 28-29; MACKENZIE, *supra* note 10, at 50-54; Susan C. Faludi, *Broken Promise: How Everyone Got Hawaiians' Homelands Except the Hawaiians*, WALL ST. J., Sept 9, 1991, at A-2.

[62] *See* Advisory Committee Report, *supra* note 26, at II. Illegal land transfers by government executive order included: 1,356 acres at Lualualei, O'ahu and 25 acres at Kekaha, Kaua'i to the U.S. Navy, 295 acres at Pohakuloa, Hawai'i to the U.S. Army, and 54 acres in Keaukaha Hawai'i to the Federal Aviation Administration. Many of these lands are still held under general leases at a cost of one dollar for the entire 65-year term. *Id.* at II. *See also* MACKENZIE, *supra* note 10, at 52.

[63] *See* Advisory Committee Report, *supra* note 26, at 17-18 notes 53-54 (noting that besides depleting trust resources, the illegal transfers by executive order have been the source of significant controversy including a federal lawsuit).

[64] *See* State of Hawai'i Dep't of Hawaiian Home Lands, *Annual Report 2010-2011*, 47 (2011), http://www.hawaiianhomelands.org/wp-content/uploads/2011/11/HHL_AR_2011.pdf (reporting a total of 26,170 applicants for the Hawaiian Homelands program as of June 30, 2011).

D. State Attempts to Repair the Broken Trust

In 1988 the Hawai'i State Legislature responded to Hawaiian community protests about the mismanagement of the Homelands trust.[65] The legislature began its efforts to resolve trust issues by passing the "Native Hawaiian Judicial Trust Relief Act."[66] The Act waived the State's sovereign immunity and allowed beneficiaries to bring suit against the State for breaches of the Homelands trust.[67]

The waiver allowed suits for money damages for future breaches of the State's trust obligations occurring after July 1, 1988.[68] The Act also allowed suits for past breaches of trust (between 1959 and 1988) if filed before June 30, 1993.[69] It eliminated, however, the right-to-sue for past breaches of trust claims if the Governor proposed and the legislature accepted an alternative method of resolution.[70]

Governor John Waihe'e submitted and the 1991 legislature adopted, "An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust" ("Action Plan").[71] The Action Plan proposed two processes for addressing the State's past trust breaches: (1) a task force to settle breaches affecting the trust as a whole, and (2) a claims panel to resolve beneficiaries' individual damage claims.[72] The first process led to the *Ka'ai'ai v. Drake* lawsuit and the Act 14 settlement.[73] The second process created an administrative panel for reviewing individual beneficiaries' claims. The demise of that panel formed the foundation of the *Kalima* class action. The *Ka'ai'ai* and *Kalima* lawsuits

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[65] *See* Haunani-Kay Trask, *The Struggle for Hawaiian Sovereignty – Introduction*, CULTURAL SURVIVAL, (April 2, 2010) http://www.culturalsurvival.org/ourpublications/csq/article/the-struggle-for-hawaiian-sovereignty-introduction (discussing the history of Native Hawaiian's cultural and political resistance to subjugation by the United States).

[66] Kalima v. State of Hawai'i, 111 Haw. 84, 88, 137 P.3d 990, 994 (2006). *See* Native Hawaiian Trusts Judicial Relief Act 395, §§ 3-4, 1988 Haw. Sess. Laws 942, 945 (codified at HAW. REV. STAT. § 673 (West, Westlaw through 2001 Legis. Sess.)).

[67] *See* Native Hawaiian Trusts Judicial Relief Act 395 §§ 3-4.

[68] *See Kalima*, 111 Haw. at 88, 137 P.3d at 994. *See also* Native Hawaiian Trusts Judicial Relief Act 395 §§ 3-4.

[69] *See Kalima*, 111 Haw. at 88, 137 P.3d at 994.

[70] *See Kalima*, 111 Haw. at 88, 137 P.3d at 994. *See* Native Hawaiian Trusts Judicial Relief Act 395 § 5.

[71] *See* Native Hawaiian Trusts Judicial Relief Act 395 § 5. *See also* Office of the Governor, An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust 3-4 (1991) (on file with the author); H.B. 10-S, 18th Leg., Spec. Sess. (Haw. 1995).

[72] *See* H.B. 10-S, 18th Leg., Spec. Sess. § 6 (Haw. 1995). *See also* Kalima v. State of Hawai'i, 111 Haw. 84, 89, 137 P.3d 990, 995 (2006).

[73] Ka'ai'ai v. Drake, No. 92-3742-10 (1st Cir. Haw. Oct. 1992).

emerged amid the vibrant Hawaiian pro-sovereignty movement of the 1980s and 1990s and are integral to an evolving cultural narrative about self-determination for the Native Hawaiian people.[74]

The first process in the Governor's Action Plan created a task force to determine appropriate compensation to restore the trust for the State's misuse of Hawaiian Homelands for non-trust purposes.[75] The task force included the "[G]overnor's office (representing the State as principal wrongdoer) and the director of DHHL (representing the Department as passive wrongdoer)."[76] Representatives also joined from the Department of Land and Natural Resources (DLNR) and the Office of State Planning.[77] The State Attorney General, "whose office had allowed the misappropriation [of Homelands] for twenty-five years," provided counsel for the task force.[78] The task force denied Native Hawaiian community organizations' requests to participate.[79]

Without transparency or participation by trust beneficiaries, the closed process resulted in a proposed settlement that significantly understated the value of the trust's claims.[80] The task force initially recommended a one-time payment of $39 million for the State's illegal misuse of 29,633 acres of trust lands since statehood.[81] The task force also suggested that

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[74] The pro-sovereignty movement revived the Hawaiian language, Hawaiian music, hula and other arts, and encompassed the reclamation of the island of Kaho'olawe. *See generally* JONATHAN K. OSORIO, DISMEMBERING LAHUI (2002); J. KEHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY (2008). One aspect of the sovereignty movement was the response to and backlash against the Supreme Court's decision in *Rice v. Cayetano*. *See* Rice v. Cayetano, 528 U.S. 495 (2000) (holding that the election of trustees for the Office of Hawaiian Affairs by Native Hawaiian voters violated the Fifteenth Amendment of the U.S. Constitution). For an in-depth discussion of the impacts of the *Rice* decision, *see* Yamamoto & Betts, *supra* note 31.

[75] *See* Office of the Governor, An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust 3-4 (1991) (on file with the author). According to the Act 14 settlement, the task force was specifically responsible for: "verifying title claims, determining if improper uses were still in existence and whether these uses should be cancelled or continued if authorized . . . conducting appraisals, and determining appropriate compensation for past and continued use of Hawaiian home lands, and pursuing all avenues for return of lands and compensation from the federal government for wrongful actions during the territorial period." H.B. 10-S, 18th Leg., Spec. Sess. § 6 (Haw. 1995). *See also* Yamamoto, *supra* note 1, at 897.

[76] Yamamoto, *supra* note 1, at 897.

[77] *See* H.B. 10-S, 18th Leg., Spec. Sess. § 6 (Haw. 1995). *See also* Yamamoto, Haia & Kalama, *supra* note 154, at 75-76 n. 279.

[78] Yamamoto, *supra* note 1, at 897.

[79] *See* Yamamoto, Haia & Kalama, *supra* note 14, at 76 n. 279.

[80] *See* Yamamoto, *supra* note 1, at 897.

[81] *See* Yamamoto, Haia & Kalama, *supra* note 14, at 76. *See also* Yamamoto, *supra* note 1, at 896.

payment be conditioned upon a waiver by DHHL, on behalf of all Native Hawaiians, of what appeared to be rights to uncompensated claims – for instance, the misappropriation of trust interests in land-connected resources like water.[82]

While some initially supported the recommended settlement as the first compensation ever paid for the State's illegal use of Homelands, others questioned the validity of the valuation and the appraisal upon which it was based.[83] Lawyers, Native Hawaiian community leaders, and pro-sovereignty advocates developed a strategy for contesting the settlement.[84] Charles Ka'ai'ai, Alice Aiwohi, Noelani Joy and Robert Asing ("Ka'ai'ai") then sued the State in *Ka'ai'ai v. Drake*.[85] Ka'ai'ai challenged the propriety of the State's task force process for resolving Homelands trust beneficiaries' breach of trust claims – particularly the exclusion of Homelands trust beneficiaries' participation in the settlement

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[82] *See* Yamamoto, *supra* note 1, at 897 (noting that if executed, the waiver would likely have barred any claims asserted by a future Native Hawaiian governing entity).

[83] *See* Yamamoto, *supra* note 1, at 897-99.

[84] *See* Yamamoto, *supra* note 1, at 897-99. Professor Yamamoto served as co-counsel to the plaintiffs and class in the *Ka'ai'ai v. Drake* litigation. A core advocate's group was led by attorney Bill Meheula and attorney and sovereignty education advocate Ho'oipo Pa Martin. That group assessed the risk of legalizing the dispute, the effect of negative cultural narratives inscribed in law, difficulty in finding an unbiased venue to bring suit against the State, and the small likelihood of a favorable outcome. The core group also strategized and prepared for media backlash by organizing press conferences and community group meetings to better inform the public of the plaintiffs' goals. That group included many members of Hawaiian communities and leaders of Hui Na'auao (the umbrella sovereignty education organization).

[85] Ka'ai'ai v. Drake, No. 92-3742-10 (1st Cir. Haw. Oct. 1992). *See* Yamamoto, Haia & Kalama, *supra* note 14, at 76 n.279. When the DHHL was "poised to receive payment from the State in settlement of claims, based on Task Force 'recommendations, and sign a broad release waiving past and future claims," Ka'ai'ai *et. al.* brought suit in federal court. *Id.* The federal suit alleged breach of trust in the exclusion of a representative for the Native Hawaiian beneficiaries on the task force and was vigorously opposed by the State. *Id.* Plaintiffs voluntarily dismissed during the preliminary injunction hearing and re-filed in State court in light of the intervening Hawai'i Supreme Court decision in *Pele Defense.* Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992) (recognizing beneficiaries' standing to sue the State for breach of trust claims seeking retrospective relief). *See also* David Forman, *Native Hawaiian Cultural Practices Under Threat*, in 1 HAW. B.J., no. 13, 1998, at 1, 1-2 (noting beneficiaries' right to sue under State law and the Court's distinction of Native Hawaiian interests as distinguishable from the public interest in PASH); Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Haw. 192, 891 P.2d 279 (1995) (later recognizing a beneficiary's right to sue the State for violating trust obligations contained in the Admissions Act under U.S.C. § 1983 or the due process clause of the fourteenth amendment.).

process and, as a result, the continuing denial of Hawaiian self-determination.[86]

Ka'ai'ai succeeded in persuading the State circuit court to enter a preliminary injunction halting the settlement process. Thereafter, with legislative authorization, Ka'ai'ai and the State converted the suit to a statewide class action.[87] The court appointed an "independent representative" for the trust beneficiaries to the re-open task force and ordered a complete reevaluation of the claims.[88] The re-appraisal and new deliberations concluded in the settlement approved by the governor and authorized by the legislature in Act 14: $600 million in damages to the trust payable incrementally starting in 1995 without any waiver of claims.[89] The Act's payments from the State are now nearing completion. The $600 million has provided funds for infrastructure development and construction and loans for Hawaiian lessees – the very measures Aunty Alice dreamed of when she, then illegally, moved that shipping container onto her Homelands parcel.

What the settlement did not extinguish were the individual claims for damages sustained by trust beneficiaries who languished on the waitlist as a result of the trust breaches.[90] That is the subject of the *Kalima* class action. With the passage of Act 14, and the ensuing $600 million settlement, the legislature recognized that thousands of acres of Homelands had been "used, disposed of, or withdrawn from the trust by territorial or state executive actions in contravention of the HHCA."[91] Act 14 also explicitly acknowledged the generations of beneficiaries who had received no compensation for out-of-pocket losses and who had been "patient and

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[86] Yamamoto, Haia & Kalama, *supra* note 14, at 76.

[87] *See* H.B. 10-S, 18th Leg., Spec. Sess. § 1 (Haw. 1995). *See also* Yamamoto, *supra* note 1, at 899; Yamamoto, Haia & Kalama, *supra* note 14, at 76 n.279 (describing the impacts of the Ka'ai'ai suit).

The public "trial", cross examination of key government officials and media coverage led the court to grant a restraining order (the first of its kind against the State in a Hawaiian land trust case). A partial settlement required the state to pay the Task Force's initial recommended amount as a floor, not a ceiling, and eliminated the waiver-release. A Homelands beneficiary representative was appointed to the Task Force. The Task Force reconsidered all compensation claims, increasing its recommendation from $38 million to over $300 million. Finally, the 1983 legislature committed to pay $30 million a year for 20 years—$600 million total to the Homelands trust.

[88] Ka'ai'ai v. Drake, No. 92-3742-10 (1st Cir. Haw., Oct. 1992).

[89] *See* H.B. 10-S, 18th Leg., Spec. Sess. § 1 (Haw. 1995).

[90] *See* H.B. 10-S, 18th Leg., Spec. Sess. § 1 (Haw. 1995) (explaining that Act 14 withdrew the waiver of sovereign immunity granted in Act 395 (Chapter 673) and claims under that Act are forever barred, except individual claims under Chapter 674 are preserved).

[91] H.B. 10-S, 18th Leg., Spec. Sess. § 1 (Haw. 1995).

charitable in their prolonged wait for truth, justice and fair play."[92] It further acknowledged the "frustration, anxiety and spiritual loss of a class of native people whose culture welcomed strangers and generously shared finite resources."[93]

E. Still Struggling After All These Years

Overall, and over time, the State initiated beneficial efforts to repair the damage to the Homelands trust: cancelling illegal executive orders, negotiating land exchanges to replace trust lands, enacting limited "right to sue" provisions, improving funding support, implementing an accelerated award program, assigning raw land to beneficiaries and extending some lease terms from 99 to 199 years to allow generations of beneficiaries to remain on the land.[94] As investigators highlighted earlier, however, "despite forward steps, the DHHL continues to suffer from bureaucratic inefficiencies and a mandate well beyond the capabilities of its limited staffing and financial resources."[95]

Two decades ago Kamaki Kanahele testified before the Hawai'i Advisory Committee to the U.S. Commission on Civil Rights that, "[t]he end result [is] more lands being leased out to non-Hawaiians, shorter inventories to disperse to its beneficiaries and finally the impossibility of ever being able to bring more Native Hawaiians to the land."[96] This statement generally holds true today, while over 26,000 individual

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[92] H.B. 10-S, 18th Leg., Spec. Sess. § 1 (Haw. 1995).

[93] H.B. 10-S, 18th Leg., Spec. Sess. § 1 (Haw. 1995).

[94] *See* Advisory Committee Report, *supra* note 26, at 37. One positive measure undertaken by Governor George Ariyoshi was the cancellation of 27 executive orders and proclamations, which resulted in almost 28,000 acres being returned to the DHHL in 1984. *Id.* at 76 (citing Administration of Hawaiian Homes Comm'n Act: Hearing on S.J. Res. 154 Before the Select Comm. on Indian Affairs, 13th Congress (1989) (statement of Ruth G. VanCleve, Lawyer, Solicitor's Office)). While some lands were directly exchanged with the State for those of equal value, the DHHL allowed other uses to continue under various conveyances. *Id.* at 31. For example, the Department issued 5-year licenses for beach parks in Nanakuli, Waimanalo, Kaiona, Kaupo, and Makapu'u for a total of one dollar. *Id.* at 31. Louis Hao, former chairman of the Office of Hawaiian Affairs, said "the response to illegal set-asides was imperfectly implemented by the DHHL. Almost immediately after the lands were returned . . . revocable leases were approved to continue most of these [previous uses]." *Id.* at 31 (citing Louis Hao, testimony before Hawaii Advisory Committee, USCCR, Sept. 6, 1988, p.4).

[95] *See* Advisory Committee Report, *supra* note 26, at 37.

[96] *See* Advisory Committee Report, *supra* note 26, at 27 (citing Kamaki Kanahele, chairman, State Council of Homestead Associations, testimony before Hawaii Advisory Committee, USCCR, Aug. 2, 1990, p. 4-5).

Hawaiians remain on the waitlist and prime lands are still leased to non-beneficiaries.[97]

Today the DHHL "is one of the largest master-plan community developers in the state, with about 10,000 residential leases."[98] The new Chairman of the Hawaiian Home Lands Commission and Director of the State Department of Hawaiian Home Lands, Alapaki Nahale-a, expressed the Department's goal of delivering diverse homesteading opportunities and increasing the annual average placements from 150 to 200.[99]

Even the increased number of placements effectuated by the Act 14 settlement payments has made only a modest dent in the lengthy waitlist.[100] The reverberations of the past misappropriation of lands, long-standing lack of adequate funding and overall trust mismanagement are still felt today. Ninety years after enactment, the State and Federal governments are struggling to bring the full purpose of the HHCA to fruition. And the trust breaches, highlighted by *Kalima*, continue to await remediation.

III. *KALIMA V. STATE*

A. Lead up to the Kalima *Class Action*

The *Kalima* suit arose from the demise of the second part of the Governor's action plan to resolve past breach of trust claims against the State.[101] The first part of the action plan created the Governor's task force and ultimately resulted in the Act 14 settlement to repair the trust itself. The second part of the Governor's action plan proposed a process for administering individual beneficiaries' damage claims. HRS Chapter 674

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[97] Advisory Committee Report, *supra* note 26, at II (reporting "over 62 percent of the [total lands available for homesteading] are being used by non-natives"). Department of Hawaiian Home Lands 2009 Annual Report, DEPARTMENT OF HAWAIIAN HOME LANDS, 29, (June 1, 2010), http://www.hawaiianhomelands.org/wp-content/uploads/2011/11/HHL_AR_2009.pdf (reporting that as of 2010, only 22.4 percent of trust lands are leased to intended trust beneficiaries and used for homestead purposes).

[98] *See* Mark Coleman, *Alapaki Nahale-a: The Hawaiian Home Lands Commission chairman is eager to help Hawaiians achieve self-determination*, HONOLULU STAR ADVERTISER, Feb. 24, 2012 at A16-A17.

[99] *See* Coleman, *supra* note 98, at A16-A17 (describing the four different areas of the DHHL's new five-year strategic plan: "to deliver diverse homesteading opportunities, provide excellent service, reaffirm and assert trust status, and ensure financial well-being of the trust").

[100] *See* Coleman, *supra* note 98, at A16-A17. Chairman of the HHC Nahale-a noted the absence of State general funds for the program, observing that over 26,000 beneficiaries remain on the waitlist despite the acceleration of awards following the Act 14 settlement payments. *Id.*

[101] *See supra* notes 65-74 and accompanying text.

established an administrative claims review process through which individual trust beneficiaries could resolve actual damage claims resulting from State breaches of trust between 1959 and 1988.[102]

In 1997 the Hawaiian Home Lands Trust Individual Claims Review Panel ("panel") submitted its first report to the governor and legislature. The panel reported that it had received 4,327 claims submitted by 2,752 claimants prior to the August 31, 1995 deadline.[103] The panel recommended $6.7 million in damages for 162 claims and requested a two-year extension to continue its review.[104] But the 1997 legislature found ambiguities in the panel's formula for calculating claims and declined to appropriate the recommended funding, instead choosing to pass Act 382.[105] Act 382 not only extended the life of the panel by two years but also established a "Working Group" of state administrators to determine criteria for resolving HRS Chapter 674 claims.[106] The Working Group's interpretation of Chapter 674 differed significantly from the panel's formula and would have eliminated sixty percent of claims (waiting list claims) from consideration.[107] But, Act 382 became the subject of a lawsuit in which the circuit court ruled that the Working Group's proposed formula abrogated the fairness of the Chapter 674 claims process.[108] Finding parts

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[102] Kalima v. State of Hawai'i, 111 Haw. 84, 89-90, 137 P.3d 990, 995-96 (2006). The compromised amendments (incorporated in HB 895) to the individual right to sue (previously Act 395 section 5) became Act 323, the "Individual Claims Resolution under the Hawaiian Home Lands Trust Act" (later codified as HRS Chapter 674). The final process under HRS Chapter 674 included the following: (1) establishing the claims panel to receive, review and evaluate individual claims; (2) legislative consideration of reports submitted by the Panel; (3) "disbursement by the Panel of any compensation awarded[;]" and (4) filing of a written notice rejecting the legislative action (if the claimant was not satisfied with the process) and the filing of an action in circuit court. *See id.* at 90-92, 137 P.3d at 996-98 (citing Act 351 § 1, 1993 Haw. Sess. L. 991).

[103] *Kalima,* 111 Haw. at 91, 137 P.3d at 997.

[104] *Id.* Of the 4,327 claims filed prior to the August 31, 1995 deadline, the panel found 67 percent of the claims involved (either partially or directly) waiting an unreasonable amount of time for a homestead award. *Id.* Of the 4,327 claims, 396 were closed and 3,931 were accepted for investigation. *Id.* Of the 3,931 accepted, 601 were concluded resulting in final decisions on 172 claims affecting 147 claimants, 165 of which were found meritorious. *Id.*

[105] *See id.*

[106] *See Kalima,* 111 Haw. at 92, 137 P.3d at 998 (noting that the Working Group was comprised of the Attorney General, the Director of Budget and Finance, the Chair of the Hawaiian Homes Commission, and the Panel Chair).

[107] *See id.*

[108] *See id.* (finding the members of the Working Group biased by their official positions and prior testimony against beneficiary claims in *Apa v. Cayetano,* No. 97-4641-11 (1st Cir. Haw. Dec. 30, 1998)).

of Act 382 unconstitutional, the Court enjoined the Working Group from any further participation in the claims process.[109]

Despite losing a year of productivity, the panel performed admirably, thoroughly vetting claims, listening to claimants' stories and carefully crafting recommendations. The panel's report to the 1999 legislature recommended over $16 million in damage awards for 2,050 claims and requested an additional extension to review the remaining 53% of the claims.[110] In response to the 1999 report, the Legislature granted the panel more time to review claims, but then-Governor Ben Cayetano vetoed the bill, finding that "the administrative process was not working and that it would take more than an additional year for the Panel to complete its work, which [is] deemed totally unacceptable."[111]

By the time the claims review panel filed its Final Report in 1999, the panel had issued decisions on 53% of the claims.[112] The focus of the panel in its last months shifted to notifying claimants of the deadline to file a notice of rejection of the legislative action on October 1, 1999.[113] On September 30, 1999, the day before the deadline, the Native Hawaiian Legal Corporation (NHLC) filed "the statutorily required notice of rejection of legislative action on behalf of, *inter alia,* all 2,721" individuals who were dissatisfied by the legislature's failure to act on the panel's recommendations.[114] These Native Hawaiians comprised the class in *Kalima v. State.*

B. Procedural History of Kalima v. State

The *Kalima* class members participated in the administrative process, failed to receive legislatively approved administrative remedies and filed proper notices of rejection (either personally or through NHLC).[115] Having satisfied the prerequisites for the right to sue under Chapter 674, three former panel participants and beneficiaries of the Homelands trust brought

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[109] *See Kalima,* 111 Haw. at 93, 137 P.3d at 999.

[110] *See id.*

[111] *See id.*

[112] *See id.*

[113] *See id.*

[114] *See id.* HRS Chapter 674 required beneficiaries to complete the administrative process and file a notice of rejection of the legislative action before bringing suit. This narrowed the number of eligible claimants from the nearly 26,000 Native Hawaiian beneficiaries on the waitlist to the 2,721 class members who satisfied the prerequisites. *See Kalima,* 111 Haw. at 93-94, 137 P.3d at 992-93. *See also* KALIMA LAWSUIT, http://www.kalima-lawsuit.com (last visited March 9, 2012) (stating that "only those people who filed claims with the Panel between 1991 and 1995 are a part of th[e] lawsuit.").

[115] *See Kalima,* 111 Haw. at 86, 137 P.3d at 992.

a class action suit against the State for breaching its trust obligations under the HHCA from 1959 to 1988.[116]

Plaintiffs Leona Kalima, Dianne Boner and Raynette Nalani Ah Chong (Special Administrator of the Estate of Joseph Ching)[117] filed a seven-count complaint seeking damages arising from the State's breaches of trust under Hawai'i Revised Statutes ("HRS") Chapters 674, 673 and/or 661.[118] The alleged breaches of trust causing damage to individual *Kalima* class members included: "(1) mismanagement of the extensive waiting list; (2) mishandling of the plaintiffs' applications; (3) preference policies regarding eligibility requirements; and (4) the awarding of raw lands lacking infrastructure."[119]

With approval of the circuit court, the parties agreed first to address the threshold issue of whether the *Kalima* plaintiffs and class members could pursue their claims under HRS Chapters 674 and/or 661 (Count I).[120] Finding sufficient evidence to satisfy the prerequisites of class certification, the court certified the 2,721-member class under the Hawai'i Rules of Civil Procedure 23(b)(3).[121] In August 2000, Circuit Court Judge Victoria S.

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[116] *Id.* Upon original filing of the suit on December 29, 1999, the defendants included: the State of Hawai'i, the State of Hawai'i Department of Hawaiian Home Lands, the State of Hawai'i Hawaiian Home Lands Trust Individual Claims Review Panel, and Linda Lingle, (the suit originally named Ben Cayetano), in her official capacity as Governor, State of Hawai'i. *Id.*

[117] *See Kalima,* 111 Haw. at 94, 137 P.3d at 1000. Originally, 2,752 claimants filed 4,327 claims. *Id.* at 91, 137 P.3d at 997. The 2,721 plaintiffs in this case represent all claimants except the 31 claimants that settled). *Id.* at 94 n.13, 137 P.3d at 992 n.13. All 2,721 plaintiffs (class members) filed timely claims with the panel. *Id.* at 94, 137 P.3d at 992. The panel considered and issued an advisory opinion to the legislature for the 418 plaintiffs represented by Raynette Nalani Ah Chong, on behalf of Joseph Ching. *Id.* The 53 plaintiffs represented by Dianne Boner had their claims considered and an advisory opinion issued but never presented to the legislature. *Id.* Leona Kalima represents the remaining 2,250 plaintiffs that received no advisory opinion on their claims. *Id.*

[118] *See Kalima,* 111 Haw. at 94-95, 137 P.3d at 1000-1001.

[119] *Kalima,* 111 Haw. at 86, 137 P.3d at 992.

[120] *See Kalima,* 111 Haw. at 86, 137 P.3d at 992.

[121] *See* HAW. R. CIV. P. 23. Before the interlocutory appeal in 2000, the *Kalima* class was originally certified by the circuit court as a 23(b)(2) class because Count I primarily sought declaratory relief. Kalima v. State, No. 99-0-4771-12 (1st Cir. Ct. Haw. 2000) (Order Granting Plaintiffs' Motion For Class Certification On Count I Of The Complaint Filed On May 16, 2000), *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SMmExYWY4MzQtYmM5Yy00NGJkLWFlNTktZjU2NDE4N2M5ODJm/edit. In June 2011, the court re-certified the waiting list subclass under 23(b)(3) for the purpose of determining a method for calculating class-wide damages. Kalima v. State, No. 99-0-4771-12, at 2-4, (1st Cir. Ct. Haw. 2011) (Order Granting Plaintiffs' Motion To Recertify Waiting List Subclass To Include The Amount of Damage Filed October 1, 2010), *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SOWY4MjFmZTgtZTU3OS00OWE5LWFk

Marks granted the plaintiffs' motion for partial summary judgment as to Count I, allowing them to pursue their claims.[122] States, however, are generally immune from lawsuits for money damages "except where there has been a 'clear relinquishment' of immunity and the [s]tate has consented to be sued."[123] Waivers of sovereign immunity must be clear, unequivocal and strictly construed. Thus, the circuit court certified an interlocutory appeal and State filed a timely notice of appeal with the Hawai'i Supreme Court in December 2001, contending that the circuit court erred in granting summary judgment because the statutory conditions for the waiver of sovereign immunity were not met.[124]

C. Hawai'i Supreme Court's Initial Decision in Kalima v. State

The State's interlocutory appeal contested numerous rulings by the circuit court, including its finding that the State waived its sovereign immunity against the *Kalima* class members' claims for individual damages.[125] The Hawai'i Supreme Court issued its decision in June 2006: "(1) affirm[ing] . . . that the plaintiffs' are entitled to pursue their claims under HRS Chapter 674; (2) revers[ing] the . . . determination that Act 14 is a settlement agreement and that the *Kalima* class members have a right to sue under HRS chapter 661; and (3) remand[ing] . . . to the circuit court for further proceedings."[126] The Court began by conducting a detailed analysis of the requirements and procedures of HRS Chapter 674.[127]

The Court found Chapter 674 to be both a remedial statute to be construed liberally and a waiver of sovereign immunity that must be strictly construed.[128] The parties agreed that section 16 of chapter 674 is a specific

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[122] *See Kalima*, 111 Haw. at 87, 137 P.3d at 993. For a discussion of the court's numerous conclusions of law in favor of the plaintiffs and the procedural posture of the case, *see id.* at 96, 137 P.3d at 1002.

[123] *Id.* at 101, 137 P.3d at 1007.

[124] *See id.* at 87 n.5, 137 P.3d at 993 n.5.

[125] *See Kalima*, 111 Haw. at 97, 137 P.3d at 1003. The State also asserted error in the circuit court's findings that, (1) Act 14 is a contract conveying a separate right to sue and (2) the doctrine of exhaustion should not be used to penalize the class members who are unable to control the individual claims review panel or the legislature. *Id.*

[126] *Kalima*, 111 Haw. at 112-113, 137 P.3d at 1018-1019.

[127] *See Kalima*, 111 Haw. at 98-100, 137 P.3d at 1004-06. The Court found that HRS chapter 674 explains the purpose of the act (HRS §§ 674-1 and 2), the administrative process of the individual claims review panel (HRS §§ 674-3 through 674-15) and the judicial process (HRS §§ 674-16 through 674-21).

[128] *See Kalima*, 111 Haw. at 100, 137 P.3d at 1006. (defining remedial statutes as those that provide, facilitate, or improve existing remedies).

waiver of sovereign immunity that includes the State's consent to be sued for money damages resulting from breaches of trust that occurred between 1959 and 1988.[129] The parties disagreed, however, on the conditions of the waiver and Kalima's satisfaction of the administrative and procedural prerequisites.[130]

The conflict led the Court to examine whether the *Kalima* class members had satisfied the prerequisites of the waiver. Under HRS section 674-17, the right to sue only extends to aggrieved individual claimants, who had claims reviewed by the Panel and filed written notices rejecting the legislative action taken on their claims.[131] The Court ruled that the panel had completed its process by reviewing and reporting on the merits of the claims and recommending damage awards to the legislature.[132] The Court also ruled that the legislature's failure to act on the Panel's recommendations until the statutory deadline had passed was an effective denial of all claims.[133] In enacting chapter 674 the legislature intended that the dissatisfied claimants retain the right to sue.[134] The Court concluded that the two conditions of the administrative process, the panel "review" and legislative "action," set forth in the definition of aggrieved individual claimant in HRS Section 674-17, had been timely completed and that the circuit court properly determined that *Kalima* perfected the right to sue

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[129] *See id.* at 101, 137 P.3d at 1007.

[130] *See id.* at 101, 137 P.3d at 1007.

[131] *Id.* at 101, 137 P.3d at 1007. An aggrieved individual claimant is defined as "an individual claimant [1] whose claim was reviewed by the [P]anel under this chapter and [2] who has filed, no later than October 1, 1999, a written notice with the [P]anel that the claimant does not accept the action taken by the legislature in regular session upon the claim." HAW. REV. STAT. § 674-17(b) (2006).

[132] *See Kalima,* 111 Haw. at 103-04, 137 P.3d at 1009-10. The panel was required to "receive and review each claim, as well as submit reports to the legislature that include . . . its findings and opinions regarding the merits of each claim, and its recommendations for an award of damages." *Id.* In examining the Panel's reports the Court found that the Panel had met the statutory requirements of HRS §§ 674-10 and 674-14 and sufficiently reviewed the claims. *Id.*

[133] *See Kalima,* 111 Haw. at 104-05, 137 P.3d at 1010-11. The Court found that, "if the [l]egislature fails to fund the claims, ignores them . . . the [l]egislature has acted upon the claims." *Id.* at 104, 137 P.3d at 1010. The Court concluded that the legislature's "deferral" of the Panel's recommendations was a "denial of all claims and, therefore an 'action' upon each claim." *Id.* at 105, 137 P.3d at 1011. Limiting claims to those that had advisory opinions included in the panel reports to the legislature would eliminate most of the claims filed "through no fault of their own," in contravention of the legislative purpose. *Id.* at 106, 137 P.3d at 1012.

[134] *See Kalima,* 111 Haw. at 105, 137 P.3d at 1011. Aside from the issue of sovereign immunity, the Court also found the defendant's remaining arguments to be without merit. *Id.* at 105-106, 137 P.3d at 1011-12.

under chapter 674.[135] The Supreme Court of Hawai'i ultimately affirmed the Kalima class members' right to bring suit under HRS chapter 674, reversed their right to sue under HRS chapter 661, and remanded the case to the circuit court for further proceedings consistent with the opinion.[136]

D. On Remand Judge Hifo Found Breaches of Trust and Reserved the Question of the Measure of Class Damages

Upon remand to the First Circuit Court, after a full trial, Judge Eden Hifo determined that the State breached its Homelands trust duties during the claims period and that the breaches caused compensable harm for which the State is liable.[137] Judge Hifo reserved the issue of the amount of damages to be awarded to the *Kalima* class members for future determination.[138] Judge Hifo called for further proceedings, including motions to establish a fair method for calculating damages and for the possible appointment of a special master to administer the claims process.[139] Judge Hifo made specific findings relevant to the current impasse.

First, Judge Hifo found that the State accepted the trust duties owed to the Native Hawaiian trust beneficiaries under the HHCA when it became successor trustee to the Federal government.[140] The State's main duty as

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[135] *See Kalima,* 111 Haw. at 103, 137 P.3d at 1009. Lastly, the Court reversed the circuit court's determination and held instead that *Kalima* did not have a right to sue for breach of contract under HRS chapter 661 (Act 14). *Id.* at 112-13, 137 P.3d at 1018-19.

[136] *Id.* at 112-113, 137 P.3d at 1018-1019.

[137] *See* Kalima v. State, No. 99-0-4771-12, at 1-2, (1st Cir. Ct. Haw. 2009) (Decision Regarding Liability and Legal Causation Following Bifurcated Trial on Aforesaid Issues), *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SN Tk3NmQ0YWEtY2YwN y00ZWI2LTk3MzQtODgwZGUzNTU5MjBi/edit [hereinafter Hifo's Decision]. The November 2009 decision noted that the "plaintiffs [had] proved by clear and convincing evidence breaches of trust by the [State] . . . and that said breaches [constituted] a substantial factor or legal cause of eligible Native Hawaiians not being placed on the land in further breach of trust." *Id.* at 1-2. The court based its decision on federal and state law, trial evidence, non-expert testimony, trust experts' testimony and documentary evidence including trial exhibits and DHHL Annual reports. *Id.* at 2.

[138] *See generally* Hifo's Decision, *supra* note 137; Transcript of the Proceeding Held on April 15, 2011, before the Honorable Virginia Lee Crandall, Judge Presiding at 5, Kalima v. State, Civil No. 99-0-4771 (1st Cir. Ct. Haw. 2011) *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SMDk5NDhiOTYtMTVlMS00YTBmLWE5 MjQtNmNiZTgwMzc1YWNl/edit?hl=en_US&authkey=CL7mz8oB [hereinafter April 2011 Transcript] (noting Hifo's finding insufficient evidence to determine the amount of damages caused by mismanagement of the trust, the amount of revenues lost by leases to private entities, and the extent to which proper management would have allowed for increased site development, home loan funds, or administrative costs).

[139] *See* Hifo's Decision, *supra* note 137, at 2.

[140] *See* Hifo's Decision, *supra* note 137, at 2. The trust instruments governing the State's

trustee is to protect and manage trust assets to ensure their productivity.[141] Although the State is not required to fund the trust directly, the State does possess a distinct duty to maintain accurate financial records to ensure the program's eligibility for legislative appropriations.[142] Judge Hifo determined that the State breached this duty by failing to maintain adequate, auditable records, which prevented the program from qualifying as an authorized revenue-bonding authority until 1989.[143]

Second, Judge Hifo found that the State "fail[ed] to ascertain the property within the trust and to correct that same failure by the predecessor trustee."[144] The court also found the State breached its trust duties by: (1) failing to "correct its own and the predecessor trustees' illegal 'set asides'" by not cancelling or withdrawing the executive orders or proclamations that wrongly conveyed more than 29,000 acres of Hawaiian Homelands to private entities, and (2) failing to compensate the trust for fair rent during the period of non-beneficiary State use.[145] Although the poor quality of much of the Homelands is widely known, the court determined that comparable lands leased by private entities and trusts (such as the Bishop and Campbell estates) obtained significantly higher lease rates than Homelands leased by DHHL to private entities.[146] The court therefore determined that the State mismanaged the lands and failed to make the Homelands fully productive by allowing private lessees to underpay the lease rents owed to the trust.

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fiduciary duties are the Hawaiian Homes Commission Act, the Admission Act sections 4 and 5(f) and article XII section two of the State Constitution. The applicable trust law is the common law of Hawai'i and the Restatement (Second) of the Law of Trusts. For a complete list of the relevant sections of the Restatement, *see* Hifo's Decision, *supra* note 137, at 3-6.

[141] *See id.* at 4.

[142] *See* Hifo's Decision, *supra* note 137, at 6 (noting that failing to appropriate legislative funds does not constitute a breach of trust).

[143] *See* Hifo's Decision, *supra* note 137, at 7. The court found the State's "failure to keep accurate [accounting] records was a substantial factor in aggravating the lack of funds to create homesteads and thus significantly contributed to delay of awards." The court thus concluded that the State breached its trust duties under sections 172, 174, 169 and 181 during the claims period. *Id.* at 7, 15.

[144] *See* Hifo's Decision, *supra* note 137, at 8.

[145] *See* Hifo's Decision, *supra* note 137 at 8 (reiterating that more than 29,000 acres were withdrawn from the trust by executive orders and proclamations that provided no compensation to the trust or simply exchanged homestead lands for lands of lesser value).

[146] *See* Hifo's Decision, *supra* note 137, at 9-10. The State attempted to present expert testimony to the contrary by comparing State leases for non-beneficiary lands with those of DHHL lands. However, because the State's leasing of public non-trust lands is not constrained by the same duties owed under the HHCA, the court determined that the leases at issue are better compared to leases issued by private trust entities that have similar trust obligations as the State. *Id.* at 9-11.

Although Congress never explicitly stated its intent to "place Native Hawaiians on the land in a prompt and efficient manner," Judge Hifo ascertained this to be an undeniable reason for the creation of the trust and determined that the State's failure to do so, evidenced by the burgeoning waitlist, constituted a breach of trust pursuant to Restatement section 181.[147] The court concluded that the main reason for the State's inability to award homesteads is the increasing cost of site development and the department's insufficient funds to develop raw lands.[148] The State's witness testified that normal site development time is five to six years, which is considered the optimal time for an eligible applicant to wait before an award is offered.[149] The court determined that State's breaches were a substantial factor in wait list applicants incurring out-of-pocket expenses during the inordinate delay [often more than 30 years] in receiving homestead awards.[150] On the issue of causation, Judge Hifo found that all of the "breaches of trust were caused by acts or omissions by employees of the State in the management and disposition of trust resources."[151]

Judge Hifo left for future proceedings the determination of the amount of damages and proof of claims for each *Kalima* class member.[152] The next section will discuss circuit court Judge Crandall's multiple attempts to ascertain a workable method for calculating the beneficiaries' individual damage claims on a class-wide basis.

E. Judge Crandall Twice Rejects the State's and Plaintiffs' Proposals and Calls for a Workable Method

In April 2011, Judge Crandall rejected differing proposals by both parties for ascertaining the proper measure of damages for class members, announcing, "[a]t this point the court is not adopting either party's model for proceeding . . . The State's model is too strict and goes too far, and then

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[147] Hifo's Decision, *supra* note 137, at 12.

[148] *See* Hifo's Decision, *supra* note 137, at 13 (observing the increase in site development costs from $2,000 in 1920 to $8,000 in 1971, and finally $35,000 in 1987). In 2007, DHHL estimated the cost of developing roads, water and sewer lines and electrical service to be well over $100,000 per lot. Department of Hawaiian Home Lands, DHHL Newsletter, Ka Nuhou No. 2, at 1 (Summer 2007).

[149] Hifo's Decision, *supra* note 137, at 13.

[150] Hifo's Decision, *supra* note 137, at 14. The evidence indicated that the backlog would have been decreased and significantly more homesteads would have been awarded during the claims period if the State had cured its own breaches and those of the predecessor trustees.

[151] Hifo's Decision, *supra* note 137, at 11.

[152] Hifo's Decision, *supra* note 137, at 11.

plaintiffs offer no model for determining what period of delay was presented."[153]

Kalima first proposed a computation of class damages based on the out-of-pocket losses suffered, as defined by the Hawai'i courts for breach of contract cases.[154] *Kalima* asserted entitlement to the benefit of their bargain. *Kalima* argued that class members lost the benefit of leasing a developed lot at $1 per year and should recover compensation for the value of a developed homestead.[155] Thus, *Kalima* proposed using land sales data to calculate the difference in the market value of an improved homestead lot at the time of application and the market value of the lot at the time of award, or the time of trial.[156]

The State strongly contested *Kalima*'s methodology in its reply brief, describing the proposal with extreme language such as specious, preposterous, egregious, frivolous, baseless and absurd.[157] The State's proposed method emphasized that the *Kalima* class members are only entitled to out-of-pocket losses resulting from the State's breaches of trust.[158] The State proposed a clearly unworkable 4-step method, requiring proof of: (1) how much money or land the trust lost (and when) as a result of each breach; (2) how many additional homesteads could be developed (and when) with the additional money or land the trust would have retained

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[153] April 2011 Transcript, *supra* note 138, at 42-43, 47. Actual damages are defined as direct, monetary out-of-pocket loss, excluding non-economic damages sustained by an individual claimant resulting from a breach of trust by the State from 1959-1988. HAW. REV. STAT. § 674-2 (West 2011). Noneconomic damages include pain and suffering, loss of enjoyment of life, loss of consortium, etc. HAW. REV. STAT. § 663-8.5 (West 2011).

[154] *See* Plaintiffs' Motion to Determine What Model Should Be Used to Establish The Amount of Damage Class Members Suffered as a Result of The Breaches Committed By Defendants; Declaration of Andrew Rothstein; Exhibits 1-2 And Certificate of Service at 5 n.1, Kalima v. State, No. 99-0-4771 VLC (Class Action) (1st Cir. Ct. Haw. 2011) (on file with author) [hereinafter Plaintiffs' First Motion]. The Hawai'i Supreme Court defined "'out of pocket loss' as the economic benefit the injured party would have been expected to receive but for the wrongful conduct of another." This statutory remedy is noteworthy and atypical. Typically, for breaches of trust "the remedies of the beneficiary against the trustee are exclusively equitable." *Id.* (citing Zanakis Pico v. Cutter Dodge, Inc., 98 Haw. 309, 321-22, 47 P.3d 1222, 1234-35 (2002) internal citations omitted; RESTATEMENT (SECOND) OF TRUSTS § 197 (1959)).

[155] *See generally id.*

[156] *See generally id.*

[157] *See generally* Defendants' Opposition To Plaintiffs' Motion to Determine What Model Should Be Used To Establish The Amount Of Damage Class Members Suffered As a Result Of The Breaches Committed By Defendants; Certificate of Service, Kalima v. State, Civil No. 99-0-4771 VLC (Class Action) (1st Cir. Ct. Haw. 2011) (on file with author) [hereinafter Defendants' First Motion].

[158] *See* Defendants' First Motion, *supra* note 157, at 2.

absent the breaches; (3) when (based on actual waiting lists and other individual circumstances) each subclass member would have received a homestead had the additional homesteads been available; and finally (4) the out of pocket expenditures a subclass member was forced to make on alternative land during the breach-caused delay.[159]

Judge Crandall rejected both methods of calculating damages. Instead, she demanded new approaches for determining: (1) the length of the delay; (2) proper measure of out-of-pocket loss; and (3) the specifics of maintaining the waitlist, priority placement, and eligibility for a lease.[160]

At a second hearing in October 2011, Judge Crandall considered another round of motions to determine a fair method for calculating the *Kalima* class members' damages.[161] *Kalima* based their second proposal for calculating damages on landlord-tenant law.[162] *Kalima* proposed calculating the fair market rental value (4% of the appraised fee value of the property) of an improved residential homestead lot (adjusted for inflation).[163] By then applying that fair market rental value as a base value to each class member multiplied by years spent on the waitlist, the model attempted once again to conform each class members' loss to a standard *developed* residential lot.[164] *Kalima* proposed calculation of out-of-pocket expenses (cost of replacement leases obtained in the area in which they resided) as a secondary option for class members to pursue if their individual damages extended beyond the base amount they are awarded.[165] The State proceeded to submit substantially the same 4-step method the court rejected earlier.[166]

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[159] *See* Defendants' First Motion, *supra* note 157, at 2.

[160] *See* April 2011 Transcript, *supra* note 138, at 42-47.

[161] *See* KALIMA LAWSUIT, http://www.kalima-lawsuit.com (last visited March 9, 2012).

[162] *See* Plaintiffs' Second Motion to Determine What Model Should Be Used to Establish The Amount of Damage Class Members Suffered As A Result Of The Breaches Committed By Defendants; Declaration of Andrew Rothstein; Exhibits 1-2; Declaration of Thomas Loudat; Declaration of Melody K. Mackenzie; Declaration of Carl M. Varady; Exhibits 3-6; Notice of Motion; Certificate of Service at 6-9, Kalima v. State, Civil No. 99-4771-12 VLC (Class Action) (1st Cir. Ct. Haw. 2011), *available at* https://docs.google.com/filed/0BxTdYPR6vv8SMzRiMjg2MmMtMDVlNC00ZWU2LWIwZjgtZWVlMmZjMjllNDI1/edit?hl=en_US [hereinafter Plaintiffs' Second Motion].

[163] *See* Plaintiffs' Second Motion, *supra* note 162, at 7.

[164] *See generally* Plaintiffs' Second Motion, *supra* note 162, at 8.

[165] *See* Plaintiffs' Second Motion, *supra* note 162, at 6, 8-9.

[166] *See* Notice of Hearing; Defendants' Second Round Motion For The Court To Adopt Defendants' Model For Determining The Actual Damages, If Any, Suffered By Each Subclass Member As A Result Of Breaches at 1-3, Kalima v. State, No. 99-0-4771 VLC (1st Cir. Ct. Haw. 2011), *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SY2JhOTlkNDYtODBjMi00ZjBlLWIwYmMtODdjNDRjMjJiMDM5/edit?hl=en_US.

Judge Crandall reaffirmed Judge Hifo's decision regarding liability, causation and the entitlement to damages.[167] The Judge once again declined to accept either side's proffered method for calculating damages. Instead the court ruled that, "damages would be measured either by the fair market value of a comparable homestead lot or by the actual out of pocket expenses."[168] The aggregation and extrapolation method we propose *infra* to break the procedural impasse combines aspects of both measures noted by Judge Crandall by measuring the out-of-pocket expenditures in obtaining a fair market *lease of land comparable* to a homestead lot with underlying infrastructure.

Although dissatisfied with the second round of proposals presented, Judge Crandall did rule on the issue of reasonable delay. She determined that the *Kalima* class members' damages would start to run six years from the date of placement on the waitlist.[169]

At bottom, Judge Crandall appeared to be frustrated by the failure of both parties to propose a workable method for a second time.[170] The parties thereafter submitted a third round of briefs to the circuit court.[171] But full agreement on a method is unlikely. Regardless of what Judge Crandall decides, neither party is likely to be satisfied and one or both will likely pursue an interlocutory appeal to obtain an appellate ruling on the validity

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[167] *See* KALIMA LAWSUIT, http://www.kalima-lawsuit.com/announcements/updateon October132011hearing (last visited March 11, 2012).

[168] *Id.*

[169] *See* KALIMA LAWSUIT, http://www.kalima-lawsuit.com (last visited March 11, 2012). *See also* Hifo's Decision, *supra* note 137, at 11. The issue of "reasonable delay" was litigated in the trial before Judge Hifo. In the absence of any explicit language, Judge Hifo found that "the purpose [of the HHCA was to] place Native Hawaiians on the land in a prompt and efficient manner." *Id.* at 11-12. Thus, the State's failure to make timely offers of homestead awards constituted a breach of trust. Although the State's expert testified that the "normal site development time is 5 to 6 years and that would be the logical, optimal waiting list time for eligible applicants," Judge Hifo declined to determine when damages should start to run. *Id.* at 13, 17. Thus, arguments on the issue of reasonable delay continued before Judge Crandall. Plaintiffs argued that damages should run from the date of application because the State's breaches made the proper wait time unascertainable. *See* Reply Memorandum In Support Of Plaintiffs' Motion To Determine What Model Should Be Used To Establish The Amount of Damage Class Members Suffered As A Result Of The Breaches Committed By Defendants; And Certificate of Service at 4, Kalima v. State, No. 99-4771-12 VLC (1st Cir. Ct. Haw. 2011) (on file with author) [hereinafter Reply in Support of Plaintiffs' Motion]. Defendants argued that the State is only liable for the specific portion of a class member's total wait caused by the breaches, rather than the entire wait because beneficiaries do not receive awards on the date they apply. *See* Defendants' First Motion, *supra* note 157, at 1-3.

[170] For the parties' second round briefs, *see* KALIMA LAWSUIT, http://www.kalima-lawsuit.com (last visited March 11, 2012).

[171] *See supra* note 21 and accompanying text.

of the method to be employed. On remand, the trial court will then be employing an approved method before substantial resources are expended on the actual class damage determinations.

The crux of a forthcoming appeal, then, is the proper method for calculating class members' damages. After thirteen years of litigation, the now two-year dispute about the appropriate method for calculating damages for a class of 2,700 – where individual trials would overwhelm the judicial system as well as the parties—requires immediate resolution.[172] Twenty years ago Governor Waihee's office recognized that "proactive actions are needed to remedy historic controversies if the State is to successfully fulfill its current and future obligations under trust."[173] Promoting justice and healing for the wounds of over 2,500 trust beneficiaries and their families is needed to repair and ultimately enhance the State's relationships with the Native Hawaiian communities and create a stronger foundation for future interactions.[174]

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[172] *See supra* notes 114, 117 and accompanying text. As previously discussed, the *Kalima* class is limited to the 2,721 beneficiaries who filed claims with the review panel before the 1995 deadline. *Id.* The claims of the almost 26,000 other beneficiaries on the waitlist are precluded from obtaining any compensation for damages. *Id.* The outcome of the *Kalima* case may be valuable to the other beneficiaries if a subsequent chance to re-file claims is ever granted by the legislature. *See* discussion *infra* Part V.A.1.

[173] Office of the Governor, An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust 2 (1991) (on file with the author).

[174] *See* Eric K. Yamamoto & Ashley K. Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 33 (2009). Recent efforts for Native Hawaiian self-recognition include the 2011 ceded lands settlement and the Act 195 Native Hawaiian recognition bill. *See also* Star-Advertiser Staff, *State to Give OHA Kaka'ako Land in Ceded Lands Settlement*, HONOLULU STAR ADVERTISER, Nov. 16, 2011, *available at* http://www.staradvertiser.com/news/breaking/133997733.html?id=133997733 (discussing the terms of "an agreement to settle past due amounts owed to OHA from ceded lands payments"); Native Hawaiian Recognition – Native Hawaiian Roll Commission, Act 195, S.B. 1520 (2011) (recognizing Native Hawaiians as the only indigenous, aboriginal, maoli people of Hawai'i and giving the Governor power to appoint a five-member Native Hawaiian Roll Commission to build a foundation for self-determination and establishment of a Native Hawaiian governing entity.); Star-Advertiser Staff, *Former OHA Executive Oversees Native Hawaiian Roll Commission*, HONOLULU STAR ADVERTISER, Jan. 6, 2012, *available at* http://www.staradvertiser.com/news/breaking/136864118.html?id=136864118 (reporting the appointment of the former executive officer of OHA, Clyde Namuo, as executive director of the Native Hawaiian Roll Commission joining former Governor John Waihe'e as Commission Chair).

IV. THE PROPOSAL: A THREE-PHASE AGGREGATION METHOD FOR CALCULATING CLASS MEMBERS' OUT-OF-POCKET LOSSES

Six years have passed since the trial court determined the State's liability, and the class members are entitled to expeditious resolution of their claims.[175] The *Kalima* class members' and the State's attorneys thrice failed to proffer an acceptable method for calculating damages. The court appeared to find the proposed methods by both sides to be clearly inadequate. While *Kalima* sought to employ a more reasonably conceived yet overly simplified all-encompassing formula that standardized the damages for all class members, the State urged an approach that seemingly barred any recovery at all.[176]

With this backdrop and drawing upon case precedents, scholarly commentary, and Professor Yamamoto's experiences as class counsel in *Ka'ai'ai v. Drake*[177] and as procedural consultant in the *In re Marcos*[178] human rights class action, we suggest careful consideration of the proposed aggregation method as a procedural approach for breaking through the litigation impasse in *Kalima*. With careful oversight, the method establishes the parameters for fairly calculating out-of-pocket damages of class members by deploying expert statisticians and appraisers under the guidance of a special master—as suggested by Judge Hifo.[179]

"Aggregation and extrapolation" is no longer considered a "novel and radical procedure" as it was initially in the early 1990s.[180] Aggregation methods have been employed and assessed extensively in mass tort litigation and have been found to lessen the burden on courts and comport with due process.[181] The aggregation method we detail below draws upon

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[175] *See* discussion *infra* Part V.A.1. Kalima v. State of Hawai'i, 111 Haw. 84, 97, 137 P.3d 990, 1003 (2006).

[176] *See supra* Part III.E.

[177] *Ka'ai'ai v. Drake*, No. 92-3742-10 (1st Cir. Haw., Oct. 1992)

[178] *In re Marcos*, 910 F. Supp. 1460 (D. Haw. 1995).

[179] *See* Hifo's Decision, *supra* note 137, at 2 (suggesting that further proceedings should involve motions to establish a fair method for calculating damages and appointing a special master to implement the method).

[180] *See* Saks & Blanck, *supra* note 23, at 819 (citing Judicial Conference of the United States, Report of the Judicial Conference ad hoc Committee on Asbestos Litigation (1991)). Judge Thomas F. Hogan of the ad hoc Committee on asbestos litigation dissented from the report and its recommendations considering aggregation techniques to be novel and radical procedures that had not yet been accepted by an appellate court. *Id.* at 818-819 (citing the Judicial Conference of the United States, Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation at 41 (1991)).

[181] *See, e.g.*, In re Shell Oil Refinery, 136 F.R.D. 588 (E.D. La. 1991) (indicating a willingness to use sampling to calculate a class wide punitive damages award); Jenkins v. Raymark Indus., 782 F.2d 468, 474 (5th Cir. 1986) (suggesting the use of a multiplier to

two major cases (*Marcos*[182] and *Cimino*[183]) that employed aggregation methods in mass injury litigation. Aggregation procedures for calculating damages in a tort class action appear readily employable in a breach of public trust damage case.[184]

The proposed aggregation method, when validated by statistical analysis and informed by expert appraisals, has the potential to benefit class members by providing a long-awaited material remedy without undue burden. The method also has potential to benefit the State in its dual capacities as defendant (by assuring a reasonable degree of accuracy) and as the judiciary (by preventing the clogging of the courts with innumerable individual trials). In short, a crafted aggregation method appears to be the most practical and cost-effective legally acceptable means for providing class members a deserved remedy while assuring basic fairness to the State as defendant and accommodating the functional realities of the judiciary. A synopsis and detailed description of the proposed aggregation method and the due process analysis follow.

A. Synopsis of the Proposed Aggregation Method

The *Kalima* class members are entitled to the loss of a homestead lease measured by their costs in obtaining replacement leases (or other replacement options) in excess of one dollar per year during their time on the waitlist. The proposed aggregation method for calculating class member damages employs a court-appointed special master to implement a three-phase procedure.

First, the special master separates the class members into discrete damage categories based on: (1) the island they lived on for the majority of their time on the waitlist; and (2) the type of lease requested on their homestead applications. This process yields three main damage categories—

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compute punitive damages); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 258-63 (5th Cir. 1974) (Pettway III); *accord* Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157, 1222 (5th Cir. 1978) (using a collective, statistical approach to calculate back pay awards in an employment discrimination case); E.K. Hardison Seed Co. v. Jones, 149 F.2d 25, 256 (6th Cir. 1945) (advocating the use of sampling). *See generally* Saks & Blanck, *supra* note 23, at 819; Robert G. Bone, Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity, 46 VAND. L. REV. 561 (1993).

[182] In re Marcos, 910 F. Supp. 1460 (D. Haw. 1995).

[183] Cimino v. Raymark Indus., 751 F. Supp. 649 (E.D. Texas 1990) (affirmed in part and vacated in part on other grounds).

[184] *See* Bone, *supra* note 181, at 565 n.11 (citing *Provident Life and Accident Ins. Co. v. United States*, 772 F. Supp. 1016 (E.D. Tenn. 1991)) (United States government advocating for the judicial use of sampling instead of individualized adjudication to resolve several million claims in a case seeking recoupment of mistaken Medicare payments).

Residential, Agricultural, and Pastoral—for each of the five islands where homeland awards are offered (Kaua'i, O'ahu, Maui, Moloka'i, and Hawai'i).

Second, the special master oversees the identification of sample members for a category and the calculation of each sample member's out-of-pocket loss. If the special master begins with the largest category both in terms of the number of class members and the amount of damages—the *O'ahu Residential*—then the calculation for each of the other damage categories may be made with relatively minor adjustments.

An expert in inferential statistics randomly selects the statistically valid number of sample class members that are needed to accurately represent the category. At this time, either side can challenge the representative quality of the sample class members for each category. The sample members' out-of-pocket loss is measured by the annual value of the land with basic improvements underlying the replacement option (whether they rented, purchased, or stayed with relatives) minus the one-dollar cost of a homestead lease.

Third, the special master employs an administrative process to identify the claim eligibility of each non-sample class member. To assess claim eligibility each non-sample class member submits an affidavit for review by the special master – the affidavit would be similar to the proof of claim form used in many damage class actions.[185] The State is allowed access to these affidavits and may contest individual members' claim eligibility by presenting contradictory evidence. Each sample class member receives his or her individual annual damage award. Each eligible non-sample class member would receive an extrapolated annual average of the sample class members' awards for his or her respective category multiplied by the number of years on the waitlist minus six years.[186]

With careful implementation and continuous oversight of the court-appointed special master, the proposed three-phase aggregation method offers a promising approach for calculating the *Kalima* class members' damage claims. The ultimate validity of a particular aggregation method, of course, depends on the specific calculations and assessments of the experts. But it is noteworthy that courts have approved carefully crafted aggregation awards employing statistical sampling and extrapolation. And prominent scholars provide the analytical justifications and, indeed, urge

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[185] *See* Bone, *supra* note 181, at 651 n.88 (suggesting that proof of claim forms can be distributed by a special master to compile detailed case information under oath. *See, e.g.*, In Re Shell Oil Refinery, 136 F.R.D. 588 (E.D. La. 1991)).

[186] *See supra* note 169 and accompanying text.

thoughtful use of aggregation methods as invaluable instruments of civil justice.

B. A Detailed Description of the Proposed Three-phase Aggregation Method

The following section explains the aggregation method as overseen by the special master, including the: (1) separation of the class, (2) statistical selection of the sample and calculation of the sample members' claims, and (3) administration of all non-sample class members' claim eligibility and extrapolated damage awards.

1. First, separate class members into discrete damage categories based on the island they primarily lived on and the type of lease requested

Accurate separation of the class is imperative to ensure the representative quality of the sample class members for each category. Sample averaging and the more powerful and expensive regression analysis both necessarily distinguish and focus on the most important damage-related variables while collectively averaging those of lesser import.[187] For example, the procedure employed in *Cimino* preserved important distinctions among disease types (because different diseases produced vastly different damages) and averaged other variables such as "the extent of the injury, . . . the reasonable medical expenses incurred, the effect of the injury on employment opportunities and future earnings, and the degree of pain and suffering."[188]

In order to address this concern, the class members are grouped based on the variables that are the most likely to have an impact on damage awards.[189] Samples are then drawn from subgroups or stratifications of the population.[190] Careful grouping of the class creates the most homogenous categories possible, which thereby increases statistical efficiency and

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[187] For a discussion of linear regression techniques, *see* Bone, *supra* note 181, at 584-87.

[188] Bone, *supra* note 181, at 570.

[189] *See* Bone, *supra* note 181, at 570-77 (proposing stratified sampling as a solution to the risks of over- or under-compensation, "[a]s Judge Parker did in *Cimino*, a court could divide the population into subgroups selected to minimize intragroup variance and sample from each subgroup separately.") *Id.* at 583.

[190] University of Missouri–Columbia, STATISTICS IN THE SOCIAL SCIENCES: CURRENT METHODOLOGICAL DEVELOPMENTS 65-66 (Stanislav Kolenikov et. al. eds., 2010) [hereinafter STATISTICS IN THE SOCIAL SCIENCES].

Stratification is the process of grouping class members into more homogenous subclasses. Stratified sampling or randomly selecting the sample class members from each subgroup increases accuracy and efficiency. *Id.* at 23.

accuracy.[191] The most effective grouping of the *Kalima* class members for the calculation of out-of-pocket losses is by the island the beneficiary primarily lived on during their time on the waitlist and the type of lease requested on their application.

a. Divide class members based on the island they resided on for the majority of their time on the waitlist (Kaua'i, O'ahu, Maui, Moloka'i or Hawai'i)

Consistent with federal cases, the initial organization of the 2,852 *Kalima* class members into discrete damage categories is based on the out-of-pocket losses incurred as a result of the State's breaches.[192] In *Kalima*, each Hawaiian Homelands beneficiary applied for a homestead lease at one dollar per year regardless of the type of lease or island requested.[193] The State's breaches caused compensable harm by unnecessarily extending the time spent on the waitlist without a homelands lease.[194] Contrary to the model initially presented by *Kalima*'s attorneys, the class members did not lose the fair market rental value of a developed homestead lot; they lost the benefit of a land lease at the cost of one dollar per year.[195] Thus, the out-of-pocket loss incurred by each beneficiary is the cost (exceeding one dollar per year) of obtaining a replacement land lease or other replacement option while awaiting his or her homestead lease award.[196]

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[191] *See* Bone, *supra* note 181, at 579 (suggesting that courts can address the problem of over- and under-compensation "to some extent by sampling from more homogenous subgroups and eliminating extreme cases from the aggregation.").

[192] *See* Cimino v. Raymark Indus., 751 F. Supp. 649 (E.D. Texas 1990); In re Marcos, 910 F. Supp. 1460 (D. Haw. 1995). In *Marcos* and *Cimino*, the Court divided the class into three and five damage categories respectively based on the type of injuries suffered. In the *Cimino* class action asbestos litigation, the court divided the class of 2,298 members into five disease categories based on the plaintiffs' injury claims (mesothelioma, lung cancer, other cancer, asbestosis, and pleural disease). *Cimino*, 751 F. Supp. at 653. The court in *Marcos*, a human rights class action against the Estate of the former president of the Philippines, grouped the 9,541 class members into three subclasses based on the type of injuries suffered: "(1) plaintiffs who were tortured; (2) the families of those individuals who were the subjects of summary execution; and (3) the families of those who disappeared as a result of the actions of Marcos." *In re Marcos*, 910 F. Supp. at 1462.

[193] *See supra* Part II.A; *see also* Hawaiian Homes Commission Act, *supra* note 31.

[194] *See* Hifo's Decision, *supra* note 137 (finding the State's breaches caused some amount of compensable damage to the beneficiaries).

[195] *See supra* Part III.E; *see also* KALIMA LAWSUIT, http://www.kalima-lawsuit.com (last visited March 11, 2012).

[196] *See* Defendants' First Motion, *supra* note 157, at 7-8. *See also* April 2011 Transcript, *supra* note 138, at 13. The State argued in its brief and before Judge Crandall that the

First, separating the *Kalima* class members by island is logical because the replacement land lease values will differ for the applicants who pursued alternative housing options on O'ahu instead of Kaua'i or Maui.[197] In measuring damages based on the replacement land lease option exercised, it is practical to start with the category in which class members are most likely to have obtained alternative leases. The calculation of damages focuses first on the island of O'ahu because it is the island with the most applications for residential homesteads.[198]

b. Further divide class members into three categories based on the type of lease applied for (Residential, Agricultural or Pastoral)

Second, the calculation focuses initially on the residential category (rather than the agricultural or pastoral) because it has the largest number of class members and the highest individual out-of-pocket losses.[199] Although the number of applications submitted for agricultural leases is close to the number of applications for residential leases, it is safe to presume that very few individuals obtained replacement leases for agricultural lands. Whereas every applicant would need to obtain a replacement residential lease (shelter being a basic necessity), an applicant would not normally obtain a replacement agricultural lease on the private market unless he or she was a professional farmer.[200]

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amount of out-of-pocket loss should be measured by what the beneficiaries lost. As a result of not having a homestead lease at one dollar per year, the beneficiaries "may have had to rent alternative land at a substantially greater sum," and those out-of-pocket expenditures constitute the correct measure of damages. Defendants' First Motion, *supra* note 157, at 7-8.

[197] U.S. Census Bureau, 2010 American Community Survey, *Median Gross Rent (Dollars) Universe: Renter-occupied housing units paying cash rent* (2010), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_B25064&prodType=table (reporting the comparative cost of residential rental prices in the four main counties of Hawai'i as follows: Hawai'i County (972 +/-70), Honolulu County (1,363 +/-35), Kaua'i County (1,096 +/-129), and Maui County (1,287 +/-123).

[198] *See* State of Hawai'i Dep't of Hawaiian Home Lands, *Annual Report 2010-2011*, 47 (2011), http://www.hawaiianhomelands.org/wp-content/uploads/2011/11/HHL_AR_2011.pdf (reporting that the Island of Hawai'i has the highest number of applications for homestead awards with a total of 14,342, compared to O'ahu with 13,022 total applications. However, O'ahu has the greatest number of residential applications with 9,670, compared with Hawai'i island's 5,601 residential applications).

[199] *See* State of Hawai'i Dep't of Hawaiian Home Lands, *Annual Report 2010-2011*, 47 (2011), http://www.hawaiianhomelands.org/wp-content/uploads/2011/11/HHL_AR_2011.pdf (noting that as of June 30, 2011, there are 20,216 residential, 17,803 agricultural, and 2,929 pastoral applications for Hawaiian homelands).

[200] If the class member was a professional farmer and procured a replacement agricultural lease, he or she could opt-out of the damage calculation phase and pursue an individual

Grouping class members with similar claims ensures the representative quality of the randomly selected sample members, and adequate representation guarantees valid extrapolation (of the average of the sample members' verdicts) to the non-sample class members in the same category.[201] Separating the *Kalima* class members by type of lease and the island resided on creates damage categories of individuals who have exercised similar replacement options and are entitled to similar damage awards.

2. Second, for each category, a special master oversees the identification of sample class members and calculation of their out-of-pocket losses

The second step in the proposed aggregation method employs an expert in inferential statistics to identify a group of sample class members for each category.[202] An expert appraiser is then employed to assist in calculating the out-of-pocket loss that each individual sample class member incurred.[203] Later, the average sample member award is extrapolated to each eligible non-sample member.[204]

Statistical "samples are receivable in evidence to show the quality or condition of the entire lot or mass from which they are taken," as long as the population (category) is substantially uniform and the sample is fairly representative of the population.[205] Courts have employed statistical analyses to prove class damages in tort cases, especially in determining lost or future revenues, profits and earnings.[206] Courts have found that statistics

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remedy. *See* HAW. R. CIV. P. 23(c)(2).

[201] *See supra* notes 190-191 and accompanying text.

[202] *See* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 67 (Univ. Casebook Series ed., 2nd ed. 1990). "The two generic uses of statistics . . . are to describe the data collected and to make inferences from the data collected from the sample groups to larger populations of interest." *Id.* at 67. *See also* Cimino v. Raymark Indus., 751 F. Supp. 649, 660 n.3 (E.D. Tex. 1990) (citing L. OTT & W. MENDENHALL, UNDERSTANDING STATISTICS 10 (5th ed. 1990)) (advocating for the use of statistics, the objective of which "is to make an inference about a population of interest based on information obtained from a sample of measurements from that population.").

[203] *Cf.* Cimino, 751 F. Supp. at 662-63.

[204] *See* Saks & Blanck, *supra* note 23, at 818 (defining the collective trial or case aggregation as a "process consist[ing] of sampling asbestos cases from the total filed within a court's jurisdiction, trying the sample, and then extrapolating the results of the sampled cases to the remaining cases, without subjecting them to individual trials.").

[205] Cimino v. Raymark Indus., 751 F. Supp. 649, 662 n.14 (E.D. Texas 1990) (citing E.K. Hardison Seed Co. v. Jones, 149 F.2d 252, 256 (6th Cir. 1945)).

[206] *See Cimino*, 751 F. Supp. at 662. Judge Parker justified the aggregation method employed in the *Cimino* Phase III damage calculations by citing the use of statistics in various professional and academic fields, including medicine, insurance, business, and

provide "information with an acceptable degree of accuracy and economy" and "have permitted, or even advocated, [for] the use of formulas or models for [calculating] damage awards in class action suits, rather than employing an individual-by-individual approach."[207]

a. A statistical expert randomly selects a valid number of sample class members needed to accurately represent the category

Statistical sampling involves the random selection, by a lottery process, of a sample of the population, in this case, each damage category.[208] First, the expert statistician identifies the sample size—that is, how many individual claims need to be calculated to provide an accurate representation of the other class members in the category.[209] Sample size varies based on population size and composition of each category and the

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political science. The opinion also noted the use of statistical evidence in diverse legal contexts, including employment discrimination, antitrust, trademark infringement, civil rights and tort litigation. *Id.* at 659-663. Recently, statistical evidence has been accepted by courts for calculating damages in large class actions. *See e.g.*, Sullivan v. Kelly Services, Inc., 268 F.R.D. 356, 365 (N.D. Cal. 2010) (noting plaintiffs' submission of a viable method for managing the case as a class action including the use of statistical evidence to determine damages at trial); Alvarez v. IBP, Inc., 339 F.3d 894, 901, 914-15 (9th Cir. 2003); Bell v. Farmers Ins. Exchange, 115 Cal. App. 4th 715, 747-755, 9 Cal. Rptr. 3d 544 (2004) (approving the use of statistical sampling of randomly selected sample class members to calculate aggregate damages payable to a class); Scottsdale Memorial Health Systems, Inc. v. Maricopa County, 228 P.3d 117 (Ariz. Ct. App. 2010) (affirming the use of statistical sampling as a means of fact finding but lacking sufficient evidence to adequately review the validity of the statistical sampling and extrapolation methodology in the instant case).

[207] *Cimino*, 751 F. Supp. at 663 (citing Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 258-63 (5th Cir. 1974)). In *Pettway*, the court noted that class size "or the ambiguity of promotion or hiring practices or the multiple effects of discriminatory practices or the illegal practices continued over an extended period of time" could necessitate a class wide approach to measuring damages. Pettway, 494 F.2d at 261. Different approaches in calculating class-wide remedies for back pay were presented to the trial court in *Pettway* and affirmed on appeal. *See* Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157, 1222 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). The *Cimino* court "[did] not perceive [its] method of extrapolation . . . to be substantially dissimilar to the methods advanced in *Pettway*. . . . [as] the desirability of proceeding on a class-wide, rather than individual basis, is readily apparent." *Cimino*, 751 F. Supp. at 663.

[208] *See* MONAHAN & WALKER, *supra* note 202, at 75. Studying an entire population of relevant people or events requires infinite time and resources. Thus, social science researchers employ inferential statistics to study a cross-section or sample of the population instead. *Id. See generally* DAVID A. FREEDMAN, STATISTICAL MODELS AND CAUSAL INFERENCE 24 (David Collier et al. eds., 2010).

[209] *See id.*

statistical confidence level sought.[210] Second, the correct number of sample class members for each category is randomly drawn from the population.[211]

In *Cimino*, the court divided the class of 2,298 members (comparable to the 2,852 members in *Kalima*[212]) into five disease categories with sample sizes of 15, 20, and 25, and two categories with 50 sample members.[213] The jury returned damage verdicts for the 160 sample members.[214] Each sample class member received his or her individual damage award, and the non-sample class members received an average damage award, calculated and extrapolated from the sample members' awards for their category.[215]

The proposed method for *Kalima* is similar to that of *Cimino* with the court-appointed special master overseeing the statistician's identification of the sample members for each damage category. The damage categories serve as the initial groups which can, if necessary, be further divided by cluster analysis to reflect those who may have purchased (a relatively small number), rented, or lived with relatives as these three subpopulations within each category will likely include class members with homogenous claims.[216] If further refinement of the damage categories becomes

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[210] *See* Saks & Blanck, *supra* note 23, at 842. Variability of the population informs the number of cases that need to be sampled to accurately represent the non-sample members. If the population is more diverse the required sample will be larger; but if it is more homogenous the required sample is smaller. *Id.* Dividing the class into damage categories, and possibly further into stratification of claims before selecting the sample, could increase the homogeneity of the subpopulations increasing the accuracy of the outcome and efficiency of the technique.

[211] *See* Saks & Blanck, *supra* note 23, at 821 n.48 (explaining that "a 'random sample' is one in which each member of the population has an equal probability of being selected for inclusion in the sample . . . . courts using sampling techniques ought to describe exactly what sort of procedure was employed . . . so that readers can evaluate for themselves the quality of the research.").

[212] Kalima v. State, No. 99-0-4771-12, at 1-2 (1st Cir. Ct. Haw. 2011) (Order Granting Plaintiffs' Motion To Recertify Waiting List Subclass To Include The Amount of Damage Filed October 1, 2010), *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SOWY4MjFmZTgtZTU3OS00OWE5LWFkMzItYjQ0MGYwYzgzY2U2/edit?hl=en_US&authkey=CIe2-c8M.

[213] Cimino v. Raymark Indus., 751 F. Supp. 649, 653 (E.D. Tex. 1990).

[214] *Id.* at 653.

[215] *Id.* at 653.

[216] *See* Saks & Blanck, *supra* note 23, at 845 n.190. Employing cluster analysis could potentially create a single homogenous subgroup of all of the "no-damages" claims or those that will be eliminated by the State's mitigation arguments. At some point, however, "a tradeoff has to be made between the number and size of the subgroups." *Id.* at 845. The greater the number of subgroups the more homogenous each subgroup, but the smaller it will be and the less reliable and efficient the sampling will be. *Id.* At some point, further refinement will cost more in reliability than it gains in homogeneity and the expert statistician and the court must decide where the balance should lie. *Id.* at 845.

impractical, statistical adjustments can be made to eliminate any outliers (those who purchased or those who have no damages) in the randomly selected sample and these cases can be calculated separately.[217]

b. Challenges to the representative quality of the randomly selected sample class members can be entertained

The main issue with the extrapolation of an average damage verdict is the representative quality of the sample.[218] The representative quality of the sample can be determined by conducting additional hearings if contested.[219] In *Cimino*, the court chose to defer the question of representativeness until after the sample members' damage awards had been calculated.[220] The *Cimino* court went a step further than traditional statistical analysis. The court used numerous statistical goodness-of-fit tests to compare the randomly drawn samples to the population of their corresponding disease category.[221] The confidence level achieved by the samples exceeded the

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[217] *See* Saks & Blanck, *supra* note 23, at 845 (noting that, "[c]ases that do not fit into a cluster could be deemed too *sui generis* to be included in the aggregations and could be tried individually[,] [and] [s]amples could then be drawn from the highly homogenous clusters.")

[218] *See* Saks & Blanck, *supra* note 23, at 841. (noting that "[r]epresentativeness is the touchstone of good sampling," and that the population of cases from which samples are drawn in aggregate procedures are "known with unusual completeness," while any other necessary details can be easily learned about each member of the population as well).

[219] *See* MONAHAN & WALKER, *supra* note 202, at 69-73. The typicality of sample scores is a question of concern in statistical analysis. Every population possesses some degree of variability (the scores differ from one another) and "a measure of variability simply indicates the degree of this dispersion among the set of scores." *Id.* at 70. Variability indicates the spread of values in a population and how far they deviate from a central (average) value. *Id.* Although range is the simplest measure of variability to calculate, it can be deceiving because it only considers the difference between the highest and lowest score in the population. *Id.* at 70-71. Therefore standard deviation (based on variance) is the preferred method reported. *Id.* at 71. Standard deviation is basically the average amount that each individual value in the population deviates from the average value. *Id.* Variability provides a measure of "just how typical or representative of the other scores [a] number is." *Id.* at 73. The hetero- or homo-geneity of claims in each damage category is an important statistical calculation because higher variation in the class members' claims leads to increased likelihood of errors and decreased likelihood of achieving an accurate outcome.

[220] *See* Cimino v. Raymark Industries, 751 F. Supp. 649, 664 (E.D. Tex. 1990) (noting that when the court set the lump-sum approach aside and adopted statistical sampling "it could have [or should have] conducted a hearing [initially] and made necessary findings on the representativeness question – that is, what sample sizes are appropriate for each disease category – prior to trial of Phase III.").

[221] *See Cimino*, 751 F. Supp. at 664. *See also* MONAHAN & WALKER, *supra* note 202, at 66-79 (citing CLAIRE SELLITZ, LAWRENCE S. WRIGHTSMAN, AND STUART W. COOK, RESEARCH METHODS IN SOCIAL RELATIONS (3d ed. 1976). Statistical tests of significance

confidence level sought by the court.[222] Thus, the court found that the "procedure has proved to be a valid statistical exercise . . . [and found] no persuasive evidence why the average damage verdicts in each disease category should not be applied to the non-sample members."[223]

The defendants in *Cimino* had access to a database of information about both the 160 sample members and the non-sample class members.[224] Yet they chose not to challenge the random selection and extrapolation method employed by the court.[225] That method appeared to serve the defendants' interests in reducing litigation costs and in lowering the likely value of individual verdicts.[226] The State defendants in *Kalima* will also have access to the claim affidavits of the class members and to the assessments of their expert statistician. The State too may determine that it is in its interest to agree to a grounded fair aggregation method, or it may choose to contest the representative quality of the sample size or the representative quality of the sample members after they are identified.

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must be conducted to assume that the inferences drawn from the sample are a reasonably accurate representation of the actual circumstances within the population—"the possibility always exists that the samples do not correspond exactly to the populations they are intended to represent." *Id.*

[222] *See* Saks & Blanck, *supra* note 23, at 824 n.68. The experts reported that the level of accuracy obtained exceeded the confidence level sought by the court, "[s]tatistically this would mean that the goodness-of-fit between the [representative] sample and the population was closer than the court required." *Id.* at 824 n.69 (citing *Cimino*, 751 F. Supp at 664). While the court in *Cimino* utilized confidence levels, as a tool for assessing the "extent to which a sample reflects the population," Professors Saks and Blanck compare and advocate for the use of significance levels, which they find more accurate, instead. *Id.* at 824 n.68.

[223] *See Cimino*, 751 F. Supp. at 664-65. Professor Ronald D. Frankiewicz, a professor at the University of Houston in evaluation methods and statistics conducted the statistical tests and testified at the post-trial hearing. *Id.* at 664. Dr. Frankiewicz considered the dichotomous, continuous, and categorical variables in examining the goodness-of-fit between the samples and the disease categories. *Id.* He testified that the precision level achieved was 99%, which exceeded the 95% that was originally sought by the court. *Id.* at 664.

[224] *See Cimino*, 751 F. Supp. at 664-65 (including access to depositions, medical examinations, employment history, wage history, medical history, records, expenses and family background).

[225] *See Cimino*, 751 F. Supp. at 664 (concluding that if Dr. Frankiewicz's "methodology was inappropriate or if the sample was, in fact, skewed and not representative of the class, the Court would have heard that evidence"). *Id.* at 664-665.

[226] *See Cimino*, 751 F. Supp. at 665 (finding that "the defendants cannot show that the total amount of damages would be greater under the Court's method compared to individual trials of these cases . . . [and] the millions of dollars saved in reduced transaction costs inure to defendants' benefit"). *Id.* at 665.

c. Calculate the out-of-pocket losses for the sample class members in each category by measuring the cost of their replacement lease minus the cost of a homestead lease

The special master oversees the process of calculating the value of each sample class members' out-of-pocket loss. In *Kalima*, the beneficiaries each sought a lease of Hawaiian homestead land at a fee of $1 per annum. Because the State's breaches caused the delays in awarding leases, the proper measure of out-of-pocket losses are the expenditures of each class member occurring after the period of reasonable delay (defined as the point in time which, absent the breaches, they would have received a homestead award).[227]

In the residential categories, each class member's damage award will differ depending on whether he or she rented, purchased a home or lived with relatives while on the waitlist.[228] An expert appraiser is employed to properly calculate damages based on the replacement option exercised by each sample class member. For those who rented, the out-of-pocket loss incurred would not amount to the full rental cost (which covers house and underlying land). They are only entitled to the cost of the portion of their total rental price that is attributable to the underlying land with basic improvements (basically, the cost of obtaining a replacement lease of land).[229]

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[227] Judge Crandall ruled that the period of reasonable delay is six years from the date of application. *See* KALIMA LAWSUIT, http://www.kalima-lawsuit.com (last visited March 11, 2012). Damages would begin to run from that date. *Id.* For the arguments presented on reasonable delay and the court's decision, *see* discussion *supra* note 169 and accompanying text.

[228] Reply in Support of Plaintiffs' Motion, *supra* note 169, at 7. Plaintiffs' attorneys noted in their reply brief to the first round of damage proposals that the measurement of damages must include several possible options exercised by the beneficiaries while awaiting homestead awards, including renting, purchasing, or living with relatives.

[229] For instance, assume the average sample member's rental option is valued at $1,000 rent per month ($12,000 per year) and further assume that ten percent of the rental value is attributable to the underlying land. The class member's loss is measured by the portion of annual rent attributable to the land less the cost of a Homestead lease ($1,200 minus $1)—$1,199 for each year on the waitlist. If the member waited for 15 years (a midpoint between a 1-28 year wait), the total out-of-pocket loss would be $17,985. If the portion of the rental value attributable to the land were more than ten percent, then the loss would be proportionately greater.

If $17,985 is the average of the "sample" members' awards for the *O'ahu Residential* category and is extrapolated to the other 1,000 members of the category, the total damage for the category is roughly $18 million dollars. The total damages for the category, of course, depends on the appraiser's actual assessments and the number of eligible class members in the category.

There are two alternative approaches by which the expert appraiser can calculate the portion of the total rental value that is attributable to the underlying land. The first method is simple: the appraiser considers the sample members in a category (*e.g. O'ahu residential*) and estimates the annual rental cost for an average family on the island of O'ahu. The appraiser then determines the average portion of the rental cost attributable to the underlying land. That number is then multiplied by the average number of years on the waitlist (15 years) to determine the average sample class member's out-of-pocket loss.

The second approach is more precise and somewhat more complicated. The Special Master, with help from the appraiser, calculates each sample member's individual circumstances: how much rent was actually paid in one year, what the land portion of the rent is, multiplied by the number of years on the waitlist. The average of the calculation of sample members' individual claims should be generally comparable to the estimates in the first method.

For both approaches, although rental values differ depending on location, if the sample includes members from varying areas of O'ahu, the overall averaging for the O'ahu residential category should be statistically valid. After first calculating the sample members' damage awards for the largest damage category, *O'ahu residential*, the calculations may be extrapolated to the other islands with minor adjustments (as determined by the statistical expert).[230]

3. Third, the special master employs an administrative process to determine the claim eligibility of each non-sample class member in each category

Class members must submit affidavits or declarations (proof of claim forms) asserting their eligibility for a damage award.[231] Eligibility will

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[230] *See supra* note 197 and accompanying text. Once the estimate of damages for the average member of the *O'ahu Residential* category is established, the appraiser can testify to the estimated difference of the average rental price on O'ahu compared to Kaua'i (or Maui, Moloka'i or Hawai'i). For example, if the lease values on O'ahu are 10 percent higher than those on Kaua'i, then, if appropriate, the average of the sample members' damage awards for the *O'ahu residential* category can be decreased by 10 percent to adequately represent the average of the sample members' awards for the *Kaua'i residential* category. Extrapolation to the other islands' damage categories becomes relatively simple once the baseline is established for the *O'ahu Residential* category. The validity of the procedure does depend on the specific procedures developed by the expert appraiser and statistician.

[231] *See* Jack Ratliff, *Special Master's Report in* Cimino v. Raymark Industries, Inc., 10 REV. LITIG. 521, 524 (1991) (noting that "an initial submission of proof-of-claim or other summary is desirable as a way of providing information necessary to insure the typicality of

mainly depend on the four factors outlined in the affidavit: (1) the eligibility of the applicant for a Hawaiian homelands lease; (2) date of application; (3) alternative housing option(s) exercised (rent, own, other); and (4) proof of participation in the Hawaiian Claims Panel process. The affidavits will need to be collected early in the process in order to initially group the class members into the damage categories. Much of the needed information may already be available from the records of the Hawaiian claims panel.[232] Although time-consuming for the plaintiffs' lawyers at the outset, the task of gathering information and submission should be manageable and, ultimately, productive.

The next step of the administrative process is the review by the Special Master of the legitimacy of the individual class members' claims. If a claimant is deemed eligible, each non-sample member is awarded an annual average of the sample members' damage awards for their category, which is then multiplied by the number of years that class member spent on the waitlist.[233]

The State has the opportunity to contest the class members' eligibility for damage awards.[234] The burden of proof is on the State to prove class members' ineligibility because the court has determined that the State breached the trust and caused individual damages to those on the waitlist.[235]

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the claims of class representatives and to provide the data for the experts' . . . analysis of damages"). *Id.* at 524.

[232] *See, e.g.* State of Hawai'i Hawaiian Home Lands Trust Individual Claims Review Panel, Final Report of the Individual Claims Panel to the 1999 Legislature (1999) (on file with the author).

[233] *See* MONAHAN & WALKER, *supra* note 202, at 68. The average of the sample members' damage awards is awarded to the non-sample members in the category because it is considered the most typical or representative amount. *Id.* at 68. Of the three most frequently used measures of central tendency, the arithmetic mean or average is preferred because it is "based on all of the scores and the quantity of the scores." *Id.* at 68. However, means tend to be greatly affected by extreme scores in the data (outliers), which need to be removed to maintain accuracy. *Id.* Professor Bone discusses how the procedure of awarding the average of the sample members' verdicts to the non-sample members allocates total litigation costs and proposes several possible alternatives. *See also* Bone, *supra* note 181, at 588-94.

[234] The Court in *Cimino* allowed the defendants to introduce evidence of plaintiffs' contributory negligence, such as smoking, that resulted in some plaintiffs receiving damage awards of zero. These awards of no damages were subsequently factored into the average of the sample damage awards that was extrapolated to the other non-sample class members. *See* Saks & Blanck, *supra* note 23, at 823-24 (citing *Cimino* 751 F. Supp. at 665). Similarly in *Kalima*, the State is also afforded the opportunity to assert possible mitigation arguments against any class members' eligibility claims.

[235] *See* Plaintiffs' Memorandum in Opposition to Defendants' Second Round Motion For The Court to Adopt Defendants' Model For Determining The Actual Damages, If Any, Suffered By Each Subclass Member as a Result of Breaches [Filed July 22, 2011];

The circuit court found that because of the State's mismanagement of funds and poor record keeping, it is nearly impossible to accurately measure what would have occurred had the correct amount of homesteads been created and awarded.[236] Nevertheless, the State may present specific evidence in support of affirmative defenses to individual class members' claims. Judge Hifo's order anticipated the State's presentation of several possible defenses, including, "the fact of many having deferred offerings for financial inability to qualify for a home construction loan, and . . . others having rejected offering(s) for unwillingness to live in the area offered (sometimes but not always to maintain employment in the existing area of residency)."[237] While fairly entertaining the State's defenses to particular class members' eligibility, the special master, and ultimately the court, should ensure that the State does so in an efficient good-faith manner and does not strategically erect undue burden and cost obstacles to fair recovery.

Aside from statistical soundness, the proposed aggregation method falls within the court's legal authority to direct the management of a class action suit.[238] The proposed aggregation method is also analyzed and will likely be found to meet the requisite burdens of proof.[239] Lastly, by examining the

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Declaration of Carl M. Varady; Exhibits 1-5; Certificate of Service at 7, Kalima v. State, No. 99-0-4771-12 (VLC) (1st Cir. Ct. Haw. 2011), *available at* https://docs.google.com/file/d/0BxTdYPR6vv8SYjVhZGU2ZmUtNjM4Yy00MzA2LWJmZjgtNWUyMDc4YTNhODQz/edit?hl=en_US&pli=1.

[236] *See* Hifo's Decision, *supra* note 137, at 7.

[237] *See* Hifo's Decision, *supra* note 137, at 13.

[238] *See* HAW. R. CIV. P. 23(d). Pursuant to the Hawai'i Rules of Civil Procedure (HRCP) 23(d), the court has broad discretion to make appropriate orders in governing the conduct of a class action. The court has authority to determine the course of proceedings to prevent undue repetition or complication. *Id.* Under comparable Federal Rules of Civil Procedure (FRCP) 23(d), federal courts also have the authority to employ aggregation methods in managing the conduct of a class action. FED. R. CIV. P. 23(d). Professor Bone dismisses the idea that sampling and aggregation are prohibited by existing procedural values finding that "Federal courts have broad equitable power to devise novel and remedial approaches in class actions" as long as the sampling procedure is "consistent with due process, separation of powers, and Article III principles." *See* Bone, *supra* note 181, at 566 n.16. The court has the authority to enter orders of any type to prevent undue repetition, such as determining the appropriate method for computing and allocating damages among class members. *See* Plaintiffs' Second Motion, *supra* note 162.

[239] Under Hawai'i law the "fact of damage must be prove[n] with reasonable certainty," but once proven, the amount of damage may be established by "any reasonable basis." Plaintiffs' First Motion, *supra* note 154, at 11-12 (citing Tanuvasa v. City and County of Honolulu, 2 Haw. App. 102, 116, 626 P.2d 1175, 1185 (1981) (internal citations omitted)). In 2009, Judge Hifo determined that "the wait-list class members suffered damages in fact but was unable at the time to calculate specific amounts." *See* Hifo's Decision, *supra* note 137. Thus the court has the legal authority to conduct the proceedings and to determine the

proposed aggregation method under the *Mathews v. Eldridge* test and comparing it to the methods successfully employed in other aggregation cases, the method proposed here is likely to be found to comport with due process and to advance both the State's and the class members' interests in justice.

V. ASSESSING THE PROPOSED AGGREGATION METHOD: THE REQUIREMENTS OF FAIRNESS TO ALL PARTIES

A reviewing court would be justified in determining that with careful implementation the proposed aggregation method is authorized by procedural rules,[240] produces reasonably accurate results, is statistically valid and therefore comports with due process.[241]

Constitutional due process aims not for conceptual purity but for procedures that generate a reasonably fair and accurate decision by

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proper method for calculating the amount of damages.

[240] Procedural due process restricts state government action to prevent the procedurally unfair deprivation of an individual's liberty or property. U.S. CONST. amend. XIV; HAW. CONST. ART. I, § 5. The 14th amendment's due process clause and the due process clause of the Hawai'i Constitution are identical, providing in pertinent part: "No State . . . shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV.

[241] The due process analysis becomes exceedingly important in the context of a certified class action because of the possible consequences of violating the rule in *Pennoyer*. Procedures used in class action litigation must be thoroughly examined and found to comport with due process because even though the court seemingly lacks personal jurisdiction over the class members, who are not parties in the suit, a binding judgment can be entered against them if they are adequately represented. If they are not, then the court's judgment violates due process and cannot be enforced. *See* Pennoyer v. Neff, 95 U.S. 714 (1877) (overruled in part by Shaffer v. Heitner, 433 U.S. 186 (1977)). *See also* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 624-25 (1997) (discussing the due process implications of extending a settlement to a global class of asbestos claimants of a huge number of individuals with varying "medical expenses, smoking histories, and family situations").

Conceptually, due process protects individuals from the State, not the State from itself. Thus, the State of Hawai'i in *Kalima* has no right to due process. The State, as defendant, is nonetheless entitled to legal procedures that promote fairness to both parties—an assurance of procedural fairness that is embodied in the due process calculus crafted by the U.S. Supreme Court in *Mathews v. Eldridge* (discussed *infra*). *See, e.g.*, Scottsdale Memorial Health Systems, Inc. v. Maricopa County, 228 P.3d 117, 129 (Ariz. Ct. App. 2010). In *Scottsdale*, the plaintiffs argued that "the County may not object on due process grounds to the superior court's use of statistical sampling because as a governmental entity, the County enjoys no due process rights under the Arizona or United States constitutions." *Id.* The court agreed and proceeded to "determine whether the statistical sampling methodology . . . breached the County's rights to procedures that are just, fair, and regular." *Id.*

"weigh[ing] the defendant's . . . right to trial in each individual case against judicial economy and manageability by use of a valid statistical procedure"—a cost-benefit analysis.[242] When employing an aggregation procedure, parties must receive fair and adequate notice, the process must be conducted as a judicial proceeding and parties must have the opportunity to be heard.[243] The ultimate purpose of the rights to notice, hearing and participation is to promote fair decision-making and to generate the sense that justice has been done.[244] As Professors Marshall and Redish observe, the U.S. Supreme Court's conception of due process "is extremely flexible, . . . [but] the balancing of interests must never be conducted in a manner that ignores recognized core values"—this includes protecting individuals from unfair exercises of government power.[245]

In this light due process is not "a technical conception with a fixed content unrelated to time, place, and circumstances."[246] Innovative techniques for measuring damages, such as the proposed aggregation method, have been held to comport with due process. Although questions will exist as to the validity of any particular aggregation method, many

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[242] In re Marcos, 910 F. Supp. 1460, 1467 (D. Haw. 1995).

[243] *See* Saks & Blanck, *supra* note 23, at 829-30. Professors Saks & Blanck note that in addition to the instrumental values of notice, hearing, and counsel, there are "noninstrumental" values of due process. *Id* at 830. While some values such as "equality, predictability, transparency, rationality and revelation may be quite well served by aggregation," other values such as the appearance of justice are contingent upon careful consideration of the procedures employed. *Id.* at 832. The professors further acknowledge, "although autonomy and dignity seem to suffer in the aggregated trial, both are vindicated largely by comparing the relative losses to plaintiffs versus defendants as to the various realistic alternatives for adjudication in mass injury situations." *Id.* at 832.

[244] *See* Saks & Blanck, *supra* note 23, at 829. However, "in certain circumstances, traditional elements of due process have been omitted 'without adversely affecting the fact finding process'." *Id.* Professors Saks & Blanck note that "[i]n some circumstances it is possible 'to fashion a hearing that meets the requirements of due process, even though one or another of these procedural elements is absent.' . . . cases on appeal [are] regularly decided on written briefs without oral arguments . . . [and] in small claims trials, . . . participation by counsel is neither required nor customary." *Id.*

[245] Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence And The Values Of Procedural Due Process,* 95 YALE L.J. 455, 456 (1986). Some scholars argue that the Supreme Court's Mathew's balancing approach does not adequately meet the requirements of due process. *See also* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28 (1976) (arguing that the Court's balancing approach ignores other basic concerns including, individual dignity and equality). The predominant view of courts and scholars is that the three-factor calculus articulated by the Supreme Court in *Mathews* is valid and controlling.

[246] Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

courts have determined that carefully tailored aggregation procedures pass constitutional muster and "have the potential to achieve a level of justice that simply is not possible in individual trials."[247]

The two seminal cases determining that aggregation methods comport with due process are *Cimino v. Raymark Industries*[248] and *In re Estate of Ferdinand E. Marcos Human Rights Litigation.*[249] The courts in these cases affirmed the constitutionality of aggregation procedures employed in response to the exorbitant cost and delay of ordinary mass injury individual damage trials. *Cimino* was a mass tort asbestos case; *In Re Marcos* involved human rights. *Cimino* and *Marcos* both employed the *Mathews* due process test in validating the plaintiffs' aggregation methods.[250] The cases provide guidance for *Kalima.*

A. Properly Implemented, the Proposed Aggregation Method Would Likely be Found to Pass Due Process Muster Under Mathews v. Eldridge

In *Mathews v. Eldridge* the Supreme Court identified the key factors in the prevailing approach to due process analysis: "first, the private interest that will be affected . . . second, the risk of an erroneous deprivation of such interest through the procedures used . . . and finally, the Government's interest."[251] In *Kalima,* the court will engage the *Mathews* cost-benefit analysis to determine whether the proposed aggregation method comports with due process by considering the following factors: (1) the private interest that will be affected, in this case, the class members' interest in

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[247] *See* Saks & Blanck, *supra* note 23, at 851.

[248] *See* Cimino v. Raymark Indus., 751 F. Supp. 649 (E.D. Texas 1990) (aff'd in part, vacated in part by Cimino v. Raymark Indus., 151 F.3d 297 (5th Cir. 1998).

[249] *See* In re Marcos, 910 F. Supp. 1460 (D. Haw. 1995)

[250] *See* Mathews v. Eldridge, 424 U.S. 319 (1976). In Mathews, a man whose social security benefits had been terminated brought a constitutional challenge against the administrative procedures for assessing continuing disabilities, and the Supreme Court held that an evidentiary hearing was not a prerequisite to the termination of disability benefits and the procedures employed comport with due process. *Id.* at 319.

[251] *Mathews,* 424 U.S. at 335. *See, e.g.,* Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Haw. 192, 204, 891 P.2d 279, 291 (1995) (applying *Mathews* in a challenge against the Hawaiian Homes Commission under federal civil rights statutes with respect to awards of lots); Sandy Beach Defense Fund v. City and County of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989) (employing the *Mathews* test in challenging the city council's issuance of a special management area use permit to developers pursuant to the Coastal Zone Management Act); Bank of Hawai'i v. Kunimoto, 91 Haw. 372, 388, 984 P.2d 1198, 1214, (1999) (ruling that revocation of out of state attorney's pro hac vice status for fraud upon court was warranted under the Mathews test); Brown v Thompson, 91 Haw. 1, 9, 979 P.2d 586, 594 (1999) (holding that the owner of a derelict vessel had due process right to hearing regarding impoundment under the *Mathews* test).

obtaining a remedy; (2) the risk of an erroneous deprivation of such interest through the procedures used, in this case, the State's right to individual adjudications; and (3) the Government's interest involving both fiscal and administrative burdens.[252] On balance, after carefully reviewing the benefits and workability of the proposed aggregation method and after considering some scholars and courts' concerns about aggregation methods generally, a reviewing court would be amply supported in determining that the benefits of the proposed aggregation method outweigh the burdens and that the method is capable of ensuring basic fairness to the named parties and class members.

1. The Kalima *class members have a strong private interest in the aggregation method*

The first prong in the *Mathews* due process analysis is the "private interest" of those affected.[253] Analysis of the first factor usually involves both the class members' ability to obtain a remedy and the defendant's interest in fairly limiting the amount of damages.[254] In *Kalima* the "private interest" is that of the class members. The defendant in *Kalima* is the State and the State has a "public" rather than private interest that we incorporate into the second and third prongs of the analysis.

The first component of the *Kalima* class members' strong private interest is the pressing need for immediate resolution of their claims. Named plaintiff Joseph Ching, who died during the pendency of the State's appeal to the Hawai'i Supreme Court in 2000, exemplifies this interest.[255] The Supreme Court record indicates that eight plaintiffs, including Joseph Ching, were deceased as of April 22, 2002.[256] Nine years later at the April 2011 hearing before Judge Crandall, the plaintiffs' attorneys lamented, "over 300 of our class members have died. And the average age of our

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[252] *See Mathews,* 424 U.S. at 335. *See also* Connecticut v. Doehr, 501 U.S. 1 (1991) (observing that in a prejudgment attachment hearing case *Connecticut* seems to modify the third factor of the *Mathews* analysis to give "principal attention to the interest of the party seeking [to implement the measure], with, nonetheless, due regard for any ancillary interest the government may have in providing greater protections." *Id.* at 11). By and large, *Mathews* is still followed particularly in cases that are not about a right to hearing before government seizure of property. *See supra* note 251.

[253] *See Mathews,* 424 U.S. 319.

[254] *See* Saks & Blanck, *supra* note 23, at 828.

[255] *See* Kalima v. State of Hawai'i, 111 Haw .84, 94 n.14, 137 P.3d 990, 1000 (2006) (noting Mr. Ching's replacement, Raynette Nalani Ah Chong, Special Administrator for the Estate of Joseph Ching, as his representative).

[256] *See Kalima,* 111 Haw. at 94 n.14, 137 P.3d at 1000 (2006).

class member is about 65."[257] Similarly in *Cimino,* nearly 450 out of the 2,298 members in the class died before the three-phase trial commenced.[258] *Cimino* found the defendant's demanded individual trials as a strategy to delay paying and were "watching cases disappear or become reduced in value as time passes and plaintiffs die."[259] *Kalima* class members will undoubtedly continue to pass away if the case remains stalled on the issue of damages. Employing the proposed aggregation method directly speaks to this interest of the plaintiffs and the other class members. Second and related, immediate resolution is imperative because the class members have sustained years of uncompensated out-of-pocket losses. For most class members, those losses impact on the basics of daily existence—food, housing, healthcare and education.

Third, in examining the validity of a procedural process, consideration must be given to "the degree of potential deprivation [of plaintiffs' private interests] that may be created by a particular decision," and "the possible length of the wrongful deprivation of benefits."[260] Case-by-case adjudication could result in severe and possibly permanent deprivation of the class members' interests. *Cimino* found the defendant's initial demand for one-on-one trials to be unreasonable.[261] It estimated that individual trials would take over six years and that this delay would deter many if not most claimants.[262] Requests for individualized treatment must be weighed against the possibility that "faced with a deluge of claims, the courts will not provide justice in any reasonable period of time, and the defendants will likely be bankrupted by legal fees and damage assessments long before all of those they have injured have been compensated."[263]

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[257] April 2011 Transcript, *supra* note 138, at 3. *See also* Saks & Blanck, *supra* note 23, at 819 (highlighting the need for immediate resolution of class action litigation, "[o]ver four hundred members of the *Cimino* class died while waiting for their cases to be heard. And by the time the class action would ultimately end, transaction costs were likely to exceed compensation.").

[258] *See* Cimino v. Raymark Indus., 751 F. Supp. 649, 652 (E.D. Texas 1990).

[259] Saks & Blanck, *supra* note 23, at 838 n.159 (quoting *Cimino* at 651-52) The court stated that "[the defendants] are attempting to avoid liability by obstructing the Court's ability to provide a forum in these cases. . . . They assert a right to individual trials in each case and assert the right to repeatedly contest in each case every contestable issue involving the same products, the same warnings, and the same conduct. The strategy is a sound one; the defendants know that if the procedure in *Cimino* is not affirmed, these cases will never be tried."

[260] *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976).

[261] *See Cimino* 751 F. Supp. at 652.

[262] *See id.* (considering that "[i]f the Court could somehow close thirty cases a month, it would take six and one-half years to try these cases and . . . [t]ransaction costs would be astronomical.") *See also* Saks & Blanck, *supra* note 23, at 820.

[263] Saks & Blanck, *supra* note 23, at 818-19.

Moreover, if aggregation is denied in *Kalima*, and individual adjudication of claims is mandated, the negative impact on the class members' private interests would extend forever because it is likely that relatively few class members would have the resources to pursue individual damage trials.[264] Professors Saks and Blanck note that the "*Cimino* class members' interests in the aggregation procedure [were] compelling because, in the absence of such procedures, they would not receive their day in court, which would be the ultimate failure of due process."[265]

Few practical alternatives are available for the *Kalima* class members: surrender because of the cost of individual trials and relative inaccessibility of available attorneys (despite the court's finding of State liability); for those who can afford it, individual damage trials when they can be scheduled (probably over many years); if lawyers are available, lawyer-negotiated bilateral settlements that would likely be long in coming; or an aggregation method like the one proposed here.[266] Professors Saks & Blanck conclude that the first several options hold little promise, but the final option, "aggregation, offers an opportunity to be heard through representatives from a potentially cohesive group of fellow victims speaking on behalf of the whole group."[267]

The delays in receiving homestead leases also continue to impact the class members on not only a basic level of deprivation of the human necessity for shelter and subsistence, but also on a deeper level because of the historical and cultural significance of land to the Native Hawaiian people.[268] Implementation of the proposed aggregation method will likely provide the most efficient and timely option for *Kalima* class members to obtain the remedies they have sought from the State for over fifteen years.[269]

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[264] *See* Saks & Blanck, *supra* note 23, at 826 n.86 (citing *Cimino* 751 F. Supp at 666; David Hittner & Kathleen Weisz Osman, *Federal Civil Trial Delays: A Constitutional Dilemma?*, 31 S. TEX. L.J. 341 (1990) (arguing that "the absence of [aggregation] procedures is tantamount to denying many litigants their due process trial rights altogether").

[265] Saks & Blanck, *supra* note 23, at 829.

[266] *See* Saks & Blanck, *supra* note 23, at 839.

[267] Saks & Blanck, *supra* note 23, at 839.

[268] *See supra* Part I.

[269] *See generally,* KALIMA LAWSUIT, http://www.kalima-lawsuit.com (last visited March 9, 2012) (documenting that the plaintiffs' attorneys first filed pleadings in the *Kalima* case in 2000, but twelve years later, the beneficiaries are awaiting compensation for breaches that occurred over 50 years ago).

2. The proposed aggregation method would likely bear little risk of erroneous determinations

The second factor in the *Mathews v. Eldridge* due process calculus analyzes the possibility of the erroneous deprivation of the parties' interests.[270] This includes an evaluation of "the fairness and reliability of the existing . . . procedures and the probable value of additional or substitute procedural safeguards."[271]

The court in *Cimino* "rejected defendants argument that they were entitled to one-on-one trials for each of the 2,298 cases."[272] The Court held "due process is not necessarily limited to the traditional sense as argued by defendants, 'but should also encompass the impact on plaintiffs and even the obvious societal interests involved.'"[273] The use of existing procedures for calculating damages individually is as implausible in *Kalima* as it was in *Cimino*. As stated above, individual adjudication would likely result in the *Kalima* class members' inability to obtain any relief at all despite the court's determination that the State's trust breaches caused compensable losses. And in its circuit court filings the State did not advance credible arguments about why individual trials would be substantially fairer than other alternatives.

The aggregation method has immense value as a substitute procedure because individual trials are not a plausible method for calculating class members' damages. Yet the State's concerns of fairness and accuracy are reasonable. Professors Saks and Blanck acknowledge that "the use of aggregation and sampling is sometimes criticized for failing to approximate the justice afforded by traditional case-by-case determinations."[274] A fair and accurate process should "result in plaintiffs receiving, within

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[270] *See Mathews v. Eldridge,* 424 U.S. 319, 321 (1976).

[271] *See id.*

[272] *In re Marcos,* 910 F. Supp. 1460, 1467 (D. Haw. 1995) (citing *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 666 (E.D. Texas 1990)).

[273] *In re Marcos,* 910 F. Supp. 1460, 1467 (D. Haw. 1995) (citing *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 666 (E.D. Texas 1990)).

[274] Saks & Blanck, *supra* note 23, at 815. *See e.g.*, Evans v. Lasco Bathware, Inc., 178 Cal. App. 4th 1417, 1427, 101 Cal. Rptr. 3d 354, 363 (2009) (finding class treatment was inappropriate because individualized trials for each class member's damages would be required to determine the appropriate award for each class member); Bower v. Bunker Hill Co., 114 F.R.D. 587, 596 (E.D. Wash. 1986) (rejecting collective damages award because damages required individualized proof). The calculation of damages by aggregation has been challenged as being constitutionally suspect in denying defendants rights to due process and jury trials in each individual case. Saks & Blanck, *supra* note 23, at 818 n.22 (citing Judicial Conference of the United States, Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 41 (1991)).

reasonably tolerances, the proper amount in damages" and the process extracting from defendants only what they owe to each plaintiff.[275] The main argument against aggregation, then, is that each non-sample class member who receives the sample members' average damage award is accepting either more or less than they are entitled to, which may lead to the State in some instances paying more than they are liable for.[276] Properly implemented, the proposed aggregation method specifically accounts for the State's concerns about accuracy.

The State's interest in accuracy is likely protected because: (1) expert testimony from inferential statisticians will confirm the validity of the aggregation and extrapolation method, and (2) the State will have several opportunities to contest both the specifics of the method and individual class members' eligibility. First, in order to safeguard the State's interests, an inferential statistician will validate the procedures for randomly selecting the sample members and for measuring the representative quality of the sample.[277] The State's experts will also be allowed to offer responding testimony. Second, the State has a number of opportunities to contest the method—(1) by proposing changes, or presenting an alternate proposal; (2) by contesting the randomly selected sample members and arguing against their sufficiency as representatives of the category; (3) by presenting their own statistician to verify the proper calculation and extrapolation of the total damages; and (4) by contesting the eligibility of the individual class

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[275] Saks & Blanck, *supra* note 23, at 833-34. Professors Saks & Blanck assert that aggregation methods tend to provide damage awards that are often more accurate than individual verdicts because every "traditional" verdict is merely a single sample taken from a large population of potential verdicts and a single verdict can be abnormally high or low. *Id.* at 833-834. The "true" and most accurate award would then be obtained by taking the average of the population of verdicts, because any single verdict would represent an under or over compensation compared to the mean "true" award. *Id.* at 834. Use of aggregation as a procedural device expresses this concept; and it allows the trial of say 100 cases drawn at random and the award of the mean damage verdict, which represents a "true" award with the least amount of over or under compensation. *See id.* at 835. *But see* Bone, *supra* note 181, at 577 (noting that in mass tort scenarios, individual trials may give "a more accurate verdict than sampling for at least some cases").

[276] *See also* Bone, *supra* note 181, at 564. Arguing that claims aggregated by statistical sampling are not homogenous and cases that are more distant from the mean on the distribution tend to be either over or under compensated. A trial verdict would seemingly be a better estimate of actual damages than the average of the sample verdicts for these claims. *Id.* at 578.

[277] *See supra* Part IV.B.1-2. When selecting the appropriate sample sizes for each category the, proposed aggregation method follows a similar approach to that used in *Cimino* and *Marcos*. *Kalima's* experts in inferential statistics will testify that the randomly selected members were representative of the category because they were injured in the same way and the members of the category are entitled to the same extrapolated average damage awards.

members to recover damages based on the claims verified by their affidavits.[278] Professors Saks and Blanck observe that because defendants are given notice, hearing, counsel, the opportunity to opt out or participate in the cross-examination of witnesses and oral arguments, "the [properly conducted] aggregated trial does not deny any of the instrumental values of [fairness and justice], particularly from the viewpoint of defendants."[279]

Even where specific facts raise concerns about possible under- and over-compensation, these concerns can also be addressed, and have been in other cases, by sub-grouping the class members by cluster analysis, removing outliers and addressing individual proof of claims.[280]

The proposed method embodies these protections. Rather than treating all class members equally, the proposed aggregation method separates the class members into damage categories. Sample members are randomly selected from each category and each non-sample member receives an average of the sample damage awards in their category annually for each year spent on the waitlist.[281] Instead of selecting the sample class members from the population as a whole, the method draws samples from subgroups or stratifications of the population, which increases accuracy and statistical

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

[279] Saks & Blanck, *supra* note 23, at 830.

[280] *See* STATISTICS IN THE SOCIAL SCIENCES, *supra* note 190, at 65-66.

> The probability sampling methodologies that have developed typically include one or more of the following components: stratification, multiple stages of selection, cluster sampling, and unequal probabilities of selection. . . . Although some sampling designs are more common than others, there are myriad variations of design. Cochran (1977), Kish (1965), Levy and Lemeshow (1999), and Lohr (1999) provide descriptions of the most commonly used sampling designs and their components.

Id. at 65.

For a recent example of a stratified statistical sampling methodology, *see* Scottsdale Memorial Health Systems, Inc. v. Maricopa County, 228 P.3d 117 (Ariz. Ct. App. 2010). The Court hired an acknowledged qualified statistical expert from Stanford University and UCLA, Dr. Donald Ylvisaker, to devise a methodology for calculating class members' damages. *Id.* at 122 n.6. Dr. Ylvisaker's proposed sampling plan divided the claims by hospital, removed outliers (claims with significantly higher dollar values than the general population of that hospital's claims), and segregated each hospital's remaining claims into two groups based on higher-valued and lower-valued claims. *Id.* at 122. The proposed plan then called for random selection of samples from each of the two groups for trial and extrapolation of a percentage of the "valid claim dollars" to the remaining claims after the selected sample claims were tried. *Id.*

[281] The court in *Cimino* applied stratified sampling, dividing the population into five disease categories and selecting random samples from each category. Cimino v. Raymark Indus., 751 F. Supp. 649, 653 (E.D. Tex. 1990). The court in *Marcos* randomly selected 137 sample claims from the total 9,541 valid claims in the total population, some of which represented each of three damage categories. *See* Bone, *supra* note 181, at 563. *See also,* In re Marcos, 910 F. Supp. 1460, 1466 (D. Haw. 1995).

efficiency.[282] As discussed previously, grouping the class members based on variables that are likely to have an impact on damage awards helps to ensure the valid representation of the category.[283] The damage categories serve as the initial subgroups which can, if necessary, be further divided by cluster analysis to reflect those who may have purchased (a relatively small number), rented or lived with relatives as these three subpopulations within each category will likely include class members with homogenous claims.[284]

In the unusual situation, remittitur and additur can be used by the court in *Kalima* to adjust compensation awards that vary greatly from the extrapolated average of the sample members' awards. For example, in *Cimino,* upon examining the verdicts of the class representatives and sample plaintiffs, the court issued remittiturs in 34 of the 160 sample plaintiffs' cases and granted one new trial.[285]

Numerous measures are incorporated into the proposed aggregation procedure to protect against erroneous determinations including stratified sampling, removing outliers and allowing for remittitur and additur. While ensuring a valid statistical methodology protects the State's interests, the State also has several opportunities to contest the method. Carefully implemented, the proposed aggregation method bears little risk of erroneously depriving the defendant of its interest in a fair procedure. As is shown in the next section, the proposed aggregation method is also beneficial to the State in its role as the court.

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[282] *See* Saks & Blanck, *supra* note 23, at 842.

[283] *See supra* Part IV.B.2.a-b. Saks and Blanck reason that "using cluster analysis[,] cases could be grouped so that the cases within a group are most like each other, while the subgroups themselves are most different from each other." Saks & Blanck, *supra* note 23, at 845.

[284] *See* STATISTICS IN THE SOCIAL SCIENCES, *supra* note 190, at 65-66. Clustering is the further grouping of class members within their damage categories by considering multiple sample elements. *Id.* at 66. Employing cluster analysis in *Kalima* could potentially create a single homogenous subgroup of all of the "no-damages" claims or those that will be eliminated by the State's mitigation arguments. But, "[a]t some point, a tradeoff has to be made between the number and size of the subgroups." Saks & Blanck, *supra* note 23, at 845. The greater the number of subgroups the more homogenous, but the smaller they will be and the less reliable and efficient the sampling will be. At some point, further refinement will cost more in reliability than it gains in homogeneity and the expert statistician and the court must decide where the balance should lie. Saks & Blanck, *supra* note 23, at 845.

[285] *See* Cimino v. Raymark Indus., 751 F. Supp. 649, 658 (E.D. Tex. 1990) (employing the usual remittitur analysis but also considering medical evidence to examine the progression of the class members' diseases).

3. The proposed aggregation method accounts for fairness to the State in its dual role as the defendant and the court

The final factor in the cost-benefit analysis is consideration of the public interest, including "the administrative burden and other societal costs."[286] In *Kalima*, the burden on the government involves two components, the burden on the government acting as the court and the burden on the government as the defendant. Here the benefit to the State in both capacities far outweighs the burden because individual trials would require inordinately more fiscal and administrative resources of the judiciary and would possibly result in higher verdicts.[287]

The first component of the third factor, the burden on the government in its role as the court, is considered in light of the societal interests involved.[288] The State's interest in employing a fair and just method for calculating damages and limiting damage awards to the greatest extent possible must be balanced with the public's interest in conserving a limited amount of fiscal and administrative resources available for dispute resolution. *Cimino* determined that "the method incorporated into Phase III [bifurcated damages trials] produces a level of economy in terms of both judicial resources and transaction cost that needs no elaboration."[289] *In re Marcos* reached the undeniable conclusion that "one-on-one trials are more burdensome on the court than an aggregate trial."[290]

Furthermore, courts originally developed aggregation procedures because of the immense judicial burdens of mass tort asbestos litigation.[291]

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[286] *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976).

[287] *See* Saks & Blanck, *supra* note 23, at 828 (concluding that "[n]o one can argue rationally that the procedure creates additional fiscal or administrative burdens for the defendants that come close to those resulting from the traditional one-on-one trial context").

[288] *See In re Marcos*, 910 F. Supp. at 1467. *See also* Jon. O Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1643-44 (1985) (explaining that "[a] broadened concept of fairness . . . includes fairness not only toward litigants . . . but also to all who use or wish to use the litigation system and to all who are affected by it.").

[289] *Cimino*, 751 F. Supp. at 663.

[290] *In re Marcos*, 910 F. Supp at 1468.

[291] *See* Saks & Blanck, *supra* note 23, at 817. The volume of mass injury litigation was a problem that quickly progressed into a judicial administration disaster. *Id.* The effects of asbestos began coming to light in the 1990s resulting in "increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects of judgments." *Id.* at 817. The large number of asbestos products liability cases were crowding the federal courts, comprising about one third of the caseload, and consuming a disproportionate amount of judicial resources. *Id.* The existing procedure of case-by-case litigation proved clearly inadequate. *Id.* In 1991, the Judicial Conference Ad Hoc Committee on Asbestos Litigation developed the concept of collective trials or case aggregation techniques involving statistical sampling

Aggregation techniques, if otherwise appropriate, offer great benefit to the general public by conserving scarce judicial resources.

The proposed aggregation method would also be less burdensome on the State acting as the defendant. Mass injury litigation has proven that one-on-one trials often produce higher verdicts than those returned in the aggregate.[292] *In re Marcos* cited two examples in which other "bipolar" human rights litigation awarded higher amounts ($10 million for a single summary execution) than the average damages awarded to class members in the aggregated trial ($150,000 to $700,000).[293]

Finally, the State and the public have a significant interest in fairly resolving with finality decades-long meritorious breach of trust claims that have divided Native Hawaiians against the State and generated great discomfort among Hawaii's populace.[294] The public's interest in the proposed aggregation method as a substitute for individual litigation is immense.[295]

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as an alternative solution to the problem facing the federal courts. *Id.*

[292] *See In re Marcos*, 910 F. Supp at 1468 n.18 (finding that "the damages returned by the same jury in the cases of the opt-out individual plaintiffs were significantly more than the damages for each plaintiff in the aggregate.").

[293] *See In re Marcos*, 910 F. Supp at 1468 (citing Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984). *See also* Bone, *supra* note 181, at 595; In re Nassau County Strip Search Cases, 742 F. Supp. 2d 304, 325 (E.D.N.Y. 2010) (citing In re Marcos, 910 F.Supp. 1460, 1468 (D. Haw. 1995), *aff'd sub nom.* Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) (noting the benefit to defendants as class members' individual recovery in an aggregated calculation is likely to be less than if class members pursued their claims individually)).

[294] The benefits in avoiding higher individual verdicts, the measures taken to remedy possible over- and under-compensation and the immense public interest may induce the State to execute a waiver of consent. The defendants in *Cimino* declined to sign such a waiver, asserting that due process entitles them to a traditional individual trial on each claim. Cimino v. Raymark Indus., 751 F. Supp. 649, 665 (E.D. Tex. 1990). The court rejected the defendants' contention based on the plaintiffs' stipulation to use of the aggregation method which waived their rights to individual verdicts and the fact that defendants did not show that individual trials were more favorable. *Id.* For a discussion of waivers of consent, *see* Saks & Blanck, *supra* note 23, at 824-25 n.77, 79. *See also* Bone, *supra* note 181, at 564 n.6.

[295] *See,* Saks & Blanck, *supra* note 23, at 817-19 (considering the numerous other solutions such as "pretrial and trial management, consolidation of cases, . . . collateral estoppel, alternative dispute resolution," and a legislative takeover for resolution of disputes in another forum that have been proposed or employed without any successful results).

4. On balance, a court would be on sound footing in determining that the proposed aggregation method satisfies due process

In evaluating the three *Mathews* factors, a reviewing court could soundly conclude that the proposed aggregation method comports with due process. According to the *Mathews* calculus, the proposed aggregation method aptly accounts for and accommodates the plaintiffs' (and class members') interests, the State's interest as defendant, as well as the State's interest as the judiciary.[296] Carefully crafting and employing the aggregation method in *Kalima* will benefit, (1) the class members by securing a valid and meaningful remedy for the State's breaches of trust, (2) the judiciary by preventing the crisis-level administrative burden of adjudicating separate claims, and 3) the State as the defendant by aggregating the claims into one total damage award and protecting it from individual suits that could return higher damage awards.

Nevertheless, ultimate judicial determination, of course, will depend on the specifics of the assessments made by the statisticians and appraisers that are integrated into the method actually employed. In terms of due process notions of fairness, "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case."[297] As *Cimino* explained, while the "[d]efendants complain about the [one percent] likelihood that the result would be significantly different . . . plaintiffs are facing a 100% confidence level of being denied access to the courts."[298] The two major mass class actions employing similar aggregation methods, discussed in the following section, determined that the damage aggregation methods passed constitutional muster.[299]

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[296] *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

[297] *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970) (footnote omitted)).

[298] Cimino v. Raymark Indus., 751 F. Supp. 649, 666 (E.D. Tex. 1990).

[299] *See Cimino*, 751 F. Supp. 649, 666 (E.D. Tex. 1990) (finding the 99% likelihood that due process was served to be satisfactory under the circumstances); *In re Marcos*, 910 F. Supp. 1460 (D. Haw. 1995) (finding that neither the right to due process nor the right to a jury trial was violated).

B. The Courts in Marcos *and* Cimino *Applied Similar Aggregation Methods and Determined That the Methods Comported With Due Process*

Two major class action lawsuits employing aggregation techniques to calculate class members' damages, discussed in summary fashion above, were both adjudged to comport with due process.[300]

In *Cimino v. Raymark Industries*, District Court Chief Judge M. Robert Parker employed a then-innovative aggregation method to resolve the mass tort asbestos class action.[301] Phase I of the trial resolved all common issues, phase II limited the exposure claims by "time, place, craft, and amounts of exposure" and phase III assessed damages.[302] According to Professor Bone, Judge Parker devised the method to address "the consequences in *Cimino* as well as in thousands of pending and future cases that would have to be tried individually at the damages stage unless some aggregative procedure could be devised."[303]

In phase III, the court divided the class into five disease categories and damages were calculated by selecting a random sample of 15-50 plaintiffs from each category to represent the claims of the other members in their category.[304] Each sample member received his or her individual damage verdict subject to remittitur, and each non-sample group member received the average sample damage award for the category.[305] Every class member

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[300] The courts also ruled that the procedures did not violate the defendant's right to separate jury trials. The *Marcos* court found that "[t]he Seventh Amendment 'was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details.'" *In re Marcos*, 910 F. Supp. at 1468 n.20 (citing *Galloway v. United States*, 319 U.S. 372, 392 (1943)). The *Marcos* court determined that defendants inability to cross-examine every class member did not violate their right to jury trial because they were given the opportunity to depose any of the 137 sample class members as well as any of the other 10,059 class members. *Id.* at 1464 n.5. Thus, the defendant had his day in court, with sampling and aggregation techniques being used to facilitate the presentation of evidence. *Id.* at 1469.

[301] *See Cimino*, 751 F. Supp. 649, 651. Prior to the implementation of the aggregation procedure, numerous failed attempts were made to resolve the case, including "a district-wide market share determination among the defendants" to reduce transactional costs and establish apportionment, issue preclusion to find asbestos-containing products "dangerous as a matter of law," and a voluntary alternative dispute resolution program. *Id.* at 651. Judge Parker characterized the Fifth Circuit Court of Appeals' rejection of each proposed solution as "missed opportunities." *Id.* at 651.

[302] *Cimino*, 751 F. Supp. at 653.

[303] Bone, *supra* note 181, at 563.

[304] *Cimino*, 751 F. Supp. at 653.

[305] *See Cimino*, 751 F. Supp. at 665 (noting that "[t]he averages are calculated after remittitur and take into consideration those cases where plaintiffs failed to prove the existence of an asbestos-related injury or disease resulting in a zero verdict"). *See also*

stipulated to the use of the aggregation procedure and waived their right to an individualized verdict.[306]

Cimino employed inferential statistics to justify the extrapolation of damages,[307] supporting their method by providing detailed information on the historical uses of statistics as well as present-day uses in various professional settings.[308] According to the court the use of statistics is valid as long as the subject category is "substantially uniform" to the sample and the sample is "fairly representative" of the total category population.[309] After statistical tests were conducted comparing the sample claims to the other claims in their respective disease categories, an expert statistician testified that a 99% confidence level was achieved and the sample members were representative of the larger population.[310] Although defendants objected, asserting their right to individual trials in all 2,298 cases, they presented no evidence attacking the statistical methodology.[311] The court concluded that, "science has assumed its proper role in the dispute resolution process" and an ultimate failure of due process would occur if it were not used because "[p]laintiffs are facing a 100% confidence level of being denied access to the courts."[312] Although the Fifth Circuit vacated the district court's judgment because it misconstrued applicable state substantive law, it did not invalidate the overall aggregation method crafted by Judge Parker.[313]

The next major case advocating for the use of aggregation procedures for measuring damages in a class action suit was brought in Federal District Court in Hawai'i. In 1995, District Court Judge Manuel Real approved the use of an aggregate procedure to calculate compensatory damages in the *In*

Bone, *supra* note 181, at 564.

[306] *See Cimino*, 751 F. Supp. at 665.

[307] *Cimino*, 751 F. Supp. at 659 (citing *E.K. Hardison Seed Co. v. Jones*, 149 F.2d 252, 256 (6th Cir. 1945) (holding that the use of samples is admissible "to show the quality or condition of the entire lot or mass from which they are taken").

[308] *Cimino*, 751 F. Supp. at 663 (referencing the use of statistics by defendants as well as in various fields of medicine, industry product testing, marketing, insurance, education, and politics). Professor Bone critiques Judge Parker's use of statistical analysis and his justification of such use. Bone, *supra* note 181, at 576 n.44. Professor Bone distinguishes the use of statistics in the cited cases as "a way to estimate probabilistic variables relevant to recovery" from the use of statistics in *Cimino* as a "trial technique" that results in plaintiffs sometimes receiving less than their substantive entitlements due to the preference for awarding outcomes averaged over the sample group.

[309] *Cimino*, 751 F. Supp. at 662 n.14 (citing E.K. Hardison Seed Co. v. Jones, 149 F.2d 252, 256 (6th Cir. 1945)).

[310] *See Cimino*, 751 F. Supp. at 664.

[311] *See id.*

[312] *See id.* at 666.

[313] Cimino v. Raymark Indust. Inc., 151 F.3d 297, 335 (5th Cir. 1998).

re Marcos human rights litigation.[314] *In re Marcos* provides important guidance for the instant case because: (1) it sought to extend the use of aggregation procedures; (2) it modeled its methods after *Cimino*; and (3) it was brought in the Federal District Court in Hawai'i. Despite a total class (9,541 class members) almost five times that of *Cimino* and *Kalima*, the court employed the same procedure by dividing the class into 3 categories based on their injuries and tried the case in three phases.[315] Phase I determined liability, phase II exemplary damages, and phase III compensatory damages.[316]

The Hawai'i district court in *Marcos* aptly described how inferential statistics informs the aggregation method.

> [Plaintiffs' expert in the case] testified that inferential statistics is a recognized science which uses mathematical equations to infer the probability of events occurring or not occurring. One branch of that science is the sampling theory, which deals with the selection of sample sizes sufficient to produce results that can be applied to a larger population from which the sample was selected with a specified probability of error.[317]

After a jury found the defendant liable, the calculation of class compensatory damages in phase III was accomplished by litigating the claims of 137 randomly selected sample plaintiffs.[318] A special master, authorized by the court to review the depositions of the sample members and the claim forms of the non-sample class members, recommended separate damage awards for each prevailing sample members. The sample members' awards were extrapolated to the remaining non-sample class members in their respective categories. The special master then recommended to the jury a statistically valid estimate of the total damages suffered.[319] The jury had the option of accepting, modifying, rejecting the

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[314] *See* In re Marcos, 910 F. Supp. 1460, 1464 (D. Haw. 1995).

[315] *See id.* at 1462.

[316] *See id.* at 1462.

[317] *Id.* at 1465. Plaintiffs' expert in inferential statistics was James Dannemiller of the Hawai'i-based firm SMS Research. He employed "a well-known statistical tool that is found in Leslie Kish, Survey Sampling 53 (New York, John Wiley 1962)" in his analysis. *Id.*

[318] *See id.* Dannemiller formulated a statistical method for achieving a 95% statistical confidence level that the 137 sample members could adequately represent the claims of the 9,541 class members. *Id.* at 1465. The court found the 95% confidence to meet "any due process or confrontation claim made by the defendant." *Id.* at 1465 n.7.

[319] *See id.* at 1465 n.10. The court directed the special master to review the depositions of the 137 sample members for whether: (1) the abuse fell within one of the three specified categories; (2) the Philippine military was involved in the abuse; and (3) the abuse occurred from 1972 to 1986. *Id.* at 1465. The special master took various other factors into consideration when analyzing claims under each of the three damage categories. *Id.* at 1466.

Special Master's recommendation, or it could independently make a judgment on damages.[320] The jury modified the recommendation for a few sample members' claims but adopted the recommended awards for the non-sample class members whose cases had not been individually tried.[321]

Judge Real determined, and the Ninth Circuit Court of Appeals affirmed, that the aggregation method employed *In re Marcos* comported with due process under the *Mathews* test and did not violate the defendants' right to individual jury trials.[322] Judge Real articulated a compelling interest in avoiding the cost, waste, delay, and inconsistency of ten thousand individual trials. The Ninth Circuit Court of Appeals later endorsed Judge Real's rationale stating that the "time and judicial resource to try the nearly 10,000 claims in this case would alone make resolution of [plaintiffs'] claims impossible . . . The similarity in the injuries suffered by many of the class members would make such an effort . . . especially wasteful."[323] The court weighed the need for 9,541 individual trials – that would take decades and would be largely duplicative—against the efficiency of employing an aggregation technique. The court held that "'the aggregate trial is . . . superior to the individual trial' and does not violate the substantive or procedural due process rights of either the plaintiffs or the defendant."[324]

C. Scholarly Views of Cimino *and* Marcos *Diverge Yet Overall Provide Strong Support for the Aggregation Method in* Kalima

Scholarly views diverge but generally support the careful use of aggregation methods.[325] Noted class action scholar Professor Linda S. Mullenix observes that recent Supreme Court class action "jurisprudence

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Ultimately finding that although each specific claim "could have been but were not totally unique . . . there were sufficient similarities within a rating category to recommend a standard damage amount to each victim within that grouping." *Id.* at 1466.

[320] *See id.* at 1466.

[321] *See id.* at 1464.

[322] *See id.* at 1468-69 The court highlighted that neither the Seventh Amendment right to jury trial nor the FRCP Rule 23 provides a formula for procedure and only requires application of the rules of evidence in a fair and just manner. *Id.* at 1468-69. Thus, the calculation of damages for randomly sampled claimants in an aggregate trial deprives neither side of their right to a jury trial. *See also* Hilao v. Estate of Marcos, 103 F.3d 767, 786-87 (9th Cir. 1996); Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211, 2220 (2004).

[323] Hilao v. Estate of Marcos, 103 F.3d 767, 786 (9th Cir. 1996).

[324] *Marcos*, 910 F. Supp. at 1467 (citing Saks & Blanck, *supra* note 23, at 827).

[325] *See* Saks & Blanck, *supra* note 23, at 819 n.22. *See also* Bone, *supra* note 181, at 569.

creates powerful new arguments in favor of the aggregate" model of damage adjudication, particularly for punitive damages, "that offers a route back towards the viable use of class actions in mass tort scenarios."[326] Other scholars reinforce that view, citing the practical utility of the method as well as Ninth Circuit rulings. Still others express concern about the precedential value in federal courts of the earlier aggregation cases in light of the Fifth Circuit's uncertain series of decisions.[327]

The Fifth Circuit in *Jenkins* first upheld certification of a Rule 23(b)(3) asbestos damage class action in 1986 based on a then-novel three-phase trial plan.[328] The *Jenkins* trial plan created by district court Judge Parker first determined class-wide issues, including liability and the total amount of punitive damages to be awarded. It then determined individual damage awards in "mini-trials" of four to ten class members. Punitive damages were to be awarded to the class in the aggregate and extrapolated to the class members later. Each class member would receive his or her proportionate share of the punitive fund based on a ratio to the amount of compensatory damages an individual received.[329]

In *Watson,* District Court Judge Mentz developed a class aggregation method based on *Jenkins.*[330] In 1992, the Fifth Circuit again approved

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[326] Linda S. Mullenix, *Nine Lives: The Punitive Damage Class,* 58 U. KAN. L. REV. 845, 845 (2010). Despite the limiting opinion in Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), a series of cases decided in 1990s and early 2000s seemed to provide hope for the punitive damage class action. *Id.* at 847 n.12 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424 (2001); BMW of North America v. Gore, 517 U.S. 559 (1996); TXO Prod. Corp. v. Alliance Res., 509 U.S. 443 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)). More recent cases have both approved and denied punitive damage classes. *Id.* at 847-48 nn.13-15 (citing In re Simon II Litigation, 211 F.R.D. 86, 163-65 (E.D.N.Y. 2002) (vacated, 407 F.3d 125 (2d Cir. 2005)); Baker v. Washington Mut. Fin. Group, 193 F. App'x 294, 298 (5th Cir. 2006)).

[327] *See* Mullenix, *supra* note 326, at 856-58 (noting that the *Jenkins, Watson,* and *Hilao* cases, although predating the *Ortiz* opinion, were certified pursuant to Rule 23(b)(3) and "would not be subject to *Ortiz*'s limited-fund requirements." *Id.* at 857).

[328] *See* Jenkins v. Raymark Indus. Inc., 782 F.2d 468 (5th Cir. 1986). *See also* Mullenix, *supra* note 326, at 858.

[329] An individual's punitive award can be calculated through the following formula: Individual compensatory award / total compensatory award for ¼ of the class = x (individual's unknown punitive damage award) / ¼ segment of the total punitive damages fund.

Any award the jury makes as punitive damages will, of course, be subject to examination in terms of excessiveness at the time of the establishment of the punitive fund and also at the time that each quarter of the punitive fund is apportioned respectively among one quarter of the class members. *Jenkins,* 109 F.R.D. at 282 (E.D. Tex. 1985), *aff'd,* 782 F.2d 468 (5th Cir. 1986).

[330] Watson v. Shell Oil Co., 979 F.2d 1014, 1018 (5th Cir. 1992), *on reh'g,* 53 F.3d 663 (5th Cir. 1994).

aggregation methods generally as well as the specific trial plan. The *Watson* trial plan called for a jury to first determine the class-wide issue of liability. If punitive damage liability were found, compensatory damages would be calculated in twenty fully tried sample plaintiffs' cases. "The jury would then establish the ratio of punitive damages to compensatory damages for each class member."[331] Rather than extrapolating the average sample members' punitive damage award, the court determined a basis for assessing punitive damages in the form of a ratio. Class members would receive their respective entitlement in proportion to their compensatory damage award.[332] The Fifth Circuit granted a rehearing en banc, vacating the panel decision. But the parties settled. Thus the court of appeals in *Watson* did not reach the validity of the aggregation method.[333]

Similar to *Watson,* "after a number of days at trial, the *Jenkins* class action settled and the court never actually implemented the novel trial plan approved by both the district and appellate court."[334] Because the court of appeals in *Jenkins* and *Watson* approved aggregation methods generally, those cases continue to be cited "by proponents of the punitive damage class in support of judicial approval of this [aggregation] mechanism."[335]

According to Mullenix, in *Cimino* the Fifth Circuit Court "reexamined its prior enthusiasm for exotic trial plans, statistical extrapolation of damages, and punitive damage classes."[336] In particular, it examined the validity of

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[331] *Watson,* 979 F.2d at 1018.

[332] *See id.* at 1019. The primary purpose of punitive damages is to punish defendant's misconduct and deter similar conduct in the future. *Id.* The Fifth Circuit rationalized that the "degree of culpability underlying a single act—and hence the propriety of imposing punitive damages as a result of that act—should not markedly vary [between individual class members]." *Id.* Thus, the minimal variance between individuals justified the calculation of punitive damages based on the claims of a cross-section of the class.

[333] *See* Mullenix, *supra* note 326, at 859.

[334] Mullenix, *supra* note 326, at 859.

[335] Mullenix, *supra* note 326, at 859 n.83.

[336] Mullenix, *supra* note 326, at 857. *See also* In re Fibreboard Corp, 893 F.2d 706, 712 (5th Cir. 1990). In *Fibreboard,* the court vacated a trifurcated trial plan, which proposed a class-wide determination of damages based on a trial of eleven class representatives' claims, evidence of thirty illustrative representatives' claims, and expert testimony. *Id.* at 709. The trial plan failed under Texas substantive law, which requires individual proof of causation and damages. *Id.* at 711. *See also* Cimino v. Raymark Indust., Inc., 151 F.3d 297, 335 (5th Cir. 1998) (disapproving certification of a Rule 23(b)(3) asbestos class based on an innovative three-phase trial employing statistical extrapolation to determine damages because of the individual proof requirement under Texas law); Sherman, *supra* note 22, at 700 (noting that aside from the stipulation issue, the main disagreement between District Judge Parker and the Fifth Circuit panel was "whether leeway may be given in aggregated cases to allowing determination of damages on a basis other than a strict individualized examination as to each plaintiff").

the modified three-phase trial plan employed by Judge Parker. The court did not rule on the validity of the specific aggregation/extrapolation or statistical sampling procedures in the Phase III damage determinations. Instead, the majority vacated the plan because of a legally impermissible stipulation about causation in sample plaintiffs' Phase II trials that contravened applicable state substantive law.[337] Texas law required that determinations of causal links to damages be made as to "individuals, not groups."[338] Because only "some" and not "all" of the sample plaintiffs were sufficiently exposed to asbestos, the court ruled that the phase II stipulation was not sufficiently individualized according to state law.[339]

Because the Phase III extrapolations were based on the same improper stipulation about causation in Phase II, the Phase III calculations were vacated.[340] The non-sample class members in Phase III were never required to individually prove their damages were caused by the defendant's wrongful conduct as required by state law. The federal court thus ruled that "as to the matter of individual causation . . . [and] as to the matter of actual damages" the extrapolations were "likewise fatally defective."[341]

Significantly, the court did not invalidate Judge Parker's aggregation method generally for the broad array of possible class actions not involving

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[337] *See Cimino*, 151 F.3d at 335. Sherman, *supra* note 25, at 699-700 (noting that the Fifth Circuit vacated in part due to a stipulation that bypassed the individual proof of causation that the court "viewed as required by Texas Law and the Seventh Amendment."). *Id.* at 699.

[338] *Cimino*, 151 F.3d at 336 (citing *In re Fibreboard*, 893 F.2d at 711). In *Cimino*, the Fifth Circuit was bound to the precedent set by *Fibreboard* and the application of State substantive principles as required by *Erie*. The Fifth Circuit also noted that the majority opinion in *Hilao*, upholding an aggregate procedure, is distinguishable from *Fibreboard* because *Hilao* was brought under the Federal Alien Tort Claims Act so the court applied Federal substantive law or International "common law" rather than State laws. *Id.* at 318 (citing *Hilao v. Estate of Marcos*, 103 F.3d at 776-78.) The Fifth Circuit found *Cimino* to be analogous to *Fibreboard* and thus distinguishable from *Hilao*, stating that *Hilao* "did not operate under the constraints of the Rules of Decision Act or *Erie;* the present case, by contrast, does operate under those constraints." *Id.* at 319. The court lastly cited the dissenting opinion in *Hilao*, with which it agreed that under Texas State law, "even in the context of a class action, individual causation and individual damages must still be proved individually." *Id.*

[339] *See Cimino*, 151 F.3d at 336-37. The Fifth Circuit found that the phase II stipulation was inadequate. No jury or trial determination had been made establishing the 160 sample plaintiffs' exposure to asbestos or that such exposure caused the plaintiffs' illness or disease. *Id.*

[340] *Id.* at *319*.

[341] *See id.* at 319-20. (observing further that "none of the experts at the extrapolation hearing purported to say that the damages suffered by the phase III plaintiffs in a given disease category . . . were to any extent representative of the damages suffered by the extrapolation plaintiffs in the same disease category").

the unusual Texas causation law. The dissent noted that but for the applicable substantive Texas law the aggregation method would have been approved, noting that "Judge Parker's phase II plan would have been sufficient" were it not for the improper stipulation about causation.[342] The "inescapable reality is that Texas law requires that determinations of damages be made as to individuals, not as to groups, and this Court is powerless to alter that reality."[343]

After considering both scholarly support for and concern about *Cimino*, District Court Judge Real employed a similar aggregation method in the *Marcos* human rights litigation. The Ninth Circuit upheld the statistical aggregation method employed in both *In re Marcos* and the related *Hilao v. Estate of Marcos*.[344] In *Hilao*, the Ninth Circuit Court of Appeals approved District Court Judge Real's use of aggregation, random sampling, inferential statistics and extrapolation to calculate class members' damages.[345] According to a class action litigator, the Court of Appeals "took comfort from the care with which the sampling and calculation procedure was designed, the integrity of the process as implemented, the deduction for invalid claims, and . . . the proof-of-claim forms . . . requir[ing] each class member . . . to certify under penalty of perjury that the information provided was true and correct."[346]

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[342] *Id.* at 337-38.

[343] *Id.* at 337-38. The Court concluded, "Judge Parker made a valiant and admirable effort to take . . . action. Unfortunately, however, this Court is without the power to sanction or condone his approach." *Id.* at 337. The Fifth Circuit Court of Appeals dismissed numerous potential solutions presented to resolve the mass torts class action asbestos case, Judge Parker's "procedural innovation of aggregation" being the fourth. *Cimino*, 751 F. Supp. 649, 651. Judge Parker responded by emphasizing "the disparity of appreciation for the magnitude of the problem between the trial court and the Court of Appeals," suggesting that "thirty to forty identical appeals [should] have been processed in order to enhance the awareness level of the Court of Appeals. *See id. See also* Saks & Blanck, *supra* note 23, at 820. The disparity in the numbers of filings may explain why District Court Judges seem to be more comfortable developing innovative procedural approaches to resolving repetitive and costly litigation.

[344] *See* Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996). *But see* Mullenix, *supra* note 326, at 860-61. Mullenix considers *Hilao* to be "challenging precedent" for advocates of the punitive damage class because of its distinguishing factors. The claims were pursued under the federal Alien Tort Claims Act, involved alleged egregious violations of human rights, the case "was freighted with sympathetic political implications compelling some forum for palliative justice, and the class members as well as the defendant were all foreign nations." *Id.* Mullenix argues that "the court essentially glossed over choice-of-law issues embedded in the class action in an effort to construct an administrative model for compensating egregious human rights violations." *Id.* at 861.

[345] *See* Cabraser, *supra* note 323, at 2218 (citing *In Re Marcos*, 910 F. Supp. at 1464-65)

[346] Cabraser, *supra* note 323, at 2221.

The Hawai'i district court concluded in *Marcos* and the Ninth Circuit affirmed in *Hilao* that the aggregate techniques employed protected the constitutional due process rights of all parties.[347] Both courts thus approved a slightly refined version of district judge Parker's aggregation approach in *Cimino*.

In sum, with both thoughtful support and concerns as backdrop, courts continue to embrace aggregation methods that are based generally on Judge Parker's careful approach.[348] Procedural experts too express strong support.[349] Highly-regarded plaintiffs' mass-tort attorney Elizabeth Cabraser concludes, the *Marcos* and *Hilao* litigation ultimately "legitimized the utilization of statistical sampling techniques to extrapolate class wide damages . . . [and has] proved widely influential."[350] Indeed, the *Mathews* calculus is founded on the premise that "due process is flexible and calls for procedural protections as the particular situation demands."[351] The dean of civil procedure, the late Professor Charles Alan Wright, aptly describes the

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[347] *See* Cabraser, *supra* note 323, at 2222 (citing *In re Marcos*, 910 F. Supp. at 1467). The Ninth Circuit determined that the plaintiff's enormous interests and the judiciary's interests in the aggregation method were aligned due to the insurmountable practical hurdles of 9,541 individual adjudications. *See Hilao*, 103 F.3d 767, 786-87.

[348] *See, e.g., In re Marcos*, 910 F. Supp. at 1467; *Hilao*, 103 F.3d at 767; Bell v. Farmers Insurance Exchange, 115 Cal. App. 4th 715, 752 (Cal App. 2004); Sullivan v. Kelly Services, Inc., 268 F.R.D. 356, 365 (N.D. Cal. 2010).

[349] *See* Mullenix, *supra* note 326, at 849. "One academic commentator recently authored a strenuous defense of the punitive damage class "that offers a route back towards the viable use of class actions in mass tort scenarios." James M. Underwood, *Road to Nowhere or Jurisprudential U-Turn? The Intersection of Punitive Damage Class Actions and the Due Process Clause,* 66 WASH. & LEE L. REV. 763, 763 (2009). In addition, plaintiffs' attorneys have suggested revitalized support for the punitive damage class pursuant to the Class Action Fairness Act of 2005 (CAFA). *See* Elizabeth J. Cabraser & Robert J. Nelson, *Class Action Treatment of Punitive Damage Issues After Philip Morris v. Williams: We Can Get There from Here*, 2 CHARLESTON L. REV. 407 (2008).

[350] *See* Cabraser, *supra* note 323, at 2222. Cabraser discusses how the Marcos litigation "established Rule 23 as a feasible procedural device to unite the claims of thousands, or hundreds of thousands, of victims of human rights violations, allowing effective representation litigation in United States courts." *Id.* at 2222. For example, the California Court of Appeals recently "upheld the propriety of statistical sampling to determine aggregate damages" in an employment class action. *Id.* at 2222 n.53 (citing Bell v. Farmers Insurance Exchange, 115 Cal. App. 4th 715, 9 Cal.Rptr.3d 544 (Cal App. 2004) (concluding "[w]e find little basis in the decisional law for a skepticism regarding the appropriateness of the scientific methodology of inferential statistics as a technique for determining damages in an appropriate case." *Id.* at 577-78). In 2010, a California state court advocated for statistical calculation of damages. *See* Sullivan v. Kelly Services, Inc., 268 F.R.D. 356, 365 (N.D. Cal. 2010).

[351] *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

value of aggregation methods, like those effectively employed in *Marcos* and *Cimino*: "Unless we can use the class action and devices built on the class action, our judicial system is not going to be able to cope with the challenges of the mass repetitive wrong."[352]

With the overall court rulings and general scholarly approval in mind, Mullenix concludes her thorough analysis of the federal court jurisprudence by making two observations. She first notes that the "novel trial plans endorsed in *Jenkins, Watson,* and *Hilao* were never reviewed by the [United States] Supreme Court."[353] And second, she concludes that, "the continued vitality of the 23(b)(3)" damage class action, particularly concerning punitive damages, "is inexorably linked with the Court's evolving [aggregation of] . . . damages jurisprudence."[354]

For Kalima, all of the federal cases, and the varying views about their precedential value for the federal courts, provide guidance—but not precedent—for the Hawai'i state courts. What is crucial is this: cases and commentary, after careful and thoughtful consideration, highlight the practical utility (and necessity) of an aggregation method for resolving the *Kalima* class members already-recognized meritorious claims and provide an ample foundation of judicial and scholarly support for the method.

VI. CONCLUSION

Congress enacted the Hawaiian Homes Commission Act to physically return Native Hawaiians' to their lands. By enabling this process, the HHCA facilitates restoration of spiritual and ancestral connections as well. Plagued with governmental mismanagement and misuse for almost a century, despite recent improvement the main purpose of the act remains largely unfulfilled.

The *Kalima* case exemplifies the Native Hawaiian beneficiaries' struggle to hold the State of Hawai'i accountable for its homelands trust obligations under the HHCA. Going on two decades of litigation the case is stalled on the issue of the proper method for calculating damages. Three rounds of unsuccessful proposals have been briefed and argued before First Circuit

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[352] *Cimino*, 751 F. Supp. at 652 (citing H. Newberg, *Newberg on Class Actions* § 17.06, at 373 (2d ed. 1985)). *Cimino* further noted a serious due process concern that from the amount of time and effort required to try the 160 sample cases, it was apparent that without some form of aggregation, the other non-sample cases would never be tried. *Id.* at 666.

[353] Mullenix, *supra* note 326, at 861. *See also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (indicating current Supreme Court majority's narrow construction of class action prerequisites in rejecting class certification of a mega-employment discrimination action).

[354] Mullenix, *supra* note 326, at 862.

Court Judge Crandall and a second interlocutory appeal to the Hawai'i Supreme Court will likely ensue.

This article offers a creative approach for breaking the class action impasse—both in *Kalima* and potentially in other class actions assessing substantial damages for a multitude of class members. It proposes in detail and supports in depth the use of a tailored aggregation-interpolation method for calculating class members' losses. The method makes use of inferential statistics and is drawn from federal cases employing similar methods that courts have found to comport with due process. The proposed aggregation-interpolation method is a cost-effective approach that seeks to provide a much-needed procedural breakthrough for stalled class action litigation and an opportunity to rectify the past to revitalize the future—all in the interest of justice, for Alice Aiwohi's family, for Native Hawaiians and for the people of Hawai'i.

Christian Legal Society v. Martinez: In Hindsight

Timothy J. Tracey*

ABSTRACT

Before becoming a professor, I helped litigate the Christian Legal Society v. Martinez *case. Since the Supreme Court issued its decision, scholars and commentators have labeled the decision "narrow" and "inconsequential."*

But these conclusions are mistaken. The Martinez *Court's reasoning anticipates the eventual dismantling of the First Amendment doctrine of equal access. A majority of the Court held that a university's recognition of student groups is a government subsidy rather than the creation of a speech forum. This shift frees universities to argue that they can pick and choose which student groups to recognize, even if it means picking nonreligious groups over religious groups.*

These consequences flow, at least in part, from CLS's stipulation to Hastings' all-comers policy—a stipulation that made sense only to the extent the Court was willing to view the case as about association rather than equal access. But the Justices unanimously viewed the case through the lens of equal access. Looking back, the Justices' analysis now seems unsurprising, because: (1) since the late 1950s, the Court has treated expressive association as merely another form of speech; and (2) the lower courts had already treated Martinez*-like cases as equal access cases.*

I. INTRODUCTION

It has been said that "[t]he most fertile source of insight is hindsight."[1] I have found this never truer than with my participation in *Christian Legal Society v. Martinez*.[2] Many lawyers and scholars have commented on the importance of the case in the almost three years since the United States Supreme Court issued its decision. They have been quick to label the

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[1] MORRIS KLINE, MATHEMATICS: THE LOSS OF CERTAINTY 4 (Oxford University Press 1980).

[2] __ U.S. __, 130 S. Ct. 2971 (2010).

Court's decision "narrow" and "inconsequential."[3] But these conclusions are mistaken. The *Martinez* Court's reasoning clears the way for the dismantling of the longstanding First Amendment doctrine of "equal access."

Before becoming a professor, I was part of the team of lawyers that litigated and lost the *Martinez* case five-to-four at the United States Supreme Court.[4] I represented the Christian Legal Society (CLS) from September 2004, when the demand letter was sent,[5] until June 2010, when the Supreme Court issued its decision.[6]

I wrote the initial demand letter to Hastings College of the Law, briefed the case before the federal district court in San Francisco, briefed and argued the case to the Ninth Circuit Court of Appeals, and prepared the petition for certiorari to the United States Supreme Court. Ultimately, my fellow attorneys and I lost in the Supreme Court.

A five-justice majority held that Hastings College of the Law's application of its all-comers policy to CLS complied with the Court's equal access case law.[7] After all, what could be more evenhanded than an "all-comers requirement" that "draws no distinction between groups"?[8] As

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[3] *See, e.g.*, William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 720 (2011) (providing *Martinez* as an example of a "narrow" constitutional rule); Will Creeley, *In 'CLS v. Martinez' Ruling, Sharply Divided Supreme Court Undermines Freedom of Association on Campus*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Jun. 28, 2010), http://thefire.org/article/12001.html (claiming that "the scope of today's opinion is narrow in important respects"); David French, *CLS v. Martinez: My First Quick Take*, BENCH MEMOS (Jun. 28, 2010), http://www.nationalreview.com/bench-memos/230398/i-cls-v-martinez-i-my-first-quick-take/david-french# (asserting that "[t]he Court's ruling is remarkably narrow"); Michael Peabody, *Analysis- Christian Legal Society v. Hastings- The Lesson: Stipulations Matter*, RELIGIOUSLIBERTY.TV (Jul. 16, 2010), http://religiousliberty.tv/analysis-christian-legal-society-v-hastings-a-problem-of-stipulation.html (stating that "the court ruling is very narrow and can be challenged again should future plaintiffs play their cards right"); Jason Pitzl-Waters, *Quick Notes: The Plato Code, King Arthur, and SCOTUS*, THE WILD HUNT (Jun. 30, 2010, 12:47 PM), http://www.patheos.com/blogs/wildhunt/2010/06/quick-notes-the-plato-code-king-arthur-and-scotus.html (explaining that "this decision was actually quite narrow, which means that new court cases will happen to determine if the policy is truly being applied fairly to all college groups"); *NAE Backs Christian Legal Society in Religious Freedom Case*, NAT'L ASS'N OF EVANGELICALS (Jun. 28, 2010), http://www.nae.net/news/376-nae-backs-christian-legal-society-in-religious-freedom-case ("While a setback for CLS and religious liberty, the Court's decision is narrow due to the 'all-comers' policy unique to Hastings.").

[4] *Martinez*, 130 S. Ct. at 2977.

[5] *Id.* at 2980-81.

[6] *Id.* at 2995.

[7] *Id.*

[8] *Id.* at 2993.

Justice Ginsburg put it, "It is . . . hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."[9]

My colleagues and I stipulated that rather than prohibiting discrimination on the typical, enumerated bases such as race, sex, and religion, Hastings required student groups to "allow *any* student to participate, become a member, or seek leadership positions in the organization, *regardless of [her] status or beliefs*."[10] In short, we agreed that Hastings required all student groups to accept anyone as an officer or member.[11]

But if Hastings' so-called all-comers policy was so obviously constitutional, then why did five experienced attorneys agree to the policy and suffer ridicule from the Supreme Court for our "unseemly attempt to escape from the stipulation"?[12] The answer is that we viewed the case as chiefly about expressive association, not equal access. We believed the primary constitutional infirmity with Hastings' policy was that it intruded upon CLS's "internal structure or affairs" by forcing CLS to accept leaders and members who disagreed with, or even opposed, its religious beliefs.[13] From this standpoint, it did not matter how evenhanded Hastings' policy was.[14] It only mattered that the policy burdened CLS's expressive association rights.

Unfortunately, the Supreme Court saw things differently. Rather than analyzing the case as one about expressive association, the Court viewed the case as being solely about equal access—whether Hastings provided CLS the same access to classrooms, bulletin boards, email, and funding as it provided to nonreligious groups.[15] From this perspective, our stipulation to the all-comers policy was fatal, because "[a]n all-comers condition . . . to [recognized] status . . . is textbook viewpoint neutral[ity]."[16]

This article argues that, in hindsight, the Supreme Court's decision to view the case through the lens of equal access is unsurprising. The Court has, at least since the late 1950s, seen a "close nexus" between speech and expressive association,[17] even deeming expressive association as "the

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[9] *Id.*

[10] *Id.* at 2979, 2982 (emphasis added).

[11] *Id.* at 2982.

[12] *Id.* at 2984.

[13] Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (holding that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire").

[14] *See* discussion *infra* Part IV.A.

[15] *Martinez*, 130 S. Ct. at 2985-86 (ruling that the Court's equal access precedents "suppl[ied] the appropriate framework for assessing both CLS's speech and association rights).

[16] *Id.* at 2993.

[17] *See* NAACP v. Patterson, 357 U.S. 449, 460 (1958) ("Effective advocacy of both

functional equivalent of speech itself."[18] Moreover, the Court has an over thirty-year history of treating university student group cases as equal access cases.[19] When the Court confronted yet another university student group, CLS, asserting the "functional equivalent" of a speech claim, the Court naturally reached for its equal access precedents.

This article concludes that, despite the conclusion drawn by scholars and commentators, the impact of the *Martinez* decision will be broad.[20] While the Court's holding is limited to Hastings' unique all-comers policy, the Court's reasoning readies the Court for the dismantling of equal access.[21]

Part I of this article states the basic facts of the *Martinez* case. Part II situates the decision in the larger sweep of the Supreme Court's "equal access" case law—a context that is crucial to understanding why the Court analyzed the case as it did. Part III examines how both the majority and the dissent decided to view the case through the lens of equal access. Part IV answers in more detail the oft-asked question of why my colleagues and I stipulated to Hastings' all-comers policy. Part V argues that, in retrospect, the Court's decision to analyze CLS's claims exclusively under its "equal access" precedents is not surprising. Part VI, the culmination of the article, argues that the consequences of the Court's decision are wide-ranging.

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public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.").

[18] *Martinez*, 130 S. Ct. at 2985 (citing Brief for Petitioner at 35 Christian Legal Soc'y v. Martinez, 130 S. Ct. 2917 (2010) (No. 08-1371)).

[19] *See* discussion *infra* Part II. *See generally* Widmar v. Vincent, 454 U.S. 263 (1981) (where the Supreme Court first established the principle of "equal access").

[20] *See, e.g.*, Robert Luther III, *Marketplace of Ideas 2.0: Excluding Viewpoints to Include Individuals*, 38 HASTINGS CONST. L.Q. 673, 673-74 (2011) (arguing that "the Court issued a narrow rule that is praiseworthy for its clarity but for little else"); Kimberlee W. Colby, *CLS v. Martinez: Some Thoughts on the Recent Supreme Court Decision*, CHRISTIAN LEGAL SOCIETY (2010), http://www9.clsnet.org/law-students/cls-v-martinez-some-thoughts-recent-supreme-court-decision (asserting that "the holding is very narrow, and applies only to the Hastings-style 'all comers' policy, which does not exist at any other public university"); Jay Thompson, *Christian Legal Society v. Martinez and Religious Freedom in South Carolina Public Schools and Universities*, 22 S. CAROLINA LAWYER 23 (Sept. 2010) ("Because of its narrow scope and application, *Martinez* is not likely to have great precedential value regarding issues of discrimination against religious student organizations."); David French, *CLS v. Martinez: Further Thoughts*, SPEAK UP BLOG (Jun. 28, 2010), http://blog.speakupmovement.org/university/uncategorized/cls-v-martinez-further-thoughts/ (stating, "As I read through the Supreme Court's opinion, I'm struck by the profound narrowness of its holding.").

[21] *Compare Martinez*, 130 S. Ct. at 2984 (limiting opinion to "whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution"), *with id.* at 2986 (embracing a government subsidy model for recognition of student organizations—CLS seeks "what is effectively a state subsidy").

While the Court limited its holding to Hastings' unique all-comers policy, its reasoning calls into question the continuing viability of the Court's equal access precedents.

II. THE FACTUAL BACKGROUND OF THE CASE

CLS is an organization with chapters at law schools across the country.[22] The purpose of the society is to "provide[] opportunities for fellowship, as well as moral and spiritual guidance, for Christian lawyers," to promote "justice, religious liberty, and biblical conflict resolution[,]" and to encourage "lawyers to furnish legal services for the poor."[23]

Anyone can attend and participate in a CLS meeting, but voting members and officers—the students who control the group—must affirm their commitment to the group's core beliefs by signing a Statement of Faith.[24] The Statement of Faith declares a belief in fundamental Christian doctrines, for example, the belief that "the Bible [is] the inspired Word of God."[25] Those who sign the Statement of Faith are expected to live up to its precepts, including refraining from either "participation in or advocacy of a sexually immoral lifestyle."[26] "Sexually immoral" behavior includes pre-marital sex, adultery, and homosexual conduct.[27]

And therein lies the problem for Hastings. Hastings insists that all student groups seeking recognition from the school must maintain an all-comers policy with regard to membership and leadership.[28] The law school dean explained in a deposition: "[I]n order to be a registered organization you have to allow all of our students to be members and full participants if they want to."[29] The dean provided the example that "the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization."[30] The dean even boasted that the school's policy requires that an African-American student group admit white supremacists.[31]

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[22] *Id.* at 2980.

[23] Brief for Petitioner at 5 Christian Legal Soc'y v. Martinez, __ U.S. __, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL 711183, at *5.

[24] *Martinez*, 130 S. Ct. at 2974.

[25] *Id.* at 2980 n.3 (quoting the CLS Statement of Faith).

[26] Brief for Petitioner at 7, *Martinez*, 130 S. Ct. 2971 (No. 08-1371), 2010 WL 711183, at *7.

[27] *Id.*

[28] *Martinez*, 130 S. Ct. at 2993.

[29] Brief for Petitioner at 14, *Martinez*, 130 S. Ct. 2971 (No. 08-1371), 2010 WL 711183, at *14 (emphasis omitted).

[30] *Id.* at 47.

[31] Tim O'Brien, *Christian Legal Society v. Martinez*, RELIGION AND ETHICS NEWS

Students groups, like CLS, that will not open their membership and leadership to all-comers can still form and have a campus presence, but they will not be given official recognition and its attendant benefits.[32] They cannot use classrooms for meetings and activities.[33] Nor can they use the typical, campus channels for communication, such as the student organizations fair, the school newsletter, or the school mailboxes.[34]

The oddity is that Hastings annually recognizes a wide range of student groups.[35] The University of California has charged the law school with a responsibility to "ensure an ongoing opportunity for the expression of a variety of viewpoints."[36] The school stipulated that it recognizes student groups "to promote a diversity of viewpoints [on campus] . . . including viewpoints on religion and human sexuality."[37]

Recognized student groups include political groups, religious groups, groups that promote social causes, groups organized around racial or ethnic identity, and groups that focus on human sexuality.[38]

Most of these groups exist to express a message.[39] Silenced Right, a pro-life group, teaches that "all human life from the moment of conception until natural death is sacred and has inherent dignity," while Law Students

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WEEKLY (Apr. 16, 2010), http://www.pbs.org/wnet/ religionandethics/episodes/april-16-2010/christian-legal-society-v- martinez/6109/.

[32] *Martinez*, 130 S. Ct. at 2975, 2980-81.

[33] *Id.* at 3008 (Alito, J., dissenting).

[34] *Id.* The benefits of recognition include: (a) use of the Law School's name and logo; (b) use of certain bulletin boards in the basement of Snodgrass Hall; (c) eligibility for a Law School organization email address; (d) eligibility to send out mass emails through the Associated Students of the University of California at Hastings; (e) eligibility for a student organization account with fiscal services at the Law School; (f) eligibility to apply for student activity fee funding; (g) eligibility to apply for limited travel funds; (h) ability to place announcements in the Hastings Weekly, a weekly newsletter prepared and distributed by the Office of Student Services; (i) eligibility to apply for permission to use limited office space; (j) eligibility for the use of an organization voice mailbox for telephone messages; (k) listing on the Office of Student Services' website and any hard copy lists, including the Student Guidebook and admissions publications; (l) participation in the annual Student Organizations Faire; and (m) use of the Student Information Center for distribution of organization materials to the Law School community. Registered student organizations may also apply for permission to use the Law School's rooms and audio-visual equipment for meetings. Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. 04-04484, 2006 WL 997217, at *1 (N.D. Cal. May 19, 2006) (internal citations omitted).

[35] *Martinez*, 130 S. Ct. at 3001-02 (Alito, J., dissenting) (noting that Hastings annually recognizes "more than 60 registered groups").

[36] Brief for Petitioner at 52, *Martinez*, 130 S. Ct. 2971 (No. 08-1371), 2010 WL 711183, at *52.

[37] *Martinez*, 130 S. Ct. at 3013 (Alito, J., dissenting).

[38] *Id.* at 3002 (Alito, J., dissenting).

[39] *Id.* at 3002 (Alito, J., dissenting).

for Choice aims to "defend and expand reproductive rights."[40] The American Constitution Society seeks "to counter . . . a narrow conservative vision of American law," and the Hastings Student Animal Defense Fund aims "at protecting the lives and advancing the interests of animals through the legal system."[41]

These groups maintain their message by limiting their leadership and membership to students who share their core beliefs. Silenced Right tells students that "[s]o long as individuals are committed to the goals set out by the leadership, they are welcome to participate and vote in Silenced Right elections."[42] Hastings Democratic Caucus (HDC) asks members not to "exhibit a consistent disregard and lack of respect for the objective of the organization as stated in [HDC's bylaws]."[43] "The sole objective identified in those bylaws is the group's ideological commitment to advance Democratic party principles."[44] The Hastings chapter of the Association of Trial Lawyers of America (ATLA) requires that all members must "adhere to the objectives of the Student Chapter as well as the mission of [national] ATLA."[45]

Despite the recognition of these other groups in apparent violation of the school's all-comers policy, the law school refused to recognize a Hastings chapter of CLS.[46] CLS's Statement of Faith requirement, according to the school, violated its policy.[47] Hastings' refusal resulted in protracted litigation.[48] The case made its way from federal district court in San Francisco to the U.S. Supreme Court where the Court faced the question: May Hastings withhold recognition from CLS unless the group relinquishes its First Amendment right to form an association of like-minded Christian students?[49] In a five-to-four decision, the Supreme Court said yes.[50]

III. THE HISTORICAL CONTEXT OF THE COURT'S DECISION

The decision is best understood in the larger context of the Supreme Court's equal access case law. For years, school administrators relied on

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[40] *Id.*

[41] *Id.*

[42] Brief for Petitioner at 28, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (No. 08-1371), 2010 WL 711183, at *28.

[43] *Id.* at 13.

[44] *Id.* (internal quotation marks omitted).

[45] *Id.*

[46] *Martinez*, 130 S. Ct. at 2980-81.

[47] *Id.* at 2980.

[48] *Id.* at 2981-82 (detailing the procedural history of the case).

[49] *See id.*

[50] *Id.* at 2982 ("affirm[ing] the Ninth Circuit's judgment" in favor of Hastings).

the Establishment Clause of the First Amendment—"separation between church and State"[51] —to deny recognition to religious student groups. The text of the Establishment Clause provides, "Congress shall make no law respecting an establishment of religion."[52] Until the late 1940s, the clause was interpreted, consistent with the plain text, as only applicable to the federal government. "The limitation of power in the first amendment of the Constitution is upon Congress, and not the states."[53]

The Supreme Court incorporated the Establishment Clause to apply to the states in 1947.[54] In so doing, the Court affirmed that the First Amendment "has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[55] Just four years later, in 1951, the Court held that public school districts were allowed to deny religious groups equal access to school facilities.[56] The Jehovah's Witnesses had no right to use a school district's

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[51] Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (Jan. 1, 1802)).

[52] U.S. CONST. amend. I. The Establishment Clause of the First Amendment was intended as a "structural restraint" on federal governmental power. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 8 (1998) (observing that the "task [of the Establishment Clause is to serve as a] structural clause [in order] to manage sovereign power"). Professor Esbeck explains:

> [T]he Establishment Clause presupposes a constitutional model consisting of two spheres of competence: government and religion. The subject matters that the Clause sets apart from the sphere of civil government—and thereby leaves to the sphere of religion—are those topics "respecting an establishment of religion," e.g., ecclesiastical governance, the resolution of doctrine, the composing of prayers, and the teaching of religion.

Id. at 10-11. *See also* Watson v. Jones, 80 U.S. 679, 730-31 (1871) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority.").

[53] Permoli v. Mun. No. 1 of City of New Orleans, 44 U.S. 589, 606 (1845). *Cf.* Barron v. City of Balt., 32 U.S. 243, 247 (1833) ("The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.").

[54] *See* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15 (1947) ("The broad meaning given the [First] Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First [Amendment] applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause.").

[55] *Id.* at 18.

[56] *See* McKnight v. Bd. of Public Educ., 341 U.S. 913 (1951), *summarily aff'g*, McKnight v. Bd. of Public Educ., 76 A.2d 207 (Pa. 1950) (holding that religious organization was not entitled to prevail in mandamus action to compel school board to issue a permit to the religious organization for use of auditorium).

high school auditorium "for the purpose of conducting a series of public Bible lectures."[57] The school district could deny use "of the auditorium to appellants while permitting it to others . . . for non-sectarian or non-religious purposes."[58]

In response, public schools at all levels, from elementary schools to institutions of higher education, began excluding religious organizations on the cry of "separation of church and state."[59] In case after case, federal and state courts held that allowing religious groups to meet in school facilities "violated the Establishment Clause by creating an unconstitutional link between church and state."[60]

Johnson v. Huntington Beach Union High School District[61] is characteristic. A California high school refused "to permit a voluntary student Bible study club to meet and conduct its activities on the school campus during the school day."[62] The school argued that "recognition of plaintiff's Bible study club would impermissibly advance religion and would cause the state to penetrate the federal and state constitutional barriers between church and state."[63] A California Court of Appeal agreed with the school, holding that "permitting plaintiffs' Bible study club to meet and operate on the school campus during the school day . . . offends establishment principles."[64]

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[57] *McKnight*, 76 A.2d at 208.

[58] *Id.* at 209.

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

[60] Brandon v. Bd. of Educ., 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *see also* Hunt v. Bd. of Educ. of Kanawha Cnty., 321 F. Supp. 1263 (S.D. W. Va. 1971) (holding that Establishment Clause required exclusion of student prayer meetings); Trietley v. Bd. of Educ. of City of Buffalo, 65 A.D.2d 1, 8 (N.Y. App. Div. 1978) (holding that "accommodating" religious student groups "would transgress the principle of governmental neutrality expressed in the establishment clause of the First Amendment"); Johnson v. Huntington Beach Union High Sch. Dist., 137 Cal. Rptr. 43, 50 (Cal. Ct. App. 1977) (holding that "permitting plaintiffs' Bible study club to meet and operate on the school campus during the school day . . . offends establishment principles."); Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038, 1047 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) (holding that "use of the District's facilities" for "religious meetings . . . leads to an impermissible establishment of religion."); Bell v. Little Axe Indep. Sch. Dist. No. 70, 766 F.2d 1391, 1407 (10th Cir. 1985) (holding that policy permitting equal access to religious group "cannot withstand scrutiny under the Establishment Clause"); Bender v. Williamsport Area Sch. Dist., 741 F.2d 538, 559-60 (3d Cir. 1984), *vacated*, Bender v. Williamsport Area Sch. Dist. 475 U.S. 534 (1986) (holding that granting religious groups equal access violated the Establishment Clause).

[61] 137 Cal. Rptr. 43.

[62] *Id.* at 45.

[63] *Id.* at 46.

[64] *Id.* at 50.

The near total exclusion of religious groups from school campuses continued until the early 1980s. With *Widmar v. Vincent*[65] in 1981, however, the Supreme Court began a dramatic shift away from the strict separation that had marked its interpretation of the Establishment Clause over the last forty years. Rather than the Establishment Clause requiring schools to single out religious groups for exclusion, the Court found the Establishment Clause demanded only that schools provide neutral treatment.[66] Religious groups could be given the same access to classrooms, bulletin boards, email, and funding as any other group without offending the "separation of church and state."[67]

In *Widmar*, the Supreme Court articulated the legal doctrine now known as "equal access."[68] Under the doctrine of equal access, if public universities and colleges are recognizing and providing benefits to nonreligious groups, they must provide the same recognition and benefits to religious groups. Such even treatment of religious groups is not only *permitted* by the First Amendment's Establishment Clause, but also *required* by the First Amendment's Free Speech Clause.

The University of Missouri at Kansas City (UMKC) regularly "recognize[d] over 100 student groups" and "provide[d] University facilities for [their] meetings."[69] But it refused to provide a classroom to Cornerstone for "religious worship or religious teaching."[70] The school argued that it "could not provide facilities for religious use without giving prohibited support to an institution of religion" in violation of the Establishment Clause.[71] The Supreme Court disagreed, holding that UMKC's failure to provide Cornerstone the same access to facilities as the other 100 student groups on campus violated the Free Speech Clause and that "the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds"—both religious and nonreligious.[72]

While acknowledging "religious groups will benefit from access to University facilities," the Court held that the benefit was at best "incidental" for Establishment Clause purposes.[73] Making facilities "available to a broad class of nonreligious as well as religious speakers"

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[65] 454 U.S. 263 (1981).
[66] *Id.* at 277.
[67] *Id.* at 264.
[68] *Id.* at 271.
[69] *Id.* at 265.
[70] *Id.*
[71] *Id.* at 267.
[72] *Id.* at 267, 269.
[73] *Id.* at 273.

prevented "any imprimatur of state approval on religious sects or practices."[74] A policy of equal access "'would no more commit the University . . . to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities."[75] According to the Court, "[t]he provision of benefits to so broad a spectrum of groups [was] an important index of secular effect."[76]

Three years after *Widmar*, in 1984, Congress passed the Equal Access Act[77] to extend the principle of equal access from college campuses to secondary schools—high schools and middle schools. The Act compels federally-funded secondary schools to provide student groups equal access to school accommodations.[78] If a school receives federal aid and allows at least one student group to use its facilities, channels of communication, or both, then it must allow religious student groups the same.[79]

The Supreme Court considered the constitutionality of the Equal Access Act in *Board of Education Of Westside Community Schools v. Mergens*.[80] Westside High School, a public secondary school in Nebraska, annually recognized about thirty student groups;[81] but when a student named Bridget Mergens approached the school principal about "permission to form a Christian club at the school[,]"[82] the principal "denied the request."[83] Mergens sued the school, arguing that the "refusal to permit the proposed club to meet at Westside violated the Equal Access Act."[84] The high school denied that it had to comply with the Equal Access Act, since the Act "violated the Establishment Clause of the First Amendment and was therefore unconstitutional."[85]

The Supreme Court disagreed. According to the Court, "the logic of *Widmar* applie[d] with equal force to" the constitutional questions surrounding "the Equal Access Act."[86] "Because the Act . . . grants equal

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[74] *Id.* at 274.

[75] *Id.* (quoting Chess v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980)).

[76] *Id.*

[77] 20 U.S.C. § 4071 (2006); *see also* Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905 (2006) (passed by Congress in 2002 as part of the No Child Left Behind Act; it specifically requires pubic schools to provide Boy Scouts equal access to school facilities).

[78] 20 U.S.C. § 4071.

[79] *Id.*

[80] 496 U.S. 226 (1990).

[81] *Id.* at 231.

[82] *Id.* at 232.

[83] *Id.*

[84] *Id.* at 233.

[85] *Id.*

[86] *Id.* at 248.

access to both secular and religious speech, . . . the Act's purpose was not to 'endorse or disapprove of religion'" in violation of the Establishment Clause.[87] Nor did the Court think students were "likely to confuse an equal access policy with state sponsorship of religion."[88] Rather, "students are mature enough . . . to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[89] Thus, the Court held "that the Equal Access Act does not . . . contravene the Establishment Clause."[90]

The Supreme Court then addressed the issue of student group funding. Government funding of religious groups has always been viewed with a certain amount of suspicion. It is one thing for religious groups to benefit from access to school facilities and channels of communication, but "monetary subsidization of religious organizations and projects . . . is a beast of an entirely different color."[91]

Such suspicion harkens back to concerns of the Founders, such as James Madison. As the author of the First Amendment, Madison has been viewed as the "authority on questions about the meaning of the Establishment Clause."[92] In his *Memorial and Remonstrance Against Religious Assessments*,[93] Madison famously wrote that not even "three pence" should be taken from the citizens for the purpose of supporting religion.[94]

Despite the historical concerns about religious funding, the Supreme Court held in *Rosenberger v. Rector and Visitors of the University of Virginia*,[95] that granting religious student groups equal access to funding

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[87] *Id.* at 249 (quoting Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).

[88] *Id.* at 250.

[89] *Id.*

[90] *Id.* at 253.

[91] Rosenberger v. Rector & Visitors of the Univ. of Va., 18 F.3d 269, 286 (4th Cir. 1994), *rev'd*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 846 (1995).

[92] *Rosenberger*, 515 U.S. at 868 (Souter, J., dissenting); *see, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 770 n.28 (1973); Everson v. Bd. of Educ. Of Ewing Twp., 330 U.S. 1, 13 (1947).

[93] JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in Everson*, 330 U.S. at 41 ("If it were lawful to impose a small tax for religion the admission would pave the way for oppressive levies.").

[94] *Everson*, 330 U.S. at 40. Madison wrote his *Memorial and Remonstrance* in opposition to a bill, introduced in the General Assembly of Virginia by Patrick Henry, to levy a general assessment for the support of religious teachers. The *Memorial and Remonstrance* played a key role in having the assessment bill tabled. It also cleared the way for the passage of Thomas Jefferson's Act for Establishing Religious Freedom in January of 1786, which is seen as a precursor to the First Amendment. *See generally* RALPH LOUIS KETCHAM, JAMES MADISON: A BIOGRAPHY 57 (Univ. of Virginia Press 1990) (1971).

[95] 515 U.S. 819.

"would no more violate the Establishment Clause than would giving those groups access to an assembly hall."[96] The Court specifically distinguished the concerns of Madison and his fellow Founders when it explained that "[t]he *neutrality* of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches."[97] The Court elaborated:

> A tax [for direct support of a religious institution], of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic. The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects. The exaction here, by contrast, is a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission.[98]

The Establishment Clause, thus, permits public schools to offer benefits, whether facilities or money, to student groups on a neutral basis, that is, "offered to a broad range of groups . . . without regard to their religion."[99]

The Court extended the reach of equal access one last time—this time to elementary schools. In *Good News Club v. Milford Central School*.[100] Milford Central School violated the Free Speech Clause by allowing community groups, such as the Boy Scouts, to use school facilities to teach children moral values and character development, while at the same time denying religious community groups' access to do the same.[101] As with the Court's previous equal access decisions, the Court held that the Establishment Clause permits public schools to provide religious groups neutral treatment.[102] Milford may ensure that religious groups are treated "neutrally and given access to speak about the same topics as are other groups"[103] without offending the Establishment Clause.

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[96] *Id.* at 843.

[97] *Id.* at 840 (emphasis added).

[98] *Id.*

[99] Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality opinion) (recognizing *Rosenberger* as case where neutrality of the funding saved student funding program in face of Establishment Clause challenge).

[100] 533 U.S. 98 (2001).

[101] *Id.* at 108-09 (noting that the Good News Club seeks "to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint").

[102] *Id.* at 113 ("conclud[ing] that the school has no valid Establishment Clause interest").

[103] *Id.* at 114.

Good News Club marked the completion of the Court's shift from an Establishment Clause jurisprudence requiring exclusion of religious groups to one of equal access for religious and nonreligious groups.[104]

Public schools—largely universities and colleges—responded to this shift by imposing religion and sexual orientation nondiscrimination policies on religious student groups.[105] In particular, schools began to forbid such groups from recruiting leaders and members who profess Christian beliefs and seek to live consistent with that profession.[106] The schools argued that their nondiscrimination policies complied with the Supreme Court's requirement of equal access because *all* students groups, not just religious groups, were prohibited from discriminating on the basis of religion and sexual orientation.[107] Religious and nonreligious groups were treated alike.[108]

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[104] *See also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (giving a church "equal access" to school facilities for showing film series did not violate Establishment Clause); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (allowing a group to display cross in public square open to broad spectrum of groups did not violate Establishment Clause).

[105] *See* Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 662-72 (1996) (observing that public universities and colleges responded to the seemingly settled issue of equal access with the imposition of alleged neutral conditions on recognition, such as religion nondiscrimination policies).

[106] *See* Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006); Beta Upsilon Chi Chapter at the Univ. of Fla. v. Machen, 586 F.3d 908 (11th Cir. 2009) (University of Florida); Alpha Iota Omega Christian Fraternity v. Moeser, No. 04-765, 2006 WL 1286186, at *3 (M.D.N.C. May 4, 2006) (University of North Carolina); Univ. of Wis.-Madison Roman Catholic Found., Inc. v. Walsh, No. 06-649, 2007 WL 1056772, at *4 (W.D. Wis. Apr. 4, 2007); Christian Legal Soc'y v. Holbrook, No. C2-04-197 (S.D. Ohio) (Ohio State); Christian Legal Soc'y Chapter at Ariz. State Univ. v. Crow, No. 04-2572 (D. Ariz.); Christian Legal Soc'y at the Univ. of Toledo v. Johnson, 3:05-cv-7126 (N.D. Ohio); Intervarsity Multi-Ethnic Campus Fellowship v. Rutgers, No. 02-06145 (D.N.J.); Beta Upsilon Chi v. Adams, No. 3:06-cv-00104 (M.D. Ga.) (University of Georgia); Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law v. Farley, No. 04-4120 (D. Kan.); Maranatha Christian Fellowship v. Regents of the Bd. of the Univ. of Minn. Sys., No. 03-5618 (D. Minn.); DiscipleMakers v. Spanier, No. 04-2229 (M.D. Pa.) (Penn State); Cordova v. Laliberte, No. 08-543 (D. Idaho) (Boise State); Intervarsity Christian Fellowship UW-Superior v. Walsh, 06-0562 (W.D. Wis.). *See also* Ga. Op. Att'y Gen., No. 97-32 (Dec. 12, 1997) (ruling that Georgia Tech could not deny recognition to ReJOYce in Jesus because of its faith standards for voting members and officers).

[107] Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. 04-04484, 2006 WL 997217, at *26 (N.D. Cal. Apr. 17, 2006) (ruling that CLS "has not presented any evidence that it has been treated differently from other student groups"); Every Nation Campus Ministries v. Achtenberg, 597 F. Supp. 2d 1075, 1099 (S.D. Cal. 2009), *aff'd sub nom.*, Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011) (Plaintiffs' "claim must fail as a matter of law because they are not treated differently than any other similarly

It is in this context that *Christian Legal Society v. Martinez* arose. But *Martinez* differed fundamentally from other university nondiscrimination policy cases. Hastings had adopted an unusual nondiscrimination policy—its so-called all-comers policy. Rather than prohibiting discrimination based on the typical protected classes such as race, sex, and religion, Hastings' all-comers policy required *all* registered student groups to allow *any* student to be a member or leader of the group, regardless of whether the student agreed with or actively opposed the values, beliefs, or speech of the group.[109]

Both the federal district court and the Ninth Circuit Court of Appeals held that Hastings' imposition of its all-comers policy complied with the Supreme Court's equal access precedents.[110] Hastings did "not target or single out" religious groups.[111] "[A]ll student groups [must] comply with Hastings' Policies and Regulations Applying to College Activities, including the Nondiscrimination Policy."[112] CLS did "not present[] any evidence that it ha[d] been treated differently from other student groups."[113] The United States Supreme Court subsequently granted certiorari and affirmed the Ninth Circuit.[114] The Court agreed that CLS had been provided equal access.[115] More significantly, the Court treated the recognition and funding of student organizations as the provision of a government subsidy, marking a fundamental change in the Court's treatment of university student group cases.[116] This change in the Court's jurisprudence is explored in more detail under the discussion of the decision's consequences in Part VI.[117]

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situated student organization with respect to the nondiscrimination policy . . . ."); Truth v. Kent Sch. Dist., 542 F.3d 634, 647 (9th Cir. 2008), *overruled in part by* Los Angeles Cnty., Cal. v. Humphries, __ U.S. __, 131 S. Ct. 447, 450-51 (2010) (holding that district's nondiscrimination policies "do not implicate any rights that Truth might enjoy under the [Equal Access] Act").

[108] *See* Paulsen, *supra* note 105, at 663 (noting the argument that "[r]eligious speakers and groups, no more or less than non-religious speakers and groups, must accept the burdens that go with the benefits, so long as those benefits are applied alike to all").

[109] *See Martinez*, 130 S. Ct. 2971, 2983 n.7 (2010).

[110] *See Kane*, No. 04-04484, 2006 WL 997217, at *13; Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, 319 Fed. Appx. 645, 645-46 (9th Cir. 2009).

[111] *Kane*, No. 04-04484, 2006 WL 997217, at *24.

[112] *Id.* at *11.

[113] *Id.* at *26.

[114] *See* Christian Legal Soc'y v. Martinez, __ U.S. __, 130 S. Ct. 795 (2009) ("Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted.").

[115] *Martinez*, __ U.S. __, 130 S. Ct. 2971, 2985-86 (2010).

[116] *Id.* at 2986.

[117] *See* discussion *infra* Part VI.B.2.

IV. THE SUPREME COURT'S DECISION

At the Supreme Court, CLS argued that Hastings' all-comers policy ran afoul of its First Amendment rights to free speech and expressive association.[118] Rather than treating these two claims independently, the majority and the dissent ruled that CLS's "expressive-association and free-speech arguments merge[d]."[119] The Court explained that the case should be analyzed only as one concerning equal access—was CLS receiving the same treatment as the nonreligious student groups on campus?[120]

The majority and the dissent differed only in their conclusion to this question. The majority found no "need [to] dwell" on the issue.[121] It readily concluded that, at least on its face, Hastings' all-comers policy drew "no distinction between groups."[122] The policy required "*all* student groups"—whether religious or nonreligious—"to accept *all* comers."[123] The majority distinguished the Court's previous equal access decisions, such as *Widmar* and *Rosenberger*, as cases "in which universities singled out organizations for disfavored treatment because of their points of view."[124] CLS had received no such disfavored treatment. "[T]he all-comers policy governs *all* [student organizations]; Hastings does not pick and choose which organizations must comply with the policy on the basis of viewpoint."[125] The majority, thus, "reject[ed] CLS'[s] free-speech and expressive-association claims."[126]

The majority refused to consider whether Hastings "selectively enforce[d] its all-comers policy"—the argument that though the policy appeared neutral on its face, in practice, Hastings applied the policy only to religious groups, like CLS.[127] The majority believed that this selective enforcement argument had neither been addressed by the lower courts nor properly asserted by CLS.[128]

Breaking from past precedent, the majority ruled that the recognition and funding of student groups is "a form of government subsidy."[129] The

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[118] *Martinez*, 130 S. Ct. at 2984.
[119] *Id.* at 2985.
[120] *Id.* at 2985-86.
[121] *Id.* at 2993.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 2993 n.25.
[126] *Id.* at 2995.
[127] *Id.*
[128] *Id.*
[129] William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The*

Constitution may protect CLS's right to exclude, but CLS "enjoys no constitutional right to state subvention of its selectivity."[130] "Hastings, through its [registered student organization] program is dangling the carrot of subsidy, not wielding the stick of prohibition."[131] The majority emphasized that CLS, "in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition."[132] Thus, Hastings could pick and choose what types of association it wanted subsidize, even if that meant picking nonreligious association over religious association. Underscoring the point, Justice Stevens observed in his concurrence that while Hastings must tolerate all viewpoints, "[i]t need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities."[133]

"[T]he dissent largely accepted the majority's doctrinal framework, including in particular" the case being controlled by the Court's equal access case law.[134] It even agreed that Hastings' all-comers policy was "facially neutral"—treating religious and nonreligious groups alike.[135] But the dissent believed CLS's selective enforcement argument was ripe for consideration.[136] The school had selectively applied the all-comers policy by allowing nonreligious groups, like the Hastings Democratic Caucus and La Raza, to limit members and leaders to those who share the group's beliefs, but denying religious groups, like CLS, the same latitude.[137] Hastings' all-comers policy—and apparent neutral treatment of student groups—"was a pretext for the law school's unlawful denial of CLS's registration application" and an impermissible denial of equal access.[138]

Thus, the majority and the dissent agreed that the case should be analyzed under the Court's equal access precedents, but they disagreed as to whether Hastings had in fact provided CLS equal access: the majority concluded that the school had done so, while the dissent disagreed.

Implications of Christian Legal Society v. Martinez, 261 ED. LAW REP. 473, 486 (2010).

[130] *Martinez*, 130 S. Ct. at 2978.

[131] *Id.* at 2975.

[132] *Id.* at 2986.

[133] *Id.* at 2998 (Stevens, J., concurring).

[134] Ashutosh Bhagwat, *Associations and Forums: Situating CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 543, 548 (2010).

[135] Christian Legal Soc'y v. Martinez, 130 S. Ct. at 3017 (Alito, J., dissenting).

[136] *Id.* at 3017-19 (Alito, J., dissenting).

[137] *Id.* at 3018 (Alito, J., dissenting).

[138] *Id.* at 3017 (Alito, J., dissenting).

V. THE STIPULATION

By ignoring CLS's expressive association claim, CLS's stipulation to the all-comers became decisive. Like every other group on campus, CLS had to bestow leadership and membership on any student that showed an interest. So does that mean the agreement with Hastings was a blunder? It certainly seems that way now. But at the time, the stipulation made sense. It was unthinkable that a court would find it constitutional for a public university to tell students that if they wanted to form a registered student organization, they had to abandon their First Amendment rights of association.[139]

The notion of such an "association free zone" smelled of the classic Supreme Court case, *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*[140] There, the board of the Los Angeles International Airport (LAX) passed a resolution banning all "First Amendment activities" in the terminal.[141] Desiring to distribute literature, Jews for Jesus challenged the ban as unconstitutional.[142] The Supreme Court held that the ban was overbroad:

> [T]he resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual "First Amendment Free Zone" at LAX. The resolution does not merely regulate expressive activity in the Central Terminal Area that might create problems such as congestion or the disruption of the activities of those who use LAX. Instead, the resolution expansively states that LAX "is not open for First Amendment activities by any individual and/or entity," and that "any individual and/or entity [who] seeks to engage in First Amendment activities within the Central Terminal Area . . . shall be deemed to be acting in contravention of the stated policy of the Board of Airport Commissioners." The resolution therefore does not merely reach the activity of respondents at LAX; it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some "First Amendment activit[y]." We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.[143]

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[139] *See id.* at 2993 (discussing the all-comers policy as a "condition on access to [registered student organization] status").

[140] 482 U.S. 569 (1987).

[141] *Id.* at 570-71.

[142] *See id.* at 571-72.

[143] *Id.* at 574-75 (internal citations omitted).

Hastings' insistence that no student organizations could engage in expressive association seemed just as outrageous as LAX's absolute ban on speech. The all-comers policy reached not just leadership and membership decisions that were discriminatory—such as those based on race or gender—but *any* leadership or membership decision whatsoever.[144] The soccer club could not require its leaders and members to have the ability to play soccer. The chess club could not decline to make someone president because she did not understand the rules of chess. The vegetarian club could not deny the privilege of voting to a band of meat eaters. And the list could go on. So, at the time, it seemed Hastings had handed CLS the case by agreeing to the all-comers policy.

A. Stipulation Based on Violation of CLS's Expressive Association Rights

The legal team always viewed the *Martinez* case as chiefly about expressive association. The primary constitutional infirmity with Hastings' policy was not that it treated CLS differently than other groups, but rather that it forced CLS to accept leaders and members with ideologies and philosophies fundamentally at odds with those of the group's founders.

The Supreme Court had previously held that "the freedom to associate . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."[145] The Court had further recognized that forcing an association to hand over control of leadership and voting rights to persons who disagree with, or even oppose, the association's beliefs "may seriously distort its collective decisions—thus impairing the [association's] essential functions."[146]

Roberts v. United States Jaycees[147] is instructive. The Supreme Court held that the Jaycees' expressive association rights were not burdened by

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[144] *See Martinez*, 130 S. Ct. at 2979. *See also* Brief for Petitioner at 47, *Martinez*, 130 S. Ct. 2971 (No. 08-1371), 2010 WL 711183, at *47 ("The Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization."); *Christian Legal Society v. Martinez*, RELIGION AND ETHICS NEWS WEEKLY (Apr. 16, 2010), http://www.pbs.org/wnet/religionandethics /episodes/april-16-2010/christian-legal-society-v- martinez/6109/ (Hastings' dean stating that the all-comers policy requires the Black Law Students Association to admit a white supremacist).

[145] Democratic Party v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122 n.22 (1981) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 791 (1978) ("Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.")).

[146] *Id.* at 122.

[147] 468 U.S. 609.

the forced inclusion of women.[148] Crucial to the Court's holding was the observation that "it impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."[149]

Hastings' imposition of its all-comers policy had the exact opposite effect on CLS. It stripped the group completely of the ability to exclude persons with beliefs at odds with those of its founding members.[150] CLS had to allow anyone to lead its Bible studies, plan its social calendar, select its officers, or amend its constitution. CLS lost all ability to limit the control of the group to people who agreed with its profession of faith.[151]

From this perspective, whether Hastings' policy was viewpoint neutral, or whether Hastings denied CLS equal access, was irrelevant. The only thing that mattered was that the policy prevented student groups, and CLS in particular, from protecting themselves from persons with adverse beliefs.

Historically, the Supreme Court had treated expressive association analysis as unrelated to the evenhandedness of the government's nondiscrimination policy. Returning again to *Roberts*, the Court observed

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[148] *See id.* at 626 ("The Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association.").

[149] *Id.* at 627.

[150] The argument that the denial of recognition to CLS was "only indirect pressure to modify its membership policies," *Martinez*, 130 S. Ct. at 2986, is flatly contradicted by Healy v. James, 408 U.S. 169 (1972). There, the Supreme Court addressed Central Connecticut State College's argument that "denial of official recognition" to Students for a Democratic Society (SDS) "abridged no constitutional rights," since "all that was denied petitioners was the administrative seal of official college respectability"; the "college's stamp of approval." *Id.* at 182 (internal quotation marks omitted). Further, the College contended that "petitioners still may meet as a group off campus, that they still may distribute written material off campus, and that they still may meet together informally on campus—as individuals, but not as [Central Connecticut State College]-SDS." *Id.* at 182-83. The Court rejected this argument, ruling:

> We do not agree with the characterization . . . of the consequences of nonrecognition. We may concede . . . that the administration has "taken no direct action . . . to restrict the rights of (petitioners) to associate freely. . . ." But the Constitution's protection is not limited to direct interference with fundamental rights. . . . [T]he group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: "Freedom such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."

Id. at 183 (quoting Bates v. City of Little Rock, 361 U.S. 516, 523 (1960)).

[151] *Cf. Roberts*, 468 U.S. at 623 ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.").

that the Minnesota Human Rights Act "does not distinguish between prohibited and permitted activity on the basis of viewpoint."[152] Minnesota treated the Jaycees like any other private organization. But the Court still considered the impact of the Act on the Jaycees' expressive association rights—asking whether the "admission of women as full voting members [would] impede the organization's ability to engage in . . . protected . . . [First Amendment] activities or to disseminate its preferred views."[153] The Act's apparent neutral treatment of organizations did not preclude the Court from engaging in an expressive association analysis.

The same was true in *Board of Directors of Rotary International v. Rotary Club of Duarte*.[154] The Court noted that California's Unruh Act "makes no distinctions on the basis of the organization's viewpoint."[155] California did not single out groups like Rotary "who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world."[156] Instead, California treated Rotary like any other "business establishment" in the state.[157] But the Court still examined whether the Unruh Act worked some "infringement on Rotary members' right of expressive association."[158] It still considered whether "admitting women to Rotary Clubs [would] affect in any significant way the existing members' ability to carry out their various purposes."[159] The alleged evenhandedness of the Unruh Act had no bearing on the Court's expressive association analysis.

The Court employed a similar approach in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[160] The Court concluded that the Massachusetts public accommodations law did not "target speech or discriminate on the basis of its content[.]"[161] The law treated all places of public accommodation equally; it did not single out organizers of St. Patrick's Day parades. But the Court still considered whether the law interfered with the organizers' expressive association rights—their ability to exclude persons "whose views were at odds" with the positions they were

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[152] *Id.*

[153] *Id.* at 610.

[154] 481 U.S. 537 (1987).

[155] *Id.* at 549.

[156] *Id.* at 539.

[157] *Id.* at 541 n.2 (noting that the Unruh Act promises "the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever" in the State of California).

[158] *Id.* at 549.

[159] *Id.* at 548.

[160] 515 U.S. 557 (1995).

[161] *Id.* at 572.

espousing.[162] Regardless of how neutral the Massachusetts public accommodations law appeared, the Court examined the law's impact on the parade organizers' expressive association rights.[163]

With *Roberts*, *Duarte*, and *Hurley* on the books, the legal team believed courts would assess the impact of Hastings' all-comers policy on CLS's expressive association rights regardless of whether or not the policy provided CLS equal access.

The Seventh Circuit's decision in *Christian Legal Society v. Walker*[164] seemed to confirm this conclusion. The facts of the case paralleled those of *Martinez*. Southern Illinois University (SIU) revoked the official recognition of a chapter of the Christian Legal Society, because the chapter's religious criteria for officers and members allegedly violated the university's nondiscrimination policy.[165] The chapter sued arguing that SIU's application of its policy violated the group's expressive association and speech rights.[166] The Seventh Circuit held "[t]here can be little doubt that SIU's [nondiscrimination] policy [was] viewpoint neutral on its face[.]"[167] But the court still considered whether "SIU's application of its antidiscrimination policy as a justification for revocation of CLS's student organization status unconstitutionally intrude[d] upon its right of expressive association."[168] The court concluded that the university's actions did so intrude, and it reached this conclusion without concern for how SIU treated other student groups.[169] All that mattered was that "SIU's enforcement of its antidiscrimination policy [was] . . . intended to induce CLS to alter its membership standards."[170] CLS had proven "a reasonable likelihood of success on its claim for violation of its right of expressive association" without the need to show that SIU had denied it the same treatment as other student groups.[171]

The legal team believed courts would assess CLS's expressive association claim in *Martinez* the same way—based purely on the impact of Hastings' all-comers policy on CLS's leadership and membership decisions. The policy's effect, or lack of effect, on other student groups was irrelevant. The stipulation exacerbated an already thorny expressive

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[162] *Id.* at 580.
[163] *See id.*
[164] 453 F.3d 853 (7th Cir. 2006).
[165] *See id.* at 858-59.
[166] *See id.* at 858.
[167] *Id.* at 866.
[168] *Id.* at 862.
[169] *See id.* at 861-864.
[170] *Id.* at 863.
[171] *Id.* at 864.

association problem for Hastings. The school's policy went from just trampling CLS's expressive association rights to nixing the rights of the entire student body. Hastings' institution of an "association free zone" was the nearest thing to a constitutional slam-dunk.

B. Stipulating to the Existence of the "All-Comers" Policy But Not to Its Application

CLS never viewed its agreement to the all-comers policy as reaching the issue of the policy's application. It stipulated that Hastings had *adopted* a policy "requiring all student groups to accept all-comers."[172] But it never stipulated that Hastings had *applied* that policy evenhandedly.[173]

Of course, a school's "policies that are facially neutral may be discriminatory as applied."[174] The Sixth Circuit's decision in Barr v. Lafon[175] is illustrative. The Blount County School Board in Tennessee adopted a dress code banning clothing depicting racially divisive symbols.[176] High school officials applied the policy to prohibit students from displaying the Confederate flag on their clothing.[177] The students argued the dress code "discriminate[d] on the basis of viewpoint"—banning racially divisive symbols but not racially inclusive symbols.[178] The court held that the school board had "a facially neutral ban on racially divisive symbols[.]"[179] So "[t]he critical question," said the court, "[was] whether the school ha[d] enforced its facially neutral, written dress code banning racially divisive symbols in a viewpoint-discriminatory manner."[180] The

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[172] Christian Legal Soc'y v. Martinez, __ U.S. __, 130 S. Ct. 2971, 2993 (2010) (original emphasis omitted).

[173] *See id.* at 3018 n.11 (Alito, J., dissenting) (noting that "counsel for CLS acknowledged below that Hastings *has* an all-comers policy [but argued that] . . . 'the Court needs to . . . reach the constitutionality of the all-comers policy *as applied to CLS in this case.*'").

[174] Stephanie R. Tumbiolo, *"Intimately Linked": Examining Religious Protection for Student Expressions of Sexual Abstinence*, 48 J. CATH. LEGAL STUD. 117, 129 (2009). *See, e.g.*, Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 803 (9th Cir. 2011) ("A nondiscrimination policy that is viewpoint neutral on its face may still be unconstitutional if not applied uniformly."); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (finding that even though a law appears to be fair and impartial, a court can still find it unconstitutional if the law is applied with an "unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights . . .").

[175] 538 F.3d 554 (6th Cir. 2008).

[176] *See id.* at 556-57.

[177] *See id.* at 557.

[178] *Id.* at 570.

[179] *Id.* at 571.

[180] *Id.* at 573.

facial neutrality of the law only answered half of the constitutional question; the school board still needed to apply the dress code evenhandedly.

So even though Hastings' all-comers policy was likely facially neutral, CLS "consistently argued in the courts below that Hastings had *applied* its registration policy in a discriminatory manner."[181] For example, CLS contended in the Ninth Circuit:

> Hastings claims the Nondiscrimination Policy requires "all student groups to allow all students to become members and officers." Nonetheless, Hastings . . . recognizes student organizations that require officers and members to agree with their organizations' purposes. Hastings recognizes Outlaw despite its constitution's provision that officers may be removed for "working against the spirit of the organization's goals and objectives." The Hastings Chapter of The Association of Trial Lawyers of America is recognized even though it requires members to "adhere to the objectives of the Student Chapter as well as the mission of ATLA." Hastings Democratic Caucus is recognized, yet students may only be members "so long as they do not exhibit a consistent disregard and lack of respect for the objectives of the organization." These groups require their members and officers to adhere to specific viewpoints (e.g. positive views of homosexual conduct, trial attorneys, and Democratic political objectives), yet they are recognized by the College.
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> . . . .
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> As applied, the Policy allows secular groups to select officers holding certain beliefs for secular reasons but prohibits religious groups from selecting officers holding the same beliefs for religious reasons. An Orthodox Jewish group is forbidden from requiring officers and members to abstain from eating pork on religious grounds, but a vegetarian club can require its officers and members to refrain from eating meat. A Quaker fellowship is prohibited from requiring officers and members to be pacifists for religious reasons, but an anti-war group can require officers and members to oppose war for political reasons.[182]

Though CLS stipulated that Hastings had put an all-comers policy in place, CLS "*never* ceded [the] argument that Hastings applie[d] its accept-all-comers policy unequally."[183] Yet a majority of the Supreme Court viewed the stipulation differently.

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[181] Christian Legal Soc'y v. Martinez, __ U.S. __, 130 S. Ct. 2971, 3018 n.11 (2010) (Alito, J., dissenting) (emphasis added).

[182] Appellant's Reply Brief at 38-41, Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, 319 Fed. Appx. 645 (No. 06-15956), 2007 WL 968270, at *38-*40 (9th Cir. Feb. 28, 2007) (internal citations omitted).

[183] *Martinez*, 130 S. Ct. at 3018 n.11 (Alito, J., dissenting).

VI. AN UNSURPRISING ANALYSIS

When the Supreme Court handed down its decision on June 28, 2010, legal scholars and commentators criticized the Court for its "failure to take seriously CLS's freedom of association claim."[184] The Court analyzed the case as being *solely* about equal access—whether Hastings offered CLS the same treatment it offered nonreligious groups.[185] The Court gave no consideration to whether forcing CLS to open its leadership and membership to students who disagree with, or even oppose, its religious beliefs burdened the group's expressive association rights.[186]

The Court's method of analysis rendered CLS's stipulation to the all-comers policy fatal. As Justice Ginsburg put it, "It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."[187] Finding Hastings' all-comers policy to

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[184] John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 195 (2010) [hereinafter Inazu, *Freedom of Association*]. *See also* Ashutosh Bhagwat, *supra* note 134, at 549 (arguing that "the key error made by all the Justices in *Martinez* was to treat the case as one primarily about the right of free speech, rather than about freedom of association"); Thro & Russo, *supra* note 129, at 484 (noting that "[t]he Supreme Court discounted the student organization's Freedom of Association argument"); Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 514 (2010) (challenging decision on the grounds that "freedom of association rights are distinct from free speech rights and should receive independent protection"); Jack Willems, *The Loss of Freedom of Association in Christian Legal Society v. Martinez*, 34 HARV. J.L. & PUB. POL'Y 805, 806 (2011) ("The Court's opinion in *CLS* dramatically undercuts the freedom of association. The Court unjustifiably departed from precedent and merged the speech and association rights of the Christian Legal Society."); Erica Goldberg, *Amending Christian Legal Society v. Martinez: Protecting Expressive Association as an Independent Right in a Limited Public Forum*, 16 TEX. J. C.L. & C.R. 129, 155 (2011) ("By merging CLS's speech and expressive-association claims, the Court left the right of expressive association with no independent protection in a limited public forum."); Zachary R. Cormier, *Christian Legal Society v. Martinez: The Death Knell of Associational Freedom on the College Campus*, 17 TEX. WESLEYAN L. REV. 287, 290 (2011) ("CLS'[s] associational freedoms quickly flattened and then seemingly vanished altogether.").

[185] *Martinez*, 130 S. Ct. at 2985 (holding that CLS's "expressive-association and free-speech arguments merge" and that the Court's equal access cases "supply the appropriate framework for assessing both CLS's speech and association rights").

[186] *Id.* at 2988-95 (considering only whether Hastings' all-comers policy complies with the Court's equal access precedents, i.e., whether the policy is reasonable and viewpoint neutral).

[187] *Id.* at 2993.

comport with the Court's equal access precedents, the Court "reject[ed] CLS'[s] free-speech and expressive-association claims."[188]

In hindsight, scholars and commentators should not have been so surprised by the Court's analysis.[189] It is telling that both the majority and the dissent viewed the case through the lens of equal access rather than expressive association.[190] Two things explain this unanimity among the Justices: First, at least since the late-1950s, the Court has treated association as a species of speech.[191] Second, as detailed above, the Court has a thirty-year history of treating university student group cases as equal access cases,[192] and almost every lower court faced with a *Martinez*-like case has treated these equal access precedents as controlling.[193]

A. Association as a Form of Speech

In the 1958 case, *NAACP v. Alabama ex rel. Patterson*,[194] the Court established, what it termed, a "close nexus" between the freedoms of speech and association.[195] The Court adopted the view that the right of association exists to facilitate the exercise of other First Amendment rights, such as speech.[196] The "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech."[197]

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[188] *Id.* at 2995.

[189] *Cf.* Paulsen, *supra* note 105, at 675 (arguing that university's imposition of religion nondiscrimination policy to religious groups violates the First Amendment doctrine of equal access—dubbing "the use of 'nondiscrimination' requirements in such a manner [as] a thinly-veiled attempt to circumvent *Widmar* because of disagreement with its equal-access-for-religion result").

[190] *See Martinez*, 130 S. Ct. at 2985-86 (holding that the Court's equal access "precedents supply the appropriate framework for assessing both CLS's speech and association rights"); *see also id.* at 3016-19 (Alito, J., dissenting) (considering whether the all-comers provides student groups "neutral" treatment).

[191] *See* Bhagwat, *supra* note 134, at 550-53. *See also* Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002).

[192] *See* discussion *supra* Part II (providing a detailed look at the Supreme Court's thirty year history of equal access).

[193] *See* discussion *infra* Part V.B (detailing the lower court decisions treating *Martinez*-like cases as equal access cases).

[194] 357 U.S. 449 (1958).

[195] *Id.* at 460.

[196] *Id.* at 460-61.

[197] *Id.* at 460.

The Court went so far as to hold that the right of expressive association is in fact "*implicit* in the right to engage in activities protected by the First Amendment."[198] "The right to engage in activities protected by the First Amendment," said the Court, "implies 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'"[199]

The Court recognized the right to associate to maximize protection of the core First Amendment rights to speak and to worship.[200] "The ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government."[201] The right of association, thus, serves as a hedge against the government's intrusion on these core rights.

Chief Justice Roberts helpfully summarized the Court's thinking on expressive association in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*:[202]

> We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a "right of expressive association." The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others. If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.[203]

The Court ensures the fullest exercise of the freedoms of speech and religion by guaranteeing the "correlative freedom to engage in group effort toward those ends"—the right of expressive association.[204]

1. The Supreme Court's manner of analyzing expressive association cases illustrates its "close nexus" between speech and association.

Since *Patterson*, the Court's method of analyzing expressive association cases has reinforced the "close nexus" between speech and association. For example, in *Hishon v. King & Spalding*,[205] the law firm argued that being

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[198] Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (emphasis added).

[199] Bd. of Dir. Of Rotary Int'l, et al. v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) (quoting *Roberts*, 468 U.S. at 622).

[200] *See Roberts*, 468 U.S. at 622.

[201] New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988).

[202] 547 U.S. 47 (2006).

[203] *Id.* at 68 (internal citations omitted).

[204] *Roberts*, 468 U.S. at 622.

[205] 467 U.S. 69 (1984).

forced to consider a woman for partnership would infringe its right of expressive association.[206] The Court acknowledged that lawyers engage in expression—making a "distinctive contribution . . . to the ideas and beliefs of our society"—but held that the firm's expression was not "inhibited by a requirement that it consider petitioner for partnership on her merits."[207] Whether the firm's expressive association rights had been violated turned on whether the inclusion of an unwanted person—in this case, a woman—affected the firm's speech.[208]

In *Roberts*,[209] the Court's expressive association analysis, again, hinged on the impact on the Jaycees' speech. At the outset, the Court determined that the members of the Jaycees regularly engaged in expression:

> To be sure . . . a not insubstantial part of the Jaycees' activities constitutes protected expression on political, economic, cultural, and social affairs. Over the years, the national and local levels of the organization have taken public positions on a number of diverse issues, and members of the Jaycees regularly engage in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment.[210]

The Court concluded, however, that the Jaycees' expressive association rights were not violated by requiring them to admit women, because there was "no basis in the record for concluding that admission of women as full voting members [would] impede the organization's ability to engage in these protected activities or to disseminate its preferred views."[211] The success of the Jaycees' expressive association claim was tied directly to how their speech was affected.[212]

The Court employed a similar scheme for analyzing the Rotary Club's expressive association claim in *Board of Directors of Rotary International v. Rotary Club of Duarte*.[213] The Court conceded that Rotary clubs engage in expressive activities, such as making speeches and leading community projects,[214] but held that including women would not "affect in any significant way the existing members' ability to carry out their various

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[206] *See id.* at 78 ("respondent argues that application of Title VII in this case would infringe constitutional rights of expression or association").

[207] *Id.* (citing NAACP v. Button, 371 U.S. 415, 431 (1963)).

[208] *See id.*

[209] 468 U.S. 609.

[210] *Id.* at 626-27 (internal citations and quotations omitted).

[211] *Id.* at 627.

[212] *See id.*

[213] 481 U.S. 537 (1987).

[214] *Id.* at 541, 546.

purposes."[215] The lack of any impact on the clubs' speech precluded the finding of an expressive association violation.[216]

The Supreme Court, thus, has hitched expressive association to speech.[217] The Court will only find an expressive association violation when forcing the association to accept an unwanted person will produce a measurable impact on the association's speech.[218]

2. *The Supreme Court's repeated analogy to compelled speech cases when analyzing expressive association claims reinforces the speech-like nature of association.*

Nowhere is this "close nexus" between speech and association more clearly seen than in the Court's frequent recourse to compelled speech cases in analyzing expressive association claims. The Court's decisions in *Boy*

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[215] *Id.* at 548.

[216] *See id.* at 548.

[217] *See* Inazu, *Freedom of Association*, *supra* note 191, at 196 (discussing the Court's acceptance of notion that "expressive association is entitled to no more constitutional protection than speech"); Bhagwat, *supra* note 134, at 551 (positing that the Court has treated "the associational right as one derivative of free speech and protected only to the extent that it is necessary to permit free expression").

[218] The Court's campaign financing cases are also helpful in illustrating the Court's close connection between speech and expressive association. In Buckley v. Valeo, 424 U.S. 1 (1976), for instance, the Court held that limitations on campaign expenditures impinged on *both* the rights of speech and association. *Id.* at 59. According to the Court, the rights are virtually inseparable—infringing the right of political expression simultaneously infringes the rights of political association. "[T]he right of association is a basic constitutional freedom, that is closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Id.* at 25 (internal citations and quotations omitted). To limit campaign expenditures "place[d] substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.* at 59.

Following *Buckley*, the Court considered the validity of a city ordinance placing a limitation on contributions to committees formed to support or oppose ballot measures in Citizens Against Rent Control/Coalition for Fair Housing v. Berkley, 454 U.S. 290, 292-94 (1981). The Court again held that the limitation infringed both the rights of speech and association, and that these rights intermix:

> A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression. The restraint imposed by the Berkeley ordinance on rights of association and in turn on individual and collective rights of expression plainly contravenes both the right of association and the speech guarantees of the First Amendment.

Id. at 300.

Scouts of America v. Dale[219] and *California Democratic Party v. Jones*[220] are characteristic.

The Court in *Dale* considered whether forcing the Boy Scouts to retain James Dale, "a gay rights activist," as an assistant scoutmaster would impair their expressive association rights.[221] The Court framed the issue in compelled speech terms: "We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'"[222] The Court concluded that it would. "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[223]

The Court specifically analogized the Boy Scouts' plight to that of the parade organizers' in *Hurley v. Irish-American Gay, Lesbian, Bisexual Group of Boston, etc., et al.*,[224] a compelled speech case.[225]

> *Hurley* is illustrative on this point. There we considered whether the application of Massachusetts' public accommodations law to require the organizers of a private St. Patrick's Day parade to include among the marchers an Irish-American gay, lesbian, and bisexual group, GLIB, violated the parade organizers' First Amendment rights. We noted that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner. We observed:
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> [A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals . . . . The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

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[219] 530 U.S. 640 (2000).

[220] 530 U.S. 567 (2000).

[221] *Dale*, 530 U.S. at 653.

[222] *Id.* (quoting Reply Brief for Petitioner at 5 Boy Scouts of America v. Dale, 530 U.S. 640, 653 (2000) (No. 99-699)).

[223] *Id.*

[224] 515 U.S. 557 (1995).

[225] *Id.* at 573 (considering whether Massachusetts' imposition of its public accommodations law on parade organizers violates the rule that the government "may not compel affirmance of a belief with which the speaker disagrees").

> Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not "promote homosexual conduct as a legitimate form of behavior." As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.[226]

The Court, thus, concluded that forcing the Scouts to accept Dale as an assistant scoutmaster constituted "a severe intrusion on [their] rights to freedom of expressive association."[227]

In *California Democratic Party v. Jones*,[228] the Court again relied on its compelled speech cases to hold that a "blanket primary" law violated the Democratic Party's expressive association rights.[229] The law allowed "'[a]ll persons entitled to vote, including those not affiliated with any political party . . . to vote . . . for any candidate regardless of the candidate's political affiliation.'"[230] California defended the law on the basis that it "forces parties to reconsider long standing positions since it 'compels [their] candidates to appeal to a larger segment of the electorate.'"[231] Citing to *Hurley*, the Court rejected this justification for the law:

> We have recognized the inadmissibility of this sort of "interest" before. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the South Boston Allied War Veterans Council refused to allow an organization of openly gay, lesbian, and bisexual persons (GLIB) to participate in the council's annual St. Patrick's Day parade. GLIB sued the council under Massachusetts' public accommodation law, claiming that the council impermissibly denied them access on account of their sexual orientation. After noting that parades are expressive endeavors, we rejected GLIB's contention that Massachusetts' public accommodation law overrode the council's right to choose the content of its own message. Applying the law in such circumstances, we held, made apparent that its "object [was] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. . . .

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[226] *Dale*, 530 U.S. at 653-54 (quoting *Hurley*, 515 U.S. at 574-75) (internal citations omitted).

[227] *Id.* at 659.

[228] 530 U.S. 567 (2000).

[229] *Id.* at 585.

[230] *Id.* at 570 (citing Cal. Elec. Code Ann. § 2001 (West Supp. 2000)).

[231] *Id.* at 582 (quoting Brief for Respondents at 46).

> [I]n the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids."[232]

Just as Massachusetts' attempt to hijack the message of the St. Patrick's Day parade violated the First Amendment, so too did California's blanket primary law. According to the Court, the law

> forces petitioners to adulterate their candidate-selection process—the basic function of a political party—by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome—indeed, in this case the *intended* outcome—of changing the parties' message. We can think of no heavier burden on a political party's associational freedom.[233]

Forcing the Democratic Party to allow anyone, regardless of party affiliation, to select its candidates "impair[ed] the ability of the group to express those views, and only those views, that it intend[ed] to express."[234]

The Court's continued intertwining of speech and association, and especially its reliance on compelled speech cases, has rendered association a mere species of speech. Association is just one more variety of expression like symbolic speech, verbal expression, or published word. Thus, the Court's instinct when faced with an expressive association case, like *Martinez*, is to reach for its free speech precedents.

B. The Supreme Court's Thirty-Year History of Treating Speech Claims by Student Groups as "Equal Access" Claims

The Court's impulse to apply its free speech cases to expressive association claims makes all the more sense in the context of university student group cases. The Court has a thirty-year history, as detailed above, of treating every university student group case to come before it as an equal access case.[235] Since the Court first laid out the doctrine of equal access in *Widmar* in 1981,[236] whether the issue was access to meeting space,[237]

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[232] *Id.* at 582-83 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, etc., et al., 515 U.S. 557, 578 (1995)) (internal citations omitted).

[233] *Id.* at 581-82 (emphasis added) (citations omitted)).

[234] Boy Scouts of America v. Dale, 530 U.S. 640, 648 (2000).

[235] *See* discussion *supra* Part II.

[236] Widmar v. Vincent, 454 U.S. 263, 267 (1981) (referencing the Eighth Circuit Court of Appeals holding that "the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds").

[237] *Id.* at 265-70 (considering university's provision of "facilities for the meetings of registered organizations"); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387-88 (1993) (considering church's application "for permission to use school facilities to show a six-part film series containing lectures by Doctor James Dobson"); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102 (2001) (considering school board's

procuring student activity fee funds,[238] or even a student's compelled funding of disagreeable student groups,[239] the Court has decided these cases on the basis of equal access. If a student group brought a speech claim in a university context, the Court resorted to equal access.

It should be no surprise then that when CLS came along asserting an expressive association claim—what amounts to a free speech claim—in a university forum, the Court resorted yet again to its equal access precedents.

It is even less surprising due to the fact that every lower court but one had done precisely this when faced with a *Martinez*-like case.[240] For

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"regulations governing the use of . . . school facilities").

[238] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 826-27 (1995) (considering religious student publication's application for student activity fees).

[239] Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 230 (2002) (examining First Amendment rights of "complaining students . . . being required to pay fees which are subsidies for speech they find objectionable, even offensive").

[240] *See* Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, 319 Fed. Appx. 645 (9th Cir. 2009) (analyzing law school's refusal to recognize religious student group because of noncompliance with nondiscrimination policy as equal access case); Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2d Cir. 1996) (considering school district's refusal to recognize religious student group because of noncompliance with nondiscrimination policy as equal access case); Boy Scouts of Am. v. Wyman, 335 F.3d 80 (2d Cir. 2003) (ruling that state charitable campaign's refusal of Boy Scouts because of noncompliance with nondiscrimination policy should be viewed as equal access case); Knights of the Ku Klux Klan v. E. Baton Rouge Parish Sch. Bd., 578 F.2d 1122 (5th Cir. 1978) (analyzing school board's denial of access to KKK because of noncompliance with nondiscrimination policy as equal access case); Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000) (examining state's refusal to allow KKK to participate in adopt-a-highway program because of noncompliance with nondiscrimination policy as equal access case); Truth v. Kent Sch. Dist., 542 F.3d 634 (9th Cir. 2008) (considering school district's denial of recognition to religious student group because of noncompliance with nondiscrimination policy as an equal access case); Boy Scouts of Am. v. Till, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (addressing school board's refusal to provide access to Boy Scouts because of noncompliance with nondiscrimination policy as an equal access case); Ass'n of Faith-Based Orgs. v. Bablitch, 454 F. Supp. 2d 812 (W.D. Wis. 2006) (holding that state kicking out religious charities from charitable campaign because of noncompliance with nondiscrimination policy should be treated as equal access case); Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg, 597 F. Supp. 2d 1075 (S.D. Cal. 2009) (analyzing universities' denial of recognition to religious student groups because of noncompliance with nondiscrimination policy as equal access case); Alpha Iota Omega Christian Fraternity v. Moeser, No. 04-765, 2005 WL 1720903 (M.D.N.C. Mar. 2, 2005) (holding that university's imposition of nondiscrimination policy on religious student group constituted denial of equal access); Christian Legal Soc'y v. Eck, 625 F. Supp. 2d 1026 (D. Mont. 2009) (analyzing university's refusal to recognize and fund religious student groups because of noncompliance with nondiscrimination policy as equal access case); *see also* Ga. Op. Att'y Gen., No. 97-32 (Dec. 12, 1997) (opining that university's denial of recognition to religious student group because

instance, in *Hsu v. Roslyn Union Free School District No. 3*,[241] the school district refused to recognize a religious student club, Walking on Water, because the club insisted "that only Christians could be club officers."[242] The school district claimed, "[T]his condition violated the school policy prohibiting all student groups from discriminating on the basis of (among other things) religion."[243] The club sued under the Equal Access Act arguing that they had been denied equal treatment.[244] The court agreed.

> Equal treatment should mean that the Walking on Water Club enjoys the same latitude that other clubs may have in determining who is qualified to lead the Club. Thus, just as a secular club may protect its character by restricting eligibility for leadership to those who show themselves committed to the cause, the Hsus may protect their ability to hold Christian Bible meetings by including the leadership provision in the club's constitution.
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> . . . Under the Equal Access Act, the Hsus may try to preserve the content of the religious speech at their meetings by discriminating in a way that ensures that the Club's leaders will be committed to both its cause and a particular type of expression. The School's recognition of the Club only on the condition that it abandon this effort therefore constitutes a failure to provide equal treatment, and denies the Walking on Water Club "equal access."[245]

Similarly, in *Truth v. Kent School District*,[246] the Ninth Circuit Court of Appeals treated a religious club's expressive association challenge to a school's nondiscrimination policy as an equal access claim. The Court explained:

> Expressive association is simply another way of speaking, only the group communicates its message through the *act of associating* instead of through an act of "pure speech" such as publishing, marching, speaking or performing. There is no question that acts of expressive association are protected forms of speech under the First Amendment. When the state *restricts access to a*

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of noncompliance with nondiscrimination policy would constitute a denial of equal access). *But see* Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006) (analyzing university's refusal to recognize religious student group because of noncompliance with nondiscrimination as expressive association case); Univ. of Wis.-Madison Roman Catholic Found., Inc. v. Walsh, No. 06-649, 2007 WL 1056772 (W.D. Wis. Apr. 4, 2007) (unreported decision applying *Walker* to grant preliminary injunction against university for refusing to recognizing religious student group because of noncompliance with nondiscrimination policy).

[241] 85 F.3d 839 (2d Cir. 1996).

[242] *Id.* at 848.

[243] *Id.*

[244] *Id.* at 850.

[245] *Id.* at 861-62.

[246] 542 F.3d 634 (9th Cir. 2008).

> *limited public forum* in a way that interferes with a group's speech or expressive association, however, we apply the lesser standard of scrutiny, even if the same burden on a group's rights *outside* a limited public forum would be subject to strict scrutiny. To hold otherwise would accord an act of "pure speech" such as publishing a newspaper-the core of what the First Amendment protects-less protection than an act of expressive association.[247]

Finding the record to be insufficient, the Ninth Circuit remanded the case for a determination of whether the school district had afforded the religious club equal access.

> Here we understand Truth to be challenging an allegedly arbitrary or discriminatory practice of granting waivers to non-religious groups, but not religious groups. . . . If indeed the District has a policy of enforcing the non-discrimination policy only against religious groups, this policy would of course violate the [principle of equal access].
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> . . . .
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> There is evidence in the record that other groups, such as the Men's and Girl's Honor Clubs, were granted ASB recognition despite violating the District's non-discrimination policy. Therefore, to the extent Truth argues that it was denied an *exemption* from the non-discrimination policy based on the content of its speech, we hold it has raised a triable issue of fact, and reverse the district court's summary judgment.[248]

Likewise, in *Boy Scouts of America v. Till*,[249] a federal district court in Florida analyzed the Scouts' association claim against a public school district as an equal access claim. The court observed that district already opened school facilities to a number of other "discriminatory" groups:

> Groups using the schools include a number of sororities, pom pom teams and cheerleading teams, which use the schools despite the fact that their participants are all girls. Numerous youth groups which regularly meet in the Broward County public schools limit participation to students of certain ages, such as the National Child Labor Committee, the Florida Youth Orchestra, and the Biddy Basketball League. Groups consisting of senior citizens also use the schools, including the National Council on the Aging and the Service Agency for Senior Citizens of Broward County. Both senior citizen groups have partnership agreements with the School Board.
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> Some groups using the Broward County public schools focus their efforts on persons of certain ethnicities. For example, the Urban League of Broward County, Inc. conducts programs for African-American children while Inroads,

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[247] *Id.* at 652 (Fisher, J., and Wardlaw, J., concurring) (internal citations omitted).

[248] *Id.* at 648-50.

[249] 136 F. Supp. 2d 1295 (S.D. Fla. 2001).

> a group that selects high school students from certain minority groups for its programs, gives preference to African-American, Hispanic, and Native American students. Both Inroads and the Urban League have partnership agreements with the School Board. In addition, Zeta Phi Beta, an African-American sorority, signed a lease for the use of the schools which includes a nondiscrimination clause, yet the group limits its membership to African-American women and its programs are for girls, i.e. charm classes and an annual debutantes cotillion. Further, the School Board has allowed numerous churches and other religious groups to use the Broward County public schools facilities for meetings, worship services, and other activities, including the baptism of believers in school pools. Congregations using the schools include churches and synagogues of several denominations, including Baptist, Seventh Day Adventist, Catholic, and Jewish.[250]

For the school district to now try to oust the Scouts for its "exercise of th[e] right" of association while these "other groups continue[d] to enjoy access," violated the First Amendment requirement of equal access.[251]

The same was true in *Every Nation Campus Ministries v. Achtenberg*.[252] "[F]our Christian student groups at two California State University (CSU) campuses" argued that they should not "have to comply with CSU's nondiscrimination policy, a string attached to formal recognition on campus."[253] The groups alleged that CSU's requirement burdened their expressive association rights.[254] The California district court ruled that "[a]cts of expressive association are protected forms of speech," and, thus, should be treated like any other speech in a university forum.[255] CSU could restrict access to its forum so long as those restrictions complied with the principle of equal access—being viewpoint neutral and reasonable.[256] The Court held that the religious groups were "not treated differently than any other similarly situated student organization with respect to the nondiscrimination policy . . . [T]he First Amendment burdens imposed by the policy are viewpoint-neutral and uniformly applied to all clubs irrespective of their particular viewpoints."[257]

Thus, the overwhelming majority of lower federal courts analyzed these *Martinez*-like cases as cases about equal access—where the critical

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[250] *Id.* at 1303-04.

[251] *Id.* at 1308, 1311.

[252] 597 F. Supp. 2d 1075 (S.D. Cal. 2009) (note that the Ninth Circuit recently affirmed the decision of the federal district court in Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011)).

[253] *Achtenberg*, 597 F. Supp. 2d at 1078-79.

[254] *Id.* at 1079.

[255] *Id.* at 1093.

[256] *Id.*

[257] *Id.* at 1099-1100.

question was whether religious student groups were receiving the same treatment as nonreligious student groups. The courts gave no consideration to a traditional expressive association analysis—whether the nondiscrimination policies "intru[ded] into the internal structure or affairs"[258] of the religious student groups. The fact that the organizations may have been required to offer leadership or membership to persons who disagree with their religious beliefs did not matter.

This trend in the lower courts should have tipped CLS off to where the Supreme Court was likely to go. The Court had already established that expressive association was just another form of speech. Once that had been determined, the case CLS brought was yet another case of a religious student group asserting a speech claim in a university forum. It makes perfect sense that the Court would analyze the case like every other university student group case it had confronted over the past thirty years—as an equal access case.

But what no one could have anticipated was the Court's buy-in to the notion that the recognition and funding of student groups is "a form of government subsidy."[259] The Court disowned the idea that the recognition and funding of student groups is the creation of a forum for private speakers. Instead, it embraced the concept that such recognition and funding is an extension of the university's own educational programs. In other words, the university is subsidizing student organizations to further its own educational mission, not accommodating the private speech of student organizations. This fundamental shift cast doubt on the continuing viability of the doctrine of equal access—a topic that will be discussed in much greater detail below.[260]

VII. THE CONSEQUENCES

My colleagues were quick to label the consequences of the *Martinez* decision as narrow. The National CLS and the Alliance Defense Fund issued a joint press release announcing, "Today's ruling, however, will have limited impact. We are not aware of any other public university that has the exact same policy as Hastings."[261] The National CLS reported that "the holding [of the case] is very narrow, and applies only to the Hastings-style 'all comers' policy, which does not exist at any other public

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[258] Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

[259] Thro & Russo, *supra* note 129, at 486-87.

[260] *See* discussion *infra* Part VI.B.2.

[261] Press Release, Alliance Def. Fund, Supreme Court: Calif. University's Policy Upheld, But School Still Barred from Targeting Christian Group (Jun. 28, 2010), http://www.adfmedia.org/News/PRDetail/3726.

university."[262] Attorneys from the Alliance Defense Fund commented similarly on their Speak Up Blog:

> As I read through the Supreme Court's opinion, I'm struck by the profound narrowness of its holding. Put simply, the Supreme Court upheld Hastings Law School's policy that every student organization must be open to any student on campus. This policy is known as Hastings "all-comers" policy, and as of the date of the oral argument in the case, we could not locate *any other public university in the country* with a similar policy. In fact, in the more than 10 years that I've been arguing and litigating this issue on campus, I've never seen another policy like it.[263]

A. The Apparently Narrow Consequences of the Decision

In one sense, it is absolutely true that the decision is narrow. The Court's decision requires no public college or university to do anything; it merely allowed Hastings the discretion to retain its unusual nondiscrimination policy.[264]

The Court expressly confined its decision to Hastings' all-comers policy. Justice Ginsburg emphasized, "This opinion, therefore, considers *only* whether conditioning access to a student-organization forum on compliance with an *all-comers* policy violates the Constitution."[265] The majority underscored that it was not addressing the constitutional questions surrounding the far more common nondiscrimination policy that enumerates specific, protected classes, such as race, sex, and religion.[266]

Only Justice Stevens opined that a conventional nondiscrimination policy, with enumerated classes, could be constitutionally applied to religious student groups' selection of leaders and members.[267] But even he did so in a concurrence that began by observing that the majority properly "confine[d] its discussion to the narrow issue "presented by the record . . . and correctly upholds the all-comers policy."[268]

It is also true that Hastings' all-comers policy is one of a kind. Even now, almost three years after the Court's decision, Hastings remains the

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[262] Colby, *supra* note 20.

[263] French, *supra* note 20.

[264] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2995 (2010) (holding that "the all-comers policy is constitutional").

[265] *Id.* at 2984 (emphasis added).

[266] *Id.* at 2984 n.10 (noting that the "constitutional question [was] not properly presented").

[267] *Id.* at 2995, 2996 (Stevens, J., concurring) (opining that a conventional nondiscrimination with enumerated classes "is content and viewpoint neutral").

[268] *Id.* at 2995 (Stevens, J., concurring) (internal citations omitted).

only public university[269] in the country that rather than prohibiting discrimination on the typical bases—such as race, sex, and religion—has an all-comers policy. While Justice Ginsburg cited to "[o]ther law schools [that] have adopted similar all-comers policies"—such as Hofstra University and Georgetown University[270]—these schools are *private* institutions free from the strictures of the First Amendment.[271] They are free to adopt all-comers policies without concern for the constitutional implications.

Of the handful of schools that have taken action in response to *Martinez*, only *private* schools have adopted all-comers policies. For example, according to Reverend Glen Davis of Chi Alpha Christian Fellowship, Stanford University reinterpreted its nondiscrimination policy as an all-comers policy to "align[] itself with the standards set forth by the Supreme Court's ruling."[272] The *Martinez* decision means "where a religious group denies membership or the promotion of a leadership position to a homosexual, that group can then legally be barred from using campus facilities as well as denied university recognition as an official student group."[273]

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[269] *See* Colby, *supra* note 20 (noting that a similar all-comers policy "does not exist at any other public university"); French, *supra* note 20 (asserting that ADF "could not locate *any other public university in the country* with a similar policy"); Gregory S. Baylor, *Discussing CLS v. Martinez at Columbia Law School*, SPEAK UP BLOG (Feb. 2, 2011), http://blog.speakupmovement.org/university/freedom-of-association/discussing-cls-v-martinez-at-columbia-law-school/ (observing that "public universities have not in great numbers adopted 'all comers' policies like the one Hastings said it had"); Thompson, *supra* note 20, at 24-26 (deeming the all-comers policy "unique" to Hastings).

[270] *Martinez*, 130 S. Ct. at 2979-80.

[271] *See, e.g.*, Cooper v. U.S. Postal Serv., 577 F.3d 479, 491 (2d. Cir. 2009) (quoting Nat'l Broad. Co., v. Communications Workers of America, 860 F.2d 1022, 1024 (11th Cir. 1988)) (stating that "[t]he Fourteenth Amendment, and, through it, the First Amendment[], do not apply to private parties unless those parties are engaged in activity deemed to be 'state action'"); United States v. Miller, 152 F.3d 813, 815 (8th Cir. 1998) ("the Constitution does not apply to searches, reasonable or otherwise, by private individuals, so long as the private party is not acting as an agent of the Government or with the participation or knowledge of any governmental official") (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984) (internal quotation marks omitted)).

[272] Rubi Ancajas, *Stanford's All-Comers Policy Gets More Attention After CLS v. Martinez*, THE COLLEGE FIX (Jan. 28, 2011), http://www.thecollegefix.com/post/6495. *See also* Michael Class & Jennifer Brooks, *Vanderbilt University Nondiscrimination Policy Called Unfair to Religious Groups*, THE TENNESSEAN (Sept. 27, 2011), http://www.tennessean.com/article/20110927/NEWS04/309270019/Vanderbilt-s-nonbias-policy-called-unfair-to-religious-groups (detailing Vanderbilt's imposition of its nondiscrimination policy to exclude religious groups, such as CLS).

[273] Ancajas, *supra* note 272.

In contrast to *private* schools, the response to *Martinez* by *public* schools has been tepid.[274] Any public schools reacting to the case have been quick to acquiesce when challenged. For example, three days after the Supreme Court issued its decision, the University of Houston emailed campus religious groups informing them that it was deleting an exemption that permitted "religious student organizations [to] limit officers to those members who subscribe to the religious tenets of the organization."[275] However, when religious groups protested, the university backed down and said that it would place its policy "under review."[276]

The lone public school to adopt a more aggressive posture is The Ohio State University. An advisory committee at the university recommended retracting a religious exemption the university had put in place in response to litigation in 2003.[277] The university had permitted religious student groups to "deny membership to those who don't share their 'sincerely held religious beliefs.'"[278] The school reported that it viewed the *Martinez* decision as "open[ing] the door for colleges to apply anti-discrimination policies to religious groups seeking recognition or funds as campus groups."[279] Despite the recommendation from the advisory committee, the school has retained its religious exemption at least in so far as it applies to the selection of officers and leaders.[280]

Subsequent analysis has also agreed that the *Martinez* decision is limited. The general consensus is that "it is not a landmark case."[281] One legal scholar commented:

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[274] *See* Baylor, *supra* note 269 (noting that *public* universities have been slow to adopt all-comers policies).

[275] Letter from Kimberlee Wood Colby, Senior Legal Counsel, Ctr. for Law & Religion Freedom, to Dona H. Cornell, Vice Chancellor, Univ. of Houston (Jul. 2, 2010) (on file with author).

[276] *Id.*

[277] Encarnacion Pyle, *OSU to Weigh Conflicting Rights*, THE COLUMBUS DISPATCH (Jan. 18, 2011), http://www.dispatch.com/content/stories/local/2011/01/18/osu-to-weigh-conflicting-rights.html.

[278] *Id.*

[279] *Id.*

[280] *See* THE OHIO STATE UNIV., REGISTRATION GUIDELINES FOR STUDENT ORGS. AT OHIO STATE, at 4 (May 1, 2011), http://ohiounion.osu.edu/posts/documents/doc_512011_155339678.pdf (retaining provision stating that "[a] student organization formed to foster or affirm the sincerely held religious beliefs of its members may adopt eligibility criteria for its Student Officers that are consistent with those beliefs").

[281] *Landsberg, Sims See No Landmark Ruling*, NEWS AND EVENTS MCGEORGE SCHOOL OF LAW (Sept. 17, 2010), http://www.mcgeorge.edu/Newsroom/News_Archive/2010_News_Archives/Landsberg_Sims_See_No_Landmark_Ruling.htm.

> What are the implications of the *Christian Legal Society v. Martinez* decision? First, in ruling that public universities may require that all recognized student organizations permit any and "all comers" to be eligible for all offices of the organization, the Court issued a narrow rule that is praiseworthy for its clarity but for little else.[282]

Attorney Jay Thompson wrote in the *South Carolina Lawyer* that "[b]ecause of its narrow scope and application, Martinez is not likely to have great precedential value regarding issues of discrimination against religious student organizations."283 Likewise, the *Chronicle of Higher Education* cautioned universities "not [to] be lulled into thinking their policies on student groups are immune to legal challenges based on the U.S. Supreme Court's decision[.]"284 According to *The Chronicle*:

> The ruling . . . focused on a type of policy . . . found at only a minority of colleges: an "accept all comers" policy requiring any student group seeking official recognition to be open to anyone who wishes to join. More common at colleges . . . is a policy of allowing student groups to have requirements for membership and leadership as long as those requirements are not discriminatory.[285]

While many courts have cited to *Martinez*, only two courts have considered its impact on the Supreme Court's equal access case law, and they reached opposite conclusions.[286] The Seventh Circuit in *Badger Catholic, Inc. v. Walsh*[287] agreed with my colleagues—deeming the decision to have "left [the equal access] approach in place."[288] In contrast, the Ninth Circuit in *Reed*[289] viewed *Martinez* as upending the rule of equal access that the Free Speech Clause *requires* public schools to provide religious student groups evenhanded treatment.[290] Instead, according to the

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[282] Luther, *supra* note 20, at 673.

[283] Thompson, *supra* note 20, at 24.

[284] Peter Schmidt, *Ruling is Unlikely to End Litigation Over Policies on Student Groups*, THE CHRONICLE OF HIGHER EDUCATION (Jun. 30, 2010), http://chronicle.com/article/Many-Colleges-Student-Group/66101/.

[285] *Id.*

[286] *Compare* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 802-04 (9th Cir. 2011) (ruling that *Martinez* broke with the Supreme Court's past equal access cases by the deeming university recognition a "benefit" and holding that the First Amendment places no obligation on "universit[ies] to subsidize" religious student groups), *with* Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 781 (7th Cir. 2010), *cert. denied*, Walsh v. Badger Catholic, Inc., __ U.S. __, 131 S. Ct. 1604 (2011) (ruling that the *Martinez* court left its longstanding equal access approach "in place").

[287] 620 F.3d 775.

[288] *See id.* at 781.

[289] 648 F.3d 790.

[290] *Id.* at 803.

Ninth Circuit, *Martinez* signals to religious student groups that they "are free to express any message they wish, and may include or exclude members on whatever basis they like; they simply cannot oblige the university to subsidize them as they do so."[291]

Turning to *Walsh*,[292] the University of Wisconsin denied a Catholic student group funding "on the ground that much of [its] speech is religious in character [consisting of] worship, proselytizing, or religious instruction."[293] The student group prevailed against the university in the federal district court, and the Seventh Circuit Court of Appeals "deferred action on th[e] appeal while the Supreme Court had *Christian Legal Society* under advisement."[294] The Seventh Circuit "wanted to see whether the [Supreme] Court would modify the approach articulated in *Widmar*, *Rosenberger*, and *Southworth*."[295] After the *Martinez* decision came down, the Seventh Circuit determined that the Court had not altered its equal access approach to student group cases—"[t]he Court left that approach in place and reiterated the norm that universities must make their recognition and funding decisions without regard to the speaker's viewpoint."[296] The Seventh Circuit concluded after *Christian Legal Society* that the Catholic student group was denied equal access to funding.[297]

So my colleagues are undoubtedly correct. The *Martinez* decision is narrow. The Court addressed only Hastings' unusual all-comers policy.[298] It left for another day the constitutionality of applying a typical, enumerated nondiscrimination policy to religious student groups.[299] No public colleges and universities have adopted all-comers policies.[300] The public schools

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[291] *Id.*

[292] 620 F.3d 775.

[293] *Id.* at 777.

[294] *Id.* at 781.

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *See Martinez*, 130 S. Ct. at 2984.

[299] *See id.* at 2984 n.10.

[300] *See* Baylor, *supra* note 269 (Attorney Baylor rightly points out that the likely reason "public universities have not in great numbers adopted 'all comers' policies" has less to do with the perceived "narrowness" of the *Martinez* decision and more to do with "schools . . . recogniz[ing] the absurdity and the virtual impossibility of consistently enforcing an all comers policy"). *Martinez* makes clear, even an all-comers policy is unconstitutional if it is not *applied* uniformly to every student group on campus. 130 S. Ct. at 2995 (remanding to determine whether "Hastings selectively enforces its all-comers policy"). If any student group by policy or practice requires its members or leaders to agree with its viewpoint, then the policy may not be applied to the religious group—otherwise it violates the principle of equal access. Accordingly, an all-comers policy must be inexorably applied to all student groups' membership and leadership criteria. That may be possible in a

that have taken action against religious student groups have been few in number and quick to back down. One of the two courts analyzing the case has viewed it as leaving untouched the longstanding rule of equal access.[301]

B. The Not So Narrow Consequences of the Decision

But, upon closer inspection, the assertion that *Martinez* is narrow glosses over its full impact. The decision takes the teeth out of *Walker*[302]—the lone case holding unconstitutional the application of a conventional nondiscrimination policy to religious student groups.[303] More significantly, the Court's reasoning lays the groundwork for the eventual dismantling of equal access.

1. Gutting Christian Legal Society v. Walker

Attorneys at National CLS have argued that the limited scope of the opinion "means that *CLS v. Walker* is still good law. *Walker* held that a traditional non-discrimination policy may not be applied to religious groups who require a statement of faith from members."[304] Lead counsel on the case at the Supreme Court, Professor (and former Tenth Circuit Judge) Michael McConnell has made a similar claim concerning *Walker*, that the opinion does "not touch the written nondiscrimination policy; the leading precedent on that policy remains the Seventh Circuit decision holding it unconstitutional."[305]

These claims overlook the fact that the *Martinez* Court refused to engage in an expressive association analysis. The Court held that its equal access precedents controlled *both* CLS's free speech and expressive association claims.[306] The Court gave no consideration to whether Hastings' all-comers

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situation like Hastings, where the school annually recognizes only about "60 registered groups," none of which are fraternities, sororities, or single-sex club sports teams. *Id.* at 3001-02 (Alito, J., dissenting). But the typical public university, like the University of Florida, recognizes over 700 student organizations each year. In such a situation, a uniform application of an all-comers would simply be impossible. *See* Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen, 586 F.3d 908, 912 (11th Cir. 2009) (noting that "more than 750 UF student groups are RSOs").

[301] *See Walsh*, 620 F.3d at 781.

[302] Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006).

[303] *See id.* at 864.

[304] Colby, *supra* note 20 (citation omitted).

[305] French, *supra* note 20 (quoting statement from Professor Michael McConnell).

[306] *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2985-86 (2010).

policy inhibited CLS's leadership and membership decisions.[307] Any interference with CLS's associational rights was irrelevant.

The Seventh Circuit in *Walker* did just the opposite, analyzing CLS's expressive association claim *independently* from its free speech claim.[308] Rather than only asking whether CLS received the same treatment from SIU as any other student group, like the *Martinez* Court did, the Seventh Circuit asked "whether application of SIU's antidiscrimination policy to force inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity."[309] The court gave separate consideration to CLS's expressive association claim.

Given that the Supreme Court cared only that Hastings offered religious groups the same treatment as nonreligious groups, the continuing validity of the Seventh Circuit's separate expressive association analysis is questionable.[310] The majority and the dissent in *Martinez* gave no indication that the take all-comers nature of Hastings' policy drove its decision to engage only in an equal access analysis. Indeed, there is every reason to believe that *anytime* a student group asserts an expressive association claim in a university forum, the Court would find its equal access law controlling.[311] To do otherwise the Court said would be "anomalous."[312] The Seventh Circuit's expressive association analysis, therefore, is very likely no longer good law.

The Ninth Circuit's recent decision in *Reed*[313] confirms this conclusion that the *Martinez* Court's analysis applies with equal force to a conventional nondiscrimination policy. The Ninth Circuit considered the constitutionality of San Diego State University conditioning recognition of religious student groups on compliance with a "nondiscrimination policy that, instead of prohibiting *all* membership restrictions, prohibited membership restrictions only on certain specified bases, for example, race, gender, religion, and sexual orientation."[314] The court acknowledged that the Supreme Court in *Martinez* "expressly declined to address whether [its] holding[] would extend to a narrower nondiscrimination policy" such as the

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[307] *See id.* at 2988-95 (considering only whether Hastings' all-comers policy is reasonable and viewpoint neutral).

[308] *See Walker*, 453 F.3d at 861-64.

[309] *Id.* at 862.

[310] *See Martinez*, 130 S. Ct. at 2985-86.

[311] *See* Thro & Russo, *supra* note 129, at 481-85.

[312] *Martinez*, 130 S. Ct. at 2985.

[313] Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 802-04 (9th Cir. 2011).

[314] *Id.* at 795.

one before it.[315] However, the court nonetheless ruled that the Supreme Court's reasoning demanded the application of the "same analysis" to a traditional nondiscrimination policy, meaning "both freedom of speech and freedom of expressive association challenges are properly analyzed under" the Court's equal access precedents.[316] According to the court, there is "no material distinction between" Hastings' all-comers policy and a traditional nondiscrimination policy that would dictate a different result.[317]

So what remains of *Walker*[318] is only the court's free speech analysis. This analysis does little to aid religious student groups in their fight against university nondiscrimination policies. It is true that the Seventh Circuit in *Walker* held that SIU's antidiscrimination policy was viewpoint discriminatory.[319] But it held so only because of the way SIU had *applied* its policy. Writing for the majority, Judge Sykes stated, "There can be little doubt that SIU's [antidiscrimination] policy is viewpoint neutral on its face, but as the record stands, there is strong evidence that the policy has not been applied in a viewpoint neutral way."[320] She further stated, "For whatever reason, SIU has applied its antidiscrimination policy to CLS alone, even though other student groups discriminate in their membership requirements on grounds that are prohibited by the policy."[321] So Judge Sykes in essence said just what the Supreme Court said in *Martinez*—the policy is neutral on its face but it is viewpoint discriminatory because of how it was applied. SIU had applied its policy to deny CLS equal access.

If anything, *Walker* may now leave religious student groups worse off than *Martinez*. The Seventh Circuit readily reached the issue that eight out of the nine Justices refused to touch—that a typical, enumerated nondiscrimination policy is viewpoint neutral.[322] Thus, under *Walker*, assuming a university does not apply such a policy in a discriminatory fashion by targeting religious groups like SIU, then a typical nondiscrimination policy is perfectly constitutional.[323]

Thus, *Walker*'s free speech analysis now simply stands as an example of how a *Martinez*-like analysis might be applied to a typical university nondiscrimination policy. The policy is deemed neutral on its face and

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[315] *Id.*

[316] *Id.* at 797.

[317] *Id.*

[318] Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006).

[319] *Id.* at 867 (holding that "that SIU is applying its policy in a viewpoint discriminatory fashion").

[320] *Id.* at 866.

[321] *Id.*

[322] *See id.*

[323] *See id.*

what matters is whether the university has applied its policy to provide religious student groups equal access. That is precisely what the Ninth Circuit did in *Reed*.[324] It concluded that San Diego State's traditional nondiscrimination policy was "viewpoint neutral as written, but that there [were] triable issues of fact as to whether San Diego State ha[d] selectively enforced its nondiscrimination policy."[325] It just so happened in *Walker*[326] that SIU had applied its policy in a discriminatory fashion.[327]

2. Dismantling equal access

More importantly, the assertion that the *Martinez* decision is narrow overlooks the Court's embrace of a subsidy model for student organization recognition.[328] The Court has historically distinguished between the government opening a forum for private speakers and the government providing a subsidy to private speakers to carry the government's own message.

"[W]hen the government creates a limited public forum so that others may speak, it has no real control over the private [speakers] and viewpoint discrimination is inappropriate."[329] But when "the government provides a subsidy to a private group as part of its efforts to implement one of its policies, then the government has substantial control over the private entity and may even engage in viewpoint discrimination.[330]

The Court has always categorized a school's recognition of student groups as the creation of a forum for private speakers.[331] Schools are accommodating the student groups' private expression, not using the student groups to send the their own message. Way back with *Widmar*,[332]

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[324] Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011).

[325] *Id.* at 800.

[326] 453 F.3d 853.

[327] *See id.* at 866.

[328] *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2986 (2010).

[329] Thro & Russo, *supra* note 129, at 486.

[330] *Id.*

[331] *See* Widmar v. Vincent, 454 U.S. 263, 267 (1981) ("Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups."); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995) (holding that by creating the student activity fee forum, "the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers"). *See also* Pleasant Grove City v. Summum, 555 U.S. 460, 478 (2009) (listing the forum doctrine as applicable where "a public university's student activity fund . . . provide[s] money for many campus activities" or "[a] public university's buildings . . . offer meeting space for hundreds of student groups.") (citing *Rosenberger*, 515 U.S. at 825; *Widmar*, 454 U.S. at 274-75).

[332] 454 U.S. 263.

the Court held that when a school adopts a "policy of accommodating [student group] meetings, the [school] has created a forum generally open for use by student groups"—a school forum governed by the principle of equal access.[333]

In contrast, when a school is, for example, selecting a speaker for a school assembly, it is providing a government subsidy. It is bringing in a private speaker to send a message of the school's own choosing.[334] The principle of equal access does not apply.[335] The school may choose to promote abstinence at a school assembly without at the same time promoting promiscuity and condom use.[336]

The Supreme Court put it this way:

> We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances . . . in which the government "used private speakers to transmit specific information pertaining to its own program." As we said in *Rosenberger*, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, when the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.[337]

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[333] *See id.* at 267, 269 (holding that University of Missouri at Kansas City violated the First Amendment when it "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion" and that ruling "that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds"); *see also Rosenberger*, 515 U.S. at 834 (holding that "the University may not discriminate based on the viewpoint of private persons whose speech it facilitates").

[334] *See Rosenberger*, 515 U.S. at 833 ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker *or when it enlists private entities to convey its own message*.") (emphasis added).

[335] *See* Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (noting that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker").

[336] *Cf.* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (holding that Congress's decision to fund family-planning services but forbidding doctors from discussing abortion was not viewpoint discrimination, rather Congress had "merely chosen to fund one activity to the exclusion of the other").

[337] *Id.* at 541-42. (quoting *Rosenberger*, 515 U.S. at 833) (other internal quotation marks and citations omitted).

The Tenth Circuit's decision in *Fleming v. Jefferson County School District R-1*[338] is a helpful illustration. After the 1999 shootings at Columbine High School, the school established a tile-painting project as part of its reconstruction effort.[339] "[S]tudents would create abstract artwork on 4-inch-by-4-inch tiles that would be glazed, fired, and installed above the molding throughout the halls of the school."[340] The school banned students from painting religious symbols.[341] Some students challenged the exclusion of religious speech as a denial of equal access—the school allowed nonreligious messages on the tiles but not religious ones.[342] The Tenth Circuit held that the tile project constituted school-sponsored speech—speech directly subsidized by the school.[343] "[E]ducators," said the court, "[may] make viewpoint-based decisions about school-sponsored speech."[344] By way of example, the court explained, "[T]he school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint."[345] Columbine could permit nonreligious messages on the tiles without permitting religious messages at the same time.[346] When the school is promoting its own program, it need not comport with the principle of equal access.

Until *Martinez*, the Supreme Court had rebuffed attempts by universities to classify the recognition and funding of student groups as anything other than the creation of a forum. For instance, in *Rosenberger*,[347] the University of Virginia argued that its funding of student groups was a government subsidy.[348] The Court disagreed. The university was "expend[ing] funds to encourage a diversity of views from private speakers," not "us[ing] private speakers to transmit specific information pertaining to [the university's] own programs."[349] The university had opened a forum for private speakers. It could "not silence the expression of selected viewpoints"; it had to grant equal access to both the religious and nonreligious viewpoints.[350]

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338 298 F.3d 918 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003).
339 *See id.* at 920-21.
340 *Id.* at 920 (internal quotations omitted).
341 *Id.* at 921.
342 *See id.* at 922.
343 *Id.* at 924, 929-30.
344 *Id.* at 926.
345 *Id.* at 928.
346 *See id.* at 933.
347 515 U.S. 819 (1995).
348 *See id.* at 832-34.
349 *Id.* at 833-34.
350 *Id.* at 834, 835.

"When the University determines the content of the education it provides," said the Court, different legal principles govern.[351] There, "it is the University speaking, and [the Court has] permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."[352] In those situations, the principle of equal access does not apply; the university can favor one view over another without transgressing the First Amendment.[353]

The Court drew the same distinction in *Southworth*,[354] where it considered the rights of university students to refuse to fund student organizations they found objectionable.[355]

> The case we decide here, however, does not raise the issue of the government's right, or, to be more specific, the state-controlled University's right, to use its own funds to advance a particular message. The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors. . . . If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.
>
> The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students. We conclude the objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support. . . . The standard of viewpoint neutrality found in the public forum cases provides the standard we find controlling. We decide that the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students.[356]

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[351] *Id.* at 833. *See also* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("In the instant case, the speech is not that of the University or its agents. It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered.").

[352] *Rosenberger*, 515 U.S. at 833.

[353] *See id.* ("We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.") (internal citation omitted).

[354] 529 U.S. 217.

[355] *See id.* at 221.

[356] *Id.* at 229-30 (internal citations omitted).

The University of Wisconsin's activity fees were fostering private speech from student groups.[357] As such, the university had to allocate those fees in compliance with the principle of equal access.[358]

Thus, historically, a university's recognition and funding of student groups was the creation of a forum for private speakers. The school was accommodating the private speech of groups, not using the groups to promote its own educational message. The principle of equal access dictated that the university treat each of those speakers the same—whether religious or nonreligious.

In *Martinez*, the Supreme Court reversed course. The Court ruled that CLS was "seeking what is effectively a state subsidy. . . . Hastings, through its [registered student organization] program, [was] dangling the carrot of subsidy."[359] The Court acknowledged that CLS had the right to exclude unwanted students, but it had "no constitutional right to state subvention of its selectivity."[360]

The Court distinguished its previous equal access decisions. Unlike the University of Missouri in *Widmar* seeking to "create[] a forum generally open for use by student groups"[361] or the University of Virginia in *Rosenberger* seeking "to encourage a diversity of views from private speakers,"[362] Hastings recognized student groups as an extension of its own educational program.[363] It was "a mechanism through which Hastings conferr[ed] certain benefits and pursue[d] certain aspects of its educational mission."[364] It was not the creation of "an open commons that Hastings happen[ed] to maintain."[365]

Student group recognition being deemed an "essential part" of Hastings' own "educational process," the school was free to pick and choose what forms of an association it would subsidize.[366] According to Justice Stevens' concurrence, Hastings "need not remain neutral—indeed it could not remain neutral—in determining which goals the program will serve and

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[357] *Id.* at 229.

[358] *See id.* at 233 ("The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support.").

[359] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2986 (2010) (internal citations and footnotes omitted).

[360] *Id.* at 2978.

[361] Widmar v. Vincent, 454 U.S. 263, 267 (1981).

[362] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995).

[363] *See Martinez*, 130 S. Ct. at 2988-89.

[364] *Id.* at 2998 (Stevens, J., concurring).

[365] *Id.* (Stevens, J., concurring).

[366] *Id.* at 2989.

which rules are best suited to facilitate those goals."[367] Hastings was free to subsidize groups willing to associate with anyone and to deny subsidization to groups, like CLS, that sought to limit their association.[368]

But while the Court embraced a subsidy model for student group recognition, it did not go so far as to hold that Hastings could choose to subsidize nonreligious groups over religious groups. The Court's reliance on the government subsidy model, however, certainly anticipates the eventual dismantling of equal access. After all, as discussed above, even viewpoint discrimination is permissible in the realm of government subsidies.[369] If recognition and funding of student groups is, as the majority contends, "effectively a state subsidy,"[370] then nothing prevents a university from granting access to some groups and not others, including nonreligious groups over religious groups. As Justice Stevens put it in his concurrence, the majority opinion means that a university "need not subsidize [student groups], give them its official imprimatur, or grant them equal access to law school facilities."[371]

Martinez, thus, sets the Court's equal access jurisprudence on a course that parallels that of its free exercise jurisprudence. The Court has recognized a "play in the joints"[372] between what the Establishment Clause *permits* and what the Free Exercise Clause *requires*.[373] "In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."[374] For instance, a state *may* consistent with the Establishment Clause provide scholarship money for students to pursue a degree in theology,[375] but it is not *required* to provide such money under the Free Exercise Clause.[376] The choice is left to the state. It may choose to fund the study of theology or not.[377]

Martinez places universities in a similar position with regard to the recognition of religious student groups. Universities may provide religious groups equal access to campus facilities and funding without violating the Establishment Clause, but they are no longer *required* to do so under the

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[367] *Id.* at 2998 (Stevens, J., concurring).

[368] *See id.* at 2978.

[369] *See supra* notes 322-342 and accompanying text.

[370] *Martinez*, 130 S. Ct. at 2986.

[371] *Id.* at 2998 (Stevens, J., concurring).

[372] Locke v. Davey, 540 U.S. 712, 712 (2004) (internal quotation marks omitted).

[373] *Id.* at 718-19 (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)).

[374] *Id.* at 718-19.

[375] *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986).

[376] *See Locke*, 540 U.S. at 725.

[377] *See id.* at 721 ("The State has merely chosen not to fund a distinct category of instruction.").

Free Speech Clause. The choice of whether to subsidize religious student groups is left up to the university.

The Ninth Circuit in *Reed* recognized this same shift in the Supreme Court's equal access jurisprudence.[378] The court ruled that *Martinez* "makes clear, there is a difference 'between policies that require action and those that withhold benefits.'"[379] The denial of recognition to a religious student group is simply the withholding of "certain benefits."[380] Religious student groups "are free to express any message they wish, and may include or exclude members on whatever basis they like; they simply cannot oblige the university to subsidize them as they do so."[381]

So, far from being narrow, the Justices in *Martinez* forecast the dismantling of equal access. They called into question one of the two central pillars of equal access—that the Free Speech Clause *requires* the government to provide religious groups even treatment. Their acceptance of the subsidy model suggests that universities are free to choose; universities can recognize religious student groups or not. The Justices ruled narrowly only in the sense that they limited their holding to a Hastings-style all-comers policy. Their reasoning has much, much broader implications.

VII. CONCLUSION

My colleagues and I ultimately failed at vindicating CLS's First Amendment rights before the Supreme Court. Our decision to stipulate to Hastings' all-comers policy proved fatal. The stipulation made sense only to the extent the Court was willing to view the case as one about expressive association, rather than equal access.

The Court—all nine Justices—viewed the case through the lens of equal access. "[E]xpressive association in this case is the functional equivalent of speech itself."[382] It "plays [only] a part auxiliary to speech's starring role."[383] From the Justices' standpoint, CLS was asserting a speech claim in a university forum like all the other university student group cases they had decided since *Widmar*. The only question the Justices needed to

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[378] Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011).

[379] *Id.* at 802 (citing Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2986 (2010)).

[380] *Id.* at 803 (citing *Martinez*, 130 S. Ct. at 2986).

[381] *Id.*

[382] *See Martinez*, 130 S. Ct. at 2985 (citing Brief for Petitioner at 35, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL 711183, at *35) (internal quotation marks omitted).

[383] *See id.* (citing Brief for Petitioner at 18, Christian Legal Soc'y v. Martinez, 130 S. Ct. 1971 (2010) (No. 08-1371), 2010 WL 711183, at *18).

answer was whether Hastings offered CLS equal treatment. Because CLS had stipulated that Hastings required "all student groups to accept *all* comers," they easily concluded that Hastings' treated all students groups, including CLS, the same.[384]

Looking back, the Court's method of analysis is unsurprising. Since the late-1950s, the Court has treated expressive association as simply another form of speech—no different than publishing a newspaper[385] or wearing an armband.[386] Prior to *Martinez*, the majority of the lower federal courts, except for the Seventh Circuit, acknowledged this.[387] When confronted with a religious student group asserting an expressive association claim in a school forum, the courts made recourse to equal access case law.

The consequences of the *Martinez* decision are likely to be significant. While the Court limited its holding to Hastings' unique all-comers policy, the Court's reasoning jeopardizes the future of the doctrine of equal access. A majority of the Court held that a university's recognition of student groups is a government subsidy rather than the creation of a forum.[388] This change in the Court's thinking allows universities to argue that they can pick and choose which student groups they wish to recognize—even if it means picking nonreligious groups over religious groups.

Though the Court has not killed off the over thirty-year-old doctrine of equal access, it has undoubtedly laid the groundwork to do so.

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[384] *Id.* at 2993.

[385] *See generally* Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931).

[386] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[387] *See supra* note 240.

[388] *See generally* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

Think Globally, Act Locally: How Innovative Domestic American Efforts to Reduce Shark Finning May Accomplish What the International Community Has Not

Cameron S.G. Jefferies*

I. INTRODUCTION

Sharks have existed in the Earth's oceans for over 400 million years.[1] They evolved into top predators some 200 million years ago[2] and by the time of the dinosaurs these cartilaginous fishes were "morphologically similar" to modern sharks.[3] Today, more than 440 known shark species[4] "are found throughout the world's oceans—from coastal waters to the open ocean, from the surface to depth's of 3,000 [meters]."[5]

The fifteenth Conference of the Parties (COP 15) for the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) took place in Doha, Qatar between March 13th and 25th of 2010.[6]

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[1] ELLEN K. PIKITCH ET AL., SHARKS OF THE OPEN OCEAN: BIOLOGY, FISHERIES & CONSERVATION 3 (Merry D. Camhi et al. eds., 2008).

[2] *See* Jessica Spiegel, *Even Jaws Deserves to Keep His Fins: Outlawing Shark Finning Throughout Global Waters*, 24 B.C. INT'L & COMP. L. REV. 409, 409 (2001).

[3] PIKITCH, *supra* note 1, at 3.

[4] *See generally* LEONARD COMPAGNO ET AL., SHARKS OF THE WORLD (2005) (describing the known shark species in field-guide form).

[5] PIKITCH, *supra* note 1, at 3.

[6] Melissa Blue Sky, *Getting on the List: Politics and Procedural Maneuvering in CITES Appendix I and II Decisions for Commercially Exploited Marine and Timber Species*, 10 SUSTAINABLE DEV. L. & POL'Y 35, 35 (2010); Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243. Note that 2010 is the International Year of Biodiversity. *See* UNITED NATIONS 2010 INTERNATIONAL YEAR OF BIODIVERSITY, *available at* http://www.cbd.int/2010/welcome/ (last visited Nov. 8, 2010). At the start of this year United Nations Secretary-General Ban Ki-moon stated that to properly protect the Earth's biodiversity "[w]e must generate a greater sense of urgency and establish clear and concrete targets. Biodiversity is life. Biodiversity is *our* life." Press Release, Secretary-General, Secretary-General, in Message

Sharks figured prominently in preliminary discussions at COP 15 as the United States proposed additional protection for four shark species of "great commercial value" (namely the porbeagle, spiny dogfish, oceanic whitetip, and scalloped hammerhead); however, all four proposals were rejected.[7] China ("as the world's foremost consumer of sharks") and Japan ("which opposes CITES listings for any marine species") resisted these proposals in favor of the status quo, citing alternate regulatory mechanisms and the technical difficulty associated with implementing such measures.[8] The United States also proposed a non-binding measure that "called for increased transparency in the shark trade and more research into the threat posed to sharks by illegal fishing," which was defeated.[9] At the end of COP 15, Oceana (the "largest international ocean conservation organization") declared COP 15 a "tragedy of the oceans."[10] As this article proceeds to print, COP 16 is set to begin, and this author hopes that the outcome will be significantly different than COP 15, and that it will signal a shift in the trends identified in the analysis contained in this article.

Sharks are fished commercially, recreationally, and caught as bycatch (incidental or accidental catch in other fisheries). Of particular concern is shark finning, whereby sharks are captured, their fins are cut off, and the rest of the animal is returned to the ocean alive to drown, be eaten by other fish, or bleed to death.[11] Shark finning is "one of the most controversial hunting or fishing activities in the world"[12] due to the cruel nature of the

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Marking International Year of Biodiversity, Calls for New Vision to Ensure Natural-Resource Sustainability, Long-Term Viability, U.N. Press Release SG/SM/12695 (Jan. 11, 2010), *available at* http://www.un.org/News/Press/docs/2010/sgsm12695.doc.htm.

[7] Blue Sky, *supra* note 6, at 38.

[8] *Id.*

[9] *Latest Updates on CITES, Shark Conservation Measures Dealt a Blow at CITES Conference*, WWF INDIA, http://www.wwfindia.org/about_wwf/enablers/traffic/cites_update/ (last visited Nov. 9, 2010).

[10] Dustin Cranor, *Oceana Declares CITES a 'Tragedy of the Oceans': Environmental Group Says Commercial Traders Like Japan Paid for Demise of Commercially Exploited Marine Species*, OCEANA NEWS & MEDIA (Mar. 25, 2010), http://na.oceana.org/en/news-media/press-center/press-releases/oceana-declares-cites-a-tragedy-of-the-oceans (describing a tragedy that extends beyond the failed attempts to have new shark species listed. The parties at COP 15 also voted against listing the Atlantic blue fin tuna which has rapidly declined in abundance due to its high market value, and thirty-one species of pink and red coral that are quickly disappearing).

[11] *See* Julie B. Martin, *The Price of Fame: CITES Regulation and Efforts Towards International Protection of the Great White Shark*, 39 GEO. WASH. INT'L L. REV. 199, 202 (2007); *See also* Jennifer O'Brien and Randall Szabo, *2009 Legislative Review*, 16 ANIMAL L. 371, 377 (2010); *See also* Spiegel, *supra* note 2, at 409.

[12] John R. Platt, *Shark fin soup: CITES fails to protect 5 species of sharks from overfishing and finning*, SCIENTIFIC AMERICAN (Mar. 25, 2010),

practice and also because fins are used for shark fin soup, a highly desirable traditional Chinese luxury dish that is prized as a status symbol. Recent estimates suggest that 73 million[13] to 100 million[14] sharks are killed annually for their fins, and the rate of shark finning is increasing by approximately 6% per annum as shark fin soup gains popularity.[15] We no longer have the luxury of time when it comes to shark conservation, as there is "consensus that prompt implementation of substantially improved conservation and management measures is essential if shark populations are to recover and be fished sustainably."[16] Unfortunately, COP 15 typifies the failure of international efforts to regulate shark finning. However, in contrast to the failure of COP 15, there are signs of hope within the United States where legal reform is occurring at both the national (Shark Conservation Act of 2010)[17] and state (Hawaii's Shark Fin Prohibition) level,[18] suggesting that the future of many shark populations might, by necessity, be dependent on efforts undertaken by individual nations at the domestic level (i.e., national or sub-national initiatives).

To date, legal commentary has focused on creating an effective international regime to monitor, manage, and enforce shark finning. Given the failure of the international community to meaningfully address shark finning over the last decade, the reluctance of Asian countries to

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http://www.scientificamerican.com/blog/post.cfm?id=shark-fin-soup-cites-fails-to-prote-2010-03-24.

[13] Shelley Clarke et al., *Social, Economic, and Regulatory Drivers of the Shark Fin Trade*, 22 MARINE RES. ECON. 305, 306 (2007).

[14] LINDA PAUL, HAWAII AUDUBON SOCIETY, INTERNATIONAL TRADE IN SHARK FINS, & ILLEGAL, UNREPORTED, AND UNREGULATED SHARK FINNING 3 (2009), available at http://www.pacfish.org/pub09/sharktrade.pdf; Holly Edwards, *When Predators Become Prey: The Need For International Shark Conservation*, 12 OCEAN & COASTAL L.J. 305, 316 (2007); Boris Worm et al., *Global catches, exploitation rates, and rebuilding options for sharks*, 40 MAR. POL. 194, 199 (2013) (indicating that the range for global shark catches is likely between 63 million and 273 million sharks per year, and that a conservative estimate suggests that 97 million sharks were killed in 2010).

[15] LINDA PAUL, *supra* note 14, at 3.

[16] Mahmood S. Shivji, *DNA Forensic Applications in Shark Management and Conservation*, *in* SHARKS AND THEIR RELATIVES II: BIODIVERSITY, ADAPTIVE PHYSIOLOGY, AND CONSERVATION 593 (Jeffrey C. Carrier et al., eds., 2010).

[17] 16 U.S.C.A. § 1857 (West 2011); *See also* John Vidal, *EU to close shark finning loophole*, THE GUARDIAN (Nov. 22, 2012), http://www.guardian.co.uk/environment/2012/nov/22/eu-shark-finning-loophole (noting that the European Union recently voted to close a loophole that had been effectively undermining a 2003 finning prohibition. This loophole allowed vessels with freezer capability to obtain permits enabling fins to be landed without carcasses).

[18] HAW. REV. STAT. § 188-40.7 (West 2011) (Hawaii's Shark Fin Prohibition broadly prohibits shark fin possession/trade).

acknowledge shark finning as an extinction pressure for many shark species, and the urgency of the problem, it is critical to shift our focus to innovative domestic efforts that effectuate meaningful conservation. In addition to helping stabilize shark populations within United States waters, innovative domestic regulation that exposes shark finning as a cruel and wasteful fishing practice can serve as a model for legislative reform in other jurisdictions, lend credibility to an emerging grassroots movement opposed to shark finning and shark fin soup consumption that is gaining momentum world-wide, help dispel the myth that sharks are calculated man-eaters,[19] and work towards limiting fin exports to Asia by removing Hawai'i as a Pacific hub for the fin trade.[20]

In this article, I first address the scientific and economic background to the current shark finning problem, which is necessary to understand the factors that have contributed to the current crisis and the obstacles that must be addressed moving forward. I then discuss three major problems that plague international efforts to regulate finning, namely the profitability of shark fin trading, the prevailing attitudes towards animal welfare in Asia, and the voluntary nature of international efforts. In the prescriptive portion of the paper, I investigate recent legislative reforms in the United States and assess their importance moving forward.

II. UNDERSTANDING SHARKS

Sharks belong to class Chondrichthyan – animals characterized by a cartilaginous rather than bony skeleton, with bone limited to tooth and spinal deposits.[21] Sharks differ from other Chondrichthyans (skates, rays, sawfish, and chimaerans) because of their cylindrical body form.[22] Sharks are fished throughout the Earth's oceans commercially (for fins, meat, and cartilage), recreationally (as trophy fish), for medical purposes (for burn victim skin transplant material, immunology research, and cornea transplant material),[23] and are caught incidentally as bycatch in the long-lines and dragnets used to catch tuna and billfish.[24]

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[19] *See* RACHEL CUNNINGHAM-DAY, SHARKS IN DANGER: GLOBAL SHARK CONSERVATION STATUS WITH REFERENCE TO MANAGEMENT PLANS AND LEGISLATION 45 (2001).

[20] Clarke, *supra* note 13, at 316.

[21] *See* Nicholas K. Dulvy & Robyn E. Forrest, *Life Histories, Population Dynamics, and Extinction Risks in Chondrichthyans*, *in* SHARKS AND THEIR RELATIVES II: BIODIVERSITY, ADAPTIVE PHYSIOLOGY, AND CONSERVATION 640 (Jeffrey C. Carrier et al. eds., 2010).

[22] CUNNINGHAM-DAY, *supra* note 19, at 13.

[23] *Id.* at 9.

[24] Dulvy & Forrest, *supra* note 21, at 661-62.

Scientifically, sharks remain one of the most intriguing yet ill-studied animals, being notoriously difficult to research given that many species are migratory and pelagic (live in the open ocean), and existing catch data is unreliable because of unreported catches and a lack of species identification. These factors make it extremely difficult to estimate or model shark population dynamics.[25] One recent abundance estimate for the Mediterranean Sea, which compiled shark sighting records, commercial data, and recreational fishing data, suggests that nine species that live in the open ocean in the Mediterranean have declined by 96-99.99%.[26] Scientists are increasingly expressing concern about the consequences of a shark-less ocean since sharks, the top predator in many oceanic ecosystems, exert an essential selection pressure on marine mammal and bony fish populations, meaning they eat the old or sickly and allow only the healthy to mature and reproduce.[27]

While I refer to sharks generally in this paper, it is important to remember that shark species vary dramatically in habitat, size, diet, and abundance.[28] Some characteristics shared by many shark species that make immediate regulation imperative include "large body size, few natural predators, slow rates of growth, late onset of maturity and small numbers of well-developed young," which taken together mean sharks "cannot withstand high levels of predation."[29] This life-history strategy allows most naturally stable shark populations to increase by only 1-2% annually, which is insufficient growth to sustain the rapid increase in shark fishing that has occurred since the shark fin market exploded in the 1980s.[30] It is a harsh reality that 10-20% decreases in population size appear to be quite common for many shark species,[31] while certain specially affected shark populations have been reduced by 70%[32] to 90% in the last fifteen years.[33]

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[25] *See* Shivji, *supra* note 16, at 593-94. *See* Lucy A. Howery-Jordan et al., *Complex Movements, Philopatry and Expanded Depth Range of a Severely Threatened Pelagic Shark, the Oceanic Whitetip (*Carcharhinus longimanus*) in the Western North Atlantic*, 8:2 PLOS ONE e56588 (2013) (describing a satellite tagging mechanism that is enabling new scientific investigation into shark behavior).

[26] Dulvy & Forrest, *supra* note 21, at 661-62.

[27] Edwards, *supra* note 14, at 306.

[28] *See generally* Dulvy and Forrest, *supra* note 21, at 640.

[29] CUNNINGHAM-DAY, *supra* note 19, at 15 (scientists refer to species that share these characteristics as k-selected).

[30] Edwards, *supra* note 14, at 312 (further discussion to come).

[31] *See* Blue Sky, *supra* note 6, at 38.

[32] O'Brien and Szabo, *supra* note 11, at 377.

[33] Romney Philpott, *Why Sharks May Have Nothing More to Fear than Fear Itself: An Analysis of the Effect of Human Attitudes on the Conservation of the Great White Shark*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 445, 446 (2002).

III. A SHARK FINNING EXPLOSION

Shark finning is exactly as it sounds. It is "the practice of removing the fins from a deceased shark and dumping its carcass back into the ocean, or slicing the fins off a live shark and then leaving the helpless shark in the ocean to drown, starve to death, or be eaten by other predators."[34] Shark finning can be described as "global-scale industrial fishing" since it is currently practiced by more than 125 nations.[35] As biologist Shelley Clarke notes, "[t]he demand for shark fins is arguably the most important determinant of the fate of shark populations around the world."[36]

The reason fishermen fin sharks is quite simple — fins constitute the most commercially valuable portion of the majority of shark species.[37] As a result of high uric acid content in shark meat, it is generally an undesirable source of animal protein that sells for only €10 a kilogram. In comparison, shark fins are used for shark fin soup (a delicacy in China and for Chinese populations around the world) and can sell for €500 per kilogram, while fins from rare species can sell for as much as €1,000 each.[38] By percentage weight, shark fins account for only 2-5% of the total shark, and this incents finning to maximize the value of the product kept aboard fishing vessels.[39] Once detached from the shark, shark fins are easily stacked and bundled. Furthermore, keeping the entire carcass maximizes space for fins on vessels.[40]

Shark fin soup is not a new dish. Historically, shark fin consumption can be traced to the Ming Dynasty (1368-1644 CE) as banquet cuisine for the Emperor and his Imperial family.[41] To prepare shark fin soup, dried, frozen

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[34] Spiegel, *supra* note 2, at 410.

[35] Shivji, *supra* note 16, at 593; Spiegel, *supra* note 2, at 410.

[36] Clarke, *supra* note 13, at 305.

[37] *See* Annabelle M. Ng, Shark Fisheries Management and the Sustainable Seafood Movement: A Possibility for Sustainable Shark-Fin Soup? 20 (Apr. 24, 2009) (Unpublished Masters project, Duke University) (on file with Duke University Nicholas School of the Environment and Earth Sciences), and *available at* http://dukespace.lib.duke.edu/dspace/handle/10161/1036.

[38] OCEANA, THE INTERNATIONAL TRADE OF SHARK FINS: ENDANGERING SHARK POPULATIONS WORLDWIDE (Mar. 2010), *available at* http://na.oceana.org/sites/default/files/reports/OCEANA_international_trade_shark_fins_english.pdf.

[39] *Id.*

[40] Philpott, *supra* note 33, at 452.

[41] Clarke, *supra* note 13, at 307; *See also* Spiegel, *supra* note 2, at 411 (suggesting that shark fin consumption can be traced back quite a bit further than the Ming Dynasty in China. Specifically, Spiegel's research indicates that shark fin soup was being consumed in Imperial China as early as the Han Dynasty (approximately 2,200 years ago), and that surviving records indicate that by the Song Dynasty (960-1279 CE), shark fin soup had become established as a standard dish served at banquets).

or fresh fins are skinned, excess cartilage is removed, and the fin is then soaked or boiled to separate the "fin needles," that comprise the fin, from the membranous tissue that holds them together.[42] The fin needles themselves are mostly tasteless and simply serve to add texture to the brothy soup;[43] on average, the fins from one shark serve eight people[44] with each bowl costing between $200 and $720.[45]

Shark fin soup acquired the status of delicacy in Imperial China for the following reasons: (i) catching a shark was considered a tribute to the Emperor because of the dangers associated with landing a shark; (ii) sharks were regarded as strong, virile animals and the Chinese believed that these physical and sexual characteristics could be internalized by consumption;[46] and (iii) shark fins are said to have traditional medicinal and therapeutic properties.[47] Over the centuries that have passed since the Ming Dynasty, and in spite of scientific studies demonstrating that consuming shark fin is potentially harmful because of toxin accumulation in fins,[48] shark fin soup has retained its value as a status symbol for the wealthy and is "traditionally served at wedding banquets and other occasions such as birthdays, reunion diners and when hosting very important clients."[49]

The explosion in the consumption of shark fin soup that has happened since the late 1980s has been attributed to cultural reforms in China, which have facilitated the emergence of a large, wealthy middle class willing to spend their disposable income on traditional luxury items.[50] Additionally, shark fin soup consumption in China was once limited geographically to the southern provinces of Guandong, Fujan and certain metropolitan centers (including Shanghai, Hong Kong, and Beijing), but since the 1990s the soup has become readily available on the mainland and in most major

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[42] Stefania Vannuccini, Food and Agriculature Organization [FAO], *Shark Utilization, Marketing and Trade*, FAO Fisheries technical Paper No. 389, 101-05 (1999), *available at* http://www.fao.org/docrep/005/x3690e/x3690e00.htm.

[43] *Shark Finning*, OCEANA, http://na.oceana.org/en/our-work/protect-marine-wildlife/sharks/learn-act/shark-finning (last visited Nov. 6, 2011).

[44] Edwards, *supra* note 14, at 316.

[45] O'Brien & Szabo, *supra* note 11, at 377; Philpott, *supra* note 33, at 453.

[46] Clarke, *supra* note 13, at 307.

[47] Ng, *supra* note 37, at 4.

[48] *See* Douglas H. Adams & Robert H. McMichael, Jr., *Mercury Levels in Four Species of Sharks from the Atlantic Coast of Florida*, 97 FISHERY BULLETIN 372 (1999); Tori Timms et al., *In the Soup: How Mercury Poisons the Fish we Eat*, WildAid, (2010), available at http://www.wildaid.org/PDF/reports/In%20the%20Soup_2010.pdf; Kiyo Mondo et al., *Cyanobacterial Neurotoxin β-N-Methylamino-L-alanine (BMAA) in Shark Fins*, 10(2) MARINE DRUGS 509 (2012).

[49] Ng, *supra* note 37, at 4.

[50] *See* Clarke, *supra* note 13, at 305.

cities.[51] Finally, China's population is currently 1.35 billion and has consistently exhibited a population growth of 0.5% over the last decade,[52] and it is predicted that the strengthening Chinese economy is prompting the rural poor to migrate to urban centers for higher paying jobs, "creating a new and massive middle class."[53] Taken together, these factors suggest that the demand driving the shark slaughter may yet increase. It is undisputed that Asia dominates the shark fin problem, with Hong Kong serving as the epicenter of shark fin trade.[54] This confluence of factors has led some commentators to aptly describe shark fin soup as "extinction in a bowl."[55]

In considering the above, along with the fact that many shark species whose fins are preferred because of their size or quality[56] live outside national territorial waters and Exclusive Economic Zones, it would appear that this issue should be addressed at the international level.[57] The remainder of this paper will focus on why international efforts have proved ineffective, and demonstrate that wholly domestic regulatory efforts may be the key to preventing what currently appears to be an inexorable progression towards widespread shark species extinction—all for a bowl of soup.

IV. THE INSUFFICIENT INTERNATIONAL RESPONSE

Many of the world's species do not live out their lives wholly within the borders or regulated waters of one country, and this fact alone renders wildlife management an international issue.[58] The international regulation

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[51] *Id.* at 308.

[52] *See generally International Data Base,* U.S. CENSUS BUREAU, http://www.census.gov/population/international/data/idb/informationGateway.php (last visited Feb. 25, 2013).

[53] Diana Farrell et al., *The value of China's emerging middle class: Demographic shifts and a burgeoning economy will unleash a huge wave of consumer spending in urban China,* THE MCKINSEY QUARTERLY, Jun. 2006, at 61, *available at* www.siboni.net/resources/China$27s+Middle+Class.pdf.

[54] Edwards, *supra* note 14, at 317; *See generally* Clarke, *supra* note 13, at 306 (describing Hong Kong as the oldest shark fin trading market and how Hong Kong's importance as an importer increased throughout the 1990s as it became the primary distribution source for mainland China).

[55] Platt, *supra* note 12.

[56] *See* Philpott, *supra* note 33, at 452.

[57] *See generally* Peter H. F. Graber, *Coastal Boundaries, in* ENCYCLOPEDIA OF COASTAL SCIENCE 246, 250 (Maurice L. Schwartz ed., 2005) (it is understood that American territorial waters extend twelve nautical miles from the low-water mark on the coast while control over fisheries extends 200 nautical miles from the low-water mark baseline, which is the boundary for the Exclusive Economic Zone (EEZ)).

[58] *See* Mark Giordano, *The Internationalization of Wildlife and Efforts Towards its*

of wildlife use and protection has "traditionally revolved around agreements between nation-states on the allocation of rights of access to and use of these wildlife resources. . . . made explicit through treaties, conventions, protocols, and similar agreements," and hundreds of such agreements currently exist, protecting everything from mollusks and butterflies to whales.[59] Wildlife treaties have evolved over time to focus on an expanded conception of the natural world and value, considering the animal within its ecosystem and the many ways we can benefit from wildlife , and in so doing have come to address habitat destruction in addition to direct killing.[60] International efforts to protect terrestrial species differ significantly from efforts to protect marine species in that terrestrial species have traditionally been protected in an ad hoc fashion as the international community responds to particular threats for endangered species, whereas marine species are regulated in a manner that seeks to achieve sustainable yield and equitable access for all nations.[61] Unfortunately, this approach to marine species conservation is a classic illustration of Hardin's "tragedy of the commons" problem, whereby "free access to a free resource which no one controls and everyone can exploit leads inexorably to over-consumption, unrestrained competition, and ultimate ruin for all."[62] In addition to this limiting feature, notoriously poor compliance records and enforcement mechanisms further compromise international treaties aimed at species conservation.[63]

Management: A Conceptual Framework and the Historical Record, 14 GEO. INT'L ENVTL. L. REV. 607, 610 (2002).

[59] *Id.* at 614-15.

[60] MICHAEL BOWMAN ET AL., LYSTER'S INTERNATIONAL WILDLIFE LAW, 61-91 (Cambridge University Press, 2nd ed. 2010).

[61] PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 587-88 (3d ed. 2009); *see generally* Daniel Pauley, *Unsustainable Marine Fisheries*, 7 SUSTAINABLE DEV. L & POL'Y 10, 10-12 (2006-2007) (describing how the 20th and 21st centuries have led to the collapse of many fisheries as increasing demand, the misconception that the ocean provides limitless bounty, and technological advances have enabled fisheries to fish beyond the ocean's capacity to provide).

[62] BIRNIE ET AL., *supra* note 61, at 705; *see generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (Hardin sets out his theories on the tragedy of the commons).

[63] *See generally* Cameron S. G. Jefferies, *Strange Bedfellows or Reluctant Allies?: Assessing Whether Environmental Non-Governmental Organizations (ENGOs) Should Serve as Official Monitors of Whaling for the International Whaling Commission (IWC)*, 26 WINDSOR REV. LEGAL & SOC. ISSUES 75 (2009) (wherein I discuss how enforcement and monitoring of the International Convention for the Regulation of Whaling is ineffective. Generally, this failure extends to most international environmental treaties that set broad goals and policy statements but fail to implement an effective liability regime or monitoring scheme).

The failure of the international community to adequately address the cruel and unnecessary act of shark finning is not a problem of recognition or diagnosis; rather, it is a problem of insufficient response. The most notable international attempts to address shark finning, to date, include the following: (i) the Food and Agricultural Organization of the United Nations (FAO) Committee on Fisheries' International Plan for the Conservation and Management of Sharks (IPOA-Sharks), which calls on member nations to voluntarily adopt National Plans of Action (NPOA) to assess the status of their shark populations, improve research, and enhance catch reporting;[64] (ii) Regional Fisheries Management Organizations (RFMOs) created pursuant to the UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Stocks (UNFSA), which can also implement NPOAs pursuant to IPOA-Sharks, or restrict signatory nations' finning activities;[65] (iii) CITES, as the international convention that restricts international trade that compromises the existence of threatened and endangered species, has on many occasions received proposals from member nations for listing shark species desired for shark fin soup;[66] and (iv) the Convention on the Conservation of Migratory Species of Wild Animals (CMS), which recognizes the need for international cooperation to manage species that are not contained wholly within national borders, also lists species based on vulnerability and has proposed a non-binding Memorandum of Understanding to protect migratory sharks.[67] I will also describe certain international shark conservation efforts that have happened since COP 15 that may or may not prove to be moderately successful moving forward.

The majority of Western legal commentary produced in the last decade addressing shark finning has focused on critically examining these international mechanisms, and crafting prescriptive reforms aimed at enhancing international and regional conservation or moving towards

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[64] FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS INTERNATIONAL PLAN OF ACTION FOR THE CONSERVATION AND MANAGEMENT OF SHARKS 11, *available at* ftp://ftp.fao.org/docrep/fao/006/x3170e/X3170E00.pdf (1999) [hereinafter FAO]; Ng, *supra* note 37, at 11.

[65] United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, N.Y., U.S., July 24-Aug. 4, 1995, *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1992 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, U.N. Doc. A/CONF.164/37 (Sept. 8, 1995).

[66] *See generally* Clarke et al., *supra* note 13, at 306.

[67] Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333 [hereinafter CMS].

sustainable shark fishing. The United Nations General Assembly has even passed a resolution calling on member nations to enhance and enforce shark conservation;[68] however, the situation for shark species continues to deteriorate. These international efforts have been impacted by a lack of enforcement and compliance, but it appears that the problem with the international approach to shark finning is even more fundamental - because we do not yet recognize the integral role sharks play in their ecosystem, we cannot meaningfully address the issue of direct killing in an effort to protect them. TRAFFIC and The Pew Environment Group released a report in January of 2011, concluding that the top twenty shark fishing nations have failed to effectively regulate their shark fisheries as most of these nations pledged to do a decade ago, and because these twenty nations account for 80% of all shark fishery mortality "the future sustainability of shark populations is effectively in their hands."[69] Political scientist Peter Jacques has gone so far as to postulate that the current international approach to shark conservation is inherently flawed and bound to fail because there are "no binding shark-centered regimes and the institutions that do exist do not provide for active international management of sharks."[70] I have isolated three obstacles that, until remedied, will likely prevent effective international efforts from occurring.

A. The Profitability of the Fin Trade Stifles CITES

The eighty nations that originally signed CITES in 1973 had the intention of protecting species such as leopards, elephants, and alligators, whose parts were being traded within the fashion industry, as a response to the recognition by the international community that this trade was threatening the very existence of certain species.[71] Since 1973, CITES' mandate to regulate the wildlife trade has expanded beyond its initial conception to

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[68] G.A. Res. 62/177, U.N. Doc. A/RES/62/177 (Feb. 28, 2008); Claudia A. McMurray, *Wildlife Trafficking: U.S. Efforts to Tackle a Global Crisis*, 23 WTR NAT. RESOURCES & ENV'T 16, 18 (2009).

[69] MARY LACK & GLENN SANT, THE FUTURE OF SHARKS: A REVIEW OF ACTION AND INACTION 22 (Jan. 2011).

[70] Peter J. Jacques, *The Social Oceanography of Top Oceanic Predators and the Decline of Sharks: A Call for a New Field*, 86 PROGRESS IN OCEANOGRAPHY 192, 193 (2010) (assessing existing international shark conservation mechanisms and observing that they do not prioritize the shark itself). *Id.* at 202 (Jacques advocates for the creation of a new shark management approach that integrates rather than dissociates human motivations from management because this might be the only way to actually shift away from the "economistic paradigm enforced by country-actors, industry, and international law" that currently exists).

[71] Blue Sky, *supra* note 6, at 35.

cover approximately 5,000 animals and 28,000 plants. Regardless of the purpose of the trade; membership in CITES has swelled from 80 to 175 nations.[72]

In the introduction to this paper, I referred to the controversial decisions made at CITES COP 15 where all proposed listings for shark species were rejected. In theory, CITES exists to regulate the international trade in species that are endangered or threatened, and to that end, species can be listed in one of three Appendices to CITES, which in turn dictate both how and the extent to which trade in that species is restricted.[73] Specifically, Appendix I is meant for species "threatened with extinction" where trade is "permitted only in exceptional circumstances;" Appendix II lists species that are not necessarily threatened with extinction but whose "trade must be controlled in order to avoid utilization incompatible with survival;" and Appendix III consists of species protected in at least one country when other member nations have been asked to help control trade.[74] Listing a species on Appendix I or II can happen in one of two ways: (i) two-thirds of member nations represented at a Conference of the Parties (COP) vote to list the species; or (ii) if a COP is not in session, two-thirds of at least half of all CITES member nations vote in favor of the listing.[75] Listing decisions are initiated when a member nation submits a proposal to the Secretariat (at least 150 days prior to a COP), who is then responsible for consulting the proposal with CITES member nations, interested groups, and intergovernmental organizations (only required for marine species proposals).[76] The Secretariat is also responsible for providing all member nations with a copy of the proposal.[77] Additionally, CITES provides parties with listing criteria meant to guide their decisions as they vote on proposals.[78]

As early as 2001, shark conservationist and legal commentator Rachel Cunningham-Day identified that CITES has a history of rejecting shark listings;[79] currently only the great white shark (Appendix II listing in 2005), the basking shark (Appendix II listing in 2002) and the whale shark (Appendix II listing in 2002) are covered by CITES.[80] While existing

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[72] *Id.*

[73] Edwards, *supra* note 14, at 309.

[74] *How CITES Works*, CITES, *available at* http://www.cites.org/eng/disc/how.php (last visited Nov. 19, 2011).

[75] *See* Blue Sky, *supra* note 6, at 35.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] CUNNINGHAM-DAY, *supra* note 19, at 97-98.

[80] *See* Clarke et al., *supra* note 13, at 306.

literature does not explain why these species were successfully listed and the most recent proposals were voted down, one possible explanation is that these three shark species are somewhat unique in their size, scarcity, and popular recognition. Before COP 15 was convened, an ad hoc FAO panel, the International Union for Conservation of Nature (IUCN), and TRAFFIC (an international organization that monitors wildlife trade) each independently reviewed the proposed shark listings, and "the CITES secretariat and IUCN agreed that all the shark proposals met the criteria for inclusion in Appendix II."[81] It is recognized that the truly troubling ramification of the fact that the proposals did not receive the required two-thirds vote is that "CITES used to be a treaty that restricted trade for the sake of conservation—[and] at this meeting, it became a treaty that restricts conservation for the sake of trade."[82] In general, this calls into question the ability of CITES to effectively restrict trade for endangered and threatened species moving forward, and for shark species not currently listed; COP 15 demonstrates that so long as the economic incentive for trading shark fins persists, it may not be practical to rely on CITES to effect shark conservation in response to shark finning.

The reality is that the shark fin trade is highly lucrative; in 2007, it was valued at between 400-550 million U.S. dollars and there are no signs that it is becoming less profitable.[83] It is no surprise that two key nations opposed to these listings, China and Japan, have a vested interest in minimizing trade restriction. As mentioned earlier, China is the primary consumer of shark fins, while Japan is an exporter of fins and is generally opposed to restricting marine species through CITES.[84] However, blame for the CITES shift from a conservation treaty to a market-facilitating instrument as it relates to sharks does not rest with these two countries alone. A recent report prepared by Oceana indicates that in 2008, eighty-seven countries exported over 10,000,000 kilograms of fins to Hong Kong (the hub of the shark fin trade), with Spain, Singapore, Taiwan, Indonesia, and the United Arab Emirates being the largest exporters.[85] COP 16 features five new

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[81] Susan Lieberman, Director, International Policy, Pew Environment Group, Keynote Address at Dalhousie University 2010 Elisabeth Mann Borgese Lecture: Science Versus Politics: Tales From CITES, 6 (June 8, 2010), http://internationaloceaninstitute.dal.ca/EMBlecturetext_2010.pdf.

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

[83] Clarke et al., *supra* note 13, at 306.

[84] *See* Blue Sky, *supra* note 6, at 38 (assuming it is appropriate to apportion blame in this sort of situation, every nation that voted against the shark listing proposals is partially responsible).

[85] *See generally* OCEANA, *supra* note 38 (demonstrating that fin exporting nations encompass most of the world's coastal nations, from North America, South America, Africa, Europe and Australia and describing how Hong Kong imports all manner of fins: dried,

Appendix II shark listing proposals, specifically for the porbeagle, the oceanic whitetip, the smooth hammerhead, scalloped hammerhead, and great hammerhead.[86] If considerable progress by CITES is not made quickly, and the "fate of [shark] populations around the world" is actually "inextricably linked with actions of the parties to CITES," as scholars Fordham and Dolan suggest it is, the future for sharks may be quite bleak.[87]

B. Prevailing Attitudes Towards Animal Welfare in Asia

Asian religions and cultures generally espouse strong environmental interconnectedness, compassion, and peaceful coexistence with Earth's creatures;[88] there is no doubt that Asian cultures value associations with nature and wildlife.[89] These traditional values and beliefs exist in stark contrast to a highly exploitive Asian wildlife trade that threatens many species and "can arouse disapproval and condemnation" around the world.[90]

Given that China is still grappling with human rights issues, it is not surprising that animal rights are not well developed.[91] Championed by law scholar Chang Jiwen, director of the Chinese "animal protection legislation project panel,"[92] a draft of the first general animal welfare law was proposed to the National People's Congress of China in early 2010.[93] There are hopes that this legislation will address some of the more egregious practices that currently happen in China, including bear farming for bile, controversial laboratory experimentation, unsuitable farm animal living conditions, and the skinning of live dogs for the fur trade;[94] however, there

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frozen, salted, brined, and fresh).

[86] *Proposals for amendment of Appendices I and II*, CITES, http://www.cites.org/eng/cop/16/prop/index.php (last visited Feb. 25, 2013)

[87] Sonja Fordham & Coby Dolan, *A Case Study in International Shark Conservation: The Convention on International Trade in Endangered Species and the Spiny Dogfish*, 34 GOLDEN GATE U. L. REV. 531, 571 (2004).

[88] *See* JOHN KNIGHT, WILDLIFE IN ASIA: CULTURAL PERSPECTIVES 3 (John Knight ed., 2004).

[89] *See id.* at 5.

[90] *Id.* at 4.

[91] *See Animal Rights in China: A Small Voice Calling*, THE ECONOMIST (Feb. 28, 2008), http://www.economist.com/node/10766740?story_id=10766740.

[92] *Proposed Animal Welfare Law Watered Down*, CHINA.ORG.CN (Jan. 26, 2010), http://www.china.org.cn/china/2010-01/26/content_19309286.htm.

[93] *Legislation Update: January 2010*, ANIMALS ASIA FOUNDATION, http://www.animalsasia.org/index.php?UID=OGWH3FU0LER (last visited Nov. 26, 2010).

[94] *See* Pete Wedderburn, *China Unveils First Ever Animal Cruelty Legislation*, THE TELEGRAPH (Sept. 18, 2009), http://blogs.telegraph.co.uk/news/peterwedderburn/100010449/china-unveils-first-ever-animal-cruelty-legislation/; David Harrison, *More Bears Fact Torment on China's Bile Farms*, THE TELEGRAPH (Nov. 30, 2002),

is no indication that such a law will soon pass. After a failed attempt to introduce animal welfare legislation to China in 2006, Zhou Ping, a member of the National People's Congress, noted that "few Chinese accept that animals have any rights at all."[95] Generally, the prevailing stance is not to protect animals, and acts that would be regarded as animal cruelty in the Western world are commonplace.[96] Japan has more established animal protection laws than those in the Western World, but these have not translated into the protection of marine life;[97] Japan continues to exploit cetaceans (whales, porpoises and dolphins), despite strong international opposition, and remains an exporter of shark fins to China.[98]

In terms of wildlife use, it has been suggested that Asian pragmatism and utilitarianism has resulted in the "*hyper*utilization of wildlife—in the sense that . . . Asian utilization of wildlife tends to deplete wildlife populations."[99] This approach seems to persist at the international level and dominates foreign relations. I believe that these attitudes may change as education and information dissemination leads to public awareness of these problems, which in turn bolsters the efficacy of the initiatives undertaken by individuals like Chang Jiwen and Zhou Ping.[100] Until prevailing attitudes change, it is unlikely that China and Japan, the two major Asian players, can be counted on to support meaningful protection for wildlife such as sharks.

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http://telegraph.co.uk/news/worldnews/asia/china/1414897/More-bears-face-torment-on-Chinas-bile-farms.html.

[95] *Animal Rights in China*, *supra* note 91.

[96] *See generally* Wedderburn, *supra* note 94.

[97] KNIGHT, *supra* note 88, at 5.

[98] OCEANA, *supra* note 38; *See generally* Jefferies, *supra* note 63 (describing how Japan has a strong historical and cultural connection to the whale hunt and the consumption of whale meat, which it has internationally defended and intends to continue defending. Recently, Japan has maintained its whale hunt despite a commercial moratorium on most whaling by utilizing a controversial scientific whaling exemption found in the International Convention for the Regulation of Whaling, which sustains an annual harvest of approximately 1,000 whales. This practice has led to considerable Western opposition and confrontation on the high seas with environmental non-governmental organizations. Further, Japanese are starting to increase their hunt for smaller coastal whales and dolphins to supplement their annual catch of large whales).

[99] KNIGHT, *supra* note 88, at 5.

[100] *See infra* Part III(b)(a)(iii), which describes a growing grassroots movement in China, supported by animal welfare groups, that resists the consumption of shark fin soup and might signal that a shift in shark conservation is possible.

C. The Voluntary Nature of IPOA-Sharks (National and Regional) and CMS

The FAO gathers and compiles shark catch data in their Fishstat Capture Production database in the hopes of assessing global shark populations, which are notoriously difficult to estimate given natural fluctuations, unreported bycatch, illegal fishing, and the lack of species identification in reported catches.[101] In 1999, the FAO Committee on Fisheries adopted IPOA-Sharks, which provides guiding principles and requirements for nations or regional organizations to implement.[102] It is important to note that the goal of IPOA-Sharks is to assist in the implementation of future international agreements to protect sharks,[103] so it would not be fair to critique this attempt in isolation. Most importantly, IPOA-Sharks called for: (i) an assessment of the use of sharks by each nation; (ii) the voluntary adoption of National Plans of Action (NPOA) to address any conservation or sustainable fisheries problems; (iii) catch-reporting mechanisms; (iv) provisions for the review of each NPOA every four years; and (v) for each member nation to have a shark plan in place by 2001.[104] The goal of the IPOA-Sharks initiative was for member nations to implement NPOAs, and aid in future research, catch reporting, and catch identification.[105]

As of 2009, and despite the issuance of a United Nations General Assembly Resolution calling for better implementation of IPOA-Sharks,[106] TRAFFIC reports that only thirty-four of the FOA's 204 member nations have assessed whether their country needs a NPOA, and of those nations, only thirty-one have implemented a plan.[107] Perhaps even more disconcerting is that, as of January 2011, only thirteen of the top twenty shark fishing nations have implemented a NPOA (this does not include the top two shark fishing nations, Indonesia and India, which are both currently in the development or draft stages of NPOA production).[108] Based on these perceived failures, TRAFFIC and the Pew Environment Group conclude

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[101] MARY LACK & GLENN SANT, TRENDS IN GLOBAL SHARK CATCH AND RECENT DEVELOPMENTS IN MANAGEMENT 2-3 (2009), *available at* http://www.traffic.org/species-reports/traffic_species_fish34.pdf.

[102] Ng, *supra* note 37, at 11; *See* FAO, *supra* note 64, at 10-16.

[103] *Id.*

[104] *See* FAO, *supra* note 64, at 13-15.

[105] *See* Edwards, *supra* note 14, at 308.

[106] Ng, *supra* note 37, at 15; *See also* G.A. Res 61/105, U.N. Doc. A/RES/61/105 (Mar. 6, 2007).

[107] LACK & SANT, *supra* note 101, at 8.

[108] LACK & SANT, *supra* note 69, at 2.

that this effort to reduce shark mortality and enhance conservation has been largely unsuccessful one decade after its inception.[109]

The FAO Committee on Fisheries provided a summary of IPOA-Sharks in July, 2012, which presents a slightly different view. Specifically, the Summary of the Review on the Implementation of the International Plan of Action (IPOA) for the Conservation and Management of Sharks indicates that of the 26 nations that accounted for 84% of the global reported shark catches between 2000-2009, seventeen have implemented a NPOA, five have produced a plan that has yet to be adopted (or are currently working towards completing a plan), and four have yet to create an NPOA.[110] This review emphasizes the role that RFMOs play in in helping regulate shark catches, but emphasizes that "[i]llegal, unreported and unregulated (IUU)" shark fishing represents a significant challenge.[111]

The failure to achieve large-scale implementation of IPOA-Sharks suggests that the initial goals of this program were too lofty, or perhaps simply that most individual nations do not perceive the need to take unilateral action to conserve sharks in this manner. Compounding this host of problems is the fact that there is no way for the FAO to verify the efficacy or validity of existing NPOAs to determine if they comply with IPOA-Shark guidelines or goals, or to determine whether the suggested periodic review is taking place.[112] In sum, so long as participation remains voluntary, enforcement and compliance mechanisms are not included, and there is limited ability for the FAO to vet the efficacy of each NPOA - this measure in and of itself leaves much to be desired.

Regional implementation of IPOA-Sharks is a different story. The UNFSA (Straddling Fish Stocks Agreement), which became effective in 2001, employs the "precautionary approach" toward the conservation and management of migratory fish species, and as an implementing agreement, it contemplates the formation and utilization of RFMOs and regional cooperation.[113] The FAO provides that RFMOs can also implement the plans as proposed by IPOA-Sharks as "fishing entities."[114] While there are currently no RFMOs that purport to deal exclusively with shark fishery

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

[110] FAO Committee on Fisheries, *Summary of the Review on the Implementation of the International Plan of Action (IPOA) for the Conservation and Management of Sharks*, at 2, COFI/2012/3 Add.1/Rev.1.

[111] *Id.* at 3.

[112] LACK & SANT, *supra* note 69 at 2.

[113] Ng, *supra* note 37, at 9.

[114] IUCN SPECIES SURVIVAL COMMISSION'S SHARK SPECIALIST GROUP, THE CONSERVATION STATUS OF PELAGIC SHARKS AND RAYS 32 (Merry D. Camhi et al. eds., 2007) [hereinafter REPORT OF THE IUCN]; *See also* Ng, *supra* note 37, at 11.

management, some existing RFMOs have adopted "resolutions and recommendations" in an effort to promote live release of by-catch sharks, increase catch data reporting, further research, and nine such agreements even ban shark finning in most international water.[115] Unfortunately, RFMOs are limited by their "failure . . . to heed the advice of their own scientific committees or other scientific advisory bodies," by a lack of monitoring and enforcement, and also by the fact that they rely on voluntary compliance which renders it nearly impossible to estimate their effectiveness.[116]

The Convention on the Conservation of Migratory Species of Wild Animals (CMS) is an international treaty that entered into force in 1983.[117] The purpose of this treaty is to protect animals that live in international waters or that migrate through the boundaries of more than one country throughout their lifetimes.[118] The CMS currently has 116 member nations, and as a framework convention one of its main goals is to encourage the member states within each migratory species range to develop regional and global agreements to protect that species.[119] The agreements that member states create can take various forms, some of which are legally enforceable and others that are not.[120] Towards accomplishing these goals, migratory species are listed on two appendices according to the actions necessary to affect their conservation.[121] Appendix I lists migratory species currently threatened with extinction and therefore "should be conferred strict protection," whereas Appendix II lists species that currently have an "unfavourable conservation status" that could benefit from conservation agreements.[122]

The plight of highly migratory species of sharks has been of significant interest to the CMS since 2005, when member nations adopted a resolution calling for increased shark protection by all signatories in response to pressures like bycatch, over-fishing, and habitat destruction.[123] There are currently seven shark species listed on the two appendices, but the CMS

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[115] REPORT OF THE IUCN, *id.* note 115, at 32, 34.

[116] *Id.* at 34.

[117] CMS, *supra* note 67.

[118] *See* REPORT OF THE IUCN, *supra* note 115, at 36.

[119] *About CMS: Introduction to the Convention on Migratory Species*, CONVENTION ON MIGRATORY SPECIES, http://www.cms.int/about/intro.htm (last visited Nov. 20, 2011).

[120] *Id.*

[121] REPORT OF THE IUCN, *supra* note 115, at 36.

[122] *Id.*; *See generally About CMS*, *supra* note 119 (this website provides that for species listed on Appendix I, member states are obligated to "strive towards strictly protecting these animals, conserving or restoring the places where they live, mitigating obstacles to migration and controlling other factors that might endanger them.").

[123] REPORT OF THE IUCN, *supra* note 115, at 36.

Scientific Council has suggested that thirty-five species of sharks and rays should be listed.[124]

On February 12, 2010, the CMS released for signature the Memorandum of Understanding on the Conservation of Migratory Sharks (MoU).[125] This MoU functions as a "non-legally binding instrument"[126] pursuant to Article IV, paragraph 4 of the CMS, and strives "to achieve and maintain a favourable conservation status for migratory sharks based on the best available scientific information, taking into account the socio-economic and other values of these species for the people of the Signatories."[127] The key conservation piece of this MoU is the Section 4 Conservation Plan, which was adopted as Annex 3 to the MoU at the first Meeting of the Parties on September 27, 2012.[128] The Conservation Plan, amongst other things, strives to do the following for the shark species listed on the CMS appendices (as reproduced in Annex 1 of the MoU): (i) improve ". . . our understanding of migratory shark populations through research, monitoring and information exchange"; (ii) ensure that directed and non-directed shark fisheries are sustainable (using RFMO, FAO, and other international collaboration as necessary); (iii) ensure "to the extent practicable the protection of critical habitats and migratory corridors and critical life stages of sharks"; (iv) increase "public awareness of threats to sharks and their habitats, and enhance public participation in conservation activities" and (v) enhance cooperation amongst nations, governments, and the existing international obligations previously described, such as the FAO and RFMOs.[129] In addition to limited species coverage and the non-binding nature of the MoU, the Conservation Plan is also not legally binding, and in this respect is flawed and may become another international mechanism that simply says the right things but ultimately does little to further migratory shark conservation.

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[124] REPORT OF THE IUCN, *supra* note 115, at 37.

[125] Convention on the Conservation of Migratory Species of Wild Animals, *Memorandum of Understanding on the Conservation of Migratory Sharks* 2 (Feb. 12, 2010), *available at* http://www.ecolex.org/server2.php/libcat/docs/TRE/Multilateral/En/TRE154630.pdf.

[126] *Id.* at 2.

[127] *Id.* at 4.

[128] *Id.* at 5; Convention on the Conservation of Migratory Species of Wild Animals, *Annex 3 to the MOU: Conservation Plan* (Sept. 27, 2012), *available at* http://www.cms.int/species/sharks/MOS_Mtgs/MoS1/mtg_report_&_outcomes_&_decisions/Outcome_1_2_Annex3_to_MoU_Conservation_Plan_En.pdf.

[129] *Id.* at 2-8

D. The International Commission for the Conservation of Atlantic Tuna

It is proper and necessary to include in this discussion what I perceive as failed international efforts to protect sharks. Recent international developments suggest that the failure of CITES to protect sharks at COP 15 has had a negative impact on subsequent international negotiations. Specifically, I am referring to the protection of seven Atlantic shark species provided by the International Commission for the Conservation of Atlantic Tuna (ICCAT) on November 27, 2010.[130] The ICCAT, a multilateral international commission, is primarily responsible for "the conservation of tunas and tuna-like species in the Atlantic Ocean and adjacent seas"[131] pursuant to the International Convention for the Conservation of Atlantic Tunas, which entered into force in 1969.[132] It should be noted that no shark species are listed by the ICCAT as one of the 30 species of primary concern; however, sharks fall within the prevue of the ICCAT by virtue of the fact that they are caught as bycatch in the tuna fishing industry.[133]

The delegates that met in November of 2010 voted to ban the catch of seven species of sharks by tuna boats, including: (i) the oceanic whitetip shark; (ii) the great hammerhead; (iii) the scalloped hammerhead; (iv) the scoophead hammerhead; (v) the smalleye hammerhead; (vi) the smooth hammerhead; and (vii) the whitefin hammerhead, all of which are used to make shark-fin soup.[134] Additionally, the delegates approved a measure that requires accurate catch data be submitted to the ICCAT by member nations for the short-fin mako shark by 2013, and has indicated that failure to comply with this reporting obligation will result in penalization.[135]

Matt Rand, director of the shark conservation branch of Pew Environmental Group, suggests that the ban passed by the ICCAT may be in part a reaction to the criticisms levied against international policy makers and delegates who voted down the proposals at CITES, but he is quick to

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[130] *See generally* Juliet Eilperin, *Atlantic Sharks Get New Protections*, THE WASHINGTON POST (Nov. 28, 2010), http://www.washingtonpost.com/wp-dyn/ content/article/2010/11/27/ AR2010112703755.html (while this might be a positive step, it is clear in this article that the purpose of the ICCAT is not shark protection, and the argument could be made that addressing sharks in this manner distracts from the fact that the ICCAT once again did not act to protect vulnerable tuna species this year, which are also in desperate need of protection).

[131] International Commission for the Conservation of Atlantic Tunas, *Introduction*, ICCAT (Jan. 17, 2007), http://www.iccat.int/en/introduction.htm [hereinafter ICCAT].

[132] *Id.*; *also see* International Convention on the Conservation of Atlantic Tuna, May 14, 1966, 20 U.S.T. 2887, 673 U.N.T.S. 63.

[133] *See* ICCAT, *supra* note 131.

[134] Eilperin, *supra* note 130.

[135] *Id.*

note that "[i]t's a good step forward but far short of what is needed to save the world's sharks."[136] Michael Hirshfield, a scientist for Oceana, views this measure as essentially too little too late, whereas Sonja Fordham, president of Shark Advocates International, believes that this is a start but will only be successful if it is met with a similar response from other organizations and becomes stricter over time.[137]

E. International Union for Conservation of Nature (IUCN) Estimates

One area where an international effort has had a measurable effect is the continued assessment of global shark populations. The IUCN maintains the Red List of Threatened Species, which "is widely recognized as the most comprehensive, objective global approach for evaluating the conservation status of plant and animal species."[138] A review of IUCN data tables indicates that the 468 known shark species are designated by this international organization as follows: (i) eleven are Critically Endangered; (ii) fifteen are Endangered; (iii) forty-eight are Vulnerable; (iv) sixty-nine are Near Threatened; (v) 210 are Data Deficient; and (vi) 115 are of Least Concern.[139] It is with this uncertain future in mind that I now turn to a discussion of the importance of recent legislative reform within the United States.

V. CRAFTING EFFECTIVE DOMESTIC REFORMS

The 2007 IUCN report titled Conservation Status of Pelagic Sharks and Rays posits the following about efforts to limit shark finning: "although much of the political will for banning shark finning results from the public's perception of cruelty, most domestic and international finning bans focus on the need to reduce waste and remove the incentive to target sharks just for their fins."[140] Recent American domestic legislative reform appears to move beyond the typical regulatory response noted by the IUCN by

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[136] *Id.*

[137] *Id.*

[138] International Union for Conservation of Nature and Wild Species, *Red List Overview*, THE IUCN RED LIST OF THREATENED SPECIES, http:// www.iucnredlist.org/about/ red-list-overview (last visited Nov. 20, 2011).

[139] *See Table 3a-Status category summary by major taxonomic group (animals)*, THE IUCN RED LIST OF THREATENED SPECIES Version 2010.4, available at http://www.iucnredlist.org/documents/summarystatistics/2010_4RL_Stats_Table_3a.pdf; *See also Table 4a-Red list category summary for all animal classes and orders*, THE IUCN RED LIST OF THREATENED SPECIES Version 2010.4, available at http://www.iucnredlist.org/documents/summarystatistics/2010_4RL_Stats_Table_4a.pdf.

[140] REPORT OF THE IUCN, *supra* note 115, at 34.

utilizing existing political will to target the actual act of finning directly. In this portion of the paper, I will describe these reforms and assess their potential to enhance the international response to the shark finning problem.

A. Federal Regulation of Sharks

Shark fishing in American territorial waters[141] has been federally regulated since Congress passed the Magnuson Fishery Conservation and Management Act (the Magnuson-Stevens Act) in 1976.[142] The Magnuson-Stevens Act established the creation of eight Regional Fishery Management Councils (managed by the Marine Fishery Service), and each is tasked with implementing the goals of the Magnuson-Stevens Act and creating fishery management plans (FMPs) for every fishery in their region;[143] FMPs were subsequently implemented for both the Atlantic and Pacific coasts.[144] The Magnuson-Stevens Act was amended in 2000 by the Shark Finning Prohibition Act (the SFPA) to ban shark finning in American waters, which did in fact impact American fin exports to China.[145]

The inability of the SFPA to meaningfully regulate and restrict shark finning in American waters was exposed by the Ninth Circuit decision of United States v. Approximately 64,695 Pounds of Shark Fins (Approximately 64,695 Pounds of Shark Fins).[146] In Approximately 64,695 Pounds of Shark Fins, the federal government sought civil forfeiture of fins found aboard a vessel that had been chartered to meet fishing vessels at sea, collect the fins, and then transport them to Guatemala for processing.[147] The SFPA contained a rebuttable presumption that fins found on board a "fishing vessel" without a corresponding shark carcass were illegally obtained by finning,[148] but the Ninth Circuit found that the presumption did not operate and the SFPA had not been violated in this instance since the transport vessel did not qualify as a fishing vessel within the statutory definition.[149]

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[141] *See* Graber, *supra* note 57.

[142] *See* Spiegel, *supra* note 2, at 414.

[143] *Id.* at 414-15.

[144] Ng, *supra* note 37, at 14-15.

[145] Shark Finning Prohibition Act, Pub. L. No. 106-557, 114 Stat. 2772 (2000); *See* Martin, *supra* note 11, at 203.

[146] United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976 (9th Cir. 2008).

[147] *Id.* at 977.

[148] *Id.* at 978.

[149] *Id.* at 983.

This case exposed flaws in a fundamental premise of the SFPA, which allowed fishermen "to possess detached shark fins on board their vessel so long as the fins make up no more than 5% of the total weight of the shark carcasses on board, and provided that a corresponding carcass is present for all fins aboard the vessel."[150] Specifically, this approach contains two features that limit the effectiveness of reducing finning and make enforcement difficult: (i) as demonstrated in *Approximately 64,695 Pounds of Shark Fins*, the transfer of fins from fishing vessels to transport vessels was not a violation of the SFPA; and (ii) the wording of the act does not prohibit fishermen from finning sharks that have high value fins and matching those fins to high value carcasses, resulting in low value carcasses and low value fins both being thrown overboard.[151]

The amendments provided for in the Shark Conservation Act of 2010 quickly close these loopholes and improve enforcement by: "(1) requiring that all shark fins aboard a fishing vessel be naturally attached to the shark carcass and (2) banning the transfer of shark fins from vessel to vessel unless they are naturally attached to the carcass."[152] Further, this legislation establishes the rebuttable presumption that if detached fins are found without the carcass aboard a fishing vessel, they were transferred illegally. It should be noted that the Shark Conservation Act of 2010 contains one exemption to the rule that shark fins cannot be separated from the carcass at sea, namely the smooth dogfish fishery in North Carolina.[153] Smooth dogfish are fished and primarily used for their meat, and fishermen are allowed to separate the fins from the carcass so long as they are able to demonstrate that the corresponding carcass is still on board the fishing vessel.[154]

The Shark Conservation Act of 2010 was passed by the House of Representatives and the Senate during "the last few days of the 111th Congress"[155] after having previously been referred to the Committee on Commerce, Science, and Transportation;[156] on January 4, 2011 President Obama signed this measure into law.[157] The importance of this federal

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[150] O'Brien & Szabo, *supra* note 11, at 377-78.

[151] *Id.* at 378.

[152] *Id.*

[153] *See* Serda Ozbenian, President Obama Signs the Shark Conservation Act! AWI Applauds Law to End Shark Finning, ANIMAL WELFARE INSTITUTE (Jan. 4, 2011), *available at* http://www.awionline.org/content/president-obama-signs-shark-conservation-act-awi-applauds-law-end-shark-finning.

[154] *Id.*

[155] *Id.*

[156] *H.R. 81: International Fisheries Agreement Clarification Act,* GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h111-81 (last accessed Nov. 20, 2011).

[157] Ozbenian, *supra* note 153.

reform in terms of accomplishing what the international community has not, is that it directly addresses shark finning, and the requirement that sharks be landed with fins naturally attached streamlines enforcement by creating rebuttable presumptions, closing existing loopholes by simplifying factual determinations, aiding in species identification and catch data, and helping to reduce the opportunity for "undetectable finning".[158] This federal reform should be regarded as a positive step in America's effort to protect sharks. Hawai'i has had this sort of regulation in place since 2000, and it should come as no surprise that once again Hawai'i is leading the way in shark finning regulation.[159]

B. Hawaii's Prohibition on Shark Fins

On July 1, 2010, Hawai'i introduced innovative legislation that sets the new standard for addressing shark finning. Hawai'i has had a ban on finning in Hawaiian waters since 2000, requiring all sharks to be landed with fins naturally attached, but this alone has not been enough to prohibit shark finning and control the trade in fins.[160] The Shark Fin Prohibition features the following:

i) It is now "unlawful for any person to possess, sell, offer for sale, trade, or distribute shark fins," with "shark fin" defined as "the raw or dried fin or tale of a shark;"

ii) The only exemption to this prohibition is for educational and research purposes; to conduct such action you must have a permit from the Department of Land and Natural Resources;

iii) The preparation and sale of shark fin soup by restaurants is not permitted beyond July 1, 2011, and as of July 1, 2010, the only fins that can be used for shark fin soup are those already held by the restaurant;

iv) Punishment for violation of this legislation is incremental, and structured as follows:

a. First offence is an administrative fine between $5,000-$15,000;

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[158] Clarke, *supra* note 13, at 321; *See* O'Brien & Szabo, *supra* note 11, at 377-79.

[159] *See* Clarke, *supra* note 13, at 321.

[160] *Id.*; *See generally* Gina Mangieri, *Legislative Clock Ticking on Hawaii Shark Fin Ban*, KHON2 NEWS (Apr. 19, 2010, 7:21 PM), http://www.khon2.com/news/local/story/Legislative-Clock-Ticking-On-Hawaii-Shark-Fin-Ban/8qGcnYuSBEWCMN8tPGs77A.cspx (this article makes the point that the shark finning ban that had been in place in Hawai'i was difficult to enforce given the problem of having to prove that the shark finning occurred close to Hawai'i).

b. Second offence is a fine between $15,000-$35,000 and confiscation of property used in the violation (i.e. licenses, fishing gear, vessels);

c. Third violation is a fine of $35,000-$50,000 and/or imprisonment for less than one year and confiscation of property used in the violation.[161]

Hawaiian Democratic Senator Clayton Hee, who championed this legislation, commented that over his 26-year career as an elected official in Hawai'i, he has never witnessed an issue that has been "so deeply cared about by both local and international communities."[162] What at first glance might appear to be a story about local innovation in fact runs much deeper; Senator Hee noted that in addition to local support for this bill, the international response from individuals supporting Hawaii's initiative through electronic mail and from environmental and animal welfare interest groups was both unexpected and overwhelming.[163] Senator Hee has also commented that, "[a]s far as I am concerned it's no different than killing an elephant for its tusks or dehorning a rhinoceros for its horn. These are cruel and inhumane practices that have no business in a civilized world."[164] The legislative product reflects these analogies by doing much more than simply regulating the act of finning—it recognizes "fins as a commodity" and regulates them as such.[165] The novel aspect of Hawaii's legislation, making it the new world standard in terms of addressing the shark finning problem, is that it recognizes both the supply-side and demand-side components of the issue and seeks to limit both.[166]

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[161] *See generally* HAW. REV. STAT. § 188-40.7 (West 2011).

[162] Telephone Interview with Clayton Hee, Democratic State Senator of Hawai'i, (Nov. 16, 2010).

[163] *Id.* (Senator Hee noted in our conversation that he received thousands of emails supporting Hawaii's initiative from all over the world throughout the legislative process).

[164] Tim Sakahara, *Animal Advocates Celebrate Historic Shark Fin Ban*, HAWAII NEWS NOW June 30, 2010, http://www.hawaiinewsnow.com/Global/story.asp?S=12738729.

[165] Interview with Clayton Hee, *supra* note 162.

[166] *See* Press Release, Humane Society of the United States, The HSUS Joins Advocates to Celebrate Landmark Hawaii Shark Protection Law (June 30, 2010), *available at* http://www.humanesociety.org/news/press_releases/2010/06/hawaii_shark_finning_enacted_063010.html; *See generally* Clarke, *supra* note 13, at 321 (assessing various international regulatory efforts to conserve sharks and making a series of recommendations for reform. The authors describe the importance of both supply-side and demand-side efforts to reduce shark finning, and in the context of their recommendations conclude that "[w]hile most of these recommended actions would operate on the supply side of the economic equation, demand side actions, such as consumer awareness and precautionary demand reduction campaigns, also appear appropriate. The target audience for such campaigns would obviously be consumers and potential consumers in mainland China, as no other group can so strongly affect the fate of shark populations.").

C. Demand-Side

1. Elimination of the Legal Hawaiian Market for Shark Fin Soup

The first impact of this legislation that must be discussed is the fact that Hawai'i has taken the bold step of locally banning shark fin soup, the reason that finning occurs in the first place. Just because Asia leads the world in shark fin consumption does not mean that this is the only place where the soup is being consumed. Throughout the United States, Canada, and the rest of the Western world it is possible to purchase fins and soup at local Chinese restaurants and markets.[167] As well, shark fin soup is served within Western Asian communities at the same sort of functions as in China, namely wedding receptions and other celebratory banquets. It is estimated that prior to this ban, twelve restaurants in Hawai'i served shark fin soup, and that there was some opposition to the ban within Hawaii's Chinese population (which is sizeable, accounting for 13% of Hawaii's total population).[168] Further, Hawai'i is highly dependent on tourism and is growing increasingly reliant on affluent Chinese tourists, who will no longer be able to legally consume shark fin soup after July 1, 2011.[169]

Hawai'i demonstrated that it is possible to ban shark fin soup, thereby eliminating at least one market in which shark fins can be bought and sold legally for consumption. This action properly highlights the issue as a problem that is playing out in restaurants and local markets, not just on board fishing vessels where finning occurs. The cruel act itself happens at sea, but this problem cannot be dissociated from the fact that the result is the soup that ends up on the dinner table. By addressing both the act and the product, it is hoped that this will limit the act itself and also reduce the motivation to fin sharks in the first place. Further, local action in Hawai'i has the added benefit of working to dispel the myths and fears that surround sharks. Traditional Hawaiian culture has a rich tradition of revering sharks as ancestral gods, which Senator Hee has noted is being threatened by this indulgent food. This makes Hawai'i particularly well suited as the launching point for a new approach to shark finning regulation.[170] It may be impossible at this point in time to ban shark fin soup in the Asian markets that dominate consumption and trade, but local action is feasible,[171]

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[167] Stop Shark Finning, http://www.stopsharkfinning.net/network.htm (last visited Sept. 18, 2011, 3:11 pm).

[168] Audrey McAvoy, *Hawaii to Make Eating Shark Fins Illegal*, MSNBC (May 29, 2010, 5:58 PM), http://www.msnbc.msn.com/id/37416078/.

[169] *Id.*

[170] *Id.*

[171] *But see* Clarke, *supra* note 13, at 321 (asserting that to be effective, any ban like this

which leads me to the second significant impact of Hawaii's ban on shark fins.

2. A Model for Legislative Reform

Considering that prior to the ban, shark fin soup was only served in 12 restaurants in Hawai'i, the market for shark fin soup in Hawai'i pales in comparison to the Asian markets and that eliminating the consumption of shark fin soup in Hawai'i is by no means a quick-fix to the problems plaguing shark conservation.[172] Nonetheless, this reform demonstrates that it is possible to take effective unilateral action on a state level that is not plagued by the problems preventing the creation of a comprehensive international response. The true impact of this legislation may not be felt until other American states or other countries have implemented similar legislation. As Mary O'Malley of the New York based conservation group Shark Savers notes, "[p]eople from around the word have been following this Hawai'i bill every step of the way. The success of the bill has motivated people in Hong Kong, Malaysia, other states in the U.S., Canada and even Ireland to seek shark-fin ban legislation modeled after the Hawai'i bill."[173] Presently, California, Oregon, Washington State, and Illinois have enacted similar legislation.[174] While it makes sense for coastal nations and states to pay particular attention to this legislation, I suggest that similar legislation has relevance to landlocked nations and states as well, given that the prohibition extends to possession of shark fins and regulates shark fin soup as the ultimate product. Any nation interested in making a statement against this cruel practice could ban the possession of shark fins and ensure that shark fin soup is not legally consumed within its borders. Perhaps eliminating demand may prove to be as effective as eliminating the cruel act itself.

When asked about the potential modeling effect of Hawaii's legislation, Senator Hee replied that he believes Hawai'i has triggered "a Pacific initiative" for shark conservation.[175] Senator Hee's comment refers to

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would have to occur in Asian markets. In the discussion to come I suggest that there are other ways for Hawaii's action to have an international effect).

[172] McAvoy, *supra* note 168.

[173] *Hawaii Says No to Shark Fin Soup*, UPI.COM SCIENCE NEWS (May 29, 2010), http://www.upi.com/Science_News/2010/05/29/Hawaii-says-no-to-shark-fin-soup/UPI-35471275161131/.

[174] Don Gourlie, *Comparing the US Shark Fin Bans*, SHARK DEFENDERS (Feb. 7, 2012), http://www.sharkdefenders.com/2012/02/comparing-us-shark-fin-bans.html [Gourlie].

[175] Interview with Clayton Hee, *supra* note 162. *See also* Richard Black, *Palau Pioneers 'Shark Sanctuary'*, BBC NEWS (Sept. 25, 2009), http://news.bbc.co.uk/2/hi/ 8272508.stm

recent legislative action by Pacific island nations that are following Hawaii's innovation. First, on July 1, 2010, Representative Gloria Macapagal Arroyo of the House of Representatives of the Philippines introduced H.B. 174 to the Fifteenth Congress of the Philippines (First Regular Session), titled An Act Banning the Catching, Sale, Purchase, Possession, Transportation and Exportation of All Sharks and Rays in the Country and for Other Purposes (Sharks and Rays Conservation Act of 2010).[176] This bill is similar to Hawaii's legislation in that it makes possession and trade of shark fins illegal, but it goes even further as it: (i) extends this prohibition to rays as well; (ii) extends protection to shark and ray habitats; (iii) makes illegal the mere wounding of sharks and rays; and (iv) contemplates a more severe punitive regime for violations of the bill, which includes imprisonment for up to twelve years and fines of up to 1,000,000 Pesos.[177] Second, on July 22, 2010, Representative Dieto T. Benavente introduced in the House of Representatives of the Seventeenth Northern Marianas Commonwealth Legislature H.B. 17-94, titled A Bill for an Act to Prohibit Any Person From Possessing, Selling, Offering for Sale, Trading or Distributing Shark Fins in the CNMI.[178] This legislation is nearly identical to Hawaii's legislation; the only notable difference being that H.B. 17-94 only provides restaurants selling shark fin soup ninety days to sell existing stock from the date the law is enacted before shark fin

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(this article describes another aspect of innovative action taking place in the Pacific that Senator Hee also referred to in our telephone conversation. Specifically, the small Pacific Island country of Palau has designated its entire Exclusive Economic Zone as a shark sanctuary, effective September of 2009. This article indicates that the sanctuary is 230,000 square miles in size. Palau has also lobbied internationally for a complete ban on shark fishing, and this article recognizes that this country of only 20,000 inhabitants was motivated to introduce this ban on all shark fishing since the primary industry in Palau is tourism which relies on scuba diving and maintaining a healthy reef ecosystem. Sharks help maintain this healthy reef ecosystem and are also an attractive feature for divers that come to Palau).

[176] An Act Banning the Catching, Sale, Purchase, Possession, Transportation and Exportation of All Sharks and Rays in the Country and for Other Purposes, House Bill No. 174 (2010), (Phil.), *available at* http://www.congress.gov.ph/download/basic_15/ HB00174.pdf.

[177] *Id.* at §§ 4-6. This bill has not progressed though the committee stage, and in the meantime a strikingly similar bill (Senate Bill 2616) was introduced at the end of 2010 and is also currently being considered at committee level (*see* An Act Banning the Catching, Sale, Purchase, Possession, Transportation, Importation and Exportation of all Sharks and Rays or Any Part Thereof in the Country, Senate Bill No. 2616 (2010), (Phil.) *available at* http://www.senate.gov.ph/lisdata/104688961!.pdf).

[178] A Bill for an Act to Prohibit Any Person From Possessing, Selling, Offering for Sale, Trading or Distributing Shark Fins in the CNMI, House Bill No. 17-094 (2010), (CNMI), available at http://www.cnmileg.gov.mp/documents/house/hse_bills/17/HB17-094.pdf.

possession becomes illegal.[179] After passing through the House of Representatives and more recently the Senate, on January 27, 2011, Governor Benigno R. Fitial signed H.B. 17-94 into law as CNMI Public Law 17-27.[180] As originally conceived, this law bans all shark finning and the sale or consumption of shark fin products will be illegal after the expiration of the ninety day grace period starting January 27, 2011; however, it should be noted that this ban does not affect the ability to continue to fish for sharks in the waters of CNMI for subsistence or other non-commercial purposes.[181] After signing this bill into law, Governor Fitial stated that "[t]oday, we [CNMI] proudly follow suit behind Palau's creation of a shark sanctuary in 2009, Hawaii's law banning all shark products in 2010, and President Obama's enactment of the Shark Conservation Act just this past January 4th [2011]."[182] Similarly, on January 21, 2011 at the Thirty-first Guam Legislature 2011 (First) Regular Session, Vice Speaker and Senator Rory Respicio introduced Bill 44-31, titled An Act to Prohibit the Possession, Selling, Offering for Sale, Trading, or Distribution of Shark Fins and Ray Parts.[183] This bill was signed into law by Governor Calvo on March 9, 2011 and has substantially the same goals as the CNMI legislation.[184]

More recently, Hawaii's legislative efforts have been modeled by other American states. For example, Washington state brought the shark fin ban to the continental United States when Governor Chris Gregoire signed Senate Bill 5688 into law on May 12, 2011.[185] Similarly, on August 12, 2011 Oregon Governor John Kitzhater signed a ban on shark fin trade into law,[186] on October 7, 2011 California's Governor Jerry Brown signed bill AB376 (which bans the sale, trade and possession of shark fins) into law,[187]

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[179] *Id.* at § 2.

[180] Haidee V. Eugenio, *Shark Finning Ban Now a CNMI Law*, SAIPAN TRIBUNE (Jan. 28, 2011), http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=106535.

[181] *Id.*

[182] *Id.*

[183] An Act to Prohibit the Possession, Selling, Offering for Sale, Trading, or Distribution of Shark Fins and Ray Parts, House Bill 44-31, 2011, (Guam), *available at* http://www.guamlegislature.org/Bills_Introduced_31st/Bill%20No.%20B044-31%20(COR).pdf.

[184] *See* Press Release, WildAid (Mar. 9, 2011), *available at* http://www.reuters.com/article/2011/03/10/idUS23020+10-Mar-2011+PRN20110310.

[185] *See* Press Release, The Center for Oceanic Awareness, Research, & Education, Historic Washington Legislation Protects Sharks (May 12, 2011), *available at* http://coare.org/press/20110512-wafinban.pdf.

[186] *Breaking: Oregon Governor Signs Shark Fin Trade Ban,* OCEANA (Aug. 4, 2011), http://na.oceana.org/en/blog/2011/08/breaking-oregon-governor-signs-shark-fin-trade-ban.

[187] *California Shark Fin Ban Becomes Law,* FOX NEWS, Oct. 7, 2011, http://www.myfoxla.com/dpp/money/california-shark-fin-ban-becomes-law-20111007.

and as of January 1, 2013 shark finning is illegal in Illinois (being the first inland state to enact a ban).[188] Certain law makers in California, most notably Senator Leland Yee (D-San Francisco), adamantly opposed this ban and characterized it as cultural discrimination and Senator Yee referred to it before it became law as an "an unfair attack on Asian culture and cuisine."[189] Most recently, similar bans on shark fin possession and trade have been considered along the Atlantic seaboard in Florida, Virginia, Maryland, and New York.[190] Only time will tell how many more nations or states will follow the example set by Hawai'i. Nonetheless, it is encouraging that Hawaii's action has been noticed and emulated in other jurisdictions, seemingly initiating a legislative chain-reaction in the Pacific. Undoubtedly, Hawaii's initiative has set the standard for the future of shark conservation.

3. Lending Credibility to a Growing Grassroots Movement

The other potential impact that Hawaii's Shark Fin Prohibition could have is that it lends credibility and serves as a rallying point for a growing grassroots movement against shark finning and shark fin soup consumption emerging throughout the world.[191] One of the major functions that a wide

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[188] *Shark fin off the menu in Illinois; ban kicks in Jan. 1*, CHICAGO SUN-TIMES, Dec. 31, 2012, http://www.suntimes.com/news/metro/17320423-418/shark-fin-off-the-menu-in-illinois-ban-kicks-in-jan-1.html.

[189] Stephanie Ulmer, *California Shark Fin Ban on its Way to Full Senate*, ALDF BLOG (Aug. 30, 2011), http://aldf.org/article.php?id=1803.

[190] Elisabeth Rosenthal, *New York May Ban Shark Fin Sales, Following Other States*, NEW YORK TIMES, Feb. 21, 2012, http://www.nytimes.com/2012/02/22/nyregion/bill-in-albany-would-ban-sale-of-shark-fins.html?_r=2&.

[191] *See generally* Srilatha Batiwala, *Grassroots Movements as Transnational Actors: Implications for Global Civil Society*, 13 VOLUNTAS 393 (2002) (in this paper, the author describes the emergence of international grassroots movements that target environmental, human rights and gender equality issues; these movements may be a product of globalization and they have assumed many forms with varying levels of organization). *Id.* at 400 (the author describes grassroots movements as "movements of, for, and by the people most directly affected by the consequences of public policies."). *Id.* at 394 (grassroots movements have "formed a virtual quasi-state at the global level because they are reshaping national policies and pushing forward legislative and fiscal reforms."). *Id.* at 401-02 (Batiwala provides two examples in this paper to support the proposition that grassroots movements are expanding beyond localities to create cross-border and cross-cultural connections for pressing issues, and gaining legitimacy in the process. The first example provided is the emergence of Women in the Informal Economy Globalizing and Organizing (WIEGO), which has a grassroots component that engages an international network for workers based at home, a marginalized group traditionally ignored by union movements. WIEGO has, since its creation in 1997, formed working arrangements with other international institutions and established a framework within which "statisticians, economists, activists and

variety of environmental non-governmental organizations (ENGOs) and animal welfare groups interested in shark conservation has undertaken is information dissemination and education about the negative effect that shark fin soup consumption is having on the world's shark populations. Hawaii's example demonstrates that meaningful legislative action targeting shark fin soup is possible.

The importance of this educational component cannot be understated, and it is currently occurring in many forms. This educational component can be broken into two subsets, the first being action within Asia, and the second being action targeting Asian communities in other parts of the world. One such example is the pressure that was exerted by the Sea Shepherd Conservation Society (an international not-for-profit marine conservation organization) on the Disney Corporation, who was planning on serving shark fin soup at their themed hotel in Hong Kong.[192] A vigorous ad campaign by the Sea Shepherd Conservation Society and other animal rights groups resulted in considerable negative media attention for Disney, who decided to remove shark fin soup from their menu.[193] Another such campaign within Asia was initiated in 2009 by WildAid (a group devoted to reducing demand for wildlife products), who partnered with international Chinese basketball sensation Yao Ming to produce a public service announcement and a series of billboards aimed at educating the Chinese population about potential adverse consequences of eating shark fin soup and the inhumane and cruel finning practice utilized to obtain the fins.[194] This movement is also gaining momentum amongst the younger generation in China who appear to be willing to challenge ecologically

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organizers, policy analysts, and academics from different disciplines" can contribute towards one common goal). *Id.* at 402-04 (WIEGO has links from Asia to Latin America and is recognized and considered by formal institutional organizations such as the United Nations. The second example is Slum/Shack Dwellers International (SDI), a group composed of Asian and African slum and shack dwelling urban poor that have partnered with NGOs; founded in 1996, SDI represents the interests of urban poor and was initially designed to facilitate their participation with local officials to coordinate better living conditions by incorporating slum/shack dwellers interests in infrastructure decision making procedures. Internationally, SDI has helped implement sanitation projects for slums as projects tendered by World Bank India, and has also experienced European sponsored but community-led infrastructure projects. These movements are further advanced than the anti-shark finning movement I describe in this paper, but they usefully demonstrate how individual/community action coupled with NGO support can have an international effect).

[192] Sea Shepherd Conservation Society, *Disney Agrees to Ban Shark Fin Soup: Hong Kong Disney to be a Shark Fin Free Zone*, SEA SHEPHERD (Jun. 24, 2005), http://www.seashepherd.org/news-and-media/news-050624-1.html).

[193] *Id.*

[194] *Chinese Basketball Hero, Yao Ming Acts to Saves the Sharks*, WILDAID, Dec. 20, 2009, http://www.wildaid.org/news/chinese-basketball-hero-yao-ming-acts-saves-sharks.

harmful traditions.[195] For example, Steven Leung and Sylvia Chung, a southern Chinese couple who were recently married, decided to leave shark fin soup out of their traditional Cantonese 13-course wedding banquet because of their objection to the practice of shark finning, an action which received international press coverage.[196] Since Hawaii's ban on shark fin possession and shark fin soup was legislated, this movement has gained momentum in China, and reported action includes the following: (i) computer programmer Clement Lee has established a Facebook group in China that asks wedding guests to reduce their wedding gifts by 30% if the couple serves shark fin soup, and a second Facebook group that pressured City Bank Hong Kong to eliminate a shark fin soup dinner discount for card holders; (ii) Hong Kong based environmental group Green Sense has organized a pledge from 182 primary and secondary schools in China to no longer serve shark fin at their banquets; (iii) Mak Ching-po, the chairman of the Hong Kong Dried Seafood and Grocery Merchants Association, has stated, "our shark fin business has dropped considerably;" (iv) local restaurants are starting to advertise shark fin free menus; and (v) the Government of China has indicated that it will stop serving shark fin soup at official government functions by 2015.[197]

This grassroots movement is also gaining momentum in the Western world. For example, Hawaiian born Chinese-American actress Kelly Hu attended the signing of the bill into law and describes her role following the enactment of this law as follows: "I'm here to encourage other Asian Americans to help end the demand by talking, blogging and tweeting about this bill and encouraging their friends to support the bills in their areas prohibiting the sale and possession of shark fins as we have here . . . [t]he way to stop shark finning all together is to stop the demand for the product."[198] Renowned nature filmmaker Bob Nixon was also in attendance, stating that he plans to include this legislation in his upcoming film, Mission Blue, about the future of our oceans as a beacon of hope in a generally pessimistic subject area.[199] Asian couples in Vancouver, Canada are also starting to voluntarily eliminate shark fin soup from their wedding banquets, and Vancouver-based shark conservation group Shark Truth runs

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[195] *Hong Kongers Wage Campaign Against Shark Fin*, FOX NEWS, Aug. 18, 2010, http://www.foxnews.com/leisure/2010/08/18/hong-kongers-wage-campaign-shark-fin/.

[196] *Id.*

[197] *Id.*; *See* Katie Hunt, *China plans banquet ban on shark fin*, CNN, Jul. 3, 2012, http://www.cnn.com/2012/07/03/world/asia/china-shark-fin.

[198] Sakahara, *supra* note 164.

[199] *Id.*

wedding banquet seminars and contests to educate and reward couples that decide to not serve shark fin soup.[200]

D. Supply-Side

It has been suggested that prior to the shark finning prohibition that was enacted in Hawai'i in 2000, Hawai'i was a major hub for the trade of shark fins in Asia.[201] The previous prohibition did not prohibit ships from entering Hawaiian harbors with fins aboard, given the difficulty of proving that the finning in fact took place in Hawaiian waters, which was a legislative requirement.[202] This shortfall also made it impossible to prohibit trans-ship transfer of fins and the storing of shark fins in Hawaii's harbors in warehouse-sized quantities, which "allowed Hawaii to be the Pacific hub for the shark fin trade in Asia and beyond."[203] Further, fishermen that were able to evade this law engaged in a dockside trade in fins that were purchased and then sent directly to Asia.[204]

The supply-side consequence of Hawaii's new legislation is that it should help to shut down trade that was able to circumvent existing laws. Whether this legislation is able to accomplish this goal will depend largely on the emphasis that is placed on enforcement. In theory, enforcement should be much simpler than it has been in the past, given that shark fins have essentially been elevated to the status of contraband,[205] and without a permit any ship or restaurant (after July 1, 2011) that is found to have shark fins is subject to sanction.[206]

By comparing the treatment of shark fins to elephant tusks or rhino horns, Senator Hee indirectly highlights one of the key challenges that will have to be addressed in Hawai'i moving forward—the black market. It is

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[200] Larry Pynn, *The Dangerous Allure of Shark-Fin Soup and the Grassroots Movement to Combat it*, THE VANCOUVER SUN, Oct. 25, 2010, http://www.vancouversun.com/technology/dangerous+allure+shark+soup+grassroots+movement+combat/3722642/story.html; *See Wedding Contest*, SHARK TRUTH (Jun. 2010), http://www.sharktruth.com/stop-the-soup/wedding/contest/.

[201] Mangieri, *supra* note 160.

[202] *Id.*

[203] *No More Shark Fin Soup: Hawaii's Shark Fin Ban Takes Effect*, ENVIRONMENTAL NEWS SERVICES, Jun. 30, 2010, http://www.ens-newswire.com/ens/ jun2010/2010-06-30-093.html.

[204] Spiegel, *supra* note 2, at 422.

[205] Bill Harrigan, *Extinct for Soup?*, ALERT DIVER ONLINE, http://www.alertdiver.com/?articleNo=413.

[206] *No More Shark Fin Soup: Hawaii's Shark Fin Ban Takes Effect*, ENVIRONMENTAL NEWS SERVICES, Jun. 30, 2010, http://www.ens-newswire.com/ ens/jun2010/2010-06-30-093.html.

understood that a "lucrative trade [in illegal animal parts] has propelled the global black market in wildlife to crisis proportions," and because there is high demand for shark fins, the black market that undoubtedly already exists in Hawai'i for fins will adapt to exploit the market.[207] The reality of wildlife trade is that "[a]s long as buyers are willing to pay for protected wildlife species, suppliers will continue their grisly work, providing animals either dead or alive to collect what amounts to a bounty on the head of every protected species."[208] Given the considerable media attention that has focused on this innovative legislation, it is this author's hope that enforcement agencies will be given the resources necessary to fulfill the legislative mandate, combat attempts to take the trade in shark fins in Hawai'i underground and onto the black market, and demonstrate to the rest of the world that this legislation is not only possible in theory but also practical in implementation.

VI. CONCLUSION

2010, the International Year of Biodiversity, came to a close with a whimper and the observation that "the rate of biodiversity loss does not appear to be slowing," suggests that the status quo persists.[209] This realization makes innovative reform in the face of persistent problems (and recognition of such efforts) all the more important. When one considers the magnitude and complexity of the issues inhibiting our response to global biodiversity loss, it is discomforting that the international community, thus far, has unequivocally failed to protect sharks from finning. The reality is that sharks have survived for hundreds of millions of years as top oceanic predators, but many species are now precariously poised on the brink of extinction because of an increasing demand for a luxury food item.[210]

It is not the purpose of this paper to suggest that pursuing meaningful international shark finning regulation is a frivolous pursuit; however, it is this author's opinion that in light of consistent international setbacks attributable to identifiable weaknesses of the international approach to shark finning regulation, it is important to recognize creative domestic reforms and demonstrate to the international community that meaningful regulation is in fact possible. The recent shark protections provided by the ICCAT indicate that the international community is aware of the fact that CITES COP 15 was a failure, but it is not possible to conclude that this one

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[207] McMurray, supra note 68, at 16; *See* Paul, *supra* note 14, at 3.

[208] McMurray, *supra* note 68, at 20.

[209] Stuart H. M. Butchart et al., *Global Biodiversity: Indicators of Recent Declines*, SCIENCE, May 28, 2010, at 1164.

[210] REPORT OF THE IUCN, *supra* note 115, at 1.

gesture alone signals a sea change in international shark conservation. Furthermore, given the current rate of shark population reduction, it is not prudent to simply focus on re-doubling efforts to have commercially valuable shark species listed by CITES at COP 16,[211] where, at the time of writing, five Appendix II shark species listing proposals are being considered by the international community.

Hawaii's Shark Fin prohibition alters the established international approach to shark finning by addressing both the demand-side and supply-side components of the finning problem, and by effectively circumventing the hurdles that have persistently compromised international regulation. The effectiveness of Hawaii's innovation may succeed or fail on two fronts: (i) how stringently the administrative regime is enforced; and (ii) the extent to which other American states or nations follow Hawaii's example and do their part towards ending this meaningless shark slaughter. For many commercially exploited shark species, we may have already passed the threshold for recovery, and for others that threshold is fast approaching. As the future of sharks hangs in the balance, "[t]he key is to be organized, focused, and direct;"[212] it is incumbent on every individual who has read this paper or otherwise becomes aware of the shark finning problem, to elect to not consume shark fin soup, to educate those who may not yet be aware of this ongoing tragedy, and to support innovative reforms that may in fact help prevent mass shark extinction.

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[211] *Contra* Lieberman, *supra* note 81, at 9.

[212] Earl Blumenauer, *The Role of Animals in Livable Communities*, 7 ANIMAL L. i, vi (2001) (addressing how we must act to co-exist with animals and the value that can be gained from discovering this balance). *Id.* at iii ("[i]t is not due to a lack of knowledge, money or ability that we disregard the welfare of animals and our environment. It is a failure of our political will—and more importantly, our failure as individuals—when we do not speak out and do our part.").

Missing the Men: Defining Female Servicemembers as Primary Caregivers in Deployment Deferral Policy

Malcolm Wilkerson*

"[A] father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised[; such right] undeniably warrants deference and, absent a powerful countervailing interest, protection.'"
-Weinberger v. Wiesenfeld[1]

I. INTRODUCTION

A. Soldiers vs. Caregivers: Evolving Conceptions of Sex Roles

America is currently engaged in the longest war in its history.[2] Female servicemembers have played an integral part in this Global War on Terror, including active participation in ground combat operations. In 2005, two female Soldiers received the nation's third highest award for combat valor, the Silver Star, for their battlefield actions in Iraq[3] and Afghanistan.[4] As of

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[1] Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1975).

[2] Thomas Nagorski, *Editor's Notebook: Afghan War Now Country's Longest*, ABC NEWS (June 7, 2010), http://abcnews.go.com/Politics/afghan-war-now-longest-war-us-history/story?id=10849303 ("And today 'The Other War' has gained a fresh and dubious distinction: it is the longest war in our nation's history, surpassing the conflict in Vietnam. 103 months passed between passage of the Gulf of Tonkin Resolution and the withdrawal of the last American combat forces from Vietnam. As of today, the Afghanistan war is 104 months old.").

[3] Sara Wood, *Woman Soldier Receives Silver Star for Valor in Iraq*, AMERICAN FORCES PRESS SERVICE (June 16, 2005), http://www.defense.gov/news/newsarticle. aspx?id=16391 ("Being the first woman soldier since World War II to receive the medal is significant to Hester. But . . . she doesn't dwell on the fact. 'It really doesn't have anything to do with being a female,' she said. 'It's about the duties I performed that day as a soldier.'").

[4] *Female Medic Earns Silver Star in Afghan War: 19-Year-Old Only Second Woman to Receive Valor Award Since WWII*, ASSOCIATED PRESS (Mar. 9, 2008, 12:41 PM),

2007, female servicemembers comprised over fourteen percent of the active duty military;[5] and since 2001, nearly half of women in the active duty force have deployed to the Middle East in support of Operation Iraqi Freedom or to Afghanistan in support of Operation Enduring Freedom.[6] By 2010, 113 women have died during military operations in Iraq and Afghanistan.[7] Indeed, since 1994, women may be assigned to perform virtually any of the duties traditionally held by male soldiers.[8] And with former-Secretary of Defense Leon Panetta's recent announcement, the presumption against female participation in all combat roles has fallen.

Meanwhile in the last 30 years, the traditional understanding of the male role has also expanded substantially. Studies indicate that married couples place an increasing value on shared parenthood, and the total time that fathers spend exclusively on child care each week has risen considerably. In ranking the values that married couples wished to reflect in their marriage, a 1997 study found that the value of "shar[ed] responsibilities, decision-making and physical and emotional care of infants and young children" was the second most important priority among newly married couples surveyed, a value that ranked only eleventh out of fifteen just sixteen years earlier.[9] Another study found that the time that married fathers spent exclusively on child care doubled from 1965 to 2000.[10]

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http://www.msnbc.msn.com/id/23547346/ns/us_news-military/t/female-medic-earns-silver-star-afghan-war/.

[5] JOINT ECON. COMM., 109TH CONG., Rep. ON HELPING MILITARY MOMS BALANCE FAMILY AND LONGER DEPLOYMENTS 1 (2007).

[6] *Id.*

[7] HANNAH FISCHER, U.S. MILITARY CASUALTY STATISTICS: OPERATION NEW DAWN, OPERATION IRAQI FREEDOM, AND OPERATION ENDURING FREEDOM, CONG. RESEARCH SERV., RS22452 at 2-3 (2010).

[8] Memorandum from Sec'y of Defense Les Aspin to the Sec'y of the Army, Navy, and Air Force et al., (Jan. 13, 1994) (on file with author) (Women are presently ineligible for assignment to "units below the brigade level whose primary mission is to engage in direct combat on the ground.").

[9] Adrienne Burgess, *The Costs and Benefits of Active Fatherhood: Evidence and Insights to Inform the Development of Policy and Practice* 1, 8 (2006), http://www.fatherhoodinstitute.org/uploads/publications/247.pdf (citing J.H. PLECK, Paternal Involvement: Levels, Sources, & Consequences *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (M.E. Lam ed., 1997)).

[10] *Id.* at 7 (citing S.M. BIANCHI, J.P. ROBINSON, & M.A. MILKIE, CHANGING RHYTHMS OF AMERICAN FAMILY LIFE (2006)).

Although lingering traditions may still define conventionally selected professional and social paths, both the Constitution and evolving social customs permit men and women to follow a path of their choosing. What were once exclusive spheres—the male domain and the female domain—now overlap almost entirely. And society itself has moved to, at least, an implicit appreciation that both partners can play—and do play—a role of significance in raising their children.

Despite legal, social, and political changes, however, the U.S. Department of Defense ("DoD") continues to maintain a policy that treats men and women inequitably. Specifically by permitting active duty mothers to temporarily forego their military duties in order to remain behind as the primary caregivers of newborn children and rejecting the proposition that military fathers might be equally—or even preferably—situated to provide that care, DoD perpetuates sex-based stereotypes among military personnel—at the same time that DoD has moved toward greater equality in all other career assignments. Not only does this treatment offend modern appreciation for the equality between men and women, but it also runs afoul of the Equal Protection Clause of the Constitution.

B. The DoD Post-partum Deferment Policy

DoD Instruction ("DoDI") 1315.18, *Procedures for Military Personnel Assignments*, provides that for the four months after bearing a child, a female servicemember is deferred from being deployed to (1) a dependent-restricted overseas tour, such as a deployment to Afghanistan and a variety of lesser-known assignments throughout the world; or (2) an accompanied overseas tour when concurrent travel is denied, including many assignments in South Korea.[11] The DoDI articulates no reason for this exemption. DoDI 1342.19, *Family Care Plans*, repeats the deployment deferment for post-partum military mothers, but it expands the coverage to include "duty away from home station,"[12] which includes temporary duty for school or training away from the servicemember's duty station. To opt-out of the deployment deferment, the military mother must expressly waive the deferment.[13] Noting in either directive turns the application of the policy on the mother's post-partum health. Indeed standing alone, this

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[11] U.S. DEP'T. OF DEF., INSTR. NO. 1315.18, PROCEDURES FOR MILITARY PERSONNEL ASSIGNMENTS, para 6.10.4 (2005) [hereinafter *DoDI 1315.18*].

[12] U.S. DEP'T. OF DEF., INSTR. NO. 1342.19(4)(g)(1), FAMILY CARE PLANS, (2010) [hereinafter *DoDI 1342.19*].

[13] DoDI 1315.18, para 6.10.4.

policy would allow a mother who suffered from post-partum complications to waive the policy's protection even at the expense of her own health.

Because this blanket restriction does not turn on the post-partum health of the military mother, this provision demonstrates DoD's preference that military mothers of newborns be allowed to "stay" a deployment for at least four months in order to care for newborn children. But military fathers of the same, who may be equally able to care for the child or who the couple jointly decided should be the parent who cares for the child, are not permitted that exemption, and are required to leave their families and focus on their military duties.

To be sure, it is DoD's policy that all servicemembers-both male and female-are responsible for the care of their dependents during deployments and temporary duty. The military itself is under no obligation to provide additional services or otherwise accommodate servicemembers or their families during deployments away from their home station.[14]

Despite that fact, DoD's post-partum deployment deferment explicitly accommodates mothers in the care of their newborn dependents. DoDI 1342.19 states plainly that its purpose is "to assist Service members in developing family care plans and establishing a pattern of child care."[15] But neither justification is solely the domain of the female servicemember.

First a "pattern of child care" is not defined in DoDI 1342.19 or any other DoD policy. But establishing a pattern of child care is a responsibility that is ostensibly shared equally between fathers and mothers. "Family care plans" are written tools that provide for the care of a servicemember's dependents when he or she is away on military orders for any duration.[16] Basically, family care plans are child custody plans. And Family care plans are required of all single military parents with custody of children and of

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[14] *See* DoDI 1342.19(4)(a) ("All service members identified . . . shall plan for contingencies in the care and support of dependent family members, and shall develop and submit a family care plan within the timeliness *set forth in this Instruction.*") (emphasis added).

[15] DoDI 1342.19(4)(g).

[16] DoDI 1342.19(3). A family care plan is defined as:

> [a] document that outlines, on Service-specific forms, the person(s) who shall provide care for a Member's dependent family members in the absence of the Member due to military duty (training exercises, temporary duty, deployments, etc.). The plan outlines the legal, medical, logistical, educational, monetary, and religious arrangements for care of the Member's dependent family members. The plan must include all reasonably foreseeable situations and be sufficiently detailed and systematic to provide for a smooth, rapid transfer of responsibilities to the caregiver in the absence of the Member.

Id.

dual-military couples with dependents.[17] A servicemember who fails to maintain a valid family care plan can be involuntarily separated from the Armed Forces under DoD Directive ("DoDD") 1332.14 or DoDD 1332.30.[18] While the military clearly places considerable emphasis on the importance of establishing a family care plan, the obligation to establish such a plan falls equally on military fathers and mothers. Why, then, does DoDI 1342.19 afford only military mothers—and not military fathers—a four-month deployment deferment following the birth of a newborn to establish such a plan?

Although the deployment-deferment policy has been the subject of political interest, the reason for that interest has been equity among the services, not equity between parents. Specifically, DoDI 1315.8 sets only floor for each military department, each military department (e.g., the Department of the Army) can make its post-partum deployment deferment longer than four months: the Air Force's deferment is four months,[19] the Army's is six months,[20] the Marine Corps' is six months,[21] and the Navy's is twelve months.[22] No military department has extended the deferment to include military fathers of newborn children. Congressional inquiry into DoD's post-partum deployment deferment policy has focused on equalizing deferment length differences between military branches. Such a focus on this policy is typified by Senator Claire McCaskill's call for a "single, equitable [DoD] policy" for deployment deferment that makes "medical, including psychological, considerations of the *mother* and newborn child the first priority of the policy."[23]

In 2009, it was predicted that approximately 76,000 military men would become fathers.[24] Although the era of persistent deployments to Iraq has

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[17] DoDI 1342.19(1)(b).

[18] DoDI 1342.19(4)(c).

[19] Brian Mann, *Military Moms Face Tough Choices*, NATIONAL PUBLIC RADIO (May 26, 2008), http://www.npr.org/templates/story/story.php?storyId=88501564.

[20] *Id.* The Army recently changed its policy from four months to six months. Memorandum from the PTC Washington D.C. to ALARACT (July 15, 2008), *available at* http://www.armyg1.army.mil/MilitaryPersonnel/ppg/Hyperlinks/Adobe%20Files/ALARACT%20171%202008.pdf.

[21] Mann, *supra* note 19.

[22] *Id.*

[23] Claire McCaskill, *McCaskill Urges Sec. Gates to Adopt Uniform, Fair Maternity Leave Policy* (Feb. 21, 2008), http://mccaskill.senate.gov/?p=press_release&id=450 (emphasis added).

[24] Tom Philpott, *Military Update: Senators OK Extra Leave for Military Dads*, STARS AND STRIPES (May 10, 2008), http://www.stripes.com/news/military-update-senators-ok-extra-leave-for-military-dads-1.78659.

ended and is ending in Afghanistan, it is unlikely that deployments to dangerous and austere locations will end entirely. And despite the fall from use of the term the "Long War,"[25] DoD personnel policies must assume that such a war is potentially in the offing.

DoD itself has recognized the value of supporting military families and strengthening the family unit. DoDD 1342.17, *Family Policy*, states that "DoD personnel and their families are the most valuable resource in support of the national defense. DoD families serve as a force multiplier, contributing to the readiness and retention of quality personnel."[26] DoD's conception of "family," however, is out of step with the modern understanding of this social structure and the ideals that have come to define it. American society has attributed to fathers an increasingly equal and active role in child care and development, but that understanding of the role of fathers in child care has not informed DoD policy.[27] To the extent that DoD policies address family issues, including child care, those policies ought to reflect the social norm that men and women are equally situated in parental responsibility.

Setting aside these further developments to our social consciousness, however, the Constitution does not permit this type of social-based differentiation between men and women. Absent a compelling biological basis for distinguishing between the care that a mother can provide her newborn and the care that a father can provide his newborn, deployment-deferment policies may not unequally draw a distinction between the parental roles of mothers and fathers.

II. EQUAL PROTECTION ANALYSIS

The Equal Protection Clause of the Fourteenth Amendment sets forth that "[n]o State shall . . . deny any person within its jurisdiction the equal protection of the laws."[28] The Supreme Court has held that the Equal Protection Clause applies to the federal government through the Due Process Clause of the Fifth Amendment.[29] Under the Equal Protection

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[25] U.S. DEP'T. OF DEFENSE, NATIONAL DEFENSE STRATEGY (June 2008), *available at* http://www.defense.gov/news/2008%20national%20defense%20strategy.pdf.

[26] U.S. DEP'T. OF DEFENSE, DIR. NO. 1342.17, FAMILY POLICY, para E3.1.1 (Dec. 30, 1988; certified current as of November 21, 2003) [hereinafter *DoDD 1342.17*].

[27] *See* discussion *infra* Part III.D.1.

[28] U.S. CONST. amend. XIV, § 1.

[29] *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); Buckley v. Valeo, 424 U.S. 1, 93 (1976) (stating that the equal protection analysis for Fifth Amendment is same as the Fourteenth

Clause, all government actors, both state and federal, must treat similarly situated individuals alike;[30] if individuals are not similarly situated, then the government may treat them differently subject, or course, to other provisions of the U.S. Constitution.[31] With respect to sex discrimination, "the state cannot treat women who are similar to men in interests and abilities as if they are different just because they are women,"[32] nor can it, applying the same analysis, treat men as though they were different from women.[33]

In order to state a claim under the Equal Protection Clause, a plaintiff must show how the government action is "purposeful discrimination,"[34] either facially or in impact.[35] Government action that singles out males or females, and treats them differently according to sex constitutes facial discrimination.[36] Sex is a quasi-suspect class and is subject to intermediate

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Amendment); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)) ("Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'").

[30] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (stating that the Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike.").

[31] *See* Rostker v. Goldberg, 453 U.S. 57, 76-78 (1981) (holding that women and men are not similarly situated for means of conscription because women are ineligible for military combat); M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 471 (1981) (upholding statutory rape law because "young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity.").

[32] Jill E. Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 152 (2008).

[33] Orr v. Orr, 440 U.S. 268, 278-80 (1979).

[34] *Accord* Washington v. Davis, 426 U.S. 229, 240 (1976) ("[t]he basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

[35] *See, e.g.*, Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 148-153 (1993); Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1735-1737 (1989) (quoting Regents of the Univ. of Cal. V. Bakke, 438 U.S. 265, 407 (1978)) (Supreme Court decisions about affirmative action has shown two distinct positions: "The first . . . interprets equal protection as requiring that the same protection be given to every person regardless of race. The second is . . . 'in order to treat some persons equally, we must treat them differently.'").

[36] *See* Craig v. Boren, 429 U.S. 190 (1976) (striking down facial sex classification that women in Oklahoma could buy low-alcohol beer at age 18, but men not until 21); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (striking down law that men, but not women, could dispose

scrutiny by the judiciary.[37] For a court to uphold such action, the government must show that the classification "serve[s] important governmental objectives and must be substantially related to achievement of those objectives."[38] The burden of that justification is demanding and falls "entirely on the State."[39] Courts are free to accept the government's proposed objectives for the discriminatory action or to determine that the proposed objectives are post-hoc rationalizations,[40] and to examine *sua sponte* what it considers are the "actual state purposes."[41] Unlike strict scrutiny, which requires narrow tailoring of means and ends, the test for intermediate scrutiny is less rigorous;[42] indeed, the Court has exhibited a great willingness to defer to congressional judgments on the connection between a government actor's stated objectives and a particular classification.[43] In general, the Supreme Court has upheld sex-based classifications based on physiological differences[44] between men and women but has struck down distinctions based on sex stereotypes.[45]

Sex-based discriminatory policy that occurs in context of the military adds an additional layer of analysis to any Equal Protection claim. The U.S. Constitution vests Congress[46] and the President[47] with the authority to determine how best to organize the United States Armed Forces, and the Supreme Court—recognizing the judiciary's lack of institutional competence in understanding the "complex, subtle, and professional decisions" of military officials[48]—has traditionally deferred to this "broad

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of property without consent of spouse in Louisiana).

[37] *See Craig*, 429 U.S. at 218.

[38] *E.g., id.* at 197; Califano v. Webster, 430 U.S. 313, 316-317 (1977).

[39] United States v. Virginia, 518 U.S. 515, 533 (1996).

[40] *See id.* at 535-36 ("a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.").

[41] *Id.* at 535.

[42] *Id.* at 573-74 ("we held that a classification need not be accurate 'in every case' to survive intermediate scrutiny so long as, 'in the aggregate,' it advances the underlying objective. There is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance.").

[43] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 66 (1981) ("[H]ealthy deference to legislative and executive judgments in the area of military affairs."); Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 94 (2001) ("[W]ide deference afforded to Congress in the exercise of its immigration and naturalization power.").

[44] *See Nguyen* 533 U.S. at 73.

[45] Orr v. Orr, 440 U.S. 268, 283 (1979).

[46] *See* U.S. CONST. art. I, § 8, cls. 12-14.

[47] *See* U.S. CONST. art. II, § 2, cl. 1.

[48] Gilligan v. Morgan, 413 U.S. 1, 10 (1973); *Roskter*, 453 U.S. at 65 (1981).

and sweeping" power.[49] In *Rostker v. Goldberg*, for example, the Supreme Court upheld mandatory male, but not female, draft registration, stating that:

> The existence of the combat restrictions clearly indicates the basis for Congress' decision to exempt women from registration. The purpose of registration was to prepare for a draft of combat troops. Since women are excluded from combat, Congress concluded that they would not be needed in the event of a draft . . . . Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause.[50]

Despite a recent change in DoD policy, which may call into question the factual basis that underlies this premise, the Court has consistently resisted "legislating" military policy from the bench by engaging in broad constitutional interpretations. Yet in spite of this institutional deference, military action is still subject to the fundamental tenets of the Constitution, including the limitations of the Due Process Clause.[51]

III. EQUAL PROTECTION APPLICATION TO POSTPARTUM DEFERMENT POLICY

A. Discriminatory Purpose

DoDI 1315.18 and DoDI 1342.19 require that a post-partum military mother be granted a deferral from conducting duty that takes her away from her home station for the four-month period following childbirth. This policy is purposefully discriminatory on the basis of sex because it takes a cohort of the population—the parents of newborns—and divides men from women. To put it another way, the policy explicitly treats differently two groups who are otherwise equally situated as parents: military mothers, who the policy directly accommodates, and military fathers, who the policy excludes. And there can be no doubt that the policy discriminates between military mothers and military fathers.

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[49] United States v. O'Brien, 391 U.S. 367, 377 (1968). *See* Lichter v. United States, 334 U.S. 742, 755 (1948).

[50] *Rostker*, 453 U.S. at 77-79.

[51] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919).

B. Stated Government Objective: Care for DoD Families

Here, analysis of the government's objective, regardless of whether that objective is stated or underlying, raises two basic issues: (1) identification of the important government interest; and (2) the substantial relationship between that interest and the sex-based rule.[52] As an initial matter, there is an undeniably important government interest in the regulation of the Armed Forces, which the U.S. Constitution expressly places directly within the domain of the Congress[53] and the President.[54]

The stated purpose of DoDI 1342.19 is to "[establish] policy, [assign] responsibilities, and [prescribe] procedures for the care of dependent family members [of DoD personnel] . . . who are: (1) Single Parents[;] (2) Dual-Member couples with dependents[;] (3) [members] . . . who otherwise bear sole responsibility for the care of children under the age of [nineteen] . . . [;] or (4) Primarily responsible for dependent family members."[55] As a general matter, the knowledge that families are cared for likely improves the emotional well-being and mental preparedness of servicemembers, which in turn justifies some level of regulation to ensure that care.

But the policy does more than just ensure that dependent children receive appropriate care; it incentives the assignment of that care to a military mother. Although DoDD 1342.17 suggests the obvious that the care of military families contributes to "the readiness and retention of quality personnel,"[56] DoD 1342.19 fails to state expressly how the assignment of traditionally private parenting responsibilities relates to military effectiveness. Indeed by encouraging the assignment of child care responsibilities to the mother by allowing only the mother to delay a deployment, the policy crosses into the private sphere of familial responsibilities. In a sense, the policy arguably seeks to expand DoD authority beyond the Executive's constitutional mandate to regulate the armed forces. And there remains therefore some question as to whether or not the regulation of familial responsibilities is legitimately within the scope of DoD's authority.

But assuming, *arguendo*, that the government's interest in ensuring the care of DoD family members is legitimate, I assert that the relationship between that government interest and the mothers-only deployment

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[52] *See supra* Part II.

[53] *See* U.S. CONST. art. I, § 8, cls. 12-14.

[54] *See* U.S. CONST. art. II, § 2, cl. 1.

[55] DoDI 1342.19(1)(b).

[56] DODD 1342.17, E.3.1.1. *See supra* Part I.B.

deferment is tenuous, and the written goal of assisting servicemembers "in developing family care plans and establishing a pattern of child care"[57] does not justify the application of the policy to women alone. By excluding men, the poorly crafted policy undermines, rather than promotes, the goals of family care plan development and child care pattern establishment. Worse yet, the exclusion of military men with newborn dependents seems to conform impermissibly to sex-based stereotypes that would relegate primary care-giving duties to women.

C. Stated Government Objective: Family Care Plan and Pattern of Child Care

According to DoDI 1342.19, one justification for the deployment deferment is to assist military mothers of newborns in developing a family care plan. This justification is over-inclusive, as there exists no express requirement that all post-partum military mothers complete a family care plan.[58] On the contrary, a post-partum military mother is required to complete a family care plan only if she falls into one of two groups: (1) if she is a single parent with custody of her child or (2) if she is married to another member of the military and has custody of her child.[59] Furthermore, DoDI 1342.19 fails to provide for the fact that a segment of men is also required to complete a family care; like women, military fathers are required to complete a family care plan if (1) he is a single custodial parent or (2) he is married to another member of the military and has custodial dependents.[60]

The policy does not specify why a mother needs an additional four months to generate a Family Care Plan. And indeed in either case, it seems at least reasonable that both parents could be expected to develop such a plan during gestation. Without reason, therefore, DoDI 1342.19 assists only women in the making of family care plans.

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[57] DoDI 1342.19(4)(g).

[58] The stated purpose of DoDI 1342.19 is to establish policy on the "care of dependent family members of Service members . . . who are: (1) Single parents," "(2) Dual-Member couples with dependents," "(3)[members] . . . who otherwise bear sole responsibility for the care of children under the age of [nineteen]" or "(4) Primarily responsible for dependent family members." DoDI 1342.19(1)(b). When prescribing who is required to complete a family care plan, a similar, albeit not completely same, group is covered: "All Service members identified in paragraph 1.b. . . . shall develop and submit a family care plan within the timeliness set forth in this Instruction." DoDI 1342.19(4)(a).

[59] DoDI 1342.19(1)(b)(3).

[60] *Id.* DoDI 1342.19(1)(b)(3) applies to both mothers and fathers. *Id.*

The second stated justification for the deployment deferment is to allow the military mother of a newborn to establish a pattern of child care.[61] Neither the policy itself nor any other DoD policy explains or defines a "pattern of child care." But taking the words to mean what they say raises the inevitable question: what makes establishing a pattern of child care applicable solely to women?

Supreme Court precedent and empirical research both support the notion that fathers are as important as mothers in a newborn's life and can have a comparable infant relationship. In *Caban v. Mohammed*, the Supreme Court invalidated a New York statute that required the consent of the mother, but not the father, before a child born out of wedlock was placed for adoption.[62] In so doing, the Court expressly rejected the claim that there was a "fundamental difference between maternal and paternal relations"[63] and stated that an "unwed father may have a relationship with his children fully comparable to that of the mother."[64] Stated simply, the *Caban* Court recognized that a father can have a parental relationship with his child equal to that of the child's mother.[65] In *Weinberger v. Wiesenfeld*, the Supreme Court also held that "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, (which) undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[66]

Furthermore, the presence of fathers, especially involved fathers, can—like mothers—be greatly beneficial to the physical care of newborns and their cognitive development. When fathers are highly involved with their infants, those infants tend to be more "cognitively competent at [six] months and score higher on the Bayley Scales of Infant Development."[67] The establishment of an early infant-father relationship also shows

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[61] DoDI 1342.19(4)(g).

[62] Caban v. Mohammed, 441 U.S. 380, 388 (1979).

[63] *Id.*

[64] *Id.* at 389 ("Contrary to appellees' argument . . . maternal and paternal roles are not invariably different in importance."). *Id.*

[65] *Id.*

[66] Weinberger v. Weisenfeld, 420 U.S. 636, 652 (1975) (quoting Stanley v. Ill., 405 U.S. 645, 651 (1972)).

[67] Sarah Allen & Kerry Daly, *The Effects of Father Involvement: An Updated Research Summary of the Evidence* 1 (2007) (citing Frank A. Pedersen et al., *Parent-Infant and Husband Wife Interactions Observed at Age Five Months*, in THE FATHER-INFANT RELATIONSHIP: OBSERVATIONAL STUDIES IN THE FAMILY SETTING 71, 71-86 (Pedersen ed., 1980); Frank A. Pedersen et al., *Infant Development in Father-Absent Families*, 135 J. GENETIC PSYCHOL. 51, 51-61 (1979)).

considerable stability over the infant's first three years of life.[68] In short, apart from breastfeeding (discussed *infra*), there is no biological basis—physical, psychological, cognitive, or otherwise—for distinguishing between male and female parents in their ability to act as caregivers or to determine suitable child care, or both parents' potential need to "establish a pattern of child care." But notwithstanding the positions of the Supreme Court, social scientists, and healthcare professionals, DoD policy only recognizes the importance of the mother in establishing a pattern of a child care.

DoDI 1342.19 also reveals a significant oversight in crafting, as it effectively defers the deployment of noncustodial post-partum mothers for whom family care plans and pattern of child care justifications are wholly irrelevant. Such child care arrangements would not apply, for example, to surrogate mothers[69] or natural mothers who plan to give a baby up for adoption.[70] Yet DoD's policy—again, without turning on the health of the post-partum mother—textually incorporates those mothers into the deployment-deferment policy.

D. Biological Difference Analysis

In some circumstances, the biological differences between men and women justify differential treatment. In *Nguyen v. Immigration & Naturalization Service*, the Supreme Court held that sex discriminatory action, which arguably benefits only women, is permissible if based on

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[68] Burgess, *supra* note 9, at 16 (citing A.H. Beitel & R.D. Parke, *Paternal Involvement in Infancy: The Role of Maternal and Paternal Attitudes*, 12 J. FAM. PSYCHOL. 268, 268-88 (1998)).

[69] Under current Tricare procedures, surrogate mothers are covered for the pregnancy and birth, unless Tricare learns of the contractual arrangement. Rick Maze, *DoD: Drop Surrogate Pregnancies from Tricare*, ARMY TIMES (Apr. 11, 2007, 2:41 PM), http://www.armytimes.com/news/2007/04/military_surrogatepregnancy_tricare_070411w/. DoD has tried unsuccessfully so far to cut off coverage for surrogate pregnancies. *Id.*

[70] *See generally supra* note 13. A full reading of DoDI 1342.19(1) reveals a policy wholly lacking in consistency and thoughtful justification. The Instruction is inexplicably sex neutral when addressing deployment deferments for adoptive parents. In cases of adoption, single parents and either parent in a dual military couple receive a four-month deployment deferment from the date the child is placed in the home, but neither military mothers nor military fathers who adopt while married to civilians are afforded this extra time. Reserve component members—presumably either male or female—are eligible for a four-month deferment from involuntary recall to active duty. It is unclear whether the deferment applies to reservists who are adoptive parents, natural parents to newborns, or both.

such biological differences.[71] In *Nguyen*, the Court upheld a law that required unwed American fathers to affirmatively establish paternity before granting U.S. citizenship to a child born abroad and out of wedlock.[72] Unwed American mothers, on the other hand, were required to take no action to ensure a foreign-born child's U.S. citizenship.[73] The Court stated that biological maternity could be established with greater certainty than could biological paternity, and asserted that a mother's biologically necessary presence at a child's birth afforded her the opportunity to establish an immediate relationship with her child.[74] In contrast, a father—who may or may not be present at delivery—was not guaranteed to have such an opportunity.[75]

In that case, though, biology was clearly tied to the policy: the biological fact of childbirth established a woman's tie to a baby, but without some claim to or acknowledgment of paternity, an unmarried man's tie to a child was less apparent (or, for that matter, verifiable). But in DoD's deployment deferment policy, there is no indication that biological differences between men and women were relevant to the decision to keep women—and women alone—from being deployed.

1. Biological Difference: Post-partum Recovery

While a post-partum deployment deferment could conceivably be provided for purposes of post-partum physical recovery—a circumstance clearly tied to biological differences between men and women—there is no evidence that this police was formulated to serve that purpose. As an initial matter, neither policy refers to the post-partum health of the mother as a basis for the deployment deferment. And in any event, a DoD policy based on post-partum recovery would be largely redundant, as all branches of the Armed Forces already provide a minimum of forty-two days of post-partum convalescent leave to military mothers, following a normal birth, before requiring her to return to duty.[76] More significantly, though, to the extent that post-partum recovery requires a break from the physical and occupational duties of military service, it is worth noting that the first six weeks of post-partum deferment overlaps with the forty-two days

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[71] Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 73 (2001).

[72] *Id.* at 63-64.

[73] *Id.* at 61.

[74] *Id.* at 64-65.

[75] *Id.*

[76] Michael R. Bell, *Breastfeeding in the Military: Part I. Information and Resources Provided to Service Women*, 168 MIL. MED. 807, 809 (2003).

convalescent leave, but the remaining deferment period, approximately eleven weeks, provides only that a female servicemember will not deploy. Nothing in the policy states that she is entitled to any other restriction in the duties that she may be called upon to perform.

2. Biological Difference: Breastfeeding

A postpartum woman's physical ability to care for her child by breastfeeding likely constitutes a biological difference between men and woman sufficient to overcome an Equal Protection suit. But neither policy defines that as a purpose for the deployment-deferment policy. And consequently, the Supreme Court is apt to perceive any such justification by DoD as an illegitimate post-hoc rationalization in response to litigation.[77] In *United States v. Virginia*, for instance, the Court held that the all-male admissions policy of Virginia Military Institute, a state military college, violated the Equal Protection Clause by excluding female students.[78] The Court stated that the government's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."[79] It is, consequently, improbable that DoD could successfully proffer breastfeeding as a legal justification for its discriminatory policy because breastfeeding is not cited as a justification for the policy and the time afforded for the deferral does not conform to medically recommended minimum timeframes.[80]

Nonetheless, breastfeeding remains a valid area of analysis and is likely a sufficient justification for a post-partum deployment deferral policy. Infant breastfeeding is almost indisputably best for both mother and child, for their family budget, and even for military effectiveness. The American Academy of Pediatrics recommends newborns be fed breast milk exclusively in the first six months of life since "human milk [is] uniquely superior for infant feeding" and "ensures the best possible health as well as the best developmental and psychosocial outcomes for the infant." [81] Nursing newborns show decreased incidences of health problems,

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[77] United States v. Virginia, 518 U.S. 515, 533 (1996). *See also* Orr v. Orr, 440 U.S. 268, 280 n.10 (1979) ("If upon examination it becomes clear that there is no substantial relationship between the [challenged] statutes and their purported objectives, this may well indicate that these objectives were not the statutes' goals in the first place.")

[78] *Virginia*, 518 U.S. at 519.

[79] *Id.* at 533.

[80] *See* discussion *infra* Part III.E.

[81] Lawrence M. Gartner & Arthur I. Eidelman, *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 496, 501 (2005).

decreased rates of sudden infant death syndrome, and slightly enhanced performance on tests of cognitive development.[82] Military effectiveness is indirectly enhanced by breastfeeding because a non-breastfed infants' increased susceptibility to illness could affect the readiness of active duty servicemembers in single parent and dual military families, as frequent illness will require parents to take leave or time off from duty in order to care for an ill newborn.[83] And in any event, it is common sense that an ill child at home makes for a worried (and therefore distracted) deployed parent abroad. Further, nursing mothers return earlier than non-nursing mothers to their pre-pregnancy weight and have decreased risks of breast cancer and ovarian cancer.[84] Accelerating military mothers' recovery, both medically and physically, following pregnancy is in the best interest of the military departments, as faster recovery allows women to meet more quickly the military's requirements for weight and physical fitness.

In economic terms, breastfeeding may produce $3.6 billion in decreased annual health care costs, through lower costs for programs such as the Special Supplemental Nutrition program for Women, Infants, and Children ("WIC") and a reduced incidence of parental employee absenteeism.[85] Although such effects indirectly impact military readiness, the DoD has warned that the rising costs of the military health care system ("Tricare") could jeopardize military readiness,[86] while breastfeeding mothers might help decrease Tricare's costs incurred in treating newborns.

But even if this becomes the basis of DoD's justification for its sex-based deployment-deferment policy, it is worth understanding that fathers also play an important role in nursing process. Studies show that a father's active participation in the breastfeeding decision, along with a positive attitude and knowledge of breastfeeding, have a "strong influence on the initiation and duration of breastfeeding."[87]

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[82] *Id.* at 497.

[83] Bell, *supra* note 76, at 807.

[84] Gartner, *supra* note 81, at 497.

[85] *Id.* at 497.

[86] Laura M. Colarusso & Bryan Bender, *Pentagon Fears Healthcare Costs Will Erode Readiness*, BOSTON GLOBE (Mar. 5, 2007), http://www.boston.com/news/nation/articles/2007/03/05/pentagon_fears_healthcare_costs_will_erode_readiness/.

[87] Burgess, *supra* note 9, at 23 (citing Vivien Swanson & Kevin G. Power, *Initiation and Continuation of Breastfeeding: Theory of Planned Behaviour*, 50 J. ADVANCED NURSING 272 (2005); Naomi B. Bar-Yam & Lori Darby, *Fathers and Breastfeeding: A Review of Literature*, 13 J. HUMAN LACTATION 45 (1997); Samir Arora et al., *Major Factors Influencing Breastfeeding Rates: Mother's Perception of Father's Attitude and Milk Supply*, PEDIATRICS, Nov. 1, 2000, at 67).

Since DoD has no comprehensive policy on breastfeeding,[88] the deployment deferment period falls short of the recommended breastfeeding timeframe,[89] and the group at issue includes non-breastfeeding mothers, it is unlikely that DoD could in good faith assert that the post-partum deployment deferment was premised on accommodating breastfeeding. The four-month deployment deferment is two months shy of meeting the minimum period recommended by leading health care institutions: the American Academy of Pediatrics,[90] the Health and Human Services Department,[91] and the American College of Obstetricians and Gynecologists,[92] all recommend breastfeeding for the first six months. The American Academy of Pediatrics recommends continued breastfeeding alongside the introduction of complementary foods for at least the first year of life and thereafter "for as long as mutually desired by mother and child."[93] In fact, the Breastfeeding Coalition of the Uniformed Services characterized the deployment deferral as "too short," calling the policy the "final roadblock for active duty breastfeeding mothers."[94]

If DoD intended that its deployment-deferment policy accommodate breastfeeding women, it was poorly crafted not only in its departure from the medically recommended nursing period but also in its over-inclusion of non-nursing mothers. The policy fails to acknowledge that post-partum mothers may be unwilling or unable to breastfeed due to low or nonexistent milk supply, infant latching complications, various other physical or biological obstacles, or personal choice alone. Notably, and in spite of the lack of guidance from DoD on breastfeeding, a U.S. Army hospital in

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[88] A search by the author of current DoD Issuances on November 7, 2008 resulted in only one policy document that addressed breastfeeding directly, and only in one paragraph of five sentences. In fact, the one policy that directly addressed breastfeeding, albeit in a document on health surveillance in the workplace, states "the military mission may supersede the woman's desire to breastfeed." U.S. DEP'T OF DEF., DoD 6055.05-M, OCCUPATIONAL MEDICAL EXAMINATIONS AND SURVEILLANCE MANUAL C3.7 (2007; Incorporating Change 1, 2008).

[89] *See infra* text accompanying notes 91-92.

[90] Gartner, *supra* note 81, at 499.

[91] U.S. DEP'T. OF HEALTH & HUMAN SERVS., *HEALTHY PEOPLE 2010, FOCUS AREA 16: MATERNAL, INFANT, AND CHILD HEALTH* (2000); *see also* Breastfeed Your Baby, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Nov. 15, 2011), http://www.healthfinder.gov/prevention/ViewTopic.aspx?topicID=50.

[92] *New Campaign Encourages Women to Breastfeed*, Am. Coll. of Obstetricians & Gynecologists, 48 ACOG TODAY 1 (2004).

[93] Gartner, *supra* note 81, at 499.

[94] *Breastfeeding Coalition of the Uniformed Services Update: There is a Roadblock within Navy, Army, and Air Force*, MILITARY MEDICINE 6, 6-7 (2007), www.amsus.org/membership/newsletters/spring2007.pdf.

Germany has developed a novel program to provide a twelve-month deployment deferment for breastfeeding mothers assigned to the Landstuhl Regional Medical Center and its supporting facilities.[95] This policy, which addresses post-partum breastfeeding mothers exclusively, shows none of the crafting errors that would result from the DoD's justification of breastfeeding.[96] And finally, if this is the basis of the deployment-deferment policy, it is a basis that ignores the needs of single fathers, who have as much of a need to establish a "pattern of child care" as a single mother even if those fathers cannot breastfed their infant.

E. Sexual Stereotyping: Characterizing Military Mothers as Caregivers, Military Fathers as Soldiers

One plausible inference of the DoD post-partum deployment deferral policy is that it seeks to perpetuate the stereotype that mothers are (or, perhaps, should be) the primary parental caregivers. Such views have not been unknown to the law, and these types of stereotypes were reflected in the view of the Supreme Court until 1971, when it first invalidated a facially sex discriminatory law.[97] Indeed laws were regularly upheld as constitutionally permissible that discriminated between the sexes and that reflected a paternalistic attitude regarding the need to protect females, the weaker sex.[98]

Those views began to give way, though, in 1971. And illustrating its new approach to sex discrimination, the Supreme Court in *Orr v. Orr* invalidated an Alabama divorce law that provided alimony for women, but not for men, holding that the "old notion" that a man was primarily responsible for providing the "home and its essentials" was no longer a permissible justification for a sex-based discriminatory statute.[99] Explaining further, the Court stated, "[n]o longer is the female destined

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[95] Steve Mraz, *New Landstuhl Policy Encourages Deferred Deployment of 12 Months for Nursing Mothers*, STARS AND STRIPES (Aug. 17, 2008), http://www.stripes.com/news/new-landstuhl-policy-encourages-deferred-deployment-of-12-months-for-nursing-mothers-1.82050.

[96] *Id.*

[97] Reed v. Reed, 404 U.S. 71, 77 (1971) (striking down state law giving preference to men over women in estate administration).

[98] *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (upholding state law excluding women from being licensed as bartenders, but exempting wives and daughters of male bar owners); Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding Oregon law setting maximum hours for women factory workers).

[99] Orr v. Orr, 440 U.S. 268, 279-80 (1979).

solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[100]

The exclusion of men from DoD's deferment policy may also suggest that the DoD perceives males as "more" indispensible to training and operational deployments, whereas female servicemembers—who are allotted four-months post-partum without the possibility of deployment—are at least temporarily expendable. The DoD's preference for accommodating new mothers but not new fathers was apparent even before the establishment of DoDI 1342.19: during the Persian Gulf War, all married or single mothers with children under four months of age were given the option to not deploy, but not a single one of the 49,819 active duty single fathers[101]—let alone married fathers—was offered a deferment.[102] The policy could be construed as indicating that a man is first and foremost a warrior and a father only secondarily, whereas a woman's primary duty is a child care provider. Either way, DoD lacked then and continues to lack now a compelling justification for a policy that relegates women, at least for four months, to the hearth and the home while it sends men to the theater of war.

An examination of the range of possibilities in DoD's deployment-deferral policy demonstrates patent sex stereotyping. Regardless of relationship status, all military males are subject to deployment prior to, during, and immediately after the birth of his newborn.[103] But again regardless of relationship status, all military females, however, are provided the deployment deferral following a child's birth.[104] And in all scenarios, the female is allowed to act as the primary caregiver.[105] In the case of the married military male, the policy presumes that his civilian wife will become the primary caregiver if he is deployed.[106] If the serviceman's spouse is also a military member, the policy again presumes that the wife will be the primary caregiver, affording only the female in a dual military marriage the opportunity to remain with the

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[100] *Id.* at 280 (citing Stanton v. Stanton, 421 U.S. 7, 14-15 (1975)).

[101] That is not to say that all single fathers were in deploying units; however, it is nearly impossible that a sizeable percentage were not deployed.

[102] LINDA FRANCKE, GROUND ZERO: THE GENDER WARS IN THE MILITARY 153 (1997).

[103] See DoDI 1315.18, para 6.10 (this section provides deferment for military mothers of newborns, but not for married military fathers).

[104] DoDI 1315.18, para 6.10.4.

[105] *See id.* ("For [four] months after the birth of the child, a military mother shall be deferred from assignment to a dependent-restricted overseas tour or an accompanied overseas tour when concurrent travel is denied." No such provision is available for the military father).

[106] *See supra* text accompanying note 105.

newborn child after birth.[107] If a female servicemember is married to a civilian, the policy again presumes that the woman and not her civilian husband will make child care arrangements and otherwise function as the newborn's primary caregiver.[108] The same sex stereotyping holds true in a single parent scenario.[109] While a single military mother always receives a post-partum deployment deferral, a single military father receives no such guarantee.[110] The policy does not recognize that a single military father may possess sole custody of a newborn due to circumstances such as death of the mother, maternal abandonment, or termination of the mother's parental rights. But even in those cases, the DoDI does not provide for a deployment deferral on the behalf of a male primary caregiver.[111] Under the DoD policy, a single military father is expected to activate his Family Care Plan and deploy.

In both the married and single context, it is the female that is expected to play the stereotypical female role of primary caregiver. As a consequence, the policy unjustifiably isolates womanhood as a proxy for suitability as the primary parental caregiver. In crafting the policy, it appears that DoD relied on broad and antiquated generalities about the propensities of men and women instead of making critical evaluations about the military's actual needs and the best interests of its soldiers and military families.

F. Deference to Military Related Law

Though courts have traditionally deferred to military regulations,[112] the post-partum deployment deferment policy is not based on the military's professional assessment of the post-partum mother's effectiveness as a Soldier, Sailor, Airman, or Marine but rather on her obligations in a

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[107] DoDI 1315.18, para 6.10.4.

[108] *See* DoDI 1315.18, para 6.10.

[109] *Id.*

[110] *Id.*

[111] DoDI 1315.18, para 6.10.5 (A single father may apply for, but is not guaranteed, a deployment deferral: "When a member becomes a single parent as a result of hardship or humanitarian circumstances; for example, on the death of a spouse, the member may apply for an assignment deferment or reassignment under the provisions contained in Service regulations for humanitarian or hardship deferments and/or assignments.").

[112] *See* Rostker v. Goldberg, 453 U.S. 57, 66 (1981) (quoting Parker v. Levy, 417 U.S. 733, 756, 758 (1974)) ("'Congress is permitted to legislate both with greater breadth and with greater flexibility' when the statute governs military society, and that '[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.'").

decidedly non-military role: a mother. As noted above, in *Rostker v. Goldberg*, the Supreme Court upheld the constitutionality of a federal law that required registration of men, but not women, for a military draft.[113] The Court found that "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments" and determined that this is an area in which the courts may have the least competence.[114]

As an initial matter, there are strong reasons to doubt the continuing validity of *Rostker* as "good law."[115] Since *Rostker*, few cases have challenged military restrictions on servicewomen, and not one case has reached the Supreme Court, making *Rostker's* premises ripe for reevaluation.[116] Specifically, many of the factual and cultural assumptions of *Rostker* are no longer valid, particularly given that women's military duties have dramatically expanded since the first Persian Gulf War.[117] To date, virtually "every significant limitation on" women's military service has been either "repealed or substantially narrowed."[118] With the repeal of statutory exclusions on women in combat[119] and the narrowing to a small minority the collection of combat positions that were closed to women,[120] it is now difficult to justify the assertion made in *Rostker* that men and women are not similarly situated with respect to military services.[121] And the recent change in DoD's combat-role policy only further places these sex-stereotype policies in starker relief.

Assuming, *arguendo*, that *Rostker* still has precedential authority, it is nonetheless distinguishable from DoD's deployment deferment policy. To be sure, *Rostker* discussed military deference specifically as it related to congressional authority, not the policies of executive departments.[122] The Court in *Rostker* underscored the legitimizing force of congressional policy,

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[113] *Id.* at 83.

[114] *Id.* at 65 (citing Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953)).

[115] *See* Hasday, *supra* note 32, at 97-99.

[116] *Id.*

[117] *Id.* at 97.

[118] Diane H. Mazur, *Military Values in Law*, 14 DUKE J. GENDER L. & POL'Y 977, 986 (2007).

[119] National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531, 105 Stat. 1290, 1365 (1991); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541, 107 Stat. 1547, 1659 (1993).

[120] *See* LORY MANNING, WOMEN IN THE MILITARY: WHERE THEY STAND 13 (5th ed. 2005) (by 1994, 99% of Air Force, 62% of Marine Corps, 70% of Army, and 91% of Navy job specialties were open to women).

[121] *Id.*

[122] Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981).

acknowledging that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[123] But arguably, the Constitution gives at least as expansive military and foreign policy powers to the Executive Branch as it does to Congress. Indeed the judicial branch has accorded the Executive's military policymaking (including that of the executive departments) a comparable level of deference.[124] The Supreme Court has specifically noted the President's "constitutionally conferred competence in military affairs as Commander in Chief of the Armed Forces"[125] and also deemed it appropriate to defer to military officials because "military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy."[126]

Regardless in contrast to the similarly situated circumstances of present-day male and female servicemembers, a now repealed statutory combat restriction was the basis for the unequal treatment at issue in *Rostker*. In light of the purpose of the draft registration statute in *Rostker* and the fact that women were then statutorily ineligible for many military assignments, the Court evaluated a law that started with women effectively on unequal ground with men when it came to the military draft.[127] Thus, *Rostker* addressed a legislative action (the draft registration) founded on already well-established legislative actions and executive policies (exclusions of women from combat). In short, significant congressional authority existed that supported differential treatment between the sexes in this context. To put it simply, it made little sense to draft women for many of the roles that they were, as a matter of law, ineligible to fill.

Here, however, there are no statutory measures differentiating between the parental abilities or obligations of military fathers and military mothers;[128] again, the deployment deferment policy does not constitute "legislative action," nor is it based on "[military-related] congressional

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[123] *Id.* at 70.

[124] *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (as to military policy powers); Weiss v. United States, 510 U.S. 163, 171 (1994) (as to foreign policy powers).

[125] John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 675 (2007) (citing Loving v. United States, 517 U.S. 748, 768 (1996)).

[126] *Id.* (citing *Goldman*, 475 U.S. at 507-508).

[127] *Rostker*, 453 U.S. at 83.

[128] *See supra* Part I.B. (Under DoDI 1342.19(4)(a), both mothers and fathers are equally responsible for the care of their children).

authority" at all.[129] On the contrary, DoD's deployment deferment policy significantly undermines the Senate's express desire that DoD assignment policies relevant to the parents of minor children give "appropriate consideration . . . to the unique needs of: i) single parents; ii) families in which both parents are members of the Armed Forces; and iii) newborn children."[130] Whereas the Senate's limited guidance on the question of family policy was affirmatively sex neutral, DoD's policy arbitrarily excludes men.

The statute at issue in *Rostker* is also fundamentally different from the DoD deployment deferment policy in that the policy does not implicate the composition, training, equipping, or control of a military force. Indeed, unlike in *Rostker*, present day women are already a key "composition" of deployment forces, especially combat forces—more than half of active duty females have deployed to either Iraq or Afghanistan, and women are now as eligible as men are to receive awards for combat valor.[131] In the U.S. Army, for example, women are eligible for a Combat Action Badge for being "personally present and actively engaging or being engaged by the enemy . . . ."[132] As for training, equipment, and control, women are an integral part of the Armed Forces and receive *exactly* the same unit training, equipment, and command relationship as their male counterparts in their respective units. Furthermore, the personal choice of the female servicemember to opt-in to the deployment even after a birth of a child cuts against the concept that a military command cannot exercise effective control over a post-partum military mother.[133] In short, none of the areas cited by the *Rostker* Court as involving "complex, subtle, and professional" decisions[134] of military professionals is applicable here. And with DoD's new policy on the assignment of women to combat roles, these trends are likely to only continue.

Despite the significant change in military policies, composition, and assignment that limit the relevance of *Rostker*, the case likely remains good law in its acknowledgment that simply characterizing a policy as "'military' . . . does not automatically guide [the] court to the correct constitutional

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[129] *Rostker*, 453 U.S. at 70.

[130] S. 320, 102d Cong. § 603 (1991) (engrossed as agreed to or passed by Senate).

[131] *See supra* Part I.A.

[132] *Combat Action Badges*, U.S. ARMY, http://www.army.mil/symbols/CombatBadges/action.html (last visited Feb. 15, 2012).

[133] *See* DoDI 1315.18, para 6.10.4 (post-partum military mothers may defer deployment for four months after child birth).

[134] *Rostker*, 453 U.S. at 65.

result."[135] As the opinion so succinctly states, although judicial deference to military-related policies, legislative or otherwise, may generally be warranted, "deference does not mean abdication."[136]

IV. CONCLUSION

As presently written, DoDI 1342.19 permits no reasonable justification for treating men and women differently in deciding to whom a post-birth deployment deferment will be extended. Whereas a six-week deferral would align with the medically accepted standard for post-partum physical recovery[137] (and would tie neatly to convalescent leave) or a twelve-month deferral would coincide with the medically recommended period of infant breastfeeding,[138] four months appears to be an arbitrary time period unrelated to the biological differences between men and post-partum women. Furthermore, by incorporating all "military mothers of newborns," instead of just single parents and dual military personnel,[139] the terms of DoDI 1342.19 exceed its stated purpose of addressing Family Care Plan requirements.

There are multiple ways to reconcile the post-partum military deferment policy with the Equal Protection Clause of the Constitution:

(1) Eliminate the policy entirely, and deploy servicewomen at the conclusion of their convalescent leave;

(2) Change the deployment deferment time to a medically accepted standard that ties a post-partum mother's deferment period to a biological basis by (a) limiting the deferment to the six weeks physical recovery time that medical professionals typically recommend to post-partum mothers or (b) restricting the deferment's application to nursing mothers exclusively, while extending the deferment period to the six or twelve-month minimums that medical professionals recommend for infant breastfeeding;

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[135] *Id.* at 70.

[136] *Id.*

[137] *Cf.* Dwenda K. Gjerdingen et al., *Changes in Women's Physical Health During the First Postpartum Year*, 2 ARCHIVES FAM. MED. 277, 277 (1993) (post-partum physical recovery has been traditionally thought to require six weeks, although this article argues that more than six weeks are needed for recovery after childbirth).

[138] *Breastfeeding*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 19, 2010), http://www.cdc.gov/breastfeeding/faq/index.htm ("The American Academy of Pediatrics (AAP) recommends that breastfeeding continue for at least [twelve] months, and thereafter for as long as mother and baby desire.").

[139] DoDI 1342.19(4)(g)(1).

(3) Provide for a case-by-case adjudication, enumerating factors relevant to the circumstances under which a deployment review board should permit deployment deferments to new parents;

(4) Permit deployment deferments according to very specific terms unrelated to sex, as by awarding deferments to all single parents or policy-defined "primary caregivers," or end those deferment as soon as a pattern of child care has been established and a required Family Care Plan has been written and approved;

(5) Provide servicemembers the option of a temporary separation from active duty in order to care for a newborn dependent;

(6) Permit servicemembers to use any leave accrued in order to delay deployment while caring for a newborn dependent, something servicemembers currently do not have the right to do; or

(7) Extend the policy to include military fathers of newborns on the same terms as military mothers of newborns.

While any of the above policies would more closely adhere to requirements of the Equal Protection Clause, mere establishment of a constitutionally sound policy is insufficient to bring DoDI 1342.19 in line with DoDD 1342.17, *Family Policy*. DoDD 1342.17 implements Executive Order 12,606, *The Family*,[140] which requires executive agencies (including DoD) to use family policymaking criteria in formulating and implementing policies that "shall continue to support initiatives that contribute to the well-being of DoD families."[141] Specifically, executive agencies must address "what message, intended or otherwise" a proposed policy "send[s] to the public concerning the status of the family[.]"[142] The deployment-deferral policy in DoDI 1342.19 unconstitutionally stereotypes military females as primary caregivers,[143] which cuts against the strides made for sex equality within the military. The DoD's policy on the role of fathers in newborn care is also out-of-step with developing norms about sex roles, social studies, and biological evaluations, all of which underscore the fact that paternal involvement in a newborn's life is of significant social and developmental importance on par with maternal involvement.

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[140] It is worth noting that the DoDI's reference is incorrect: Exec. Order No. 12,606 was revoked by Exec. Order No. 13,045, but its requirements were subsequently enacted into statute. *See* Protection of Children from Environmental Health Risks and Safety Risks, 62 Fed. Reg. 19,885 (Apr. 21, 1997) (revoking the Executive Order 12,606 of September 2, 1987); 5 U.S.C. § 601 (2006).

[141] DoDD 1342.17, para E3.1.5.

[142] Exec. Order No. 12,606, 52 Fed. Reg. 34,188 (Sept. 2, 1987).

[143] *See supra* Part I.A.

Ultimately, a comprehensive discussion of policy pros and cons, evaluated in the context of military personnel requirements and medical, psychological, and social considerations, is necessary to reformulate the policy at issue. While a full exploration of the merits and drawbacks of the above policy alternatives exceeds the scope of this paper, it is clear that DoD is not without options in developing a constitutionally sound postpartum deployment deferment policy. Admittedly, the simplest-and perhaps most cost effective—route would be to simply eliminate the post-partum military deployment deferment altogether, forcing new fathers, as is presently policy, to deploy with their units and new mothers to deploy at the conclusion of their convalescent leave. If, however, DoD's goal is broadly "the care of dependent family members of . . . DoD [personnel,]"[144] then permitting military fathers deployment-deferment opportunities equal to the option presently available to post-partum mothers would best serve DoD's interest. As discussed above, extending the postpartum deployment deferment to include fathers would foster parent-child relationships, bolster the strength and structure of the family unit, and benefit the military itself.[145] As previously stated, the DoD itself has recognized the value of family stability to the military community generally, and permitting fathers an opportunity to involve themselves immediately in the lives of their newborn children may also create stronger, more stable soldiers.[146] One study, in fact, found emotional involvement with children acted as a buffer against work related stresses, suggesting that a father's emotional involvement with his children may also be a great counterweight to the psychological wear and tear of war.[147]

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[144] DoDI 1342.19(1)(b).

[145] *See supra* Part I.B.

[146] See *supra* Part I.B.

[147] Rosalind C. Barnett, Nancy L. Marshall & Joseph H. Pleck, *Men's Multiple Roles and Their Relationship to Men's Psychological Distress*, 54 J. MARRIAGE & FAM. 358, 366 (1992).

A Self-Executing Article XI, Section 9—The Door For a *Bivens* Action for Environmental Rights?

Michelle Oh Yip*

I. INTRODUCTION

Although constitutions in the United States declare the rights of the people, federal and state courts throughout the centuries have grappled with the issue of vague constitutional provisions that fail to articulate specific means of enforcement.[1] Traditionally, the courts have viewed constitutions as containing general principles to guide the development of laws instead of actual mandates for relief.[2] Because constitutional provisions do not give detailed guidance on how to enforce rights, courts created the doctrine of self-executing provisions to transfer decisions regarding practical and political matters to the legislature and the executive branch.[3]

However, in contrast to the traditional view, states in recent decades have started to enact constitutional provisions that provide not only rights, but specific obligations assigned to government entities and directions for the enforcement of rights.[4] In particular, numerous states have enacted

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[1] Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 335-40 (1993) (providing examples of federal and state governments analyzing the self-executing status of constitutional provisions involving extradition of fugitives, uniform import duties, and mandatory civil service examinations).

[2] *Id.* at 340 (quoting O'Neill v. White, 22 A.2d 25 (Pa. 1941)).

[3] *Id.* at 339. *See, e.g.*, Goldman v. Clark, 1 Nev. 607 (1865) (holding that constitutional provision regarding homesteads was inoperative and required future action of the legislature); Bowie v. Lott, 24 La. Ann. 214 (La. 1872) (holding that constitutional provision requiring the division of land sold under court decrees was not self-executing and required legislative action for implementation). *Cf.* Atkins v. Curtis, 66 So. 2d 455 (Ala. 1953) (holding that the court gives deference to the state legislature in implementing state constitutional provision requiring maintenance of the poor).

[4] *Id.* at 340. *See also* HAW. CONST. art. XI, § 9 (1978).

constitutional provisions for environmental rights that contain clauses mentioning enforcement by public and private actors.[5] This newer constitutional language raises questions regarding: (1) whether or not a particular provision is self-executing; and (2) if a provision is self-executing, the nature of the obligation imposed on states and individuals to protect the right.[6]

Although most state courts have ruled that their respective environmental constitutional provisions are not self-executing,[7] the Hawai'i Supreme Court breathed new life into private enforcement of Hawaii's environmental laws. In *County of Hawai'i v. Ala Loop Homeowners*[8] ("*Ala Loop*"), the Court held that Hawai'i Constitution article XI, section 9 grants a self-executing private right of action to enforce environmental rights. As a result of the Hawai'i Supreme Court's affirmative answer to the self-executing question regarding article XI, section 9, the Hawai'i judiciary is now faced with subsequent issues of defining the nature of enforcement. How will the courts determine remedies for violations of environmental rights? Can judges fashion remedies outside of Hawaii's current environmental statutory scheme?

Part II provides the background for the *Ala Loop* decision that resulted in a self-executing Hawai'i Constitution article XI, section 9, and Part III discusses whether courts should allow a constitutional tort action for money damages under a self-executing article XI, section 9.

II. BACKGROUND OF THE *ALA LOOP* DECISION

In 1978, the Hawai'i Constitutional Convention amended the state constitution to include article XI, section 9, which states the following:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.[9]

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[5] John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 325-26 nn.13-14 (1996).

[6] Fernandez, *supra* note 1, at 340-43.

[7] Horwich, *supra* note 5, at 326.

[8] Cnty. of Haw. v. Ala Loop Homeowners, 123 Haw. 391, 235 P.3d 1103 (2010).

[9] HAW. CONST. art. XI, § 9 (1978).

For over three decades, article XI, section 9 did not provide for a private right of action for enforcement;[10] rather, the Hawai'i courts used the provision as a guiding principle for analyzing legal issues such as expanding the doctrine of standing when adjudicating environmental claims.[11] However, in July 2010, the Hawai'i Supreme Court determined that article XI, section 9 contained more than a mere guiding principle—it was a judicially enforceable constitutional provision.[12]

The *Ala Loop* decision arose from a dispute between Wai'ola Waters of Life Charter School ("Wai'ola") and its neighbors, the Ala Loop Homeowners ("Homeowners"), on the island of Hawai'i.[13] Wai'ola sought to open a school on a piece of property it had acquired; however, Hawai'i Revised Statutes section 205-6[14] required a special use permit for school operations because the land was designated for agricultural use.[15] Despite

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[10] *See* Stop H-3 Ass'n v. Lewis, 538 F.Supp. 149, 175 n.31 (D. Haw. 1982) *rev'd* in part by Stop H-3 Ass'n v. Dole, 740 F.2d 1442 (9th Cir. 1984) (holding that article XI, section 9 does not provide a private right of action because the statute had a specific enforcement provision); Sierra Club v. Dep't of Transp., 115 Haw. 299, 320 n.28, 167 P.3d 292, 313 n.28 (2007) (declining to hold that article XI, section 9 provides a private right of action because the statute in question contained "specific language regarding who may enforce the law"); Life of the Land v. Land Use Comm'n, 63 Haw. 166, 172 n.5, 623 P.2d 431, 438 n.5 (1981) (using article XI, section 9 for support that constitutional provisions can change judicial application of prudential rules like standing).

[11] *See Life of the Land*, 63 Haw. at 171 n.5, 623 P.2d at 438 n.5 (using article XI, section 9 as guidance for expanding the doctrine of standing for environmental plaintiffs); *see also Sierra Club*, 115 Haw. at 320, 167 P.3d at 313 ("The less rigorous standing requirement this court applies in environmental cases draws support from the Hawai'i Constitution, article XI, section 9.").

[12] *Ala Loop*, 123 Haw. at 394, 235 P.3d at 1106.

[13] *Id.* at 394, 235 P.3d at 1106.

[14] HAW. REV. STAT. § 205-6(a) (2001 & Supp. 2010) states the following:

> Subject to this section, the county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition. Copies of the special permit petition shall be forwarded to the land use commission, the office of planning, and the department of agriculture for their review and comment.

[15] *Ala Loop*, 123 Haw. at 394, 235 P.3d at 1106. *See also* DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS in HAWAI'I 21-22 (2d ed. 2010). Hawai'i law provides a state Land Use Commission to designate land into four land use districts: Urban, rural, agricultural, and conservation. HAW. REV. STAT. § 205-2 (2001 & Supp. 2010). Land designated for agricultural use may include farming, ranching, research facilities, or

the land use laws, Wai'ola did not seek a special use permit because Hawai'i Revised Statutes ("H.R.S.") section 302A-1184 exempted charter schools from state laws except for those relating to health and safety; Wai'ola assumed that the special use permitting scheme was not a health or safety law.[16] The neighboring Homeowners contacted the County of Hawai'i Planning Department and the County of Hawai'i Office of Corporation Counsel to express their view that Wai'ola required a special use permit to operate the school.[17] Both the Planning Department and Corporation Counsel opined that Wai'ola did not need a special use permit because H.R.S. section 205 was not a law regarding health or safety.[18] However, the Corporation Counsel added that the school was required to obtain a county use permit under chapter 25 of the Hawai'i County Code.[19] Shortly thereafter, the Attorney General issued a letter to Corporation Counsel stating that charter schools were required to obtain a special use permit under H.R.S. section 205-6—a view contrary to both the Planning Department and Corporation Counsel.[20] In order to resolve the conflicting legal interpretations of the above entities, the County of Hawai'i filed a complaint in the Circuit Court of the Third Circuit to obtain declaratory relief against the Homeowners.[21] The Homeowners in turn counter-claimed for (1) declaratory relief mandating that Wai'ola had to obtain a special use permit under H.R.S. chapter 205 before operating a school[22] and (2)

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open-area recreational facilities, but school operations are not allowed. HAW. REV. STAT. § 205-2(d) (2010); CALLIES, at 21-22.

[16] *Ala Loop*, 123 Haw. at 394, 235 P.3d at 1106. HAW. REV. STAT. § 302A-1184 (Supp. 2002) (repealed 2006, reenacted as HAW. REV. STAT. § 302B-9 (Supp. 2006)) states:

> New century charter schools; exemptions. Schools designated as new century charter schools shall be exempt from all applicable state laws, except those regarding:
> (1) Collective bargaining under chapter 89; provided that:
> (A) The exclusive representatives defined in chapter 89 may enter into agreements that contain cost and noncost items to facilitate decentralized decisionmaking;
> (B) The exclusive representatives and the local school board of the new century charter school may enter into agreements that contain cost and noncost items;
> (C) The agreements shall be funded from the current allocation or other sources of revenue received by the new century charter school; and
> (D) These agreements may differ from the master contracts;
> (2) Discriminatory practices under section 378-2; and
> (3) Health and safety requirements.

[17] *Ala Loop*, 123 Haw. at 394-95, 235 P.3d at 1106-07.

[18] *Id.* at 395, 235 P.3d at 1107.

[19] *Id.* at 396, 235 P.3d at 1108.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 396, 235 P.3d at 1108.

injunctive relief barring the County of Hawai'i from issuing building permits before Wai'ola obtained the required special use permit.[23] The Homeowners also filed a cross-claim against Wai'ola for injunctive relief barring the school from conducting school-related activities without a special use permit.[24]

The circuit court ruled in favor of the Homeowners, declaring that Wai'ola required a special use permit to operate the school and granting the injunction prohibiting school activities on the property until Wai'ola obtained the permit.[25] However, the Intermediate Court of Appeals ("ICA") reversed[26] and concluded that the Homeowners lacked standing to enforce H.R.S. section 205 based on the ICA's decision in *Pono v. Molokai Ranch, Ltd.*[27]

In *Pono*, the ICA dealt with a similar issue involving the need for a special use permit.[28] Pono, a private association, sued Molokai Ranch after the Ranch built campgrounds on land designated for agricultural use without a required permit.[29] The issue was whether Pono, despite the lack of an explicit statutory provision, had an implied right upon which the court could grant relief.[30] To determine if Pono had an implied legal right, the ICA examined three factors established in *Reliable Collection Agency, Ltd. v. Cole*[31]: (1) Is plaintiff "one of the class for whose *especial* benefit the statute was enacted[?]" (2) Is there "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?" and (3) Is an implied remedy for the plaintiff "consistent with the underlying purposes of the legislative scheme[?]"[32] The ICA also applied *Rees v. Carlisle*,[33] noting that legislative intent "appears to be the determinative factor."[34] Based on the *Rees/Reliable* test, the ICA in *Pono* concluded that the legislature vested power in the Land Use Commission and in county authorities to enforce H.R.S. section 205-6; the legislature did not intend to

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[23] *Id.* at 397, 235 P.3d at 1109.

[24] *Id.*

[25] *Id.* at 401, 235 P.3d at 1113.

[26] Cnty. of Haw. v. Ala Loop Homeowners, 120 Haw. 256, 203 P.3d 676 (Ct. App. 2009).

[27] Pono v. Molokai Ranch, Ltd., 119 Haw. 164, 194 P.3d 1126 (Ct. App. 2008).

[28] *Id.*

[29] *Id.* at 165-66, 194 P.3d at 1127-28.

[30] *Id.* at 184, 194 P.3d at 1146.

[31] 59 Haw. 503, 584 P.2d 107 (1978).

[32] *Id.* at 507, 584 P.2d at 109.

[33] 113 Haw. 446, 153 P.3d 1131 (2007).

[34] *Id.* at 458, 153 P.3d at 1143.

allow private actors to enforce the land use scheme.[35] Therefore, the ICA in *Ala Loop* concluded that the Homeowners, as private actors, did not have a private right of action to enforce H.R.S. section 205-6 against Wai'ola.[36]

On appeal, the Hawai'i Supreme Court reversed the decision of the ICA[37] and overruled *Pono*.[38] Chief Justice Recktenwald, writing for the majority, determined that the ICA in *Pono* failed to consider article XI, section 9 in its private right of action analysis.[39] Although the *Rees/Reliable* test should be used to determine if the legislature "intended to create a private right of action when it enacts a statute," Justice Recktenwald stated that the test "is not applicable when the state constitution creates the private right of action."[40] In order to find a private right of action under the Hawai'i state constitution, the Court needed to determine whether article XI, section 9 was self-executing.

A. The Hawai'i Supreme Court Majority Opinion—Hawai'i Constitution article XI, Section 9 is Self-Executing

The doctrine of self-executing provisions requires courts to examine if the judiciary can provide relief to a plaintiff under a constitutional provision without legislation (self-executing provision).[41] The seminal case explaining the doctrine of self-executing provisions in Hawai'i is *State v. Rodrigues*.[42] In *Rodrigues*, the Court established the test for determining if a constitutional provision is self-executing:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.[43]

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[35] *Pono*, 119 Haw. at 185-91, 194 P.3d at 1147-53.

[36] Cnty. of Haw. v. Ala Loop Homeowners, No. 277-7, 2009 WL 623377, at *5-*6 (Haw. Ct. App. Mar. 12, 2009).

[37] Cnty. of Haw. v. Ala Loop Homeowners, 123 Haw. 391, 394, 235 P.3d 1103, 1106 (2010).

[38] *Id.* at 408, 235 P.3d at 1120.

[39] *Id.*

[40] *Id.*

[41] David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 91 (2000).

[42] 63 Haw. 412, 629 P.2d 1111 (1981).

[43] *Id.* at 414, 629 P.2d at 1113 (quoting Davis v. Burke, 179 U.S. 399, 403 (1900)).

Hawai'i Constitution article XVI, section 16 states that "[t]he provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit."[44] Despite this apparent presumption in favor of self-executing provisions, Hawai'i courts will deem a provision non-self-executing if the provision imposes a particular duty on the legislature before the courts can enforce the law.[45]

In *Rodrigues*, the Hawai'i Supreme Court analyzed Hawai'i Constitution article I, section 11,[46] to determine if the provision was self-executing.[47] Justice Ogata, writing for the majority, determined that the constitutional provision was not self-executing because the phrase "as provided by law" implied that other statutes or provisions were needed in order to implement the constitutional mandate.[48] Justice Ogata noted that the constitutional provision itself "fails to define the number of independent counsel required, appoint or removal procedure, qualifications, length of term, compensation, or source of funding."[49] Furthermore, the phrase "as provided by law" was regularly construed in other jurisdictions as requiring enacting legislation before a provision could be enforced in court.[50]

Although the Hawai'i Supreme Court used the *Rodrigues* analysis to examine article XI, section 9 in the *Ala Loop* decision, the court used constitutional law decisions made after *Rodrigues* to conclude that article XI, section 9 is self-executing.[51] Based on Hawai'i case law, the *Ala Loop* court established two steps to determine whether a constitutional provision is self-executing—(1) examine the "plain language" to determine if the provision "indicates that the adoption of implementing legislation is

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[44] HAW. CONST. art. XVI, § 16 (1978).

[45] *Rodrigues*, 63 Haw. at 414, 629 P.2d at 1113. *See also* Save Sunset Beach Coal. v. City & Cnty. of Honolulu, 102 Haw. 465, 474-76, 78 P.3d 1, 10-12 (2003) (court determined that ARTICLE XI, § 3 of the Hawai'i State Constitution was not self-executing because the provision required a "two-thirds vote" of a particular body in order for the provision to be effective).

[46] HAW. CONST. art. I, § 11 (1978) states the following:

> Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.

[47] *Rodrigues*, 63 Haw. at 412, 629 P.2d at 1111.

[48] *Id.* at 415, 629 P.2d at 1114.

[49] *Id.* at 414, 629 P.2d at 1113.

[50] *Id.* at 415, 629 P.2d at 1114.

[51] Cnty. of Haw. v. Ala Loop Homeowners, 123 Haw. 391, 411, 235 P.3d 1103, 1123 (2010).

necessary[;]"[52] and (2) examine the framers' intent as found within the history of the constitutional provision.[53]

At the first step, the court examined the plain language of the provision, namely the phrase "as provided by law," to determine if the legislature needed to pass implementing legislation before the provision could be enforced in court.[54] The court noted that "as provided by law" had been interpreted differently in past Hawai'i Supreme Court decisions that examined constitutional provisions.[55] While "as provided by law" could be interpreted as a call for legislative action that renders a provision non-self-executing,[56] the phrase could also refer to statutes existing before the enactment of the amendment.[57] If such legislation was on the books before passage of the constitutional provision, the language "as provided by law" might be a passive reference to existing law instead of a requirement of additional legislative action.[58] Because "an existing body of statutory and other law" was in place when article XI, section 9 was adopted, the Court determined that this earlier plain language favored a self-executing interpretation.[59]

The *Ala Loop* court distinguished *Rodrigues* by noting that article XI, section 9 provided for enforcement "through appropriate legal proceedings," which is "within the ability of the judiciary to implement without legislative action."[60] The *Ala Loop* court concluded that, unlike *Rodrigues* in which enforcement of the right to grand jury counsel created difficult implementation issues (payment, deciding members of the counsel, etc.), a private action enforcing environmental rights "does not raise practical issues of implementation."[61]

For the second step of the analysis, the *Ala Loop* court examined the historical context of article XI, section 9.[62] According to the court, the committee report indicated that the framers thought the provision would

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[52] *Id.* at 412, 235 P.3d at 1124.

[53] *Id.* at 413, 235 P.3d at 1125.

[54] *Id.* at 411-12, 235 P.3d at 1123-24.

[55] *Id.*

[56] State v. Rodrigues, 63 Haw. 412, 415, 629 P.2d 1111, 1114 (1981).

[57] *Ala Loop*, 123 Haw. at 412-13, 235 P.3d at 1124-25.

[58] *Id.* (citing United Pub. Workers, AFSCME, Local 646 v. Yogi, 101 Haw. 46, 62 P.3d 189 (2002)).

[59] *Id.*

[60] *Id.* at 413, 235 P.3d at 1125 (internal quotation marks omitted).

[61] *Id.* at 413, 235 P.3d at 1125.

[62] *Id.* at 413-14, 235 P.3d at 1125-26 (citing Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of 1978, at 689-690 (1980)).

allow individuals to sue public and private violators in court.[63] The report did not explicitly state that procedural limitations were required before citizens could exercise their private right of action under article XI, section 9.[64] The Court also concluded that legislative acts subsequent to the passage of article XI, section 9 also supported a self-executing constitutional provision.[65]

B. Justice Acoba's Dissent

Justice Acoba vigorously dissented from the majority's analysis of the self-executing nature of article XI, section 9.[66] Addressing the issue of framers' intent first, Acoba noted the following statement by the Committee on Environment, Agriculture, Conservation and Land during the 1978 Constitutional Convention:

> *Developing a body of case law defining the content of the right could involve confusion and inconsistencies.* On the other hand, legislatures can adopt, modify or repeal environmental laws and regulation laws in light of the latest scientific evidence and federal requirements and opportunities. Thus *the right can be reshaped and redefined through statute, ordinance and administrative rule-making procedures and not inflexibly fixed.*[67]

Justice Acoba reasoned that the framers gave future legislatures, counties, and administrative agencies the authority to define the private right of action because those governmental bodies could adjust the law to respond to "scientific evidence and federal requirements and opportunities."[68] In this context, Acoba examined the plain language of the provision, interpreting "as provided by law" to mean that specific legislation was required for enforcement of article XI, section 9.[69]

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[63] *Id.* at 414, 235 P.3d at 1126.

[64] *Id. See* Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 689-90 (1980).

[65] *Ala Loop*, 123 Haw. at 414-15, 235 P.3d at 1126-27.

[66] *Id.* at 450, 235 P.3d at 1162 (Acoba, J., concurring in part and dissenting in part). While Justice Acoba agreed with the outcome of the case, he would have overruled the Intermediate Court of Appeal's decision on other grounds instead of addressing the constitutional question. *Id.* at 425, 235 P.3d at 1137.

[67] *Id.* (citing Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 689-90 (1980)) (emphasis added).

[68] *Id.* at 451, 235 P.3d at 1163 (citing Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 689-90 (1980)).

[69] *Id. See also* David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 92 (2000) (noting that "provisions[] which use the phrase 'as provided by law,' do not explicitly mandate implementing statutes, but have

Therefore, in his view, the framers intended the content of the right to be "defined by flexible legislative prescription and not by judicial case law."[70]

Acoba further attacked the majority's view, stating that:

> The majority attempts to define the constitutional right as encompassing the *entirety* of HRS chapter 205 through judicial "case law" in its opinion. Without the prescription of "reasonable procedural and jurisdiction matters, and a reasonable statute of limitations . . . this approach invites havoc in future applications of a private right of action . . . . defining the right by case law "can involve confusion and inconsistencies . . . . There is no jurisdictional or procedural basis for enforcing such a right and certainly no statute of limitations as to such a right under article XI, section 9. Hence, under the majority's approach, a suit on an alleged violation of HRS chapter 205 pursuant to article XI, section 9 could be brought in perpetuity and without the specific safeguards contemplated in the Report.[71]

He also disagreed with the majority's attempt to distinguish *Ala Loop* from *Rodrigues*; Acoba claimed that the phrase "as provided by law" instructed the legislature to address the administrative details of a provision before court enforcement.[72] Although Chief Justice Recktenwald had stated that enforcing environmental rights "does not raise practical issues of implementation,"[73] Acoba noted that the statute in question in *Ala Loop*, H.R.S. chapter 205, did not mention any "reasonable procedural and jurisdiction matters, and a reasonable statute of limitations" for a private right of action.[74]

III. THE NEW FRONTIER—DETERMINING REMEDIES FOR A SELF-EXECUTING CONSTITUTIONAL PROVISION FOR ENVIRONMENTAL RIGHTS

Although almost half of the states in the United States have constitutional provisions for environmental protection,[75] Hawai'i is one of only seven

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been interpreted by the Hawai'i Supreme Court to imply such a requirement. These can be classified as non-self-executing amendments.")

[70] *Id.* at 452, 235 P.3d at 1164.

[71] *Id.* (internal brackets and citations omitted).

[72] *Id.* at 453-54, 235 P.3d at 1165-66.

[73] *Id.* at 413, 235 P.3d at 1125 (majority opinion).

[74] *Id.* at 452, 235 P.3d at 1164 (Acoba, J., concurring in part and dissenting in part) (internal citations omitted).

[75] *See* Bryan P. Wilson, Comment, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627 (2004); *see also* Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 181 n.58 (1993) (discussing ALASKA CONST.

states that have constitutional provisions explicitly conferring environmental rights.[76] Despite the significant number of states that affirm goals of environmental protection in their respective constitutions, most state courts have significantly limited the protections of these environmental provisions by declaring that they are non-self-executing or not justiciable for various reasons.[77]

Because the existence of a self-executing constitutional environmental rights provision is a relatively new development in environmental law,[78] *Ala Loop* raises a plethora of legal issues regarding enforcement. Article XI, section 9 provides for the "right to a clean and healthful environment,

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art. VIII, §§ 1-7; CAL. CONST. art. X, § 2, art. X(A), §§ 1-3 & art. XIV, § 3; COLO. CONST. art. XVIII, § 6; FLA. CONST. art. II, § 7; HAW. CONST. art. IX, § 8 & art. XI, §§ 1, 9; ILL. CONST. art. XI, §§ 1-2; LA. CONST. art. IX, § 1; MASS. CONST. art. XCVII; MICH. CONST. art. IV, § 54; MONT. CONST. art. IX, § 1; N.C. CONST. art. XIV, § 5; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, §§ 4, 5; OHIO CONST. art. II, § 36; OR. CONST. art. XI-H, § 6; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17; TENN. CONST. art. XI, § 13; TEX. CONST. ART. XVI, § 59; UTAH CONST. art. XVIII, § 1; and VA. CONST. art. XI, §§ 1-2).

[76] Cusack, *supra* note 75, at 183 n.62 (discussing HAW. CONST. art. XI, § 9, ILL. CONST. art. XI, § 2, MASS. CONST. art. XLIX, § 179, MONT. CONST. art. II, § 3, N.Y. CONST. art. XIV, § 5, PA CONST. art. I, § 27, R.I. CONST. art. I, § 17).

[77] Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1501 (2010). *See also* Wilson, *supra* note 75, at 628; Horwich, *supra* note 5, at 326 (1996) ("State courts have repeatedly held these environmental provisions are not self-executing: the courts ruled that they create no new rights, impose no new obligations and establish no new limits on government or private action in the absence of state legislation implementing their terms."); Fernandez, *supra* note 1.

Scholars have noted that the courts might be wary of violating the separation of powers between the judiciary and the legislature. *See* Usman, at 1501; *see also* Fernandez, *supra* note 1, at 385. The courts might also reason that the enforcement of fines and penalties is more of a political issue; therefore, the legislature should have the power to adjust environmental enforcement according to changing circumstances and evaluate data on scientific advancements to promote particular policies. *See* Fernandez, *supra* note 1, at 375-82. This is particularly true in environmental law as standards for a clean and healthful environment continue to shift with new research information. *See* Paolo F. Ricci et al., *Precaution, Uncertainty and Causation in Environmental Decisions*, 29 ENV'T INT'L 1, 17-18 (2003), http://www.dss.dpem.tuc.gr/pdf/Precaution,%20uncertainty%20and%20causation%20in%20environmental%20decis.pdf (discussing the precautionary principle in law-making and the complexity of environmental decisions because of data deficiencies); *see also* Fernandez, *supra* note 1, at 381-82.

[78] *See* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3:102 & § 3:102 n.1 (2011) (noting that state courts are adverse to using environmental rights provisions within their respective constitutions to further environmental protection claims). *See also* Usman, *supra* note 77, at 1501; Fernandez, *supra* note 1, at 361-71.

as defined by law."[79] In addition to questions regarding procedural limitations on exercising the private right of action,[80] Hawai'i courts adjudicating private actions under article XI, section 9 will be faced with the task of determining remedies for violations of environmental rights. This is no small feat considering the various environmental statutory schemes and their different enforcement mechanisms.[81] Some Hawai'i environmental statutes provide guidance for state courts regarding the appropriate remedy;[82] however, other statutes vest authority in an administrative agency to enforce the law instead of explicitly providing for a court remedy.[83] Furthermore, the reference to "laws" defining environmental rights arguably might reach beyond statutes and regulations to include common law remedies as well.[84]

Statutes without explicit court remedies raise issues of the court's ability to fashion remedies under the state constitution.[85] While injunctive relief

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[79] HAW. CONST. art. XI, § 9.

[80] The dissent in *Ala Loop* illustrated potential procedural and jurisdictional issues involving the private right of action. *Ala Loop*, 123 Haw. at 452, 235 P.3d at 1164 (Acoba, J., concurring in part and dissenting in part) ("Without the prescription of "reasonable procedural and jurisdiction matters, and a reasonable statute of limitations . . . this approach invites havoc in future applications of a private right of action . . . ."). However, the discussion of the existence or non-existence of procedural and jurisdictional limitations is beyond the scope of this paper.

[81] *Compare* HAW. REV. STAT. § 342B-48 (2010) (providing for administrative penalties) *with* HAW. REV. STAT. § 205A-6 (2001 & Supp. 2010) (providing remedies in the form of injunctions and restraining orders), *and* City & County of Honolulu Department of Planning and Permitting Rules of Practice and Procedure § 10 (2010), *available at* http://honoluludpp.org/permitinfo/part1.pdf (imposing fines for violations of conditional use permits).

[82] *See* HAW. REV. STAT. § 342C-5 (2010) (statute for ozone layer protection imposes civil penalties for releasing chlorofluorocarbons, or CFCs, into the environment) *and* HAW. REV. STAT. § 342E-4 (2010) (imposing civil penalties for nonpoint source pollution management and control).

[83] *See* HAW. REV. STAT. chapter 342D (2010) (no citizen suit provisions in the water discharge permitting scheme). The water discharge permitting scheme grants powers of enforcement to the director, not to individual citizens. HAW. REV. STAT. § 342D-4 (2010) (granting the director the power to "prevent, control, and abate water pollution in the State and may control all management practices for domestic sewage, sewage sludge, and recycled water, whether or not the practices cause water pollution"); HAW. REV. STAT. § 342D-9 (2010) (granting enforcement powers to the director); HAW. REV. STAT. § 342D-11 (2010) (granting the director the power to bring a civil action in court for "injunctive or other relief" against violators of the statute); HAW. REV. STAT. § 205 (2001 & Supp. 2010).

[84] *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 758, 775 (2001) (arguing for the use of common law actions like public nuisance to address environmental harm).

[85] *See* Fernandez, *supra* note 1, at 353-55 (discussing questions of court enforcement for

and administrative penalties are relatively common,[86] money damages are not the typical form of relief for violations of state environmental statutes.[87] However, a self-executing environmental right in the state constitution arguably could provide an avenue for money damages.[88]

The Montana Supreme Court recently confronted the question of whether Montana's constitutional environmental rights provision provided for money damages in constitutional tort.[89] Specifically, the Court asked the parties in *Sunburst School District No. 2 v. Texaco, Inc.* to brief the following questions: "(1) whether Article II, section 3 is self-executing; (2) whether a *Bivens*-type action would lie for violation of the right to a clean and healthful environment; and (3) whether such an action could be brought against a private entity."[90] Ultimately, the Montana Supreme Court avoided the *Bivens* question by resolving the case on other grounds.[91]

The Hawai'i Supreme Court did not directly address the constitutional tort question in *Ala Loop*. However, in contrast to *Sunburst*, the *Ala Loop* decision opened the door for the consideration of money damages in constitutional tort by concluding that article XI, section 9 was self-executing.[92] Because article XI, section 9 is self-executing, Hawai'i courts may have to address *Sunburst*'s unanswered issues of: (1) The

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self-executing provisions).

[86] *E.g.*, HAW. REV. STAT. § 342B-56 (2010) (providing for enforcement of an emission standard or limitation, power to order the director to perform an act or duty, or civil penalties, but not money damages).

[87] *See, e.g.*, HAW. REV. STAT. §342B-56 (2010) (providing for enforcement of an emission standard or limitation, power to order the director to perform an act or duty, or civil penalties, but not money damages); Mark Latham, Victor E. Schwartz & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 758-59 (2011) (noting that remedies for violations of environmental regulations usually involve forcing compliance instead of providing traditional damage remedies); Diamond v. General Motors Corp., 97 Cal. Rptr. 639, 645 (1971) (noting that federal and state air quality regulations provided for remedies in the form of "license revocation, civil injunctions, and criminal prosecutions").

[88] Betsy Griffing, *The Rise and Fall of the New Judicial Federalism Under the Montana Constitution*, 71 MONT. L. REV. 383, 391 (2010) (discussing Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079, 1093 (Mont. 2007)).

[89] Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 165 P.3d 1079, 1093 (Mont. 2007) (citizen sued private party oil company for violation of environmental rights).

[90] *Id.* at 1112 (Gray, J., concurring in part and dissenting in part).

[91] *Id.* at 1093 (majority opinion). The Montana Supreme Court found that the plaintiff had recourse to common law redress in order to obtain damages; therefore, the court did not need to answer the constitutional law question. *Id.*

[92] *Compare* Cnty. of Haw. v. Ala Loop Homeowners, 123 Haw. 391, 410-17, 235 P.3d 1103, 1122-29, *with Sunburst School Dist.*, 165 P.3d at 1112 (Gray, J., concurring in part and dissenting in part).

existence of a *Bivens*-type action for violation of the right to a clean and healthful environment; and (2) whether a *Bivens*-type action could be brought against a private entity.[93]

A. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics[94]

In *Bivens*, the United States Supreme Court considered whether a federal court could provide money damages as a form of relief for a constitutional violation. Bivens was arrested in his home without a search warrant. Federal agents had used unreasonable force by handcuffing him in front of his wife and children; threatening to arrest the entire family; searching their apartment; and interrogating, booking, and conducting a visual strip-search of Bivens at the Brooklyn federal courthouse.[95] Bivens claimed that the federal agents had violated his Fourth Amendment right to be free from unreasonable searches and seizures.[96] Bivens requested relief in the form of damages for the humiliation, embarrassment, and mental suffering he endured from his treatment by the federal agents.[97]

Justice Brennan, writing for the majority, noted that the Constitution does not explicitly provide for money damages as a form of relief for violations of constitutional rights.[98] However, Brennan reasoned that "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[99] Because Congress did not explicitly bar Bivens from recovering damages, the court concluded that federal courts could provide such relief.[100] The court, quoting from *Marbury v. Madison*,[101] reiterated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[102] Brennan noted that common

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[93] *Sunburst School Dist.*, 165 P. 3d at 1112 (Gray, J., concurring in part and dissenting in part).

[94] 403 U.S. 388 (1971).

[95] *Id.* at 389.

[96] *Id.* at 390-92.

[97] *Id.* at 389-90.

[98] *Id.* at 396.

[99] *Id.* (quoting Bell v. Hood, 327 U.S. 678, 684 (1946) (internal quotation marks omitted)).

[100] *Id.* at 397.

[101] 5 U.S. 137, 163 (1803).

[102] *Bivens*, 403 U.S. at 397 (1971) (quoting Marbury v. Madison, 5 U.S. 137, 163 (1803)).

law precedent provided relief to private citizens who had suffered an "invasion of personal interests in liberty."[103]

However, the Court mentioned limitations that came to characterize the *Bivens* analysis in later cases. First, the court limited the holding by noting that the relationship between federal agents and citizens is distinct from the relationship between two private citizens because private citizens can rely on state authorities to preserve their personal interests.[104] In contrast, citizens cannot call state authorities to save them from abuse from federal authorities.[105] Second, the court acknowledged that "special factors counseling hesitation"[106] might bar the creation of a *Bivens* remedy.[107]

Justice Harlan concurred with the majority and argued that the Constitution did not give Congress exclusive power to determine remedies.[108] He noted that the court had authorized relief in damages in past cases in order to effectuate underlying policy in congressional statutes.[109] He also noted that Congress provided the courts with equitable remedial powers.[110] Therefore, Justice Harlan argued, the court should exercise its power to provide a damages remedy if the remedy is "necessary"[111] or "appropriate"[112] to effectuate statutory policy. Justice Harlan also determined that the court should consider a "range of policy considerations . . . at least as broad as the range [] a legislature would consider with respect to an express statutory authorization of a traditional remedy."[113] While deterrence is a factor in justifying a damages remedy, Harlan emphasized that compensation could also be a major factor.[114] For Bivens, injunctive relief was not sufficient because he could not show a potential future instance of abusive conduct by federal authorities.[115] However, the inability to show a repeat violation did not mean that Bivens

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[103] *Id.* at 395-96.

[104] *Id.* at 394.

[105] *Id.*

[106] *Id.* at 396.

[107] *Id.* at 396-97 (citing Wheeldin v. Wheeler, 373 U.S. 647 (1963)). The Supreme Court gave two examples of "special factors": Cases involving "federal fiscal policy," and allegations of congressional employee conduct that was not a violation of the Constitution, but merely allegations that employees acted outside the authority delegated by Congress. *Id.*

[108] *Id.* at 401-402 (Harlan, J. concurring).

[109] *Id.*

[110] *Id.* at 404 (citing Act of May 8, 1792, sec 2, 1 Stat. 276) (Harlan, J. concurring).

[111] *Id.* at 402.

[112] *Id.* at 403.

[113] *Id.* at 407.

[114] *Id.*

[115] *Id.* at 408.

had not suffered harm; therefore, he should be able to obtain a remedy in damages.[116] In regards to precedent and judicial experience in awarding damage claims, Harlan noted that judges had experience in adjudicating private trespass and false imprisonment claims, which were sufficiently analogous to demonstrate that "courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights."[117]

Chief Justice Burger dissented on the grounds that the Supreme Court should defer to Congress even in Bivens's situation.[118] Burger proclaimed that courts had overstepped the bounds of judicial power. Furthermore, the court-provided remedy would be ineffective because juries might sympathize with federal law enforcement officials trying to do their job more than with the victim whose rights had been violated.[119] In Burger's view, Congress should set up administrative or quasi-judicial remedies to provide an effective scheme of compensation and restitution.[120]

Justice Black's dissent opposed the judicial creation of a cause of action because the Constitution did not give the court the power to construct such a remedy.[121] Black presented a court-clogging argument, claiming that the majority's holding would draw a large number of cases for constitutional tort violations, crowding out other citizen claims for tort, fraud, governmental infringement of rights, deprivation of liberty and property, equal opportunity, and the pursuit of happiness.[122] Black asserted that such delays could deny justice, and that legislators should have the final say about where the government allocated its resources and what battles the government should fight.[123] Black also argued that the courts would have a hard time resolving competing policies, goals, and priorities in the use of resources.[124] Congress and the state legislatures should have the power to evaluate the pros and cons of creating judicial remedies; the "judiciary is to interpret the laws and not to make them."[125] The absence of a

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[116] *Id.* at 409.
[117] *Id.*
[118] *Id.* at 412, 421 (Burger, J. dissenting).
[119] *Id.* at 421-22.
[120] *Id.* at 422.
[121] *Id.* at 428 (Black, J. dissenting).
[122] *Id.*
[123] *Id.* at 428-29.
[124] *Id.* at 429.
[125] *Id.* at 430.

Congressional remedy implied that the legislature did not intend to provide a civil suit remedy.[126]

Blackmun reiterated some of the concerns of his fellow dissenters, adding that the decision would impose burdens on effective law enforcement.[127] He also argued that silence by both Congress and the courts indicated that the legislature and the courts had thought that existing remedies were sufficient to address a *Bivens*-like claim.[128]

B. The Bivens *Doctrine—Arguments and Concerns*

Bivens has created some level of confusion at the federal as well as the state level. While the *Bivens* action was initially extended to the Fifth Amendment[129] and the Eighth Amendment,[130] the success of the *Bivens* majority was short-lived. Subsequent to *Bivens*, the Supreme Court started to limit the doctrine by denying *Bivens* claims for various reasons. Burger, Black, and Blackmun's arguments regarding separation of powers, involvement in political issues, and the benefits of legislative action became the dominant concerns as the Supreme Court addressed cases outside of the Fourth, Fifth, and Eighth Amendments.

In *Bush v. Lucas*,[131] a federal employee sued the government for violating his First Amendment rights by demoting him for publicly criticizing his employer.[132] Justice Stevens, writing for the majority, neatly captured the Supreme Court's position regarding the conflicting rationales behind the *Bivens* doctrine:

> We might adopt the common-law approach to the judicial recognition of new causes of action and hold that it is the province of the judiciary to fashion an adequate remedy for every wrong that can be proved in a case over which a court has jurisdiction. Or we might start from the premise that federal courts are courts of limited jurisdiction whose remedial powers do not extend beyond the granting of relief expressly authorized by Congress . . . . Our prior cases, although sometimes emphasizing one approach and sometimes the

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[126] *Id.* at 429-30.

[127] *Id.* at 430 (Blackmun, J. dissenting).

[128] *Id.*

[129] Davis v. Passman, 442 U.S. 228 (1979) (providing a *Bivens* action in damages under the Fifth Amendment for sex discrimination in employment because Title VII did not cover congressional employees who were not in "competitive service.").

[130] Carlson v. Green, 446 U.S. 14 (1980) (providing a *Bivens* action for deceased federal prisoner whose Eighth Amendment rights were allegedly violated).

[131] 462 U.S. 367 (1983).

[132] *Id.* at 369-71.

> other, have unequivocally rejected both extremes. They establish our power to grant relief that is not expressly authorized by statute, but they also remind us that such power is to be exercised in the light of relevant policy determinations made by the Congress.[133]

Stevens then found that the "special factors" rationale in *Bivens* "related to the question of who should decide whether such a remedy should be provided."[134] After examining the history of remedies for government employees who faced demotion for exercising their right to free speech, Stevens concluded that the legislative and executive branches had provided a "comprehensive procedural and substantive" enforcement scheme to protect employee rights.[135] Because the legislature and the executive had to resolve several conflicting policy considerations to create the existing remedies, Stevens reasoned that the addition of a new judicial remedy would require policy considerations because of the potential interaction between the new remedy and the current enforcement scheme.[136] Deeming Congress to be in the best position to weigh the policy implications and the effectiveness of the additional remedy, Stevens used the "special factors" rationale to deny a constitutional tort claim for money damages under the First Amendment.[137] Subsequent Supreme Court cases expanded "special factors counseling hesitation" to include Congress's discretion and power over the military affairs[138] and "potential[] enormous financial burden[s]" on government agencies.[139] Additionally, the Supreme Court held that *Bivens* actions are precluded when Congress provides alternative remedies, even if such remedies fail to fully compensate individuals.[140]

Although *Bivens* is a federal case, state courts have considered analogous *Bivens* actions to allow for money damages under their state constitutions.[141] States have allowed constitutional tort actions for

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[133] *Id.* at 373 (internal footnotes omitted).

[134] *Id.* at 380.

[135] *Id.* at 368.

[136] *Id.* at 388-89.

[137] *Id.* at 388-90.

[138] *See* Chappell v. Wallace, 462 U.S. 296 (1983) *and* United States v. Stanley, 483 U.S. 669 (1987).

[139] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001) (quoting FDIC v. Meyer, 510 U.S. 471, 486 (1994)).

[140] Laurence H. Tribe, *Death By A Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO. SUP. CT. REV. 23, 64-65 (2007) (explaining the decline of the *Bivens* doctrine and the emphasis on Congressional action).

[141] *See* Helen Gugel, *Remaking the Mold: Pursuing Failure-To-Protect Claims Under State Constitutions Via Analogous Bivens Actions*, 110 COLUM. L. REV. 1294, 1322-23 (2010).

violations of equal protection,[142] the right to be free from illegal search and seizures,[143] the right to privacy,[144] the right to be free from handicap discrimination,[145] and the right to be free from cruel and unusual punishment.[146] However, most states have denied *Bivens*-type constitutional tort claims.[147] Furthermore, a few states that allowed for analogous *Bivens* actions have overruled past decisions providing for money damages by issuing new decisions severely limiting constitutional tort actions.[148] Instead of a presumption of the existence of a constitutional tort, the courts have introduced several limiting factors when determining the existence of a constitutional tort. First, each constitutional provision is analyzed separately, and the courts carefully examine if the framers intended to provide or deny a damages remedy.[149] Second, the courts consider the existence of alternative remedies.[150] Third, the courts determine if there are special factors that would counsel against providing money damages for a constitutional rights violation.[151] While the courts

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[142] *See* Brown v. State, 674 N.E.2d 1129, 1138 (1996).

[143] *See id.*

[144] *See* Moresi v. State Through Dep't of Wildlife & Fisheries, 567 So. 2d 1081 (La. 1990).

[145] *See* Layne v. Superintendent, Mass. Corr. Inst., 546 N.E.2d 166 (1989) (implicitly assuming monetary damages, but remanding because plaintiffs had not proved a constitutional rights violation).

[146] *See* Bott v. DeLand, 922 P.2d 732 (Utah 1996) (*abrogated by* Spackman v. Bd. of Educ. of the Box Elder Cnty. Sch. Dist., 16 P.3d 533 (Utah 2000)).

[147] *E.g.*, Dick Fischer Dev. No. 2, Inc. v. Dep't of Admin., 838 P.2d 263 (Alaska 1992) (denying constitutional tort for due process violations because alternative remedy was available); Katzberg v. Regents of Univ. of Cal., 58 P.3d 339 (Cal. 2002) (denying money damages for due process rights under the California Constitution by noting the trend of Supreme Court cases post-*Bivens*).

[148] *See Katzberg*, 58 P.3d 339; *Spackman*, 16 P.3d 533 (abrogating Bott v. DeLand, 922 P.2d 732 (Utah 1996), and substituting the *Bott* analysis with a more restrictive analysis based on Supreme Court decisions post-*Bivens*).

[149] *See Katzberg*, 58 P.3d at 318 (examining "whether there is evidence from which we may find or infer, within the constitutional provision at issue, an affirmative intent either to authorize or to withhold a damages action to remedy a violation."); *see also Spackman*, 16 P.3d at 537 (examining the text of the constitution and statutory authority first before moving on to the common law as a source of authority for courts to provide damage remedies).

[150] *E.g.*, Augat v. State, 244 A.D.2d 835 (N.Y. 1997) (holding that adequate alternate remedies barred constitutional tort claims for rights of due process and freedom of association); Walt v. State, 751 P.2d 1345, 1353 (Alaska 1988) (holding that it would be inappropriate to recognize a constitutional tort when alternative legislative and administrative remedies existed); *Katzberg*, 58 P.3d at 355; *Spackman*, 16 P.3d at 538-39.

[151] *See Katzberg*, 58 P.3d at 350 (noting that "we also shall consider the existence of any

may have power to adjudicate a case, state courts might still refrain from providing particular remedies because of the implications for separation of powers and political issues as illustrated in the federal cases.[152] These concerns might explain why the Hawai'i courts have been reluctant to allow *Bivens* actions for violations of the state constitution.

C. The Bivens *Doctrine in Hawai'i*

The Hawai'i Supreme court first examined the *Bivens* doctrine in *Figueroa v. State*.[153] Figueroa was sent to a juvenile home operated by the Corrections Division of the State of Hawai'i.[154] While there, he attempted to commit suicide.[155] Figueroa, permanently disabled, brought a tort claim against the state, claiming that the state was negligent in taking care of a juvenile.[156] The trial court determined that Figueroa's rights to due process, freedom from cruel and unusual punishment, and rehabilitative treatment were violated.[157] Figueroa maintained that he had a private right of action in damages that arose from the state constitution.[158]

The Hawai'i Supreme Court disagreed. The court found that federal courts refused to extend liability to the sovereign for damages; therefore, the court did not want to abrogate the state's sovereign immunity to allow *Bivens* claims.[159] The court noted that the self-executing status of a constitutional provision did not automatically confer "any and all accepted forms of redress including money damages."[160] The court did not buy the

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special factors counseling hesitation in recognizing a damages action, including deference to legislative judgment, avoidance of adverse policy consequences, considerations of government fiscal policy, practical issues of proof, and the competence of courts to assess particular types of damages"); Binette v. Sabo, 710 A.2d 688, 699 (Conn. 1998) (noting that there are no special factors counseling hesitation in the case at hand); Provens v. Stark Cty. Bd. of Mental Retardation and Developmental Disabilities, 594 N.E.2d 959, 962-63 (1992) (noting special factors counseling hesitation as part of the *Bivens* analysis).

[152] *See* Andrea Robeda, *The Death of Implied Causes of Action: The Supreme Court's Recent Bivens Jurisprudence and the Effects on State Constitutional Tort Jurisprudence: Correctional Services Corp. v. Malesko*, 33 N.M. L. REV. 401, 424-25 (2003); *see also* Fernandez, *supra* note 1, at 380.

[153] 61 Haw. 369, 604 P.2d 1198 (1980).

[154] *Id.* at 372-73, 604 P.2d at 1200-01.

[155] *Id.* at 374, 604 P.2d at 1201.

[156] *Id.* at 375-77, 604 P.2d at 1202-03.

[157] *Id.* at 380-81, 604 P.2d at 1204-05.

[158] *Id.* at 381, 604 P.2d at 1205.

[159] *Id.* at 381-82, 604 P.2d at 1205-06.

[160] *Id.* at 382, 604 P.2d at 1206.

argument that "all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available."[161]

The Hawai'i Supreme Court used the reasoning in *Gearin v. Marion*[162] to reject the *Bivens* principle. Gearin brought an action for damages after city employees released logs, trees, and stumps from a bridge, causing damage to Gearin's buildings and land. Although the Oregon Constitution had a self-executing provision that "every man shall have a remedy . . . for injury done him in his person, property or reputation,"[163] the Oregon court stated that the provision did not apply to tort claims brought against the state or county because a state statute prohibited suits against the counties.[164]

Using the reasoning in *Gearin*, the Hawai'i Supreme Court examined the State Tort Liability Act and found that the act did not have a provision allowing for liability in money damages for constitutional torts. Although constitutional torts were not included as an exception to state liability, the court refrained from interpreting the act liberally.[165] The court noted that the act was intended to waive immunity for "traditionally recognized common law causes of action in tort . . . . It was not intended to visit the sovereign with novel liabilities."[166]

In *Pele Defense Fund v. Paty*,[167] the Hawai'i Supreme Court once again reiterated that a constitutional rights violation did not automatically allow money damages.[168] The Court additionally noted that, in claims against the sovereign, plaintiffs could ask for prospective relief to prevent future or ongoing harm (typically injunctive or declaratory relief), but retrospective relief (typically damages) was not allowed.[169] Although the plaintiffs in Pele were asking for injunctive relief, the Supreme Court denied the claim because the relief was "tantamount to an award of damages for a past violation of . . . law."[170]

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[161] *Id.*

[162] 223 P. 929 (Or. 1924).

[163] *Figueroa*, 61 Haw. at 383, 604 P.2d at 1206 (quoting OR. CONST. art. I, § 10).

[164] *Id.*

[165] *Id.* at 383-84, 604 P.2d at 1206-07 ("We did say . . . that the State Tort Liability Act . . . should be liberally construed; however, this . . . rule of construction . . . is subservient to the cardinal rule of construction that the legislative intent must prevail. The State Tort Liability Act did not waive governmental immunity in all cases . . . .").

[166] *Id.* at 383, 604 P.2d at 1207.

[167] 73 Haw. 578, 837 P.2d 1247 (1992).

[168] *Id.* at 605, 837 P.2d at 1264.

[169] *Id.* at 609, 837 P.2d at 1266.

[170] *Id.* at 609-10, 837 P.2d at 1266 (quoting Papasan v. Allain, 478 U.S. 265, 278 (1986)).

D. Article XI, Section 9 and the Bivens *Doctrine*

Using the rationale behind the federal cases and Hawai'i precedent, Hawai'i courts should not allow for analogous *Bivens* actions under article XI, section 9 against state or private actors. While *Figueroa* and *Pele* are on-point regarding environmental rights claims against state actors[171] and would likely bar *Bivens* actions against state actors,[172] courts will need to address article XI, section 9's unique language about enforcement against private actors.[173] The Supreme Court had emphasized that *Bivens* actions should only be applied to *government* violations of constitutional rights because an individual could usually rely on the state and federal government to protect citizens from other private actors.[174] However, this argument may not apply because article XI, section 9's text explicitly provides for private enforcement against other private actors.[175] As the other state cases demonstrate, each constitutional provision must be examined to determine if a *Bivens*-type action should be allowed.[176] In this case, based on the framers' intent; special policy factors regarding the environmental enforcement scheme; and the existence of alternative remedies, Hawai'i courts should probably bar analogous *Bivens* actions in order to maintain a coherent environmental enforcement scheme.

1. Framers' intent for article XI, section 9

Hawai'i courts should remain cognizant of the framers' intent when providing remedies for environmental harm. Based on the text and the committee report, the framers likely did not intend for the provision to be enforced through constitutional tort actions. The text of article XI, section 9 states that (1) the right to a clean and healthful environment should be defined by "laws relating to environmental quality" and (2) "[a]ny person may enforce this right . . . through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law."[177] The term

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[171] Under Hawai'i law, municipalities are "subject to the state's tort laws in the same manner as any other private tortfeasor" and are not entitled to sovereign immunity. Kahale v. City and Cnty. of Honolulu, 104 Haw. 341, 349, 90 P.3d 233, 241 (2004).

[172] *See infra* notes 245-256 and accompanying text.

[173] *Compare* HAW. CONST. art. I, § 5, *and* HAW. CONST. art. I, § 12 *with* HAW. CONST. art. XI, § 9.

[174] *See supra* notes 104, 105 and accompanying text.

[175] HAW. CONST. art. XI, § 9.

[176] *See* cases cited *supra* note 149.

[177] HAW. CONST. art. XI, § 9.

"law" in the provision is clarified in the historical reports related to article XI, section 9. In the standing committee report, the committee indicated that the "definition of this right would be accomplished by relying on the large body of statutes, administrative rules and ordinances relating to environmental quality."[178] Furthermore, the report shows a clear delineation between legislative and judicial action in defining the right. While reliance on legislative action is encouraged in the report, the development of judicial common law is discouraged by the report's statements that "[d]eveloping a body of case law defining the content of the right could involve confusion and inconsistencies."[179]

Additionally, the report stated that the Committee's intent was to remove "standing to sue barriers" and to allow individuals to "directly sue public and private violators of statutes, ordinances, and administrative rules relating to environmental quality."[180] However, within the same paragraph the Committee clarified that article XI, section 9 "adds no new duties."[181] The committee's careful explanation of how the right should be exercised seems to mirror *Figueroa*'s analysis that access to the courts does not automatically equate with a cause of action for money damages.[182] Even though article XI, section 9 lifted standing to sue barriers, environmental enforcement claims should follow the procedural and remedial scheme in existing law instead of creating an additional liability for money damages.[183]

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[178] Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 689 (1980).

[179] Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 689 (1980). The specific text of the section of the report contrasting judicial and legislative action is as follows:

> *Developing a body of case law defining the content of the right could involve confusion and inconsistencies.* On the other hand, legislatures can adopt, modify or repeal environmental laws and regulation laws in light of the latest scientific evidence and federal requirements and opportunities. Thus *the right can be reshaped and redefined through statute, ordinance and administrative rule-making procedures and not inflexibly fixed.*

Id. (emphasis added).

[180] Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 690 (1980).

[181] *Id.*

[182] *See* State v. Figueroa, 61 Haw. 369, 383, 604 P.2d 1198, 1206 (1980).

[183] *See id.* at 383, 604 P.2d at 1206 (recognizing that constitutional tort actions would have increased liability on the sovereign beyond common law torts).

2. Special factors counseling hesitation

The framers' emphasis on legislative and administrative enforcement illustrates that there are "special factors"[184] that would likely bar a *Bivens*-type remedy. Supreme Court cases after *Bivens* illustrate that money damages might present political and social issues that would better be resolved by the legislature.[185] While the courts have calculated money damages in traditional common law actions, article XI, section 9 has distinguishing characteristics that caution against allowing for a money damages remedy through a constitutional tort action.

In contrast to rights like freedom from cruel and unusual punishment and freedom from illegal search and seizure, environmental rights have an element of public values that complicates enforcement through means of common law money damages.[186] The framers' careful analysis of the limitations of the private right of action demonstrates that the framers did not want the right to be abused by private parties.[187]

The common law's limitations on environmental rights claims reflect the view that common law damages are typically meant to target individual or site-specific problems instead of general resource protection for the public.[188] Before statutes and administrative regulations, citizens sought court enforcement of environmental rights by bringing claims for trespass, private nuisance, public nuisance, strict liability, and protection of the public trust.[189] However, plaintiffs faced limitations in common law actions. While trespass or private nuisance suits could impose liability on environmental rights violators for damaging personal property, the common law's specific causation requirements posed difficulty when trying to assess

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[184] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

[185] *See supra* notes 131-140 and accompanying text.

[186] Antolini, *supra* note 84, at 858.

[187] Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 690 (1980) ("Your Committee believes that this new section adequately recognizes the right to a clean and healthful environment and at the same time would prevent abuses of this right. Concern was expressed that the exercise of this right to a clean and healthful environment would result in a flood of frivolous lawsuits.").

[188] Michael D. Axline, *The Limits of Statutory Law and the Wisdom of Common Law, in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 53, 68 (Clifford Rechtschaffen & Denise Antolini eds., 2007).

[189] Denise E. Antolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher, in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 11, 12 (Clifford Rechtschaffen & Denise Antolini eds., 2007).

harm to natural resources.[190] Without direct tangible harm to the individual, plaintiffs faced difficulty using the tort system to protect the environment.[191, 192]

Statutory environmental law was developed to address environmental issues on the societal level.[193] Statutes and regulations resolved the causation issues in environmental claims by "allow[ing] the government to regulate without proof of specific harm and causation."[194] Statutory and administrative enforcement schemes also provided for set penalties, which resolved damage calculation issues.[195]

The development of environmental law demonstrates that environmental claims do not neatly fit within the private law category or the public law category—injury to a private party may involve injury to the public in general.[196] However, article XI, section 9 presents a particular issue because plaintiffs can use public harm to argue for individual compensation; after all, article XI, section 9 states that "[e]ach person" has the right to a clean and healthy environment as defined by public laws.[197] This particular aspect of environmental law distinguishes these types of provisions from other constitutional provisions with *Bivens*-type remedies. Analogous *Bivens* actions typically allow for individual relief against a government agency for a personal injury.[198] A typical *Bivens* case usually

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[190] Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 130-31 (2007); Axline, *supra* note 188, at 54.

[191] *See* Axline, *supra* note 188, at 68.

[192] The exceptions to the typical individual focus of the common law are public trust and public nuisance claims. However, public trust and public nuisance actions do not provide guidance for environmental common law damage remedies because courts usually issue injunctive relief for such claims. *See* In re Water Use Permit Applications, 94 Haw. 97, 127-28, 9 P.3d 409, 439-40 (2000) (public trust doctrine tends to deal with special property, like navigable soil or water); Victor E. Schwartz, Phil Goldberg, & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629, 632-36 (2010) (examining cases attempting to use public nuisance to protect environmental rights). *See also* Antolini, *supra* note 84, at 774 ("[A]ccording to Prosser, 'the great majority of nuisance suits have been in equity, and concerned primarily with the prevention of future damage.'"). Additionally, private plaintiffs in environmental public nuisance claims face problems because of standing limitations. Klass, *supra* note 190, at 128.

[193] Axline, *supra* note 188, at 68.

[194] Axline, *supra* note 188, at 54.

[195] *Id.*

[196] Klass, *supra* note 189, at 144-45.

[197] HAW. CONST. art. XI, § 9 (1978).

[198] Brown v. State, 674 N.E.2d 1129 (N.Y. 1996) (illegal search and seizure); Moresi v. State Through Dep't of Wildlife & Fisheries, 567 So.2d 1081 (La. 1990) (handicap

involves a government actor directly harming a particular plaintiff's person or property, like an unlawful arrest or termination of a job.[199] In contrast, allowing money damages under article XI, section 9 creates fairness issues because individuals could obtain damages for violations of a public good even if there is no direct harm to the individual.[200] Public nuisance cases are particularly illustrative of this problem. Scholars examining the use of common law public nuisance acknowledge that the action could be abused by "privately motivated litigants seeking strategic advantage by cloaking private nuisance or personal injury cases in public nuisance claims."[201] Because common law public nuisance should focus on protecting *public* values, scholars note that the courts should "look[] first toward injunctive relief rather than monetary damages."[202] While the framers intended for more Hawai'i citizens to enforce environmental protection statutes by eliminating barriers to standing, the framers likely did not want the right to be abused by allowing individuals to profit from violations of public values.[203]

In contrast to money damages for torts, statutory remedies like civil penalties tend to avoid the "windfall" issue because the money collected is placed in a government fund for public environmental resource protection.[204] Perhaps courts could solve the windfall issue by apportioning

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discrimination); Bott v. DeLand, 922 P.2d 732 (Utah 1996) (abrogated by Spackman v. Bd. of Educ. of the Box Elder Cnty. Sch. Dist., 16 P.3d 533 (Utah 2000)) (cruel and unusual punishment).

[199] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979); *and* Carlson v. Green, 446 U.S. 14 (1980).

[200] *See* Antolini, *supra* note 84, at 858 n.541 ("If the basis of the lawsuit is to vindicate public values, then it may seem anomalous that the plaintiff receives individual damages, e.g., for a loss to recreational fishing resources."); *see also* Klass, *supra* note 190, at 144-45 ("[T]he harm . . . is not "personal" to the plaintiff as it is in the intentional tort cases. Instead, the private plaintiff is attempting to recover for harm to natural resources owned or managed by the public . . . even if obstacles to private party standing and valuation are removed, it does not follow that the plaintiff should be the beneficiary of . . . damages that flow from the public harm.").

[201] Antolini, *supra* note 84, at 864.

[202] *Id.* at 858 n.541.

[203] *See* Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 690 (1980) (framers emphasized public law in defining the right and acknowledged potential issue of frivolous lawsuits).

[204] *See* HAW. REV. STAT. § 128D-2 (1993 & Supp. 2010). The environmental response revolving fund contains funds from the legislature, civil penalties and fines, court settlements, and certain taxes. The money is used to address environmental emergencies that require immediate clean up, support recycling programs, and to encourage environmental and natural resource protection programs. *Id.*

awards between private plaintiffs and state or nonprofit agencies that preserve public environmental rights.[205] Allocating damages to such actors would be similar to the civil penalties system because damages from public harm would be used to prevent or mitigate environmental harm in the future.[206] A few statutory provisions give courts discretion to distribute public funds to private projects that "enhance public health or the environment."[207]

However, there is a distinct difference between court discretion that is conferred by statute and court discretion derived from the constitution. Current enforcement schemes that give courts the discretion to make apportionment decisions are provided by *statute*; in a constitutional tort action, the court would be creating the apportionment scheme. While the public can exert political pressure on the legislature to change statutory provisions, the judiciary is more insulated from that pressure, particularly for constitutional law decisions.[208] Modifying statutes tends to be easier than amending constitutions.[209] State court rulings on constitutional provisions are "usually final absent constitutional amendment."[210] Because judicial action as a constitutional tort may "inflexibly fix[]"[211] certain policies in the environmental enforcement scheme, the judiciary should not give damage windfalls to private environmental groups absent an explicit legislative provision. Court decisions that pick and choose to fund certain environmental programs without any check by an elected branch could result in a loss of judicial legitimacy if the public perceived judges as legislating from the bench and catering to particular groups.[212]

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[205] Klass, *supra* note 190, at 157.

[206] *See* HAW. REV. STAT. § 128D-2 (1993 & Supp. 2010). *See* HAW. REV. STAT. § 342J-10.5 (2010) (fines and penalties collected for violations of hazardous waste laws must be deposited in the environmental response revolving fund established by HRS § 128D-2).

[207] *See* HAW. REV. STAT. § 342B-56(h) (2010) ("The court shall have discretion to order that such civil penalties, in lieu of being deposited in the fund, be used in beneficial mitigation, education, or protection projects which enhance public health or the environment.").

[208] *See* Fernandez, *supra* note 1, at 385. *See also* Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 322-23 (1995) (noting that legislative actions allow for more public participation, increasing public support based on "a more reassuring appearance of democratic participation").

[209] Fernandez, *supra* note 1, at 385.

[210] Fernandez, *supra* note 1, at 385.

[211] Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 689 (1980).

[212] Fernandez, *supra* note 1, at 381 ("The absence of consensus on environmental issues leaves the courts open to accusations of elitism and judicial 'legislating' when they attempt to enforce environmental rights provisions . . . [i]f the public should ever become convinced

In addition to judicial legitimacy issues regarding windfall awards, the calculation of monetary damages for environmental rights violations might be particularly controversial because of the lack of scientific consensus about optimum levels of biodiversity, water and air quality, chemical uses, etc.[213] What is the value of a Hawaiian monk seal or a day at the beach? How should the court calculate harm from the introduction of an invasive species or the release of CFCs into the atmosphere?[214] Such issues regarding environmental enforcement have typically been entrusted to legislatures as policy judgments because the answers require a balancing of environmental, industrial, commercial, and consumer concerns that may change as society progresses.[215]

Furthermore, a constitutional tort action under article XI, section 9 would require the judiciary to consider the impact of a judicial money damage remedy on the current environmental enforcement scheme. While the framers of article XI, section 9 acknowledged the potential for a flood of frivolous lawsuits, the framers were reassured that litigation costs would be a barrier to less legitimate claims.[216] However, the availability of money damages for constitutional tort theories might change the cost-benefit analysis for citizens and lawyers contemplating a lawsuit.[217] Legislatures

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that the Court is merely another legislature . . . the Court's future as a constitutional tribunal would be cast into grave doubt.") (internal quotation marks and footnotes omitted).

[213] Fernandez, *supra* note 1, at 380; *and* Ricci, *supra* note 77, at 17-18, (discussing the precautionary principle in law-making and the complexity of environmental decisions because of data deficiencies). If environmental rights violations result in injury to person or property, individuals could sue for compensatory damages under common law theories of tort that are grounded in the law of nuisance and negligence. Mark Latham, Victor E. Schwartz & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 750 (2011). However, such cases seem to support the proposition that environmental rights can coincide with other types of rights, not that damages for environmental rights are easily quantifiable. *See id.* at 749-54, 760-62 (discussing the overlap between tort law and environmental law objectives, and concluding that some environmental harms cannot be remedied under traditional tort theories). *See also* Klass, *supra* note 190, at 130-31 (discussing how common law theories like private nuisance do not "provide a vehicle for plaintiffs to recover for damage to natural resources that cannot be translated into an economic loss borne by the plaintiff").

[214] *See* Klass, *supra* note 190, at 134.

[215] *See* Theodore J. Boutrous, Jr. & Dominic Lanza, *Global Warming Tort Litigation: The Real "Public Nuisance,"* 35 ECOLOGY L. CURRENTS 80, 83-85 (2008) (discussing global warming lawsuits seeking damages against private companies and noting that federal courts tend to throw out such cases as posing "political questions" better suited for the executive and legislative branches).

[216] Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 690 (1980).

[217] *See* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 785-86

carefully consider damage provisions and fee-shifting devices in order to encourage or discourage private enforcement.[218] Additionally, a damages remedy raises the issue of multiple plaintiffs suing a defendant for a single violation.[219] Injunctive relief avoids this problem because the remedy for all plaintiffs is the same.[220] As Justice Stevens noted in *Bush v. Lucas*, the provision of a constitutional torts remedy could create unforeseen trends that change the nature of the overall enforcement scheme.[221] Such effects might better be evaluated by the legislature as elected officials attempt to determine the proper balance between environmental enforcement and other public values.[222]

3. Availability of alternative remedies

As illustrated in the federal and state court cases subsequent to *Bivens*, individuals should not be able to recover damages if there are alternative remedies available.[223] The article XI, section 9 committee report stated that

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(2011) (examining the effect of damage provisions and fee-shifting statutes on litigation levels and plaintiff success rates).

[218] *See id.* at 787-93 (examining the reasons for encouraging private enforcement and the various mechanisms used to encourage private enforcement).

[219] *See* Klass, *supra* note 190, at 151 (discussing how harm recovered by multiple plaintiffs against the same defendant could result in multiple punitive damage awards for a single wrong). *See also* Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1621 (2005) ("[E]nvironmental injury claims hold the potential for numerous plaintiffs to allege individual injuries arising out of a single act or course of conduct on behalf of a single defendant.").

[220] Antolini, *supra* note 84, at 858 n.541 (encouraging emphasis on injunctive relief to prevent abuse by private plaintiffs suing for public rights).

[221] Bush v. Lucas, 462 U.S. 367, 388-89 (1983). The above issues demonstrate that the existence of a constitutional tort action under article XI, section 9 would likely require the creation of a body of case law clarifying appropriate damages for environmental rights violations, which runs contrary to the framers' intent. *See supra* note 67, 176-78 and accompanying text. Another area that might also require case law is punitive damages. One rationale behind *Bivens*-type actions is deterrence for future violators. *See* Carlson v. Green, 446 U.S. 14, 21 (1980). If the Hawai'i courts determine that punitive damages should be allowed to deter violators of constitutional rights, this would likely require a body of case law to address appropriate intent for punitive damages and due process issues. *See* Klass, *supra* note 189, at 98-127 (discussing Supreme Court jurisprudence on punitive damage ratios and state court jurisprudence on damages for torts and environmental harm).

[222] *See Bush*, 462 U.S. at 388-89; *and* Klass, *supra* note 189, at 145-46 (proposing that legislatures should provide qui tam and split-recovery provisions to supplement current environmental enforcement schemes).

[223] *See supra* notes 131-152 and accompanying text.

the private right of action "complements and does not replace or limit existing government enforcement authority."[224] Where statutory remedies exist, government enforcement should probably pre-empt the common law remedy.[225] Some statutes specifically provide for citizen suit provisions that authorize injunctive relief to compel agencies to enforce environmental laws.[226] Other statutes do not have citizen suit provisions; instead, the statutory scheme vests authority in agencies to pass rules to implement environmental laws.[227] Although Hawai'i citizens now have a private right of action available under article XI, section 9, the Hawai'i Constitution does not explicitly provide citizens with a right to sue violators to collect fines and penalties on behalf of the state.[228] However, court cases and statements by the Hawai'i attorneys general over time imply that private actors would be able to sue for penalties.[229] Although statutes might not provide an explicit remedy for private citizens, the existence of administrative remedies should preclude individuals from using analogous *Bivens* actions for money damages.

4. Constitutional tort claims against state actors—state sovereign immunity

Based on *Figueroa* and *Pele*, article XI, section 9 should not allow an analogous *Bivens* action for money damages against state actors. The doctrine of sovereign immunity bars suits against the State for money damages unless the state gives a "clear relinquishment" of immunity.[230] Potential plaintiffs could argue that the language of article XI, section 9 allows for enforcement against state entities; this language could be used to infer that the state could be liable for compensatory damages.[231] However,

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[224] Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 690 (1980).

[225] Antolini, *supra* note 84, at 887.

[226] *See* HAW. REV. STAT. § 205A-6 (2001 & Supp. 2010) (citizen suit provision allowing citizens to compel government agencies to act in coastal zone management); *see also* HAW. REV. STAT. § 342B-56 (2010) (similar provision for air pollution control).

[227] *See* HAW. REV. STAT. § 342C-4 (2010) (giving authority to department to create rules, but silent on private enforcement as to ozone layer protection); *see also* HAW. REV. STAT. § 342D-4 (2010) (granting authority to adopt rules in relation to controlling all management practices for water pollution).

[228] David Kimo Frankel, *Enforcement of Environmental Laws in Hawai'i*, 16 U. HAW. L. REV. 85, 136 (1994).

[229] *Id.* (discussing the need for private citizen enforcement to supplement current government enforcement).

[230] Pele Defense Fund v. Paty, 73 Haw. 578, 607, 837 P.2d 1247, 1265 (1992).

[231] HAW. CONST. art. XI, § 9 ("Any person may enforce this right against any party,

the Hawai'i Supreme Court in *Figueroa* held that a constitutional provision establishing enforceable rights should not be interpreted as a clear relinquishment of sovereign immunity.[232] *Figueroa* also demonstrates that the State Tort Claims Act could not be used as a waiver of sovereign immunity.[233] Unlike *Figueroa*'s claim for a procedural due process violation, which did not fall within an exception to the State Tort Liability Act, the exceptions in H.R.S. section 662-15 would likely bar most constitutional tort suits because environmental statutes provide for a legal remedy.[234] For suits that do not fall within an exception to the State Tort Liability Act, compensatory damages under a *Bivens*-type action would not be considered a "traditionally recognized common law cause[s] of action in tort" and would likely be considered a somewhat "novel liability" that the legislature did not intend to impose upon the sovereign.[235] While

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public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.").

[232] Figueroa v. State, 61 Haw. 369, 382, 604 P.2d 1198, 1205 (1980). *See also* Pele Defense Fund, 73 Haw. at 607, 837 P.2d at 1265 (citing *Figueroa* for the proposition that the creation of rights under article XII, section 4 did not automatically waive sovereign immunity).

[233] *Figueroa*, 61 Haw. at 383, 604 P.2d at 1207.

[234] *See* HAW. REV. STAT. § 662-15(3) (1993 & Supp. 2010), stating:

> This chapter shall not apply to:
>
> (1) Any claim based upon an act or omission of an employee of the State, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused;
>
> (2) Any claim arising in respect of the assessment or collection of any tax, or the detention of any goods or merchandise by law enforcement officers;
>
> (3) Any claim for which a remedy is provided elsewhere in the laws of the State;
>
> (4) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;
>
> (5) Any claim arising out of the combatant activities of the Hawaii national guard and Hawaii state defense force during time of war, or during the times the Hawaii national guard is engaged in federal service pursuant to section 316, 502, 503, 504, 505, or 709 of Title 32 of the United States Code;
>
> (6) Any claim arising in a foreign country; or
>
> (7) Any claim arising out of the acts or omissions of any boating enforcement officer.

[235] *See Figueroa*, 61 Haw. at 383, 604 P.2d at 1206. The analysis on constitutional torts providing money damages would apply to environmental statutes that do not specify the damages allowed for relief. There are specific statutory provisions that do specifically allow for money damages. *E.g.*, HAW. REV. STAT. § 198-5(c) (1993 & Supp. 2010).

> In addition to the remedy of injunctive relief, the holder of a conservation easement shall be entitled to recover money damages for any injury to such easement or to the

traditional common law actions like trespass and private nuisance have been used for environmental rights violations,[236] constitutional tort actions have characteristics that distinguish this action from traditional common law torts.[237] Although article XI, section 9 increases environmental protection by encouraging private citizens to monitor government actors, fulfilling this purpose does not require a constitutional tort action for damages. While sovereign immunity bars retrospective relief (money damages for past violations of the law), the doctrine allows for prospective relief (measures to address current violations of the law).[238] As illustrated in the *Ala Loop* case, plaintiffs could protect their rights by suing for declaratory or injunctive relief if the state fails to enforce environmental regulations because such claims are not barred by sovereign immunity.[239]

V. CONCLUSION

The *Ala Loop* decision may be on the frontier of environmental rights enforcement by establishing that a state constitutional provision for environmental rights is self-executing. The effects of the decision on the doctrine of self-executing provisions in Hawai'i should provoke thoughtful inquiry into the nature of separation of powers between the courts and the legislature regarding the enforcement of constitutional rights. The state judiciary must be cautious as it navigates the enforcement of rights by way of the private right of action. A self-executing provision in the state constitution might provide new theories for remedies like money damages for constitutional torts. However, the existence of a self-executing provision does not automatically confer all types of redress.[240] While an action for money damages might be available by means of an analogous *Bivens* action, special factors counsel hesitation in allowing money damages for article XI, section 9. The framers of article XI, section 9 carefully emphasized legislative action for defining the overall

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> interest being protected thereby or for the violation of the terms of such easement. In assessing such damages there may be taken into account, in addition to the cost of restoration, the loss of scenic, aesthetic, or environmental value to the real property subject to the easement, and other damages.

Id.

[236] Such common law actions were commonly composed of trespass, private nuisance, public nuisance, strict liability, and Public Trust. *See* Rechtschaffen & Antolini, *supra* note 189.

[237] *See supra* notes 183-221 and accompanying text.

[238] Pele Defense Fund v. Paty, 73 Haw. 578, 609-10, 837 P.2d 1247, 1266 (1992).

[239] *See* Cnty. of Haw. v. Ala Loop Homeowners, 123 Haw. 391, 235 P.3d 1103 (2010).

[240] *Figueroa*, 61 Haw. at 382, 604 P.2d at 1206.

environmental enforcement scheme. As Hawai'i moves forward in pioneering the balance between private and public enforcement, the courts must carefully guide the private right of action so as to complement, not confuse, the enforcement of environmental rights for the citizens of Hawai'i.

The "Aloha Corporation:" Infusing the Culture of Hawai'i to Broaden the Perspective of Business and Return to Community

Brent Kakesako*

There is a growing desire and market for social enterprises, businesses that create their own social good yet remain profitable. However, there is a tension between social good and profitability in current business practices that limit social enterprise efforts to short-term planning. Tax-exempt organizations are limited by financial constraints to focus on their social mission and corporate structures are expected to maximize shareholder profits. Hybrid entities have begun to incorporate community benefit and provide some legal protection, but are limited by a lack of guidance and direct substantive benefit and thus fail to appeal to mainstream business. Prior efforts to include social values under community economic development (CED) focused on building the capacity of low-income individuals, which is a very a narrow segment of the population. Building off of CED theory, the inclusion of Hawaiian cultural values will reconcile the tension between social good and profitability by emphasizing communal responsibility, experiential learning, and building communal assets to ultimately shift the perspective of business towards a long-term focus founded in community. This article offers a corporate entity, the "Aloha Corporation," that focuses on a social mission and is required to contribute to community but receives a State tax-exemption. Its components includes: (1) a "Ho'owaiwai Statement" to push the Aloha Corporation's vision towards the long term; (2) a "Lokahi Commitment" to carry out a direct state service in order to earn its tax-exempt status; (3) "Kuleana Development" to provide experiential learning opportunities for community members; and (4), an "Aloha Audit" to ensure that the Aloha Corporation remains true to its communal vision. Interim solutions use the Aloha Corporation's components to shift the perspective of business

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* J.D. Candidate 2012, William S. Richardson School of Law, University of Hawai'i at Manoa. Mahalo to those within the legal community and the community as a whole who mentored me, contributed to their time, and provided me with their mana'o in the creation of this article. This was a labor of love of which you are all authors and a topic on which you and many others are leading the way. A special mahalo to my family and friends who are always there to support my passion and endeavors.

towards a more culturally informed one that would naturally support the Aloha Corporation.

I. INTRODUCTION: GROWING NEED AND DESIRE FOR SOCIAL ENTERPRISE

The recent downturn in the global economy highlights the tension that exists between profits and social good in business entities and indicates the need for a structure that is able to achieve social good while remaining profitable. American corporations make up over a quarter of Forbes' Global 2000 list of the world's leading companies yet this number has been steadily slipping since 2004.[1] The business focus on profits and revenues arguably creates a pressure-filled environment in which corporate management mismanage their books to hide losses[2] or leave the company and its employees in financial ruin as they escape with a "golden parachute."[3] Non-profit organizations in America number at over 1,500,000 and focus on advancing a variety of social missions to address issues ranging from the environment to poverty, usually with the help of a tax exemption.[4] However, the recent downturn has forced these organizations to deal with an ongoing lack of resources while demand for services has increased.[5] There is an increased public awareness that current business practices are lacking and perhaps even flawed.[6]

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[1] Scott DeCarlo, *A Regional Look at the Forbes Global 2000*, FORBES.COM (Apr. 18, 2012, 11:47 AM), http://www.forbes.com/sites/scottdecarlo/2012/04/18/a-regional-look-at-the-forbes-global-2000-3/ (The United States has 536 companies in the Forbes Global 2000).

[2] *See* Knowledge@Wharton, *Drawing Lessons from WorldCom*, CNET NEWS (Jul. 14, 2002, 6:00 AM), http://news.cnet.com/ Drawing-lessons-from-WorldCom/2009-1022_3-943517.html ("The cases of Xerox, Enron and WorldCom demonstrate that U.S. managers still have incentives to commit outright accounting fraud.").

[3] *See* Linda Douglass, *Ex-Enron Workers Wait for Severance*, ABC NEWS (Jan. 29, 2011), http://abcnews.go.com/Business/story?id=87396&page=1#.Trb0JXPmHqU ("[Former CEO Ken] Lay, who resigned from the company last week, will receive his 2000 salary and bonus through 2003. With a base salary of $1.3 million and a bonus of $7 million, Lay is eligible to receive a hefty severance package of at least $24.9 million.").

[4] *Number of Nonprofit Organizations by State, 2010*, NATIONAL CENTER FOR CHARITABLE STATISTICS, http://nccsdataweb.urban.org/PubApps/profileDrillDown. php?rpt =US-STATE (last visited May 15, 2012).

[5] *See Nonprofit Finance Fund 2011 Survey: America's Nonprofits Struggle to Meet Fast-Climbing Demand for Services*, NONPROFIT FINANCE FUND, (Mar. 21, 2011), http://nonprofitfinancefund.org/announcements/2011/nonprofit-finance-fund-survey-americas-npos-struggle-to-meet-fast-climbing-demand (The survey indicates that "87% of nonprofits say, 'The recession has not ended'" and "85% of organizations expect an increase in service demand in 2011; just 46% expect to be able to fully meet this demand.").

[6] *See* Celia R. Taylor, *Carpe Crisis: Capitalizing on the Breakdown of Capitalism to*

Yet the growing popular awareness of the flawed focus of current business practices creates an opportunity and a market for social enterprises that reconcile the tension between social good and profits. The internet has shrunk and flattened the world to empower individuals at a local level to collaborate and compete on a global level.[7] These individuals are often more connected to their communities and to the need to carry out social good. Technological advances highlight disparities in wealth and circumstance but also increase general feelings of compassion and commonality, which pushes social good.[8] Studies have found that security analysts are awarding more favorable ratings to socially responsible firms in recent years hinting at an increased desire for socially responsible business practices.[9] Investors, including those on Wall Street, are including corporate social responsibility issues in their investment analyses, reflecting a growing social awareness in the business sector that profitability and long-term sustainability are tied with a business's record of social responsibility and governance.[10] There has consequently been an explosion of businesses coining themselves as "social enterprises." This article defines a "social enterprise" as an entity that has its own social mission.[11] A social enterprise "makes" social value by directly contributing to this mission through its own revenue-generating activity rather than "buying" social value by using a portion of its profits to make charitable donations or subsidize a social mission it supports.[12]

Despite the growing enthusiasm for social enterprise, the structural tension between social good and profits limits true social enterprise. An organization within the non-profit sector has colloquially been referred to as a "non-profit organization," which refers to the structure that the entity must register as with the applicable state agency. However, this arguably encouraged the perception that such an organization should not make a profit. This article will narrow its focus to organizations that have also applied and received their federal tax exemption, which qualifies them as a

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Consider the Creation of Social Businesses, 54 N.Y.L. SCH. L. REV. 743, 744 (2010).

[7] *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT (2007).

[8] *See* Taylor, *supra* note 6, at 745.

[9] Ioannis Ioannou & George Serafeim, Working Paper, *The Impact of Corporate Social Responsibility on Investment Recommendations* (Sept. 10, 2010), *available at* http://hbswk.hbs.edu/item/6484.html.

[10] *See* Rakhi I. Patel, *Facilitating Stakeholder-Interest Maximization: Accommodating Beneficial Corporations in the Model Business Corporation Act*, 23 ST. THOMAS L. REV. 135, 136-37 (2010).

[11] *See* Robert A. Katz & Antony Page, *The Vermont L3C & Other Developments in Social Entrepreneurship: The Role of Social Enterprise*, 35 VT. L. REV. 59, 91 (2010).

[12] *Id.*

501(c)(3) tax-exempt organization and in doing so avoid using the non-profit designation.[13] Tax-exempt organizations are focused on carrying out their social missions and are thus subject to financial constraints that ensure that these organizations do so. Similarly the use of "for-profit" or "for-profit organization" creates the perception that such an organization is created only to generate revenue. This article will refer to these organizations as a "corporation," a basic business entity designation that technically has no connotation of profit. Corporations limit their activities to short-term profit maximization as this focus is clear, legally safe, easily measurable, and thus easy to attract investors. The distinct focuses of tax-exempt organizations and corporations limits planning to the short-term, which also limits social enterprise activities.

Currently, a number of alternative entities exist but they are all limited in one way or another to empower true social enterprises. Hybrid entities have increased in popularity as they are corporate entities that include community benefit requirements and protect management from decisions that emphasize social good rather than profits. However, in trying to balance profit and community benefit, these entities create ambiguities with regards to traditional management and financial considerations and offer little measurable, direct benefits for incorporating community benefits—limiting the appeal of these entities to mainstream business. Community economic development ("CED") efforts have existed since the 1970s and include social values to address the need for development tailored to empower impoverished populations.[14] Yet this focus on impoverished neighborhoods has created a perception that it has a limited application for mainstream business practices. CED theory, however, incorporates social values that focus on community, individual empowerment, and an expanded definition of wealth that could be broadened and applied to mainstream business with the addition of Hawaiian cultural values.

While no legal entity structure may totally resolve the tension between social good and profit, the unique cultural values of Hawai'i provide a way to blend social good and profit. This article uses the Hawaiian cultural values of communal responsibility, experiential learning, and community asset building to create an entity called the "Aloha Corporation," or "A Corp,"[15] that acts as a community and addresses the tension between social

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[13] I.R.C. § 501(c)(3) (West 2010).

[14] *See* Roger A. Clay, Jr. & Susan R. Jones, *What is Community Economic Development?*, *in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 3 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

[15] Interview with James Koshiba, Executive Director, Kanu Hawaii and Olin Lagon,

good and profit. The Hawaiian word *aloha* has been adopted in a variety of industries as a symbol of Hawai'i with its use as a greeting, farewell, or feeling of love.[16] Yet *aloha* has a deeper meaning that embodies the Hawaiian cultural emphasis on relationships and caring for others and the land itself.[17] The very use of the word *aloha* indicates the special responsibility that the Aloha Corporation has undertaken for the community.

The Aloha Corporation is a corporate, state tax-exempt entity, which is motivated by a social mission founded in community as dictated by four key components. First, the Aloha Corporation requires a "Ho'owaiwai Statement" in its incorporation documents that includes a forty-year vision tied to community benefits with required deliverables at specific milestones to promote long-term planning. Second, an Aloha Corporation requires a "Lōkahi Commitment" in which the Aloha Corporation must carry out a direct state benefit to justify its State tax-exempt status. Third, an Aloha Corporation must create positions for "Kuleana Development" to foster community capacity for certain classes of individuals, including low-income individuals, formerly incarcerated individuals, and students. Finally, an Aloha Corporation must carry out an "Aloha Audit" to evaluate its efforts to report back to the State and provide for transparency. An Aloha Corporation will thus not only brand for social good but actually create social good. In order to further facilitate the shift in perspective away from a strict focus on finances towards a more flexible definition of wealth that is founded in community, this article concludes with incremental steps inspired by the Aloha Corporation. The ambiguity and breadth of social good makes it difficult to incentivize and police it through policy initiatives. These steps will help the business community move towards naturally incorporating social good through this new entity structure and detail how government can encourage businesses to do so.

Section II delineates the financial constraints faced by tax-exempt organizations and sets out the need for an entity with broad financing options. Section III demonstrates the lack of guidance beyond profit maximization for corporations and the need for a corporate entity that is specifically formed for social good. Section IV examines emerging hybrid

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Director Social Ventures, Kanu Hawaii in Honolulu, Haw. (Feb. 3, 2011) (The name "Aloha Corporation" or "A Corp" was adopted from Olin Lagon with his permission.).

[16] *See The Meaning of Aloha*, TO-HAWAII.COM: HAWAII TRAVEL GUIDE, http://www.to-hawaii.com/aloha.php (last visited May 15, 2012).

[17] Manu Aluli Meyer, *Aloha is Our Intelligence*, VOICES OF TRUTH: ONE-ON-ONE WITH HAWAI'I'S FUTURE, http://voicesoftruthtv.com/?ep=aloha-is-our-intelligence&from=11&sec=episode (last visited May 15, 2012).

entities and their limitations due to the existing tension between social good and profits, and the subsequent need for clarity in reconciling social good and profits. Section V looks at the success of CED efforts to include social values into business development due to its narrow focus on impoverished populations. Section VI introduces cultural values of Hawai'i and demonstrates how they build on the takeaway values synthesized from CED efforts to offer their values of community responsibility, experiential learning, and a long-term focus on building communal assets that is more applicable to mainstream business practices. Section VII is an in-depth look at the components of the Aloha Corporation and how its structure addresses the issues raised with tax-exempt, corporate, hybrid, and CED structures. Section VIII applies the components of the Aloha Corporation towards interim solutions in order to provide legal remedies that address the constraints of current business practices and provides the beginnings of a shift in the perspective of business towards a long-term view founded in community.

II. TAX-EXEMPT ORGANIZATIONS ARE LIMITED BY FINANCIAL CONSIDERATIONS THAT ENSURE THE ORGANIZATION CARRIES OUT ITS SOCIAL MISSION

A tax-exempt organization receives certain privileges to carry out activities that address a social need, but are subsequently forced to follow a number of restrictions—specifically financial ones—which limits it as an option for social enterprise. Government created the tax-exempt sector in order to alleviate the burden on government in addressing certain social problems.[18] Many of these mechanisms restrict the ability of the tax-exempt organization's directors to control the organization's resources in order to ensure that these resources generated or given to the tax-exempt organization remain dedicated for society's benefit for perpetuity.[19]

A. Tax-Exempt Organizations are Limited in Carrying Out Their Own Financial Activities

A tax-exempt organization is not prevented from generating a profit, however, the money it raises must be reinvested in the organization to further the organization's mission and tax-exempt purpose. In order to qualify for a tax exemption under section 501(c)(3) of the Internal Revenue

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[18] Katz & Page, *supra* note 11, at 77-78.

[19] *Id.* at 93-94.

Code, an applying organization must fulfill the organizational and operational tests.[20] Under the organizational test, the organization must be formed exclusively for one or more of the exempt purposes under section 501(c)(3) and only an insubstantial part of its activities can further non-exempt activity.[21] Under the operational test, the organization must operate primarily for an exempt purpose and no more than an insubstantial part of activity may benefit a non-exempt purpose.[22] Although the word "exclusively" is used in the statute, it has been interpreted to mean "primarily," which creates interpretation issues as to what level of non-exempt activity would be considered insubstantial.[23] Generally less than ten percent of a tax-exempt organization's income has been considered insubstantial, subject to the type and function of the tax-exempt organization.[24] Therefore a tax-exempt organization is limited in the types of non-exempt activities it can undertake to fund itself. If a tax-exempt organization were to violate either of these tests, it would jeopardize its tax-exempt status.[25] Hawai'i statutory law mirrors this requirement as a tax-exempt organization is not allowed to carry out any activity where the primary purpose is to produce income even if the income is used for or in furtherance of exempt activities.[26]

A tax-exempt organization can run into confusion if it attempts to generate revenue, because the Internal Revenue Service ("IRS") deems these activities as unrelated to the organization's mission and thus subject to the Unrelated Business Income Tax ("UBIT"). Assuming that the tax-exempt organization fulfills the organizational and operational tests, UBIT comes into play if the organization carries out a non-exempt activity that is substantially unrelated to the exempt purposes of the organization.[27] The revenue from that activity would then be subject to the applicable corporate rates.[28] The UBIT requirement is not a punishment on tax-exempt organizations that attempt to generate revenue to fund their mission but

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[20] Treas. Reg. § 1.501(c)(3)-1(a) (2011), *available at* http://ecfr.gpoaccess.gov/cgi/t/text/textidx?sid=10c95b4a474b1de9b 3d85 ddaaf93276c&c=ecfr&tpl=/ecfrbrowse/Title26/26tab_02.tpl.

[21] *Id.* at §1.501(c)(3)-1(b)(1)(i)(b).

[22] *Id. at* § 1.501(c)(3)-1(c)(1).

[23] *Id.* at §§1.501(c)(3)-1(c)(1)), 1.501(c)(3)-1(d).

[24] Erik B. Bluemel, *The Nonprofit Implications of For-Profit Community Development,* 16 U. FLA. J.L. & PUB. POL'Y 103, 121 (2005).

[25] Taylor, *supra* note 6, at 753.

[26] HAW. REV. STAT. § 237-23(b)(3) (West 2011).

[27] Bluemel, *supra* note 24, at 121.

[28] I.R.S. Publ'n 598 (Rev. March 2010), *available at* http://www.irs.gov/pub/irs-pdf/p598.pdf.

deters profit-seeking behavior that takes advantage of their tax-exempt status.[29] UBIT requirements thus add costs and complexities to a tax-exempt organization's operations.[30] This in turn deters a tax-exempt organization from undertaking revenue generating activities to avoid these potential headaches and limits revenue generating activities to those that can be practically guaranteed to support the tax-exempt organization's mission. Such difficulties are also reflected in the ability of tax-exempt organizations in securing funding from outside parties through charitable donations.

B. Tax-Exempt Organization are Limited in Generating Revenue From Outside Investors

Limitations on private investment and management's related fiduciary duties ensure that revenue generated by the tax-exempt organization is reinvested towards its mission. A tax-exempt organization is limited in raising independent private investment as it may not allow its net earnings to benefit private shareholders or individuals.[31] This effectively eliminates equity capital markets as no returns can be generated for investors,[32] which ensures that this revenue is reinvested towards the tax-exempt organization's mission. The affirmative duty of a tax-exempt organization's management to use such profits to advance the organization's mission further supports this redirection of profits.[33] Finally, the tax-exempt organization's assets are locked and remain dedicated to their general charitable purposes and the founder and donor's preferred charitable purposes.[34] Even upon the tax-exempt organization's dissolution its assets must be transferred to another charitable organization or to the state.[35] Tax-exempt foundations may also use program-related investments ("PRIs") to generate income but unclear IRS regulations have limited growth in this area.[36] A social enterprise needs to be able to raise capital to

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[29] Taylor, *supra* note 6, at 753-54.

[30] *Id.*

[31] Treas. Reg. § 1.501(c)(3)-1(c)(2) (2011).

[32] *Id.*

[33] Katz & Page, *supra* note 11, at 68.

[34] *Id.* at 74.

[35] *Id.*

[36] PRIs are a form of IRS required distributions that allow foundations to invest in for-profit entities to generate a return of up to five percent. Taylor, *supra* note 6, at 754. A foundation must determine whether the organization's mission aligns with their own mission and whether the receiving organization's governance and financial structure ensures that the organization will operate within the PRI requirements or it could be subject to harsh

generate financial support and while the corporate form allow for that, it is also limited by a lack of guidance beyond the maximization of profits.

III. CORPORATIONS ARE LIMITED BY A LACK OF GUIDANCE BEYOND MAXIMIZATION OF PROFITS

Corporate models provide expansive access to capital, which is necessary for successful social enterprise, but the expectation of profit maximization for shareholders and a lack of guidance for other factors make other considerations, including social good, irrelevant. There is no provision that specifically states that corporate management must maximize shareholder profits, but there is also no guarantee that a corporation with a social mission must carry that mission out in the event of a crisis such as insolvency.[37] Furthermore, as a corporation, a potential social enterprise faces the risk of a "legacy problem" following a change in ownership in which new management may ignore the social aspect of the social enterprise.[38] Corporate governance thus remains tied to an approach that focuses on reconciling board and management action with shareholders' interests, as best exhibited by maximizing profits.[39]

A. Corporation's Inherent Responsibility to Community is Limited by a Focus on Maximizing Profits

A social enterprise would benefit from the corporate structure's wide access to financing mechanisms, but a corporation is limited by the expectation to maximize shareholder profits and a lack of guidance in fulfilling other interests. Corporate directors are believed to have a

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penalties. Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879, 891 (2010). A foundation could apply to the IRS for a Private Letter Ruling ("Ruling") to determine whether their potential investment is an acceptable situation for a PRI, but the process is an expensive and lengthy one. Matthew F. Doeringer, Note, *Fostering Social Enterprise: A Historical and International Analysis*, 20 DUKE J. COMP. & INT'L L. 291, 318 (2010). PRIs are thus a potential source of capital for tax-exempt organizations yet they are not widely used because of the complex documentation needed, a lack of a coordinated market, and the inherent risk in the investment. Taylor, *supra* note 6, at 754-55.

[37] Patel, *supra* note 10, at 145.

[38] Katz & Page, *supra* note 11, at 95-96.

[39] Beate Sjafjell, *Transnational Corporate Responsibility for the 21st Century: Internalizing Externalities in E.U. Law: Why Neither Corporate Governance Nor Corporate Social Responsibility Provides the Answers*, 40 GEO. WASH. INT'L L. REV. 977, 982 (2009).

fiduciary duty to maximize profits for shareholders.[40] Case law, as exemplified by *Dodge v. Ford*, specifically states that "a business corporation is organized and carried on primarily for the profit of stockholders" and the power of the directors is focused on stockholders' profit "and does not extend . . . to other purposes."[41] Yet a director's duty to maximize shareholder wealth at all times is not as strict as the business community perceives. The court in *A.P. Smith Mfg. Co. v. Barlow* recognized that corporations must "assume the modern obligations of good citizenship" because of their growing wealth.[42] The court acknowledged that charitable giving provides an indirect benefit of increasing the corporation's goodwill with the community.[43] Numerous commentators noted "that shareholder wealth maximization is effectively unenforceable by the courts" as courts will defer to the director's judgment as long as the action may lead to some benefit to the shareholder, *even in the distant future*.[44] The director may thus consider factors other than short-term profit maximization without fear of repercussions. There is an exception to the unenforceability of shareholder wealth maximization, dubbed the "Revlon duties" of the board to "maximize shareholders' immediate returns," but these duties are limited to specific actions initiated by management as illustrated in the case of Ben & Jerry's.[45]

The case of Ben & Jerry's Homemade, Inc. ("Ben & Jerry's") demonstrates how a highly successful social enterprise may be subject to a takeover bid, which has dulled the enthusiasm for social enterprise activities in the corporate form. Ben & Jerry's unique business model, which emphasized socially conscious actions coupled with its high quality ice cream, attracted numerous buyout offers.[46] As part of their fiduciary duties, corporate directors are forced to consider takeover bids that are well over their stock price, but not necessarily forced to take them.[47] Ben & Jerry's management, however, ultimately agreed to the highly criticized merger with Unilever because of a fear of personal liability and bankruptcy.[48] Unilever did concede to a number of provisions that would

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[40] Taylor, *supra* note 6, at 747.

[41] Dodge v. Ford Motor Co., 204 Mich. 459, 507 (Mich. 1919).

[42] A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 586 (N.J. 1953).

[43] *Id.* at 585.

[44] Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 232 (2010).

[45] *Id.* at 232-33.

[46] *Id.* at 226.

[47] *Id.* at 236.

[48] *Id.* at 229.

contribute to Ben & Jerry's social mission, but they were mainly provisions that Unilever felt pressured to preserve by the market or were profitable based on popularity with customers.[49] Critics point to the duty of a director to carry out their Revlon duties, but these did not apply in this case because Ben & Jerry's did not initiate the bidding process to sell or break-up the company.[50] The story of the Ben & Jerry's takeover thus demonstrates two lessons for aspiring social enterprises: (1) the pressure of expectations to maximize shareholder profits despite the authority directors have to consider factors other than finances; and (2) the general risk that a takeover could result in the social enterprise components of a business being minimized or cut out following the takeover.

In response to the perceived limitations of corporate management, a movement towards corporate social responsibility ("CSR") gained momentum to increase corporate responsibility to the community. CSR proponents claim that business management has the responsibility to "take purposeful action to minimize the harmful effects and increase the positive impacts their firm has on the environment, the communities they interact with, and their employees."[51] Yet CSR initiatives are often pushed within traditional corporate governance structures that emphasize profit maximization, which have limited their effectiveness and led to criticism that such initiatives are little more than "greenwashing" or clever marketing.[52] In addition, because of the perception of management's fiduciary duties to shareholders, CSR has been limited to "do no harm" social responsibility, in which a manager only considers other interests from the community, customers, employees, and suppliers but remains committed to generating returns for shareholders.[53]

Historically, however, corporations were established for the good of society to help build national infrastructure and managers were pushed "to consider social obligations over economic self-interest."[54] The Hawai'i Business Corporation Act, which is based on the Model Business Corporation Act, reflects the director's discretion to consider, *in addition to shareholders' interests*:

> (1) The interests of the corporation's employees, customers, suppliers, and creditors;

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[49] *Id.* at 245.
[50] *Id.* at 235.
[51] Taylor, *supra* note 6, at 748.
[52] Sjafjell, *supra* note 39, at 984.
[53] Taylor, *supra* note 6, at 751.
[54] Patel, *supra* note 10, at 140.

(2) The economy of the State and the nation;

(3) Community and societal considerations, including, without limitation, the impact of any action upon the communities in or near which the corporation has offices or operations; and

(4) The long-term as well as short-term interests of the corporation and its shareholders, including, without limitation, the possibility that these interests may be best served by the continued independence of the corporation.[55]

Corporation directors in Hawai'i are thus uniquely positioned to be able to consider communal interests for the long-term sustainability of the organization. Unfortunately, despite such language in the Hawai'i Business Corporation Act, corporate directors limit themselves and their businesses by remaining faithful to current business practices and expectations. Additional questions center on whether business management should be charged with determining issues of fairness or creating a social mission as it intersects with a policymaking component that is traditionally beyond their scope of authority.[56] These concerns extend to limited liability companies, as its flexibility serves as a lack of guidance.

B. Limited Liability Company's Flexibility Allows for Social Enterprise Possibilities but is Limited by a Lack of Strict Guidelines

The limited liability company ("LLC") entity allows for more flexible management structures and maintains their legal security, but the lack of guidance beyond profit maximization limits LLCs from being the entity of choice for social enterprise. A LLC has the liability protection of a corporation and the tax status of a partnership.[57] Hawai'i law states the LLC may be organized for "any lawful purpose"[58] and the inclusion of "LLC" in the organization's name delineates that designation.[59] The management structure of the LLC is also flexible as it allows for the traditional manager-managed company or a member-managed company for increased member participation.[60] Member contributions can take the form

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[55] HAW. REV. STAT. § 414-221(b) (West 2011).

[56] John Tyler, *The Vermont L3C & Other Developments in Social Entrepreneurship: Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 131 (2010).

[57] Kleinberger, *supra* note 36, at 886.

[58] HAW. REV. STAT. § 428-111(a) (West 2011).

[59] *Id.* § 428-105(a).

[60] *Id.* § 428-404.

of tangible or intangible assets.[61] A LLC is held liable for any conduct that a director or officer carries out in the course of their duties,[62] as well as any debts, obligations, and liabilities,[63] which protects them from individual suit. Therefore, LLC entities allow for more flexible management structures and maintain legal security for directors to avoid results that mirror Ben and Jerry's outcome. Unfortunately, like corporations, LLCs also continue to focus solely on profit maximization for shareholders, which serves to limit LLCs from being the entity of choice for social enterprise.

A LLC striving to be a social enterprise also faces problems with unclear legal protection for actions that may divert profits for social good and introduces a high possibility of risk for a social enterprise. LLCs were not created with the intent to carry out social good so it is not clear whether the promotion of social good over profit will be protected in case of suit.[64] Members and management only owe to the LLC and each other the fiduciary duties of loyalty and the duty of care,[65] and thus members appear to have the freedom to bring suit if they personally do not agree with a management decision that carries out social good but does not maximize profits. A clear delineation between a traditional LLC and a socially-motivated LLC does not exist, which also causes investment problems if a LLC is not clear in its formation documents or if not all members are on the same page.[66] Finally, even if members and management agree on carrying out social good, a LLC will not receive tax benefits for carrying out an activity that would qualify as tax-exempt.[67] The flexibility of LLCs lack explicit protection for social good, which emerging hybrid entities address, but these hybrid entities are still limited by a lack of guidance and the focus of business on the short-term.

IV. EMERGING HYBRID ENTITIES UNDERTAKE SOCIAL ENTERPRISE BUT ARE LIMITED BY CURRENT BUSINESS PRACTICES

Given the problems of using current corporate structures as vehicles for social enterprise, social entrepreneurs have begun to use different combinations of entities or "hybrid entities" to create social value but have

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[61] *Id.* § 428-401.
[62] *Id.* § 428-302.
[63] *Id.* § 428-303.
[64] Taylor, *supra* note 6, at 752.
[65] HAW. REV. STAT. § 428-409.
[66] Taylor, *supra* note 6, at 752.
[67] *Id.*

had limited success. Organizations that are striving to be social enterprises by using both tax-exempt and corporate structures include the Omidiyar Network, Google.org, Pacific Community Ventures, and the Emancipation Network.[68] Each organization attempts to take advantage of having a tax-exempt entity with a social mission yet rely on the backing of a for-profit subsidiary to provide increased access to capital.[69] These organizations face a variety of obstacles involved with trying to navigate both the for-profit and non-profit sectors and the "cultural differences" of each entity that create concerns regarding these entities' reputation, organizational strength, and ability to carry out its vision.[70] Contract hybrid entities have also been proposed, but it appears to be limited to larger organizations able to handle the complex structure of the range of contractual arrangements it uses to bind a tax-exempt and a for-profit subsidiary.[71]

Other hybrid entities have sprung up that begin to address some of these issue by incorporating community benefit requirements and protecting management from suit for decisions that emphasize social good. But the loose structure of the hybrid entities and their lack of incentive to carry out public benefit have not made these hybrid entities as appealing as expected with mainstream tax-exempt or corporate sectors. Hybrid entities allow for increased access to capital investment and avoidance of jeopardizing or compromising its social mission within the current legal structure,[72] but offer no additional substantive benefits.

A. B Corporation Protects for Public Benefit but Provides Little Incentive to Carry Them Out

The B Corporation form, or "beneficial corporation," increases community input, provides for public benefit, and holds management accountable for doing so, but it can be a rigorous process that lacks incentives and limits its mainstream appeal. B Corporations embed social and environmental goals into the corporation's governing documents, which tasks management with achieving these goals for stakeholders while remaining profitable to shareholders.[73] There are two avenues to becoming

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[68] *Id.* at 756-58.

[69] *See id.*

[70] *Id.* at 758.

[71] *See* Allen R. Bromberger, *A New Type of Hybrid*, STANFORD SOCIAL INNOVATION REVIEW (2011), *available at* http://www.ssireview.org/pdf/2011SP_Feature_Bromberger.pdf.

[72] Katz & Page, *supra* note 11, at 92.

[73] Patel, *supra* note 10, at 137.

a B Corporation: through B Lab certification or statutory provisions. B Lab is a tax-exempt organization that certifies any interested entity who voluntarily submits to rigorous registration and review process, beginning with an extensive survey found on the B Lab website.[74] B Lab claims that companies that choose to become B Corporations benefit by their act of leadership to hold themselves to a higher standard, which will set them apart from other businesses.[75] A number of states have created statutory provisions for a B Corporation entity in order to provide for more substantive legal rights and protections.[76] The B Corporation goes by different names including socially responsible corporations ("SRC"), "for-benefit organization,"[77] and in the case of Hawai'i, "sustainable business corporations."[78] The recently passed Hawai'i legislation aims to create a "sustainable business corporation" that is a socially responsible and environmentally sustainable business entity.[79]

1. Hawaii's proposed sustainable business corporation includes a public benefit requirement and subsequent legal protection for management

A new corporation or existing corporation can voluntarily attain the designation as a sustainable business corporation ("SBC") by including a statement that delineates the corporation as SBC in their incorporating articles.[80] A SBC must have a general public benefit as part of its corporate purposes and may have one or more specific public benefits focused on low-income communities, opportunities beyond jobs, the environment, human health, arts, sciences, or education, or investment towards a public benefit purpose.[81] The director must take into account the accomplishment of the public benefits, and may take into account employee, customer,

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[74] *See generally* B LAB, http://www.bcorporation.net (last visited May 15, 2012).

[75] *See An Act of Leadership: Become a B Corporation,* B LAB, http://www.bcorporation.net/resources/bcorp/documents/An%20Act%20of%20Leadership_Become%20a%20B%20Corporation3.pdf (last visited May 15, 2012).

[76] *Public Policy,* B LAB, http://www.bcorporation.net/publicpolicy (last visited May 15, 2012) (Maryland and Vermont passed benefit corporation legislation in 2010, the New Jersey Senate and Assembly unanimously passed benefit corporation legislation and it is currently waiting for the governor's approval. Six other states, including Hawai'i, have introduced benefit corporation legislation this past year.)

[77] Patel, *supra* note 10, at 137.

[78] S.B. 298 26th Leg., Reg. Sess. (Haw. 2011) (enacted).

[79] *Id.*

[80] *Id.* §3.

[81] *Id.* §5.

community and societal considerations, and long-term factors for the sustainable business corporation on top of shareholder interests.[82]

A benefit director must also be included on the board of directors and is responsible for preparing the annual benefit report to shareholders and a statement on whether the SBC carried out its general and specific public benefit purposes.[83] In the annual benefit report, the benefit director must describe how the corporation pursued their general and specific public benefits and to what extent they were successful.[84] The benefit report must also delineate the compensation to directors and names of substantial shareholders.[85] The benefit report must be judged by a third-party standard that is carried out by an independent organization and looks comprehensively at the SBC's overall corporate, social, and environmental performance.[86] The third-party standard focuses on transparency by disclosing the applied criteria, the identity of corporation management, the revision and membership processes, and a financial disclosure of funding sources.[87] A SBC therefore requires a corporate entity to consider public benefits, provides protection for management to do so, and requires internal oversight and transparency. It serves a solid first step in branding corporations that are making some sort of effort to contribute a public benefit.

2. Sustainable business corporations provide limited direct benefit for the business due to a lack of clear requirements

The SBC designation begins to blend social factors into a business entity but lacks guidance or financial incentives to make it appealing to mainstream business and impactful for the community. The SBC designation is limited to corporations, and such a corporation is undertaking additional responsibilities and restrictions with little direct benefit to the community or the business itself. It is also unclear whether the formation articles alone will be enough to protect directors from judicial scrutiny with regards to their fiduciary duties to shareholders.[88] In addition, the annual benefit report creates additional work for management with vague guidelines and no set or uniform third-party standard. A SBC does not

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[82] *Id.* §6.
[83] *Id.* §7.
[84] *Id.* §11.
[85] *Id.* §11.
[86] *Id.* §12.
[87] *Id.*
[88] Patel, *supra* note 10, at 138.

necessarily have to fulfill its direct public benefit but only needs to document its efforts. While this is a great tool for transparency and accountability, it relies heavily on the oversight of stakeholders and the general public. Consequently, there is little incentive for the business to follow through on their public benefits and potentially very little direct benefit for the community. In addition, the overall lack of guidance makes it difficult to prevent against hostile takeovers that will alter their original mission.[89]

This lack of guidance carries over to the SBC board's task to take into account multiple stakeholders, which creates numerous opportunities for conflict. The board of directors has a duty to multiple stakeholders and determining which interests take precedence over the others potentially creates conflict. Critics have pointed out that a director could potentially escape accountability by playing these different interests off of each other.[90] In addition, the language of Chapter 414 of the Hawai'i Revised Statutes, which governs corporations, already includes consideration of "community and societal considerations."[91] Yet without additional incentives corporations have tended to ignore that provision to adhere with the shareholder maximization misperception. The SBC includes a benefit director position to address these concerns, but this could potentially create internal conflict within the management structure as this individual is supposed to be independent of the corporation. In addition, the degree of the benefit director's independence is arguable as this individual is still employed by the corporation. Overall, the lack of guidance limits the effectiveness of the SBC requirements, which is similar to the challenges faced by the low-profit limited liability company.

B. Low-Profit Limited Liability Company Brands for Layered Investing and Program-Related Investment Which Limits its Appeal to Mainstream Business

The low-profit limited liability company ("L3C") attempts to expand investment possibilities by focusing on program-related investments ("PRIs"). The L3C is a subset of the LLC that aims to combine the pursuit of social good with profit generation through the use of PRIs and a clearer articulation of management's fiduciary duties to investors.[92] L3C

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[89] *Id.*

[90] *Id.*

[91] HAW. REV. STAT. § 414-221(b)(3) (West 2011).

[92] Tyler, *supra* note 56, at 122, 143.

legislation has been enacted in eight states and two Native American nations and L3C legislation has been proposed in eleven other states, including Hawai'i.[93]

1. L3Cs build off of the strengths of LLCs to expand financing options

L3Cs expand on LLC financing options by attempting to capitalize on PRIs and including different investment tranches. A L3C enjoys a number of LLC benefits including limited liability, broad financing options, flexible management structures, and the ability to limit fiduciary duty.[94] The L3C form closely follows the IRS code regarding PRIs and codifies the PRI elements into a business form in order "to make PRIs more accessible, simpler, less expensive, and less mysterious."[95] Because of the L3C's ability to receive PRIs, an L3C must ensure the primacy of charitable, tax-exempt purposes, which cannot be waived due to the express language of the L3C statute.[96] The pursuit of charitable, tax-exempt purposes thus becomes an additional fiduciary duty of the director.[97] Subsequently, the L3C form may create a branding advantage that separates it from the traditional LLC, but the statutory form itself carries no additional advantages with regards to the articles of incorporation or operating agreement.[98]

L3Cs take advantage of the flexibility of LLCs to provide increased financing options, including the use of tranches, or layers, for different types of investors.[99] The L3C allocates high risk and low return investments to a foundation tranche and allocates lower risk and higher return investments to a market tranche.[100] Because the foundation tranche takes the first risk position, most investment risk is removed from the other tranches.[101] While this makes an L3C more attractive to commercial investors, the increased risk to foundations adds to the uncertainty surrounding the PRI issue.[102]

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[93] AMERICANS FOR COMMUNITY DEVELOPMENT, http://www.americansforcommunitydevelopment.org/laws.php (last visited May 15, 2012).

[94] Tyler, *supra* note 56, at 143-44.

[95] *Id.* at 122.

[96] *Id.* at 146-47.

[97] *Id.* at 141.

[98] Carter G. Bishop, *The Low Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243, 249 (2010).

[99] Tyler, *supra* note 56, at 122.

[100] Bishop, *supra* note 98, at 251.

[101] Kleinberger, *supra* note 36, at 884.

[102] Bishop, *supra* note 98, at 263.

2. L3Cs brand for social good but are limited by current business practices and a lack of guidance regarding PRI financing

The tax-exempt requirement for L3Cs allows the entity designation to serve as branding for social good but current business practices makes it difficult to achieve this purpose. Similar to attempts at social enterprise in the traditional and B corporate forms, issues arise around balancing the different investor interests and the manager's accountability towards pursuing social good purposes that may be counter to member's economic interests.[103] Social good, in this case, hinges on the IRS's definition of a "charitable" or "exempt" activity.[104] The IRS, however, has not released any rulings that specifically approve the use of PRIs for L3Cs and thus few foundation managers are comfortable with proceeding.[105] The conflict between a L3C's profit generating and social purposes could lead to potential L3C violations. Furthermore, a successful L3C may find itself violating L3C criteria because its profit-generating component becomes greater than its tax-exempt component.[106]

Critics decry the L3C's failure at promoting PRIs and go as far as to call it "unnecessary, unwise, and inherently misleading" as they claim a LLC can carry out all of the L3Cs functions.[107] A further criticism is the irrelevance of the "low-profit" purpose as many LLC statutes no longer require a for-profit purpose.[108] The L3C attempts to tap underutilized funding sources, but in doing so, loses its appeal to mainstream business. In addition, without IRS support, very few businesses will take on the risk of a PRI, and the L3C become just another LLC. Focusing on incorporating social good into business models is difficult but it has been done successfully with a narrow focus as shown by community economic development efforts.

V. COMMUNITY ECONOMIC DEVELOPMENT INCORPORATES SOCIAL VALUES INTO BUSINESS PRACTICES BUT IS LIMITED TO A NARROW POPULATION SEGMENT

Community economic development ("CED") emphasizes revitalization of communities beyond economic reasons through community involvement

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[103] Tyler, *supra* note 56, at 155.
[104] *Id.* at 156.
[105] Bishop, *supra* note 98, at 243-44.
[106] Tyler, *supra* note 56, at 158.
[107] Kleinberger, *supra* note 36, at 895.
[108] *Id.* at 897.

and empowerment for impoverished populations.[109] CED efforts began in the 1960s in response to federal urban renewal programs that ultimately squeezed out lower-income groups, particularly African-Americans, for incoming higher income groups.[110] CED practitioners thereby took an antipoverty approach that emphasized grassroots action and redistributive economics.[111] As time progressed, CED efforts became focused in community organizations that focused on low-income housing and job programs with an emphasis on individual self-sufficiency.[112] CED efforts thus focus on empowering low-income community residents by eliminating institutional barriers and emphasizing distributive justice through the redistribution of material resources to rebuild communities.[113] CED practitioners have used a variety of mechanisms including community development corporations ("CDCs"), cooperatives, and micro-financing institutions ("MFIs") and their success has been limited in scale due to their focus on a narrow portion of the population. But overall the different practices offer lessons that can better inform business practices including: a focus on community, the importance of individual empowerment, and an expanding definition of wealth.

A. Focus on Community to Emphasize Interconnectivity

A community focus emphasizes interconnectivity and thus promotes decisions focused on the long-term, but CED efforts have been limited to single communities or neighborhoods. Community in CED theory traditionally takes on a place-based definition that encompasses a group of people who share a commonality: inhabiting the same geographic area, sharing similar backgrounds, or sharing common interests.[114] The place-based definition of community was a rallying point for lower income individuals who banded together in the early stages of CED efforts, which focused on affordable housing, often through CDCs.[115] This focus,

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[109] Clay, *supra* note 14, at 3.

[110] Carmen Huertas-Noble, *Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Study of Colors and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 CLINICAL L. REV. 255, 261 (2010).

[111] Clay, *supra* note 14, at 8-9.

[112] *Id.* at 4.

[113] Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131, 132 (2004).

[114] John Loxley, *Elements of a Theory of Community Economic Development, in* TRANSFORMING OR REFORMING CAPITALISM: TOWARDS A THEORY OF COMMUNITY ECONOMIC DEVELOPMENT 7, 10 (John Loxley ed., 2007).

[115] Huertas-Noble, *supra* note 110, at 261.

however, has also limited its application to those types of neighborhoods and away from mainstream business.

CDCs embody positives and negatives of a neighborhood or area-specific focus. A CDC is typically organized as a tax-exempt organization "dedicated to developing a geographically distinct neighborhood with large numbers of low- and moderate-income people."[116] It consists of community members on their leadership boards, and undertakes some sort of economic development activity. CDCs vary in size and scope and have a variety of names: community-based organizations, community-based development organizations, neighborhood-based organizations, neighborhood development organizations, or economic development corporations.[117] As they are usually structured as tax-exempt organization, CDCs qualify for tax benefits, grants, subsidized loans, and other assistance from government agencies and foundations.[118] In addition, CDCs often have the backing of government and business as they are forced to deal with both for financing.[119] The community focus of a CDC provides a distinct goal that guides development decisions and their tax-exempt status allows a CDC to make decisions for the long-term as these often entail short-term losses.

CDCs, however, are limited by its structure and difficulty in generating its own revenue. CDCs usually do not have an accumulation of discretionary capital, an endowment, or a steady and free cash flow, and thus CDCs must always search for funding.[120] The instability of funding has forced CDCs to focus on fundraising and thus subjected them to the desires of those fundraisers.[121] Second, CDC activities often reflect the desires of business leaders and politicians and thus are sometimes unrelated to the desires of the community, which does little to empower the community members.[122] Third, CDCs are often formed to address social purposes and thus its board and staff are often not equipped to deal with complex economic decisions, including multiple funding sources.[123] The

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[116] Dana A. Thompson, *The Role of Nonprofits in CED, in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 57, 58 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

[117] *Id.*

[118] WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, & THE NEW SOCIAL POLICY 124 (2005).

[119] Thompson, *supra* note 116, at 66-67.

[120] SIMON, *supra* note 118, at 128.

[121] Thompson, *supra* note 116, at 66.

[122] *Id.* at 58.

[123] EDWARD J. BLAKELY & NANCEY GREEN LEIGH, PLANNING LOCAL ECONOMIC DEVELOPMENT: THEORY AND PRACTICE, 335 (4th ed. 2010).

CDC form is thus limited by its narrow focus, but the inclusion of a community-focus can be strengthened by an inclusion of individual empowerment.

B. Increased Responsibility to Empower the Individual

Increased responsibility empowers an individual, but current CED efforts are limited to ownership and financial control. Worker cooperatives and micro-finance institutions ("MFIs") push individuals to take responsibility for their decisions and lives thereby empowering them but are limited in adaptability by contextual issues. Both mechanisms, however, highlight the basic idea of how increasing individual responsibility, whether through ownership or financial stability, increases their individual capacity.

1. Worker cooperatives empower individuals through ownership but are unfeasible for mainstream business entities

Worker cooperatives demonstrate the importance of individual ownership but also the organizational limitations created for mainstream business application. Worker cooperatives encourage a more democratic form of ownership in which the business is owned by the workers.[124] The cooperative is a specific legal entity and requires incorporation under state statute.[125] Membership is voluntary and a worker becomes a member as based on certain, non-discriminatory criteria, which often includes an initial capital contribution.[126] The worker then becomes an owner and receives the right to vote in management and financial decisions.[127] Both the voting right and right to income distributions are deemed personal rights and thus nontransferable.[128]

The democratic structure empowers workers, builds their confidence, and potentially makes the cooperative much more responsive to the workers' needs. First, workers are empowered as the owners of the cooperative and they dictate their own wages and working conditions as a group, which may be higher than they could have leveraged as individuals.[129] Second, worker cooperatives develop "firm-specific human capital," which creates

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[124] Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 185-86 (1999).

[125] BLAKELY & LEIGH, *supra* note 123, at 338.

[126] Cummings, *supra* note 124, at 186.

[127] *Id.*

[128] *Id.*

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

incentives to not only improve upon their skills but also improve the cooperative.[130] Workers have more opportunities for advancement and leadership roles as based on their commitment and quality of work.[131] In addition, cooperatives emphasize self-education by providing training in tasks related to the employment and management aspects of the business.[132] Finally, a worker cooperative often distributes income in proportion to patronage such as work performed,[133] or number of years as a member[134] thus rewarding commitment to the community.

Yet the democratic structure of the worker cooperative is impractical for application towards a broader business entity. The cooperative's democratic structure hinders quick decision making, which can make it difficult to quickly respond to the market.[135] Furthermore, the structure creates the potential for intra-organizational dispute and gridlock as every member gets one vote.[136] The cooperative structure also makes securing capital investment extremely difficult. A cooperative needs to rely internally on members for capital investment because outside investors cannot receive the same ownership-rights and would thus be less inclined to invest in a cooperative.[137] Members often do not have the cash or liquidity to contribute additional capital because of their financial situation.[138] Even if members do have the cash, investing additional capital into the cooperative increases their investment risk, which could be alleviated through diversification of investments.[139] Members are also limited in reselling additional shares because of the cooperative's limits in finding an individual who is qualified to repurchase the shares due to the cooperative structure.[140] Ownership is thus an effective but limited way to empower an individual, which is a similar difficulty that micro-finance institutions face in financing an individual.

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130 SIMON, *supra* note 118, at 135.
131 Cummings, *supra* note 124, at 187.
132 *Id.*
133 SIMON, *supra* note 118, at 133.
134 BLAKELY & LEIGH, *supra* note 123, at 340.
135 Cummings, *supra* note 124, at 188.
136 *Id.*
137 SIMON, *supra* note 118, at 133-34.
138 *Id.* at 134.
139 *Id.*
140 *Id.*

2. Micro-finance institutions empower individuals through finance and education but are limited by logistics

Micro-finance institutions ("MFIs") demonstrate the power of providing individuals with small amounts of capital and education to start and own a business, and the logistical and financial limitations in doing so to a large number of individuals, especially of a lower income bracket. MFIs focus on extending financial services to low-income individuals.[141] As tax-exempt organizations, MFIs loan small amounts of credit to low-income borrowers with little or no collateral at high interest rates in order to finance microenterprises.[142] Microenterprises have been defined as "any type of small business that has fewer than five employees and is small enough to benefit from loans of under $35,000."[143] MFIs additionally provide training for the microenterprise owners, which encourage empowerment and builds practical skills.

MFIs deal with interest rate problems, which highlight the inherent difficulty of focusing on the lower income bracket of the population.[144] As tax-exempt organizations, MFIs are limited in their efforts in attracting investment capital.[145] MFIs charge higher interest rates than a commercial bank because of high operating costs that stem from the high volume of small loans from borrowers with uncertain credit histories, lack of collateral, and higher possibility of defaults.[146] By extension, the uncertain finances of the target consumers lead to difficulty in securing investment capital due to the high risk of backing such consumers.[147] In order to ensure profitable and sustainable MFIs, the creation of a hybrid entity, the microfinance limited partnership ("MLP") has been proposed.[148] A MLP is

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[141] Susan R. Jones & Amanda Spratley, *How Microenterprise Development Contributes to CED, in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 379, 379 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

[142] Michelle Scholastica Paul, Note, *Bridging the Gap to the Microfinance Promise: A Proposal for a Tax-Exempt Microfinance Hybrid Entity*, 42 N.Y.U. J. INT'L L. & POL. 1383, 1384 (2010).

[143] Jones & Spratley, *supra* note 141, at 380 (citing *Microenterprise Development in the United States: An Overview*, ASSOCIATION FOR ENTERPRISE OPPORTUNITY (2005), *available at* http://www.aeoworks.org/images/uploads/pages/fact_sheet_overviewofusmicro.pdf (last visited Oct. 22, 2009)).

[144] Paul, *supra* note 142, at 1411.

[145] *Id.* at 1384.

[146] *Id.*

[147] *Id.*

[148] *Id.* at 1420.

a for-profit entity that allows for member management and provides microloans but can leverage investment from private investors and promises tax-free dividends.[149] Although MFIs and the proposed MLP provide an innovative opportunity for individual empowerment, both models are limited in scalability because of their narrow focus on the low-income segment of the population. However, CED efforts have begun to expand with a broader definition of wealth.

C. Expanding the Definition of Wealth by Focusing on Communal Asset Building

CED theory focused on building individual assets but also expanded its focus towards building communal assets. The word asset has a broad definition in the CED field and has been defined to include the concrete value of money as well as the intangible value of opportunity and skill building for individuals.[150] Because of this dual definition of assets, asset building policies must broaden the possibility of asset ownership and facilitate access to the overall financial system to allow individuals to maximize those assets.[151] Asset ownership has been touted as another mechanism to empower low-income individuals and reconnect them to the broader economy and society to increase capacity.[152] Current efforts have focused on efforts to encourage individual savings through community development financial institutions ("CDFIs") and individual development accounts ("IDAs"). CDFIs are organizations that promote community development and provide financial services to a target, typically low-income, population.[153] IDAs are savings accounts for low-income individuals in which the government or a private source matches the amounts deposited; and the individuals also undertake financial education, which culminates in the investment of specific assets.[154] Both CDFIs and IDAs create individual assets to increase financial stability and allow individuals the flexibility to make choices that can better their financial

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[149] *Id.*

[150] Sarah Molseed, Note, *An Ownership Society for All: Community Development Financial Institutions as the Bridge Between Wealth Inequality and Asset-Building Policies*, 13 GEO. J. ON POVERTY L. & POL'Y 489, 490 (2006).

[151] *Id.* at 491.

[152] *Id.*

[153] *Id.* at 504.

[154] Kim Pate, *Matched Savings Accounts, in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 323, 325 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

position.[155] By increasing an individual's involvement in his own financial betterment through the maintenance of their personal assets, an individual may gain confidence, which also encourages their participation in the civic process to continue to protect those assets.[156]

CED practitioners have recently recognized the limitations of an individual focus on asset building and have begun to explore the importance of community asset building through relationships. A focus on individual assets encourages individuals to move out once they build individual assets thus breaking the community link.[157] Individuals and families live and work within the structure of communities, which form a natural support network.[158] Furthermore, CED practitioners have recognized the need for interconnectivity with a systems and relationship model that emphasizes the individual as a part of community.[159] In order to increase community assets, individuals need to "move up by staying put" through a focus on people, land, and institutions.[160] Land is the physical foundation of community, while people are the drivers of that community, which can be facilitated by the institutions in the community.[161] The place-based idea has thus expanded to include people-based definitions of diverse communities that recognize shared problems and purpose-based definitions of community that emphasize shared experiences to foster collective action.[162] CED has begun to push communities of opportunity and sees its role as providing pathways to opportunity by investing in human capital.[163] Such realizations in CED theory of land as the foundation of community, the importance of community, and fostering human capacity have been concepts that form the basis of Hawaiian cultural beliefs.

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[155] Molseed, *supra* note 150, at 492-93.

[156] *Id.* at 494.

[157] Hannah Thomas & Thomas Shapiro, *Assets and Community, in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 303, 306 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

[158] *Id.* at 313.

[159] John A. Powell & Jason Reece, *Perspectives on CED in a Global Economy, in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 17, 18-19 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

[160] Thomas & Shapiro, *supra* note 157, at 306.

[161] *Id.* at 307-08.

[162] Huertas-Noble, *supra* note 110, at 263.

[163] Powell & Reece, *supra* note 159, at 34-35.

VI. INFUSING SOCIAL AND CULTURAL VALUES OF HAWAI'I TO EXPAND COMMUNITY ECONOMIC DEVELOPMENT IDEAS TO VIEW BUSINESSES AS COMMUNITIES

Social and cultural values of Hawai'i shape CED theory for mainstream business through themes of communal responsibility, experiential learning, and a communal definition of wealth that looks long term. Knowledge is shaped by culture to create "best practices."[164] Native Hawaiian culture as compared to Western cultures focuses on relationships rather than money.[165] Relationships in Native Hawaiian culture begin with the *āina*, which literally refers to the land and environment, but figuratively refers to the land as mother or inspiration and how she influences the way one perceives the world.[166] Such a deep connection emphasizes "develop[ing] harmony with land" and expands relationships to other people as "opportunities to practice reciprocity, exhibit balance."[167] The word *aloha* breaks down into *"alo,"* or in the presence of, and *"ha,"* or the breath of life,[168] and has been interpreted on a deeper level to mean "the intelligence with which we meet life."[169] *Aloha* is akin to an emotional intelligence that dictates how to properly respond to others and take care of them as well as the *āina*.[170]

The way one learns in Hawaiian culture is through experience, which leads to the active creation of knowledge.[171] The five senses, as defined using the Hawaiian language and through the deeper, figurative meanings of the words, emphasize reciprocal learning built on awareness and experience to create knowledge.[172] There is a subsequent sense of *kuleana*, or responsibility, to share this knowledge. *Kuleana*, however, goes beyond responsibility in the Western sense to a commitment towards actively fostering and protecting knowledge for perpetuity's sake and the betterment

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[164] SIMON, *supra* note 118, at 127-28.

[165] Manulani Aluli Meyer, *Our Own Liberation: Reflections on Hawaiian Epistemology*, 13 THE CONTEMPORARY PACIFIC 124, 126 (2001).

[166] *Id.* at 128.

[167] *Id.* at 134.

[168] *See The Meaning of Aloha*, TO-HAWAII.COM: HAWAII TRAVEL GUIDE, http://www.to-hawaii.com/aloha.php (last visited May 15, 2012); *Kahuna Lapa'au 'O Hawai'i*, KA LEO 'O NA KAHUNA LAPA'AU 'O HAWAI'I, http://www.kahunahaleolono.org/language.html (last visited May 15, 2012).

[169] Manu Aluli Meyer, *Aloha is Our Intelligence*, VOICES OF TRUTH: ONE-ON-ONE WITH HAWAI'I'S FUTURE (Feb. 5, 2007), http://www.youtube.com/watch?v=8xNBxVGBEF0.

[170] *Id.*

[171] Meyer, *Our Own Liberation*, *supra* note 165, at 129-30.

[172] *Id.* at 132-33.

of the community.[173] In Hawaiian culture, understanding *kuleana* develops one's own potential and the potential in others to carry out that responsibility using the best of that individual's capabilities.[174]

Hawaiian culture emphasizes building communal assets for the long-term as opposed to focusing strictly on individual assets. Conscious maintenance of relationships is an active way to develop an interdependence with other people, the *āina*, and the community.[175] These relationships allow for knowledge that is applicable and useful due to experience, which leads to purposeful work that creates value and is worth passing on.[176] The value that is created is one that benefits the community through increased interdependence and shared knowledge. Cultivating *aloha* is a long-term process in which the individual develops their own capacity by helping others and by extension the community.[177] Hawaiian cultural values add to CED lessons with a communal focus supported by an emphasis of communal responsibility, individual empowerment through experiential learning, and a broader definition of wealth to shift communal focus to the long-term.

A. Communal Focus by Emphasizing Communal Responsibility

A few local entities in Hawai'i have begun to undertake efforts that encourage a communal focus through Hawai'i-influenced values, which emphasize communal responsibility but are struggling to fit within current entity structures. MA'O Organic Farms ("MA'O") uses "*āina* based activities" that offer educational and employment opportunities for the youth of Wai'anae to develop leadership skills, reconnect them to the *āina* to rebuild "a strong sense of stability, security, and belonging to the *'ohana nui*, or larger community."[178] MA'O is an acronym for *mala 'ai 'opio*, which roughly translates as "the youth food garden," as MA'O cultivates youth as well as organic produce.[179] MA'O explicitly focuses on a specific

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[173] Interview with Maile Meyer, Owner, Native Books/Nā Mea Hawaii, in Honolulu, Haw. (Mar. 18, 2011).

[174] MANULANI ALULI MEYER, HO'OLU: OUR TIME OF BEGINNING 11, 13 (2004).

[175] Meyer, *Our Own Liberation*, *supra* note 165, at 134-35.

[176] *Id.* at 137-38.

[177] MEYER, HO'OLU, *supra* note 174, at 14.

[178] *Who We Are*, MA'O ORGANIC FARMS, http://maoorganicfarms.org/index.php?/mao_farms/_who_we_are (last visited May 15, 2012).

[179] *11 Acres Protected for Wai'anae Community Farm (HI)*, TRUST FOR PUBLIC LAND (Jan. 30, 2009), *available at* http://www.tpl.org/news/press-releases/11-acres-protected-for-waianae.html.

community to cultivate individual empowerment through education that focuses around the community, its history, and the importance of those relationships that populate that community's land. MA'O recently acquired eleven acres of land, which more than doubled its original holding, and it has become a profitable social enterprise that continues to grow.[180] Yet MA'O's success is not the norm and it faces a lot of criticism that its status as a redevelopment corporation is akin to a subsidized business.[181]

Nā Mea Hawai'i/Native Books Hawai'i ("Native Books") is a locally-owned book store that prides itself as a source for Hawaiian culture, language, and traditions but is struggling financially within current entity structures. Through the distribution of books, educational materials and locally-made products, Native Books serves as a resource center, and creates a "business environment of collaborative and shared effort and concern for one another and our community."[182] The shop has a workshop area where local artisans create items to be sold directly to the customer within the store.[183] Native Books, however, is struggling financially to fit into the business entities that are currently being offered as it is selling products with a limited consumer audience.[184] An entity structure that emphasizes communal responsibility and provides financial support for community-focused business is thus needed to foster true social enterprise and empower community members.

B. Individual Empowerment by Learning Through Experience

The active creation of knowledge can only be done through experience, which inevitably empowers the individual and naturally creates social enterprise. MA'O Farms allows students to take part of every aspect of the farm, including the management decisions in order to learn through experience.[185] Kanu Hawai'i is a tax-exempt organization that encourages "island style" activism that begins with personal commitments to change and continues with group demonstrations based in *kuleana*, or long-term, communal responsibility.[186] Kanu Hawai'i aims to build a movement

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[180] Interview with Gary Maunakea-Forth, Managing Dir., MA'O Organic Farms and Wei Fang, Social Enters. Dir., MA'O Organic Farms in Wai'anae, Haw. (Feb. 21, 2011).

[181] *Id.*

[182] *About Us,* NATIVE BOOKS HAWAII, http://www.nativebookshawaii.com/index.php?option=com_content&task=view&id=29&Itemid=43 (last visited May 15, 2012).

[183] Interview with Maile Meyer, *supra* note 173.

[184] *Id.*

[185] Interview with Gary Maunakea-Forth, *supra* note 180.

[186] *The Kanu Vision,* KANU HAWAII, http://www.kanuhawaii.org/kanu/vision/ (last visited

founded in island lessons of environmental sustainability, neighborly compassion, and local self-reliance to benefit an island earth.[187] The word *kanu* literally means "to plant" but has a deeper meaning of "passed down by inheritance from an ancestor."[188] Kanu Hawai'i thus cultivates member empowerment and pushes them to actively learn through the experiences of these *kuleana*-based demonstrations founded in and for the benefit of community.

The membership of Kanu Hawai'i has skyrocketed to over 14,000 members in almost three years attesting to the appeal of the model, but still deals with challenges that plague tax-exempt organizations. Kanu Hawai'i is always aware of the need to generate revenue and faces other organizational issues such as UBIT consequences with the recent launch of a for-profit subsidiary.[189] There is no doubt about the benefit of experiential learning to the individual, the organization, and arguably the greater community, but the problem has been focused around how to make it profitable. A corporate entity that relies on a broad definition of wealth would focus on building community assets and shift the perspective of business towards the long-term.

C. Focus on Community Asset Building to Shift the Business Perspective to the Long-Term

Community asset building policy that relies on Hawaiian cultural values would shift the perspective of business to the long-term and allow for true social enterprise that reconciles the tension between profit and social good. Community economic development ("CED") efforts in Hawai'i have been spearheaded by the Hawai'i Alliance for Community Based Economic Development ("HACBED"), a tax-exempt organization, which advocates for asset building policies that center around family and community-based self-sufficiency.[190] HACBED serves as an outside consultant for community organizations that desire help with capacity building and community based planning.[191]

May 15, 2012).

[187] *Id.*

[188] *About Kanu Hawaii*, KANU HAWAII, http://www.kanuhawaii.org/kanu/ (last visited May 15, 2012).

[189] Interview with James Koshiba, *supra* note 15.

[190] *Programs and Services*, HACBED: HAWAI'I ALLIANCE FOR COMMUNITY-BASED ECONOMIC DEVELOPMENT, http://hacbed.org/index.php?option=com_content&view=article&id=49&Itemid=75 (last visited May 15, 2012).

[191] *Id.*

HACBED initiated the Ho'owaiwai Initiative in 2008 to nurture a broad definition of asset building, which includes assets such as family, community, the natural environment, and culture, and views financial assets as a way that one can invest or acquire the non-financial assets.[192] *Ho'owaiwai* is a Hawaiian word that means "to enrich" but its deeper meaning refers to a communal definition of wealth.[193] Part of *ho'owaiwai* is *wai*, which means "fresh water," and was a precious communal commodity in ancient Hawai'i.[194] Each person in the village had the responsibility to take care of the *wai* because of its importance to the entire community and thus a sufficient supply of *wai* was viewed as a source of wealth for the individual and the community.[195] The use of *ho'owaiwai* demonstrates a cultural definition of wealth that includes the natural asset of water and the human asset of active responsibility to take care of that water, which is founded in the village, the community. The Ho'owaiwai Initiative aims to encourage self-sufficiency tied to overall economic development by encouraging activities, such as saving, financial education, home ownership, and entrepreneurial activity and tie it all to community.[196] Although the Ho'owaiwai Initiative focuses on low-income individuals and families, it exemplifies the cultural values of Hawai'i that emphasize communal responsibility, learning through hands-on engagement, and a focus on communal assets. Incorporating these Hawaiian cultural values will shift the perspective of business towards a long-term approach and lays the foundation for the Aloha Corporation.

VII. "ALOHA CORPORATION:" BUSINESS ENTITY AS A COMMUNITY

The Aloha Corporation is a corporate entity guided by a long-term social mission, required to directly contribute to the community, and in return it receives state tax benefits, which allows it to reconcile the tension between profit and social good. The Aloha Corporation applies Hawaiian cultural understanding of interdependence and a responsibility to others and the community to create an entity that straddles the line between profits and social good to maximize the two considerations. It builds off of the tax-exempt organization's focus on a social mission but takes on a corporate approach to financing and managerial protection from suit. The Aloha

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[192] The Hawai'i Alliance for Community-Based Economic Development, *Waiwai: An Asset Policy Initiative for Hawai'i* 3, 5 (2006).

[193] *Id.* at 3.

[194] *Id.*

[195] *Id.*

[196] *Id.* at 6, 11-23.

Corporation would be a for-profit entity organized like a limited liability company ("LLC") under Chapter 428 of the Hawai'i Revised Statutes, which will allow it to have a broad array of financing options and the ability to pay out dividends to increase its attractiveness to investors.[197] Consequently, it would not clash with the existing sustainable business corporation designation for corporations. An Aloha Corporation is expected to be self-sufficient as a for-profit entity and generate enough revenue with its business activities to sustain itself. The State Department of Commerce and Consumer Affairs ("DCCA") will be the state agency with whom the Aloha Corporation files all related documents as DCCA is the State department in charge of current business entity registration as well as oversight of business practices.[198] The Aloha Corporation would be more than a branding mechanism, marketing tool, or designation as it would delineate an organization that has committed to doing business founded in community. The Aloha Corporation provides four components that serve as a clear guideline regarding a corporation's responsibility to contribute to the community and reward it with tangible benefits.

A. "Ho'owaiwai Statement:" Setting Forward-Looking Goals for a Broader Definition of Wealth

An Aloha Corporation requires a "Ho'owaiwai Statement," which is a company-wide commitment to long-term community benefit through goals that recognize its responsibility to the community. An Aloha Corporation would be formed with a basic LLC structure with regards to general management and capital flexibility but would have a special statement in their articles of incorporation and operating agreement termed as a "Ho'owaiwai Statement." The use of the Hawaiian word *ho'owaiwai* analogizes an Aloha Corporation's statement to one that emphasizes communal wealth and the community's *kuleana*, or long-term responsibility, to maintain such wealth. An Aloha Corporation is required to set out a forty-year communal impact statement and specific milestones at years three, five, ten, twenty, and forty. Aloha Corporation management will have to choose two or three issues from the following list that their communal goals must address: environment and natural resources, education and arts, local job creation, social justice, homelessness, energy sustainability, and food security. The salary of executive members would

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[197] *See generally* HAW. REV. STAT. § 428 (West 2011).

[198] *Overview/Services*, DEPT. OF COMMERCE AND CONSUMER AFFAIRS, http://hawaii.gov/dcca/about (last visited May 15, 2012).

be tied with those of the salaried staff and the proportion would not exceed a three-to-one ratio. An Aloha Corporation will also include its chosen Lōkahi Commitment in its Ho'owaiwai Statement, which will be discussed further in the following subsection. An Aloha Corporation would file their Ho'owaiwai Statement with the DCCA and pay a one-time fee to cover the administrative costs of processing their Statement.

The Ho'owaiwai Statement thus serves as the foundation for the long-term communal and financial planning for the Aloha Corporation. A forty-year requirement will force the management of an Aloha Corporation to create a plan for long-term sustainability tied to community. The interval milestones will also force management to think of a realistic time table and interim actions to achieve its long-term goals and plan for true community involvement. Finally, choosing from a list of issues will provide guidelines of acceptable communal goals. An Aloha Corporation builds on the loose requirements of the typical incorporating articles as well as the B Corporation's public benefit provisions to require what amounts to a loose vision statement that pushes an Aloha Corporation's management to plan for the long-term.

B. "Lōkahi Commitment:" Providing a Service to the State and, by Extension, the Community to Qualify for State Tax-Exemption

The "Lōkahi Commitment" assists the Aloha Corporation's ability to reconcile the tension between profit and social good as it requires the Aloha Corporation to carry out a specific state service to justify a state tax exemption. The additional money saved via the tax exemption, however, must be directly put back into the Aloha Corporation's Lōkahi Commitment. The use of the Hawaiian word *lōkahi*, which roughly translates to collaboration, refers to the collaboration that will occur with the State of Hawai'i (the "State") and other organizations to carry out an activity that directly benefits the State and, by extension, the community. The State would need to determine areas of need and generate a list of these after discussions amongst the different agencies. An Aloha Corporation may also suggest a Lōkahi Commitment for approval by DCCA. DCCA would keep the list in its database and make sure that it is kept up to date.

The Aloha Corporation would be required to spend an equivalent of one percent of its income or resources to address one of these needs as their Lōkahi Commitment, which would have to be tied to the communal goals espoused in their Ho'owaiwai Statement. At a minimum, a Lōkahi Commitment should be a long-term commitment that can be evaluated at the milestones delineated in the Ho'owaiwai Statement. In exchange, an

Aloha Corporation would be exempt from State income taxes and general excise taxes,[199] but would be required to apply the money saved back to their Lōkahi Commitment or Kuleana Development, described below. Critics may point to the loss of tax revenue that would be necessary to cover the additional administrative costs. But the direct services that an Aloha Corporation provides through its Lōkahi Commitment should offset and even exceed those costs as it would alleviate stretched State departments and address other issues such as poverty and environmental degradation that affect numerous State services.

DCCA would be in charge of developing a checklist that a basic Lōkahi Commitment would have to follow and be responsible for oversight by relying on the Aloha Corporation's Aloha Audit, which is described later, to determine whether an Aloha Corporation is sufficiently meeting the State need. An Aloha Corporation must carry out its Lōkahi Commitment immediately upon the start of business operations or put aside the equivalent of one percent of revenue for future contribution to their Lōkahi Commitment. However, an Aloha Corporation may apply to the DCCA for an extension if they cannot launch their Lōkahi Commitment within a year despite reasonable efforts or that Aloha Corporation will lose its tax exemption, have to pay back any taxes, and may be subject to punitive fees. If an Aloha Corporation is not properly meeting its Lōkahi Commitment, the Aloha Corporation will lose its tax-exempt status and be subject to punitive taxes. An Aloha Corporation thus carries out a direct service to the State, which supports their Ho'owaiwai Statement, and receives financial incentives for doing so. In the process, the Aloha Corporation will be strengthening its own reputation through the relationships it builds as well as its own capacity through the experience.

C. "Kuleana Development:" Fostering Community Capacity Through Company Supported Workforce Development

An Aloha Corporation must also contribute to the community by providing "Kuleana Development" opportunities for certain classes of individuals to provide experiential training supported by the State and

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[199] *Outline of the Hawaii Tax System as of July 1, 2011*, HAW. DEPT. OF TAX (Jul. 1, 2010), *available at* http://www.state.hi.us/tax/pubs/11outline.pdf (Corporations are subject to net income task of 4.4% up to $25,000, 5.4% for $25,000-$100,000, and 6.4% over $100,000 of taxable income; general excise tax of 4% or 4.5% for business conducted in the City and County of Honolulu; and an excise tax on tangible personal property, which is imported or purchased from an unlicensed seller for use in the State at .5% if for retail resale and 4% if for use or consumption.).

potentially the customer. The Hawaiian word *kuleana*, or long-term communal responsibility, embodies the responsibility the Aloha Corporation must exhibit to the community through its commitment to providing opportunities for these classes of individuals, which may include certain individuals below a certain household income or status as an individual recently released from prison, programs for student internships, or other programs as approved by the DCCA. A Kuleana Development would provide hands-on opportunities for these employees to learn through experience and create substantive knowledge. The Aloha Corporation must have the number of positions equivalent to one percent of the number of employees or one percent of total revenue or resources. In addition, the Aloha Corporation must make reasonable efforts to keep this position filled at all times or put aside one percent of revenue for the future or else they would be subject to penalty fees and potentially a loss of their tax exemption.

The Aloha Corporation will be contributing towards building community capacity by focusing on community members who would most benefit from such training. If the Kuleana Development is an actual employed position, the Aloha Corporation must pay them a minimum living wage with full employment benefits. If it is a student internship, then the Aloha Corporation must spend what amounts to one percent of their total revenue or resources. The learning experience should include both skill development and managerial development, which is founded in relationship building skills. The Kuleana Development will allow the Aloha Corporation to properly reconcile the current tension between profit and social good through building capacity that will ultimately benefit the community.

D. "Aloha Audit:" Self-Regulation Focused on Transparency and Long-Term Planning

The Aloha Audit is a self-imposed audit that evaluates the Aloha Corporation's efficacy in carrying out its initiatives and transparency to shareholders, but is required at longer time intervals to account for the amount of time substantive community investment takes. The Aloha Audit mirrors the sustainable business corporation's annual benefit report's requirements as it requires the Aloha Corporation to measure its efficacy in meeting its Ho'owaiwai Statement, Lōkahi Commitment, and Kuleana Development, as well as provide for organizational transparency. The Aloha Audit would coincide initially with the two and five-year milestones tied to the community goals in the Ho'owaiwai Statement, but then be

required every five years subsequently to ensure that the Aloha Corporation stays on track. The timing requirement of the Aloha Audit would thus push Aloha Corporation management to set goals that would not be subject to the annual constraints of current entities, which are often of a financial nature, but also include more encompassing goals that capture a broader communal picture. An Aloha Corporation would also be required to delineate challenges and failures as well as successes in order to contribute to community knowledge and portray a true and complete picture of the business.

Aloha Corporation management would submit the Aloha Audit to the DCCA and its shareholders, as well as have a copy readily available upon request for oversight and transparency purposes. Along with the Aloha Audit, Aloha Corporation management would have to submit a filing fee to the DCCA to help cover administrative costs. Because of the tax incentives, the DCCA would have to evaluate how effective an Aloha Corporation has been in carrying out the goals set out in its Ho'owaiwai Statement, its Lōkahi Commitment, Kuleana Development, and the accuracy of its Aloha Audit. Absence of a reasonable effort on an Aloha Corporation's part in meeting any of the above requirements would lead to a loss of its tax exempt status and result in them paying back taxes as well as a punitive fee.

In addition, because the Aloha Corporation is receiving a tax exemption, the Aloha Corporation would also be required to post a copy of their Aloha Audit on their website for public information and have a copy of it freely available upon request. The Aloha Audit thus offers the State an opportunity to determine the effectiveness of an Aloha Corporation and the public the opportunity to see how an Aloha Corporation is taking advantage of its tax exemption. The entities that are approved by the DCCA would gain membership to the "Aloha Corporation Hui." This *hui*, or community, would encourage members to assist each other with that spirit of *aloha* in mind, whether through goods or services.

VIII. IMMEDIATE SOLUTIONS BASED ON THE ALOHA CORPORATION TO SHIFT THE BUSINESS PERSPECTIVE TOWARDS A RECOGNITION OF COMMUNAL ASSETS

It will be difficult to immediately enact the Aloha Corporation as it is an entity that approaches business in a different way and requires State support. The following recommendations offer ways to gradually transition towards the Aloha Corporation by building State support and shifting the business perspective in Hawai'i towards recognizing the importance of

social, cultural, environmental, and communal assets. Incorporating cultural values is always a difficult thing to do as culture can be manipulated as a party sees fit. The interim solutions are based on components of the Aloha Corporation to demonstrate how culturally informed business practices can reconcile the tension between profit and social good in current business entities. By gradually shifting the perspective of business away from a strict focus on profits, the proposed solutions push for long-term and sustainable business practices that will foster a business environment that would be naturally receptive to the Aloha Corporation.

A. State Requirement for an "Aloha Audit" for Existing Businesses to Determine Community Impact and Foster Long-Term Development

A modified version of the "Aloha Audit" should be required for businesses registered in the state of Hawai'i to self-determine and self-evaluate their long-term community impact and development and create communal transparency. An Aloha Audit would be required every three years for businesses that carry out any activity in the State to delineate its community impact and be submitted to the DCCA. It should be emphasized that this is not a requirement for a business to carry out explicit activities to better the community or environment. Rather it is a requirement for businesses conducting activities in Hawai'i to report their current efforts, if there are any. A simple, "Not Applicable," phrase would suffice if the company is not carrying out any activities that impact the community. If a corporation does report community benefit in an Aloha Audit, then it would be required to include data and support from community members that would reasonably support their claims.

Requiring this Aloha Audit to be filled out every three years would allow for more complete reporting on the business's communal impact over time and encourage long-term thinking and planning. It would also alleviate administrative work for the DCCA. An Aloha Audit would subsequently begin to give more legitimacy to the potential social impacts of traditional corporation forms under section 414-221 of the Hawai'i Revised Statutes and better allow corporations to focus on "community and societal considerations,"[200] as well as the long-term considerations of the corporation.[201]

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[200] HAW. REV. STAT. § 414-221(b)(3) (West 2011).

[201] *Id.* § 414-221(b)(4).

Thoroughly filling out an Aloha Audit to delineate the corporation's community impact could be extra work, but it will signal the corporation's recognition of its responsibility to the community. The corporation could thus take advantage of society's growing social support for socially responsible businesses. An Aloha Audit would provide documentation that would protect management from suit, which would help to solve some of the uncertainty that currently prevents social enterprises from carrying out social good. Second, a business could use their Aloha Audit for marketing and advertising purposes to demonstrate their past and projected contributions to the community. Finally, requiring businesses to determine their long-term community impacts would reconcile the tension between social good and profit. Most audits or business evaluations focus on revenues and profits, with little consideration given to environmental, communal, or cultural impacts. An Aloha Audit would highlight the State's acknowledgement of the importance of other factors within the business environment of Hawai'i to begin to shift the business perspective, which includes shareholders and investors, towards a different definition of wealth.

B. Revision of Directors' Standard of Conduct to Better Protect Social Value Creation in Current Corporate Structures

Current Hawai'i law, which dictates directors' standard of conduct, should be revised to better protect the ability of directors to take in considerations other than profit maximization to encourage social enterprise activities in current corporate structures. The statute currently reads:

> In determining the best interests of the corporation, a director, in addition to considering the interests of the corporation's shareholders, *may* consider: [the interests of parties beyond shareholders including employees, customers, community, and the long-term interests of the corporation.][202]

Instead of a conditional "may," the statute should be revised to support businesses that take considerations other than shareholder's interests into account:

> In determining the best interests of the corporation, if a director chooses, in addition to the interests of the corporation's shareholders, to also consider any of the following considerations, then these considerations ***must*** be included in the incorporating articles of the corporation and are protected from suit. The corporation must also explicitly state the percentage of profits that are

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[202] *Id.* § 414-221(3)(b) (emphasis added).

> expected to go towards these other considerations. These considerations include: [the interests of parties beyond shareholders including employees, customers, community, and the long-term interests of the corporation.]

Such a revision would allow corporations that do business in Hawai'i to carry out social enterprise activities with less apprehension and provide better protection for management whose decisions may inadvertently sacrifice some profits in order to carry out a social good. By explicitly delineating their treatment of profits with social good, corporations looking to carry out social enterprise activities can better protect themselves as investors will know the corporation's intended financial breakdown up front. Furthermore, market considerations would ensure that Aloha Corporation management would make decisions that also financially benefit the Aloha Corporation.

C. Push for Lōkahi Commitment and Kuleana Development Programs Now

The State is currently in dire financial straits as it faces a long-term budget crisis[203] and is considering a variety of financing options including raising the general exercise tax and eliminating tax exemptions. As the State departments prune their budgets and are forced to cut resources and positions to minimal levels, numerous services and programs are being denied,[204] which creates a growing need for other organizations to step-in and provide these missing services. The State should create pilot programs for the Lōkahi Commitment and Kuleana Development to offset the State's current financial situation and encourage corporate civic responsibility. These programs will provide businesses an opportunity to directly contribute to community through direct service to the State and push such behavior with tax incentives. The State should first create a list of its needs and create a Lōkahi Commitment program that would offer a corresponding tax break for an organization that undertakes such a responsibility. The Kuleana Development could be one a specific example of such a commitment or a separate program all together. An organization that employs a physically or mentally disabled individual, or person who has been incarcerated or is of a certain income bracket or creates internship

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[203] *See* Derrick DePledge, *Lawmakers aim to rein in budget*, HONOLULU STAR-ADVERTISER (Jan. 17, 2011), *available at* http://www.staradvertiser.com/news/20110117_Lawmakers_aim_to_rein_in_budget.html.

[204] *See* Dan Nakaso, *Government takes chisel to services*, HONOLULU STAR-ADVERTISER (Apr. 17, 2011), *available at* http://www.staradvertiser.com/news/20110417_Government_takes_chisel_to_services.html.

opportunities for students should receive some assistance from the State. The State could subsidize these positions to offset the administrative costs and the time that management will need to take to train and foster these individuals. This program would thus alleviate burden on State job training programs[205] and encourage corporate contribution to community by providing workforce development opportunities. Overall, both the Lōkahi Commitment and the Kuleana Development programs would infuse Hawaiian cultural values of experiential learning, relationship building, and communal asset building into corporate practices and pave the way for the Aloha Corporation.

IX. CONCLUSION: HAWAI'I AS A MODEL FOR BUSINESS FOUNDED IN AND CONTRIBUTING TO COMMUNITY

Existing business entities are limited in carrying out social enterprise activities by the current tension between social good and profits. Growing public and business awareness, however, indicates that there is an opportunity and growing market for a new entity that reconciles social good and profits. The Aloha Corporation blends the tax-exempt, corporate, hybrid, and CED models by employing Hawaiian cultural values to carry out true social enterprise activities that create social good. Through its Ho'owaiwai Statement, the Aloha Corporation focuses on a social mission, like a tax-exempt organization, but connects it specifically to community and forecasts it for long-term benefit. It uses corporate financing options yet provides clear guidance for social good as tied to the community and protection for management to carry out these community goals.

The Aloha Corporation builds off a community focus, individual empowerment, and building community assets with a lens founded in Hawaiian cultural values. Community responsibility is emphasized through direct services to the State through its Lōkahi Commitment. Experiential learning is stressed through its responsibility to provide Kuleana Development for certain classes of individuals. A long-term view in building community assets is highlighted by the Ho'owaiwai Statement and

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[205] *See Year Ten, Workforce Investment Act, Title 1-B Annual Performance Report, Program year July 2009-June 2010*, HAW. DEPT. OF LAB. & INDUS. REL. (Oct. 1 2010), *available at* http://www.doleta.gov/performance/results/AnnualReports/PY2009/HI_PY_2009_State_Data_Book.pdf (Under the Workforce Investment Act of 1998, the State's programs for dislocated workers in 2009 spent $2,695,140 for 924 reported participants at an average annual cost of $2,916 per participant. State programs for youth in 2009 spent $3,557,937 for 567 reported participants at an average annual cost of $6,275 per participant.).

accountability for the prior three components through an Aloha Audit. The Aloha Corporation designation is thus more than a branding mechanism. It represents a business entity that reconciles profit and social good as a true social enterprise that takes a long-term view to work with the community and consequently benefit as a member of that community.

In the interim, solutions based on the components of the Aloha Corporation should be used to shift the business perspective to reflect the cultural values of Hawai'i. An Aloha Audit should be required for corporations that are registered to do business within the State to highlight community contribution. Business should be pushed to broaden their perspective beyond a strict focus on financial assets to include community, environmental, and cultural assets. A model provision should be drafted for current corporations that are interested in carrying out social good to protect these corporations and their management in case profits are not maximized due to considerations for social good provisions. Finally, pilot programs for the Lōkahi Commitment and Kuleana Development would promote collaboration, experiential learning, and asset building founded in community.

Hawai'i is a unique place to live, informed by its cultural values, and should also be a unique place to do business, informed by those same values. The Aloha Corporation and its components reflect these values and highlight communal responsibility, provide opportunities for experiential learning, and ultimately builds communal assets. An Aloha Corporation is an institution connected to land, or place, and is committed to building community capacity by investing in people and building relationships. Incorporating the cultural values of Hawai'i into the conversation would weave the social good and profit strands together to move beyond current business limitations and shift the perspective of business toward a broader definition of wealth that is centered on community. The Aloha Corporation incorporates standards that may be tough for an individual entity to carry out and further studies could explore whether the structure could consist of multiple business entities that carry out some of the community-focused components and together serve as an Aloha Corporation, a true embodiment of business as a community.

The New First Amendment: Allowing Unlimited Corporate Election Speech Free from Response

Ryan Rodoni

I. INTRODUCTION

Corporations are different from people, even very rich people. Besides having the advantages of "'limited liability' for their owners and managers, 'perpetual life,' separation of ownership and control, 'and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments,'"[1] corporations are supposed to be driven entirely by profit seeking and they have unparalleled sums of money at their disposal. The vast majority of Americans believe that allowing large amounts of private money to influence American elections leads to political corruption,[2] threatening the integrity of American democracy. Such concerns should become exponentially magnified when the focus moves from individual wealth to corporate wealth.

In *Citizens United v. Federal Election Commission*, however, in a gross misapplication of the law, the conservative bloc[3] of the United States Supreme Court, in an opinion authored by Justice Kennedy, upset nearly a century of precedent and struck down the final check restraining an immense flood of corporate dollars from pouring into American elections.[4] Previous Supreme Court holdings,[5] vastly expanding corporate personhood, were vital in paving the way for *Citizens United*. *Citizens United*, which allows corporations to spend unlimited sums of money to influence American elections,[6] dramatically increased the danger of widespread political corruption.

Thus, after *Citizens United*, the need for constitutionally viable ways to combat the corrupting effects that private money has upon American

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[1] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 971 (2010).

[2] *See* McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d. 176, 623 (D.D.C. 2003); *see also* Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 507 (2007).

[3] Comprised of Chief Justice Roberts, Justice Alito, Justice Kennedy, Justice Scalia, and Justice Thomas. *Citizens United*, 130 S. Ct. at 886.

[4] *See id.* at 913.

[5] *See* discussion *infra* Part II.A.

[6] *See* discussion *infra* Part II.A.

politics has also dramatically increased. While some of those outraged by *Citizens United* called for an amendment to the United States Constitution or for the impeachment of Chief Justice Roberts,[7] a more practical solution was already in play in Arizona.

On the heels of embarrassing political corruption involving Arizona politicians,[8] voters passed the Citizens Clean Elections Act.[9] The Citizens Clean Elections Act made an ingenious tweak to Arizona's underachieving model of public financing of elections. This tweak, which tied public financing to private spending,[10] suddenly made public financing an attractive option even for major party politicians seeking to avoid becoming beholden to big private money. While public financing of elections has been held to serve[11] the compelling government interest of fighting actual political corruption or its appearance,[12] Arizona's previous public financing option did not attract major party candidates. The tweak implemented by the Citizens Clean Elections Act cured this deficiency and made public financing a functioning method for combating political corruption and its appearance in Arizona.[13]

The Citizens Clean Elections Act might have become a model for similar legislation at the federal and state level. In fact, nine other states had already passed legislation similar to Arizona's Citizens Clean Elections Act.[14] Unhappily, however, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the conservative bloc, in an opinion authored by Chief Justice Roberts, struck down Arizona's Citizens Clean Elections Act for allegedly infringing on the free speech rights of privately funded candidates and political expenditure groups without a compelling government interest.[15] *Arizona Free Enterprise* may have been an even

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[7] *See, e.g.*, Matthew Reichbach, *Udall, Dodd introducing constitutional amendment to overturn SCOTUS ruling*, N. M. INDEP. (Feb. 24, 2010, 1:41 PM), http://newmexicoindependent.com/48542/udall-dodd-introducingconstitutional-amendment-to-overturn-scotus-ruling; Richard Epstein, *Should Chief Justice Roberts Be Impeached?*, NATIONAL REVIEW ONLINE (Oct. 26, 2010), http://www.nationalreview.com/corner/251073/should-chief-justice-roberts-be-impeached-richard-epstein.

[8] *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2832 (2011) (Kagan, J., dissenting). In the "AzScam" scandal, "nearly 10% of the State's legislators were caught accepting campaign contributions or bribes in exchange for supporting a piece of legislation." *Id.*

[9] ARIZ. REV. STAT. ANN. § 16–940 *et seq.* (2011) (West).

[10] *See Ariz. Free. Enter.*, 131 S. Ct. at 2832-833 (Kagan, J., dissenting).

[11] *See* Buckley v. Valeo, 424 U.S. 1, 96 (1976).

[12] *See, e.g.*, Davis v. Fed. Election Comm'n, 554 U.S. 724, 740 (2008); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 478-79 (2007).

[13] *See* John Gibeaut, *Striking the Matches*, 97 A.B.A. J., no. 3, Mar. 2011, at 13.

[14] *See id.* at 19.

[15] *See Ariz. Free Enter.*, 131 S. Ct. at 2828.

more egregious misrepresentation of the law than *Citizens United.* By striking down a seemingly constitutionally viable method for combating the corrupting influence that big private money has upon politics, the Supreme Court's conservative bloc has, with one arm, opened the floodgates for unlimited corporate election speech and, with the other arm, slammed the door on those who might try to respond.

Part II of this paper details the steps leading to *Citizens United.* Part III then explains why the Supreme Court was out of line in finding Arizona's Citizens Clean Elections Act unconstitutional. Taken together, *Citizens United* and *Arizona Free Enterprise* suggest that the conservative bloc has chosen to, in the context of campaign finance law, interpret the First Amendment in a manner that usurps the power of the American people and allows the massively wealthy to use their disproportionate economic means to get their way.

II. HOW CORPORATIONS GAINED THE RIGHT TO SPEND UNLIMITED SUMS OF MONEY TO INFLUENCE AMERICAN ELECTIONS

When the Supreme Court handed down its *Citizens United* holding, declaring it unconstitutional to limit the amount of money corporations could spend to influence American elections,[16] many were left wondering how such a holding could have been reached. Corporations have changed significantly from their modest beginnings.[17] Over time, corporations have steadily gained more rights and greater protections.[18] Thus, while the majority clearly deviated from campaign finance law precedent in reaching the *Citizens United* holding, their handiwork was made much easier by previous Supreme Court decisions vastly expanding corporate personhood.

A. The Rise of the Corporate Person

Citizens United was aided immensely by the Supreme Court's long history of treating corporations like people.[19] Corporations gained the status of people incrementally, ironically often through the goal of protecting people from corporations rather than protecting corporations from the government. Whatever the intentions behind the vast expansion of corporate personhood, today corporate personhood translates to First Amendment protection for the most well funded, expertly marketed, and

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[16] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010).

[17] *See* discussion *infra* Part II.A.

[18] *See* discussion *infra* Part II.C.

[19] *See Citizens United*, 130 S. Ct. at 904.

politically influential lobbies in the marketplace of ideas, at the expense of the American people.

"The genius of the corporation as a business form, and the reason for its remarkable rise over the last three centuries, was—and is—its capacity to combine the capital, and thus the economic power of unlimited numbers of people."[20] The corporation first emerged as a business structure in the late sixteenth century in response to the need to finance the large-scale enterprises of early industrialization.[21] The most common business structure of that era, the partnership, did not offer the ability to amass enough capital because it was only able to draw upon the resources of the people who owned and managed it.

The American railroad barons created the modern corporation in the early nineteenth century.[22] Because railway ventures often required more capital than could be amassed by the relatively few wealthy families in the country, railroad stock flooded the markets, allowing the middle class to purchase corporate shares.[23] For many ordinary people, however, corporate ownership involved too much of a risk. Under the law, if a person invested in a company, even if only to own a few shares, that person was personally liable for the company's debts.[24] This obstacle was overcome by the concept of limited liability, which tied a person's stake in a company to the amount that person would be liable for should the company collapse.[25] Critics of limited liability argued that it would eliminate personal responsibility from the business world, allowing investors to "embark in trade with a limited chance of loss, but with an unlimited chance of gain . . . ," thus encouraging "a system of vicious improvident speculation."[26] Nevertheless, limited liability gradually became the norm over the second half of the nineteenth century.[27]

Beginning in the 1890s, states began competing to get valuable corporations to set up corporate homes in their jurisdictions. To this end, they began to deregulate by repealing the requirement that businesses could only incorporate for limited amounts of time and for narrowly defined purposes, lessening controls on mergers and acquisitions, and abolishing

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[20] JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER, 8 (2004).

[21] *See id.*

[22] *See id.* at 10.

[23] *See id.*

[24] *See id.* at 11.

[25] *See id.*

[26] *Id.* at 13.

[27] *See id.*

the rule that one company could not own stock in another.[28] The immediate result was a flowering of small corporations, soon followed by the absorption of these small corporations into several large corporations. Thus marked the beginning of corporate capitalism, where corporations were owned by "combinations of thousands, even hundreds of thousands, of broadly dispersed, anonymous shareholders. Unable to influence managerial decisions as individuals because their power was too dilute, [shareholders] were also too broadly dispersed to act collectively . . . . Shareholders, for all practical purposes, had disappeared from the corporations they owned."[29]

Because shareholders had little to no control over their companies, the law needed to designate some other receptacle for a company's legal rights and responsibilities. The law designated the corporation itself as this entity, a legally created, fictitious "person."[30] Corporate personhood allowed the corporation to conduct business in its own name, acquire assets, employ workers, and to sue or be sued.[31] There were some positive aspects in this development. The creation of the corporate person both streamlined the process of conducting large-scale business and gave citizens the ability to sue corporations to seek redress for wrongs; however, awarding constitutional rights and protections to corporations was unnecessary. Interestingly, it was the same qualities that made the corporation an attractive business structure for the industrial era—the ability to bring mass sums of wealth from a multiplicity of sources together for an economic venture—that allowed corporations to expand the concept of corporate personhood by bringing case after case before the United States Supreme Court.

Much of the early litigation concerned the Fourteenth Amendment.[32] The Fourteenth Amendment granted citizenship to African American males and formally established the concept of equal protection under federal law.[33] Thus, no matter what the laws of a particular state, the Fourteenth Amendment ensured that recently freed slaves could cross state lines without fear of state laws limiting their freedoms.

Almost as soon as the Fourteenth Amendment was ratified in 1868, corporate lawyers began arguing that, under the privileges and immunities

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[28] *See id.* at 14.

[29] *Id.* at 15.

[30] *Id.*

[31] *See id.*

[32] U.S. CONST. amend. XIV.

[33] *Id.*; *see also* Jan Edwards, *Timeline of Personhood Rights and Powers*, RECLAIMDEMOCRACY.ORG, 1 (June, 2002), *available at* http://reclaimdemocracy.org/personhood/ personhood_timeline.pdf.

clause, corporations were citizens.[34] Over the course of the next decade, the Supreme Court repeatedly ruled that corporations were not citizens and could not use the Fourteenth Amendment to protect themselves from state law.[35]

Ultimately, however, unrelenting corporate persistence eventually produced a legal foothold. In 1885, the Supreme Court heard the argument that the committee drafting the Fourteenth Amendment had intended the word "person" to mean corporations as well as natural persons.[36] Senator Roscoe Conkling reportedly waved an unknown document in the air and read from it in an attempt to prove that the intention of the Joint Committee that drafted the Fourteenth Amendment was to protect corporate personhood.[37] The Court did not rule on corporate personhood in *San Mateo County,* but in 1886, in *Santa Clara County v. Southern Pacific Railroad Co.*,[38] corporations were given the same Fourteenth Amendment rights to due process of law and equal protection as human beings by default. In that case, prior to argument, Chief Justice Waite announced: "[We do not] wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction equal protection under the laws, applies to corporations. We are all of the opinion that it does."[39] This decision "shifted the presumption of corporate regulation against the state,"[40] opening the floodgates for corporate challenges to state laws by allowing appeal directly to the Supreme Court. Of the Fourteenth Amendment cases brought before the Supreme Court between 1890 and

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[34] *See, e.g.,* Paul v. Virginia, 75 U.S. 168 (1868), *abrogated by* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886). In *Paul*, the issue before the Supreme Court was whether states could constitutionally discriminate against corporations that were not incorporated in the state. *Id.* at 177. The Court replied that they could; the Fourteenth Amendment, it reasoned, "applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed." *Id.* Thus, "corporations are not citizens within [the Fourteenth Amendment's] meaning." *Id.*

[35] *See* Edwards, *supra* note 33, at 1-2.

[36] San Mateo Cnty. v. S. Pac. R.R. Co., 116 U.S. 138 (1885).

[37] *See* Edwards, *supra* note 33, at 2. *See also* Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371, 371 (1937-1938). The significance of Graham's participation in San Mateo was that he was "a former member of the Joint Congressional Committee which in 1866 drafted the Fourteenth Amendment . . . ." *Id.*

[38] 118 U.S. 394 (1886).

[39] DAVID C. KORTEN, THE POST-CORPORATE WORLD: LIFE AFTER CAPITALISM 185-86 (2000).

[40] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1969: THE CRISIS OF LEGAL ORTHODOXY 74 (1992).

1910, 19 dealt with African Americans and 288 dealt with corporations. From 1905 to the mid 1930s, the Supreme Court invalidated approximately 200 state corporate regulations under the due process clause.[41]

Corporations soon set their sights on the protections guaranteed by the Bill of Rights. In 1906, in *Hale v. Henkel*,[42] corporations gained Fourth Amendment protection from "search and seizure."[43] In 1908, corporations gained the Sixth Amendment right to trial by jury in criminal cases.[44] Corporations gained First Amendment protection initially in 1936, in *Grosjean v. American Press Co.*,[45] which held that a newspaper corporation had a First Amendment right to freedom of speech applied to the states through the Fourteenth Amendment.[46]

After *Grosjean*, corporations steadily gained greater First Amendment rights by way of numerous Supreme Court holdings. This expansion of First Amendment rights for corporations was instrumental in setting the stage for the *Citizens United* holding, which extended corporate free speech to an unparalleled level. While created as a legal fiction to help structure and facilitate the activities of human beings, the corporate person has grown into a superhuman juggernaut that, after *Citizens United*, casts an ominous shadow over American democracy.

B. Citizens United*: Opening the Floodgates for Corporate Speech*

With the vast expansion of corporate personhood, only one major check preventing corporations from unlimited spending in American elections remained. Because of the unique characteristics of corporations, it was constitutionally permissible to regulate corporate election spending to prevent political corruption or the appearance thereof. Thus, even though the Supreme Court had granted corporations First Amendment rights, prior to *Citizens United*, corporations were still not permitted to spend unlimited sums of money to influence American elections.

However, on January 21, 2010, the Supreme Court, in a 5–4 split, ruled that it was a violation of the First Amendment to limit the amount of general treasury funds that corporations and unions were permitted to spend to influence American elections.[47] This holding, rejecting the longstanding

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[41] Edwards, *supra* note 33, at 2-3.

[42] 201 U.S. 43 (1906).

[43] *Id.*; *see also* Edwards, *supra* note 33, at 3.

[44] Armour Packing Co. v. United States, 209 U.S. 56 (1908); *see also* Edwards, *supra* note 33, at 3.

[45] 297 U.S. 233 (1936).

[46] *Id.*; *see also* Edwards, *supra* note 33, at 3.

[47] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010).

belief that corporate and union money posed unique risks of corruption or its appearance, represented a marked doctrinal shift. After *Citizens United*, corporations are now permitted to spend unlimited sums of money to advocate for the election or defeat of candidates in American elections.[48]

Citizens United deviated considerably from campaign finance law precedent. Furthermore, the path the majority took to reach the *Citizens United* holding suggests little regard for established legal doctrine and judicial procedure.

1. Background

In January of 2008, Citizens United, a conservative non-profit corporation that received a small amount of contributions from for-profit corporations,[49] produced a film entitled *Hillary: The Movie* (*Hillary*).[50] *Hillary* was highly critical of then-Senator Hillary Clinton, who was running for the Democratic presidential nomination. *Hillary* was screened in theaters and distributed on DVD; however, Citizens United also wanted to air *Hillary* through cable television's video-on-demand format and to broadcast commercials promoting it.[51] Citizens United, seeking to air *Hillary* free of charge, organized a deal with a cable company in which, in exchange for $1.2 million dollars, the cable company would make *Hillary* available free for on-demand-viewing.[52]

Citizens United intended to use its general treasury funds to finance this undertaking; however, it became concerned that the Federal Election Commission (FEC) might deem the airing of *Hillary* through video-on-demand and the airing of ads promoting the movie as violations of the Bipartisan Campaign Reform Act[53] (BCRA). Therefore, as a preventative measure, Citizens United brought an action seeking declaratory and injunctive relief against the FEC claiming that it might be subject to civil and criminal penalties if it went ahead as planned.[54]

The BCRA prohibited corporations from using their general treasury funds to make political expenditures for "electioneering communications" within thirty days of a primary election or sixty days of a general election for federal office if the communication could be received by 50,000 people

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[48] *See id.*

[49] *Id.* at 891.

[50] *Id.* at 887.

[51] *Id.*

[52] *Id.*

[53] 107 Pub. L. No. 155; 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

[54] *Citizens United*, 130 S. Ct. at 888.

or more.[55] The BCRA defined an electioneering communication as any publicly distributed "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office."[56]

In *Federal Election Commission v. Wisconsin Right to Life, Inc.* (*WRTL*), the Supreme Court limited the reach of the BCRA to speech that was "express advocacy or its functional equivalent."[57] The *WRTL* Court determined that an electioneering communication "is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[58]

The Federal District Court for the District of Columbia, disagreeing with Citizens United's claim that the airing of *Hillary* through video-on-demand was not an electioneering communication, denied Citizens United's motion for preliminary injunction and granted summary judgment to the FEC.[59] Citizens United appealed and the United States Supreme Court granted review.[60]

2. The majority disregarded numerous judicial principles.

Constitutional questions should be approached with great care because of their far-reaching effects. The Supreme Court established a number of rules, "developed[] for its own governance,"[61] to guide its behavior when faced with a constitutional question. Yet in order to reach the *Citizens United* holding, the majority had to disregard several well-established principles that have guided the Supreme Court throughout the decades. First, the majority unilaterally revived Citizens United's previously abandoned facial challenge to the BCRA without Citizens United ever requesting such an action. Second, the majority abandoned the principle of judicial restraint and ruled on a facial challenge when narrower outcomes were reachable. Third, the majority failed to follow *stare decisis*, the principle that established law should not be overturned merely because another judge would have decided differently if he or she had been the one to rule.

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[55] *Id.* at 887.

[56] *Id.*

[57] 551 U.S. 449, 481 (2007).

[58] *Id.* at 469-70.

[59] *Citizens United*, 130 S. Ct. at 888.

[60] *Id.*

[61] Ashwander v. TVA, 297 U.S. 288, 346 (1936).

The actions by the majority are mentioned, prior to explaining how they misrepresented well-established precedent, to demonstrate the lengths to which the majority went in order to reach the holding they desired.

a. A facial challenge was not properly before the Court.

The facial challenge that the majority ruled on was not even on the table when *Citizens United* first arrived. On appeal, Citizens United's only argument was an as-applied challenge to the BCRA. This was because Citizens United had already abandoned its facial challenge in the court below.[62] Furthermore, both Citizens United and the FEC stipulated to the dismissal of the facial challenge upon appeal.[63] Thus, to reach the *Citizens United* holding the majority had to invite Citizens United to revive its previously abandoned facial challenge.

Such an invitation was highly unorthodox. "'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.'"[64] "[O]nly in the most exceptional cases" will the Supreme Court address issues outside of the case before it.[65] However, Citizens United did not assert any claim of exceptional circumstance and the majority did not mention any exceptional circumstance in the *Citizens United* opinion.[66]

As Justice Stevens stated in dissent, "[e]ssentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."[67]

b. The majority failed to exercise judicial restraint

By reaching a facial ruling even though *Citizens United* could have been resolved more narrowly, the majority also failed to exercise judicial restraint—"the fundamental principle . . . that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[68] "[T]he 'normal

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[62] *Citizens United*, 130 S. Ct. at 931 (Stevens, J., dissenting).

[63] *Id.*

[64] Youakim v. Miller, 425 U.S. 231, 234 (1976) (quoting Duignan v. United States, 274 U.S. 195, 200 (1927)).

[65] Stone v. Powell, 428 U.S. 465, 481 n.15 (1976).

[66] *Citizens United*, 130 S. Ct. at 932 (Stevens, J., dissenting).

[67] *Id.*

[68] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) (internal quotation marks omitted).

rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'"[69] Thus, "if it is not necessary to decide more, it is necessary not to decide more."[70]

Judicial restraint is vital because facial rulings have profound and far reaching effects. Such holdings "operate[] with a sledge hammer rather than a scalpel."[71] The failure to exercise judicial restraint "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution."[72] Yet, the majority failed to adhere to this fundamental principle and, instead, facially invalidated the BCRA when numerous and narrower outcomes were reachable.

Justice Stevens suggested several alternative rulings. First, the majority could have ruled that video-on-demand did not qualify as an "electioneering communication" under the BCRA.[73] After all, the statute was designed to focus on advertisements run on television or radio, not video-on-demand.[74] However, the majority failed to even address this argument. Instead, the majority determined *Hillary* to be an "electioneering communication" on the basis of the film's content, without even considering whether video-on-demand transmissions should come under the BCRA in the first place.[75]

Second, the majority could have expanded an already existing exception to the BCRA, excluding non-profit corporations, to also exclude non-profit corporations that received only *de minimis* funding from for-profit corporations.[76] After all, such a route was taken by numerous lower appellate courts.[77] The majority rejected this resolution, claiming that a *de minimis* standard would "requir[e] intricate case-by-case determinations."[78] But, as Justice Stevens explained, such a test would not have to be complicated. "A test that granted . . . status to . . . organizations if they received less than a fixed dollar amount of business donations in the previous year, or if such donations represent less than a fixed percentage of

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[69] Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985)).

[70] PDK Labs., Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring).

[71] *Citizens United*, 130 S. Ct. at 933 (Stevens, J., dissenting).

[72] *Wash. State Grange*, 552 U.S. at 451.

[73] *Citizens United*, 130 S. Ct. at 937 (Stevens, J., dissenting).

[74] *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93, 207 (2003), *overruled by Citizens United*, 130 S. Ct. 876.

[75] *See Citizens United*, 130 S. Ct. at 889-90.

[76] *Id.* at 937 (Stevens, J., dissenting).

[77] *Id.*

[78] *Id.* at 892 (majority opinion).

their total assets, would be perfectly easy to understand and administer."[79] Or, as Justice Stevens also suggested, another option could have been to allow an exclusion if payments could be traced back to individual contributions.[80]

Finally, the majority could have ruled on Citizens United's as-applied constitutional challenge that was actually before them. However, because the majority determined that speech cannot be evaluated on the basis of the speaker's identity, they rejected this option as well.[81]

Thus, there were numerous narrower paths that the majority could have taken to avoid a sweeping constitutional ruling. Why would the majority have gone through all the trouble of resurrecting Citizens United's abandoned facial challenge just to be tripped up by a narrower finding?

c. The majority disregarded stare decisis

A third judicial principle the majority disregarded was that of *stare decisis*. "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[82] In reaching its *Citizens United* holding, the majority overturned *Austin v. Michigan Chamber of Commerce*[83] and, as a byproduct, part of *McConnell v. Federal Elections Commission*.[84] Yet, the majority offered no justification for overturning *Austin* other than unsubstantiated claims that it had been "undermined by experience since its announcement."[85]

The majority was silent on "the antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake,"[86] even though these factors should have been assessed "to determine *stare decisis* value"[87] before *Austin* was overruled. As Justice Stevens suggested, "[t]he Court's central argument for why *stare decisis* ought to be trumped is that it does not like Austin."[88] However, dislike of a holding is not reason enough to overrule it. If *stare decisis* "is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond

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[79] *Id.* at 937 n.14 (Stevens, J., dissenting).
[80] *Id.* at 937 n.15.
[81] *See id.* at 931, 945.
[82] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).
[83] 494 U.S. 652 (1990) (overruled by *Citizens United*, 130 S. Ct. 876).
[84] 540 U.S. 93 (2003) (overruled in part by *Citizens United*, 130 S. Ct. 876).
[85] *See Citizens United*, 130 S. Ct. at 912.
[86] *Id.* at 940 (Stevens, J., dissenting).
[87] *Id.*
[88] *Id.* at 938.

the preferences of five Justices, for overturning settled doctrine."[89] As Justice Stevens put it, "the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court."[90]

Thus, *Citizens United* should have reached a much different result. Yet, in analyzing the *Citizens United* opinion, one gets the sense that it was never the majority's intention to take these judicial principles seriously.

3. Cheating their way to the finish line

By resurrecting an abandoned facial challenge, disregarding *stare decisis*, and passing over numerous more narrow holdings, the majority prepped *Citizens United* in a way that allowed them to reach a far-reaching constitutional issue. Yet, because precedent did not point towards the majority's desired result, a smoke and mirrors analysis was needed to bolster their reasoning.

In reaching the *Citizens United* holding, the majority relied on numerous erroneous premises. First, they claimed that corporate speech was being "banned." Second, they claimed that the First Amendment did not allow for regulatory distinctions based on the identity of the speaker. Third, they claimed that the *Citizens United* holding streamlined campaign finance law by removing outliers in campaign finance jurisprudence. Lastly, they claimed that government lacked any sufficiently compelling interests to justify regulation. Yet, the majority was wrong on all counts.

a. The BCRA did not substantially burden corporate speech

The BCRA could only be struck down on First Amendment grounds if it was demonstrated that the BCRA substantially burdened corporations' free speech rights.[91] To make this argument, the majority continually claimed that the BCRA imposed a "categorical ban" on corporate speech.[92] However, this was a clear misrepresentation of the facts.

The BCRA only regulated "electioneering communication" funded by a corporation's general treasury funds.[93] Furthermore, even this narrow class of speech could still to be expressed through an alternative outlet without

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[89] *Id. See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

[90] *Id.* at 942.

[91] *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. at 2837 (Kagan, J., dissenting); *see also* Clingman v. Beaver, 544 U.S. 581, 592 (2005).

[92] *See Citizens United*, 130 S. Ct. at 886-87, 889, 891-92, 894, 896-98, 900-07, 909-12, 915-16.

[93] *See id.* at 887.

violating the BCRA because the BCRA provided an exemption for such speech if it was financed through a "separate segregated fund" called a political action committee ("PAC").[94] Thus, under the BCRA, corporations were still free to produce "electioneering communications" as long as such speech was financed through a PAC and not by the corporation's general treasury funds.

In fact, Citizens United could have avoided the entire case had it simply funded *Hillary* through its well-funded PAC.[95] The availability of such an alternative outlet should have led the majority to conclude that the BCRA did not significantly burden corporate speech. "The ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view."[96]

However, the majority found PACs to be an insufficient alternative for two reasons. First, they assumed that a PAC was too complicated to administer to be a constitutionally viable alternative.[97] This argument is unrealistic. While establishing and administering a PAC may be a somewhat intricate process, it is ludicrous to argue that sophisticated corporations will be deterred from speaking through PACs because PACs are too complicated. Second, the majority held that a PAC was an inadequate alternative because a PAC is "a separate association from the corporation."[98] But this argument is also without merit. As Justice Stevens explained, "The formal 'separateness' of PACs from their host corporations—which administer and control the PACs but which cannot funnel general treasury funds into them or force members to support them—is, of course, the whole point of the PAC mechanism."[99]

Thus, the majority's claim that the BCRA banned corporate speech is a complete misrepresentation. Instead, the BCRA "functions as a source restriction or a time, place, and manner restriction. It applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels."[100] As Justice Stevens stated, "the notion that corporate political speech has been 'suppress[ed] . . .

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[94] *Id.*

[95] *See id.* at 929 (Stevens, J., dissenting).

[96] *Id.* at 942 (Stevens, J., dissenting) (quoting *McConnell*, 540 U.S. at 203).

[97] *See id.* at 897.

[98] *Id.*

[99] *Id.* at 943 n.30 (Stevens, J., dissenting).

[100] *Id.* at 944.

altogether,' that corporations have been 'exclu[ded] . . . from the general public dialogue,' . . . is nonsense."[101]

Because the BCRA provided corporations with an alternative outlet for the narrow, viewpoint-neutral class of speech it regulated, judges following campaign finance law precedent should have determined that the BCRA did not significantly burden corporate speech. Yet the majority ignored both the facts and the law and held that the BCRA imposed a complete ban on corporate speech.

b. Speaker identity can be a compelling government reason to regulate speech

Even assuming, for argument's sake, the BCRA did substantially burden corporate speech, such a burden was still constitutionally permissible as long as there was a compelling government interest.[102] Congress, in passing the BCRA, determined that the unique characteristics of corporations warranted the narrow restrictions the BCRA placed upon them. Yet, the majority rejected this argument, asserting that, "the Government cannot restrict political speech based on the speaker's corporate identity."[103] This simply was not the law. Prior to *Citizens United*, First Amendment jurisprudence had a long history of allowing regulations based upon the identity of the speaker.

Though the First Amendment was written in absolute terms, "Congress shall make no law . . . abridging the freedom of speech, or of the press,"[104] its application has always been situational. While the First Amendment was adopted in 1791, the Supreme Court did not officially uphold its protections until 1931, when the Court held that displaying a red flag in opposition to organized government represented free speech protected by the First Amendment.[105] Throughout the rest of the century, the Supreme Court ruled on numerous cases involving the application of the First Amendment, sometimes affording First Amendment protection and sometimes not.[106]

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[101] *Id.* (internal citations to majority opinion omitted).

[102] *See, e.g., id.* at 898; Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 256 (1986).

[103] *See Citizens United*, 130 S. Ct. at 902.

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

[105] Stromberg v. California, 283 U.S. 359, 360-61, 368-69 (1931).

[106] *See Citizens United*, 130 S. Ct. at 945-46 (2010) ("The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' Apart perhaps from measures designed to protect the press, that text might seem to permit no distinctions of any kind. Yet in a variety of contexts, we have held that speech can be

University of Chicago Law Professor Harvey Kalven, Jr. argued that speech issues are "difficult to conceptualize, and to relate to each other."[107] Thus, he suggested that the Supreme Court should seek "not so much an organizing principle as an organizing map."[108] Prior to *Citizens United*, there had never been a unifying principle on the application of the First Amendment. Even Chief Justice Roberts endorsed such an understanding of the First Amendment, stating, "[o]ur jurisprudence over the past 216 years has rejected an absolutist interpretation."[109]

Some factors that historically have been held to limit freedom of speech include restrictions in terms of time and place.[110] However, others had been based solely on the identity of the speaker.[111] In other words, a person's speech was sometimes limited based on who they were, rather than what they were saying. The First Amendment rights of public school children, prisoners, federal employees, foreigners, and those in the military all have been constitutionally regulated despite the absolute language of the First Amendment.[112] "When . . . restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems."[113] "[T]he constitutional rights of certain categories of speakers, in certain contexts, 'are not automatically coextensive with the rights' that are normally accorded to members of our society."[114]

For example, preventing prisoners from encouraging each other to form a prisoners' union was held constitutional because of the government's compelling interest in running a prison smoothly.[115] Preventing army officers from encouraging soldiers to disobey orders was also held constitutional due to the government's compelling interest in running an army.[116] Preventing government employees from taking part in political

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regulated differentially . . ."); *See also* Fed. Election Comm'n v. Wisconsin Right To Life, Inc., 551 U.S. 449, 482 (2007) ("Our jurisprudence over the past 216 years has rejected an absolutist interpretation of those words . . .").

[107] JAMIE KALVEN, HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA, xi, xvii-xviii (1988).

[108] *Id.* at xviii.

[109] Fed. Election Comm'n v. WRTL, 551 U.S. 449, 482 (2007).

[110] *See* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[111] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682-83 (1986); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 130 (1977); Parker v. Levy, 417 U.S. 733, 758-59 (1974).

[112] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 945 (2010) (Stevens, J., dissenting).

[113] *Id.* at 945-46.

[114] *Id.* at 946 (quoting Morse v. Frederick, 551 U.S. 393, 396-97 (2007)).

[115] *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129-30 (1977).

[116] *See* Parker v. Levy, 417 U.S. 733, 758-59 (1974) (citing United States v. Priest, 21 U.S.C.M.A. 564 (C.M.A. 1972)).

campaigns was similarly held constitutional due to the government's compelling interest in the "impartial execution of the laws" by avoiding the appearance of dispensing "political justice."[117]

Yet the majority in *Citizens United* claimed that such examples of identity-based restrictions were all "inapposite" because "[t]hese precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech."[118] The majority then justified its holding by explaining that "The corporate independent expenditures at issue in this case, . . . would not interfere with governmental functions . . . ."[119]

In reaching such an unsupported holding, the majority overstepped its bounds. The running of elections is clearly a governmental function constitutionally entrusted to Congress. In enacting the BCRA, Congress determined that the regulations imposed by the BCRA were necessary to perform this constitutionally entrusted function, and Congress' determination was owed deference. "The power of Congress to protect the election[s] . . . from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress."[120]

So why did the majority interject themselves into Congress' business and invalidate the judgment of Congress? They claimed that two prior cases, *Buckley v. Valeo*[121] and *National Bank v. Bellotti*,[122] established "the principle . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity."[123] But *Buckley* and *Bellotti* provided no such justification for the majority's actions in *Citizens United* because such a principle was nowhere to be found in either opinion.

While *Buckley* did hold that the regulation of independent expenditures was unconstitutional because the governmental interest in regulating them was inadequate to justify the infringement on speech that resulted,[124] *Buckley* pertained to actual people and did not address corporate speakers.[125] This was evidenced by the fact that *Buckley* left intact a statutory provision that prohibited both contributions and expenditures by

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[117] *See* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973).

[118] *Citizens United*, 130 S. Ct. at 899.

[119] *Id.*

[120] Burroughs v. United States, 290 U.S. 534, 547 (1934).

[121] 424 U.S. 1 (1976).

[122] 435 U.S. 765 (1978).

[123] *Citizens United*, 130 S. Ct. at 885.

[124] *Buckley*, 424 U.S. at 39-45 (1976).

[125] *Id.* at 17-23.

national banks, corporations, and labor unions.[126] Thus, *Buckley* singled out corporations for different treatment than actual people.

Furthermore, after *Buckley*, numerous Supreme Court opinions indicated that government might be able to suppress speech based on the speaker's corporate identity. From 1978 through 2003, Supreme Court majority opinions included the following statements:

> 1978 - "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[127]
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> 1981 - "[D]iffering restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process."[128]
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> 1982 - "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, and there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals."[129]
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> 1986 - "The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas . . . . [R]equiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending . . . seeks to prevent this threat to the political marketplace."[130]
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> 1990 - "[T]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."[131]
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> 2003 - "Today, as in 1907, the law focuses on the 'special characteristics of the corporate structure' that threaten the integrity of the political process . . . . Substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into

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[126] *See Citizens United*, 130 S. Ct. at 958; *see also* 18 U.S.C. § 610 (Supp. V 1976).

[127] *Bellotti*, 435 U.S. 765, 788 n.26 (1978).

[128] Cal. Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 201 (1981).

[129] Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 210-11 (1982).

[130] Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 258 (1986).

[131] Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990).

> political 'war chests' which could be used to incur political debts from legislators."[132]
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> 2003 - "[O]ur prior decisions regarding campaign finance regulation . . . represent respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.' We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"[133]

Clearly, *Buckley* did not establish "the principle . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity,"[134] nor did the Supreme Court understand such a principle to have been established. As Justice Stevens argued, "[i]t is implausible . . . that *Buckley* covertly invalidated FECA's separate corporate and union campaign expenditure restriction . . . even though that restriction had been on the books for decades before *Buckley* and would remain on the books, undisturbed, for decades after."[135]

Nor did *Bellotti* provide support for the majority's claim. While *Bellotti* did hold it unconstitutional for corporate expenditures to be restricted,[136] the case involved a referendum, not a candidate election.[137] This distinction was a critical element. As the *Bellotti* opinion explained, "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections, . . . simply is not present in a popular vote on a public issue."[138] Thus, the *Bellotti* holding was explicitly limited to referenda and the *Citizens United* majority should not have extended *Bellotti* to BCRA's regulation of candidate elections.

Even though the *Bellotti* opinion expressly stated that it decided nothing about corporate expenditures in candidate elections[139] and emphasized the

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[132] Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 153 (2003) (quoting Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 209 (1982)).

[133] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 205 (2003) (quoting *Beaumont*, 539 U.S. at 155, and *Austin*, 494 U.S. at 660 (1990)) (internal citations omitted).

[134] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010).

[135] *Id.* at 958 (Stevens, J., dissenting).

[136] First Nat'l Bank v. Bellotti, 435 U.S. 765, 795 (1978).

[137] *Id.* at 769.

[138] *Id.* at 790.

[139] "Appellee . . . advances two principal justifications for the prohibition of corporate speech. The first is the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government. The second is the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation. However weighty these interests may be in the context of partisan candidate elections, they either are not

importance of the distinction,[140] the *Citizens United* majority claimed that "*Bellotti* reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity."[141] But nowhere in the *Bellotti* opinion did the Court say that corporations cannot be distinguished from human beings under the First Amendment. In fact, the *Bellotti* opinion went out of its way not to say what the *Citizens United* majority claimed it to have said. The *Bellotti* opinion stated that it was neither addressing "the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment," nor considering "whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations . . . ."[142]

Thus, the majority's claim that "[g]overnment may not suppress political speech on the basis of the speaker's corporate identity"[143] went against the entire history of the First Amendment. As Justice Stevens stated, "[o]nly the most wooden approach to the First Amendment could justify the unprecedented line [the majority] seeks to draw."[144] The majority was errant in second-guessing the judgment of Congress on the basis of such flawed reasoning.

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implicated in this case or are not served at all, or in other than a random manner, by the prohibition [against making corporate contributions or expenditures for the purposes of influencing the outcome of a referendum]." *Id.* at 787-88.

[140] "[The statute] also proscribes corporate contributions or expenditures 'for the purpose of aiding, promoting or preventing the nomination or election of any person to public office . . . .' In this respect, the statute is not unlike many other state and federal laws regulating corporate participation in partisan candidate elections. . . . The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." *Id.* at 788, n.26 (internal citations omitted).

[141] *Citizens United*, 130 S. Ct. at 902 (internal citation omitted).

[142] *Bellotti*, 435 U.S. at 777, 778 n.13.

[143] *Citizens United*, 130 S. Ct. at 913.

[144] *Id.* at 948 (Stevens, J., dissenting).

c. *The* Citizens United *holding went against well-settled First Amendment doctrine*

The majority's claim that "Government may not suppress political speech on the basis of the speaker's corporate identity"[145] is further deflated by the fact that, prior to *Citizens United*, corporate election speech had been specifically regulated for almost an entire century. Thus, while the majority characterized *Austin* and *McConnell* as "aberration[s]" to First Amendment jurisprudence,[146] it was *Citizens United* that departed from well-settled First Amendment doctrine. While campaign finance law had been frequently reshaped throughout the years, prior to *Citizens United* it had always permitted corporations to be regulated differently from actual people.

During the Progressive Era of the late 19th century, the influential lawyer Elihu Root argued for a New York constitutional amendment "to prevent . . . the great aggregations of wealth from using their corporate fund, directly or indirectly, to send members of the legislature to these halls, in order to vote for their protection and the advancement of their interests as against those of the public."[147] The efforts by Root and others at campaign finance reform, combined with prompting by President Theodore Roosevelt,[148] led to passage of the Tillman Act of 1907, which banned corporate contributions to candidates.[149] A Senate Report on the Tillman Act stated:

> The evils of the use of money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.[150]

However, the ban on corporate contributions proved largely ineffective because corporations were able to find less direct ways to get corporate money into politics. President Lyndon Johnson later characterized the ban

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[145] *Id.* at 913 (majority opinion).

[146] *Id.* at 907, 910, 916-17.

[147] United States v. United Auto. Workers, 352 U.S. 567, 571 (1957).

[148] *See Citizens United*, 130 S. Ct. at 953 ("President Roosevelt, in his 1905 annual message to Congress, declared: 'All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts'") (internal citations omitted).

[149] Tillman Act, Pub. L. No. 59-36, ch. 420, 34 Stat. 864, 864-65 (1907).

[150] S. REP. NO. 59-3056, at 2 (1906).

as "more loophole than law."[151] During the 1940s, Congress further banned corporate expenditures in addition to corporate contributions.[152]

As corporations steadily gained greater First Amendment protection, the constitutionality of banning corporate expenditures began to be challenged.[153] The Supreme Court originally rejected such claims as an "abstract issue of constitutional law."[154] However, the Supreme Court changed course and soon began to require that legislation restricting corporate speech, in order to comply with the First Amendment, had to be "narrowly tailored" to a legitimate government interest.[155]

The Federal Election Campaign Act (FECA) was enacted in 1971.[156] The FECA created the Federal Election Commission to monitor and enforce rules governing elections; set limits on the amount of money individuals and corporations could contribute to any individual candidate in a national election; imposed a $1000 a year ceiling on independent expenditures "in connection with a candidate"; and allowed limited corporate spending on elections through political action committees (PACs).[157]

The constitutionality of the FECA was challenged in *Buckley*. While the *Buckley* Court upheld the FECA's contribution limits, it struck down the FECA's expenditure limits, reasoning that contributions did not equal free speech to the extent that expenditures did because money donated directly to a candidate did not express a specific opinion and was only a symbolic act of support.[158] Thus the *Buckley* court held that contributions could be limited without the need for strict First Amendment review, but expenditures, which more closely resembled free speech, could not be limited unless a compelling government interest was present. However, contrary to what the majority claimed in *Citizens United*, as explained above, *Buckley* did not address corporate expenditure limits.

Buckley's expenditure analysis led to a distinction between "express advocacy" and issue advocacy.[159] The *Buckley* court determined that expenditure limits could not survive First Amendment scrutiny unless they were narrowly tailored and limited to those expenditures that expressly

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[151] Francis Bingham, *Show me the Money: Public Access and Accountability After Citizens United*, 52 B.C. L. Rev. 1027, 1036 (2011) (citation omitted).

[152] *See* Fed. Election Comm'n v. Wis. Right To Life, Inc., 551 U.S. 449, 510 (2007).

[153] *See* Bingham, *supra* note 151, at 1037.

[154] United States v. United Auto. Workers, 352 U.S. 567, 592 (1957).

[155] *Wis. Right to Life*, 551 U.S. at 476-77.

[156] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

[157] *See id.* § 591, 8.

[158] *See* Buckley v. Valeo, 424 U.S. 1, 19-20 (1976).

[159] *Id.* at 45.

advocated for voters to vote for or against a candidate.[160] Thus, issue advocacy expenditures, which supposedly only addressed the issues, could not be regulated.

In 1978, in *Bellotti*, the Supreme Court struck down a Massachusetts law that prohibited corporate expenditures from influencing voters unless corporations could prove that the outcome of the vote would materially affect their property or assets, reasoning that the Government could not "restrict the speech of some elements of our society in order to enhance the relative voice of others."[161] However, as explained above, the *Bellotti* court was careful to explain that the *Bellotti* holding only pertained to issue referendums and had no implication upon candidate elections. Thus, while *Bellotti* did address corporate expenditure limits, the *Bellotti* holding simply reiterated the *Buckley* court's determination that "issue advocacy" expenditures could not be regulated.

In 1990, in *Austin*, the Supreme Court upheld the constitutionality of a Michigan law prohibiting corporations from funding the advocacy of any candidate for state office.[162] The *Austin* Court, accepting that the unique characteristics of corporations posed a particularly broad threat of corruption, held that the government had a legitimate interest in limiting corporate speech based on "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[163]

In 1998, the Senate Committee on Governmental Affairs released a six-volume report revealing extensive incidents of corruption during the 1996 presidential election.[164] The report clearly showed that the distinction between "express advocacy" and "issue advocacy" had provided corporations with a major loophole to exploit: As long as corporations avoided the magic words "vote for" or "vote against," they were allowed to

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[160] *See id.* at 44. The *Buckley* Court further gave examples of "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. In a later opinion, the Court would refer to these words as "the 'magic words' requirement" that would invoke the FECA. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 191 (2003) (overruled in part by *Citizens United* v. Fed. Election Comm'n, 130 S. Ct. 876 (2010)).

[161] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 790-91 (1978) (citing *Buckley*, 424 U.S. at 48-49).

[162] Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) (overruled by *Citizens United*, 130 S. Ct. 876).

[163] *Id.* at 660.

[164] S. REP. NO. 105-167 (Mar. 10, 1998) (discussed in *McConnell*, 540 U.S. at 129-32).

spend unlimited sums on "issue" advertising, which amounted to attack or praise of candidates.[165]

Congress responded by enacting the BCRA in 2002, which established a new definition of "express advocacy." The BCRA created the term "electioneering communications," which, as mentioned above, was defined as any broadcast, cable, or satellite communication that clearly identifies a candidate for federal office within sixty days of a general election or thirty days of a primary and is targeted to the relevant voting electorate.[166] This specific definition was designed to avoid the kind of vague language that the *Buckley* Court had established could not survive First Amendment scrutiny.[167]

The first challenge to the BCRA's constitutionality came in 2003, in *McConnell*. In *McConnell*, the Supreme Court, relying on *Austin*'s "anti-distortion" rationale, upheld the electioneering communications definition, stating that the "circumvention of campaign finance laws through candidate advertisements masquerading as issue ads justified the blackout periods."[168] While the *McConnell* Court relied on *Austin*'s "anti-distortion" rational, there was also ample evidence of more direct corruption. Before enacting the BCRA, Congress amassed extensive findings pertaining to the corruptive effects of corporate expenditures. In *McConnell*, these findings, which dated back to the 1940s, produced a trial record over 100,000 pages long.[169] The *McConnell* record contained numerous examples of more direct corruption than *Austin's* "anti-distortion" rationale, which are addressed below.[170] Thus, if the *McConnell* court had known that *Austin* would be so disfavored by the conservative bloc, it could have easily rested its holding on the significant governmental interest in preventing actual quid pro quo corruption or the appearance of such corruption.[171]

Four years later, in *WRTL*, the Supreme Court moved away from the BCRA's definition of "electioneering communication," and limited the

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[165] *McConnell*, 540 U.S. at 192-93.

[166] 2 U.S.C. § 434(f)(3) (2011).

[167] *See McConnell*, 540 U.S. at 189; *see also* Buckley v. Valeo, 424 U.S. 1, 41 (1976) (abrogated by *Citizens United*, 130 S. Ct. 876).

[168] *See McConnell*, 540 U.S. at 205.

[169] *See* McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 209 (D.D.C. 2003).

[170] See discussion *infra* Part III.B.

[171] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 966 (2010) (Stevens, J., dissenting) ("Had we felt constrained by the view of today's Court that quid pro quo corruption and its appearance are the only interests that count in this field, ante, at 903–911, we of course would have looked closely at that issue. And as the analysis by Judge Kollar-Kotelly reflects, it is a very real possibility that we would have found one or both of those interests satisfied and § 203 appropriately tailored to them.").

reach of the BCRA to speech that was "express advocacy or its functional equivalent."[172] The *WRTL* Court held that an electioneering communication "is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[173]

In *Citizens United* the conservative bloc overruled *Austin* and *McConnell* and invalidated the BCRA on its face, holding that "Government may not suppress political speech on the basis of the speaker's corporate identity."[174] Prior to *Citizens United*, a prevailing theme in campaign finance law had been determining at what point corporate free speech rights could be limited by justifiable regulations because of the potential for inordinate corporate influence. As Congress enacted legislation and the make up of the Supreme Court changed, the line at which corporate free speech rights ended and government regulation became constitutionally permissible shifted back and forth. However, until *Citizens United*, the notion that there should be some sort of line, somewhere, remained a constant.

In sum, prior to the *Citizens United* holding, corporations were regulated much differently than actual people. Starting in 1907, Congress, exercising its constitutional power to regulate elections, enacted regulations that limited the influence corporations could have on American elections. While corporations gradually acquired greater and greater First Amendment protection, the compelling government interest in preventing corruption or its appearance formed the basis for repeated efforts to regulate corporate election speech. While the Supreme Court commanded that corporate regulation had to comply with the First Amendment, prior to *Citizens United* it had never suggested that such regulation could not be based on curbing the unique threats posed by corporations.

d. Corporate expenditures give rise to corruption or the appearance thereof

A law that substantially burdens political speech is "subject to strict scrutiny," yet the law will be upheld if it "furthers a compelling interest and is narrowly tailored to achieve that interest."[175] Preventing corruption or its appearance has long been recognized as a compelling government interest that justifies campaign finance regulations.[176] Thus, even if corporate

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[172] Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 481 (2007).

[173] *Id.* at 469-70.

[174] *Citizens United*, 130 S. Ct. at 913.

[175] *See, e.g.*, *Citizens United*, 130 S. Ct. at 898; *Mass. Citizens for Life*, 479 U.S. at 256 (1986).

[176] *See, e.g.*, Davis v. Fed. Election Comm'n, 554 U.S. 724, 740 (2008); *Wis. Right to*

speech was substantially burdened by the BCRA, the BCRA still should have been upheld because independent expenditures by corporations give rise to corruption or its appearance, and the BCRA was enacted to combat such a result. However, the majority rejected the argument that Congress' interest in preventing corruption or its appearance justified the BCRA's restrictions on corporate expenditures, flatly stating that "independent expenditures . . . made by corporations . . . do not give rise to corruption or the appearance of corruption."[177] Yet, the evidence that corporate independent expenditures give rise to corruption or its appearance was substantial.

As mentioned above, before enacting the BCRA, Congress amassed extensive information on corporate independent expenditures, which was detailed in the *McConnell* trial record. Highlighting the *McConnell* record were reports that:

> [C]orporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members' elections. . . . Members express appreciation to organizations for the airing of these election-related advertisements. ... Members of Congress are particularly grateful when negative issue advertisements are run by these organizations . . . . [C]ampaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run. . . . [O]rganizations use issue advocacy as a means to influence various Members of Congress. . . . Members of Congress seek to have corporations and unions run these advertisements on their behalf. . . . [C]orporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign. After the election, these organizations often seek credit for their support.[178]

After examining these congressional findings, Judge Kollar-Kotelly, the *McConnell* trial judge stated: "The record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting."[179] Judge Kollar-Kotelly thus concluded that Congress' interest in preventing corruption or its appearance was sufficient enough to uphold the BCRA.[180] This conclusion was supported by a poll contained within the *McConnell* record in which 80% of respondents said they believed that those who engaged in

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Life, 551 U.S. at 478-79.

[177] *Citizens United*, 130 S. Ct. at 909.

[178] McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 623 (D.D.C. 2003).

[179] *Id.* at 622-23.

[180] *Id.* at 215.

electioneering communications received special consideration from the elected officials they had supported.[181]

Yet the majority claimed that the *McConnell* record was insufficient, complaining that it did "not have any direct examples of votes being exchanged for . . . expenditures."[182] But not even the most optimistic of people could have expected Congress to link its members to such corrupt practices. As Justice Stevens explained, "[i]t would have been quite remarkable if Congress had created a record detailing such behavior by its own Members. Proving that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote."[183] Moreover, it was bad form, to say the least, for the majority to resurrect Citizens United's previously abandoned facial challenge, only to complain that the record before them did not contain substantial enough evidence. As Justice Stevens argued, "[i]f our colleagues were really serious about the interest in preventing quid pro quo corruption, they would remand to the District Court with instructions to commence evidentiary proceedings."[184]

Nevertheless, the majority argued that the *McConnell* record only demonstrated that corporate independent expenditures led to influence and access and that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."[185] While the majority was right that influence is not necessarily synonymous with corruption, the allowance of such influence creates an environment that is ripe for corruption to spread. As Justice Stevens explained,

> '[i]ngratiation and access' . . . create both the opportunity for, and the appearance of, quid pro quo arrangements. The influx of unlimited corporate money into the electoral realm also creates new opportunities for the mirror image of quid pro quo deals: threats, both explicit and implicit. Starting today, corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests.[186]

Furthermore, even if actual corruption did not take place, the appearance of corruption, by itself, was enough to justify regulation. Yet, the majority claimed, "[t]he appearance of influence or access, furthermore, will not

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[181] *See id.* at 623-24.

[182] *Citizens United*, 130 S. Ct. at 910.

[183] *Id.* at 965 (Stevens, J., dissenting).

[184] *Id.* at 967.

[185] *Id.* at 910 (majority opinion).

[186] *Id.* at 910, 965-66 (Stevens, J., dissenting) (internal quotation marks omitted).

cause the electorate to lose faith in our democracy."[187] However, as Justice Stevens explained, "[t]he electorate itself has consistently indicated otherwise, both in opinion polls and in the laws its representatives have passed, and our colleagues have no basis for elevating their own optimism into a tenet of constitutional law."[188] The *McConnell* poll, mentioned above, surely demonstrated that the allowance of corporate expenditures to influence elections, at the very least, leads to the appearance of corruption.

Additionally, the argument that large political expenditures can lead to corruption or its appearance was strengthened by the Supreme Court's recent holding in *Caperton v. A.T. Massey Coal Co.*,[189] whose majority opinion was interestingly also authored by Justice Kennedy. In *Caperton*, the Supreme Court determined that Justice Benjamin, who was the beneficiary of large political expenditures from the CEO of A.T. Massey Co., Don Blankenship, was required to recuse himself because "[t]hough n[o] . . . bribe or criminal influence" was involved, "Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected."[190] "The difficulties of inquiring into actual bias . . . simply underscore the need for objective rules."[191]

Caperton is an illustrative acknowledgement by the Supreme Court that, in some circumstances, political expenditures in candidate elections can lead to quid pro quo corruption or its appearance. Thus, *Caperton* supported Justice Stevens' argument in *Citizens United* that "some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes."[192]

It is difficult to square *Caperton* with the *Citizens United* majority's conclusions that "independent expenditures . . . made by corporations . . . do not give rise to corruption or the appearance of corruption"[193] and that "the appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."[194] These conclusions were unsupported by the evidence and ignored the realities of politics.

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[187] *Id.* at 910 (majority opinion).
[188] *Id.* at 963 n.64 (Stevens, J., dissenting) (citations omitted).
[189] 129 S. Ct. 2252 (2009).
[190] *Id.* at 2262.
[191] *Id.* at 2263.
[192] *Citizens United*, 130 S. Ct. at 968 (Stevens, J., dissenting).
[193] *Id.* at 909.
[194] *Id.* at 910.

C. Impressions from the Citizens United *Holding*

When reading the majority opinion in *Citizens United*, it seems that the majority chose to circumvent well-established First Amendment doctrine rather than to apply it. There were simply too many holes in the majority's argument to conclude otherwise. As demonstrated above, time and time again the majority disregarded judicial principles and misapplied the law. The path the majority took to reach their decision was dubious to say the least. The majority resurrected an abandoned facial challenge, disregarded stare decisis, and passed over numerous narrower holdings on their way to rewriting First Amendment jurisprudence and enacting far-reaching change. Justice Stevens' description of the majority's actions rings true; the majority disliked the law, "so they changed the case to give themselves an opportunity to change the law."[195]

Then, having given themselves the opportunity to change the law, the majority took a hatchet to it. The majority relied on numerous erroneous premises. They claimed that corporate speech was being banned by the BCRA. They claimed that the First Amendment did not allow for regulatory distinctions based on the identity of the speaker. They claimed that they were streamlining campaign finance law. They claimed that government lacked a compelling enough interest to justify regulation. Yet none of these claims were accurate.

As Justice Stevens stated, "Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality."[196] Thus, in the end, there is but one conclusion to draw: The majority ignored the law in favor of their own personal agenda.

D. The Impact of the Citizens United *Holding*

Citizens United has been the subject of much harsh criticism. The American Constitution Society called it "the most aggressive intervention into politics by the Supreme Court in the modern era."[197] The *Washington Post* described it as a ruling that "shakes the foundation of corporate limitations on federal and state elections that stretch back a century."[198]

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[195] *Id.* at 932 (Stevens, J., dissenting).

[196] *Id.* at 979.

[197] Monica Youn, *Citizens United: The Aftermath*, AM. CONSTITUTION SOC'Y (2010), *available at* http://www.acslaw.org/node/16287.

[198] Robert Barnes & Dan Eggen, *Supreme Court rejects limits on corporate spending on*

Jonathan Turley said the decision "will bring on a tsunami of sewer money."[199] Fred Wertheimer stated that the majority "had no idea what they were unleashing."[200] Senator Russ Feingold charged that the majority "completely disregarded their oaths."[201] Ronald Dworkin dubbed *Citizens United* "the decision that threatens democracy."[202] Richard Hasen called January 21, 2010 "a bad day for American democracy."[203] Even President Obama weighed in, proclaiming that "the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."[204]

Such harsh criticism seems justified. The *Citizens United* holding permits corporations to spend as much money as they want, whenever they want, to directly advocate for the election or the defeat of political candidates. Thus, corporations can now spend unlimited sums of money in an attempt to hand pick legislators of their choosing or to crush political candidates who oppose their interests. This is a situation that is ripe for corruption. How are politicians who have been implanted by big corporate money to be credibly charged with keeping corporations in check?

Some have argued that critics of the *Citizens United* holding have overstated its impact.[205] However, the 2010 midterm election demonstrated otherwise. In the wake of the *Citizens United* holding, independent groups spent $300 million, an amount exceeding every midterm election since

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political campaigns, WASH. POST (Jan. 22, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104866.html.

[199] Jonathan Turley, *Citizens United Ruling Brings on "Tsunami of Sewer Money"* (Nov. 3, 2010), http://jonathanturley.org/ 2010/11/03/citizens-united-ruling-brings-on-tsunami-of-sewer-money.html.

[200] Fred Wertheimer, *Court's corruption of election law*, POLITICO, (Dec. 14, 2010, 11:57 PM), http://www.politico.com/news/ stories/1210/46410.html.

[201] Robert Barnes, *In Wis., Feingold Feels Impact of Court Ruling*, WASH. POST (Nov. 1, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/31/AR2010103104314.html.

[202] Ronald Dworkin, *The Decision That Threatens Democracy*, THE N.Y. REV. OF BOOKS (May 13, 2010), http://www.nybooks.com/ articles/archives/2010/may/13/decision-threatens-democracy/.

[203] Richard Hasen, *Citizen's United: What Happens Next?*, POLITICO (Jan. 21, 2010), http://www.politico.com/arena/perm/Richard_Hasen_1FE691B8-7BF2-481C-B3BC-BB4072BC1703.html.

[204] President Barack Obama, Weekly Address: President Obama Vows to Continue Standing Up to the Special Interests on Behalf of the American People, (Jan. 23, 2010) (transcript available at http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-vows-continue-standing-special-interests-behalf-amer).

[205] *See, e.g.*, Carol Herdman, *Citizens United: Strengthening the First Amendment in American Elections*, 39 CAP. U. L. REV. 723, 724 (2011); Bingham, *supra* note 150, at 1030.

1990 combined.[206] One can only assume the corporate spending in 2012 will be astronomical.

Today, fifty-three of the one hundred largest economies in the world are corporations.[207] If the top one hundred corporations spent just one percent of their profits, they would outspend all the candidates running for president, House, and Senate combined.[208] The impact of this kind of corporate spending is nearly unfathomable.

In the face of these realities, it is astonishing that the majority argued that the allowance of corporate independent expenditures did not give rise to corruption or the appearance thereof. Post-*Citizens United*, corporations can credibly threaten politicians to either get on board, or face unlimited expenditures designed to take them down. While such actions by wealthy individuals may have already been taking place prior to *Citizens United*, the unparalleled wealth of corporations brings this threat to a dramatically more dangerous level. For example, the *New York Times* reported that lobbying firm lawyers are informing their clients that "lobbyists can now tell any elected official: if you vote wrong, my company . . . will spend unlimited sums advertising explicitly against your re-election."[209] This cannot be what the First Amendment stands for.

Of course, the majority argued that the "absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[210] However, this naively idealistic argument ignores the realities of the world. This is not the way politics works. As evidenced by the *McConnell* record, coordination with candidates goes hand in hand with political expenditures.

As Justice Brandeis famously said, "[w]e may have democracy, or we may have wealth concentrated in the hands of a few, but we can't have both."[211] The *Citizens United* holding threatens the integrity of American democracy and has brought the United States much closer to making Justice Brandeis' warning a reality.

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[206] *See Out Spending*, OPENSECRETS.ORG, http://www.opensecrets.org/ outsidespending/ index.php (last visited Apr. 17, 2012).

[207] *See* MEDARD GABEL, GLOBAL INC.: AN ATLAS OF THE MULTINATIONAL CORPORATION 2 (2003).

[208] *See Editorial, A Threat to Fair Elections*, N.Y. TIMES, Sept. 7, 2009, *available at* http://www.nytimes.com/2009/09/08/opinion/ 08tue1.html.

[209] David D. Kirkpatrick, *Lobbies' New Power: Cross Us, And Our Cash Will Bury You*, THE NEW YORK TIMES (Jan. 22, 2010), http://www. nytimes.com/2010/01/22/us/politics /22donate.html.

[210] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 902 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 47 (1976)).

[211] IRVING DILLARD, MR. JUSTICE BRANDEIS, GREAT AMERICAN 42 (1941).

Yet, no matter how much anyone disagrees with the result of *Citizens United* or the path the conservative bloc took to reach it, *Citizens United* is now the law. Thus, the focus must turn from "how did we get here?" to "what can we do about it?" Unfortunately, the answer to this vitally important question seems to be "not very much."

III. THE UNJUSTIFIABLE REJECTION OF ARIZONA'S CITIZENS CLEAN ELECTIONS ACT

In the wake of *Citizens United,* many people were left scrambling for ways to limit its impact. Many of those outraged by *Citizens United* called for an amendment to the United States Constitution.[212] Others sought the impeachment of Chief Justice Roberts.[213] However, as mentioned previously,[214] a more practical solution was already in play in Arizona.

In 1998, Arizona passed the Citizens Clean Elections Act.[215] The Citizens Clean Elections Act made an ingenious tweak to Arizona's previously unsuccessful public financing option.[216] That earlier public financing option, modeled on the federal presidential public financing plan,[217] had proved ineffective because it failed to attract major party candidates. While the presidential public financing plan is recognized as a constitutionally viable way to "reduce the deleterious influence of large contributions on our political process,"[218] such a plan cannot achieve this goal unless major party candidates choose to utilize it as an alternative to private funding. Under the presidential public financing plan, a candidate, in order to receive public financing, must agree to limit his or her spending to the amount received.[219] Therefore, candidates who choose this option leave themselves vulnerable to being considerably outspent by candidates funded by big private money. Of course, this problem could be remedied by substantially increasing the amount of the subsidy; however, states have

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[212] *E.g.*, Reichbach, *supra* note 7.

[213] *E.g.*, Epstein, *supra* note 7.

[214] *See supra* note 9.

[215] ARIZ. REV. STAT. ANN. §§ 16-940 *et. seq.* (2011) (West).

[216] *See* Ariz. Free Enter. Club's Freedom PAC v. Bennett, 131 S. Ct. 2806, 2832 (2011) (Kagan, J., dissenting) ("Before turning to public financing, Arizonans voted by referendum to establish campaign contribution limits. But that effort to abate corruption, standing alone, proved unsuccessful. Five years after the enactment of these limits, the State suffered "the worst public corruption scandal in its history.")

[217] Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* (2012). *See also* Public Funding of Presidential Elections, FEDERAL ELECTION COMMISSION (Aug. 1996), http://www.fec.gov/pages/brochures/pubfund.shtml.

[218] Buckley v. Valeo, 424 U.S. 1, 91 (1976).

[219] *See* Ariz. Free Enter., 131 S. Ct. at 2831 (Kagan, J., dissenting).

limited resources and such a modification would be wasteful, unpopular, and unsustainable. Thus, under Arizona's previous public financing option, few major party candidates chose to accept public financing and those who did put themselves at risk.

Arizona cured this shortcoming by implementing an ingenious tweak, tying private funding to public funding. This tweak allowed Arizona to set a much more competitive public financing ceiling, without wasting tax payer dollars.[220] The Arizona Citizens Clean Elections Act suddenly made public financing an attractive option for major party candidates because it assured such candidates that they would still be able to compete against opponents funded by big private money.

As Justice Kagan characterized the plan, Arizona "found the Goldilocks solution, which produces the 'just right' grant to ensure that a participant in the system has the funds needed to run a competitive race."[221] Arizona had made public financing viable and major party candidates were choosing to use it instead of private funding.[222] Thus, Arizona's Citizens Clean Elections Act represented a way to limit the impact of the *Citizens United* holding. In fact, as mentioned above, nine other states had already implemented legislation similar to Arizona's Citizens Clean Elections Act.[223] If Arizona's approach to public financing could have been followed at the federal level and throughout other states, the result, while not totally negating the effects of *Citizens United*, would have reduced its deleterious impact.

Alas, last June 27th, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the conservative bloc—once again in a 5–4 split—struck down Arizona's Citizens Clean Elections Act for allegedly infringing on the free speech rights of privately funded candidates and political expenditure groups without a compelling government interest.[224] This holding may have been an even more egregious misrepresentation of the law than the *Citizens United* holding. The *Arizona Free Enterprise* holding, which marked the first time in American history that a viewpoint neutral government subsidy was held to violate the First Amendment,[225] stood in

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[220] *See id.* at 2833.

[221] *Id.* at 2832.

[222] *See* Gibeaut, *supra* note 13, at 18.

[223] *See id.* at 19.

[224] Ariz. Free Enter. Club's Freedom PAC v. Bennett, 131 S. Ct. 2806, 2828 (2011) (holding "[t]his goes too far; Arizona's matching funds provision substantially burdens the speech of privately funded candidates and independent expenditure groups without serving a compelling state interest").

[225] *See id.* at 2822.

stark contrast to the conservative bloc's *Citizens United* mantra that "more speech, not less, is the governing rule."[226]

A. Arizona's Pervasive Political Corruption Problem

Before explaining why it was outrageous for the Supreme Court to find Arizona's Citizens Clean Elections Act unconstitutional, it is helpful to explain the political climate that led to the Citizens Clean Elections Act.

Despite approval of a referendum in 1986 that aimed to control political corruption by limiting individual campaign contributions to two hundred dollars for legislative candidates and five hundred dollars for statewide candidates, over the next ten years Arizona was besieged by a series of huge political scandals.[227] In 1988, a mere two years after the referendum, Governor Evan Mecham faced criminal charges of perjury and fraud for allegedly concealing a campaign loan, and was ultimately impeached and removed from office for misusing public funds and obstructing justice.[228] In 1989, Arizona and the nation were rocked by an even larger "Savings and Loan Scandal" involving the "Keating Five," which is considered one of the worst political scandals in the history of the United States.[229] Circumstances surrounding the collapse of the California-based Lincoln Savings and Loan Association, chaired by Arizona savings and loan tycoon Charles Keating, Jr., led to an investigation by the United States Senate Ethics Committee of five senators involving their receipt of $1.3 million in contributions to their re-election campaigns from Keating.[230] Arizona senators John McCain and Dennis DeConcini, as well as senators Alan Cranston of California, John Glenn of Ohio, and Donald Riegle of Michigan, were investigated. "While an investigation determined that all five acted improperly, they all claimed this was a standard campaign funding practice."[231]

The following year, 1990, revealed yet another shocking political corruption scandal, this time involving Peter MacDonald, leader of the Navajo Nation, who was tried by the Navajo Tribal Court for his abuses of power throughout the 1970s and 1980s.[232] MacDonald was convicted of

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[226] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 911 (2010).

[227] *See* McComish v. Bennett, 611 F.3d 510, 514-15 (9th Cir. 2010).

[228] *See id.*

[229] *See* Top Political Scandals in USA, (Jan. 31, 2011), FUNZONE COLLECTION, http://funzonecollector.blogspot.com/2011/01/top-political-scandals-in-usa.html.

[230] *See id.*

[231] *Id.*

[232] *See* Arizona History, (2010), http://www.city-data.com/ states/Arizona-History.html (last visited Apr. 25, 2012).

soliciting bribes and kickbacks in the amount of $400,000 from corporations and individuals interested in doing business with the tribe.[233] The 1986 referendum limiting campaign contributions had failed to curb Arizona's rampant political corruption.

In 1991, one more shocking corruption scandal, AzScam, proved to be the tipping point that led Arizonians to realize the necessity of further reform to attempt to end such corruption once and for all. Operation "Desert Sting"—which would become known nationwide as AzScam—was conducted by the Phoenix police and the Mariposa County attorney's office, and utilized an undercover agent claiming to be a Las Vegas "gaming consultant."[234] This consultant was offering campaign contributions to Arizona politicians who would support legislation to legalize gambling in their state.[235] Over a period of sixteen months, many of these politicians, constituting nearly ten percent of the entire Arizona legislature, accepted a total of $370,000, leading to grand jury felony indictments against seven legislators, five lobbyists, and five other political insiders for bribery, money laundering, and filing false campaign statements.[236] A quote from the book jacket of *What's In It For Me?* by Joseph Stedino, the undercover agent in AzScam, sums up the political climate leading to the passage of Arizona's Citizens Clean Elections Act of 1998: "When it broke in early 1991, the scandal resulting from the government sting known as AzScam exposed the sewer of corruption and blind ambition that is Arizona politics."[237] Clearly, it was time for a major change.

B. Arizona Free Enterprise: Denying a Response

Despite the fact that the Citizens Clean Elections Act worked as a viewpoint neutral subsidy, and despite the fact that it was enacted to combat the rampant political corruption in Arizona, the Supreme Court struck down Arizona's Citizens Clean Elections Act, claiming that it substantially burdened the political speech of privately funded candidates and independent expenditure groups and was not sufficiently justified by a compelling interest to survive First Amendment scrutiny.[238] To reach such

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[233] *Id.*

[234] *See Scandal in Phoenix*, TIME MAGAZINE U.S. (Feb. 18, 1991), *available at* http://www.time.com/time/magazine/article/0,9171, 972359,00.html.

[235] *Id.*

[236] *See* McComish v. Bennett, 611 F.3d 510, 514-15 (9th Cir. 2010).

[237] JOSEPH STEDINO & DARY MATERA, WHAT'S IN IT FOR ME? book jacket (1992), *available at* www.ernesthancock.com/desert_sting.pdf.

[238] *See* Ariz. Free Enter. Club's Freedom PAC v. Bennett, 131 S. Ct. 2806, 2813 (2011).

a conclusion, the Supreme Court once again had to circumvent well-established precedent.

1. The Citizens Clean Elections Act did not offend the First Amendment

Arizona's Citizens Clean Elections Act did not violate the First Amendment for two reasons. First, Arizona's Citizens Clean Elections Act was a viewpoint neutral subsidy and, therefore, it imposed no burden on political speech whatsoever. Second, for argument's sake, even if Arizona's Citizens Clean Election Act did burden political speech, the majority failed to demonstrate that such a burden was substantial enough to run afoul of the First Amendment.

a. The Citizens Clean Elections Act imposed no burden on political speech as suggested by the Bennett *majority*

The majority argued that the Citizens Clean Elections Act imposed a substantial burden on political speech, claiming that privately funded candidates and independent groups might choose to stop spending in order to prevent a publicly funded candidate, running for the same seat, from receiving more public financing.[239] To strengthen their claim, the majority attempted to portray the Citizens Clean Elections Act as a kind of prohibition on election speech. Thus, the majority depicted the Citizens Clean Elections Act as imposing "limits," "bar[s]," and "restraints" on privately funded candidates and on independent expenditure groups.[240] Chief Justice Roberts' majority opinion likened the Citizens Clean Elections Act to a "restrictio[n] on the amount of money a person or group can spend on political communication during a campaign[.]"[241]

However, as Justice Kagan explained in dissent, the majority's claims were grossly misleading. "The law 'impose[s] no ceiling on [speech] and do[es] not prevent anyone from speaking.' The statute does not tell candidates or their supporters how much money they can spend to convey their message, when they can spend it, or what they can spend it on."[242] The Citizens Clean Elections Act did not ban any speech whatsoever and instead functioned as a viewpoint neutral subsidy that promoted more speech. Like the presidential public financing model, the Citizens Clean Elections Act simply provided funding to help "facilitate communication by

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[239] *See id.* at 2823-24.

[240] *Id.* at 2813, 2820-21.

[241] *Id.* at 2820.

[242] *Id.* at 2833 (Kagan, J., dissenting) (quoting Citizens United v. Fed. Election Comm'n, 131 S. Ct. 876, 914 (2010)).

candidates with the electorate."[243] "By enabling participating candidates to respond to their opponents' expression, the statute expands public debate, in adherence to 'our tradition that more speech, not less, is the governing rule.'"[244]

Viewpoint neutral government subsidy of speech has been consistently upheld as constitutional. "Government subsidies of speech, designed 'to stimulate . . . expression[,] . . . [are] consistent with the First Amendment,' so long as they do not discriminate on the basis of viewpoint."[245] Because the Arizona Citizens Clean Elections Act created a public financing option that was available to all qualified candidates it was clearly viewpoint neutral.

Thus, what the majority declared to be a substantial burden to political speech was, in reality, a viewpoint neutral subsidy, not banning speech, but aiding responsive speech. The Arizona Citizens Clean Elections Act should have easily survived First Amendment scrutiny. As Justice Kagan explained, "[t]o invalidate a statute that restricts no one's speech and discriminates against no idea—that only provides more voices, wider discussion, and greater competition in elections—is to undermine, rather than to enforce, the First Amendment."[246]

2. Even if the Citizens Clean Elections Act imposed a burden, it was not substantial

Even though such a viewpoint neutral subsidy has never been found to offend the First Amendment and even if one accepts that the Arizona Citizens Clean Elections Act imposed some kind of a burden on the election speech of privately-funded candidates and independent expenditure groups, the majority still failed to demonstrate such a burden was substantial enough to offend the First Amendment.

The majority claimed that the burden imposed by the Citizens Clean Elections Act did substantially burden political speech because it both "diminish[ed] the effectiveness" of privately funded candidates' speech by enabling publicly funded candidates to compose better responses and because it might cause privately funded candidates to "not spend money" to prevent a publicly funded opponent from receiving more public financing.[247] The facts do not support either of the majority's claims.

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[243] *Id.* at 2831.

[244] *Id.* at 2834 (quoting *Citizens United*, 131 S. Ct. at 911).

[245] *Id.* (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234 (2000)).

[246] *Id.* at 2835.

[247] *Id.* at 2818 (majority opinion), 2836 (Kagan, J., dissenting).

First, the idea that the publicly-funded responsive speech imposes a substantial burden on privately-funded candidates' speech is quite a perplexing statement to make. Of course, responsive speech diminishes the effectiveness of prior speech. After all, this is how the exchange of ideas works. But to say that this means that funding responsive speech therefore imposes a substantial burden runs contrary to First Amendment jurisprudence. "The First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate."[248] Surely, the First Amendment does not guarantee speech that is free from response.

Second, while it is possible that a few privately funded candidates might choose to limit their spending in order to deny their opposing candidate greater public financing, the facts do not demonstrate that this actually happened. While some of the *Arizona Free Enterprise* candidate-plaintiffs testified that the Citizens Clean Elections Act had caused them either to decline to raise more money, or to curtail their spending until just before the election to reduce the benefits their efforts would have on their opponents, none of them could cite a specific instance in which their speech was chilled.[249] Other candidate-plaintiffs were shown to have remained willing to spend despite the Citizens Clean Elections Act.[250] Still another plaintiff, though claiming that his speech was chilled, could not even recall whether his own fundraising had triggered additional funding to his opponent.[251] One of the independent groups, claiming it had remained silent to avoid triggering additional public funding, actually had only $52.72 left to spend.[252] Moreover, contrary to the plaintiffs' unsubstantiated claims, the actual numbers told a far different story. From the enactment of the Citizens Clean Elections Act in 1998 to 2006, overall expenditures increased between 29% and 67%, with candidate expenditures growing between 12% and 40% and overall independent expenditures growing a dramatic 253%.[253]

In the face of this evidence, however, the majority contended that empirical evidence was "not need[ed] . . . to determine that the law at issue is burdensome."[254] Yet, even if the facts were different and numerous privately funded candidates chose to stop spending to prevent their opponents from receiving additional funding, such a burden would still not

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[248] *Id.* at 2830 (Kagan, J., dissenting).

[249] *See* Gibeaut, *supra* note 13, at 19.

[250] *See id.*

[251] *See id.*

[252] *See id.*

[253] *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2834 n.2 (2011) (Kagan, J., dissenting).

[254] *Id.* at 2823 (majority opinion).

be substantial enough to offend the First Amendment. Justice Kagan gave three reasons why this was the case. First, all public financing models impose the so-called burden of responsive speech upon privately funded candidates, including the presidential public financing model upheld in *Buckley*.[255] Whether all the money is received upfront or doled out as needed, all forms of public financing present a scenario in which privately funded candidates must contend with rebuttals.

Second, the Supreme Court has upheld disclosure and disclaimer requirements even though such requirements may deter some parties from speaking, reasoning that "'[d]isclosure requirements may burden the ability to speak, but do not prevent anyone from speaking.'"[256] Such logic should have guided the majority to upholding the Citizens Clean Elections Act. Even though it hypothetically could have deterred some parties from speaking, it imposed "'no ceiling' on electoral expression."[257]

Third, the Supreme Court has consistently upheld contribution limits, even though they represent a more significant burden on election speech because contribution limits "'impose direct quantity restrictions on political communication and association.'"[258] Because the Citizens Clean Elections Act imposed no such restraints, the majority had no basis to claim it substantially burdened free speech rights.

Thus, even if the Citizens Clean Elections Act somehow burdened the election speech of privately funded candidates or independent expenditure groups, such a burden cannot be meaningfully distinguished from the similar burden imposed by the presidential public financing model upheld in *Buckley*.[259] For this reason, even if the Citizens Clean Elections Act imposed a burden, it was not substantial enough to run afoul of the First Amendment.

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[255] *See id.* at 2837-38 (Kagan, J., dissenting).

[256] *Id.* at 2838 (quoting Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 2811 (2010)).

[257] *Id.*

[258] *Id.* (quoting Buckley v. Valeo 424 U.S. 1, 18 (1976)).

[259] In making the above stated claims, the majority relied solely on Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008). However, *Davis* is easily distinguishable from *Arizona Free Enterprise* because it involved a discretionary speech restriction that Congress could not otherwise have constitutionally imposed, rather than a viewpoint neutral subsidy that was doled out in a slightly different manner. Furthermore, the *Davis* opinion said nothing about a triggered distribution method being unconstitutional.

3. The Citizens Clean Elections Act was justified by a compelling state interest

A law that substantially burdens free speech will still be upheld if it is justified by a compelling government interest and is narrowly tailored to achieve that goal.[260] Because the Citizens Clean Elections Act did not substantially burden the First Amendment rights of privately funded candidates or independent expenditure groups, Arizona should not have needed to justify the Citizens Clean Elections Act by providing a compelling government interest. However, Arizona certainly had a compelling interest for enacting the Citizens Clean Elections Act. As explained previously, prior to the passage of the Citizens Clean Elections Act, political corruption was rampant in Arizona politics; the Citizens Clean Elections Act clearly was an attempt to combat the reality of this rampant corruption as well as its appearance in the Arizona political system. Considering the pervasive political corruption that Arizona faced, the majority's argument that the Citizens Clean Elections Act lacked a compelling enough government interest to survive First Amendment scrutiny is frustrating, to say the least.

a. The Citizens Clean Elections Act was enacted to prevent corruption or its appearance and was narrowly tailored to that goal

The Citizens Clean Elections Act was enacted with the specific purpose of combating the rampant political corruption in Arizona politics.[261] The prevention of corruption or its appearance is a compelling government interest strong enough to withstand First Amendment scrutiny.[262] While public financing has been continually upheld as a constitutionally viable method for combating corruption and its appearance by "reduce[ing] the deleterious influence of large contributions on our political process,"[263] the public financing model, based on the presidential election approach upheld in *Buckley*, failed to put a dent in Arizona's pervasive political corruption because it failed to attract major party candidates. The deleterious influence of large private contributions cannot be curbed by a public financing option unless major party candidates actually choose to use the public financing option. Thus, Arizona sought to find a way to make its

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[260] *See, e.g., Citizens United*, 131 S. Ct. at 898; Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 256 (1986).

[261] *See Ariz. Free Enter.*, 131 S. Ct. at 2841-42 (Kagan, J., dissenting).

[262] *See, e.g.*, Davis v. Fed. Election Comm'n, 554 U.S. 724, 740 (2008); Fed. Election Comm'n v. Wisc. Right to Life, Inc., 551 U.S. 449, 478-79 (2007).

[263] Buckley v. Valeo, 424 U.S. 1, 96 (1976) (citation omitted).

public financing option a viable choice for major party candidates. To achieve this goal, as mentioned above, Arizona came up with the ingenious tweak to its previously underachieving public financing model. This tweak, tying public financing to private spending, was a minor alteration, but was also critical in making the Citizens Clean Elections Act successful.[264] Clearly, Arizona's enactment of the Citizens Clean Elections Act, making Arizona's public financing option more attractive to major party candidates, was an attempt to further the compelling government interest of preventing corruption or its appearance and was narrowly tailored to that goal.

Yet, the majority repeatedly claimed that Arizona's "chosen method [was] unduly burdensome and not sufficiently justified to survive First Amendment scrutiny."[265] In making this claim the majority failed to explain why Arizona was not justified in passing the Citizens Clean Elections Act and also failed to identity a less burdensome alternative. "Nowhere does the majority dispute the State's view that the success of its public financing system depends on the matching funds mechanism; and nowhere does the majority contest that, if this mechanism indeed spells the difference between success and failure, the State's interest in preventing corruption justifies its use."[266] The majority attempted to argue that Arizona's enactment of the Citizens Clean Elections Act was overkill, claiming that Arizona's "austere contribution limits" reduced the need for anything more to combat corruption or the appearance of corruption.[267] "In the face of such ascetic contribution limits, strict disclosure requirements, and the general availability of public funding, it is hard to imagine what marginal corruption deterrence could be generated by the matching funds provision."[268] However, this argument is meritless as Arizona's contribution limits clearly failed to curb its pervasive issues with political corruption.

Arizona's attempts to curb its rampant political corruption had all failed. Corruption remained pervasive in Arizona politics. Thus, Arizona determined that it needed a more effective public financing option if it was to have any chance at preventing corruption or its appearance. Therefore, the enactment of the Citizens Clean Elections Act both was justified by the rampant political corruption in Arizona and was narrowly tailored to preventing corruption and its appearance.

For these reasons, the majority was wrong to claim that the Citizens Clean Elections Act was, "unduly burdensome and not sufficiently justified

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[264] *See Ariz. Free Enter.*, 131 S. Ct. at 2841-42 (Kagan, J., dissenting).

[265] *Id.* at 2828 (majority opinion).

[266] *Id.* at 2843 (Kagan, J., dissenting).

[267] *Id.* at 2842 n.11 (Kagan, J., dissenting).

[268] *Id.* at 2827 (majority opinion).

to survive First Amendment scrutiny."[269] Such a claim is nonsensical. "If public financing furthers a compelling interest—and according to this Court, it does—then so too does the disbursement formula that Arizona uses to make public financing effective. The one conclusion follows directly from the other."[270]

b. So what if the Citizens Clean Elections Act could also "level the playing field"?

Arizona made it no secret that preventing corruption or its appearance was the intended purpose of the Citizens Clean Elections Act. Within the formal findings section of the Citizens Clean Elections Act was the explanation that the Act was "inten[ded] to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money."[271] This section further stated that such action was necessary because private funding of candidates had

> "[u]ndermine[d] public confidence in the integrity of public officials;" allowed those officials "to accept large campaign contributions from private interests over which they [had] governmental jurisdiction;" favored "a small number of wealthy special interests" over "the vast majority of Arizona citizens;" and "[c]os[t] average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors."[272]

Furthermore, in arguing its case before the Supreme Court, Arizona reiterated that preventing corruption and its appearance was the intended purpose of the Citizens Clean Elections Act, explaining that the Act "deters quid pro quo corruption and the appearance of corruption by providing Arizona candidates with an option to run for office without depending on outside contributions."[273]

Yet, the majority claimed that Arizona was disingenuous in stating the Citizens Clean Elections Act's intended purpose and real goal was to "level the playing field," rather than to fight corruption.[274] Considering that Arizona was facing a pervasive political corruption problem; that public financing has long been recognized as a constitutionally viable method for combating political corruption or its appearance; and that Arizona clearly stated that the Citizens Clean Elections Act was intended to fight

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[269] *Id.* at 2828.
[270] *Id.* at 2843 (Kagan, J., dissenting).
[271] *Id.* at 2841-42 (quoting ARIZ. REV. STAT. ANN. § 16-940(A) (2006) (West)).
[272] *Id.* at 2842 (quoting ARIZ. REV. STAT. ANN. § 16-940(B)).
[273] *Id.*
[274] *Id.* at 2825 (majority opinion).

corruption, the majority's claim seems somewhat offensive. Even more offensive are the feeble arguments the majority put forth to support its claim.

First, the majority noted that the section explaining the Citizens Clean Elections Act's disbursement method was entitled "Equal funding of candidates" and that the section referred to the method as "equalizing funds."[275] This argument had little merit because "equal" was only used to describe the Citizens Clean Elections Act's disbursement method and nothing in this section suggested any desire to "level the playing field."[276] Second, the majority pointed to a contingency provision within the Citizens Clean Elections Act that allowed publicly funded candidates, if and only if Arizona could not provide the funds it promised, to accept private contributions.[277] However, this contingency provision served merely to assure candidates contemplating the public financing option that they would not be hung out to dry if there was a monetary crisis in Arizona.[278] Third, the majority noted that the Clean Elections Commission's website had at a previous time stated that the "'Act was passed by the people of Arizona . . . to level the playing field.'"[279] The majority's reliance on a website was tenuous. Even more tenuous, as pointed out by Justice Kagan, was the majority's "strange claim" that "a government website . . . (written by who-knows-whom?) reveals what hundreds of thousands of Arizona's voters sought to do in 1998 when they enacted the Citizens Clean Elections Act by referendum."[280]

The majority had no reason to find that Arizona's Citizens Clean Elections Act was really passed to "level the playing field," especially when these were the only arguments they could muster to support such a fly-by-night accusation. As Justice Kagan stated, "the majority claims to have found three smoking guns that reveal the State's true (and nefarious) intention to level the playing field. But the only smoke here is the majority's, and it is the kind that goes with mirrors."[281]

But even if the majority's claims were true and Arizona, in passing the Citizens Clean Elections Act, secretly had attempted to "level the playing field," such circumstances would not have justified the *Arizona Free Enterprise* holding as long as Arizona was also seeking to fight corruption

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[275] *Id.* at 2811 (quoting ARIZ. REV. STAT. ANN. § 16-952, 952(C)(4)).

[276] *Id.* at 2844 (Kagan, J., dissenting).

[277] *Id.* at 2825 (majority opinion).

[278] *See id.* at 2844 (Kagan, J., dissenting).

[279] *Id.* at 2825 n.10 (majority opinion) (quoting Brief for Petitioner at 10 n.3 (Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011)).

[280] *Id.* at 2844 (Kagan, J., dissenting).

[281] *Id.* at 2843.

or its appearance. As Justice Kagan explained, as long as Arizona had a compelling interest in eliminating political corruption, it was irrelevant whether Arizona also had any desire to "level the playing field."[282]

It only takes one compelling government interest to withstand First Amendment scrutiny.[283] Therefore, the presence of another non-compelling government interest should have no effect on a law's constitutionality as long as that interest is not unconstitutional in and of itself. Arizona clearly had an interest in combating political corruption and its appearance and it stated that the Citizens Clean Elections Act was enacted to do just that. Thus, even if Arizona also wanted to "level the playing field," this should not have affected the majority's constitutional inquiry into the Citizens Clean Elections Act. "Arizona has demonstrated in detail how the matching funds provision is necessary to serve a compelling interest in combating corruption. So the hunt for evidence of 'leveling' is a waste of time; Arizona's law survives constitutional scrutiny no matter what that search would uncover."[284]

IV. CONCLUSION

While *Citizens United* opened the floodgates for unlimited corporate speech to influence American elections, *Arizona Free Enterprise* slammed the door on those who might try to respond.

There are numerous similarities between *Citizens United* and *Arizona Free Enterprise*. Both were decided by 5–4 splits with the conservative bloc winning out; both overturned the logic of lower courts; both failed to defer to lawmakers; and both drastically misapplied well-established precedent. Even more glaring than these similarities, was the conservative bloc's blatant hypocrisy in the two decisions. With one breath, in *Citizens United,* the conservative bloc concluded that "more speech, not less, is the governing rule,"[285] and, with the next, in *Arizona Free Enterprise*, the same Justices stuck down a viewpoint neutral government subsidy that would have allowed for more speech, not less.

In assessing *Citizens United* and *Arizona Free Enterprise*, it is clear that the conservative bloc has rewritten the First Amendment to the United States Constitution. Their new version of the First Amendment usurps the power of the American people in order to allow the massively wealthy to use their disproportionate economic means to get their way. The

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[282] *See id.* at 2844 ("This Court . . . has never said that a law restricting speech (or any other constitutional right) demands two compelling interests. One is enough.").

[283] *See id.* at 2845.

[284] *Id.*

[285] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 911 (2010).

Constitution was designed to safeguard American democracy, not to aid in America's descent into plutocracy.

But what can be done now? If a controlling majority of the Supreme Court decides that this is the way it is, then this is the way it is.[286] There has been talk of enacting laws requiring shareholders to grant permission, or to even reach a super majority, before allowing corporations to spend money on political expenditures.[287] However, if the conservative bloc had no qualms about striking down Arizona's Citizens Clean Elections Act, why would they permit laws such as these to stand?[288]

Further troubling is the relative youth of the conservative bloc. Chief Justice Roberts is only fifty six years old.[289] Justice Alito is sixty one years old.[290] Justice Thomas has already been on the Supreme Court for twenty years and he is only sixty two years old.[291] Both Justice Scalia and Justice Kennedy are seventy four years in age.[292] It is joked that the best predictor of a long life is being a United States Supreme Court Justice.[293] If this is true, it is unlikely President Obama will have the opportunity to replace any of the members of the conservative bloc even if he serves a second term. Thus, the conservative bloc of the Supreme Court seems to be positioned to call the shots for a long time to come.

Still, perhaps the most frustrating part of all this is the way in which it is being fed to the American people. Reading the *Citizens United* and *Arizona Free Enterprise* opinions, one cannot help but be taken aback by the conservative bloc's self-congratulatory tone. Filled with lofty rhetoric, these Justices champion themselves as defenders of the Constitution, while at the same time, eroding its protections. The American people deserve far better. As Lyndon Johnson once said, "[We] may not know much, but [we] know the difference between chicken shit and chicken salad."[294]

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[286] *See* Marbury v. Madison, 5 U.S. 137, 177, 1 Cranch 137, 174, 2 L.Ed. 60, 73 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

[287] *See* Gene Nichol, *Citizens United and the Roberts Court's War on Democracy*, 27 GA. ST. U. L. REV. 1007, 1013 (2011).

[288] *See id.* ("The five Justices constituting the *Citizens United* majority will, no doubt, rebel at this. No one wants to let his landmark ruling be sidestepped by mere fancy corporate-governance footwork.").

[289] *See* Erwin Chemerinsky, *The Roberts Court and Free Speech*, 63 FED. COMM. L. J. 579, 588 (2011).

[290] *See id.*

[291] *See id.*

[292] *See id.*

[293] *Id.*

[294] *See* SearchQuotes, http://www.searchquotes.com/quotation/I_may_not_know_ much, _but_I_know_the_difference _between_chicken_shit_and_chicken_salad./3313/ (last visited Apr. 29, 2012).

Beeler v. Astrue: Addressing the Claims of Posthumously Conceived Children to Survivor Benefits

Jennifer Foor*

I. INTRODUCTION

Innovations in reproductive technology provide couples facing infertility or terminal illness with previously unimagined possibilities for family planning. "[A]ssisted reproductive technologies enable conception to take place even after the provider of the gamete has died. Gametes can be harvested and cryopreserved . . . prior to the provider's death or retrieved from him post-mortem, and then used . . . to impregnate a woman with genetic material . . . whose providers are no longer alive."[1] These medical developments have made it possible for a child to be conceived after the death of a parent with few regulatory obstacles.[2] Many couples are choosing to cryogenically preserve gametes in anticipation of infertility caused by medical treatments,[3] or death from disease or war.[4] While preserving reproductive material for conception at a later time is no longer on the cutting edge of medical development, the legal consequences of posthumous conception continue to work their way through the courts, and federal legislators have yet to address the resulting issues head-on.[5]

A number of cases springing from the birth of posthumously conceived children have risen to the federal courts of appeal. These cases result from disputes over a posthumously conceived child's rights to Social Security survivor's benefits. In the absence of applicable regulation, this collision

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[1] Ruth Zafran, *Dying to be a Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL'Y 47, 49-50 (2007).

[2] *See* Margaret Foster Riley & Richard A. Merrill, *Regulating Reproductive Genetics: A Review of American Bioethics Commissions and Comparison to the British Human Fertilisation and Embryology Authority*, 6 COLUM. SCI. & TECH. L. REV. 1, 1, 4 (2005).

[3] Beeler v. Astrue, 651 F.3d 954, 956 (8th Cir. 2011).

[4] *See* Major Maria Doucettperry, *To Be Continued: A Look at Posthumous Reproduction As It Relates to Today's Military*, ARMY LAW. (Dept. of Army, Charlottesvill, VA), May 2008, at 1, 2.

[5] *See id.* at 4-6.

between technology and law has led to circuit splits and at least one case pending review by the United States Supreme Court.[6]

Beeler v. Astrue[7] is one such case rooted in the legal status of posthumously conceived children and is currently awaiting the Supreme Court's grant or denial of certiorari. The Eighth Circuit reversed the District Court's decision when it held that a posthumously conceived child was not a "child" as the term is defined in the Social Security Act,[8] and that the biological father's acknowledgment of paternity shortly before his death did not satisfy the statutory requirements for a child, thereafter conceived artificially, to be considered his natural child prior to his death.[9] The Eighth Circuit came to the correct conclusion in this case, and it should be affirmed by the Supreme Court. Part II of this casenote will discuss *Beeler* and explain the court's rationale for deciding that a posthumously conceived child is ineligible for Social Security survivor's benefits under the Social Security Act. Part III will provide the legal context of *Beeler*, and Part IV will discuss the soundness of the *Beeler* decision and how it strikes a balance in terms of public policy.

II. THE CASE

Bruce and Patti Beeler were married soon after Bruce was diagnosed with cancer. When the couple realized that the chemotherapy necessary to treat Bruce's cancer could result in his sterility, they decided to bank his semen to preserve their chances of having a family. Unfortunately, Bruce's condition did not improve, and just over a year after beginning treatment he passed away.[10] Prior to his death, Bruce signed hospital forms to leave his banked semen to Patti for her use in the event of his death. Additionally, the Beelers signed the hospital's Form 151 which states "the signatories 'desire[ ] the female partner to be artificially inseminated or oocytes inseminated in vitro for the purpose of conceiving a child.' The form also states that the '[m]ale partner hereby agrees to accept and acknowledge paternity and child support responsibility of any resulting child or children.'"[11] In July of 2002, fourteen months after her husband's death,

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[6] *See* Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626 (3rd Cir. 2011), *cert. granted sub nom.*, Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 576 (U.S. Nov. 14, 2011) (No. 11-159). *See also* Beeler v. Astrue, 651 F.3d 954 (8th Cir. 2011), *petition for cert. filed*, 2011 WL 5976275 (U.S. Nov. 23, 2011) (No. 11-667).

[7] *Beeler*, 651 F.3d at 960.

[8] *Id.*

[9] *Id.* at 965-66.

[10] *Id.* at 956-57.

[11] *Id.*

Patti conceived a child using the semen Bruce banked in 2000. Patti's daughter was born April 28, 2003. She was the undisputed biological offspring of Bruce Beeler. On June 2, 2003, Patti filed for Social Security benefits on behalf of her daughter, and after a March 2008 administrative hearing, the Appeals Council reviewed the case and the applicable law, and in December of 2008 delivered the Social Security Administration's ("SSA") final decision, that Patti's child "is not the child of the wage earner within the meaning of the Social Security Act . . . and is not entitled to benefits."[12]

A. Procedural History

Two months after exhausting the SSA's administrative process, and being denied benefits on behalf of her child, Patti Beeler sued the Commissioner of Social Security.[13] The district court reversed the agency's determination and ordered the SSA to calculate and award benefits for Patti's child.[14] The Commissioner appealed to the Eighth Circuit.[15]

B. Holding and Rationale

The Eighth Circuit held that a posthumously conceived child was not a "child" as defined by the Social Security Act.[16] The court also concluded that the biological father's acknowledgment of paternity shortly before his death failed to satisfy statutory requirements necessary to consider Ms. Beeler's posthumously conceived child his "natural child" prior to his death.[17] In coming to this conclusion, the court applied the rules of statutory interpretation and the *Chevron* doctrine of deference to administrative agencies.[18] The court concluded that the SSA's decision qualified for *Chevron* deference, and because the agency's interpretation of the law was a reasonable one, it decided that upholding the SSA's ruling was necessary.[19]

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[12] *Id.* at 957 (emphasis omitted).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 960.
[17] *Id.* at 965-66.
[18] *See id.* at 959-60.
[19] *Id.* at 966.

1. The Chevron *deference*

The *Chevron* deference stems from *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*[20] In that case, the Supreme Court reviewed the Court of Appeals' judgment against the Environmental Protection Agency's ("EPA") interpretation of Clean Air Act provisions. Specifically, the EPA allowed a state to define "stationary polluters" as an entire plant, which may have multiple pollution-emitting devices, rather than a single source of pollution emission.[21] This interpretation was termed the "bubble" approach.[22] Previously, a state that failed to meet the Clean Air Act standards would require plants to meet tough permit standards to create a new pollution emitter.[23] The "bubble approach," however, would allow current plants to *alter* emission equipment without meeting those requirements.[24] It would only require that the alterations would not impact the entire plant's level of pollution.[25] The Court of Appeals found the EPA's interpretation to be contrary to law because the purpose of the permit system was to improve air quality, not simply maintain it.[26] Thus, the Court of Appeals declared the agency's "bubble" regulations inapplicable and set them aside in cases where the given state has not attained Clean Air quality standards.[27]

The Supreme Court reversed this decision, highlighting two issues a court must address when evaluating an agency's interpretation of a statute: whether Congress addressed the issue at hand, and if not, "whether the agency's answer is based on a permissible construction of the statute."[28] The Court decided that "Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program" and that, contrary to the appeals court decision, the EPA's application of the "bubble" concept was a reasonable policy choice.[29] The opinion stresses the restrained role of the court and the need to leave the evaluation of the wisdom of administrative policy decisions up to the other branches of government.[30]

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[20] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
[21] *Id.* at 840.
[22] *Id.* at 855.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 840.
[26] *Id.* at 841-42.
[27] *Id.*
[28] *Id.* at 843.
[29] *Id.* at 845.
[30] *Id.* at 866.

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.[31]

This opinion sets the precedent for the judiciary's role in reviewing administrative decisions, and the same process and standards apply in *Beeler*.

2. *The* Chevron *deference and* Beeler

The court in *Beeler* decided that the *Chevron* deference applied because "*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'"[32] In applying the *Chevron* doctrine, the court found that because "the regulations were issued pursuant to the Commissioner's statutory authority to promulgate rules that are 'necessary or appropriate to carry out' his functions and the relevant statutory provisions[,]" they are controlling if they are reasonable.[33] Therefore, the court needed to go no further than to show that the Commissioner's rules were indeed reasonable in order to uphold the Commissioner's decision.

The court found that the Commissioner's rules were reasonable by walking through the regulations in the opinion. The opinion begins with the code section that defines "child"[34] for purposes of the Social Security Act.[35] The court then refers to the accompanying regulation that lists the ways that someone may be related to the insured person and possibly be entitled to benefits: as a child, i.e., as a natural child, legally adopted child, stepchild, grandchild, step grandchild, or equitably adopted child.[36] The court refers to the following sections "for details on how we determine your relationship to the insured person."[37] 20 C.F.R. § 404.355(a) lists conditions required to satisfy "natural child" status that reflect the substantive requirements listed in section 416(h) of the Social Security

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[31] *Id.*

[32] Beeler v. Astrue, 651 F.3d 954, 959 (8th Cir. 2011) (quoting United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).

[33] *Id.* at 959-60.

[34] 42 U.S.C. § 416(e) (2006).

[35] *Beeler*, 651 F.3d at 957-58.

[36] *Id.* at 960 (citing 20 C.F.R. § 404.354 (2012)).

[37] *Id.*

Act.[38] The existence of the regulation shows that one of the requirements listed must be met in order for the child to possibly qualify for benefits.[39]

3. Reasonableness of the agency's interpretation

The final step for the court was to determine whether the Social Security Administration's interpretation was a reasonable one. As noted above, if it is reasonable, and the agency deserves *Chevron* deference, then the courts must uphold the agency's determination on appeal. The opinion acknowledges the circuit split on the matter between the Ninth[40] and Third[41] Circuits and the Fourth[42] and Eighth[43] Circuits. The Ninth and Third circuits decided that undisputed biological children can qualify under section 416(e) as a "child" for Social Security purposes.[44] The Fourth Circuit,[45] which follows the reasoning spelled out in this eighth circuit opinion, decided that the Social Security Administration's interpretation was correct; that all applicants must qualify under section 416(h) to be eligible for benefits.[46] Here, the court is persuaded by the statute's inclusion of the provision in section 416(h) that "the Commissioner 'shall' use state intestacy law in determining whether an applicant is the 'child' of an insured individual[.]"[47] There are no qualifiers for whom state intestacy law should be applied to determine whether an applicant is the child of an insured individual; it declares that such law shall be used, implying its use in every case.

The Third and Ninth Circuits turned to legislative history for an explanation for why such an interpretation was not reasonable, and they declared those provisions "were added to the Act to provide various ways in which children could be entitled to benefits even if their parents were not married or their parentage was in dispute."[48] Setting aside the other courts' questionable use of legislative history as the cornerstone for reversing the agency's decision, the court in *Beeler* counters their reasoning by pointing out that indeed the use of state intestacy law to qualify recipients for Social

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[38] *Id.*

[39] *Id.*

[40] Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004).

[41] Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626 (3rd Cir. 2011).

[42] Shafer v. Astrue, 641 F.3d 49 (4th Cir. 2011).

[43] Beeler v. Astrue, 651 F.3d 954 (8th Cir. 2011).

[44] *Gillett-Netting*, 371 F.3d 593; *Capato*, 631 F.3d 626.

[45] *Schafer*, 641 F.3d at 963.

[46] Beeler v. Astrue, 651 F.3d 954, 963 (8th Cir. 2011).

[47] *Id.*

[48] *Id.* at 964 (quoting *Gillett-Netting*, 371 F.3d at 596).

Security benefits has always been part of the Social Security Act.[49] One portion of the 1939 amendments reads, "In determining whether an applicant is the wife, widow, child, or parent of a fully insured or currently insured individual for purposes of this title, the Board shall apply such law as would be applied in determining the devolution of intestate personal property . . ."[50] This part of the 1939 amendments is almost mirrored by section 416(h) in the current law, examined by the Ninth circuit, which reads, "[i]n determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property . . ."[51] These facts undermine the foundation set by the Ninth and Third Circuits in their decisions, ruling that the interpretation of the Social Security Administration should be set aside.

4. Other arguments addressed

After explaining how the court arrived at its opinion, the court goes on to address each of the arguments posed by Beeler in support of her contention that all undisputed biological children of the insured are his natural children, and that all natural children qualify as a "child" for purposes of the Social Security Act under section 416(e).[52] She goes on to assert that, in her case, where the qualification can be met under section 416(e), there is no reason to go on to meet the further qualifications noted under section 416(h).[53] Although there is no express cross-reference between sections 416(e) and 416(h), section 416(h) "plainly says that the Commissioner 'shall' use state intestacy law in determining whether an applicant is the 'child' of an insured individual 'for purposes of this subchapter,' and [section] 416(e) is part of the subchapter."[54] This provides evidence that the analysis does not end at the initial definition provided by section 416(e), and that all applicable subsections must be considered in determining the status of an applicant's relation to the insured.

Beeler also urges that her child qualifies as a "child" for purposes of the Social Security Act under section 416(h)(3)(C)(i)(I) which "allows an

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[49] *Id.* at 964 (citing Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 209(m), 53 Stat. 1360, 1378).

[50] Social Security Act Amendments of 1939, Pub. L. No. 379, § 209(m), 53 Stat. 1360, 1378.

[51] 42 U.S.C. § 416(h)(2)(A) (2006).

[52] *Beeler*, 651 F.3d at 959.

[53] *Id.*

[54] *Id.* at 963.

applicant who does not qualify as a natural child under [section] 416(h)(2)(A) or [section] 416(h)(2)(B) to be 'deemed' a natural child if the insured individual, prior to his death, 'acknowledged in writing that the applicant is his . . . son or daughter.'"[55] The court finds this argument flawed. It concurs with the Social Security Administration that while Mr. Beeler may have agreed to acknowledge any child produced using his frozen semen, that agreement to acknowledge a future child does not meet the law's requirement that the insured acknowledge in writing that *the applicant* is his, as it is impossible to acknowledge the existence of a being that has yet to be.[56]

III. EXISTING LAW

This section will outline some of the major cases that have shaped this legal issue. The only widely applicable statutes are those pertinent provisions of the Social Security Act discussed in the context of the *Beeler* case and the Iowa statute on afterborn heirs.[57]

A. Case Law

1. Woodward v. Commissioner of Social Security

This opinion represents the answer to a certified question from the United States District Court for the District of Massachusetts to the Supreme Judicial Court of Massachusetts. It is the first time a court considered the inheritance rights of posthumously conceived children in a published opinion.[58] The question was:

> If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?[59]

The Massachusetts Court basically answers this question: yes, if the proper conditions are satisfied.[60] The threshold condition is that the surviving parent demonstrates a genetic relationship between the child and the

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[55] *Id.* at 965 (quoting 42 U.S.C. § 416(h)(3)(C)(i)(I) (2006)).

[56] *Id.* at 966.

[57] IOWA CODE ANN. § 633.220 (West 2011).

[58] Woodward v. Comm'r of Soc. Sec., 435 Mass. 536, 541 (2002).

[59] *Id.* at 537.

[60] *Id.* at 537-38.

deceased parent.[61] Then there must be evidence that the decedent "affirmatively consented to posthumous conception and to support of any resulting child."[62] Finally, the court noted that for intestacy purposes, a time limit would be necessary in order to provide predictability for other heirs and to limit claims against the estate.[63] In its analysis, the Massachusetts Court also highlights the uniqueness of the Massachusetts law guiding this area, pointing out that it is clear that the outcome would be different in other states. It compares the Massachusetts law on posthumous children, which is somewhat flexible, does not specifically define posthumous children as those in utero at the time of the father's death, and provides no bright line rule on the issue, with Louisiana law, which specifically requires a successor "exist at the death of the decedent."[64]

2. *Third Circuit:* Capato ex rel. B.N.C. v. Commissioner of Social Security

The facts in *Capato*[65] are almost identical to those in *Beeler*. The court's decision and reasoning differ, however. The court found that the broad definition of "child" in section 416(e) was determinative of an applicant's qualifications; that "'[e]very child (as defined in section 416(e) of this title)' will qualify, assuming of course, that the other requisites have been met."[66] The court acknowledged that section 416(h) supplies definitions of "child," but finds that those definitions in sections 416(h)(2)(A), 416(h)(2)(B), and 416(h)(3) are all *additional* definitions—alternative ways to meet the "child" definition without necessarily meeting the section 416(e) definition.[67] The *Capato* court finds that to agree with the judgment of the Social Security Administration, one would have to look beyond the plain meaning of section 402(d), which directs the reader to section 416(e) for the definition of "child" and does not require the reader to look any further.[68] The *Capato* court essentially agrees with the Ninth Circuit that

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[61] *Id.* at 537.

[62] *Id.* at 538.

[63] *Id.* at 538, 544 (discussing the state's interest in administering the estate in an orderly fashion and preventing fraudulent claims against the estate).

[64] *Id.* at 542 (quoting the Louisiana law in effect at the time LA. CIV. CODE ANN. art. 939 (2000)).

[65] *See* Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 627-28 (3d Cir. 2011).

[66] *Id.* at 629.

[67] *Id.* at 630.

[68] *Id.*

any child that can be proven to be the undisputed biological child of the deceased is considered a "child" for purposes of the Social Security Act.

3. Ninth Circuit: Gillett-Netting v. Barnhart

Gillett-Netting v. Barnhart[69] was the forerunner to *Capato*. The facts, holding, and rationale are all very similar, and *Capato* followed the precedent set by *Gillett-Netting*. The court found that the definition of "child" is broadly stated in section 416(e) of the statute, and that all undisputed biological children of the deceased qualify as a "child" for purposes of the act under section 416(e).[70] The court decided that the definitions under section 416(h) existed only for those with disputed parentage who were unable to qualify as a "child" under section 416(e).[71] The court concluded that the posthumously conceived children were "conclusively deemed dependent on Netting under the Act and [were] entitled to child's insurance benefits based on his earnings" because the children are legitimate under Arizona law, and thus deemed dependent under section 402(d)(3).[72]

4. Fourth Circuit: Schafer v. Astrue

The same sad facts arise in *Schafer v. Astrue*.[73] The Schafers were married in June of 1992 and received news that October that Mr. Schafer had cancer, treatment of which would require chemotherapy.[74] Mr. Schafer banked his sperm in December in expectation that the treatment could leave him sterile, but by March 1993 he had died from a heart attack.[75] In January 2000, almost seven years after his death, Mr. Schafer's surviving wife gave birth to a child conceived with the semen he had stored.[76] She filed for surviving child benefits through the Social Security Administration, which were initially granted by an administrative judge. The SSA Appeals Council reversed the administrative judge's original decision, and the Appeals Council's denial of benefits was upheld by the

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[69] Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004).

[70] *Id.* at 596.

[71] *Id.* at 596-97.

[72] *Id.* at 599 (citing 42 U.S.C. § 402(d)(3) (2006). This section deems a child dependent upon his father—or mother or adoptive parent—unless the child is illegitimate or has been adopted by someone else.).

[73] Schafer v. Astrue, 641 F.3d 49 (4th Cir. 2011).

[74] *Id.* at 51.

[75] *Id.*

[76] *Id.*

District Court because it also found that the child was not Mr. Schafer's "child" for purposes of the Social Security Act.[77]

On appeal, the Fourth Circuit focused its inquiry on "the relationship between the brief definition of 'child' in [section] 416(e)(1)—which is part of the only definition referred to in [section] 402(d)(1)'s basic grant of benefits—and [section] 416(h)'s more specific provisions."[78] After noting the stances taken by each side, Schafer's stance which reflected the *Gillett-Netting* ruling and the Social Security Administration's stance that every applicant's status must be determined by going through the analytical framework of section 416(h), this court took a new approach in the line of cases by applying the *Chevron* doctrine to analyze the propriety of the Social Security Administration's interpretation.[79] The court points out that "[i]t would be startling if Congress had failed to provide greater guidance on child status than that set forth in [section] 416(e)(1)."[80] This calls into question the heavy reliance placed upon that short section by both courts in *Gillett-Netting* and *Capato*. Instead of following suit, this court decides that where so much doubt exists about the logic of accepting section 416(e) as the threshold definition for a "child" of undisputed parentage, it only makes sense to look toward the more specific regulations outlined by the Act in section 416(h).[81] In turning to that section, the court is persuaded that section 416(h) applies to all cases because there is no limiting language that identifies it merely as an alternative means of eligibility; "[i]ndeed, everything about it suggests the opposite: it speaks of applying state intestacy law for purposes of the whole Act rather than for purposes of determining child status in disputed parentage cases, and it specifically addresses itself to the child status determination that must take place in evaluating every benefits application."[82] This indicates that the language anticipates all applications to go through the framework set out by section 416(h).

The *Schafer* opinion also departs from the other opinions in its exploration of the intent of the Social Security Act. It recognizes the purpose of the Act as having the "basic aim of primarily helping those children who lost support after the unanticipated death of a parent."[83] This purpose would not envelope posthumously conceived children as a class of beneficiaries because their conception and birth was done deliberately *after*

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[77] *Id.*
[78] *Id.* at 52.
[79] *Id.* at 53-54.
[80] *Id.* at 54.
[81] *Id.* at 55.
[82] *Id.* at 55-56.
[83] *Id.* at 58.

the father's death had already occurred, and with complete understanding of the consequences.

The court finds two avenues by which to reach the conclusion that the Social Security Administration's decision to deny benefits was appropriate. First, it found that the intent of the Act along with its language including all applicants within the section 416(h) framework led to the conclusion that all applicants must attain "child" status through one of the several channels in section 416(h). Alternatively, the court found that even if this reasoning was not the only possible reasoning, it must be upheld because the Social Security Administration's decisions must be affirmed due to the *Chevron* deference unless they are unreasonable.[84]

B. Iowa State Intestacy Law: 633.220 Afterborn Heirs—Time of Determining Relationship

> Heirs of an intestate, begotten before the intestate's death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived the intestate. With this exception, the intestate succession shall be determined by the relationships existing at the time of the death of the intestate.[85]

Although Iowa has since added a posthumous child statute on point, it is not retroactive, and the above statute is the closest applicable statute on record at the time Beeler gave birth to her child. The statute clearly refers to the conception of a child *before* the death of the decedent, thus disqualifying Beeler's child from intestate succession through Mr. Beeler under Iowa law.

IV. CASE ANALYSIS

The decision in *Beeler* is correct. A natural child must have inheritance rights under state law, or be eligible through one of the other section 416(h) channels, to qualify for benefits under the Social Security Act.[86] Alternatively, at a minimum, the Social Security Administration's interpretation is reasonable, deserves deference according to *Chevron*, and must be upheld on appeal.[87] The reasoning in *Beeler* closely tracks the reasoning in *Schafer* and these cases are more persuasive than *Gillett-Netting* and *Capato* because they examine the purpose of the Act, the

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[84] *Id.* at 63.

[85] IOWA CODE ANN. § 633.220 (West 2011).

[86] Beeler v. Astrue, 651 F.3d 954, 956 (8th Cir. 2011).

[87] *Id.* at 959-62.

reasons for and the structure of section 416(h), as well as the proper role of the circuit courts in reviewing these Social Security appeals in light of the *Chevron* precedent. Although the *Gillett-Netting* and *Capato* rationales are tempting to follow due to their simplicity, the opinions seem to have been crafted within the view of blinders that blocked out the scope of the law's purpose. The thorough examinations of the law in the *Schafer* and *Beeler* opinions are, therefore, more persuasive. The *Beeler* case emerges as the convincing alternative rationale to *Capato*, as the Supreme Court prepares to hear *Capato*[88] and *Beeler*[89] awaits a grant or denial of certiorari.

The *Beeler* decision's strength comes from the thorough examination of the law undertaken by the court to both interpret the Social Security Act[90] and determine the court's proper course of action in administrative law cases where the agency may be entitled to *Chevron* deference.[91] This approach supplies to distinct routes of reasoning that arrive at the same conclusion. When considering *Beeler* in comparison to the contrary decisions in *Gillett-Netting* or *Capato*, it becomes clear that those decisions lack depth and refuse to go beyond the initial analysis because doing so would have led to a different conclusion.

A. The Statutory Interpretation Approach

The *Capato* opinion asks, "why should we, much less why *must* we, refer to [section] 416(h) when [section] 416(e) is so clear, and where we have before us the undisputed biological children of a deceased wage earner and his widow[?]"[92] *Beeler* answers by explaining that

> [Section] 416(h) . . . plainly says that the Commissioner "shall" use state intestacy law in determining whether an applicant is the "child" of an insured individual "for purposes of this subchapter," and [section] 416(e) is part of the subchapter. If natural "child" in [section] 416(e) is further defined by

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[88] Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626 (3rd Cir. 2011), *cert. granted sub nom.*, Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 576 (U.S. Nov. 14, 2011) (No. 11-159).

[89] *Beeler*, 651 F.3d 954, *petition for cert. filed*, 2011 WL 5976275 (U.S. Nov. 23, 2011) (No. 11-667).

[90] *See id.* at 963-66 (outlining the court's interpretation of the relevant sections of 42 U.S.C. § 416 while explaining the flaws in the *Gillett-Netting* decision upon which many of Beeler's assertions were based).

[91] *See id.* at 959-62 (discussing the application of *Chevron* deference and explaining why Beeler's arguments against affording the Social Security Administration deference fail).

[92] *Capato*, 631 F.3d at 631.

> [section] 416(h), then Congress can incorporate the definitional provisions of [section] 416(h) without an explicit cross-reference to that subsection.[93]

The language of section 416(h) calls for the subsection to be applied across the board, not only in the cases that fail to meet the section 416(e) requirement; it "directs the Commissioner to apply state intestacy law '[i]n determining whether an applicant *is* the child' of an insured individual. Section 416(h)(2)(A) must be construed as a whole, and the first sentence is reasonably read as an all-encompassing directive for determining whether an applicant is a natural child."[94] Had the section been intended to apply only to those applicants of disputed parentage, the language would likely have been different, perhaps calling for state intestacy law to be applied in determining whether an applicant is deemed the child of an insured individual. Had section 416(h) been reserved only for those cases of disputed parentage, the subsection would so indicate. Instead, section 416(h) provides qualifications for every channel by which an applicant can become eligible for benefits, including undisputed biological children, and therefore, every applicant must go through the section 416(h) framework.

B. The Chevron *Deference Rationale*

The dispute between the application of section 416(h) is the only real area of contention between the split circuits. The Social Security Administration, the agency put in charge of administering the Social Security Act has made its interpretation clear: all applicants must attain "child" status through one of the channels enumerated in section 416(h).[95] The *Beeler* decision acknowledges the weight that should be given to the agency's interpretation of the Social Security Act in this context. The court finds that the *Chevron* deference applies to this case.[96] "Under *Chevron*, the agency's 'view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts."[97] The *Beeler* opinion walks through the *Chevron* two-step framework: (1) whether Congress delegated rule-making authority to the agency;[98] and if so (2) whether the

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[93] *Beeler*, 651 F.3d at 963.

[94] *Id.* at 963 (internal citations omitted).

[95] *See* Social Security Acquiescence Ruling 05-1(9); Gillett-Netting v. Barnhart; Application of State Law and the Social Security Act in Determining Eligibility for a Child Conceived By Artificial Means After an Insured Individual's Death—Title II of the Social Security Act, 70 Fed. Reg. 55656-01 (2005).

[96] *Beeler*, 651 F.3d at 962.

[97] *Id.* at 959 (quoting Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009)).

[98] *Id.* at 959-62 (discussing the authority delegated to the Social Security

agency's interpretation of the statute is reasonable.[99] "Here, the relevant regulations are the product of notice-and-comment rulemaking, and the regulations were issued pursuant to the Commissioner's statutory authority to promulgate rules that are 'necessary or appropriate to carry out' his functions and the relevant statutory provisions."[100] Therefore, the first prong of the *Chevron* test was met.

The second prong of the *Chevron* test was met because the agency's rationale is not contrary to the statute, and "[o]n its face, [section] 416(h)(2)(A) clearly directs the Commissioner to determine the status of a posthumously conceived child by reference to state intestacy law . . ."[101] "Beeler contends that a biological child is necessarily a 'child' under [section] 416(e), and that [section] 416(h) is thus irrelevant to B.E.B's situation."[102] This is arguably true. However, as previously noted, the *Chevron* deference calls for the courts to defer to the agency if its interpretation of the statute is merely reasonable. It need not be the only reasonable interpretation in order to command deference.

Neither of the opposing circuits opinions venture to decide that the Social Security Administration's interpretation is unreasonable. The *Gillett-Netting* opinion does not even mention the *Chevron* issue, and the *Capato* opinion refuses to go beyond section 416(e) to reach the *Chevron* issue. In a footnote to its opinion, the *Capato* court explained "[b]ecause we can resolve the issue based on our analysis of Congress' 'unambiguously expressed intent' in the statutory language, we need not determine whether the Commissioner's interpretation is a permissible construction of the statute."[103] The *Capato* court, of course, is referring to its decision that satisfying the first brief definition of "child" found in section 416(e) is all that is necessary to satisfy eligibility requirements to be a "child" for purposes of the Act. If only it were so simple to end an inquiry into the law by stopping where it is convenient. Surely, section 416(e) was written to give a definition of "child," and it does not require the reader to look further, but it also does not inform the reader that it can end the inquiry. Such a simplistic approach to the tax code, for example, would yield unreliable results, and would not be acceptable. Likewise, it is not an acceptable approach to the Social Security Act. The *Beeler* opinion is

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Administration).

[99] *Id.* at 962-64 (discussing the reasonableness of the Social Security Administration's interpretation).

[100] *Id.* at 959-60.

[101] *Id.* at 963.

[102] *Id.*

[103] Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 631 n.5 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).

much more persuasive because it considers the whole picture rather than finding a convenient stopping place in order to avoid the complexities of the law. The court also acknowledges the agency's decision and thoughtfully affirms it.

C. The Court Failed to Examine the Purpose of the Act

The court in *Beeler* could have done a more thorough job exploring the purpose of the legislation as a rationale in support of finding that posthumously conceived children are not eligible for Social Security survivor benefits. *Schafer* was quoted at the end of the opinion when the *Beeler* court noted that, "the Act's 'basic aim of primarily helping those children who lost support after the *unanticipated death* of a parent.'"[104] Incorporating this valid argument into the rationale of its decision, however, could have operated in a way to direct the reader's attention to zoom out of the minutiae of sorting through code subsections and remind the reader of the actual context of the argument—that someone is seeking survivor benefits for a child who was not in existence at the time of the deceased's death. The benefits exist as a safety net to protect children who depend on their parent for support. When that parent unexpectedly passes away, that support is yanked out from under the child, so the SSA steps in to help meet the needs that had been formerly been supplied by the parent.[105] The *Schafer* opinion did a much better job making this connection for the reader:

> Posthumously conceived children, however, differ from members of the core beneficiary class in two ways. First, they necessarily could not have relied on the wage earner's wages prior to his death. Second, they generally come into being *after* it is clear that one of the parents will not be able to support the child in the ordinary way during the child's lifetime, meaning that the survivorship benefits would serve a purpose more akin to subsidizing the continuance of reproductive plans than to insuring against unexpected losses.[106]

Here, Beeler was afforded the opportunity, and did take, the responsible steps of being sure she had a decent job and stable home in place before attempting to conceive a child. Beeler certainly did this so she would be sure that she had the necessary supports in place and the means necessary to raise a child. Beeler's scenario is a stark contrast to the sudden loss of a coal miner who was the bread winner for his three school-age children; a

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[104] *Beeler*, 651 F.3d at 966 (quoting Schafer v. Astrue, 641 F.3d 49, 58 (4th Cir. 2011).

[105] *See Schafer*, 641 F.3d at 58.

[106] *Id.* at 58-59.

scenario that conjures the precise reason that Social Security benefits exist for surviving children. The *Beeler court* could have supported its decision by including that the purpose of benefits is not to preserve the chance to have a family, but to insure against unexpected loss. The *Beeler* opinion would have only been more persuasive had it touched on these issues to reinforce its rationale.

D. Public Policy

The *Beeler* decision comports with public policy. Social Security survivor's benefits exist, undoubtedly, due to a public calling for a safety net for those instances where providers die unexpectedly, leaving dependents without support. This decision does not hamper the effectiveness of that program, nor does it impact the delivery of benefits to those to whom they are intended. Indeed, it protects children who were born during their father's lifetime from having their benefits eroded by additional beneficiaries conceived years later with whom the total possible benefits may ultimately be divided.

> [T]he Act limits the total benefits payable from one employment record. *See* 42 U.S.C. § 403(a)(1). As a result, where an additional child claims benefits from a record, children already claiming from it could see a reduction in their benefits. Though the additional benefits would generally stay in the same family, it remains true that existing children, the Act's core intended beneficiaries, could receive proportionately less support. Congress designed the Act with those children in mind, and the SSA's interpretation best protects their interests.[107]

The *Beeler* decision, thereby, reinforces public policy by protecting the core intended beneficiaries of Social Security survivor benefits.

The decision also comports with public policy concerns because the Social Security Administration and the courts, in their role in the appeals process, are entrusted to carry out the Social Security Act efficiently, fairly, and as intended. Many taxpayer dollars go into the system and it is important that they are paid out according to law. A finding that would allow posthumously conceived children of undisputed parentage to receive benefits would skew the aim of the program in a way that allows a certain group of individuals to, in essence, allocate their interest in Social Security benefits to their potential post-mortem progeny. Again, this does not jibe with the intent of these benefits to be implemented as a social safety net, and as such, the Social Security Administration's funneling of money to these claims would undermine public policy.

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[107] *Id.* at 59.

V. CONCLUSION

Posthumous conception is a great option for a widow who wishes to actualize the family that she had planned with her husband prior to his death. Couples who have the understanding of a need to plan ahead and are able to do so may find comfort in that option. But does taking advantage of such an opportunity mean that the resulting children qualify for Social Security survivor benefits? The *Beeler* decision was surely a difficult one to make, but it states the correct conclusion. Children who are the product of posthumous conception are not eligible for Social Security survivor benefits.[108] *Beeler* explains that the framework set out in section 416(h) of the Act applies to all applicants for benefits, whether their parentage is disputed or not.[109] This is clearly a better reading of the statute than that detailed in the Third Circuit's *Capato* decision.[110] There, the court was satisfied with a superficial reading of the statute that ended the inquiry simply with a definition of "child" in section 416(e).[111] Clearly, section 416(h) directs that all applicants be evaluated to determine the relationship they have to the insured, finding eligibility for natural born children only if they would have inheritance rights under state law.[112] This interpretation excludes most posthumously conceived children from eligibility because it requires that they meet their state's specific requirements for inheritance rights by posthumously conceived children—if such a law even exists in that child's state.

If that interpretation is not satisfactory, the *Beeler* decision also explains that due to the applicability of *Chevron* deference, the Social Security Administration's interpretation should be upheld.[113] The decision details how Congress delegated rulemaking power to the Social Security Administration[114] and how the agency's interpretation was reasonable.[115] Where these two factors exist, the court's role is to affirm the agency's decision.[116] Neither *Capato* nor *Gillett-Netting* ventured to assert that the SSA's interpretation was unreasonable, and neither addressed the *Chevron*

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[108] *Beeler*, 651 F.3d at 966.

[109] *Id.* at 963.

[110] Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626 (3rd Cir. 2011) (*cert. granted sub nom.*, Astrue v. Capato *ex rel.* B.N.C., 132 S.Ct. 576 (U.S. Nov. 14, 2011) (No. 11-159)).

[111] *Id.* at 631.

[112] *Beeler*, 651 F.3d at 963-64.

[113] *Id.* at 966.

[114] *Id.* at 959-60.

[115] *Id.* at 963-64.

[116] *Id.* at 959-60.

issue head-on. Finally, "whether the granting of child's insurance benefits to . . . a posthumously conceived child [] would further the purposes of the Social Security Act is debatable, given the Act's 'basic aim of primarily helping those children who lost support after the *unanticipated death* of a parent.'"[117] Considering this purpose of the Act, it is difficult to see why survivor benefits would be awarded to a child whose conception was deliberate and undertaken long after the death of the deceased parent.

[117] *Id.* at 966 (quoting Schafer v. Astrue, 641 F.3d 49, 58 (4th Cir. 2011)).

State v. Fields: Should a Declarant's Professed Memory Loss at Trial Satisfy the "Unavailability" Requirement Under Hawaii's Confrontation Clause?

Onaona P. Thoene and Andrea K. Ushijima*

I. INTRODUCTION

In State v. Fields,[1] defendant Fields was convicted on the strength of hearsay.[2] Although the hearsay declarant appeared as a witness at trial, she claimed that she did not remember the incident in question.[3] The prosecution was then able to admit her incriminating out-of-court statements into evidence.[4] On appeal, Fields argued that the admission of these hearsay statements violated his Confrontation Clause right under the state and Federal constitutions.[5]

A four-to-one Hawai'i Supreme Court majority concluded Fields's constitutional right to confront his witness is not violated when admitting the out-of-court statement of a declarant that appears at trial, but testifies she does not recall making the statement. Although several jurisdictions across the nation agree with the majority's holding, the *Fields* dissent casts doubt on the majority's reasoning pertaining to the Hawai'i confrontation clause.[6]

The dispute between the majority and dissent centered on whether the declarant was "unavailable" for purposes of the confrontation clause when she testified that she could not remember making the out-of-court statement in controversy.[7] The majority maintained that the declarant's presence at trial satisfied the defendant's right to confrontation, precluding the

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1 115 Haw. 503, 168 P.3d 955 (2007).

2 *Id.* at 506, 168 P.3d at 958.

3 *Id.* at 507-09, 168 P.3d at 959-61.

4 *Id.* at 509, 168 P.3d at 961.

5 *Id.*

6 *Id.* at 545, 168 P.3d at 997 (Acoba, J., dissenting).

7 *Id.* at 547, 168 P.3d at 999.

Crawford analysis otherwise necessary for the prosecution to admit the testimonial hearsay.[8] Justice Acoba's dissent argued that the declarant's presence at trial *did not* satisfy the defendant's right to confrontation, because the defense was unable to cross-examine the declarant about her out-of-court statement by virtue of her memory loss.[9] Justice Acoba specifically argued that (1) the majority's semantic differentiation between a declarant's simultaneous "unavailability" as a witness for the prosecution and "availability" for cross-examination is illogical and unwarranted; and (2) the majority's decision is inconsistent with the court's prior interpretation of the Hawai'i confrontation clause.[10]

Fields illustrates a scenario in which a witness's constitutional "unavailability" is essentially unclear. On one hand, the witness's presence at trial makes her physically "available" for cross-examination.[11] On the other hand, the witness's memory loss concerning the out-of-court testimonial statement makes her effectively "unavailable" for cross-examination for purposes of determining the truthfulness of the statement.[12]

Part II of this note provides an overview of federal and state confrontation clause jurisprudence, and the Hawai'i Supreme Court's application of law in *Fields*. Part III analyzes the "unavailability" requirement under *Crawford*. Part IV surveys other jurisdictions that have determined whether a witness's memory loss at trial implicates the confrontation clause. Part V analyzes the term "meaningful cross-examination" under *Fields*. Part VI assesses the practical implications of *Fields*. Finally, Part VII considers the majority's desire for accurate fact-finding with the dissent's desire for true cross-examination of the witness's out-of-court statement. Part VII also proposes that in the narrow case where a declarant claims memory loss at trial, (1) the witness must either remember the underlying events or making the statement; and (2) a witness's constitutional availability shall be determined on a case-by-case basis.

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[8] *Id.* at 528, 168 P.3d at 980 (majority opinion).

[9] *Id.* at 545, 168 P.3d at 997 (Acoba, J., dissenting).

[10] *Id.* at 550-51, 168 P.3d at 1002-03.

[11] *Id.* at 526, 168 P.3d at 978 (majority opinion).

[12] *Id.* at 524, 168 P.3d at 976.

II. THE CONFRONTATION CLAUSE UNDER THE UNITED STATES AND HAWAI'I CONSTITUTIONS, AND THEIR APPLICATION TO *FIELDS*

The Sixth Amendment of the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[13] Article I, Section Fourteen of the Hawai'i Constitution is virtually identical.[14]

A. Interpreting the Federal Confrontation Clause: United States Supreme Court Jurisprudence

In 1895, the United States Supreme Court stated in *Mattox v. United States*[15] that the primary purpose of the Confrontation Clause is "to prevent depositions or ex parte affidavits . . . being used against the [accused] in lieu of a personal examination and cross-examination of the witness . . . ."[16] Witness examination allows the accused the opportunity:

> [N]ot only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[17]

Mattox then acknowledged that this Confrontation Clause safeguard to the accused "must occasionally give way to considerations of public policy and the necessities of the case. . . . The rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."[18]

In 1980, the Court decided in *Ohio v. Roberts*[19] that the Confrontation Clause excludes statements made by a declarant not present at trial *unless* (1) the declarant is unavailable and (2) the prior testimony bears an "indicia of reliability."[20] "Reliability" is established when the evidence "falls within a firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."[21] The Court reaffirmed "that the Confrontation Clause

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[13] U.S. CONST. amend. VI.

[14] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against the accused . . . ." HAW. CONST. art I, § 14.

[15] 156 U.S. 237 (1895).

[16] *Id.* at 242.

[17] *Id.* at 242-43.

[18] *Id.* at 243.

[19] 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

[20] *Id.* at 66.

[21] *Id.*

reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination.'"[22]

In 2004, the Court refused to follow *Roberts* in *Crawford v. Washington*.[23] *Crawford* examined the doctrinal history of the Confrontation Clause,[24] and interpreted the Clause as being applicable only to hearsay that is testimonial in nature.[25] "[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[26] Thus, the Court created a distinction between testimonial and non-testimonial hearsay, and retained the requirement for unavailability.

Crawford discharged the *Roberts* "reliability" test because "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."[27] The Court recognized that the ultimate goal of the Confrontation Clause is reliability, but that this goal is obtained procedurally "by testing in the crucible of cross-examination."[28] The Court criticized the *Roberts* test because it conversely "allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability"[29] and noted that "reliability is an amorphous, if not entirely subjective, concept."[30]

In short, the applicable Confrontation Clause test under *Crawford* requires (1) unavailability of the witness and (2) a prior opportunity for cross-examination. If satisfied, testimonial hearsay may be admitted when the declarant is not present at trial.[31] The *Crawford* Court did not explicitly define "unavailability" but made clear the principles of contemporary Confrontation Clause jurisprudence.

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[22] *Id.* at 63 (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965)) (alteration in original) (footnote omitted).

[23] 541 U.S. 36 (2004).

[24] *Id.* at 42-50.

[25] *Id.* at 51.

[26] *Id.* at 53-54.

[27] *Id.* at 61.

[28] *Id.*

[29] *Id.* at 62.

[30] *Id.* at 63.

[31] *See id.* at 53-54.

B. The "Unavailability" Requirement Under the Confrontation Clause

A textual reading of the Confrontation Clause reveals no explicit requirement that the declarant's unavailability must be shown to satisfy the Confrontation Clause.[32] Unavailability is instead an evidentiary concept required by federal and state rules of evidence to admit certain hearsay statements.[33] As discussed *supra*, the core purpose of the Confrontation Clause is to protect criminal defendants from a trial solely or primarily based on *ex parte* examinations, such as affidavits and depositions,[34] and to establish an adversarial system, rather than an inquisitorial system.[35] Under modern analyses,[36] a declarant who claims memory loss is deemed unavailable as a witness for the prosecution despite being physically present in court, thus available for cross-examination. Consequently, the defendant's confrontation right is satisfied simply by the declarant taking the stand, regardless of whether the declarant is able to testify about the subject matter of the out-of-court statement. Under this post-*Crawford* interpretation of the "unavailability", constitutional unavailability is easier to satisfy than evidentiary availability. Commentary to Hawai'i Rule of Evidence 804 provides that "[t]he right of an accused under the Sixth Amendment to the U.S. Constitution and Article I, [§] 14, of the Hawai'i Constitution, to confront and to cross-examine witnesses against him

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[32] *See* U.S. CONST. amend. VI.

[33] *See* Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 720 (1993); *see also* FED. R. EVID. 804; HAW. R. EVID. 804.

[34] *See* State v. Fields, 115 Haw. 503, 513, 168 P.3d 955, 965 (2007) ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.") (quoting *Crawford*, 541 U.S. at 50); *see also* Mosteller, *supra* note 33, at 736.

[35] Mosteller, *supra* note 33, at 752.

[36] *See, e.g.*, *Fields*, 115 Haw. at 528, 168 P.3d at 980 (holding that "admission of a prior out-of-court statement does not violate the Hawai'i Constitution's confrontation clause where the declarant appears at trial and the accused is afforded a meaningful opportunity to cross-examine the declarant about the subject matter of that statement."); State v. Delos Santos, 124 Haw. 130, 145, 238 P.3d 162, 177 (2010) (holding that "under *Crawford*, a witness who appears at trial and testifies satisfies the confrontation clause, even though the witness claims a lack of memory that precludes them from testifying about the subject matter of their out-of-court statement."); *Crawford*, 541 U.S. at 59 n.9 (2004) ("[W]hen a declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.").

mandates a more rigorous showing of unavailability in criminal proceedings than in civil litigation."[37]

Under the Sixth Amendment, the accused's right is the right *to be confronted* by the witness or accuser. To wit, it is the accuser's or witness's responsibility to literally confront the accused of his alleged wrongdoing.[38] If, however, a declarant is unable to recall the incident in question, or is unable to recall making the statement, how can a declarant actually confront the accused at trial? This question is discussed in Part V of this note.

C. Interpreting the Hawai'i Confrontation Clause: Hawai'i Supreme Court Jurisprudence

The Fifth Circuit Court of the State of Hawai'i tried Fields in 2002,[39] during the pre-*Crawford* era, and the Hawai'i Supreme Court decided *Fields* in 2007, in the post-*Crawford* era. Therefore, *Fields* considered both Hawaii's prior common law interpretation of the state confrontation clause, and the "new" *Crawford* standard, interpreting the Federal Confrontation Clause.

*1. Pre-*Crawford *application of the "unavailability" requirement under the Hawai'i Confrontation Clause*

In *State v. Ortiz*,[40] defendant Ortiz was convicted for physically abusing his wife, Emily. Although Emily was absent at trial, the trial court nevertheless admitted her hearsay statements, recounted by a police officer and by her father at trial.[41] On appeal, Ortiz argued that his confrontation right was violated when the court admitted the hearsay testimony without demonstrating the unavailability of the declarant.[42] The Hawai'i Supreme Court found that Ortiz's right to confrontation under the Hawai'i Constitution was violated because "a showing of the declarant's unavailability is necessary to promote the integrity of the fact finding

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[37] HAW. R. EVID. 804 cmt. Haw. R. Civ. P. 32(a)(3)(B) defines unavailability in terms of physical presence: a deponent is unavailable if he resides on a different island and that the proponent of his testimony is unable to procure his attendance.

[38] The Sixth Amendment does not literally state that the accused has the right *to confront* witnesses against him, although that is how the clause is interpreted. *See* U.S. CONST. amend. VI. ("to be confronted with the witnesses against him").

[39] *See State v. Fields*, 120 Haw. 73, 74, 201 P.3d 586, 587 (App. 2005).

[40] 74 Haw. 343, 845 P.2d 547 (1993).

[41] *Id.* at 347, 845 P.2d at 550.

[42] *Id.* at 356-57, 845 P.2d at 554.

process and to ensure fairness to defendants."[43] The court vacated and remanded Ortiz's conviction.[44]

In *State v. McGriff*,[45] defendant McGriff allegedly set fire to his own nightclub to obtain insurance proceeds for the damage.[46] The trial court admitted incriminating out-of-court statements made by co-defendant Ingalls, who invoked his Fifth Amendment rights,[47] to co-defendant Butler.[48] McGriff argued that the admission of Ingalls's out-of-court statements to Butler violated his right to confrontation.[49]

In its analysis, the *McGriff* court noted that "unavailability" is not always required to satisfy the Federal Confrontation Clause.[50] The court then turned to the necessity of the "unavailability" requirement under *Ortiz*, stating "we have parted ways with the United States Supreme Court which has held that the sixth amendment confrontation clause does not necessitate a showing of unavailability for evidence falling within certain hearsay exceptions."[51] The court ultimately concluded that both the "unavailability" and "reliability" prongs of the confrontation clause analysis were satisfied in McGriff's case. The opinion made it clear, however, that the "unavailability" determination was an absolute requirement under the Hawai'i confrontation clause, whereas it was not always necessarily so under the Federal Confrontation Clause.[52]

State v. Apilando[53] involved a defendant convicted of sexual assault in the third degree.[54] The prosecution introduced the child victim's videotaped testimony in lieu of live testimony, merely representing that "[if] I placed the child on the witness stand, I cannot tell you with certainty that she'll be able to recollect the event."[55] The Hawai'i Supreme Court

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[43] *Id.* at 362, 845 P.2d at 556.

[44] *Id.* at 364, 845 P.2d at 557.

[45] 76 Haw. 148, 871 P.2d 782 (1994).

[46] *Id.* at 151-52, 871 P.2d at 785-86.

[47] *Id.* at 153, 871 P.2d at 787.

[48] *Id.* at 154, 871 P.2d at 788.

[49] *Id.* at 155, 871 P.2d at 789.

[50] *Id.* at 156, 871 P.2d at 790 (citing United States v. Inadi, 475 U.S. 387 (1986) (statements of a non-testifying co-conspirator may be introduced against the defendant regardless of the declarant's availability at trial)); *Id.* (quoting White v. Illinois, 502 U.S. 346, 354 (1992) ("[U]navailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding[.]")).

[51] *McGriff*, 76 Haw. at 156, 871 P.2d at 790.

[52] *Id.*

[53] 79 Haw. 128, 900 P.2d 135 (1995).

[54] *Id.* at 131, 900 P.2d at 138.

[55] *Id.* at 138, 900 P.2d at 145 (alterations in original).

stated, "[u]navailability may be demonstrated by . . . loss of memory"[56] but ruled that Apilando's right to confrontation was violated when the trial court admitted the videotaped testimony "without requiring the prosecution show that the complainant, in fact, could not or did not want to recall the events of alleged assault."[57] Consequently, the Hawai'i Supreme Court vacated Apilando's conviction, and remanded to the lower court.[58]

In *State v. Sua*,[59] defendant Sua was convicted of robbery in the first degree.[60] Witness Gooman testified about the alleged robbery before the grand jury, but at trial, Gooman claimed that he had no recollection of the event.[61] The trial court admitted Gooman's grand jury transcript into evidence.[62]

Based on *Apilando*, the Hawai'i Supreme Court determined Gooman was unavailable for purposes of the confrontation clause by virtue of his claimed memory loss at trial.[63]

2. *Post-*Crawford *application of the "unavailability" requirement to* Fields

In *Fields*, defendant Reginald Fields was convicted of abuse of a family or household member in an alleged incident with then—girlfriend, Melissa Staggs.[64] At trial, Staggs testified to certain facts that she recalled on the night of the alleged abuse, such as drinking beer, but claimed to have no memory of the abuse itself.[65] Staggs also testified that she did not recall making a statement to a police officer regarding the incident.[66] The trial court then admitted the police officer's testimony of Staggs's out-of-court statement.[67] It was undisputed that Fields was "convicted on the strength of hearsay."[68]

In a sixty-two page opinion, the *Fields* majority explained that a witness's presence at trial and meaningful opportunity for

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[56] *Id.* at 137, 900 P.2d at 144 (emphasis omitted).
[57] *Id.* at 138, 900 P.2d at 145.
[58] *Id.* at 143, 900 P.2d at 150.
[59] 92 Haw. 61, 987 P.2d 959 (1999).
[60] *Id.* at 64, 987 P.2d at 962.
[61] *Id.* at 65-67, 987 P.2d at 963-65.
[62] *Id.* at 65-66, 987 P.2d at 963-64.
[63] *Id.* at 73, 987 P.2d at 971.
[64] State v. Fields, 115 Haw. 503, 506, 168 P.3d 955, 958 (2007).
[65] *Id.* at 507-09, 168 P.3d at 959-61.
[66] *Id.* at 559-60, 168 P.3d at 1011-12 (Acoba, J., dissenting).
[67] *Id.* at 508, 168 P.3d at 960 (majority opinion).
[68] *Id.* at 506, 168 P.3d at 958.

cross-examination satisfies the defendant's right to confrontation under both the Federal and Hawai'i constitutions.[69] Therefore, despite Staggs's professed memory loss about the actual incident, she was nevertheless "available" for cross-examination because she responded to some of the questions, and the defense "certainly had the opportunity to . . . cast doubt on Staggs' earlier out-of-court statement, but voluntarily declined to do so by terminating the cross-examination."[70] The majority concluded that the confrontation clause is satisfied when the witness is available for cross-examination, and therefore, Fields's right to confrontation was not implicated when the trial court admitted Staggs's prior out-of-court statement. Addressing *Crawford*, the majority stated:

> We read *Crawford* to unequivocally require that the admissibility of testimonial hearsay be governed by the following standard: where a hearsay declarant's unavailability has been shown, the testimonial statement is admissible for the truth of the matter asserted only if the defendant was afforded a prior opportunity to cross-examine the absent declarant about the statement.[71]

Fields went on to say that *Crawford* "leaves no room for doubt that the federal confrontation clause is not concerned with the admission of an out-of-court statement where the declarant *appears at trial and is cross-examined about that statement.*"[72]

In *State v. Delos Santos*,[73] decided in 2010, the Hawai'i Supreme Court stated "[a]lthough *Fields* is ambiguous regarding whether a witness must recall the subject matter of her statements, our adoption of *Crawford* as the test for whether a witness 'appears at trial for cross-examination' resolved this ambiguity."[74] *Delos Santos* held that "a witness who appears at trial and testifies satisfies the confrontation clause, even though the witness claims a lack of memory that precludes them from testifying about the *subject matter* of their out-of-court statement."[75] Justice Acoba, concurring in result only,[76] held steadfast to his earlier position in *Fields*, that the Hawai'i confrontation clause is implicated where a witness appears at trial

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[69] *Id.* at 528, 168 P.3d at 980.
[70] *Id.* at 523, 168 P.3d at 975.
[71] *Id.* at 516, 168 P.3d at 968 (citing Crawford v. Washington, 541 U.S. 36, 68 (2004)).
[72] *Id.* at 517, 168 P.3d at 969 (emphasis added).
[73] 124 Haw. 130, 238 P.3d 162 (2010).
[74] *Id.* at 145, 238 P.3d at 177.
[75] *Id.* (emphasis added).
[76] *Id.* at 150, 238 P.3d at 182.

for cross-examination, but is unable to remember the subject matter of his out-of-court statement.[77]

D. Summary: The Hawai'i Confrontation Clause

The Hawai'i Supreme Court has made clear that "under the confrontation clause of the Hawai'i Constitution, a showing of the declarant's unavailability is necessary to promote the integrity of the fact finding process and to ensure fairness to defendants."[78] In Hawai'i, unavailability is required regardless of whether the out-of-court statement is testimonial or non-testimonial.[79]

Thus far, courts have narrowly focused on the Framers' intent when interpreting the unavailability requirement under the Confrontation Clause. Courts have required only that a declarant be physically present at trial in order to be available for confrontation purposes.[80]

III. ANALYSIS OF THE "UNAVAILABILITY" REQUIREMENT UNDER *CRAWFORD*

When analyzing "unavailability" for the purposes of the Confrontation Clause, both the *Fields* majority and dissent refer to *Crawford's* footnote nine as instructive.[81]

> [W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.[82]

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[77] *Id.* (Acoba, J., concurring).

[78] State v. Sua, 92 Haw. 61, 71, 987 P.2d 959, 969 (1999) (quoting State v. Lee, 83 Haw. 267, 276, 925 P.2d 1091, 1100 (1996)).

[79] *See* State v. Fields, 115 Haw. 503, 527-28, 168 P.3d 955, 979-80 (2007).

> Under Hawai'i's confrontation clause, if an out-of-court statement is testimonial, it is subject to the *Crawford* analysis, which mandates that (1) the witness be "unavailable," and (2) the accused had a prior opportunity for cross-examination. If an out-of-court statement is non-testimonial, it is subject to the *Roberts* analysis, requiring a showing that (1) the declarant is "unavailable," and (2) the statement bears some indicia of reliability. Thus, the "unavailability" paradigm is retained in both testimonial and nontestimonial situations.

Id.

[80] *See* Crawford v. Washington, 541, U.S. 36, 59 n.9 (2004); *Fields*, 115 Haw. at 528, 168 P.3d at 980; *Delos Santos*, 124 Haw. at 147, 238 P.3d at 179.

[81] *Fields*, 115 Haw. at 518, 547, 168 P.3d at 970, 999.

[82] Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).

The *Fields* majority interpreted footnote nine—"when a declarant *appears* for cross-examination at trial, the Confrontation Clause places *no constraints at all* on the use of his prior testimonial statements"—to mean that the declarant's physical presence at trial satisfies the defendant's confrontation right, making the *Crawford* analysis inapplicable.[83] In other words, the majority's confrontation analysis first determines whether the declarant appeared at trial and is meaningfully cross-examined.[84] If so, the defendant's confrontation right is satisfied, ending the analysis.[85] If not, the second step considers whether the out-of-court statement is testimonial or non-testimonial.[86] If testimonial, *Crawford* applies, and if non-testimonial, *Roberts* applies.[87]

The *Fields* dissent conversely reasoned that footnote nine was ambiguous because the "clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it"[88] can be construed to mean that the declarant "must be able to responds substantively to defend the statement or to explain it."[89] The dissent instead argued that the confrontation analysis should simply begin, as it did in *Sua*, with the threshold question of whether the declarant is "unavailable."[90] The dissent maintained that the majority's position is inconsistent with *McGriff* and *Sua*, constituting an improper departure from the court's prior interpretation of Hawaii's confrontation clause.[91]

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[83] *Fields*, 115 Haw. at 517, 168 P.3d at 969 (*Crawford* "leaves no room for doubt that the federal confrontation clause is not concerned with the admission of an out-of-court statement where the declarant appears at trial and is cross-examined about that statement.").

[84] *Id.* at 528, 168 P.3d at 980.

> [O]ur present holding is no more, and no less, than that a trial court's admission of a prior out-of-court statement does not violate the Hawai'i Constitution's confrontation clause where the declarant appears at trial and the accused is afforded a meaningful opportunity to cross-examine the declarant about the subject matter of that statement. In such situations, the cross-examination satisfies the accused's right of confrontation and neither the *Crawford* analysis nor the *Roberts* analysis need be employed.

Id.

[85] *Id.*

[86] *See id.*

[87] *Id.*

[88] *Id.* at 556 n.32, 168 P.3d at 1008 n.32 (Acoba, J., dissenting) (quoting Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)) (internal quotation omitted).

[89] *Id.* at 548 n.24, 168 P.3d at 1000 n.24.

[90] *Id.* at 549, 168 P.3d at 1001.

[91] *Id.* at 555, 168 P.3d at 1007.

A. Fields Interprets the Hawai'i Confrontation Clause as Offering No Broader Protection than the Federal Clause when the Declarant Appears for Cross-Examination at Trial

The *Fields* majority construed a defendant's confrontation right under the Hawai'i Constitution as virtually identical to one's confrontation right under the United States Constitution, pursuant to *Crawford*.[92] Justice Acoba disagreed, maintaining that the Hawai'i Constitution affords the defendant broader protection of his confrontation rights than the U.S. Constitution.[93] Justice Acoba cited *Ortiz* and *McGriff* for the proposition that the Hawai'i confrontation clause expands on the protections afforded under the Federal Clause.[94]

The distinction between the state and Federal Confrontation Clause is important to the dissent's "unavailability" argument,[95] but otherwise has little bearing on the majority's analysis. The majority acknowledges that:

> [T]he "unavailability" paradigm embedded within this jurisdiction's version of the *Crawford* analysis, as with this jurisdiction's version of the *Roberts* analysis, must be interpreted to include a witness' lack of memory, pursuant to the greater protection afforded by the Hawai'i Constitution as recognized by this court in *Sua*.[96]

But, the majority declined to reach the "unavailability" determination under *Crawford* due to the declarant's appearance at trial, thus precluding the *Crawford* analysis.[97]

Justice Acoba's distinction between the state and federal confrontation clauses does, however, highlight that the court could have expanded the scope of its constitutional provision in the interest of fairness to state defendants, as it has chosen to do so in the past.

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[92] *Id.* at 517, 168 P.3d at 969 (majority opinion).

[93] *Id.* at 549, 168 P.3d at 1001 (Acoba, J., dissenting).

[94] *See* State v. Ortiz, 74 Haw. 343, 845 P.2d 547 (1993); State v. McGriff, 76 Haw. 148, 871 P.2d 782 (1994).

[95] *Fields*, 115 Haw. at 549, 168 P.3d at 1001.

[96] *Id.* at 528 n.14, 168 P.3d at 980 n.14.

[97] *Id.* at 528, 168 P.3d at 980. "[C]ontrary to the dissent's assertions, we have not extinguished the 'unavailability' requirement with respect to testimonial situations." *Id.* at 527, 168 P.3d at 979.

B. The Distinction Between "Available for Cross-Examination" for Purposes of the Confrontation Clause and "Unavailable for the Prosecution" by Reason of Loss of Memory is Not Logical

Traditionally, unavailability is understood to mean that the declarant is not physically present at trial.[98] Under modern evidentiary rules, unavailability is not solely defined by physical absence from trial, but also "require[s] that the declarant's testimony be unobtainable at trial."[99]

Unavailability is not required as the basis for admitting all out-of-court statements, but is a requirement in those situations where the government seeks to admit a declarant's statement pursuant to one of Rule 804's hearsay exceptions under the Federal Rules of Evidence and the Hawai'i Rules of Evidence.[100]

The unavailability requirement is referred to as the "rule of necessity."[101] The rule of necessity embodies the Framers' preference for face-to-face confrontation and requires that the prosecution demonstrate the necessity of introducing the prior out-of-court statement by either producing the declarant at trial, or by showing that the declarant is unavailable.[102] The rule of necessity also demonstrates the preference for live testimony at trial over hearsay, and hearsay over a complete loss of the evidence.[103]

In *United States v. Inadi*,[104] the United States Supreme Court stated that "[w]hen two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence."[105] Thus, the purpose of evidence rules

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[98] Mosteller, *supra* note 33, at 720. "[U]navailability requires that the prosecution attempt but fail to elicit the testimony from the witness." Mosteller, *supra* note 30, at 761.

[99] Mosteller, *supra* note 33, at 720; *see also* FED. R. EVID. 804(a); HAW. R. EVID. 804(a).

[100] *See* FED. R. EVID. 804(b) and HAW. R. EVID. 804(b) (requiring that declarant be unavailable in order to admit former testimony, dying declarations, statements against interest, statements of personal or family history, statements of recent perception, statements by child, and forfeiture by wrongdoing); *see also* United States v. Inadi, 475 U.S. 387, 394 (1986) (stating that the unavailability rule for prior testimony was established in Mattox v. United States, 156 U.S. 237 (1895)).

[101] State v. Fields, 115 Haw. 503, 524, 168 P.3d 955, 976 (2007); *see also* HAW. R: EVID. 804 cmt. (describing the "principle of necessity").

[102] *Fields*, 115 Haw. at 524, 168 P.3d at 976; *see also* HAW. R. EVID. 804 cmt.

[103] HAW. R. EVID. 804 cmt ("The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay . . . is preferred over complete loss of the evidence of the declarant.") (internal quotation marks omitted).

[104] 475 U.S. 387.

[105] *Id.* at 394.

is to acquire the best evidence, and the purpose of the Confrontation Clause is to ensure face-to-face delivery of that evidence.[106]

Based on these principles, there are two problems with *Fields*.[107] First, if one of the purposes of the confrontation clause is to acquire the best evidence available, holding that the declarant's physical presence alone at trial satisfies the defendant's confrontation right is not sufficient.[108] By simply producing the declarant at trial, the prosecution is able to admit the declarant's prior out-of-court statement in lieu of the superior evidence, the declarant's live testimony at trial.[109] The effect is that the declarant's physical presence alone at trial is sufficient to satisfy the defendant's constitutional right to confrontation, and will not bar the admission of hearsay statements against the defendant.

Second, *Fields* arbitrarily separates a single declarant's availability status into two categories: (1) constitutional availability and (2) evidentiary availability. *Fields* stated that:

> It is not contradictory to suggest that a witness may be constitutionally "unavailable" as a witness for the prosecution by virtue of that witness' claimed loss of memory at trial as to a prior out-of-court statement, yet simultaneously semantically "available for cross-examination" as a result of the witness' physical presence on the witness stand.[110]

A plain reading of the *Fields* holding does, however, suggest that it is contradictory for the same witness to be simultaneously constitutionally

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[106] *See* Mosteller, *supra* note 33, at 722-23 ("The prosecution is prevented from admitting the prior testimony but only because the evidentiary rule requires actual unavailability. Under the Court's new formulation of constitutional unavailability, it is the hearsay rule's requirement of unavailability that forces the production of better evidence, not the Confrontation Clause.").

[107] 115 Haw. 503, 168 P.3d 955.

[108] *See* Mosteller, *supra* note 33, at 722 ("Critically, if the Confrontation Clause has the purpose of requiring better evidence, which the Court in *Inadi* asserted was the purpose of the unavailability rule, simply making the declarant available cannot be sufficient.") (footnote omitted).

[109] *See generally,* Mosteller, *supra* note 33, at 723.

> Not only would the new definition of unavailability fail to satisfy the purpose ascribed to the confrontation right by the Court, but such a definition does not fit precedent. *Mattox*, which the Court decided only under the Confrontation Clause, not a hearsay rule, assumed real unavailability through death before prior testimony could be introduced. Thus, if true to the theory developed by the Court, the prosecution must call the declarant and attempt to elicit testimony on direct examination to establish unavailability when that is required by the Constitution.

Id.

[110] Fields, 115 Haw. at 526, 168 P.3d at 978.

"unavailable" as a witness for the prosecution yet "available for cross-examination." Justice Acoba's dissent in *Fields* questions how the same witness can be "unavailable for confrontation purposes on the same facts that . . . deem him available."[111]

IV. THE EFFECT OF A WITNESS'S MEMORY LOSS AT TRIAL ON THE DEFENDANT'S RIGHT TO CONFRONTATION

In *Fields*, the majority and dissent disagreed about whether a declarant's memory loss on the stand affects his availability for cross-examination.[112] The majority argued that the witness's memory loss effectively has no bearing on the witness's confrontation right, so long as he appears at trial.[113] The dissent argued that memory loss constitutes unavailability, implicating the Hawai'i confrontation clause.[114] This section surveys case law in other jurisdictions that have examined the effect of memory loss on a declarant's "availability" under the Confrontation Clause.

A. In Many Jurisdictions, a Witness is Generally "Available" for Purposes of the Confrontation Clause Even If Affected By Memory Loss on the Stand

Several jurisdictions rely on United States Supreme Court precedent in *California v. Green*[115] and *United States v. Owens*[116] for the proposition that a witness satisfies the Confrontation Clause when he or she takes the stand at trial, regardless of his or her inability to recall making the out-of-court statement.

1. Green *and* Owens*: United States Supreme Court precedent interpreting the Confrontation Clause with respect to memory loss*

In *California v. Green*, decided in 1970, sixteen-year-old Porter was arrested for selling marijuana.[117] Four days after his arrest and while in custody, Porter identified Green as his supplier.[118] At trial, however, Porter claimed he was unable to remember how he obtained the marijuana because

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[111] *Id.* at 554, 168 P.3d at 1006 (Acoba, J., dissenting).
[112] 115 Haw. 503, 168 P.3d 955.
[113] *Id.* at 528, 168 P.3d at 980.
[114] *Id.* at 551, 168 P.3d at 1003 (Acoba, J., dissenting).
[115] 399 U.S. 149 (1970).
[116] 484 U.S. 554 (1988).
[117] *Green*, 399 U.S. at 151.
[118] *Id.*

he was under the influence of LSD at the time.[119] The trial court admitted, as substantive evidence, the testimony of a police officer stating that Porter had disclosed to him that Green provided him with marijuana.[120] Green was convicted, and on appeal, the California Supreme Court determined that the admission of Porter's prior out-of-court statement violated Green's right to confrontation under the Federal Constitution.[121] The United States Supreme Court vacated and remanded the California Supreme Court's judgment,[122] holding that Porter's presence at trial satisfied the Confrontation Clause.[123]

Under *Green*, the purposes of the Confrontation Clause are (1) to ensure that the witness's statements are given under oath; (2) to force the witness to submit to cross-examination; and (3) to permit the jury to observe the witness's demeanor.[124] In *Green*, the witness satisfied these purposes by appearing in court and testifying before the jury.[125] The Court decided that "nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case against Green," regardless whether the witness "claimed a loss of memory, claimed his privilege against compulsory self-incrimination, or simply refused to answer[.]"[126]

In *United States v. Owens*, decided in 1988, the victim Foster, was a correctional counselor at a federal prison where he was brutally beaten with a metal pipe, fracturing his skull.[127] He was hospitalized for almost one month and his memory was severely impaired as a result of his head injuries.[128]

At trial, Foster testified to his activities just prior to "the attack, and described feeling the blows to his head and seeing blood on the floor."[129] Foster recalled identifying Owens as his attacker during an interview with an FBI agent a few weeks after the incident but admitted, on cross-examination, that he could not remember seeing the assailant.[130] He also

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

[120] *Id.* at 152.

[121] *Id.* at 153.

[122] *Id.* at 170.

[123] *Id.* at 158.

[124] *Id.* at 158.

[125] *See generally id.* at 167 ("[T]he State here has made every effort to introduce its evidence through live testimony of the witness; it produced Porter at trial, swore him as a witness, and tendered him for cross-examination.").

[126] *Id.* at 167-68.

[127] United States v. Owens, 484 U.S. 554, 556 (1988).

[128] *Id.*

[129] *Id.*

[130] *Id.*

admitted that despite evidence showing that he had numerous visitors in the hospital, he could not remember any of them—except for the FBI agent that interviewed him—and could not recall if any of the visitors suggested Owens was the assailant.[131] Defense counsel tried unsuccessfully to refresh his recollection with hospital records, including one indicating that he attributed the assault to someone other than Owens.[132]

The Court held the Confrontation Clause is not "violated by admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification."[133] *Owens* interpreted the Federal Confrontation Clause to constitutionally guarantee "only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish,"[134] further reasoning "[i]t is sufficient that the defendant has the *opportunity* to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory."[135]

Justice Brennan dissented,[136] opining that under *Green*, the defendant's opportunity "to engage in cross-examination sufficient to 'afford the trier of fact a satisfactory basis for evaluating the truth of a prior statement'" was *not* met.[137] Although he agreed with the majority "that the Confrontation Clause does not guarantee defendants the right to confront only those witnesses whose testimony is not marred by forgetfulness,"[138] Brennan stressed that the right to cross-examination is a "functional" right, rather

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[131] *Id.*

[132] *Id.*

[133] *Id.* at 564.

[134] *Id.* at 559 (internal quotation marks omitted).

[135] *Id.* (emphasis added) (citation omitted). "We do not think that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness' live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness' earlier statement to that effect." *Id.* at 560.

> The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons, as is demonstrated by defense counsel's summation in this very case, which emphasized Foster's memory loss and argued that his identification of respondent was the result of the suggestions of people who visited him in the hospital.

Id.

[136] *Id.* at 564 (joined by Justice Marshall) (Brennan, J., dissenting).

[137] *Id.* at 565 (punctuation omitted) (quoting California v. Green, 399 U.S. 149, 161 (1970)).

[138] *Id.* at 571.

than solely procedural right, "to promote reliability in the truth-finding functions of a criminal trial."[139] Brennan opined:

> In concluding that respondent's Sixth Amendment rights were satisfied by Foster's mere presence in the courtroom, the Court reduces the right of confrontation to a hollow formalism. Because I believe the Confrontation Clause guarantees more than the right to ask questions of a live witness, no matter how dead that witness' memory proves to be, I dissent.[140]

Brennan's dissent underscores the discomfort with the majority's bright line rule that a witness's presence at trial summarily satisfies the Confrontation Clause, regardless of the witness's memory loss.

2. *Several jurisdictions construe* Green *and* Owens *as bases for satisfying the Confrontation Clause when the declarant testifies to being unable to recall making the out-of-court statement*

Many jurisdictions find *Green* and *Owens* instructive in determining that the Confrontation Clause is not implicated when a witness claims memory loss on the stand.

In *State v. Price*,[141] the trial court admitted the out-of-court statements of an alleged child molestation victim who testified at trial that she could not remember the alleged abuse, nor could she remember her disclosures to her mother or the detective.[142] Relying on *Crawford*, the defendant argued that the child witness's inability to remember the alleged event or out-of-court statements on stand rendered her unavailable for cross-examination under the Confrontation Clause, making it improper for the trial court to admit her prior out-of-court statements.[143] The Washington Supreme Court disagreed, holding that *Crawford* was not implicated because the declarant was available and testified at trial.[144]

The *Price* court applied *Green*, finding "all of the purposes of the confrontation clause are satisfied even when a witness answers that he or she is unable to recall."[145] The court determined that "when a witness is asked questions about the events at issue and about his or her prior statements, but answers that he or she is unable to remember the charged

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[139] *Id.* at 572 (quoting Kentucky v. Stincer, 482 U.S. 730, 737 (1987)).
[140] *Id.* at 572.
[141] 146 P.3d 1183 (Wash. 2006) (en banc).
[142] *Id.* at 1183.
[143] *Id.*
[144] *Id.*
[145] *Id.* at 1192.

events or the prior statements, this provides the defendant sufficient *opportunity* for cross-examination to satisfy the confrontation clause."[146] The court concluded that "a witness's inability to remember does not implicate *Crawford* nor foreclose admission of pretrial statements."[147]

In *State v. Gorman*,[148] the defendant's mother testified before the grand jury that her son had admitted to killing the victim. At trial, she testified that she had no memory of the confession or her grand jury testimony.[149] After the prosecution repeatedly attempted to refresh her recollection to no avail, the trial court admitted the grand jury testimony implicating the defendant.[150] On appeal of his murder conviction, the defendant protested that his mother's grand jury testimony was erroneously admitted in violation of the Federal Confrontation Clause because she was effectively unavailable for cross-examination due to her lack of memory.[151] The Supreme Judicial Court of Maine affirmed his murder conviction.[152]

The *Gorman* court considered *Green*, *Owens*, and *Crawford*[153] before determining that "the Confrontation Clause was satisfied when Gorman was given the opportunity to examine and cross-examine his mother before the jury regarding what she did and did not recall and the reasons for her failure of recollection."[154] Noting that "Gorman's mother's forgetfulness was particularly selective[,]"[155] the court concluded there was no Confrontation Clause violation in admitting Gorman's mother's prior out-of-court statement as substantive evidence against him.[156] Under *Gorman*, "a witness is not constitutionally unavailable for purposes of Confrontation Clause analysis when a witness who appears and testifies is impaired, or forgetful . . . ."[157]

In *State v. Pierre*,[158] a witness provided the state police with a seven-page written statement describing incriminating statements made by the

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[146] *Id.* (emphasis added).

[147] *Id.*

[148] 854 A.2d 1164 (Me. 2004).

[149] *Id.* at 1167.

[150] *Id.* at 1169.

[151] *Id.* at 1177. In addition to Gorman's mother's alleged memory loss, the defense also attributed her "unavailability" to her state of being under the influence of psychiatric medications and a history of delusional thought.

[152] *Id.* at 1179.

[153] *Id.* at 1176-78.

[154] *Id.* at 1178.

[155] *Id.* at 1177.

[156] *Id.* at 1174-75.

[157] *Id.* at 1177 (citation omitted).

[158] 890 A.2d 474 (Conn. 2006).

defendant, recounting the events leading up to the victim's murder.[159] During trial, however, the witness claimed he never heard the incriminating statements, and claimed that his written statement to the police was false.[160] The defendant protested that the admission of the witness's prior written statement infringed on his state and federal constitutional right to confrontation because the witness was "functionally unavailable" for cross-examination due to his lack of memory.[161] The Connecticut Supreme Court disagreed, finding that the witness was available for cross-examination at trial.[162]

In *Pierre*, the court acknowledged that because *Crawford* did not define "availability for cross-examination," it must be synthesized with *Owens* because *Owens* makes it clear that "the right to cross-examination does not imply a right to cross-examination that is effective . . . ."[163] *Pierre* concluded that the "witness' claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the confrontation clause under *Crawford*, so long as the witness appears at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination."[164]

In *Fowler v. State*,[165] the alleged victim of domestic violence appeared on the witness stand, but refused to answer any questions.[166] Like *Fields*, the trial court admitted the live testimony of the police officer that responded to the domestic violence complaint, stating what the victim told him when he asked her what had happened.[167] The defendant argued that the witness's refusal to testify at trial violated the Confrontation Clause because he was unable to cross-examine her.[168]

Although the witness did not claim memory loss, the Indiana Supreme Court construed a refusal to testify as being equivalent to memory loss on stand.[169] *Fowler* acknowledged that *Crawford* did not resolve what it

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[159] *Id.* at 483.

[160] *Id.* at 485.

[161] *Id.* at 498.

[162] *Id.* at 501 ("Despite the fact that Carr claimed that he could not remember ever having heard a description of the victim's murder, we conclude that he was available for cross-examination at trial, thus removing any issue under the confrontation clause.").

[163] *Id.* at 502.

[164] *Id.*

[165] 829 N.E.2d 459 (Ind. 2005).

[166] *Id.* at 462-63.

[167] *Id.* at 463.

[168] *Id.* at 470.

[169] *Id.* at 467.

Unlike a privilege that, as in *Crawford*, prevents the witness from taking the stand, the

means to say that a witness is "available at trial for cross-examination,"[170] contemplating that "even if a witness takes the stand, inability to obtain answers in cross-examination can arise from the witness's real or professed lack of memory . . . ."[171] The court went on to consider that "a simple refusal to answer may be viewed as barring the defendant's access to meaningful cross-examination[,]" but declined to address the issue because the defendant did not seek an order compelling a response.[172] Ultimately, the *Fowler* court found that the defendant forfeited his confrontation right by choosing to allow the witness to leave the stand without challenging her refusal to answer questions on cross-examination, and then choosing to not recall her to the stand after her out-of-court statement was later admitted.[173]

B. Some Jurisdictions Have Found that a Defendant's Confrontation Right is Implicated When the Declarant Testifies to Being Unable to Recall Making the Out-of-Court Statement

Other jurisdictions have recognized that a witness's memory loss can compromise the defendant's meaningful opportunity to cross-examine the witness, implicating the Confrontation Clause.

In *Goforth v. State*,[174] the defendant was indicted on five counts of sexual battery.[175] At trial, the court admitted a witness's signed written statement that corroborated the victim's account of the alleged events.[176] The declarant testified at trial that he could not remember the alleged incident, nor did he remember writing the statement.[177] His memory loss was attributed to an automobile accident that occurred two months after he made the written statement, leaving him both physically and mentally

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refusing witness, like the amnesiac, is before the jury. The basis for refusal and the witness's demeanor can be taken into account in evaluating the prior statement just as the loss of memory can be evaluated by the trier of fact. On the other hand, a simple refusal to answer may be viewed as barring the defendant's access to meaningful cross-examination.

Id.

[170] *Id.* at 465.

[171] *Id.*

[172] *Id.* at 467.

[173] *See id.* at 470.

[174] Goforth v. State, 70 So. 3d 174 (Miss. 2011).

[175] *Id.* at 176.

[176] *Id.* at 180.

[177] *Id.*

impaired.[178] He testified that he could not remember anything two years prior to the wreck and did not recall knowing the victim or the defendant.[179]

On appeal, the defendant argued that the admission of the witness's written statement violated the Confrontation Clause under both the Federal and State Constitutions.[180] The Mississippi Supreme Court agreed, deciding that the witness's lack of memory precluded the defendant from cross-examining the witness's prior written statement, in violation of the state confrontation clause.[181]

The *Goforth* court reasoned that under *Crawford*, "[t]he goal of the Confrontation Clause is to assess the reliability of evidence by testing it in the crucible of cross-examination. We cannot say that [the witness's] statement was subjected legitimately to that crucible."[182] Finding that the witness's lack of memory deprived the defendant of any opportunity to inquire about potential bias or the circumstances surrounding the witness's statement, the court concluded that the admission of the witness's prior testimonial statement violated the state confrontation clause.[183] As a result, the unanimous 9-0 court reversed the defendant's conviction.[184]

In *People v. Learn*,[185] the victim of alleged child sexual abuse appeared at trial, testified that she knew the defendant, but did not testify about the alleged abuse.[186] The trial court admitted the victim's prior out-of-court statements as substantive evidence.[187] The defendant argued that his right to confront witnesses against him under the Federal and State Constitutions was violated by the admission of the victim's out-of-court statements.[188] The Appellate Court of Illinois agreed and reversed and remanded.[189] The Supreme Court of Illinois denied the State's subsequent appeal.[190]

The *Learn* court determined that "[m]ere presence and general testimony are insufficient to qualify as the appearance and testimony of a witness" under *Crawford*.[191] *Learn* illustrated this point by referring back to the

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[178] *Id.*
[179] *Id.*
[180] *Id.* at 182.
[181] *Id.* at 186.
[182] *Id.* at 187 (citation omitted).
[183] *Id.* at 186-87.
[184] *Id.* at 190.
[185] 919 N.E.2d 1042 (Ill. App. Ct. 2009).
[186] *Id.* at 1044.
[187] *Id.* at 1048.
[188] *Id.* at 1048.
[189] *Id.* at 1055.
[190] People v. Learn, 949 N.E.2d 662 (Ill. 2011).
[191] *Learn*, 919 N.E.2d at 1051.

English common law trial of Sir Walter Raleigh, on which *Crawford* heavily relied.[192]

> Sir Walter Raleigh, suspecting that his out-of-court accuser, Lord Cobham, would recant if forced to testify in court, proclaimed, "'the proof of the Common law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face.'" Raleigh *did not* say, "let some person to whom Cobham told his story come before this court. Let some person other than Cobham speak. Call this third person before my face to recant his double hearsay."[193]

Learn construed the underlying basis of *Crawford* as prohibiting the admission of the witness's prior out-of-court statements made to a third party, in contrast with *Fields* that construed *Crawford*'s footnote nine as dispositive to whether the Confrontation Clause is implicated.[194]

C. Under Analogous Reasoning, Some Jurisdictions Have Found that a Defendant's Confrontation Right is Implicated When the Declarant is Unresponsive on the Witness Stand

A witness professing an inability to recall the charged event is effectively equivalent to a recalcitrant or refusing witness.[195] Several jurisdictions

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[192] The *Crawford* Court explained:

> The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ." The judges refused, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.
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> One of Raleigh's trial judges later lamented that "'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses.

Crawford v. Washington, 541 U.S. 36, 44 (2004) (citations omitted).

[193] *Learn*, 919 N.E.2d at 1051 (emphasis added) (citations omitted).

[194] *See supra* Part III.

[195] *See* Fowler v. State, 829 N.E.2d 459, 467 (borrowing the *Owens* and *Green* Confrontation Clause analyses for purposes of a refusing witness, "[a] refusal to answer, even after a court order, arguably falls on the loss of memory side of the line").

have found that a witness who refuses to respond to questions on the witness stand is unavailable for purposes of the Confrontation Clause.

In *Douglas v. State*,[196] Loyd and Douglas were tried separately for assault.[197] At Douglas's trial, Loyd refused to answer any questions about the alleged crime.[198] The trial judge permitted the State's motion to declare Loyd a hostile witness and the prosecution proceeded to effectively read Loyd's prior signed confession into evidence.[199] On appeal, the Court held "[i]n the circumstances of this case, petitioner's ability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause."[200]

In *Mercado v. Stinson*,[201] the defendant was convicted of robbery along with five other individuals.[202] Accomplice Serrano appeared on the witness stand, but refused to respond to any questions that implicated Mercado.[203] On appeal, the court held that Mercado's Confrontation Clause right was violated because "the unanswered questions concerning whether Mercado was one of the robbers go to the very heart of Serrano's direct testimony, which described the events of the robbery, and implicitly assisted the prosecution in proving Mercado's guilt."[204] The court went on to reason that "[w]ithout an answer to the question of Mercado's involvement in the crime, Mercado was deprived of a meaningful opportunity to test the truth of Serrano's testimony."[205]

V. "MEANINGFUL CROSS-EXAMINATION"—WHAT IT MEANS AND WHAT IT SHOULD MEAN

A. State v. Delos Santos*: An Extension of* Fields

The *Fields* problem occurs where a declarant proclaims that he or she does not remember making the hearsay statement. *Fields* stated that in these situations:

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196 380 U.S. 415 (1965).
197 *Id.* at 416.
198 *Id.*
199 *Id.*
200 *Id.* at 419.
201 37 F.Supp.2d 267 (S.D.N.Y. 1998).
202 *Id.* at 268.
203 *Id.* at 269-70.
204 *Id.* at 276-77.
205 *Id.* at 277.

> [T]he dispositive question becomes whether the witness can nevertheless recall the subject matter of the statement, notwithstanding the loss of memory as to the statement itself. If the accused has the opportunity to elicit the witness' testimony as to the subject matter of the statement on cross-examination at trial, the accused's right of confrontation has been satisfied.[206]

In *Delos Santos*, the Hawai'i Supreme Court extended *Fields*, reasoning:

> To the extent that *Fields* can be interpreted as indicating that a witness must testify about the subject matter of a statement to satisfy the confrontation clause, we reject this interpretation and instead hold that, under *Crawford*, a witness who appears at trial and testifies satisfies the confrontation clause, even though the witness claims a lack of memory that precludes them from testifying about the subject matter of their out-of-court statement.[207]

Following United States Supreme Court precedent set out in *Green*,[208] *Owens*,[209] and *Crawford*, the *Delos Santos* court held that "a witness 'appears for cross-examination' despite a nearly total loss of memory regarding the incident and her statements."[210]

Fields holds that "admission of a prior out-of-court statement does not violate the Hawai'i Constitution's confrontation clause where the declarant appears at trial and the accused is afforded a *meaningful opportunity* to cross-examine the declarant about the *subject matter* of that statement."[211] The Hawai'i Supreme Court further held that in these situations, neither the

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[206] State v. Fields, 115 Haw. 503, 526 n.13, 168 P.3d 955, 978 n.13 (2007).

[207] State v. Delos Santos, 124 Haw. 130, 145, 238 P.3d 162, 177 (2010).

[208] In California v. Green, 399 U.S. 149 (1970), the State's chief witness "proved to be 'markedly evasive and uncooperative on the stand.'" *Id.* at 151-52 (quoting People v. Green, 451 P.2d 422, 423 (Cal. Ct. App. 1969)). The United States Supreme Court upheld the trial court's admission of a witness's prior testimony at a preliminary hearing. "[T]he Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." *Id.* at 164.

[209] In United States v. Owens, 484 U.S. 554 (1988), the United States Supreme Court stated that the Confrontation Clause only guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 559 (emphasis omitted) (internal quotation marks omitted). The Court also held that "[i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination) the very fact that he has a bad memory." *Id.* (citation omitted).

[210] *Id.* at 147, 238 P.3d at 179.

[211] State v. Fields, 115 Haw. 503, 528, 168 P.3d 955, 980 (2007) (emphasis added).

Crawford nor *Roberts* analysis applies because cross-examination of the declarant satisfies the defendant's right to confrontation.[212]

Although the Hawai'i Supreme Court asserts that its holding in *Delos Santos* follows *Green*, *Owens*, and *Crawford*,[213] *Delos Santos* exceeded the scope of those decisions. In *Owens*, the witness recalled making his prior identification even though he was unable to recall the underlying incident.[214] In *Crawford*, the declarant, the defendant's wife, did not testify at all because of the marital privilege.[215] Although the witness in *Green* claimed memory loss at trial, he was rigorously cross-examined at the defendant's preliminary hearing, testified at trial regarding most of the underlying events, and admitted making his statement to the police.[216] The Hawai'i Supreme Court cites these decisions as authority for its holding in *Delos Santos*, yet each of these cases are factually distinguishable. In those cases, the declarant did not take the stand at all, was not physical present at trial, or the declarant remembered either the underlying event or making the statement. Thus, the Hawai'i Supreme Court had no precedential authority for the proposition that the confrontation clause is not violated where the declarant appears for trial and is cross-examined, despite a near total loss of memory regarding the incident or the making of the statement.

B. Meaningful Cross-Examination is Not Achievable When the Declarant Claims Memory Loss But is Physically Present at Trial

Despite the language in *Green*, that full cross-examination entails that the witness concedes making the statement and to explain any inconsistencies, and *Fields*, that cross-examination is satisfied when the declarant testifies as to the subject matter of his statement, *Delos Santos* holds that a witness that does not remember the subject matter of the statement, nor remember making the statement, may have his or her out-of-court statement admitted into evidence. *Delos Santos* states that "the confrontation clause is satisfied when the witness appears at trial and is available for unrestricted cross-examination."[217] According to U.S. and Hawai'i Supreme Court precedent, unrestricted cross-examination effectively means *any* cross-examination. The *Delos Santos* holding is contrary to the Confrontation Clause because a witness who does not remember anything (either the

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[212] *Id.*

[213] *See* State v. Delos Santos, 124 Haw. 130, 147, 238 P.3d 162, 179 (2010).

[214] *Owens*, 484 U.S. at 556.

[215] Crawford v. Washington, 541 U.S. 36, 40 (2004).

[216] California v. Green, 399 U.S. 149, 150-52 (1970).

[217] *Delos Santos*, 124 Haw. at 147, 238 P.3d at 179 (emphasis added).

underlying events or making the hearsay statement) cannot defend or otherwise explain any inconsistencies between the present and prior versions of his statement and thus, does not open himself up to full and meaningful cross-examination at trial.

Delos Santos fails to acknowledge that cross-examination of a witness who claims memory loss is not unrestricted—the cross-examination is restricted by the witness's memory loss. In *State v. Clark*,[218] the Hawai'i Supreme Court recognized that allowing hearsay statements to be used is substantively predicated on "the opponent's ability to cross-examine the witness about the *events contained in* the hearsay statement."[219]

Federal and state rules of evidence support a finding that the forgetful witness must remember something about the incident or must remember making the statement itself. Hawai'i Rule of Evidence 802.1 requires that the witness is subject to cross-examination regarding the *subject matter* of a prior statement. Federal Rule of Evidence 801 requires that the witness is subject to cross-examination about the prior statement before it may be used as substantive evidence.[220] The court in *Fields* stated that the justification for allowing hearsay statements to be used substantively is that the opponent is able to cross-examine the declarant about "the events contained in the hearsay statement."[221]

The *Fields* court stated that both a "meaningful opportunity" to cross-examine the declarant and cross-examination on the "subject matter"

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[218] 83 Haw. 289, 926 P.2d 194 (1996).

[219] State v. Fields, 115 Haw. 503, 558, 168 P.3d 955, 1010 (2007) (Acoba, J., dissenting) (emphasis added).

[220] HAW. R. EVID. 802.1(1) (Prior statements by witnesses are not excluded by the hearsay rule so long as "[t]he declarant is subject to cross-examination concerning the subject matter of the declarant's statement . . . ."); FED. R. EVID. 801 (d)(1) (A declarant-witness's prior statement is not hearsay if "[t]he declarant testifies and is subject to cross-examination about a prior statement . . . ."); *see Fields*, 115 Haw. at 557, 168 P.3d at 1009 ("[T]he HRE drafters decided that prior inconsistent statements might be used as substantive evidence, unless the witness could no longer recollect the events in the statement."); State v. Sua, 92 Haw. 61, 77, 987 P.2d 959, 975 (1999) ("[A] witness that is unable to recall the events allegedly described in the prior statement does not satisfy the requirements of HRE Rule 802.1[,] and therefore the prior statement would not be admissible.") (alteration in original) (internal quotation marks omitted); State v. Eastman, 81 Haw. 131, 137, 913 P.2d 57, 63 (1996) ("[A] witness must testify about the subject matter of his or her prior statements so that the witness is subject to cross-examination concerning the subject matter of those prior statements . . . .").

[221] *Fields*, 115 Haw. at 558, 168 P.3d at 1010 (citing *Clark*, 83 Haw. at 294, 926 P.2d at 199 ("Because the witness is subject to cross-examination, the substantive use of his [or her] prior inconsistent statements does not infringe the sixth amendment confrontation rights of accused in criminal cases . . . .") (alteration in original) (internal quotation marks omitted)).

of the declarant's statement are required to satisfy the defendant's confrontation rights under the Hawai'i Constitution, yet neither of these requirements were satisfied in that case.

The *Fields* majority erroneously ruled that Staggs's testimony of the events in question were sufficient to constitute "meaningful cross-examination." Despite Staggs's inability to remember the actual abuse, her out-of-court statement to police at the time of the incident did not violate the Hawai'i confrontation clause because Fields was afforded sufficient opportunity to cross-examine Staggs about the prior statement at trial.[222] While Staggs remembered other events that occurred that evening—she recalled Richards' presence at the scene of the incident on the evening in question, and remembered sitting on Fields's surfboard—she did not recall *any* details about the incident of abuse for which Fields was charged or making any statements to the police officer who responded.[223]

Courts should require that a trial witness remember either the subject matter of their statement, or remember making the actual statement before admitting the out-of-court statement of that witness. Doing so would make the analysis under both Confrontation Clause and evidentiary availability logical and consistent. Doing so would also give notice to both the prosecution and defense as to what evidence would be admissible at trial and help to reduce expending valuable time and resources arguing whether the defendant's Sixth Amendment Confrontation right has been violated.

C. Memory Loss Does Not Satisfy the Unavailability Requirement Under the Confrontation Clause Because the Defendant is Not Afforded a Meaningful Opportunity to Cross-Examine the Declarant

As discussed in Part IV.B, *Goforth v. State*[224] and *People v. Learn*[225] have held that memory loss does not satisfy the Confrontation Clause because the defendant is not able to meaningfully cross-examine the declarant on the subject matter or underlying event of the statement. Under the reasoning of these cases, a witness that testifies "I do not remember" should

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[222] *Id.* at 523-24, 168 P.3d at 975-76 (majority opinion).

[223] *Id.* at 559-60, 168 P.3d at 1011-12 (Acoba, J., dissenting).

[224] 70 So. 3d 174, 187 (Miss. 2011) (holding that the defendant's Confrontation Clause rights were violated because the witness's lack of memory deprived the defendant of any opportunity to inquire about potential bias or the circumstances surrounding the witness's statement).

[225] 919 N.E.2d 1042, 1051 (Ill. App. Ct. 2009) (holding that under *Crawford*, "[m]ere presence and general testimony are insufficient to qualify as the appearance and testimony of a witness").

alone render a declarant "unavailable as a witness for the prosecution." This note asserts that something more should be required to establish that memory loss is genuine, such as a physical injury, a medical condition, or a shocking event causing memory impairment. The witness should also be required to have some recollection of *something* to do with the actual event or the statement in order for the court to rule the out-of-court statement admissible.

Delos Santos extended *Fields* by holding that a witness's hearsay statement is admissible even though the declarant forgets both the subject matter of the statement and making the statement. In such a situation, there would be no *meaningful* cross-examination because the defense would be unable to elicit *any* testimony regarding the surrounding circumstances or the actual event and would not be able to test whether the witness's memory loss is genuine.

VI. THE PRACTICAL IMPLICATIONS OF ALLOWING A FORGETFUL DECLARANT'S APPEARANCE AT TRIAL TO SATISFY THE CONFRONTATION CLAUSE

The court in *Learn* recognized the inherent conundrum that defendants face when a witness appears on the stand but does not testify to the substantive issue. First, the bright line rule that a declarant's physical presence at trial does not implicate the Confrontation Clause opens the door to potential prosecutorial abuse. Second, by advocating that the defendant rigorously cross-examine the forgetful witness about his prior statements, the burden of proof shifts to the defense to discredit each admitted statement.

A. Construing Physical Presence at Trial as Constitutional Availability Opens the Door to Prosecutorial Abuses

The *Learn* court likened the witness's appearance on the stand to a Trojan Horse, observing, "[t]he witness's inability to answer the single question about alleged abuse . . . led only to the State's ability to bring in other witnesses to testify about what the victim said to them at some other time."[226]

The *Fields* problem is presented when memory loss is the basis for unavailability because hearsay exceptions are predicated on reliability. When the declarant does not remember anything about the underlying

[226] *Id.* at 1051.

events of the statement or making the statement itself, there is no way to test the reliability of the statement because the defendant is unable to meaningfully cross-examine the declarant about the actual incident. The distinction between the two types of availability effectively creates a loophole for these statements to be admitted without effective cross-examination.

Fields illustrates the inherent contradiction with the unavailability paradigm. In holding that a declarant may be simultaneously "available for purposes of the confrontation clause" and "unavailable as a witness for the prosecution," *Fields* not only perpetuates confrontation clause confusion, but also opens the door to prosecutorial abuse. *Fields* gives the prosecution less incentive to use a good faith effort to actually procure the declarant's live testimony at trial, which is the purpose of the confrontation clause, particularly in circumstances where the prosecution's witness is not expected to be well-received by the jury.

Fields is an authority and a tool allowing the prosecution to admit otherwise inadmissible evidence and unfairly shifts the burden to the defense to prove that the declarant's memory loss is not genuine when it is the prosecution's burden to show that a witness is truly unavailable.[227]

B. "Requiring" Rigorous Cross-Examination of the Declarant, as Advocated in Owens *and* Fields, *Improperly Shifts the Burden of Proof to the Defense*

The court in *Learn* recognized the practical consequences associated with requiring the defense to rigorously cross-examine the declarant at trial. "In order to get a declarant to 'defend or explain' testimony not given on direct examination, a defendant would be placed in the untenable position of both trying to elicit testimony about the alleged event and attempting to challenge and refute the very testimony he was forced to elicit."[228] In the absence of direct "accusatory testimony, there would seem to be very few, if any, answers that defense counsel would seek to elicit. Until facts are in issue, a defendant has no reason to turn a sworn witness into a sworn hostile witness."[229]

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[227] *See Fields*, 115 Haw. at 524, 168 P.3d at 976 ("The 'rule of necessity' is so named because it imposes a burden on the prosecution to demonstrate the necessity of introduction a prior out-of-court statement by demonstrating the 'unavailability' of the declarant at trial.") (citing Ohio v. Roberts, 448 U.S. 56, 65 (1980)).

[228] *Learn*, 919 N.E.2d at 1050.

[229] *Id.*

Citing *Crawford*, the *Learn* court turned to the principal problem at which the Confrontation Clause was directed: the use of *ex parte* examinations as evidence against the accused in criminal cases.[230] In other words, "one cannot cross-examine an out-of-court report of what he allegedly said or did. A witness must be placed under oath, with implications (*i.e.*, criminal contempt, perjury, or eternal damnation) for false testimony, and testify before the trier of fact about the charges, not about irrelevant or mere background information."[231]

Because the *Learn* witness's spoken testimony was not incriminating, "the defendant was not confronted by his accuser nor given the right to rigorously test the accusation against him through cross-examination."[232] *Learn* ultimately found the declarant "unavailable" as a witness based on the *Crawford* interpretation of the Confrontation Clause.[233] Even *Green* conceded that "[t]he defendant's task in cross-examination is, of course, no longer identical to the task that he would have faced if the witness had not changed his story and hence had to be examined as a 'hostile' witness giving evidence for the prosecution."[234]

For purposes of this note, *Learn* aptly describes the inherent discomfort with strict application of *Fields*. Under *Fields* and *Delos Santos*, the witness's feigned or real inability to recall the charged event on the stand affords the State the opportunity to bring in the witness's prior out-of-court statements without constitutional barriers.

Under these circumstances, the defense then bears the distinct burden of cross-examining each out-of-court statement in attempt to mitigate the effect of its admission before the jury. Does this burden weigh disproportionately in the State's favor? Interestingly, *Green* acknowledged this question, but declined to address it, noting whether the declarant's "apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture."[235]

Christopher B. Mueller explains in his article, *Cross-Examination Earlier or Later: When is it Enough to Satisfy Crawford?*,[236] that:

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[230] *Id.* at 1051.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] California v. Green, 399 U.S. 149, 160 (1970).

[235] *Id.* at 168-69 (footnote omitted).

[236] Christopher B. Mueller, *Cross-Examination Earlier or Later: When is it Enough to Satisfy Crawford?*, 19 REGENT U. L. REV. 319 (2006/2007).

> [T]he Court in *Green* played *down* the extent to which cross was impeded in testing what Porter said. A witness who keeps saying he doesn't remember the acts, events, or conditions reported in his prior statement can't very well be asked whether his words were accurate, or whether his perceptions were accurate.[237]

Mueller continues, pointing out that, if "the witness claims a lack of memory about both the prior statement and the acts, events, or conditions reported in it . . . then all that is left for the cross-examiner is a frontal assault on the character or motivations of the witness."[238] In such cases, the best possible outcome for the defense would be a witness that "is thoroughly discredited as a disreputable person with such a checkered past that nobody would believe anything he says on a serious matter."[239]

As in *Fields*, Mueller notes:

> [I]f a statement is offered after the witness has left the stand, then cross-examination that went forward before that time is likely to be inadequate . . . . [O]bviously a defendant cannot be faulted for not asking questions about a statement that has not yet been offered, and it is hard to see any justification for expecting otherwise.[240]

In sum, *Fields* unfairly favors the prosecution and creates the potential for abuse by allowing the prosecution to simply put a witness on the stand that testifies she does not remember, thus allowing the admission of hearsay in lieu of live testimony.

VII. RECOMMENDATIONS IN THE NARROW CIRCUMSTANCES WHERE A DECLARANT CLAIMS MEMORY LOSS AT TRIAL AND THE PROSECUTION SEEKS TO ADMIT THE DECLARANT'S TESTIMONIAL HEARSAY

This note proposes that when out-of-court statements are admitted at trial pursuant to a claim of memory loss, the witness must be able to recall some of the underlying events. If the witness is unable to testify to at least some of the underlying events, the defendant will not be able to meaningfully cross-examine the declarant because he will not get any substantive answers from the witness regarding those events, and the jury will not be able to determine whether the declarant's memory loss is genuine and whether the statements are reliable.

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[237] *Id.* at 331.
[238] *Id.* at 343.
[239] *Id.*
[240] *Id.*

This note also asserts that unavailability through memory loss should be evaluated on a fact-intensive, case-by-case basis, instead of allowing *Fields* to be used as a dispositive source of authority for the proposition that simply claiming memory loss and physically producing the declarant at trial will make his or her testimony admissible. Such a bright line distinction in either direction disproportionately favors one side in a process that is intended to be fair and adversarial.

Lastly, it is important for the attorneys to rigorously cross-examine the declarant. Judges should allow counsel leeway to elicit the testimony and the reasons behind the alleged memory loss to see if the claimed memory loss is genuine.

This note contends that the above proposals would be practical solutions to clarifying the current *Fields* unavailability analysis, taking into consideration the interests of justice and the need for clarification in a very complicated area of law.

VIII. CONCLUSION

Confrontation Clause jurisprudence has long been unclear and continues to be so with the United States Supreme Court's decision in *Crawford* in 2004, and the Hawai'i Supreme Court's decisions in *Fields* in 2007, and *Delos Santos* in 2010. *Fields* held that a declarant's physical presence at trial renders the witness "available for cross-examination," satisfying the defendant's right to confrontation, while the witness's claimed memory loss establishes the same witness as "unavailable as a witness for the prosecution," enabling the prosecution to admit the witness's otherwise inadmissible hearsay statement.[241] Effectively, a witness's physical presence at trial is enough to dispose of the *Crawford* analysis and the defendant's Sixth Amendment Confrontation Clause rights. The witness's memory loss precludes effective cross-examination regarding the witness's statement.

Questions regarding unavailability have largely been left unanswered by the courts. While most jurisdictions agree with the *Fields* majority, there is authority suggesting that a declarant's memory loss does not render the witness available for cross-examination and thus does not satisfy the defendant's Confrontation Clause right. The distinction between availabilty for purposes of the Confrontation Clause and availability as a witness for the prosecution should be eliminated and combined into a single analysis.

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[241] State v. Fields, 115 Haw. 503, 528, 168 P.3d 955, 980 (2007)

This would ensure greater predictability and help to clear up the general confusion regarding Confrontation Clause analyses.

The authors recognize that eliminating the distinction between availabilty for purposes of the Confrontation Clause and availability as a witness for the prosecution would restrict the prosecution to admit statements of declarants who claim memory loss at trial solely under the catch-all or residual hearsay exception, making it more dificult for these types of statements to be admitted. Though a more difficult task, it is not impossible. The residual hearsay exception retains the *Roberts* reliability prong.[242] Because it is very difficult to test whether a declarant's memory loss is genuine, the statement should be admissible only if it displays circumstantial guarantees of trustworthiness. This solution is fair to both the prosecution, by allowing the prosecution to admit otherwise inadmissible evidence, and to the defendant, by ensuring that an additional step is taken before admitting *ex parte* testimony against him. Doing so would also help to eliminate potential prosecutorial abuses and improper burden shifting.

Eliminating the *Fields* availability distinction and implementing a reliability inquiry in memory loss situations would not be very difficult for Hawai'i courts because Hawai'i retains the *Roberts* test for non-testimonial statements.[243] Because both testimonial and non-testimonial statements are admitted against the defendant at trial, and the weight that testimonial statements contribute to potential convictions are greater than non-testimonial statements, it is logical that testimonial statements be held at least to the same standard as non-testimonial statements, requiring some indicia of reliability.

As discussed, the purposes of the Confrontation Clause are to prevent an *ex parte* trial, to address the court's need for accurate fact-finding in the interests of justice, and to provide fairness to both defendants and the government. With that in mind, this note encourages a more flexible, balanced approach to determine the scope of the defendant's rights to confrontation and cross-examination under the Hawai'i confrontation clause; in particular, by revisiting the *Fields* unavailability analysis under the narrow circumstance in which a declarant professes memory loss at trial.

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[242] FED. R. EVID. 807; HAW. R. EVID. 804(b)(8). "A statement not specifically covered by any of the foregoing but having equivalent circumstantial guarantees of trustworthiness" are admissible if the statement is more probative on the point for which it is offered than any other evidence and admitting the evidence will serve the interests of justice. *Id.*

[243] *See Fields*, 115 Haw. at 516, 168 P.3d at 968.

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