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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

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The Trouble with Regulating Microfinance

Anita Bernstein*

In its short lifetime, the neologism "microfinance" has become central to several realms—among them philanthropy, social entrepreneurship, commercial banking, and economic development efforts underway in numerous nations—with no consensus on what the word includes and excludes. Indeterminacy makes microfinance resemble other abstract polysyllabic Latinate words like "nationalization," "industrialization," "privatization," "globalization," and "democracy." Unlike these other nouns, however, microfinance has struck observers as amenable to unitary regulation.

Well-intentioned proposals start from the erroneous premise that a single statute, best-practices compendium, or set of governing principles can cover all of microfinance. These efforts are destined to fail until reformers pause to consider the goals they can pursue and the varied sectors they address. The word has its uses. Before microfinance can be regulated, however, it must be disaggregated.

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* Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. Thanks to my adroit research assistants Tao Zhang and Alison Syré; to workshop participants at Maine, Touro, and University of Missouri-Kansas City law schools; and to Bill Black, Dana Brakman Reiser, June Carbone, Jim Fanto, Lois Lupica, Dieter Seibel, Larry Solan, and Jennifer Wriggins for helpful suggestions. Co-panelists at "Microfinance and the Law" at the New York State Bar Association's Global Law Week conference, along with the audience there, gave valuable early feedback. Errors are my own.

INTRODUCTION

Banking delivered in small-scale transactions to low-income clients, known since the mid-1990s as "microfinance," appears to cry out for law-based controls. Even governments lacking the will or expertise to regulate other industries and sectors have paid heed to loans and other financial instruments offered to clients who are too poor to access traditional bank services.[1] Experts share this view: Microfinance Needs Regulation.[2]

Room for disagreement remains, of course. Discussions fill lively literatures in a variety of disciplines, especially on whether legal controls ought to encourage, or instead curb, lending to poor people.[3] While differences flourish, however, informed opinion unites in support of regulation.

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

[2] Aneel Karnani, *Microfinance Needs Regulation*, 9 STAN. SOC. INNOVATION REV. 48 (Winter 2011), *available at* http://www.ssireview.org/images/articles/2011WI_Feature_Karnani.pdf; *see also* Aaron Jones, Note, *Promotion of a Commercial Viable Microfinance Sector in Emerging Markets*, 13 GEO. J. ON POVERTY L. & POL'Y 187, 199-203 (2006) (noting that observers agree on the need to regulate microfinance but disagree on what this regulation should provide); Shelley Thompson, Note, *80 Simple Rules: The Effective and Sustainable 2009 Rwandan Microfinance Regulations*, 38 SYRACUSE J. INT'L. L. & COM. 415, 420 (2011) (observing that regulation is salutary for microfinance institutions themselves).

[3] *See infra* Part II.

From this consensus, efforts to codify the definitive set of microfinance rules have escalated.[4] Each new statement of regulatory goals or ideals appears to inspire the next set of drafters to do it again and do it better. Although Microfinance Needs Regulation stays in place as a commitment, enthusiasts have not completed, and appear unable to complete, the project that they have deemed necessary.

When one considers the extraordinary talent and ample funding that underlie attempts to write the optimal rules for microfinance, this failure cries for an explanation. Drafters like the Consultative Group to Assist the Poor, the Basel Commission on Banking Supervision, and the World Bank have drawn on sophisticated data sets, years of experience, well-curated troves of national and local regulations, good will, good intentions, and the participation of researchers who enjoy international renown. These strengths having failed to achieve the goal—that is to say, no definitive regulation of microfinance having emerged—I raise in this Article the possibility that expertise in microfinance might impede rather than advance the undertaking.

The trouble with regulating microfinance is not the burden of regulation on microfinance providers or their stakeholders—like every other observer who writes in this field, I accept the need for legal rules—but, I argue, "microfinance" itself. The word has brought together constituents that for purposes of regulation ought to remain separate.[5] Microfinance is no more amenable to a best-practices regulatory recitation than any other broad-swath Latinate noun that describes macroeconomic conditions.

Policymakers who would never have tried to summarize in one document a scheme to regulate "industrialization," "globalization," "privatization," or "democracy" may have been misled by the "micro" in microfinance, which makes their target look small and well-cabined. It is no such thing. Because the term blurs lines that matter, any single set of regulatory considerations for microfinance will necessarily be either wrong (at least with respect to some entities or individuals in the cohort addressed) or vague to the point of meaninglessness. Accordingly the notion of Microfinance Needs Regulation, explained in Part I as resting on aggregations of crises that generate and accompany aggregations of recommendations, becomes a blueprint for the reiteration of failure.

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[4] *See infra* Part I.A.

[5] The linguistic term "polysemy," referring to overlapping and multiple meanings present in a single word, is on point. *See* Charles J. Fillmore & B.T.S. Atkins, *Describing Polysemy: The Case of "Crawl," in* POLYSEMY: THEORETICAL AND COMPUTATIONAL APPROACHES 91, 91 (Yael Ravin & Claudia Leacock eds., 2000) (noting what the verb "to crawl" can signify).

Readers will recall the distinction between what the biologist George Gaylord Simpson once called "lumpers" and "splitters": When making classifications, lumpers focus on large units; splitters focus on smaller ones.[6] Microfinance as neologism is the work product of a lumper.

The coinage aptly brings together a cluster of deprivations, challenges, innovations, and opportunities faced by the unbankable poor.[7] "Microfinance" gathers into one word a set of needs and pursuits that could easily fill a paragraph. It has a place in policy: banking for poor people is, and ought to remain, vital in national and transnational debates. Yet because the label tells nothing about conditions that the law finds meaningful—such as those found in banking law and rules related to corporate governance—it unites what ought to receive analytically separate legal controls rather than a unitary response. Part II of this Article reviews some lexical difficulties inherent in the word.

Presenting a splitter-repair to fix a lumper source of confusion, this Article makes suggestions in broad-survey outline form. My starting point is to consider what legal controls might aspire to achieve. Here I presume that regulators want to improve the delivery of small-scale loans and savings.[8]

An alternative to Microfinance Needs Regulation emerges after microfinance is disaggregated. Exploring the question broached in Part II—just what is microfinance?—Part III offers an unglamorous answer: banking for low-income savers and borrowers.[9] Clearing away high-sizzle

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[6] George G. Simpson, *The Principles of Classification and a Classification of Mammals*, 85 BULL. AM. MUSEUM NAT. HIST. 1, 23 (1945). For a recent reference to the dichotomy, see Peter H. Schuck, *Professor Rabin and the Administrative State*, 61 DEPAUL L. REV. 595, 611 (2012).

[7] "Unbankable" entered the financial-development literature with IBRAHIMA BACKHOUM, BANKING THE UNBANKABLE: BRINGING CREDIT TO THE POOR (1989). *See also* GERT VAN MAANEN, MICROCREDIT: SOUND BUSINESS OR DEVELOPMENT INSTRUMENT 17 (2004) ("In general, banks are for people with money, not for people without.").

[8] Other motives might occupy regulators. *See* ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 22 (1999) (reviewing regulatory capture and public choice, both of which ascribe self-interest to regulators' decisions).

[9] "Microfinance" as neologism tacitly favors the perspective of wealthy providers over that of their clientele. "Micro" is a gradable adjective: a savings account or a loan is small only when compared to something bigger. *See generally* Paul Egré & Nathan Klinedinst, *Introduction: Vagueness and Language Use*, *in* VAGUENESS AND LANGUAGE USE 5 (Paul Egré & Nathan Klinedinst eds., 2011) (describing gradable adjectives). Billion-dollar undertakings are not called macrofinance to reference their large size; they are simply finance, and from the vantage point of poor borrowers or savers, microfinance is simply finance. A wordier phrase like "banking for low-income savers and borrowers" brings these people to the foreground.

jargon returns regulators to a familiar task. Part IV continues this disaggregation by assessing opportunities to save and borrow with reference to who owns provider institutions.[10]

Providers of microfinance, the entities that need to be regulated, fall into three groups. The first group consists of entities whose members share the benefits of safety and risk. These institutions hold, lend, and collect money for and by their members. Owners and clients are the same people. They pool their holdings in pursuit of mutual aid. The two other ownership-based categories of microfinance providers are for-profit and nonprofit entities. Though occasionally blurred rather than bright,[11] the line between the two is familiar and widely heeded around the world. Nations that have codified any corporation law at all recognize both types of firms. The universality and familiarity of the division between nonprofit and for-profit comport with regulatory priorities for microfinance.

Each category of microfinance provider has distinct pursuits. For individuals who pool their money in affiliations like rotating credit associations and credit unions, microfinance is a source of goods and opportunities in daily human lives. Managers and donors of nonprofit microfinance institutions, for their part, envision and practice microfinance as poverty reduction and other eleemosynary goals.[12] Commercial banks experience microfinance as a source of new markets; for banks, microfinance diversifies portfolios and expands sources of income to owners.[13]

Regulators ought to bear in mind that these customers are poor, for at least two reasons. First, vulnerability—including information asymmetry, impediments to self-protection, externalities, and unequal bargaining power—is fundamental to regulation generally, *see* BALDWIN & CAVE, *supra* note 8, at 9-16 ("Why regulate?"), and poor people are exceptionally vulnerable. Second, this subcategory of banking is distinct because it includes transactions that are too small to be profitable on a per-unit basis. A provider has to deviate from banking practices used for prosperous customers—it might charge fees for savings accounts, impose interest rates that look usurious, or come up with substitutes for collateral like lending to a circle of borrowers—when offering financial services to the poor. *See* Lan Cao, *Rethinking Microfinance*, 33 U. PA. J. INT'L L. 971, 986 (2012). I thank Jeffrey Thomas for his insights on this point.

[10] Here I follow the convention that excludes from the microfinance rubric those entities and persons who hold or lend money without purporting to follow the law. "Loansharks" and "moneylenders" are providing microfinance, if microfinance is understood as financial transactions and services furnished to poor customers; but because these words bespeak an unwillingness to abide by financial regulation, such providers lie outside the scope of this Article.

[11] *See generally* Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1 (2011) (asking, with regulation in mind, what exactly characterizes a charity).

[12] Jonathan Morduch, *The Microfinance Schism*, 28 WORLD DEV. 617 (2000).

[13] BLUE ORCHARD MICROFINANCE INVESTMENT MANAGERS, *Microfinance: an*

Laws around the world authorize some nonprofit institutions, banks that pursue profit, and mutual-aid entities to offer credit or savings to low-income clients. Doing so gives these providers something in common. When holding or lending money, however, they pursue different ends. Charitable missions, earnings returned as profit to external owners, and earnings returned to internal owners in a mutual-aid scheme are fundamentally unalike.

Because these types of entities generate different opportunities and consequences, the job of regulating them calls for rules that are not monolithic, along with tailored combinations of encouragement and constraint. Treating the different providers of microfinance as a single industry or sector is a regulatory mistake. Polysemy is all very well in language—probably inevitable[14]—but when a word that encompasses so much divergence becomes the object of a unitary rulebook, disarray ensues.

I. "MICROFINANCE NEEDS REGULATION"

Several conditions manifest in microfinance support the consensus about its needing regulation. First and most generally, microfinance is market activity of a type that has experienced considerable market failure.[15] Second, microfinance encompasses consumer banking, a domain long identified as suited to government oversight.[16] Third, as a technology of national economic development that has been credited and blamed for both prosperity and ruinous debt,[17] microfinance appears simultaneously too valuable to ban and too risky to leave unattended. Finally, microfinance is a sector in which inadequate education and economic stresses impede the ability of individual participants to know, assert, and safeguard their interests.[18]

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alternative asset class, http://www.blueorchard.com/jahia/Jahia/pid/399 (last visited Oct. 24, 2012).

[14] *See* Fillmore & Atkins, *supra* note 5.

[15] *See infra* Part I.B.

[16] *See generally* Ronald J. Gilson, Henry Hansmann, & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475 (2011) (connecting this need with national development imperatives).

[17] *See infra* Part II.B.

[18] Anita Bernstein & Hans Dieter Seibel, *Reparations, Microfinance, and Gender: A Plan, with Strategies for Implementation*, 44 CORNELL INT'L L.J. 75, 90-94 (2011) (summarizing various disempowering conditions that impede micro-borrowers); Rashmi Dyal-Chand, *Reflections in a Distant Mirror: Why the West Has Misperceived the Grameen Bank's Vision of Microcredit*, 41 STAN. J. INT'L L. 217, 261-66 (2005) (reporting empirical findings about oppression in the Grameen model).

Mindful of these circumstances regulators, starting in the late 1990s, have been addressing the problem of how to regulate this sector. Comprehensive statements purporting to govern microfinance—drafted in the form of legislation, principles, guidelines, best practices, and other schemes—have proliferated. They continue to emerge.

A. What Reformers Have Offered

Proposals to regulate microfinance have taken varying approaches that reflect an array of goals and priorities for rule-writers, surveyed here with examples of each.

1. Disaggregation and Reaggregation

The World Bank, an international financial institution whose motto is "Working for a World Free of Poverty,"[19] published the first comprehensive proposal in 1998.[20] Emphasizing disaggregation, the *Framework for Regulating Microfinance Institutions* focused on risk management and "prudential"—i.e. bank-supervisory—considerations.[21] It divided microfinance providers into three categories and seven types.[22]

The Consultative Group to Assist the Poor ("CGAP"), an entity housed at the World Bank but established as "independent"[23] and funded by donor agencies and private foundations,[24] has offered an alternative set of recommendations for microfinance regulation.[25] Its description of

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[19] THE WORLD BANK GROUP, *Working For a World Free of Poverty* (2006), *available at* http://siteresources.worldbank.org/EXTABOUTUS/Resources/wbgroupbrochure-en.pdf.

[20] Hennie van Greuning, Joselito Gallardo, & Bikki Randhawa, *A Framework for Regulating Microfinance Institutions*, FINANCIAL SECTOR DEVELOPMENT DEPARTMENT, THE WORLD BANK (1998), http://elibrary.worldbank.org/docserver/download/ 2061.pdf ?ex pire s=1351231135&id=id&accname=guest&checksum=ABE46D1CB3B17EDAE0E1381024A E63C9 [hereinafter van Greuning et al., *Framework*]. "The term 'World Bank" refers only to the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA)." *See* THE WORLD BANK, *About The World Bank,* http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:201474 66~menuPK:344189~pagePK:98400~piPK:98424~theSitePK:95474,00.html#2 (last visited Oct. 25, 2012).

[21] van Greuning et al., *Framework, supra* note 20.

[22] *Id.* at ii.

[23] *See* CGAP, http://www.cgap.org/about (last visited Oct. 25, 2012).

[24] The World Bank provides this data at THE WORLD BANK, http://sitere sources. worldbank.org/INTDGF/DGFPrograms/21870033/CGAP.pdf (last visited Oct. 25, 2012).

[25] Robert Peck Christen, Timothy R. Lyman, & Richard Rosenberg, *Microfinance Consensus Guidelines: Guiding Principles on Regulation and Supervision of Microfinance*, CGAP/THE WORLD BANK GROUP (2003), http://www.cgap.org/sites/default/files/CGAP-

microfinance purports to cover all sources of this product: "non-government organizations (NGOs); cooperatives; community-based development institutions like self-help groups and credit unions; commercial and state banks; insurance and credit card companies; telecommunications and wire services; post offices; and other points of sale."[26]

2. Microfinance Understood as For-Profit Banking

For the Basel Committee on Banking Supervision, a transnational entity formed in 1930 "to foster international cooperation" among national central banks "in their pursuit of monetary and financial stability,"[27] regulating microfinance is a subset of regulating banks. The Basel Committee published *Microfinance Activities and the Core Principles for Effective Banking Supervision* in 2010.[28] Celebrated among poverty-reduction activists as "the first paper ever by the Basel Committee on a financial inclusion topic,"[29] this proposal for comprehensive regulation focuses on deposit-taking institutions.

3. Microfinance Commandments

The European Commission published its take on microfinance regulation in 2007.[30] Unlike the World Bank, CGAP, and Basel documents, which all espouse universalism, *The Regulation of Microcredit in Europe* addresses only one (large and affluent) geographic region. It differs from the other three also in favoring description over prescription; its recitation of precepts appears at the end, in four quasi-commandments: "1. Allow for lending by non-banks. 2. Avoid setting interest rate caps too low. 3. Ensure minimum

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Consensus-Guidelines-Guiding-Principles-on-Regulation-and-Supervision-of-Microfinance-Jun-2003.pdf.

[26] *See* PI SLICE, *Microfinance*, http://pi-slice.com/content.php?id=12 (last visited Oct. 25, 2012).

[27] *See* BANK FOR INTERNATIONAL SETTLEMENTS, *About BIS*, http://www.bis.org/ about /index.htm (last visited Oct. 25, 2012).

[28] Bank For International Settlements, Consultative Document, *Microfinance Activities and the Core Principles for Effective Banking Supervision*, BASEL COMMITTEE ON BANKING SUPERVISION (2010), http://www.bis.org/publ/bcbs167.pdf.

[29] Denise Dias, *Basel Blesses Microfinance*, CGAP (Oct. 19, 2010), http://www.cgap.org/blog/basel-blesses-microfinance.

[30] European Commission, Expert Report, *The Regulation of Microcredit in Europe*, ENTERPRISE AND INDUSTRY (2007), http://ec.europa.eu/enterprise /newsroom/ cf/_getdocument.cfm?doc_id=538.

legislative standards for non-banks. 4. Create a favourable general environment for microenterprise."[31]

The nonprofit World Education Australia Limited, opining on microfinance, has also adopted a quasi-commandments presentation. Its 2006 *Principles of Sustainable Microfinance*[32] opts for eleven precepts instead of four and for less specificity than what the European Commission endorses. Among its Principles are generalizations like "Microfinance is a powerful instrument against poverty" and "Microfinance means building financial systems that serve the poor,"[33] along with more specific stances: World Education Australia Limited, like the European Commission, perceives interest rate caps as detrimental;[34] it recommends that governments only enable, rather than provide, financial services.[35]

4. Comprehensive National Laws

Legislation enacted around the world has undertaken to regulate microfinance. The World Bank notes "legislation and regulation initiatives" in South Africa, Zambia, Uganda, Malawi, Nepal, Bangladesh, Bosnia, Georgia, Moldova, and Ukraine, all installed before 1999.[36] More recently, the Central Bank of Nigeria in 2011 updated its 2005 *Microfinance Policy Framework for Nigeria;*[37] the Microfinance Act, addressing deposit-taking institutions, brought comprehensive microfinance regulation to Kenya;[38] the government of Rwanda adopted a National Microfinance Strategy;[39] and draft legislation proposed to extend the reach of the Reserve Bank of India over microfinance.[40]

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[31] *Id.* at 5.

[32] WORLD EDUC. AUSTL., *Principles for Sustainable Microfinance* (2006), http://www.mdf.org.rs/pdf/MF-Principles.pdf.

[33] *Id.* at 1-2.

[34] *Id.* at 2.

[35] *Id.* at 3.

[36] van Greuning et al., *Framework, supra* note 20, at 1 n.3.

[37] Central Bank of Nigeria, *Microfinance Policy Framework for Nigeria* (2011), *available at* http://www.cenbank.org/Out/2011/pressrelease/gvd/Revised%20Microfinance%20Policy%20July%2012%202011.pdf.

[38] The Microfinance Act, No. 19 (2006), KENYA GAZETTE SUPPLEMENT NO. 103 §§4-10, *available at* http://www.idlo.int/MF/Documents/Regulations/KENYA1.pdf.

[39] Thompson, *supra* note 2, at 426 (citing United Nations Development Programme & Ministry of Finance and Economic Planning, Republic of Rwanda, *Building an Inclusive Financial Sector in Rwanda* 3 (2009), *available at* http://www.undp.org.rw/Prodoc_UNCDF_P73948.pdf).

[40] *The Micro Finance Institutions (Development and Regulation) Bill*, Draft Legislation (2011), *available at* http://financialservices.gov.in/banking/micro_finance_institution_bill_2011.pdf. For an analysis of this draft statute, see Lamar Dowling, *The Indian*

5. An Assessment

Disaggregation—the central notion of the first-published comprehensive principles—was the right idea: on that point this Article builds on well-grounded earlier work. The World Bank has long understood that microfinance cannot be regulated in monolithic terms. Its careful delineation of tiers and cohorts correctly focused on the activities of entities rather than the still-new neologism.[41] Its prudential rules for banks combined attention to safety in savings with the development goal of expanding branch banking. Yet instead of providing the last word, the *Framework for Regulating Microfinance Institutions* triggered new proposals. Experts apparently read this compendium as a first draft.

If the World Bank had hoped for acceptance and implementation of its ideas, in hindsight it harmed its chances when it gave its splitter rulebook a lumper title.[42] The term "microfinance," which the World Bank chose in 1999 when "microcredit" was still ascendant, may have made the *Framework* appear modern, ahead of the jargon curve. Its unity nevertheless undermined the drafters' thesis: Microfinance consists of divergent activities, not just one, and is furnished by entities with different priorities. An alternative title omitting the neologism—something like "Classifications to Regulate Banking for the Poor," admittedly a duller option—would have described the document more accurately. Even if it had had a descriptively accurate title, however, the *Framework* would have looked ripe for revision eight or nine years after its publication, when observers started to ask whether better rules governing financial institutions could have ameliorated a collapse.

B. Crises That Invite More Responses

The global financial crisis that began in 2007 marked a turn for microfinance. Accounts of failures and alarms among microlending institutions followed reports of setbacks in the financial sector generally. The fall of microfinance in Andhra Pradesh, a state in central India that had received large infusions of loan capital from both state and national government sources and for-profit lenders doing business in the region,

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Microfinance Institutions (Development and Regulation) Bill of 2011: Microfinance Beginnings and Crisis and How the Indian Government is Trying to Protect Its People, 45 INT'L LAW. 1083 (2011).

[41] Dividing providers into seven types within three categories made for a confusing typology, however. *See* van Greuning et al., *Framework*, *supra* note 20, at ii.

[42] *See supra* note 6 and accompanying text (contrasting lumpers with splitters).

drew particular attention.[43] Headlined as "India's Major Crisis in Microlending,"[44] the Andhra Pradesh experience circa 2010 showcased the fragility of banking for poor clients: calamities escalate.

Borrowers who defaulted on loans in Andhra Pradesh spurred more defaults. Widespread defaulting goaded lenders to pursue loan repayment more aggressively. Reports of suicides by borrowers fueled the perception of a crisis, and a legislative response by the state government, subjecting microfinance institutions to more scrutiny and limiting what these lenders could do, struck observers as understandable but counterproductive.[45] According to a publication by the Brooks World Poverty Institute at the University of Manchester, inadequate regulatory mechanisms deserve much of the blame for the Andhra Pradesh devastation.[46]

Accounts of microfinance failure in other nations during 2009 and 2010 gave further support to Microfinance Needs Regulation, as country after country reported crises in the sector. The acronym PAR, counting the percentage of a portfolio at risk, added a worrisome note to microfinance jargon:[47] When a large Moroccan microfinance institution announced in June 2009 that it would merge with a rival bank its alarming PAR, more than 30%, was part of the reason:[48] "The global financial crisis [was] not to blame," wrote one researcher; instead, microfinance failed in Morocco because of oversupply, which in turn caused, inter alia, "lack of internal controls, and substandard governance."[49] Defaults, informal bailouts, and contraction of the microloan market in Bosnia during the same year spurred

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[43] *See* Dowling, *supra* note 40, at 1086-88.

[44] Eric Bellman & Arlene Change, *India's Major Crisis in Microlending*, Wall St. J., Oct. 29, 2010, http://online.wsj.com/article/SB10001424052702304316404575580663294846100.html.

[45] Anurag Priyadarshee & Asad K. Ghalib, Working Paper, *The Andhra Pradesh Microfinance Crisis in India: Manifestation, Causal Analysis, and Regulatory Response*, BROOKS WORLD POVERTY INST. 1, 8 (2011), http://www.bwpi.manchester.ac.uk/resources/Working-Papers/bwpi-wp-15711.pdf; Micro-Credit Ratings Int'l Ltd., *M-CRIL's Comments on the Draft Microfinance Bill: A Major Step Forward for Financial Inclusion?* 1 (2011), http://www.m-cril.com/BackEnd/ModulesFiles/Publication/M-CRIL's-comments-on-the-draft-Microfinance-Bill-July-2011.pdf.

[46] Priyadarshee & Ghalib, *supra* note 45.

[47] PAR of more than 10% indicates a repayment crisis. *See* Greg Chen, Stephen Rasmussen, & Xavier Reille, *Growth and Vulnerabilities in Microfinance*, CGAP 1, 4 (2010) http://www.cgap.org/gm/document-1.9.42393/FN61.pdf.

[48] Xavier Reille, *The Rise, Fall, and Recovery of the Microfinance Sector in Morocco*, CGAP 1, 2 (2010), http://www.cgap.org/sites/default/files/CGAP-Brief-The-Rise-Fall-and-Recovery-of-the-Microfinance-Sector-in-Morocco-Jan-2010.pdf.

[49] *Id.*

commentary that inadequate regulation coupled with a surfeit of foreign-originated cash had caused unsustainable lending.[50]

The experience of Nicaragua during this period pointed up another need for regulation: microcredit can give rise to risky politics.[51] In 2008, *Movimiento No Pago* revisited an old struggle between debtors and creditors in a poverty-stricken nation when the mayor of Jalapa, a northern town, delivered a fiery speech that urged farmers to stand up against microfinance institutions to which they owed high-interest debt.[52] Violence ensued: protesters attempted to burn down the headquarters of a regional microlender called La Fundación para el Desarrollo de Nueva Segovia.[53] "I don't pay" soon morphed from slogan into political force in Nicaragua.

In 2010 the National Assembly acceded to several "no pago" demands, including a cap on interest rates for new loans, a suspension of asset seizures from delinquent borrowers and, central to the movement, what became known as a moratorium, which gave debtors partial respite by rewriting and amortizing loan terms.[54] Running for re-election to the presidency in 2011, Daniel Ortega won backing from the movement when he agreed that debtors ought to stand up to their microcreditors.[55] Whether *Movimiento No Pago* worsened—or instead merely accompanied, or perhaps even eased—effects of the global downturn for Nicaraguans is difficult to know, but credit became less available there after 2009. More than 100,000 clients lost microcredit, and the nation's microloan portfolio dropped from US $420 million in 2008 to $170 million in April 2011.[56]

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[50] William K. Black, *Microcredit Accounting Control Fraud Deepens Bosnia's Nightmare*, NEW ECON. PERSPECTIVES (Mar. 11, 2012, 10:23 PM), http://neweconomicperspectives.org/2012/03/microcredit-accounting-control-fraud-deepens-bosnias-nightmare.html.

[51] *See* Bhaskar Chakravorti, *Does Microfinance Forestall Political Upheavals? Or Does It Cause Them?*, THE FLETCHER SCH. OF LAW AND DIPLOMACY (2010), http://fletcher.tufts.edu/MIB/Ten-Questions/Q3-Microfinance (reporting an interview with Kim Wilson concluding that in Nicaragua, microfinance "exacerbated an aggressive platform that [Daniel Ortega's] political party already had").

[52] Elizabeth Minchew, *A Movement to Acknowledge: The Nicaraguan Movimiento No Pago*, MICROFINANCE FOCUS (Sept. 14, 2011), http://www.microfinancefocus.com/movement-acknowledge-nicaraguan-movimiento-no-pago.

[53] *Id.*

[54] Sergio Guzmán, *Ley Moratoria (Moratorium Law) Passes in Nicaragua*, CENTER FOR FINANCIAL INCLUSION BLOG (Mar. 23, 2010), http://cfi-blog.org/2010/03/23/ley-moratoria-moratorium-law-passes-in-nicaragua/.

[55] David Roodman, *Think Again: Microfinance*, FOREIGN POLICY (Feb. 1, 2012), http://www.foreignpolicy.com/articles/2012/02/01/think_again_microfinance?page=0,4.

[56] *See 6 Microfinance Crises That the Sector Does Not Want to Remember*, MICROFINANCE FOCUS (Apr. 22, 2011), http://www.microfinancefocus.com/6-microfinance-crises-sector-does-not-want-remember.

II. BUT WHAT IS MICROFINANCE? RECURRING CONFUSIONS

The regulation of microfinance has been confounded by three sources of fragmentation and disarray. The first and most basic difficulty is the absence of an accepted definition of the term. The second difficulty, three conventional wisdoms that coexist in contradiction to one another, destabilizes regulatory policy. The third difficulty is present in many though not all microfinance offerings: "the double bottom line," a sloganish goal that purports to favor simultaneous economic and social returns. Though attractive to donors and investors, this constituent of contemporary microfinance impedes coherence in regulation.

A. Definitional Uncertainty

Regulators who would write rules for microfinance need a working definition of this newish word. The development sociologist Hans Dieter Seibel has written that he invented "microfinance" in about 1990 to expand "microcredit," an older term, into a broader set of financial services: he was especially interested in microsavings.[57] Because no other writers has claimed to have coined "microfinance" and no printed instances of the term predate the early 1990s,[58] we can start with what Seibel has said his noun means.

To Seibel, microfinance is "that part of the financial sector which comprises formal and informal financial institutions, small and large, that provide small-size financial services to the poorer sections of the population as well as larger-size financial services to agro-processing and other small and medium rural enterprises."[59] Why Seibel includes "larger-size financial services to agro-processing and other . . . rural enterprises" in his understanding of the term is obscure, but the rest of his definition resembles other attempts to say what microfinance is.[60]

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[57] Hans Dieter Seibel, Does History Matter? *The Old and the New World of Microfinance in Europe and Asia*, UNIV. OF COLOGNE 1 n.1 (2005), http://www.microfinancegateway.org/gm/document-1.9.29698/29667_file_Does_History_Matter.pdf.

[58] *See generally* MARGUERITE S. ROBINSON, THE MICROFINANCE REVOLUTION: SUSTAINABLE FINANCE FOR THE POOR xxx (2001) (recounting that the author "first heard the term microfinance revolution used . . . in 1993"); David Roodman, *What is Microfinance?*, CTR. FOR GLOBAL DEV. (Oct. 11, 2010), http://blogs.cgdev.org/open_book/2010/10/what-is-microfinance.php (examining the word along with predecessors like "microprocessor" and "microenterprise").

[59] Seibel, *supra* note 57, at 1 n.1.

[60] *See, e.g.*, ROBINSON, *supra* note 58, at 9-10; *What is Microfinance?*, MICROFINANCE. ORG, http://www.microfinancegateway.org/p/site/m/template.rc/1.26.12263/ (last visited Oct. 27, 2012).

None of these proffered definitions is clear enough to hold up a platform of regulation.[61] To illustrate the difficulty, consider the provisional definition chosen by the Basel Committee on Banking Supervision in 2009. The Committee declared that microfinance is "the provision of financial services in limited amounts to lower income households and small, informal businesses."[62] This definition appeared in a survey questionnaire that the Committee distributed to supervisory authorities in thirty-two countries. The Basel definition resembles Hans Dieter Seibel's understanding of the word,[63] but whereas Seibel had only described what interested him as a researcher, the Basel survey had ambitions for regulation. It set out to determine how well the Committee's established *Core Principles for Effective Banking Supervision*, originally published in 1997 and revised in 2006,[64] apply to microfinance.[65] Its premise casts microfinance as a subset of banking generally that might differ enough from banking to warrant its own regulations.

With this divide in mind, drawing the line between microfinance and banking becomes critical: and yet the Basel provisional definition of microfinance avoids precision. What are "limited amounts"? Surely all financial transfers have some limit. To qualify, must customers be "households," or can individuals also participate in microfinance? How low is "lower income"? Are "small, informal businesses" different from small businesses and informal businesses?

Other instances of obscurity obstruct microfinance regulation. Some published understandings of the word presume that a microloan or micro-transfer supports entrepreneurial activity and others perceive it as coming to the recipient with no inherent restrictions on use; some recognize individuals as potential clients of microfinance while others insist that microfinance is shared by groups of poor people; some focus on the intent

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[61] One authority on microfinance who pre-published a book in chapter-by-chapter posts online stated the definitional problem forthrightly on his blog. "I'm seen as an expert on microfinance," David Roodman wrote. "I'm writing a book about microfinance. I blog about microfinance. I go to microfinance conferences. So you'd think I know what microfinance is. But I'm not sure I do." Roodman, *supra* note 58. The book is DAVID ROODMAN, DUE DILIGENCE: AN IMPERTINENT INQUIRY INTO MICROFINANCE (2012).

[62] Bank For International Settlements, *Microfinance activities and the Core Principles for Effective Banking Supervision*, BASEL COMMITTEE ON BANKING SUPERVISION 1 (2010), http://www.bis.org/publ/bcbs175.pdf.

[63] *See supra* text accompanying note 59.

[64] Bank For International Settlements, *Core Principles for Effective Banking Supervision*, BASEL COMMITTEE ON BANKING SUPERVISION 1 (2006), http://www.bis.org /publ/bcbs129.pdf [hereinafter Basel Committee].

[65] *Id.* at 34.

of the provider; some associate microfinance with the amelioration of social distress.[66]

These divergent understandings and provisional definitions undermine microfinance regulation by sowing uncertainty about the identity of providers and clients, the transactions that fall under the aegis of a rule, and the benefits or goals that the regulatory scheme seeks to advance. Imprecision, self-refuting jargon, and inclusion of entities that may or may not align with governing legal categories come together in a mélange.

B. Conventional Wisdoms

Attitudes about microfinance as a tool for enhancing economic and social development align with attitudes about its regulation. Three clusters of conventional wisdom have emerged in contemporary discussion. The first celebrates microfinance as a source of spontaneous wealth. Applied to regulation, this stance worries that too many rules will impede innovation and dampen the best hopes of the poor.[67] The second genre harbors an opposite worry, perceiving microfinance to be a source of dangerous debt, deeper poverty, or even violent upheaval. It favors more controls. Attempting to combine the optimism of the first with the pessimism of the second, the third genre of conventional wisdom on microfinance finds opportunity and danger combined.[68] The three genres swing in oscillation.

1. Optimism

Microfinance reached its apogee of prestige when Muhammad Yunus and the bank he founded, Grameen, shared the Nobel Peace Prize in 2006.[69] The Norwegian Nobel Committee drew a novel connection between a for-

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[66] *See generally* Roodman, *supra* note 58 (reporting multiplicity).

[67] *See, e.g.*, Christen et al., *supra* note 25, at 4 (recommending "enabling" regulation to encourage new entrants into the microfinance market); B. Seth McNew, *Regulation and Supervision of Microfinance Institutions: A Proposal for a Balanced Approach*, 15 LAW. & BUS. REV. AMERICAS 287, 288 (2009) (worrying that regulation of microfinance providers "can easily become overbearing, and the cost of compliance may become so high as to defeat the ultimate goal of . . . giving the world's poorest citizens access to financial services.").

[68] I advert to the orientalist notion that "crisis" in Chinese combines the ideograms for danger and opportunity. *See* Cecil Adams, *Is the Chinese Word for "Crisis" a Combination of "Danger" and "Opportunity"?* THE STRAIGHT DOPE (Nov. 3, 2000), http://www.straightdope.com/columns/read/2363/is-the-chinese-word-for-crisis-a-combination-of-danger-and-opportunity (concluding that the suggestion is mostly inaccurate).

[69] *The Nobel Peace Prize for 2006*, NOBELPRIZE.ORG (Oct. 13, 2006), http://www.nobelprize.org/nobel_prizes/peace/laureates/2006/press.html.

profit bank and world peace when it linked microcredit with the aim of its prize. "Lasting peace cannot be achieved," wrote the Committee, "unless large population groups find ways in which to break out of poverty. Microcredit is one such means."[70]

Microfinance had achieved acclaim before its 2006 triumph. Former U.S. President Bill Clinton remarked in 2002 that Muhammad Yunus "long ago should have won the Nobel Prize. I'll keep saying that until they finally give it to him."[71] The Consultative Group to Assist the Poor was formed in 1995 to expand access to financial services for so-called "unbankable persons" everywhere in the world.[72] In 2004, the United Nations announced that 2005 would be the International Year of Microcredit.[73] Scholarship in the field took off with the publication of *The Microfinance Revolution*,[74] documenting and celebrating microfinance as central to sustainable economic development.

For enthusiasts, microfinance has retained its 2006-vintage luster. When in 2009 Muhammad Yunus won the Presidential Medal of Freedom, the highest honor given to civilians in the United States, President Obama praised his Grameen Bank for "lifting millions of people from poverty with microloans."[75] Researchers continue to report that this category of banking builds wealth.[76] Microlending not only ameliorates poverty and spurs domestic economic development, but also installs

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[70] *Id.*

[71] William Jefferson Clinton, Former President of the United States, Speaker at the University of California, Berkeley (Jan. 29, 2002) (transcript available at http://www.berkeley.edu/news/features/2002/clinton/clinton-transcript.html).

[72] Edward Bresnyan, Case Study, *Addressing Challenges of Globalization: An Independent Evaluation of the World Bank's Approach to Global Programs*, THE WORLD BANK OPERATIONS EVALUATION DEPARTMENT vii (2004), http://lnweb90.worldbank.org/oed/oeddoclib.nsf/24cc3bb1f94ae11c85256808006a0046/c29f384f74e0ec5785256f240050d440/$FILE/gppp_cgap_wp.pdf.

[73] INTERNATIONAL YEAR OF MICROCREDIT 2005, http://www.un.org/events/microcredit/ (last visited Oct. 30, 2012).

[74] ROBINSON, *supra* note 58; MARGUERITE S. ROBINSON, THE MICROFINANCE REVOLUTION, VOLUME II: LESSONS FROM INDONESIA (2002).

[75] President Barack Obama, Remarks By President Obama At The Medal Of Freedom Ceremony (Aug. 13, 2009) (transcript available at http://www.muhammadyunus.org/In-the-Media/remarks-by-president-obama-at-the-medal-of-freedom-ceremony/).

[76] Alan M. White, *Credit and Human Welfare: Lessons from Microcredit in Developing Nations*, 69 WASH. & LEE L. REV. 1093, 1095-96 (2012) (reporting on "[e]xtensive empirical research"); Inter-American Development Bank, *IDB Urges Microfinance Industry to Reach Out to Millions of Underserved People in Latin America and the Caribbean*, IADB.ORG (Oct. 1, 2009), http://www.iadb.org/en/news/news-releases/2009-10-01/idb-urges-microfinance-industry-to-reach-out-to-millions-of-underserved-people-in-latin-america-and-the-caribbean,5697.html.

ancillary gains: it opens philanthropy to a wider circle of donors;[77] enhances the education of youngsters in the United States;[78] keeps poor families together and helps prevent illegal border crossings;[79] and eases the ravages of malnutrition.[80] The Nobel Peace Prize citation praised microlending for making women better off;[81] numerous writers agree.[82]

The global financial crisis presented a challenge to optimism about microfinance that enthusiasts have found sobering but not daunting. If microfinance ameliorates poverty, then by hypothesis a world grown poorer following economic collapse needs more of it. Because loan capital becomes less available in a contracted economy, policymakers can ease the downturn by making lending and borrowing more available. Poorer borrowers benefit from lower interest rates; increases in supply lower prices; accordingly, the optimist prescription urges policymakers to invite more providers into the microloan market.[83]

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[77] Tracy Turner, *Planting Seeds of Hope*, COLUMBUS DISPATCH, Apr. 13, 2007, at 1F.

[78] Sacha Pfeiffer, *Tale of Microloans Urges Kids to Generosity*, THE BOSTON GLOBE, Mar. 10, 2008, at 1D.

[79] Devon Roepcke, *"Should I Stay or Should I Go?": Preventing Illegal Immigration By Creating Opportunity in Mexico Through Microcredit Lending*, 38 CAL. W. INT'L L.J. 455, 460 (2008); Lourdes Medrano, *Micro-lending Efforts in Mexico Helps Poor Families Stay Home*, Ariz. Daily Star, June 17, 2007, at A1.

[80] Jessica Deihl, *Microfinance in Emerging Markets: The Effects of the Current Economic Crisis and the Role of Securitization*, 6 AM. U. WASH. C. BUS. L. BRIEF 37, 38-39 (2009), *available at* http://www.wcl.american.edu/blr/documents/Spring09_Microfinance.pdf (reporting a study in Bangladesh).

[81] *See* source cited *supra* note 69.

[82] *See* Susy Cheston & Lisa Kuhn, *Empowering Women through Microfinance*, MICROCREDIT SUMMIT CAMPAIGN (2002), http://www.microcreditsummit.org/papers/empowerment.pdf (summarizing benefits); *see also* Anita Bernstein, *Pecuniary Reparations Following National Crisis: A Convergence of Tort Theory, Microfinance, and Gender Equality*, 31 U. PA. J. INT'L L. 1, 31 (2009) (noting praise for microcredit as a feminist instrument). Studies consistently report that female microborrowers are more likely than non-borrowers to practice contraception. Charlotte E. Lott, *Why Women Matter: The Story of Microcredit*, 27 U. PITT. J. L. & COM 219, 227 (2009) (summarizing findings). *See generally* Salil Tripathi, *Microcredit Won't Make Poverty History*, GUARDIAN (Oct. 17, 2006), http://www.guardian.co.uk/business/2006/oct/17/businesscomment.internationalaiddevelopment?INTCMP=SRCH (arguing that "to appreciate Grameen's real worth, we need to look at its role in empowering women. That is its real success, and for achieving this in a conservative, largely rural society such as Bangladesh, where Islamic fundamentalism is on the rise, Dr. Yunus deserves his Nobel prize.").

[83] *See, e.g.*, Michael Schlein & Michael Chu, *Microfinance Goes Public*, FORBES.COM (Apr. 30, 2010, 5:40 AM), http://www.forbes.com/2010/04/30/india-microfinance-sks-ipo-markets-emerging-markets-accion.html (praising IPOs for microfinance institutions as a source of wealth).

2. Pessimism

"The idea of borrowing one's way out of poverty is passing strange," mused Judge Richard Posner in 2005,[84] joining a cohort of skeptics who expressed doubts well before the twenty-first century's first global downturn. Borrowing in contrast to saving—or microcredit in contrast to microfinance—has received the brunt of criticism. One careful review of published studies circa 2002 found microcredit no better than "other poverty alleviation models. Providing money to a population through almost any means will ordinarily have a short-term positive impact on poverty[,]" but the effect dissipates "once the funds are expended."[85] Other pre-downturn skeptics argued that microlending benefits only the richer poor,[86] that enthusiasts have overstated gains to women from microlending,[87] and that microcredit is best understood as a salve that eases the pain of "trade liberalization, deregulation and privatization" imposed on the world's poor by foreign intervenors.[88]

A global financial crisis that reached full force only two years after Yunus and his bank shared the Nobel Prize strengthened a view among pessimists, parallel to that of optimists,[89] that they had been right all along. Critics who had spoken against microcredit before 2007 returned with more ammunition.[90] Whereas earlier objections had taken a mild tone—mostly

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[84] *See* Bernstein & Seibel, *supra* note 18, at 89 n.71.

[85] Celia R. Taylor, *Microcredit as Model: A Critique of State/NGO Relations*, 29 SYRACUSE J. INT'L L. & COM. 303, 326 (2002).

[86] Thomas Dichter, *Hype and Hope: The Worrisome State of the Microcredit Movement*, MICROFINANCE GATEWAY (Mar. 24, 2006), http://www.microfinancegateway.org/p/site/m//template.rc/1.26.9051 ("The microcredit paradox is that the poorest people can do little productive with the credit, and the ones who can do the most with it are those who don't really need microcredit, but larger amounts with different (often longer) credit terms.").

[87] Dyal-Chand, *supra* note 18, at 221 (objecting to the Grameen mode of collecting on its loans); Gina Neff, *Microcredit, Microresults*, 74 LEFT BUS. OBSERVER 1, 4-5 (1996), *available at* http://www.leftbusinessobserver.com/Micro.html (criticizing microcredit programs for encouraging borrowers to compete only with other women in low-wage entrepreneurial dead ends).

[88] Walden Bello, *Microcredit, Macro Issues*, THE NATION, Oct. 30, 2006, http://www.thenation.com/article/microcredit-macro-issues (referencing the World Bank).

[89] *See supra* note 83 and accompanying text.

[90] *See, e.g.*, THOMAS W. DICHTER, WHAT'S WRONG WITH MICROFINANCE? (2007); Thomas W. Dichter, *Too Good to Be True*, 32 HARV. INT'L REV. (May 1, 2010), *available at* http://hir.harvard.edu/women-in-power/too-good-to-be-true; MILFORD BATEMAN, WHY DOESN'T MICROFINANCE WORK? THE DESTRUCTIVE RISE OF LOCAL NEOLIBERALISM (2010) (describing microfinance as advantageous to investors and international standard-setters). On doubts about microfinance in the context of trafficking, see Katherine Driscoll, *Microcredit: Not Yet a Panacea to End Trafficking in Women*, 13 U. PA. J. BUS. L. 275, 287

just skeptical that loans cure poverty and suggesting that claims of big effects were exaggerated—post-downturn critiques have found malfeasance in microfinance.[91] In this perspective, choices like awarding a big prize to a bank and declaring a calendar year of microcredit were not mere judgment-calls akin to admiring celebrities more than they deserve: they generated new harms.

Prestige from the 2006 award directly preceded the initial public offering of the controversial microfinance institution Banco Comparatamos in Mexico in 2007, a launch that drew more than a billion United States dollars in market capitalization on its closing date.[92] Boosterish books published in 2005 and 2006 that bore optimistic titles—*Untapped, Make Poverty Business, The 86% Solution, The Fortune at the Bottom of the Pyramid*—preached microfinance as a tool for anyone, rich or poor, to gain wealth.[93] Because loans are more profitable than savings,[94] it is likely that that touting microfinance encouraged wealth-pursuers, providers and customers alike, to accrete unsustainable levels of debt. Increased economic vulnerability also makes it easier for lenders to get away with overcharging and otherwise injuring poor borrowers.[95]

(2010), *available at https://www.law.upenn.edu/journals/jbl/articles/volume13/issue1/Driscoll13U.Pa.J.Bus.L.275%282010%29.pdf. See also* Rebecca Farrer, *Exploring the Human Rights Implications of Microfinance Initiatives*, 36 INT'L J. LEGAL INFO. 447, 459 (2008) (reporting that women with HIV may be especially ill served by group-loan models of microfinance) (citations omitted).

[91] *See, e.g.*, HUGH SINCLAIR, CONFESSIONS OF A MICROFINANCE HERETIC: HOW MICROLENDING LOST ITS WAY AND BETRAYED THE POOR (2012) (arguing that microfinance rapidly became a locus of gouging by commercial banks); BATEMAN, *supra* note 90.

[92] *See* Dragan Loncar, Christian Novak & Svetlana Cicmil, *Global Recession and Sustainable Development: The Case of Microfinance Industry in Eastern Europe*, MICROFINANCEGATEWAY.ORG (Sept. 2009), http://www.microfinancegateway.org/gm/document-1.9.39138/MICROFINANCE%20PAPER-%20FINAL%20VERSION.pdf (finding a connection between the two).

[93] Aneel Karnani, *Romanticizing the Poor*, 7 STAN. SOC. INNOVATION REV. 38 (2009), http://www.ssireview.org/pdf/RomaticizingthePoor.pdf.

[94] *See infra* Part III.

[95] Sebastian Strangio, *Is Microfinance Pushing the World's Poorest Even Deeper Into Poverty?*, THE NEW REPUBLIC (Dec. 14, 2011, 12:00 AM), http://www.tnr.com/article/world/98499/microfinance-drive-poverty (quoting an activist based in Dhaka: "Microcredit is discrimination against the poor, it doesn't empower. It's total nonsense."); Devinder Sharma, *Micro-finance Institutions on a Looting Spree: Making Profits From Poverty*, GROUND REALITY (Nov. 25, 2009, 11:52 AM), http://devinder-sharma.blogspot.com/2009/11/micro-finance-institutions-on-looting.html ("All that micro-finance institutions are doing now is [replacing] moneylenders. Micro-finance institutions are also extracting their pound of flesh.").

A milder expression of pessimism notes that microfinance appears neither necessary nor sufficient for the economic advancement of a nation. Anne Welle-Strand, Kristian

3. Seeking the Center

Valuable writings on microfinance have eschewed the extremes of cheerleading at one end and fretting at the other. These works include a celebrated book published in stages on the Internet, with opportunities for readers to weigh in on draft chapters;[96] explanations of how difficult it is to know whether microfinance initiatives have any effect and reviewing the small set of controlled studies;[97] and distinctions between microsavings and microcredit, the former type of microfinance being safer and more necessary.[98] These publications work in a middle ground that is different from a stance we may call centrism, which aspires to a middling level of enthusiasm for microfinance.

After optimists documented the problem of poor people cut off from access to banks and pessimists focused on various adverse consequences associated with microfinance, this hope for synthesis started to manifest in generalizations about microfinance in around 2009. Expand but add safeguards, said the newest conventional wisdom. Make more loans, but worry about abuses. Temper pessimism with optimism and optimism with pessimism.[99]

Two difficulties with centrism are pertinent to the challenge of regulating microfinance. First, there is no *a priori* reason to suppose that correctness necessarily lies midway between two policy positions perceived as polar

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Kjøllesdal, & Nick Sitter, *Assessing Microfinance: The Bosnia and Herzegovina Case*, 8 MANAGING GLOBAL TRANSITIONS 145, 150-51 (2010) (noting that Vietnam and South Korea made significant economic progress with little microfinance, while Bangladesh, Bolivia, and Indonesia, which experienced an "influx of microcredit," fared worse at alleviating poverty) (citation omitted).

[96] RODMAN, *supra* note 61.

[97] *A Partial Marvel*: Microcredit May Not Work Wonders But It Does Help The Entrepreneurial Poor, THE ECONOMIST (July 16, 2009), http://www.economist.com/node/14031284?story_id=14031284; Robin G. Isserles, *Microcredit: The Rhetoric of Empowerment, the Reality of "Development as Usual,"* 31 WOMEN'S STUD. Q. 38 (2003).

[98] The Yale University economist Dean Karlan, acclaimed for empirical work on the effects of microfinance, told a journalist that concerns about "irrational exuberance" with respect to borrowing should not obscure the need to expand microsavings. *See* Strangio, *supra* note 95.

[99] *See, e.g.*, VIKRAM AKULA, A FISTFUL OF RICE: MY UNEXPECTED QUEST TO END POVERTY THROUGH PROFITABILTY (2010) (defending for-profit microlending while condemning microlenders that charge the maximum interest rates that loan markets will bear); Beatriz Armendáriz & Marc Labie, *Introduction and Overview: An Inquiry Into the Mismatch in Microfinance*, *in* THE HANDBOOK OF MICROFINANCE 3 (Beatriz Armendáriz & Marc Labie eds., 2011) ("Microfinance . . . is seen by some as a magic wand against poverty that is supposed to solve it all. For others, microfinance is no more than a new wave of usurious practices reframed and glorified.").

opposites.[100] The optimistic and the pessimistic view of microfinance could each be wrong in the sense of not going far enough, rather than going too far. Diluting one with the other would yield worse results than would hewing to the (correct) extreme. Second, neither in isolation nor as constituents of a dialectic do optimistic or pessimistic perspectives on microfinance answer the questions of which microfinance rules are best and whether regulation ought to discourage or encourage particular financial practices.

Debates about microfinance return to the oscillation between exuberance and worry found in debates about what might be called macrofinance, the larger environment of domestic and transnational consumer banking. Good-faith disagreement about consumer-finance regulation (good-faith, that is, in the sense of disinterested pursuit of socially optimal rules rather than a quest for personal or political advantage)[101] has also shuttled between laissez-faire and sterner controls. Leaving the market alone seems like a good idea until defaults and insolvencies mount. Regulating tightly seems like a good idea until lack of access to capital appears to oppress providers or customers. Centrism between optimism and pessimism seems like a good idea until constituencies demand to know what exactly the rules are trying to install while partisans of the polar stances—laissez-faire or sterner controls—perceive any middle ground as misguided appeasement. The problem of warring ideological cohorts is thus familiar from the larger debate about financial regulation.

In microfinance the problem has worse effects because comprehensive proposals to regulate microfinance are formed at a maximum distance from clients. Consumer banking in the United States may suffer from regulatory capture, excess influence by banks over Congress and state governments, or inadequate enforcement of existing regulation, but at least rule-writers live in the same country as consumers and thus face some accountability. Best-practices statements about microfinance of the CGAP or Basel stripe get written by remotely situated researchers who do not suffer when their recommendations fail. These authors might be disinterested in the research-centered sense of the adjectives "neutral" or "impartial"; but whereas disinterestedness is good for the assessment of interventions, it can make proffered new rules worse when it insulates initiators from consequences.

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[100] BO BENNETT, LOGICALLY FALLACIOUS: THE ULTIMATE COLLECTION OF OVER 300 LOGICAL FALLACIES (2012) (identifying the argument to moderation or *argumentum ad temperantiam* as synonymous with "middle ground, false compromise, gray fallacy, golden mean fallacy, fallacy of the mean, [and] splitting the difference").

[101] *See supra* note 8.

Comprehensive national legislation avoids this infirmity because codifiers live with what they promulgate. Yet by addressing "microfinance" rather than financial institutions, these statutes exempt the middle-income and wealthy citizenry from what the rules deliver. Experiences with federal transfer payments in the United States—Medicare and Social Security for citizens in the mainstream and "welfare" and food stamps for the marginalized poor—point up the danger of stigma and isolation raised by provisions that affect only the very poor.[102] Once "microfinance" sticks as a label, this segment of consumer credit becomes a regulatory ghetto, outside the mainstream.

The lack of consequences for prosperous stakeholders makes microfinance more vulnerable to variations in exuberance and worry. Centrism also fails to mitigate extreme shifts because of the same problem: a gap between the prescribers and the prescribed-to. Separated from effects, centrist observers add mainly dilution and vagueness to a policy debate.

In sum, because regulators who draft provisions about microfinance live far from the results of their efforts, the tempering effects of lived experience are less available to ease the ideological extremes of optimism and pessimism and what may be the thoughtless compromises of centrism. For rule-writers who join the optimistic, pessimistic, or centrist teams, microfinance offers a playing field for predilections and ideologies. This distance helps to explain the proliferation of microfinance principles and compendia: the powerlessness that accompanies poverty means that people at risk of harm from interventions cannot silence an intervenor. Nor do they have much voice in the debate. In sectors of the consumer-credit economy that reach the middle class (credit cards, automobile financing), reformers would be more inhibited by modesty. Optimists, pessimists, and centrists who would normally have to negotiate with and learn from one another in ideological competition can remain separated when opining on microfinance. Relatively marginal perspectives face low barriers to entry.[103] Diversity in ideas may make for lively reading, but regulation that can be enacted and enforced needs a foundation in politics on the ground.

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[102] *See generally* Jennifer Stuber & Mark Schlesinger, *Sources of Stigma for Means-Tested Government Programs*, 63 SOC. SCI. & MED. 933 (2006) (noting an association between means-testing and stigma in U.S. transfer programs).

[103] The large majority of what is written about microfinance gets published only online. Peer review, editorial oversight, and the market of consumers who pay for what they read all hold relatively little sway in policy debates.

C. The Oxymoron of a "Double Bottom Line"

Like "microfinance" itself, "the double bottom line" makes a useful point at the expense of clarity and coherence. This coinage refers to simultaneous pursuit by an entity of pecuniary earnings and social enhancements.[104] Terms like "social entrepreneurship" for newly formed, progress-minded entities and "cause marketing" for commercial promotions that promise to give returns to charity illustrate the double bottom line as propounded by for-profit businesses.[105]

Microfinance entities—banks and charities alike—have expressed fondness for this dual pursuit, emphasizing the microcredit subset of microfinance.[106] The notion that small loans to poor borrowers yield both earnings for the lender and gains for the nearby community is foundational to contemporary microfinance. It underlay the Nobel Peace Prize award divided in 2006 between a bank founder and the entity he started.[107] The two bottom lines really do have ground in common. Pecuniary earnings and social enhancements overlap whenever gains in wealth support positive cultural change in a community. As one scholar has argued, the two priorities come together in "microfinance organizations that affirmatively seek to change culturally-based attitudes that are antithetical to broad development principles."[108]

Few would quarrel with doing good while doing well, and the truism that human actors pursue more than one goal at a time is not the problem with the double bottom line. The difficulty lies in an implicit commitment to precision that cannot be achieved. Traditional for-profit ledgers measure the financial side of a bottom line relatively easily by subtracting costs from revenues. The social-enhancement ledger is less amenable to quantification.

Measurement technologies do exist, to be sure. In her strong defense of social entrepreneurship, approving of undertakings by for-profit businesses to "harness[] innovation, people, and resources to develop an enterprise that

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[104] Jerr Boschee, *Doing Good While Doing Well*, PITT. POST-GAZETTE, Oct. 19, 2008, at G1.

[105] Brakman Reiser, *supra* note 11, at 34-41.

[106] *See* Drew Tulchin, *Microfinance's Double Bottom Line: Measuring Social Return for the Microfinance Industry*, SOCIAL ENTERPRISE ASSOCIATES 7 (2003), http://www.microfinancegateway.org/gm/document-1.9.27273/13947_13947.pdf ("Effectively gauging and then reporting financial and social activities—managing both as the Double Bottom Line (DBL)—positions microfinance institutions as a solution. Few fields in development or commerce emphasize both economic and social performance as strongly as microfinance.") (emphasis in original).

[107] *See supra* note 69 and accompanying text.

[108] Cao, *supra* note 9, at 988.

is self-sustaining, makes money, and solves a social problem,"[109] Janet Kerr surveys the tools that can gauge social impact and finds them bounteous. Innovators, she notes, have come up with taxonomies of metrics, guidelines that a board of directors can apply to the socially minded entity it governs, and a framework for managers to use while pursuing social entrepreneurship.[110] It would no longer be fair to ascribe feel-good vacuity to the social half of the double bottom line now that experts have applied themselves to the task of measurement. Nevertheless, to date "no universal standard"[111] has emerged to gauge the social profit (or loss) of a double-bottom-line venture.

"The double bottom line" must remain an oxymoron. Even if measurements should improve to the point of consensus about how to quantify the social gains of an entity, a bottom line tolerates no bifurcation. It announces finality. For any enterprise there can be only one. Accounting standards may in the future evolve to measure the sustainability or social enhancements achieved by a for-profit business, and also to recognize that gains at one side of the ledger do not necessarily come at the expense of the other;[112] but it is hard to imagine how any measure might frame one conclusion about corporate health that matters just as much as a separate conclusion. Metrics amenable to counting social gains—which have not yet taken hold—necessarily differ from the ones that count pecuniary profit. They do not lie on the same axis.

III. DISAGGREGATION, FIRST PASS: MICROFINANCE AS BANKING FOR POOR PEOPLE

Replacing "microfinance" with "banking for poor people" as an object of regulatory attention advances at least three ends. First, it disaggregates a dense Latinate term into pertinent constituents. Second, it makes the regulatory effort simpler and more intelligible. Third, it puts a vulnerable sector into the foreground for regulators.

As a label, "microfinance" distracts from the work of identifying risks, activities, and participants in the sector they are addressing. This Part substitutes a cumbersome phrase—"banking for poor people"—precisely because this alternative is too clunky to become jargon. "Banking for poor

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[109] Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 633 (2007).

[110] *Id.* at 644-53.

[111] Tulchin, *supra* note 106, at 7.

[112] Kerr, *supra* note 109.

people" also aids the task of disaggregation by inviting regulators to think about demand for, not just the supply of, the services they oversee.[113] One noun in the phrase refers to providers and the other to customers.

After "banking for poor people" becomes the object of regulatory effort, the desirability of simplicity becomes more apparent. Complexity is of course hard to avoid in rules governing banking. Other things being equal, however, these rules function better when they are relatively easy to follow.[114] At least at the preliminary level where this Article makes its recommendations, opportunities for more clarity emerge through inquiry into what customers want from banking for poor people.

Researchers know the answer. Foremost, poor people want a safe place to store their money.[115] They also want access to credit.

A. Support For Savings

"Portfolios of the poor," a jocular-sounding title of a book whose point is not facetious,[116] notes the near ubiquity of private property. Although millions of people in the world are poor, few adults possess nothing. What the poor categorically lack are secure places to store what they own, and when surveyed they rank this need above others.[117] Savings that can be kept relatively safe can smooth fluctuations in income, provide continuity during emergencies or occasions of new opportunity, and allow individuals to share life-cycle events like funerals and weddings in their communities. People need credit only some of the time, savings all of the time.[118]

The global downturn that began in 2008, reckoning with loan money gone bad, harmed the relative prestige of microcredit within microfinance. Donors and governments turned their attention away from debt and toward savings. In early 2010, the Gates Foundation announced a $38 million initiative to promote savings in 18 microfinance institutions.[119] In 2012

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[113] *See infra* Part III.B.2.

[114] Joe Nocera, *The Simplicity Solution*, N.Y. TIMES, May 29, 2012, at A23 (applying this generalization to financial regulation).

[115] ROBINSON, *supra* note 58.

[116] DARYL COLLINS ET AL., PORTFOLIOS OF THE POOR: HOW THE WORLD'S POOR LIVE ON $2 A DAY (2009).

[117] Joshua Haynes & Mariah Levin, *Debating the Future of Savings-Led Microfinance: A Summary Paper of the* Microfinance From Below *Conference* (2009), http://fletcher.tufts.edu/CEME/research/~/media/Fletcher/Microsites/CEME/newpdfs/CEME_MFSavingsConferenceReport_03-2009.ashx (referencing the research of Marguerite S. Robinson).

[118] Marguerite Robinson & Graham A.N. Wright, *Mobilising Savings*, *in* SAVINGS—AN ESSENTIAL SERVICE FOR THE POOR 25, 26 (2009), http://www.microsave.org/sites/files/technicalBriefs/briefingNotes/Savings_Booklet.pdf.

[119] *A Better Mattress: Microfinance Focuses On Lending. Now The Industry Is Turning*

Oxfam, the British charity, declared on its blog: "Forget microcredit: microsavings work much better," going on to describe the operations of its initiative Savings for Change.[120]

Regulators thus have an array of proposals, experiences, and pilot programs to draw on as they consider what to support through rule-based facilitating. Although challenges to safe savings will vary from region to region, a few points of common concern recur and provide a starting point for savings reform. Like other recommendations in this Article, savings-supportive regulatory priorities can be pursued and implemented without use of the word microfinance.

1. Reconsidering Prudential Rules

Financial institutions that seek to take deposits must comply with regulations focused on whether capital reserves are secure enough to let customers withdraw money at will. This posture regards deposit-taking as riskier than loan-making, and prudential regulation thus burdens savings banks more than lenders that dispense microcredit. This attention to safety is incomplete. Institutions that meet prudential standards are less likely to fail than those that do not, but when poor people face the danger of having no savings bank at all, aggregate-level safety diminishes.

Addressing this problem, reformers have offered suggestions to lower cash-reserve minimums to qualify for a bank charter while keeping savings accounts secure enough for poor customers.[121] The tradeoff is perilous—at the prudential level it treats poor depositors worse than prosperous ones—yet it warrants consideration as a source of welfare for a vulnerable cohort. At a minimum, rule-writers ought to ask whether existing prudential rules have made low-income prospective depositors better or worse off.

2. Linkages

Foreclosed from institutional accounts to hold their cash deposits, the unbankable poor resort to self-help, which at its most sophisticated takes the form of group-based saving. Unbankable persons who unite in these alliances know what they are missing: "security, convenience, liquidity, access to loans, choice of demand driven products, helpful and respectful

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To Deposits, THE ECONOMIST (Mar. 11, 2010), http://www.economist.com/node/15663834 [hereinafter *A Better Mattress*].

[120] Duncan Green, *Forget Microcredit: Microsavings Work Much Better*, OXFAM (Apr. 5, 2012, 9:12 AM), http://www.oxfamblogs.org/fp2p/?p=9489.

[121] *See* McNew, *supra* note 67, at 288 (noting the tradeoff); Bernstein & Seibel, *supra* note 18, at 83-84 (noting recommendations made by the Alliance for Financial Inclusion).

service, confidentiality, and returns," reported Marguerite Robinson, author of *The Microfinance Revolution*, summarizing her field work.[122] "None of us wants to bank with groups," researcher Malcolm Harper has noted wryly, "but we are happy to promote that the poor should use them forever."[123]

Linkage banking presents a partial solution to this fragility by enhancing connections between group-based savings and rotating credit associations and formal institutions. Pioneer initiatives, installed first in Indonesia and later in India, invented linkage banking when they identified small groups of savers (twenty or fewer people, predominantly women, in both countries) and helped them connect with banks, usually delivering advice as well as accounts in the name of the group.[124] Linkage banking in India, where these clusters of customers are called "self-help groups," has fostered microcredit incidentally while emphasizing microsavings.[125] Researchers studying India report positive economic effects.[126] To the extent that self-help groups have fared worse since the global downturn,[127] these consequences originate in loans rather than savings; linkage banking remains promising as a source of enhanced savings.

Access to formal institutions increases the prospects of poor savers to earn interest on their money, reach additional capital in the form of credit, and gain formal legal protection of their holdings.[128] What regulators can do to support linkage banking ranges from engagement by a large national bank with or without the mediation of nonprofit organizations, as in India, to more modest innovations. For example, bank rules could be amended to permit a wider range of names on the account.

3. New Types of Savings Accounts

Lack of access to bank accounts is the major impediment to safe savings for the poor, but other obstacles diminish the quantity of money held by low-income depositors in banks. The poor are by hypothesis short of cash. Saving money precludes spending it, and so any commitment individuals may have to save their money means a reduction in whatever utility they obtain from consumption. The pleasure of corruption can be short-lived.

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[122] *See* Haynes & Levin, *supra* note 117, at 3.

[123] *Id.*

[124] Bernstein & Seibel, *supra* note 18, at 83-84.

[125] *Id.*

[126] *Id.* at 84 (reporting on findings by Seibel and the central bank of India).

[127] *See supra* notes 43-45 and accompanying text (noting the local collapse of microlending in 2010).

[128] *See supra* note 124 and accompanying text.

Tempted to spend money that they could otherwise deposit in the bank accounts they have, people might not save as much as they think they want to. That individuals desire to prevent themselves from consuming their spare cash is manifested by the popularity of voluntary barriers to spending.[129]

Depositors voluntarily accept—and even pay for—"commitment savings products" that make their holdings less liquid. This category offers options that bank regulators could encourage in an effort to enhance safe savings.[130] A review financed by the Asian Development Bank examined schemes that have been tried and show promise. Some of the constraints that were studied force deposits; others inhibit withdrawals. On the forced-deposit side, automatic transfers into investment accounts and automatic withholding from paychecks offer promise mainly to the relatively rich poor in prosperous countries. Other practices—such as bonuses awarded by financial institutions for saving, deposit collectors, and commitment-savings schemes for farmers—can benefit the relatively poor poor.[131] Restricted-use savings accounts, restricted timing of withdrawals, a (literal) lock box that holds cash, withdrawal fees, and peer monitoring are among the examples of schemes focused on the withdrawal side of commitment savings.[132]

4. Reaching Poor Depositors Where They Live and Work

Geographic distances impede the access poor people might otherwise have to banks. Technology looks like a fix. "Much of the current buzz," remarks a 2008 report on what CGAP has called transformational branchless banking, "is around mobile phones,"[133] of which several billion

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[129] Nava Ashraf, Nathalie Gons, Dean Karlan & Wesley Yin, *A Review of Commitment Savings Products in Developing Countries*, THE FINANCIAL ACCESS INITIATIVE AND INNOVATIONS FOR POVERTY ACTION 4-5 (2003), http://financialaccess.org/sites/default/files/publications/a-review-of-commitment-savings-products-in-developing-countries.pdf (noting, inter alia, the choice of U.S. taxpayers to overwithhold the income tax they owe to get a larger refund; the high proportion of U.S. wealth held in illiquid assets, and the willingness of individuals to accept inconveniences for the purpose of generating more savings).

[130] *Id.*

[131] *Id.* at 5-8.

[132] *Id.* at 8-11.

[133] Timothy R. Lyman, Mark Pickens & David Porteous, *Regulating Transformational Branchless Banking: Mobile Phones and Other Technology to Increase Access to Finance*, CGAP (Jan. 15, 2008), http://www.cgap.org/publications/regulating-transformational-branchless-banking-mobile-phones-and-other-technology.

are in use around the world.[134] The director of a Gates Foundation initiative aimed at enhancing financial access has argued that mobile phones and retail storefronts can combine as instruments for making savings more available to poor depositors, who can use their telephones to order transactions and familiar retail venues to pick up and leave their money.[135]

Inviting banks to reach low-income prospective savers with partnerships between mobile communication technology and retail agents necessarily reaches into several regulatory domains. Rules pertaining to telecommunication, competition, and consumer protection bear on feasibility. At the banking level, implementation of such a proposal necessarily touches on foreign exchange regulations, e-commerce rules, and provisions governing whether and how a bank's agent can work with customers at retail storefronts.[136] Regulators must also consider how to count, for the sake of prudential-rules compliance, sums in accounts that are available to depositors by electronic means.[137]

B. Enhanced Lending

The downturn that had spread through the world by 2008 showcased both the presence and the absence of loan regulations. The American statutory response to this crisis, named Dodd-Frank for two committee chairmen in Congress and tellingly subtitled the Wall Street Reform and Consumer Protection Act,[138] covered most of the United States income spectrum. At the richer end, hedge funds, private equity funds, derivatives, investment banks, and other aggregations of wealth on Wall Street faced controls the likes of which had not been introduced since the Great Depression.[139] At the poorer end, Congress bestowed power over consumer-finance fundamentals on a new Consumer Financial Protection Agency.[140] Similar

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[134] *See Gartner Says Worldwide Mobile Connections Will Reach 5.6 Billion in 2011 As Mobile Data Services Revenue Totals $314.7 Billion*, GARTNER NEWSROOM (Aug. 4, 2011), http://www.gartner.com/it/page.jsp?id=1759714 (estimating 5.6 billion mobile connections worldwide in 2011).

[135] *A Better Mattress*, *supra* note 119 (quoting Robert Peck Christen).

[136] Lyman, Pickens & Porteous, *supra* note 133, at 5.

[137] *Id.*

[138] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Christopher Dodd chaired the Senate Banking Committee and Barney Frank chaired the House Financial Services Committee. Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 IND. L.J. 1361, 1380 n.100 (2011).

[139] Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 113 (2012).

[140] *See id.* (summarizing Dodd-Frank).

interventions arose outside the United States. The European Union moved in 2009 to centralize regulation of banking, securities, and the insurance sector,[141] while supranational entities took steps to strengthen prudential regulation.[142]

Re-regulating has proceeded. Going forward, the substitution of "banking for poor people" for "microfinance" would keep both customers and providers at the forefront of new lending controls. Consumer protection ought to be a priority for the regulation of loans made to low-income borrowers. Another priority, this one focusing on providers, is to optimize levels of loan capital.

1. Consumer Protection

Two ideas warrant attention in any discussion of consumer protection in microlending because they so pervade the literature on financial regulatory reform. The first is transparency: Advocates argue that consumers should receive intelligible accounts of how much they are borrowing, how much they will have to repay, how loans available in the borrowers' markets compare to one another, and the consequences of not repaying.[143] The second oft-proposed reform is a maximum interest rate.[144] Both ideas have promise and both call for caution before implementation.

Transparency offers something for two conflicting sectors in the politically binary debate, *pro* versus *contra*, on regulation. Because clarity about loan terms makes no sense unless borrowers can use disclosures to guide their decisions, transparency as policy necessarily embraces and extends consumer choice. This stance appeals to both admirers and opponents of regulation, the optimists and pessimists we met in the last Part. Pessimists appreciate transparency as a source of power for weaker parties. For optimists, transparency supports an attractive alternative to

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[141] Ian Traynor, *European Union Agrees Super-Regulator to Head Off Financial Crises*, THE GUARDIAN, Dec. 2, 2009, http://www.guardian.co.uk/business/2009/dec/02/eu-financial-regulation-deal.

[142] Kevin Davis, *Regulatory Reform Post the Global Financial Crisis: An Overview*, MELBOURNE APEC FINANCE CENTRE (2011), http://www.apec.org.au/docs/11_CON_GFC/Regulatory%20Reform%20Post%20GFC-%20Overview%20Paper.pdf.

[143] Robin Ratcliffe, *An Industry Imperative: Enhancing Consumer Protection in Microfinance*, MICROFINANCE INSIGHTS (2009), *available at* http://www.accion.org/Document.Doc?id=637.

[144] Brigit Helms & Xavier Reille, *Interest Rate Ceilings and Microfinance: The Story So Far*, CGAP OCCASIONAL PAPER (2004), http:www.cgap.org/sites/default/files/CGAP-Occasional-Paper-Interest-Rate-Ceilings-and-Microfinance-The-Story-So-Far-Sep-2004.pdf.

command-and-control rules from bureaucrats. Neither side is completely satisfied, but a policy of transparency meets them halfway.[145]

Substituting "loans made to poor people" for the word microcredit or microfinance hones attention to a couple of basic problems with transparency as policy. A summary of transparency circulated by Oikocredit, an international organization founded by church leaders in 1975 to support fledgling enterprises with loan capital, notes the custom of microfinance analysts to estimate loan prices "by looking at institutional portfolio yields."[146] Yields do not reveal the prices of loans when an institution offers multiple products at multiple prices.[147]

Lenders do not follow any unitary convention in articulating the price of a loan. Two popular metrics, annual percentage rate and total cost of credit, count the cost of borrowing differently and compete with other alternatives.[148] Even if regulators and lenders wanted to agree on criteria and terminology for loan disclosure, individual borrowers present divergent conditions for lenders: they present a range of credit histories, and market conditions can make the price of money labile in a region.[149] Prices vary in response to other conditions, including the sizes of loans, transaction costs that lenders associate with particular loans, inflation, taxes, and the maturity of the lending institution.[150]

And even if prices could be stated clearly and consistently, poverty impedes what individuals can learn about the terms banks offer them as customers. One expert on financial-literacy initiatives has concluded that "the gulf between the literacy levels of most Americans and that required to assess the plethora of credit, insurance, and investment products sold today—and new products as they are invented tomorrow—will not be

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[145] This midpoint gives transparency the appearance of transcending partisanship. *See generally* JACQUELINE BEST, THE LIMITS OF TRANSPARENCY: AMBIGUITY AND THE HISTORY OF INTERNATIONAL FINANCE (2006) (arguing that calls for transparency mask political struggles and that as policy, transparency is never just a simple corrective to shortfalls of information in a market).

[146] Alexandra Fiorillo, *Pricing Transparency in Microfinance: No Single Price for Microloans*, MFTRANSPARENCY.ORG (Oct.24, 2011), http://www.mftransparency.org/pricing-transparency-in-microfinance-no-single-price-for-microloans/.

[147] *Id.*

[148] Interview by OIKO CREDIT with Chuck Waterfield, CEO of MicroFinance Trasnsparency (Feb. 10, 2012) *available at* http://www.mftransparency.org/pricing-transparency-in-microfinance-interview-with-chuck-waterfield-ceo-of-mftransparency/.

[149] Alyssa Hansen, *The Interest Rate Debate: How is Oikocredit Protecting Clients?*, OIKO CREDIT (Aug. 9, 2011), http://oikocreditusa.org/the-interest-rate-debate-how-is-oikocredit-protecting-clients/.

[150] *Id.*

bridged."[151] Poor people in the United States are relatively rich. In India, one study of micro-borrowers "found that only 17 percent of respondents were able to solve the arithmetic problem 'divide 8,000 by 10' and only three percent of respondents could multiply '4,500 by 18.'"[152] Borrowers typically misunderstand the interest rates they pay.[153]

In debates over the regulation of loans made to poor people, the other oft-mentioned reform idea, price controls, serves as a kind of complement to transparency. Transparency enjoys popularity among reformers and other observers but warrants concern. Limits on the amounts of interest that lenders can lawfully charge borrowers have generally been decried;[154] they may deserve more support.

Critics of interest rate caps emphasize the truism that poor people's banking is a costly business. If limited to prices that would not shock observers who have ready access to loan capital, lenders to a poor clientele could not make money. They would cater to the well-banked sector, whose loans are cheaper to administer. In turn poor people, cut off from well-regulated credit, must resort to "moneylenders" or "loan sharks." These epithets connote disrespect for the rule of law, predatory tactics to get loans repaid and, of course, interest rates even higher than the high prices a well-regulated lender would charge without caps.

Regulators might keep in mind the analogous critique of minimum wage legislation as a reform to enhance welfare for the poor. For market-modelers in the academy, it once was axiomatic that employment rates and minimum hourly wages are inversely correlated. Any employer, according to the axiom, would choose to do without labor—switching to machinery, perhaps, or offshore manufacture—unless that labor came cheap, and so policymakers could have robust domestic employment or good wages but not both. Experience refuted the hypothesis.[155]

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[151] Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 201 (2008).

[152] *See* Karnani, *supra* note 2, at 50.

[153] Akhand Tiwari, Anvesha Khandelwal & Minakshi Ramji, *How Do Microfinance Clients Understand Their Loans?*, CENTRE FOR MICRO FINANCE (2008), http://ifmr.ac.in/cmf/publications/wp/2008/25_Ramji_Loan%20Contracts_Financial%20Literacy.pdf.

[154] Priyadarshee & Ghalib, *supra* note 45, at 7-9 (summarizing the debate).

[155] The leading monograph on the minimum wage concludes that raising it does not harm employment. DAVID CARD & ALAN B. KREUGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995) (reporting empirical studies). *See also* Steven Greenhouse, *A Campaign to Raise the Minimum Wage*, N.Y. TIMES, Apr. 9, 2012, at B1 (reporting a suggestion that the minimum wage be raised as an economic stimulus: more wage income means more cash in the hands of spenders). Disagreement continues. On state and local data in the U.S., *compare* Debra Burke, Stephen Miller & Joseph Long, *Minimum Wage and Unemployment Rates: A Study of Contiguous Counties*, 46 GONZ. L. REV. 661

For loans made to poor people, experience within a domestic economy can serve a similar function, informing the to-cap-or-not-to-cap question.[156] Studies of microlending have yielded mixed results. Ecuador has fared well with limits on interest rates,[157] Vietnam poorly.[158] Regulators in a jurisdiction can consider how their setting resembles, or differs from, other places where interest rate caps have succeeded. Caps are likely to function better where microloan markets are dominated by monopoly providers, because restrictions on lenders' rents would invite in more entrants to compete with the monopolist and, at least in theory, drive loan prices down.[159] Loosening the clutch of monopoly power is a regulatory goal that interest rate caps can advance. Here policymakers have available the experience of South Africa, where legislation authorizes the government to impose interest rate controls in response to market data.[160]

Another consumer-regulatory direction that experience can guide is the prohibition of abusive repayment tactics.[161] Like transparency and interest rate caps, this reform can deliver only so much and implementers ought to remain aware of its limitations. Predatory lenders foreclosed by law enforcement from one type of predation would presumably try to shift to

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(2010-2011) (finding an adverse effect on employment) *with* Scott D. Miller, *Atrophied Rights: Maximum Hours Labor Standards Under the FLSA and Illinois Law*, 28 N. ILL. U. L. REV. 261, 279 (2008) (observing that after Illinois raised its minimum wage, its employment rate went up).

[156] *Compare* Elin M. King, *Vietnam's Decree on Microfinance: A Flawed Attempt to Create an Enabling Legal Environment for Microfinance*, 17 PAC. RIM L. & POLY J. 187 (2008) (arguing that caps failed in Vietnam) *with* Megan Whittaker, *South Africa's National Credit Act: A Possible Model for the Proper Role of Interest Rate Ceilings for Microfinance*, 28 NW. J. INT'L L. & BUS. 561 (2008) (arguing that caps succeeded in South Africa).

[157] *See* Bill Payne & Gray Skinner, Microfinance Regulation: Interest Rate Caps and Concept of Usury 57 (2010) (unpublished manuscript), *available at*: http://works.bepress.com/gray_skinner/1 (reporting success in Ecuador). "I'm not in favor of interest rate caps," wrote the founder of MF Transparency in a comment left on the CGAP microfinance blog:

> but I would say that a main factor for forcing MFIs [microfinance institutions] to think harder about their pricing has been pricing caps. . . . When there isn't price competition, when there isn't pricing transparency, when there aren't pricing caps, MFIs—especially for-profit MFIs—don't have much incentive to really think hard about reducing the prices they are charging the poor.

Richard Rosenberg, *Competition Gets a Pat on the Back*, CGAP (Feb. 7, 2012), http://www.cgap.org/blog/competition-gets-pat-back (reporting a comment from Chuck Waterfield)

[158] King, *supra* note 156.

[159] *See* Karnani, *supra* note 2, at 50-51.

[160] Whittaker, *supra* note 156, at 580-81 (adverting to the National Credit Act of 2005, which allows a trade minister to set interest rate caps based on market data).

[161] *See* Dowling, *supra* note 40, at 1086 (describing predatory loan collection tactics in Andhra Pradesh).

another; regulators cannot expect that abusive lenders will live within decent means of obtaining repayment. It remains desirable, however, to remind lenders that loan payments may be pursued by some means and not others. Enforcement of legal controls on repayment tactics, in turn, returns to transparency. Enforcement tells borrowers which burdens of their repayment struggle must be endured and which are unacceptable because they violate the law.[162]

For regulators, the clearest guidance from experience is that it is desirable to prevent, or at least discourage, individual microdebtors from taking out several unsecured loans at the same time.[163] This regulatory stance—a frankly paternalistic intervention—constrains lending while keeping the vulnerability of individual debtors in mind. Legal interferences in voluntary transactions are always difficult to enforce: but this species of interference, with recent histories of default so fresh in mind, will likely warrant the necessary effort and cost. Experiments in securitization and other technologies that increase the pool of loan capital function more safely when regulators can thwart the making of multiple unsecured loans to the same low-income borrower. We now look more closely at this innovation.

2. Optimizing Loan Capital: Toward Sustainability

Researchers report, on one hand, a problem of too little loan cash available for the world's poor to borrow for microenterprises and, on the other, instances of crisis where too much money flooded a particular loan market too suddenly.[164] The word "sustainable" describes what regulators ought to pursue when they try to optimize loan capital. An increase in the supply of money will, when it is sustainable, permit poor people to borrow more at their election while at the same time not mire individuals in debts they cannot repay.

"Sustainability" is, to be sure, a conclusory term that tends to emerge only in its absence; when large numbers of borrowers default and portfolios go bad, observers condemn the initial lending in the aggregate as unsustainable. The term can nevertheless be applied to consider one technique, securitization, that sets out to enlarge microloan capital.

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[162] *See* Tiwari, *supra* note 153 (reporting findings that borrowers do not know which repayment tactics are permitted, and that they do not disapprove of some tactics prohibited by law as abusive).

[163] Multiple loans to the same borrower has been a common thread in microloan failure at the national level. *See supra* Part I.B.

[164] Deborah Burand, *Deleveraging Microfinance: Principles for Managing Voluntary Debt Workouts of Microfinance Institutions*, 27 J.L. & COM. 193, 194 (2009).

Corporate finance scholar Steven Schwarcz has expounded on the prospects of securitization, using "sustainable" in an article title.[165]

More microloan capital can be raised, Schwarcz argues, by the issuance to investors (not "donors"[166]) of shares in special-purpose entities established to lend money to low-income borrowers.[167] When buying the opportunity to collect on existing loans, this special-purpose entity would offer "regenerative securitization"; a bolder "transformative securitization" occurs when it moves beyond buying receivables and makes new loans.[168] This influx of investment capital could make microloans not only more available but cheaper.[169] Securitization means that no intermediary stands between investors and borrowers.[170] A loan price thus need not include any retail markup, which is the difference between the lower interest rate at which a bank borrows and the higher interest rate at which it lends.[171] The special-purpose entity does not borrow and so need not "buy low, sell high."[172] At least in principle, securitization offers poor people cheaper loans than what commercial banks can provide. The proposal has been implemented.[173]

Securitization of loan receivables is risky, however. Investors, borrowers, and financial systems have felt its repercussions. Special-purpose vehicles are key constituents of the "shadow banking system," which moves financial transactions out of the safety of prudential regulation.[174] Two other terms of popular alarm—"derivatives" and "collateralized debt obligations"—describe what Schwarcz praises as a source of new microloan capital. As one settlement of a notorious

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[165] Steven L. Schwarcz, *Disintermediating Avarice: A Legal Framework for Commercially Sustainable Microfinance*, 11 U. ILL. L. REV. 1165 (2011).

[166] *Id.* at 1197.

[167] *Id.* at 1175.

[168] *Id.*

[169] *Id.* at 1176.

[170] *Id.* at 1171.

[171] *Id.* at 1169.

[172] *Id.*

[173] *Id.* at 1177. CGAP and the Grameen Foundation jointly published a guide for microfinance institutions considering securitization. Peter Humphreys & Alexandra Moosally, *Securitization: A Technical Guide*, CGAP (2010), http://www.cgap.org/sites/default/files/CGAP-Technical-Guide-Securitization-Oct-2010.pdf.

[174] This term was coined by Paul McCulley. *See* Bryan J. Noeth & Rajdeep Sengupta, *Is Shadow Banking Really Banking?*, THE REGIONAL ECONOMIST (2011), http://www.stlouisfed.org/publications/pub_assets/pdf/re/2011/d/shadow_banking.pdf. *See also* PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 (2009) (depicting shadow banking as at the center of the financial crisis).

complaint has demonstrated, a special-purpose vehicle can injure investors who receive false information about the investments it holds.[175]

The dangers of special-purpose investment vehicles spread beyond investors, as indicated by the fall of home mortgages in the United States. Holders of securitized mortgages are less likely than mortgagees whose loans are not securitized to obtain loan modifications that allow them to stay in their homes, in part because of the different incentives for portfolio lenders and securitization servicers: a securitization servicer "does not care what the property brings in at a foreclosure . . . because the servicer is paid off the top. As long as there is just some land value left, the servicer will get paid."[176] Wide-scale loss of homes worsens the consequences of economic reversal in a region. Residents are displaced, neighboring properties decline in value, and what had been collateral for a loan dissipates. At the institutional level, collapses of securitized vehicles can grow big enough to raise the prospect of a government bailout—"too big to fail" makes ironic reference to what is in fact a catastrophic failure, with costs borne by nonparticipants—and a bailout in turn deepens perceptions of collapse.

Should regulators choose to reject or discourage securitization of microloan capital, however, "transformative"[177] shifts in how borrowers reach this money are relatively unlikely to emerge. Conventional banking for poor people—furnished by commercial banks, nonprofits, and aggregations of customer-owners[178]—keeps the supply of loan cash more constant, but this constancy may be inadequate. Microloan cash supplies unenlarged by the dramatic increases that securitization can bring is too limited to meet the needs of both low-income individuals and low-income national economies, whereas too much cash encourages lenders to make multiple loans to the same borrower. Optimizing loan capital thus calls for care in rulemaking, as the perils of both under- and over-supplying money have been well documented.

IV. REGULATION DISAGGREGATED, SECOND PASS: A FOCUS ON OWNERS

Imagine a rule-writer unaware of, or unpersuaded by, the thesis of this Article that microfinance must be disaggregated before it can be regulated.

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[175] SEC v. Citigroup Global Markets, Inc., 673 F.3d 158, 161 (2d Cir. 2012) (reviewing a proposed $285 million settlement of a civil complaint).

[176] Adam Levitin, *Is Redefault Risk Preventing Mortgage Loan Mods?*, CREDIT SLIPS (July 16, 2009, 2:03 PM), http://www.creditslips.org/creditslips/2009/07/is-redefault-risk-preventing-mortgage-loan-mods-.html.

[177] Schwarcz, *supra* note 165, at 1175.

[178] *See infra* Part IV.

This regulator might set out to codify the rules of microfinance in one unitary compilation—and promptly face a palimpsest of existing laws. The slate on which they write is not blank. Banking law might or might not govern a microfinance entity, depending on whether the entity fulfills a legal definition of a bank. Corporate governance law, which focuses on ownership, will apply divergently to businesses that can be held in different modes and may or may not pursue economic rents for owners.[179] This Part turns to owners of microfinance-providing entities.[180]

A. Pertinent Distinctions Among Providers

A sorting device that offers particular use to regulators is a relatively simple question: Who owns the entities that furnish credit and savings to low-income clients, and what do these owners want? Institutions that provide financial services to the poor may be classified along many lines. The smallest number of cohorts that pertain to regulation is three.[181] I

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[179] One early study of microfinance institutions identified three categories and seven types. *See* van Greuning et al., *supra* note 20 and accompanying text (describing the World Bank's *Framework for Regulating Microfinance Institutions*).

[180] Like every other discussion of regulation that pays attention to who owns and governs firms, this Part owes a debt to Henry Hansmann, whose writings on the law of business associations and donor-funded entities span decades. HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (1996) [hereinafter HANSMANN, OWNERSHIP]; Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980); Henry Hansmann, *Ownership of the Firm*, 4 J.L. ECON. & ORG. 267 (1988); Henry Hansmann & Reinier Kraakman, *Toward a Single Model of Corporate Law?*, *in* CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY 56 (Joseph A. McCahery et al. eds., 2002).

[181] *Cf.* Bernstein, *supra* note 82, at 22-23 (noting another division, by Hans Dieter Seibel, of microfinance institutions into three categories: informal, semiformal, and formal). Some writers favor a number smaller than three. In *The Ownership of Enterprise*, Hansmann works with the number two, dividing firms into for-profit versus non-profit and distinguishing those owned by producers from those owned by consumers. HANSMANN, OWNERSHIP, *supra* note 180, *passim*. For present purposes, however, I find a third group necessary: so much of the financial lives of poor people consists of mutual aid, and the entities formed are often neither for-profit nor nonprofit. Another owner-focused division into two categories restricts "microfinance" to formally incorporated providers and says that other providers offer "informal finance." Mark Schreiner, *Informal Finance and the Design of Microfinance*, 11 DEV. IN PRAC. 637 (2000). This dichotomy ignores myriad legal distinctions between for-profit and nonprofit entities that pervade regulation. A third route to the number two is to divide providers into those that offer savings and those that offer loans. Prudential rules keep the former category relatively small and regulate it more stringently. This division makes some sense, but I contend it makes even more sense for regulators to focus on the point of view of an owner: its risks, its returns, what it wants. For numbers bigger than two, see, for example, Joselito Gallardo, *A Framework for Regulating Microfinance Institutions: The Experience in Ghana and the Philippines*, THE WORLD BANK

divide them here into (1) mutual aid, (2) nonprofit, and (3) for-profit institutions.[182]

The mutual aid category covers microfinance providers that pool and distribute money to and for a group of individuals. These entities fall under the rubric of what Henry Hansmann called "customer-owned enterprise";[183] they also illustrate what Hans Dieter Seibel has deemed "member-owned institutions based on social solidarity."[184] Mutual-aid microfinance providers can hold loans and collect money without regulatory oversight, but regulated entitles like credit unions also fit in this group.

Charitable nonprofit microfinance providers offer financial services to low-income clients consistent with a philanthropic mission, typically pertaining to economic development or the alleviation of poverty. Whereas entities in the mutual-aid category can be regulated or unregulated, nonprofit entities are always regulated by some domestic law. Typically they are not overseen by a bank superintendency, however. Only a minority of nonprofit microfinance institutions are licensed to take deposits or held to prudential regulations aimed at promoting safety for clients.[185] Nonprofit microfinance institutions offer credit more than any other financial product.

For-profit microfinance institutions seek returns for investors, rather than the gains for customer-owners that mutual-aid entities pursue or the philanthropic missions that define nonprofits. For these providers, microfinance is a source of income derived most readily by charging interest on loans. Other microfinance products—savings and insurance in particular—can be profitable too; but lending is the most remunerative

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24 (2001), http://www1.worldbank.org/finance/assets/images/2755.pdf (noting that Ghanian and Philippine laws divide microfinance providers into numerous cohorts, some regulated and some unregulated).

[182] The categories contain some overlap. This Article uses "nonprofit" as a rough synonym for charity, referencing an eleemosynary mission. Should a mutual-benefit entity be incorporated as a nonprofit, I would put it in the mutual-aid rather than the nonprofit category because it lacks this mission, focusing instead on gains for its member-owners. I also believe that a classification focused on ownership can include nonprofits, the notion that a nonprofit corporation cannot have owners notwithstanding. *See* Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 574 (1981) (reminding readers that most generalizations about nonprofits contain exceptions). For purposes of this Article, the "owners" of a nonprofit are those persons who govern the corporation.

[183] HANSMANN, OWNERSHIP, *supra* note 180, at 149.

[184] Hans Dieter Seibel with Andrea Armstrong, *Reparations and Microfinance Schemes, in* THE HANDBOOK OF REPARATIONS, 676, 691 (Pablo De Greif ed., 2006).

[185] Christen, Lyman, & Rosenberg, *supra* note 25, at 25.

microfinance activity and so some entities that are licensed to take deposits choose to forgo savings and focus on loans.[186]

Ghana offers an illustration of the three categories at work in one country. Mutual aid microfinance in this country takes the form of *susu*, a term for pooled savings and credit.[187] Participants in a *susu*, following the rotating-credit model, turn over small sums to a collector, who pays out the pool to individuals in rotation.[188] Although efforts are underway to regulate this form of microfinance,[189] the category remains in the informal tier. An example of a nonprofit microfinance institution is Microfin Plus Ghana, a registered NGO that lists as its partners both the Ghana Cooperative Susu Collectors Association, at the informal end, and Barclays, a bank.[190] First Allied Savings and Loan is an example of a Ghanaian for-profit microfinance institution.[191]

In another country, Mexico, the mutual aid sector includes the *tanda*, a credit association formed by individuals in small groups united by acquaintance and a degree of mutual trust.[192] An example of a Mexican nonprofit microfinance institution is the Mexican Association for Rural and Urban Transformation, whose website announces work in "education, hygiene, healthy diets, appropriate technology, microfinance, emergency support, infant care centers and more."[193] Compartamos Banco, having

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[186] ROBINSON, *supra* note 58, at 234.

[187] Kent McKeever, *A Short History of Tontines*, 15 FORDHAM J. CORP. & FIN. L. 491, 516 (2010) (noting that *susu* is the West African word for an entity known as a *tontine* in French-speaking countries like Togo and Cote d'Ivoire, and an *esusu* in Nigeria).

[188] *Id.*

[189] "Since 1990 the Ghana Cooperative Susu Collectors Association (GCSCA) is trying to minimize fraud and regulate the operations of Susu collectors across the country." Thilo Kunzemann, *Do You Susu?*, ALLIANZ (Feb. 20, 2010), http://www.knowledge.allianz.com/search.cfm?114/do-you-susu.

[190] *See Partnership*, MICROFIN PLUS GHANA, http://microfinplusghana.org/index.php?option=com_content&view=article&id=12&Itemid=12 (last visited Nov. 1, 2012).

[191] *See About FASL*, FIRST ALLIED SAVINGS AND LOANS, http://www.firstalliedghana.com/about.php (last visited Nov. 1, 2012).

[192] For an anthropological account of the Mexican tanda, see Donald V. Kurtz & Margaret Showman, *The Tanda: A Rotating Credit Association in Mexico*, 17 ETHNOLOGY 65, 67-68 (1978); for a contemporary U.S.-based account, see Nezua, *In Tough Economic Times, Will a Tanda Work for You?*, EL MACHETE (Aug. 4, 2009, 1:03 PM), http://theunapologeticmexican.org/elmachete/2009/08/04/in-tough-economic-times-will-a-tanda-work-for-you/ (encouraging Mexican-Americans who need cash to explore this tradition).

[193] *See* AMEXTRA, http://www.amextra.org/1_amextraingles.html (last visited Nov. 3, 2012).

started microfinance operations as an NGO, shifted to the for-profit category in 2006.[194]

The large cohort of nonprofits offering microfinance in a third country, India, includes Bhoomika, a registered charity with operations in the state of Orissa; among providers in the for-profit group is SKS, continuing its microlending in troubled Andhra Pradesh.[195] Self-help groups dominate informal microfinance in India following an initiative by the National Bank for Agricultural and Rural Development. This central bank enlists nonprofits to help assemble groups of ten to twenty poor people, typically women. The self-help group meets regularly to discuss social issues and poor funds in a small savings account. When deposits are large enough, the group can make loans to members, and after it has built a history of disbursing and collecting these internal loans, it becomes eligible for commercial lending.[196]

B. Owner-Specific Attentions

1. Microfinance as Mutual Aid

The mutual-aid category ranges in sophistication from humble rotating savings-and-credit associations to well-capitalized and technologically advanced credit unions. Mutual-aid entities of the first type are in the typology of Hans Dieter Seibel "informal" microfinance institutions, meaning unregulated entities; credit unions are "formal," regulated as banks and typically licensed to take deposits.[197] This divergence in regulatory attention—from none to much—limits what can be said about attentions

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[194] *See* COMPARTAMOS BANCO, http://www.compartamos.com/wps/portal/AboutCompartamosBanco/History (last visited Nov. 3, 2012). For a critical account of the reincorporation and initial public offering of Compartamos, see Malcolm Harper, *The Commercialization of Microfinance: Resolution or Extension of Poverty?*, *in* CONFRONTING MICROFINANCE: UNDERMINING SUSTAINABLE DEVELOPMENT 49, 50-51 (Milford Bateman ed., 2011).

[195] *See* SKS MICROFINANCE, http://www.sksindia.com/know_sks.php (last visited Nov. 3, 2012). *See also* Felix Salmon, *The Lessons of Andhra Pradesh*, REUTERS (Nov. 18, 2010), http://blogs.reuters.com/felix-salmon/2010/11/18/the-lessons-of-andhra-pradesh/ (faulting SKS for an initial public offering that enriched the bank's principals without enhancing wealth for its poor clientele); AKULA, *supra* note 99 (describing SKS from the vantage point of its Indian-American founder).

[196] *See generally* Klaus Deininger & Yanyan Liu, Policy Research Working Paper, *Longer-Term Economic Impacts of Self-Help Groups in India*, THE WORLD BANK (2009), http://elibrary.worldbank.org/docserver/download/4886.pdf?expires=1351993334&id=id&accname=guest&checksum=23F566C12E348B42F7B4BAC64CE47769 (summarizing formation and operations).

[197] *See supra* note 181 (referring to the tiers-framework associated with Seibel).

specific to this type of ownership. Existing regulation treats mutual-aid providers differently from one another, as it should, depending on whether these providers do business as chartered banks. Despite this variation in the category, each mutual-aid banking entity is like all the others in that it seeks, at least in principle, to increase the prosperity and financial security of the client-members who own, spend, save, and borrow its money.

This goal not only unites modest rotating savings and credit associations with prosperous credit unions and the all mutual-aid entities in between (large rotating savings and credit associations and fledgling credit unions, for example), but distinguishes this category from the other two. For a for-profit entity, microfinance exists to return earnings to investors; a nonprofit provides microfinance to advance its mission. Mutual-aid microfinance—again, in principle—recognizes no such external goals or beneficiaries. It pays no dividends, sells no shares on any exchange, and advances no philanthropic ends. The mutual-aid entity exists for its own sake.

The simplicity of this agenda makes the mutual-aid category of microfinance uniquely attractive for what it lacks and eschews. Existing only for itself gives the entity independence. The absence of external investors and donors means more power, once again in principle, for owner-clients. Geographic constraints and restrictions on who may join, if available, keep the entity responsive to the communities to which it is tied. Because its members have to live with the results it occasions, the mutual-aid entity is likely to be the most risk averse of the three kinds of microfinance provider.

And so, in the name of safety, regulatory policy might plausibly favor this sector over the other two. Regulators in Britain reached a pertinent conclusion in 2012 following a report by the Department for Work and Pensions ("Department").[198] The expansion of credit unions, according to this report, offered great promise to the national economy as well as millions of low-income Britons trapped in predatory lending.[199] The UK government established a £38 million fund, directed mainly toward information technology "to modernise" credit union operations, building on an appropriation of £15 million in the previous year.[200] In addition to allocating funds to credit unions for infrastructure, the Department expressed support for regulatory relief, announcing its openness to

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[198] Sarah Neville, *Report Calls for Expansion of Credit Unions*, FINANCIAL TIMES (May 24, 2012, 10:24 PM), http://www.ft.com/intl/cms/s/0/7cc3edb2-9abf-11e1-9c98-00144feabdc0.html#axzz2BDKahOXn.

[199] *Id.*

[200] *Freud Announces Further Investment To Secure Future of Credit Unions*, DEPARTMENT FOR WORK AND PENSIONS (June 27, 2012), http://www.dwp.gov.uk/newsroom/press-releases/2012/jun-2012/dwp070-12.shtml.

increasing the interest rate cap on credit union loans from 2 to 3 percent per month.[201]

This instance of favoritism for the mutual-aid sector of microfinance, though responsive to conditions in one country only, illustrates a direction that other regulators can take. A strong mutual-aid sector can compete robustly with nonprofits and commercial banks in the provisioning of savings accounts and loans to low-income clients. How much encouragement it should receive might be debated, but the defining characteristic of owners-cum-customers presents a constructive alternative to other sources of banking for poor people, which are entities that have their own agendas.

2. Microfinance for Profit

Banking marketed to poor clients imposes significant regulatory challenges yet is in another sense the simplest category for regulators to consider. Extraction of income through commerce is a pursuit that follows predictable paths. The agenda for a mutual-aid or nonprofit microfinance provider necessarily contains variety and can evolve, but an entity oriented toward profit will rarely be distracted from this central goal. It may jettison services and products in response to what markets deliver and what regulators require, but it maintains its emphasis on earnings. Uniformity in its agenda streamlines the regulatory response.

Putting aside as unregulable those providers popularly known as moneylenders or loan sharks,[202] the for-profit group consists of commercial banks, already a well-regulated cohort.[203] And so most of the owner-specific attention recommended here reduces to Carry On. Laws pertaining to banking, tax, crimes, consumer protection, real property, insolvency, secured transactions, and other fields are already in place—or can be installed without fanfare—to regulate this sector.

Owner-specific attention adds a task to this familiar list, however. Much more than the mutual-aid and nonprofit categories, for-profit microfinance has tempted opportunistic politicians to encourage defaulting on loan payments. The notorious "no pago" movement in Nicaragua had counterparts elsewhere.[204] Even if regulators think that predatory

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[201] *See* Neville, *supra* note 198.

[202] *See* discussion in *supra* note 10.

[203] Well-regulated in a relative rather than an absolute sense: a jurisdiction that can enforce any regulations at all will regulate its banks.

[204] For more information on "no pago," see *supra* notes 52-56 and accompanying text. *See also* In India, Microcredit Faces Uncertainty, MICROFINANCE AFRICA (Jan. 4, 2011 1:54 AM), http://microfinanceafrica.net/tag/microfinance-borrowers-commit-suicide/ (noting

microlenders deserve to suffer, widespread failures to make loan payments impose adverse effects on the larger community and should be forestalled. Regulators familiar with historical instances of default-incitement like No Pago can make a contingency plan. They might, for instance, establish quantitative triggers for safeguards to fall in place without the need for hasty emergency legislation.

3. Microfinance as Instrumental to a Nonprofit Mission

Of the three cohorts that offer banking for poor people, only the nonprofit sector fits well with the Microfinance Needs Regulation impulse to write a comprehensive and unitary rule-scheme.[205] Nonprofit entities work to generate income and stability for poor people, understood as their beneficiaries. Banking advances a mission—to alleviate poverty, improve the position of women, enhance national or regional economic development, or otherwise carry out a donor—endorsed goal. The presence of these donors gives regulators a distinct target not present in the mutual-aid or for-profit categories.

Charity or nonprofit legislation—codified around the world—typically addresses the desire of outsiders to know about an entity's financial condition.[206] Microfinance regulation for this category has a natural home in statutory nonprofit law, which can compel these providers to describe their operations by accounting for their money. Toward this end, drafters of comprehensive proposals to regulate microfinance ought to consider narrowing their compendia to focus on nonprofits only.

Model legislation or best practices that eliminate the mutual-aid or customer-owned category on one hand, and for-profit entities on the other, can address the concerns and operations of nonprofits. Topics eligible for Principles for Nonprofit Microfinance Institutions could generate transparency. Entities would be encouraged to make public declarations about, inter alia, what "the double bottom line" means for their operations

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incitements to default on loans in Pakistan circa 2008 and 2009); Interview by India Knowledge at Wharton with Vijay Mahajan, President of the Microfinance Institutions Network of India (July 26, 2012), *available at* http://knowledge.wharton.upenn.edu/india/articlepdf/4696.pdf?CFID=229662359&CFTOKEN=17171314&jsessionid=a8309519c7ecf8f8ffaf252517d5f85c1405 (reporting the same phenomenon in India).

[205] *See supra* Part I.

[206] In the United States, donors and prospective donors are understood as the constituency that wants this information about finances; in the nonprofit law of other countries, accounting to the government plays a stronger role. Alyssa A. DiRusso, *American Nonprofit Law in Comparative Perspective*, 10 WASH. U. GLOB. STUD. L. REV. 39, 75-76 (2011).

(for example, when sustainability and a charitable mission conflict, which of the two will they pursue?), how their operations or priorities differ from those of other nonprofits that offer microfinance, which services they offer and plan to offer in the future, what other entities they work with, and how they do business with their clients.[207]

This last transparency-topic, on client dealings, gives information to borrowers as well as donors. We have noted that as a fix for the ills of consumer banking, transparency has proved elusive, disappointing, and to some observers even an impediment to meaningful reform.[208] Those who regulate the nonprofit cohort of microfinance providers would be wise not to expect great consumer-protection strides forward from transparency as policy. The exercise of communicating more accurately with one's donors may, however, enhance entity-client communication. For example, informing donors in standardized terms how much the entities charge clients in interest on loans, a reform idea pressed for years by Microfinance Transparency,[209] would put nonprofit providers in the habit of describing their interest rates in more user-financially diction.

A variation on Principles for Nonprofit Microfinance Institutions ought to foster the writing and enforcement of voluntary standards and certification. Nonprofit managers have extensive experience with this mode of reaching donors and fellow nonprofits. A microfinance provider could use a certification mark to indicate its compliance with key terms of a Principles compendium.[210] Charity or trademark law would in turn provide redress for the wrongful use of this certification. Membership in a voluntary-standards association would build a forum for peer discourse, facilitating dialogues to raise standards. Even though managers of nonprofit microfinance institutions working in a particular region compete with one another and likely hold philosophical differences, they could agree

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[207] *See* Beth Rhyne, *Social Performance: A Truth in Advertising Approach*, CENTER FOR FINANCIAL INCLUSION (Jan. 5, 2012), http://cfi-blog.org/2012/01/05/social-performance-a-truth-in-advertising-approach/#more-4920 (advocating transparency among microfinance nonprofits "to achieve mission-related results"). As with transparency generally, see *supra* notes 143-54 and accompanying text, reformers should expect increases in the quantity and quality of information acquired by nonprofit donors and clients to be modest at best. Entities and individuals who want information and can benefit from it already have the power to demand it; individuals who do not demand information about nonprofits are likely ill-situated to gain from it when it arrives. I thank Dana Brakman Reiser for elucidating this point.

[208] *See supra* Part III.B.1.

[209] *About MicroFinance Transparency*, MFTRANSPARENCY. ORG, http://www.mftransparency.org/about-our-organization/ (last visited Nov. 3, 2012).

[210] This suggestion received a helpful airing from participants at a University of Maine School of Law workshop.

on norms of conduct and be able to list injurious behaviors that any reputable institution would avoid and abjure.

4. Fitting the Three Provider Categories Together

After regulators disaggregate microfinance providers by focusing on ownership, they can move to relations among the three groups. An analogy to this "macro" approach to regeneration appears in competition law, which addresses behaviors that enhance or thwart competition within an industry or sector. Following the pattern of competition regulation (or antitrust, as this field is more frequently known in the United States), which seeks to promote multiplicity and choice in markets and to oppose monopolies, regulators of microfinance disaggregated start out preferring multiple types of ownership rather than a unitary model. Regulators who conclude that it is desirable for all the categories to flourish might consider how to encourage the continuing operations of each. They start by identifying the conditions that cause providers in each category to abandon their provision of financial services to poor people.

For-profit might look like the most durable type of provider. Entities commonly transform themselves from nonprofit to for-profit; the reverse move is rare.[211] Yet for-profit providers of loans and savings are never, *pace* the banking cliché, too big to fail. A for-profit entity whose loan portfolio declines has little incentive to stick around in the way that a mutual-aid or nonprofit provider, more tied to a community or a mission, would wish to linger. Nonprofit sources of banking services can disappear by various routes. They might leave one region to take up their work in another, shift their mission and operations away from microfinance, run out of money, or reincorporate as for-profits. A formally incorporated mutual-aid provider like a credit union can live indefinitely,[212] but a rotating savings and credit association is likely to change along with the fortunes of its members. Defaults or losses in a bad economic climate at one end, or the opening of a commercial bank branch in response to prosperity at the other, can end its reason for being. In sum, providers in all groups face

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[211] *See generally* John Tozzi, *Turning Nonprofits into For-Profits*, BLOOMBERG BUSINESSWEEK (June 15, 2009), http://www.businessweek.com/smallbiz/content/jun2009/sb20090615_940089.htm (discussing the fact that For-Profit companies would not turn into Nonprofit companies, because For-Profit companies' goals are to put shareholder profits first).

[212] *But see* Tim Worstall, *It's the Mutual, Not for Profit, Banks Which Are the Problem in Spain*, FORBES (May 10, 2012, 12:13 PM), http://www.forbes.com/sites/timworstall/2012/05/10/its-the-mutual-not-for-profit-banks-which-are-the-problem-in-spain/ (commenting on the decline of incorporated mutual-aid providers in Spain).

conditions that can put them out of business. Enabling regulation can nurture some or all of the groups.[213]

As was noted, favoring the mutual-aid category is a plausible starting point.[214] This stance rests mainly on the premise that remote investment begets new and dangerous financial instruments that push underwriting standards down.[215] Banks rooted enough in their communities to suffer in the event of defaults lend money on more sober terms. If their practices had been universal, the disastrous residential real estate bubble that emerged in the United States might have been fended off.[216] The drawbacks of securitization, amply showcased, support a regulatory stance favoring those providers who have to live with the consequences of what they lend and hold. In this perspective the third group, nonprofits, might mean well (or might not) but nevertheless are inferior to mutual aid because nonprofits furnish charity, which is in principle inferior to self-reliance.[217]

More scrutiny of this proposition ought to precede its implementation, as there is no safe sector to provide banking for poor people. Nor is it obvious how to allot this type of banking in ratio terms for the groups. What, after all, is being distributed among the three: number of providers, number of clients served, number of loans made, cash value of monies held, cash value of loans outstanding? Even if regulators could in principle agree on how to plan these balances *ex ante*, market conditions alter the distribution. What regulators ought to pursue, instead, is the more modest goal of awareness. Distinct patterns of ownership pervade microfinance, and shifts in the relative balance of these holdings affect the experiences of clients and the performance of microfinance more generally.[218]

Although regulators may not know which sector to favor above the other two, fitting the categories together leaves them plenty of other work. Consider for example the desirability of competition.[219] Because the

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[213] *See supra* note 67 and accompanying text.

[214] *See supra* notes 198-200 and accompanying text.

[215] *See* Black, *supra* note 50.

[216] Raymond H. Breschia, *Trust in the Shadows: Law, Behavior, and Financial Re-Regulation*, 57 BUFF. L. REV. 1361, 1419-22 (2009). By way of response, a British commentator noted the failure of the Spanish conglomerate Bankia, an entity formed by the merger of "mutually owned, regional, usually not for profit banking entities." Worstall, *supra* note 212.

[217] "Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 511 n.19 (1996) (quoting the ancient Chinese proverb).

[218] DiRusso, *supra* note 206, at 85.

[219] That this goal is worth pursuing is axiomatic whenever poor people in a nation or region face inadequate access to banking—with the important proviso that poor borrowers should not have access to more loan money than they can reasonably repay. *See supra* note

income that a nonprofit micro-lender receives is directed to a charitable mission rather than paid out to investors, it has less incentive than a for-profit to charge all it can get for its loans, and thus its presence in a loan market may help to temper interest rates.[220] And because microloans are relatively costly to administer, a for-profit lender that starts out making small loans predictably will move to larger ones, which are cheaper to administer on a dollars-borrowed basis. It is small loans that do the most to alleviate unbankability.[221] Nonprofits are not immune to pressures to charge higher interest rates and make bigger loans, but their mission tempers the tendency.[222] Accordingly, rules to encourage nonprofit participation in regions where for-profit entities are making microloans should be considered.

In fitting the three provider categories together, regulators are tasked with managing relations that are both reciprocal and rivalrous. Nonprofits give mutual-aid providers loan capital, options for safer savings, and advice about how to pursue goals in which nonprofits have expertise. Both nonprofit and mutual-aid entities can become institutional customers of for-profit banks. Nonprofits frequently choose to work with mutual-aid entities when seeking clients and for-profit banks when expanding their operations. The nonprofit form has also been a way for entities to start their microlending operations before going public as for-profit entities.[223] For-profit providers find customers in the mutual-aid sector, and rely on nonprofit networks to find them.[224] The groups also compete with one another in the banking market.[225]

CONCLUSION

Rejecting microfinance as a category for legal regulation emphatically does not reject microfinance as policy. Quite the contrary. Instead, I have argued, moving away from this dense neologism will permit regulators to

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178 and accompanying text.

[220] *See* Rosenberg, *supra* note 157.

[221] *See* DICHTER, *supra* note 90.

[222] Kenneth Downey & Stephen J. Conroy, *Microfinance: The Impact of Nonprofit and For-Profit Status on Financial Performance and Outreach*, ACAD. OF ECON. AND FIN. (2012), http://www.econ-jobs.com/research/35795-Microfinance--The-Impact-of-Nonprofit-and-For-Profit-Status-on-Financial-Performance-and-Outreach.pdf.

[223] *See supra* notes 194-95 and accompanying text (noting that two large for-profit microfinance institutions, SKS in India and Compartamos in Mexico, started out as nonprofits).

[224] *See supra* note 187-96 and accompanying text.

[225] *See supra* note 187-96 and accompanying text (giving Ghana, Mexico, and India as examples of countries where all three categories offer banking for poor people).

support the financial needs of poor people and the imperatives of a maturing market by honing their attention on relevant specifics. Like its Latinate cousins "development" and "industrialization," microfinance remains central to economic and financial progress. The change that this Article urges—attention to the products and providers that need regulating—strengthens the sector.

Disaggregation is central to the undertaking. This Article has identified the products of microfinance as loans and savings accounts offered to poor persons, and the providers as falling into three groups: mutual-aid, nonprofit, and for-profit entities. Governments and rule-drafters might well disagree about these particulars. They can add to the list of microfinance products,[226] or choose a different number of providers.[227] The crucial point for them to bear in mind is that microfinance is many things rather than one.[228]

Disaggregation helps regulators to focus not only on the improvements they want but the rules they already have.[229] Sources of regulation already in place—such as bank superintendencies, corporate registry authorities, and self-regulatory organizations like trade associations and cooperatives authorities—can advance the social-developmental goals of microfinance without implicitly asserting, via the prefix "micro-," that transactions and customers are and shall remain puny. Consumer protection law, banking law, and prohibitions of abusive debt recovery practices furnish some shelter for poor clients.

These existing safeguards are modest, of course. Meaningful protection for consumers of financial services has proved difficult to codify and enforce all over the world, and efforts to augment the bargaining power of poor people in financial markets have yielded disappointing results.[230] Should consumer protection make gains, however, the concept of

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[226] *See* Christen, Lyman, & Rosenberg, *supra* note 25, at 2 (suggesting that microfinance might be understood to include not just savings and loans but also insurance and cash transfers).

[227] *See* Bernstein, *supra* note 181 (citing alternative ways to count and group providers).

[228] For an example of how to do so without fuss, see Stijn Claessens, Patrick Honohan & Liliana Rojas-Suarez, *Policy Principles for Expanding Financial Access: Report of the CGD Task Force on Access to Financial Services*, CENTER FOR GLOBAL DEVELOPMENT (2009), http://www.cgdev.org/files/1422882_file_Financial_Access_Task_Force_Report_FINAL.pdf. The Center for Global Development, which describes itself as a "nimble, independent, non-partisan" think tank, scarcely uses the term "microfinance" in this report. *See About CGD*, CENTER FOR GLOBAL DEVELOPMENT, http://www.cgdev.org/section/about/ (last visited Nov. 3, 2012).

[229] *See generally* BALDWIN & CAVE, *supra* note 8, at 9-16 (asking "Why regulate?").

[230] *See supra* notes 145-52 and accompanying text (summarizing findings about the near-futility of transparency and financial literary initiatives).

microfinance will have played little role. Abstract polysyllabic words speak to elites. This term has sited poor borrowers and savers at a distance.[231]

"The trouble with regulating microfinance," in sum, has distinct facets, of which this Article has explored three. The first is definitional. A word whose meanings are obscure, contested, or multi-layered can function well elsewhere in a language, but regulation demands a more precise definition of the sector or activity in question than this term offers. Second, microfinance as a neologism has brought what looks like mood swings—optimism, pessimism, centrism—to a workaday challenge. A less distracted agenda, jargon- and buzzword-free, would return regulators to their task of making loans and savings more available and safer.[232] Third, microfinance as big tent is too big to be regulated, because it includes providers with too much divergence in their form and governance.[233] Policymakers must at the same time keep microfinance in focus as policy and recognize that it is not a single sector amenable to unitary regulatory attention.

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[231] *See supra* note 9 and accompanying text; *see also supra* Part II.B.3.

[232] *See* McNew, *supra* note 67.

[233] *See* Marc Labie & Roy Mersland, *Corporate Governance Challenges in Microfinance, in* THE HANDBOOK OF MICROFINANCE 283, 287 (Beatriz Armendáriz & Marc Labie eds., 2011) (arguing that attention to corporate governance is integral to regulating microfinance institutions).

Young Again

Larry Yackle*

This essay revisits an old problem in the law of federal courts: the source of the right of action in *Ex parte Young*.[1]

The core of the story underlying *Young* is familiar. Shareholders in railroad corporations filed suit in a federal circuit court, claiming that state-established rail rates in Minnesota violated the Fourteenth Amendment and the (dormant) Commerce Clause. The circuit court issued a preliminary injunction barring adoption of the rates and prohibiting the defendants from attempting to enforce them. One of the defendants, Minnesota Attorney General Edward T. Young, nonetheless brought a state court mandamus action against the Northern Pacific Railway. The circuit court found Young in contempt and ordered him detained. Young petitioned the Supreme Court for a writ of habeas corpus, contending that his custody was unjustified because the injunction he had defied was invalid. By his account, insofar as the plaintiffs had named him as a defendant in their action challenging the rail rates, their suit was foreclosed by state sovereign immunity. The Supreme Court held that Young could not set up Minnesota's immunity, that the circuit court had jurisdiction of the action challenging the state-prescribed rates, and that the arrangements for administering the rates did not comport with due process. Justice Peckham wrote the opinion.

The *Young* case is primarily remembered for its treatment of sovereign immunity. Justice Peckham's analysis of that issue has been debated and alternatively condemned and applauded.[2] His explicit holding that the plaintiffs could proceed on the equity side of the circuit court is also of enduring significance for cases in which private litigants file federal actions when no relevant litigation is under way in state court.[3] His express

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[1] 209 U.S. 123 (1908).

[2] *See* Virginia Office for Prot. and Advocacy (VOPA) v. Stewart, 131 S.Ct. 1632, 1638-39 (2011), discussed in the text accompanying notes 99-101, *infra*.

[3] *See* Steffel v. Thompson, 415 U.S. 452, 464-65 (1974) (citing *Young* for the understanding that federal courts generally need not abstain from exercising jurisdiction if there is no ongoing state proceeding in which a plaintiff's claims can be addressed). In *Young*, the ostensible remedy at law was inadequate not only because no state court action

conclusion that the federal circuit court had subject matter jurisdiction occasionally draws attention. Peckham rested jurisdiction on the theory that the suit was one "arising under" federal law inasmuch as the plaintiffs advanced federal constitutional claims—not because the plaintiffs' right of action was created by federal law.[4] The focus here is on Peckham's implicit holding that the plaintiffs *had* a right of action and thus were entitled to invoke the circuit court's jurisdiction.[5]

Nowhere in his opinion did Justice Peckham explain where the plaintiffs found their right to take their troubles to court. Academics have debated the possibilities longer than we care to remember. After all this time, the Supreme Court still has never faced the issue squarely. As recently as the *Douglas* case last Term, the problem was presented but was once again left unresolved.[6] There is, however, a way out of these woods—an account that squares with the actual history of this celebrated case. It is this. The right of action in *Young* was an aspect of federal equity jurisprudence and general law applied in the federal courts at the time, which permitted shareholders to sue their own companies as well as parties with whom their

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was pending when the federal suit was initiated, but also because the risks associated with challenging the rates by way of defense in state court were formidable. *See infra* text accompanying notes 75 & 92. Indeed, it was the difficulty of litigating the validity of the rates in state court (rather than the rates themselves) that Justice Peckham held to violate due process. *Young*, 209 U.S. at 148.

[4] In this essay, the term "claim" is not used in the rigorous sense of the allegations of primary fact setting up a dispute, but in the common sense of the assertions of legal wrong ascribed to the defendant—here the "claims" that state-prescribed rates violated the Constitution. Today, of course, federal question jurisdiction generally depends on a federally created right of action, and cases in which jurisdiction is established on the basis of the plaintiffs' substantive federal claims alone are exceptions to the general rule. Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 701 (2006) (explaining that cases in which jurisdiction exists in the absence of a federal right of action occupy a "slim category").

[5] This essay uses the phrase "right of action" to mean the plaintiffs' entitlement to seek judicial relief with respect to their claims, avoiding the phrase "cause of action," which is so often employed to mean the claims for which plaintiffs seek a judicial remedy. The right of action of interest is the authorization to sue on which the shareholders proceeded in their original suit—not Attorney General Young's ability to apply for habeas corpus relief. Original applications for a writ of habeas corpus in the Supreme Court, more precisely petitions for leave to apply for an original writ, form a story in themselves. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 85-87 (1807) (finessing Article III's narrow limits on original jurisdiction).

[6] Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S.Ct. 1204 (2012); *see infra* text accompanying note 36 (explaining that the right of action in *Young* was an important feature of the arguments in *Douglas*).

companies had dealings, seeking injunctive relief protecting the shareholders' interests.

Part I of this essay explains why the right-of-action question in *Young* is again on the agenda—namely, because the meaning of *Young* as a precedent figures in the current controversy over whether plaintiffs advancing preemption claims enjoy authority to sue, grounded in the Supremacy Clause, in the absence of explicit authorizing legislation. One may be sympathetic to the view that the supremacy principle alone warrants at least some private preemption suits, but nonetheless maintain that *Young* is not the best citation for advocates of that idea. Of course, one can investigate plaintiffs' authority to sue without questioning *Young's* iconic significance regarding sovereign immunity. Immunity is another matter and need be treated only insofar as it bears on the right-of-action question.

Part II offers an historical study of *Young* itself, centered on the formal structure of the original suit as a shareholder action. The *Young* case must be understood within a tradition in which corporations systematically employed shareholder suits to press constitutional claims. It is a familiar irony that in our time *Young* is revered as an essential ingredient of arrangements by which personal civil rights and civil liberties may be vindicated, but that, in its own day, *Young* was an instrument used by industry to forestall regulation that threatened corporate profits.

Part III notes (with alarm) that some of the justices have recently cited John Harrison's revisionist account of *Young* with apparent approval.[7] Harrison is open to critiques on several fronts. Moreover, if his view is accepted, *Young* might end up as a precedent favoring corporations attempting to frustrate social welfare legislation in progressive states. It would be irony upon irony if, in this way, the Court were even partially to resurrect a world in which *Young* is principally a tool of business rather than a feature of public interest litigation.

I

For specialists, a reexamination of *Young* needs no justification. The topic has intrinsic interest apart from any practical import. For the rest of humankind, some explanation is necessary.[8] There is one. This old case is

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[7] John Harrison, Ex Parte Young, 60 STAN. L. REV. 989 (2008).

[8] The academic literature is filled with treatments of *Ex parte Young*. Recent work includes Barry Friedman, *The Story of* Ex Parte Young: *Once Controversial, Now Canon, in* FEDERAL COURTS STORIES 247 (Vicki C. Jackson & Judith Resnik eds., 2010); David Shapiro, Ex Parte Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011).

a principal citation in current accounts of the conditions for private actions pursuing judicial remedies for violations of federal law.

The right-of-action question was not always with us. The common law was largely a body of individual rights and correlative duties.[9] The only law to be enforced was one person's duty to respect another's rights, and the only institutions available to enforce that law were courts. A legal argument was intelligible only if it could be advanced by means of a private suit; there was no right without a remedy—meaning a judicial remedy.[10] Today, of course, the landscape of American law and institutions is quite different. Much federal law does not sound in individual rights and duties, but rather entails programmatic regulation for the good of the public at large. Regulatory law does not necessarily require judicial remedies in every instance. There are many alternative implementation mechanisms, chief among them agency enforcement. Accordingly, the authorization (or not) of private litigation presents an independent question the Court, in its wisdom, insists is usually for Congress to address.

There is an optimistic way to look at this. Perhaps Congress *should* decide whether to authorize private suits. In some instances, it may make sense to employ private actions as the primary means of enforcement. In other contexts, it may be better to relegate private suits to a supplemental role, operating in the shadow of public mechanisms. In still other circumstances, it may be wise to exclude private actions from the field, lest they interfere with administrative schemes and the exercise of discretion by responsible officials. Getting the mix of enforcement instruments right requires judgment, which perhaps should rest with politically accountable public servants. There is a literature that ought to be consulted before we assume that private suits are always and everywhere a good thing.[11]

There is also a less sunny, not to say more cynical, attitude to strike. The authorization (or not) of private litigation may be an element in the package of compromises necessary to reach agreement on the enactment of a regulatory program. Bluntly stated, the companies due to be regulated and their sympathetic champions may be unable to short-circuit a new law entirely or to restrict its substantive reach as they would like. But they may be able to obtain concessions at the level of enforcement. They may starve

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[9] *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 31-32 (1913).

[10] WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 23 (1768).

[11] *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (the classic general discussion); *see also* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589 (2005) (examining the pros and cons of private enforcement suits).

federal agencies of the funds and personnel needed to ensure compliance or, to the same end, they may withhold authority from private organizations that might otherwise take up the slack. One can say, of course, that this scenario is perfectly legitimate—simply politics as usual when, in a democracy, policy must emerge from the clash of competing interests. Still, most of us would acknowledge a difference between missing out private actions in an effort to achieve the best blend of enforcement mechanisms and denying them for the purpose of crippling effective implementation.

The Supreme Court plays a role in all this, and that role is scarcely neutral. For some years now, the Court has focused extensive attention on the question whether litigants who want to vindicate federal law are entitled to bring private enforcement actions.[12] Ostensibly to ensure that anyone who gets to sue does so with actual congressional blessing, the Court has held that Congress must express the purpose to authorize private suits explicitly.[13] Yet to demand that Congress act affirmatively to permit private litigation obviously makes it more difficult for Congress to act favorably. In form, the Court is solicitous of Congress' decision-making authority. In effect, the Court stacks the deck against the authorization of private actions—and thus (perhaps) against effective enforcement of the regulatory schemes affected.[14]

The Court has curbed private rights of action in three ways. First, as just explained, in cases culminating in *Alexander v. Sandoval*,[15] the Court has held that plaintiffs can pursue judicial remedies for violations of federal statutes only if Congress expressly provides for private suits. Second, in *Gonzaga University v. Doe*,[16] the Court construed the right of action established by the Ku Klux Klan Act, 42 U.S.C. § 1983, to serve only for violations of federal statutes that explicitly establish *personal* rights. Third, in a related line of cases beginning with *Bivens*,[17] the Court has decided that private suits alleging violations of rights-bearing provisions of the

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[12] *See* H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501 (1986).

[13] Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001).

[14] Justice Scalia is characteristically blunt about his disdain for private enforcement suits. *E.g.*, Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 618 (2001) (Scalia, J., dissenting) (charging that private litigants press "phony" claims to obtain self-serving settlements).

[15] 532 U.S. 275 (2001).

[16] 536 U.S. 273 (2002).

[17] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

Constitution are foreclosed if Congress has supplied would-be plaintiffs with an alternative vehicle.[18] The working rationale of these last cases is that rights of action are not implied by constitutional provisions, but are fashioned by courts as a matter of policy.[19] What courts create as nonconstitutional remedial devices Congress can adjust or eliminate by statute.[20]

It is uncommon, but scarcely unheard of, that two streams of precedent go along in parallel without attention to the tension between them. This has happened in right-of-action cases. Even as the Court has restricted private enforcement actions in these three ways, the Court has allowed many private litigants to sue without benefit of federal authorizing legislation—if the argument is that federal law preempts conflicting state arrangements. The most common illustration cited is *Shaw v. Delta Air Lines, Inc.*[21] In preemption cases, the Supremacy Clause alone is said to warrant private litigation.[22]

The time is coming when these two bodies of authority will be reconciled. And when they are, *Young* will be in the thick of things. More precisely, *Young* will be cited, and the question is what *Young* will (properly) be cited *for*. The whole notion that private litigants with

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[18] *E.g.*, Bush v. Lucas, 462 U.S. 367 (1983) (holding that plaintiffs were limited to administrative avenues for the vindication of First Amendment claims). *See also* Minneci v. Pollard, 132 S.Ct. 617 (2012) (holding that an alternative supplied by state tort law may also answer).

[19] The weight of authority has converged on this understanding, offered by Justice Harlan concurring in *Bivens*. The right of action in *Bivens* itself, and in all the other *Bivens*-like cases since, is a matter of federal, nonconstitutional, judge-made law. This certainly goes for damages actions, and it probably goes for equitable suits as well. *Cf.* Boyle v. United Technologies Corp., 487 U.S. 500, 517 n.2 (1988) (Brennan, J., dissenting) (citing *Bivens* as a federal common law decision).

[20] It is an open question whether Congress might abolish all private suits even when only forward-looking injunctive or declaratory relief is sought and there is no alternative. Bush v. Lucas, 462 U.S. at 378 n.14 (expressly bypassing the issue). Yet it is probably a safe bet that courts cannot be cut out of the picture entirely when constitutional rights are at stake.

[21] 463 U.S. 85 (1983) (permitting an airline to claim that state labor regulations were preempted by a federal statute).

[22] *See* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 391 (2004) (contending that the Court "tacitly assumed" as much in *Shaw*); Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 708-09 (2009) (also reading *Shaw* this way). In cases in which plaintiffs seek only forward-looking relief, it is common to add that the federal courts have traditionally granted equitable remedies to ensure the supremacy of federal law. *E.g.*, Brief for Dominguez Respondents (Medicaid recipients) at 41, Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S.Ct. 1204 (2012) (No. 09-1158).

standing may not be entitled to seek judicial relief has emerged comparatively recently as a feature of the modern administrative state, which offers a menu of enforcement mechanisms from which to choose. It is artificial to search through old cases for what courts and lawyers at best assumed and, indeed, would have discounted as immaterial if it had come to their conscious minds at all. In the current debate over rights of action, the historical *Young* case cannot be cited for much.

We can set some issues aside. The *Young* case has nothing to do with decisions like *Sandoval*. Nobody was trying to enforce a federal statute in *Young*; all the claims advanced were constitutional. Nor does *Young* have much relevance to the *Gonzaga* interpretation of § 1983. Again, the plaintiffs in *Young* pressed only constitutional claims of right.[23]

If the fact pattern in *Young* were to repeat itself today, a suit by the railroads would probably come under the heading of § 1983.[24] A corporation may employ a § 1983 suit to obtain equitable relief against an officer with responsibility for administering a state statute said to deprive the corporation of property without due process of law.[25] When *Young* was decided, however, the Supreme Court denied that property interests protected by due process were "secured" by the Constitution within the meaning of § 1983.[26] Accordingly, § 1983 did not establish the authority to sue in *Young*.

The *Young* case may bear on the availability of private actions advancing constitutional claims. Many observers have long understood Justice Peckham to have recognized (implicitly) that the Fourteenth Amendment supplied the plaintiffs' right of action.[27] The idea that rights-bearing provisions of the Constitution come with their own, built-in remedial authority has much to recommend it.[28] Even the most vehement opponents

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[23] It is scarcely obvious that corporations have "rights" under the "dormant" Commerce Clause. But they do. Dennis v. Higgins, 498 U.S. 439 (1991).

[24] And in the next breath it would probably be foreclosed by the Johnson Act, 28 U.S.C. § 1342, which now typically bars federal injunctions against state utility rates.

[25] *E.g.*, Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189 (2001) (ultimately rejecting a due process claim on the merits).

[26] Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1502-04 (1989).

[27] The conventional citation for this view is Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 & n.124 (1954) (contending that *Young* was a "crucial advance" in the evolution of the idea that federal law provided for injunctive relief whether or not a defendant's behavior constituted a breach of some state law duty). *Accord* Berzon, *supra* note 22, at 690-91.

[28] Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995).

of *Bivens* object primarily to actions for damages as opposed to suits seeking only forward-looking equitable relief.[29] Then again, if "implied" rights of action in constitutional cases have now been reconceptualized as matters of nonconstitutional remedial law (and they have), then *Young* may be shoe-horned into current analysis. It would not be crazy to say that, when *Young* was decided, there was no alternative enforcement mechanism and that is why the plaintiffs' suit could go forward.[30]

The *Young* case plainly has a role in the explanation for the line of cases in which preemption claims have been heard without explicit statutory authorization.[31] It is arguable that *Young* proceeded from the premise that a claim that state rail rates conflicted with the Federal Constitution could be advanced under the authority of the Supremacy Clause. This idea is more dynamic. If a Supremacy Clause right of action worked in *Young* for the Fourteenth Amendment and the Commerce Clause, it would seem that it should work for any aspect of the Constitution said to trump state law. And if it worked for constitutional provisions, it would seem that it should work for federal statutes as well.[32] Congress may sensibly be assigned more authority regarding the enforcement of federal law that Congress itself created.[33] Yet the supremacy rationale still fits.[34]

This was the way *Young* came up in *Douglas* this past Term. Medicaid recipients and providers in California sued state authorities, contending that recently enacted state statutes limiting reimbursements were preempted by provisions of the federal Medicaid Act.[35] No federal statute expressly provided for private enforcement actions by those plaintiffs. The plaintiffs nonetheless cited, and the lower court relied upon, numerous prior cases, including *Young*, in which the Supremacy Clause had apparently been enough by itself.[36]

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[29] *E.g.*, Carlson v. Green, 446 U.S. 14, 43 (1980) (Rehnquist, J., dissenting) (distinguishing *Ex parte Young* on this ground).

[30] *See* Bandes, *supra* note 28, at 332-33.

[31] *See id.* at 334-36.

[32] Sloss, *supra* note 22, at 379 (contending that "statutory" preemption cases build on *Young*).

[33] Berzon, *supra* note 22, at 701 (contending that Congress may be entitled to deference regarding the implementation of statutes but not with respect to the enforcement of constitutional mandates).

[34] This essay does not address the substance of the Court's preemption analysis, but is exclusively concerned with how cases presenting preemption issues get into court to be analyzed.

[35] Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S.Ct. 1204, 1213 (2012).

[36] Indep. Living Ctr. of S. Cal., Inc., v. Shewry, 543 F.3d 1050, 1059 (9th Cir. 2008), *vacated*, Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S.Ct. 1204 (2012).

The full Court got out of the *Douglas* case without engaging the right-of-action problem. In the eleventh hour, federal authorities concluded that the California statutes were consistent with federal law, and the Court remanded the case for further consideration in light of changed circumstances.[37] Writing for the majority, Justice Breyer explained that the new federal administrative ruling introduced the real possibility that the plaintiffs would be able to raise their arguments in an action authorized by the Administrative Procedure Act.[38]

In dissent, Chief Justice Roberts objected to the idea that the Supremacy Clause warrants private preemption actions and, in particular, to the notion that Justice Peckham recognized as much in *Young* a hundred years ago.[39] Private suits contending that federal statutes *preempt* state law are not easily distinguishable from actions claiming that state law or the conduct of state officers *violates* federal enactments—that is, private suits that are now supposed to depend on positive authorization by Congress.[40] Roberts went straight to the tension between the Court's parallel lines of authority and picked a side. To adopt the view that the Supremacy Clause alone permits private litigation, he declared, would invite litigants claiming violations of federal statutes to skirt the Court's decisions in *Sandoval* and *Gonzaga* by characterizing their arguments as preemption claims.[41] Accordingly, he insisted, the plaintiffs in *Douglas* could not proceed in the absence of a statute establishing a right of action for the purpose.[42]

The routine availability of preemption suits remains uncertain and, with it, the best understanding of *Young* on the right-of-action issue. The idea that the supremacy principle suffices in at least some preemption cases is attractive; it would be hard to argue that so many precedents that appear to depend on this very premise were wrongly decided. Nor would it be persuasive to say that the source of the plaintiffs' right of action in the preemption precedents was overlooked, bracketed for purposes of deciding cases on other grounds, or forfeited by defendants who failed to object—the existence of a right of action being nonjurisdictional.[43] Moreover, one may

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[37] *Douglas*, 132 S.Ct. at 1211.

[38] *Id.* at 1210.

[39] *Id.* at 1213 (Roberts, C.J., dissenting) (joined by Scalia, Thomas & Alito, JJ.).

[40] *See* Sloss, *supra* note 22, at 370-72 (contending that the difference is largely semantic).

[41] *Douglas*, 132 S.Ct. at 1213 (Roberts, C.J., dissenting).

[42] *Id.* at 1215.

[43] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (explaining that the absence of a valid right of action does not implicate subject matter jurisdiction). *But see* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S.Ct. 1436, 1448-49 (2011) (explaining away

fairly regret the jurisprudence Chief Justice Roberts would defend—namely, the *Sandoval* and *Gonzaga* decisions making it difficult for private litigants to enforce federal statutes.

This said, *Young* is not a good citation for the proposition that private preemption suits are authorized by the supremacy principle. It may be that *Young* has since been absorbed into a tradition of federal constitutional rights of action in preemption cases.[44] But if we look backward only, we find that the litigation in *Young* was a product of its times and has no genuine purchase as a precedent on the right-of-action problem as it is viewed today. Let's examine the historical *Young* now and return to current issues in Part III.

II

The full story behind *Young* is not so well known as the hornbook version. But it is no less well documented. Richard Cortner explains that the roots of *Young* run to the years following the Civil War when farmers in the upper Midwest bridled at the excessive rates railroads charged for transporting their produce to market.[45] Early on, critics of high rail rates urged Congress to bring the railroads to heel by exercising its power to regulate interstate commerce.[46] The railroads resisted, of course, but soon realized that they could best protect their interests by engineering federal legislation with limited reach and effects.[47] The statute Congress adopted, the Act to Regulate Commerce, constructed a regulatory scheme that was largely favorable to the railroad corporations meant to be restrained.[48] The Act was deficient in numerous respects.[49] State legislatures filled the void

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Establishment Clause precedents on the ground that the plaintiffs' standing had not been raised and considered).

[44] *See* Shapiro, *supra* note 8, at 83 (suggesting that *Young* may have been "part of [the] process" leading incrementally to the recognition of a federal right of action in constitutional cases).

[45] RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION: THE RAILROADS AND THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT, at 3 (1993).

[46] *Id.* at 23.

[47] GABRIEL KOLKO, RAILROADS AND REGULATION 1877-1916, at 232-33 (1965) (presenting the Act as essentially a case of regulatory capture).

[48] The Act's effectiveness was also diminished by unsympathetic judicial decisions. *See* ISAIAH LEO SHARFMAN, I THE INTERSTATE COMMERCE COMMISSION 23-24 (1931).

[49] The intricacies are not pertinent to this story. But one illustration is that, in its initial form, the Act did not give the Interstate Commerce Commission authority to fix rail rates. *See* Interstate Commerce Comm'n v. Cincinnati, N.O. & T.P.RY. Co., 167 U.S. 479, 493 (1897) (so holding). That shortcoming was not corrected until the Hepburn Amendment in

by enacting Granger laws, which in various forms set maximum limits on the rates exacted for intrastate shipments.[50] In response, railroads launched a sustained, multi-track campaign to defeat rate regulation at the state level on constitutional grounds.[51]

In 1876, the Supreme Court held in the *Granger Cases* that states could fix maximum rates for common carriers and similar businesses and that courts would not second-guess state decisions.[52] The principal case, *Munn v. Illinois*,[53] dealt with rates for grain elevators. But the Court made it clear in companion cases that the *Munn* analysis applied to rail rates as well.[54] Chief Justice Waite flatly rejected arguments that state rate-fixing violated the Fourteenth Amendment, the Commerce Clause, or both. If railroads thought they needed to charge more, they must take their plight to "the polls, not to the courts."[55]

The *Granger Cases* confirmed state authority to regulate rates, but at the same time galvanized the railroads' resolve to continue the fight. They promptly developed additional test cases that, step by step, brought the Court around to their way of thinking. In the *Milk Rate* and *Switching Cases* in 1890, the Court held that the Fourteenth Amendment barred states from establishing rates that deprived railroads of a reasonable return on their investment and that courts would ensure that state rates met the constitutional standard.[56] The most famous decision in the period, *Smyth v.*

1906. *See* SHARFMAN, *supra* note 48, at 28 (describing the Commission's early inability to establish rates as a "crucial defect"); Clyde B. Aitchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 GEO. WASH. L. REV. 289, 326-27 (1937) (describing the Hepburn Act). Federal railroad regulation was obviously a much more complicated affair, which took shape over time. Sharfman and Aitchison offer detailed accounts. *See also* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017 (1988).

[50] The Supreme Court held that only Congress could regulate interstate rates. Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 577 (1886).

[51] *See* Aitchison, *supra* note 49, at 292; Hovenkamp, *supra* note 49, at 1023.

[52] *See* Charles Fairman, *The So-Called Granger Cases, Lord Hale, and Justice Bradley*, 5 STAN. L. REV. 587 (1953) (the classic study).

[53] 94 U.S. 113 (1876).

[54] Chicago, Burlington, & Quincy R.R. Co. v. Iowa, 94 U.S. 155 (1876); Peik v. Chicago & Nw. Ry. Co., 94 US. 164 (1876); Chicago, Milwaukee, & St. Paul R.R. Co. v. Ackley, 94 U.S. 179 (1876); Winona & St. Peter R.R. Co. v. Blake, 94 U.S. 180 (1876); Stone v. Wisconsin, 94 U.S. 181 (1876).

[55] *Munn*, 94 U.S. at 134.

[56] Chicago, Milwaukee, & St. Paul R.R. Co. v. Minnesota, 134 U.S. 418 (1890) [hereinafter the *Milk Rate Case*]; Minneapolis E. Ry. Co. v. Minnesota, 134 U.S. 467 (1890) [hereinafter the *Switching Case*].

Ames,[57] was among those marking the start of the notorious "*Lochner* Era," when the Court used substantive due process to invalidate numerous state statutes regulating economic activity.[58]

Just as the *Granger Cases* had failed to discourage the railroads from resisting rate regulation, decisions like *Smyth v. Ames* failed to stanch state attempts to curb railroad price gouging. Cortner contends that Theodore Roosevelt's battles with big business fostered further state attempts to rein in rail rates.[59] In the event, state legislatures adopted a host of new rate measures, which, in turn, triggered more litigation.[60] Not satisfied with their success in due process cases like *Smyth*, the railroads renewed the argument that state rate-fixing invaded Congress' power to regulate interstate commerce.[61] At least some railroads consciously thought matters through and concluded that they preferred to be subjected to federal superintendence rather than endure more demanding regulation at the hands of the states.[62] So declared Robert Mather, President of the Rock Island Line: "The regulation that threatens peril to the railroads . . . is the regulation of the states. . . . The day is past for unyielding opposition to all policies of *federal* control of our carrier corporations. Nay, more, the day has dawned in which to welcome that control."[63]

For our purposes, the crucial question is the means by which litigation over state rate regulation proceeded. The most important cases to date had reached the Supreme Court on direct review of state court judgments. In *Munn v. Illinois*, warehouse operators had appealed from a misdemeanor conviction in state court.[64] In one of the other *Granger Cases*, a shipper

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[57] 169 U.S. 466 (1898).

[58] *See* William F. Duker, *Mr. Justice Rufus W. Peckham and the Case of* Ex Parte Young: *Lochnerizing* Munn v. Illinois, 1980 BYU L. REV. 539 (one of many articles making the connection between *Ex parte Young* and *Lochner*). Of course, recent scholarship has clarified that the Court was less business-oriented than once was popularly thought. But it is noncontroversial that the Court employed substantive due process as it would not be used today—mostly in service of protecting corporations from regulation. The "*Lochner* Era" label remains common. *E.g.*, Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy Over Railroad and Utility Regulation*, 70 VA. L. REV. 187 (1984); Friedman, *supra* note 8, at 248.

[59] CORTNER, *supra* note 45, at 132-37.

[60] *Id.* at 135-36.

[61] *Id.* at 158.

[62] *Id.*

[63] Robert Mather, *The Railroad Problem*, XLIII THE RAILROAD GAZETTE, No. 16, at 454 (Oct. 18, 1907), *cited in* CORTNER, *supra* note 45, at 158.

[64] Munn v. Illinois, 94 U.S. 113, 119 (1876) (noting that a fine of $100 had been imposed).

had filed an original state court civil suit against a railroad.[65] In the *Milk Rate* and *Switching Cases*, railroads had raised their constitutional objections in defense of state court civil enforcement actions.[66] From the railroads' point of view, the more efficient and propitious vehicles were affirmative suits invoking the federal courts' equity jurisdiction to hear constitutional challenges to state-established rates.[67] In some instances, railroads themselves initiated suit in federal court.[68] In the main, however, railroads pursued their ends in federal actions brought *against* them by their own shareholders. This was the pattern in *Smyth v. Ames* and other cases prior to *Young*.[69]

The explanation for the railroads' reliance on shareholder suits is almost certainly to be found in the wider experience of corporate litigators in the period. Let's be candid. It was not that investors were genuinely antagonistic to the companies in which they held stock and sued for relief that corporations actually resisted. Shareholders were shills. They were formal alternative plaintiffs whose suits could evade obstacles in the way of actions by corporations themselves. Illustrations abound. Early on, before Congress conferred federal question jurisdiction on federal courts in 1875, corporations manufactured federal diversity jurisdiction by recruiting out-of-state shareholders as plaintiffs.[70] They also used shareholder suits to get around equitable and statutory prohibitions on injunctions against the collection of taxes.[71] Corporations were limited to suits for reimbursement, but shareholders could sue up front to keep corporations from paying taxes in the first place.[72] Corporations equally employed shareholder suits to achieve standing to litigate in federal court. Prior to 1940, companies could

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[65] *E.g.*, Winona & St. Peter R.R. Co. v. Blake, 94 U.S. 180 (1876); *see* Blake v. Winona & St. Peter R.R. Co., 19 Minn. 418 (1872).

[66] *E.g.*, Chicago, Milwaukee, & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890); Minneapolis E. Ry. Co. v. Minnesota, 134 U.S. 467 (1890).

[67] *See* CORTNER, *supra* note 45, at 129.

[68] *E.g.*, Chicago, Burlington, & Quincy R.R. Co. v. Iowa, 94 U.S. 155 (1876); *see* Chicago, Burlington, & Quincy R.R. Co. v. Attorney General, 5 F. Cas. 594 (D.Iowa 1875).

[69] *See also* Prout v. Starr, 188 U.S. 537 (1903); *cf.* Reagan v. Farmer's Loan & Trust Co., 154 U.S. 362 (1894) (an original suit by a bank as the holder of a trust deed issued by a railroad to secure bonds).

[70] The famous illustration is *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855). *See* Hawes v. Oakland, 104 U.S. 450, 452-53 (1881) (acknowledging the tactic); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 89-92, 95-99 (1997) (describing the widespread practice of litigating federal questions in diversity and contending that the Supreme Court was content with it).

[71] Brushaber v. Union Pac. Co., 240 U.S. 1, 9-10 (1916).

[72] *E.g.*, *id.* at 10.

not sue on the basis of economic injury alone, but shareholders could secure standing on the strength of their legal relations with their corporations.[73]

Against this background, it is easy enough to reconstruct the railroads' reasons for using a shareholder suit in Minnesota where the litigation leading to *Young* began. As Cortner tells the story, Attorney General Young hatched a two-part scheme to keep the railroads from mounting a legal challenge to newly prescribed rates.[74] The first part of the plan was to prevent the railroads from attacking the rates in defense of a state enforcement action. On this front, Young drafted rate regulations enforceable by criminal prosecution, steep fines, and, in some instances, incarceration. With these threats in view, the railroads would hesitate to violate the new rates as a means of obtaining an opportunity to test their validity in state court. Indeed, they would be unable to find employees willing to bell the cat. The second part of the plan depended on the Supreme Court's decision in *Fitts v. McGhee*,[75] where the Court had rejected a federal civil suit for an injunction preventing the enforcement of a state statute—arguably on the ground that the state officers named as defendants were not personally charged with enforcement responsibility.[76] Expecting to have the benefit of *Fitts*, Young drafted the new rate arrangements in Minnesota without specifying any particular officer to initiate enforcement proceedings.[77]

If both parts of this scheme worked, Young hoped the railroads would have no viable means of complaining to the courts, state or federal, and would have to live with the new rates whatever they thought of them. Cortner reports that the railroads felt the pinch and, for a time, appeared to acquiesce.[78] They dutifully published some of the rates at stationhouses and adhered to them even to the day of the Supreme Court's decision.[79] Yet they also prepared for litigation in the form of a shareholder action in a federal circuit court, claiming that the rates fixed by the Minnesota Railroad

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[73] *E.g.*, Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1920). *See* Larry Yackle, *Federal Banks and Federal Jurisdiction in the Progressive Era: A Case Study of* Smith v. K.C. Title & Trust Co. (forthcoming) (on file with the author) (explaining this aspect of *Smith*).

[74] CORTNER, *supra* note 45, at 144-45.

[75] 172 U.S. 516 (1899).

[76] Young overread *Fitts*, or so Justice Peckham later had it in his opinion in *Ex parte Young*, 209 U.S. 123, 156-57 (1908). *See also* Friedman, *supra* note 8, at 259 (noting that *Fitts* might have rested on an abstention ground).

[77] CORTNER, *supra* note 45, at 145-46.

[78] *Id.* at 146.

[79] *Young*, 209 U.S. at 126 (noting as much).

and Warehouse Commission, as well as the rates and regulations mandated directly by two statutes, were unconstitutional.[80]

Shareholders could get the validity of the rates before a federal court by suing their own railroad corporations for injunctions barring the railroads from limiting their charges to what the state prescribed. There was no need, then, for employees to violate a rate schedule and suffer prosecution. Nor was there any need for the railroads themselves to sue the members of the Commission or Attorney General Young and take the chance that *Fitts* would pose a bar. The railroads would win everything they desired by *losing* a suit brought by shareholders claiming that the railroads must do what they wanted to do anyway.

It cannot be proven that things fit together this neatly. Cortner reports that certain major shareholders, especially John S. Kennedy in New York, pressed for litigation when some of the railroads were not convinced it was wise.[81] There is evidence indicating that railroad officers and lawyers in Minnesota who *did* want to take the rates to court were doubtful about the shareholder device, because they hesitated to involve other attorneys (formally representing shareholders) who might have their own ideas about the issues.[82] Yet it is implausible that shareholders genuinely forced the railroads into court to defend a voluntary choice to adopt the rates. The shareholders alleged that they had asked the directors to disobey state law and file their own action to prevent the rates from becoming effective and that the directors had refused.[83] But those allegations were protocol in any shareholder suit, ostensibly meant to discourage collusion. In truth, the railroads plainly supported litigation. They paid the costs of the shareholder action, their lawyers worked with counsel for the shareholders to hone the legal arguments, and, when it came time to name an attorney to

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[80] This is accurate but incomplete. The railroads initially filed a federal action challenging certain commodity rates set by the Commission and entered half-hearted negotiations with state authorities for a settlement. CORTNER, *supra* note 45, at 139-44. It was after those talks collapsed (because the railroads were unwilling to compromise much at all) that Attorney General Young developed new rate regulations for the Minnesota Legislature to adopt, coupled with his plan to deny the railroads a viable means of challenging the new rates in court. *Id.* at 144-46. There were actually nine separate (but coordinated) suits by shareholders in each of the railroad corporations operating in Minnesota, albeit the Supreme Court ultimately examined only one of them. *Young*, 209 U.S. at 129. For the sake of simplicity, this essay adopts the conventional practice of referring to the original shareholder actions in the singular.

[81] CORTNER, *supra* note 45, at 155.

[82] *Id.* at 154-58.

[83] *E.g.*, Bill of Complaint in Perkins v. Northern Pac. Ry. Co., 155 F. 445 (C.C.D.Minn. 1907), *Ex parte* Young, 209 U.S. 123 (1908), Exhibit A, at 14.

make the oral argument in the Supreme Court, it was J.J. Hill, the larger-than-life President of the Great Northern Railroad, who made the choice (over Kennedy's express objection).[84]

You will say that if the railroads were the plaintiffs in fact, it should make no difference to us now that they were defendants in law. If, however, we are trying to identify the right of action in *Young* as it was understood at the time, the alignment of the parties matters a great deal. Again, an accurate account of this old case in its day is primarily of historical interest and should not bear significantly on the current policy questions facing the country. But if the Supreme Court thinks that the historical suit in *Young* has precedential value, then we need to get the historical case right. And the right way to understand *Young* historically is as a shareholder suit against the railroads. No one denies this, but there is a tendency to acknowledge the point as a formality and move on. That is a mistake.

It remains to characterize the source of the shareholders' right of action in *Young*. On this crucial point, we cannot expect much help from the Court's opinion. Bear in mind again that, in 1908, the idea of separating out plaintiffs' authority to go to court in search of (some) judicial remedy was largely alien, given the common law model that prevailed at the time. One looks in vain for an explicit discussion of plaintiffs' ability to seek a judicial remedy in any of the Supreme Court's contemporaneous opinions.[85] Still, if cases like *Young* are to be assigned significance as precedent regarding the right-of-action question today, we have to impose this modern idea retrospectively.

One answer is that the right of action in *Young* was created by state law. In another classic case in the period, *Smith v. Kansas City Title & Trust Co.*,[86] a shareholder sued his own corporation for an injunction preventing the company from purchasing tax-exempt bonds issued by federal land banks that Congress allegedly had no constitutional power to create. The Court now regards the right of action in *Smith* to have been grounded in the state corporate law of Missouri.[87] If this is an accurate understanding of *Smith*, the same explanation may serve for *Young*. The shareholder-plaintiffs in *Young* may have been authorized to bring the suit they did by the law of Minnesota, which presumably recognized that shareholders could sue so long as the classic elements of a shareholder action were in place—

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[84] CORTNER, *supra* note 45, at 162, 186.

[85] Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2177 (2009).

[86] 255 U.S. 180 (1921).

[87] Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005).

like the standard allegations that the plaintiffs had demanded that the directors do something and that the directors had refused to cooperate.

This answer is plausible, but dissatisfying. It is not just that Justice Peckham did not purport to rely on local law at all, far less on Minnesota state court decisions on the availability, features, and conditions of shareholder suits.[88] Again, we would hardly expect him to do that even if he did think that state law supplied the plaintiffs' authority to sue. The problem is that when *Young* was decided federal courts disclaimed any particular state's decisional law and applied general common law and uniform equity principles that *Erie* and *Guaranty Trust* would not repudiate for another thirty years.[89] The better answer, then, is that the shareholder suit in *Young* went forward under the rubric of general law and equity.[90]

In shareholder cases like *Young* and *Smith*, the Supreme Court *did* attend expressly to whether the plaintiffs satisfied the criteria for invoking federal jurisdiction on the equity side. Shareholder suits were themselves creatures of equity, having been originally developed by Chancery to deal with cases in which the law courts declined to settle intracorporate disputes.[91] In *Young*, *Smith*, and other shareholder cases, the Court equally examined the plaintiffs' demonstration of the usual preconditions for equity jurisdiction—irreparable harm and no adequate remedy at law. It was here that Attorney General Young's plan backfired. He convinced the circuit court that the railroads could not be expected to attack the constitutionality of the new rates by way of a defense to prosecution in state court, so the federal court concluded that there was no adequate remedy at law for the claims the shareholders wanted to raise.[92] This attention to general principles of equity again suggests that the authority to sue in *Young* (if we must identify one) is best situated under the umbrella of general law and equity principles.[93]

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[88] *Cf.* David Sloss, Ex Parte Young *and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1174-75 (2000) (dismissing the possibility that *Young* anticipated *Smith* because Justice Peckham did not identify a right of action based on state law).

[89] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99 (1945). *See* Kristin A. Collins, *"A Considerable Surgical Operation," Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249 (2010) (demonstrating that in the Nineteenth Century federal courts employed equitable remedies of their own creation irrespective of the forms of relief available in the forum state's courts).

[90] *Accord* Shapiro, *supra* note 8, at 82-83 (suggesting this understanding).

[91] *See* Bert S. Prunty, Jr., *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980 (1957).

[92] Perkins v. Northern Pac. Ry. Co., 155 F. 445, 448-49 (C.C.D.Minn. 1907).

[93] Woolhandler & Collins, *supra* note 85, at 2177-78 (offering this conclusion regarding

This is not to suggest that the right of action in *Young* was created by federal law, after all. The "*federal* general common law"[94] discarded in *Erie* was federal only in the sense that it was applied in the federal courts.[95] We might now decide that the supremacy principle supplies a right of action for plaintiffs pressing preemption claims; it would not be necessary to overrule *Young* to reach that conclusion. But *Young* did not establish such a proposition in 1908, such that we might now cite *Young* as a precedent we should follow in the *stare decisis* sense that like cases usually ought to be decided alike.

III

In his dissent in *Douglas*, Chief Justice Roberts suggested a quite different means of getting rid of *Young* as a precedent for preemption suits on the basis of the Supremacy Clause.[96] Roberts quoted a passage from Justice Kennedy's concurring opinion in the *VOPA* case a year earlier: *Young*, Kennedy said, involved "the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law."[97] This description of *Young* takes some unpacking.

The issue in *VOPA* was not whether private litigants had a right of action to enforce federal law. The Virginia Office for Protection and Advocacy was organized under a federal spending program to investigate allegations of patient mistreatment at state mental hospitals. There was no doubt that VOPA had statutory authority to bring an action to obtain records that might throw light on its inquiry. The question was whether VOPA, itself an arm of the state, could evade the state's sovereign immunity in a suit against the state officers in possession of the records.[98] Writing for the Court, Justice Scalia declared that VOPA's public status made no difference. He explained that the immunity doctrine ascribed to *Young* has

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Smith).

[94] *Erie*, 304 U.S. at 78 (emphasis added).

[95] *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1521-24 (1984) (explaining that general law was not understood to be part of the supreme federal law); Collins, *supra* note 89, at 290 (same).

[96] Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S.Ct. 1204, 1211-15 (2012) (Roberts, C.J., dissenting).

[97] Virginia Office for Prot. & Advocacy v. Stewart, 131 S.Ct. 1632, 1642 (2011) (Kennedy, J., concurring).

[98] *Id.* at 1638 (majority opinion).

been accepted for a century "as necessary to 'permit the federal courts to vindicate federal rights.'"[99] The "premise—less delicately called a 'fiction'"—is that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes."[100] To determine whether *Young* avoids state sovereign immunity, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'"[101]

Justice Kennedy's reason for writing separately was plain enough. While he agreed that VOPA could "rely on *Young*"[102] to dodge state immunity in the circumstances of this case, he declined to endorse Justice Scalia's description of *Young* in general.[103] Previously, in the *Coeur d'Alene* case,[104] Kennedy had floated the novel idea that *Young* is not the routinely available device for finessing state immunity it is conventionally thought to be and that an officer's ability to assert the state's immunity depends on a "careful balancing and accommodation of state interests" implicated in the particular case.[105] In *VOPA*, then, Justice Kennedy used his concurring opinion to conduct an ad hoc examination of the state's interests, concluding that the threat to the state's dignity was insufficient to defeat the suit under his own understanding of *Young*.[106] It was in that discussion, focused on sovereign immunity, that Kennedy offered the account of *Young* that Chief Justice Roberts quoted in *Douglas*—an account that restricts *Young* to a case in which litigants invoked federal equity jurisdiction to advance claims that would have been defenses to an enforcement action brought by state officials in state court.

Justice Kennedy did not develop this limited understanding of *Young* on his own. He adopted it from John Harrison, who had recently argued that *Young* is best understood as having allowed the railroads to seek a federal anti-suit injunction that would forestall threatened state enforcement proceedings.[107] Time was, justices of the Supreme Court hesitated to cite a

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[99] *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984)).

[100] *Id.*

[101] *Id.* at 1639 (quoting Verizon Md. v. Public Svc. Comm'n, 535 U.S. 635, 645 (2002), quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in the judgment)).

[102] *Id.* at 1643 (Kennedy, J., concurring).

[103] *Id.* at 1642.

[104] Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997).

[105] *Id.* at 278-80.

[106] *VOPA*, 131 S.Ct. at 1643 (Kennedy, J., concurring).

[107] John Harrison, Ex Parte Young, 60 STAN. L. REV. 989 (2008). Justice Kennedy did not join Chief Justice Roberts' dissenting opinion in *Douglas*. He buried himself in Justice

law journal article, lest they be understood to embrace all the author's contentions. In this context, Justice Kennedy was more daring, not to say reckless. He had been looking for a way to check the current Court's understanding of *Young*, and Harrison offered a rationale. Then again, Harrison's thesis does not lead to any sort of case-by-case appraisal of state interests. Far from it. Harrison would deny *Young's* effect on sovereign immunity in all cases in which enforcement actions are not imminent.

The plot thickens. In *Douglas*, the question *was* the availability of a private right of action.[108] By lifting Kennedy's language ostensibly endorsing Harrison's explanation of sovereign immunity in *Young*, Roberts appeared to buy into Harrison's view regarding the source of the plaintiffs' authority to sue—which is that *Young* assumed only that the railroads could pursue an anti-suit injunction. The implications are scarcely clear. But it is possible that Roberts saw full well where Harrison's argument leads and meant to lay the groundwork for disallowing preemption actions in general, but making an exception for suits by plaintiffs who are threatened with state enforcement actions. That result would largely privilege parties most likely to be subject to state regulation: businesses hoping to persuade the federal courts that state social welfare regulation has been displaced by federal statute law.

Harrison reaches his position on the right of action in *Young* from and through his take on the sovereign immunity question.[109] As to immunity, he contends that the modern Court has it all wrong.[110] Justice Peckham did not adopt the fiction that the suit against the Attorney General was not a suit against the state. Whatever he said about immunity (and what he said was, by all accounts, problematic), his result in *Young* can be explained on the ground that federal equity permitted the railroads to be treated as though they were defendants. The state's immunity would not have kept the railroads from offering their constitutional arguments as defenses in a state court mandamus action, and federal equity simply allowed them to present those defenses early in a suit to block an enforcement proceeding. The suit by the railroads against Minnesota was "in substance" an action by Minnesota against the railroads.[111] So Minnesota's sovereign immunity was not involved.[112]

Breyer's majority opinion avoiding the right-of-action issue.

[108] Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S.Ct. 1204, 1207 (2012).

[109] Harrison, *supra* note 107, at 996-1001.

[110] *Id.* at 990.

[111] *Id.* at 996.

[112] Harrison argues that it was sixty years before the Court cited *Young* as authority for defusing immunity in the absence of a threatened enforcement suit against the plaintiff. Yet

Next, Harrison contends that this assessment of the immunity issue is buttressed by Peckham's conception of the action in *Young* as an attempt to achieve the nullification of unconstitutional enactments.[113] The railroads proposed to establish that the state-prescribed rates were not law at all, and *that* is why the state was not implicated. In this sense, too, the railroads were essentially in a defensive posture. They did not ask for "affirmative relief" that would have forced Attorney General Young to take some action in his capacity as a state officer.[114] They requested only a "negative" injunction preventing him from doing something he had "no legal right to do."[115] They wanted only to be "let alone."[116]

Finally, Harrison argues that the same equity principles that defused the state's immunity also provided the railroads with the authority to bring suit. An anti-suit injunction was "not just an equitable remedy but an equitable cause of action."[117] Harrison does not propose that the right of action grounded in federal equity was federal in the sense that it might have established "arising under" jurisdiction. For want of a better answer, he, too, puts it down to the general law applied in the federal courts prior to *Erie*.[118]

Harrison's explanation of *Young* is unpersuasive on all three of these levels. His primary argument is at war with the very idea of state sovereign immunity, which hinges on the distinction between claims advanced offensively and defensively. Of course, private parties are not disarmed of their legal arguments whenever they litigate with a state. If the state is the

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he offers no exhaustive examination of the precedents and, indeed, neglects well known early cases that are perfectly consistent with the modern account of *Young*. In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), the Court made it clear that a railroad would be able to invoke a district court's jurisdiction in a suit against state officials for injunctive relief—once the railroad did what was necessary to complete the state's legislative process. And in *Massachusetts State Grange v. Benton*, 272 U.S. 525 (1926), the Court confirmed a district court's jurisdiction in an action contending that a state daylight savings law conflicted with the analog federal statute. The suit in *Benton* was dismissed not for want of federal judicial power to entertain it, but on the ground that none of the plaintiffs had alleged the irreparable injury necessary in an action for an injunction. Justice Holmes' opinion referred only to jurisdiction, not to immunity. But he scarcely overlooked sovereign immunity as an issue. Justice McReynolds dissented on the theory that the trial court lacked "jurisdiction" because the suit was "against Massachusetts" and thus barred by sovereign immunity under "*Fitts v. McGhee* . . . as construed in *Ex parte Young*." *Id.* at 529.

[113] Harrison, *supra* note 107, at 1004-05.

[114] *Id.* at 1006.

[115] *Id.* (quoting *Young*, 209 U.S. at 159).

[116] *Id.* at 1006.

[117] *Id.* at 1014 n.100.

[118] *Id.* at 1014.

aggressor, a private litigant does not question the state's dignity by defending himself. The point of immunity is that a state can refuse to subject itself to suits initiated by private plaintiffs. A private suit against an unconsenting state *is* an affront to the state's dignity, or so the theory of sovereign immunity would have it.[119] To be sure, when a plaintiff seeks an anti-suit injunction, he or she is making an argument that would be a defense in the action the plaintiff wants to head off. But it is puzzling how the argument can remain a defense when it is asserted offensively. It is more puzzling how, if the defendant in an action for an anti-suit injunction is a state officer, the mere existence of the suit makes sovereign immunity go away. If immunity does disappear, it has to be for some reason other than the self-evident truth that immunity would not have been an issue in some other action brought by the defendant-turned-plaintiff.[120] Harrison's explanation of immunity also relies on a fiction—namely, the fiction that the moving parties in *Young* were defending against an action brought by the state that, well, wasn't.

It is not enough to say that the reason plaintiffs could turn the tables in this way was that they could demonstrate the familiar prerequisites of equity. Those conditions identified plaintiffs who got to pursue an injunction rather than make do with remedies at law—compensation in actions against private adversaries or a defense to prosecution in the case of public officials. There is no obvious reason why they should have done double duty, also identifying plaintiffs who got to make believe they were defendants for purposes of state sovereign immunity. The two ideas, suing in equity and eluding state immunity, were not the same thing. It is a mystery why plaintiffs who passed the applicable tests for doing the one somehow, for that reason alone, managed to do the other. If anything, plaintiffs who could sue in equity despite an imminent state enforcement action were in an especially weak position regarding the state's dignitary

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[119] Alden v. Maine, 527 U.S. 706, 715 (1999); Fed. Maritime Comm'n v. South Carolina, 535 U.S. 743, 760 (2002).

[120] If Minnesota's immunity was not implicated in *Young* because the action for an anti-suit injunction was conceptualized as itself a version of an enforcement action, it is not obvious why a state officer rather than the state itself was named as the defendant. Harrison anticipates this objection and responds that the Court respected the "purely formal principle" that a state could not be named as a defendant "on the record." Harrison, *supra* note 107, at 1001. But if that is the answer, it seems that sovereign immunity *was* involved, after all, and did not dissipate on the simple theory that the state was the plaintiff "in substance." *Id.* at 996.

interests. By hypothesis, they wanted to make the state play defense without giving the state a chance to play offense.[121]

The contention that state immunity was avoided in *Young* because of the character of the suit as an action by the railroads for an anti-suit injunction fails for another reason. There wasn't any action by the railroads. Again, the suit in *Young* was a shareholder action *against* the railroads as well as other defendants. It was that shareholder suit, also a matter of federal general law and equity, which evaded the state's immunity.[122] The shareholder-plaintiffs did not face the prospect of actions against them. They sued their own corporations to prevent compliance with state laws that made their businesses less profitable. The railroad-defendants *were* threatened by enforcement suits, and the relief the shareholders requested was, in part, an injunction preventing the Attorney General from bringing enforcement proceedings to make the railroads reduce their rates. But that was different and essentially redundant.

It would be hard to argue that the shareholder action in *Young* might just as easily have named only the railroads as defendants and left everybody else out it, Young among them. There is a way that is true. Once the railroads were enjoined from adopting the new rates, state officials were unable to force the railroads to violate a federal court order—just as Young

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[121] This is not to suggest that there were no good reasons for an affirmative federal suit in *Young*. The Supreme Court concluded that the railroads did not have the usual option of violating state law once in order to generate a state enforcement suit and thus an opportunity to raise their federal claims in defense. Nor is it to suggest that state immunity should have barred a preemptive action by the railroads in federal court. Today, of course, immunity would not be an issue. But that is because of the conventional "fictional" understanding of *Young*, that is, that plaintiffs who sue a state officer for prospective relief are not suing the state. The point here is only that once Harrison jettisons the conventional view of *Young*, he has to offer some other explanation for why the state's dignity was not implicated. And the plaintiffs' showing of an inadequate remedy at law does not measure up. The modern Court, indeed, perceives powerful state interests in play after state immunity is dispatched—interests that can lead to federal abstention even if, as was true in *Young*, a federal suit is initiated when no state enforcement action is under way. Hicks v. Miranda, 422 U.S. 332 (1975).

[122] To be sure, there was something funny about this arrangement, too. Harrison, for his part, calls it a fiction in the shareholder suit: "The fiction was that the railroads, as represented by their shareholders, were the plaintiffs. They were actually defendants." Harrison, *supra* note 107, at 1001. It is true that the railroads were allied with the shareholder-plaintiffs and so were not your typical adversaries resisting the plaintiffs' claims. But Harrison seems to have in mind Victor Victoria. The railroads in *Young* were defendants pretending to be plaintiffs pretending to be defendants—defendants in form in the suit brought by shareholders, plaintiffs in reality in light of their position and interests, but then defendants for purposes of eluding state sovereign immunity.

was (ultimately) unable to violate the injunction issued against him.[123] When lawyers once decide to sue anybody, they typically sue everybody and let the named defendants wriggle out of the net if they can. In this instance, the shareholders sued Young, the members of the Commission, and even the heads of important shipping companies, seeking to enjoin them all from attempting to enforce the rates fixed by state law.[124] Still, it is too much to contend that bringing so many defendants into the room was merely a belt-and-braces strategy by aggressive litigators. The pursuit of an anti-suit injunction preventing third parties from trying to make the railroads comply with state law surely was an important aspect of the case. But the crucial point is that an anti-suit injunction was not the *only* point, the *raison d'etre* that Harrison insists it was.

Nor is it persuasive to contend that the difference between prohibitory and mandatory injunctions cut a significant figure in the historical *Young* case. Today, of course, scarcely anyone would defend that old distinction at all for any serious purpose.[125] Even if we acknowledge that it was viable

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[123] A federal order directing the railroads not to adopt the rate schedules prescribed by state law would not merely add to their defenses in a state enforcement action. If a state action was imminent, the railroads would be able to get further orders from the federal court "in aid of" its jurisdiction, under the authority granted by the All-Writs Act, 28 U.S.C. § 1651. The Anti-Injunction Act, 28 U.S.C. § 2283, would pose no bar inasmuch as the federal court would act to "effectuate" its previous judgment.

[124] Bill of Complaint, *supra* note 83, at 7-8.

[125] *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 264 (3rd ed. 2002) (expressing the conventional view that there has never been any basis for this supposed distinction); *cf.* California v. Am. Stores Co., 495 U.S. 271, 282-83 (1990) (pronouncing the distinction "illusory" in the case at bar). Justice Scalia said in *VOPA* that the immunity doctrine associated with *Young* is limited to situations in which a state officer is ordered to "do nothing more than refrain from violating federal law." Virginia Office for Prot. & Advocacy v. Stewart, 131 S.Ct. 1632, 1638 (2011). At a glance, one might take that as an opening for limiting *Young* to "negative" injunction cases. Yet in context Scalia was distinguishing other precedents in which a state was the "'real, substantial party in interest,'" for example, when a federal judgment would "'expend itself on the public treasury or domain, or interfere with public administration....'" *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 n.11 (1984), quoting Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 464 (1945), and Dugan v. Rank, 372 U.S. 609, 620 (1916)). The *Ford Motor* case was an action to recover tax revenues from the state's treasury; *Dugan v. Rank* involved a suit against federal officials for an injunction forcing them to release irrigation water in the Government's control. The famous illustration is *In re Ayers*, 123 U.S. 443 (1887), where a suit against another state attorney general was conceived as an action for specific performance of a state's contract. Justice Scalia's ringing reiteration of the *Young* immunity doctrine today clearly reaches affirmative relief or, better said, ignores any supposed distinction, drawn historically, between negative and affirmative injunctions. The injunction sought in *VOPA* itself was plainly of the latter ilk—namely, an

in 1908, it offers Harrison no help. The historical suit that needs explaining was, again, a shareholder action against the railroads and other defendants. The temporary injunction the shareholders obtained "restrained and enjoined" the railroads from "publishing, adopting, or putting into effect" the rate schedules prescribed by the Commission and state statutes.[126] Despite the (traditional) use of the term "restrained," the injunction was hardly negative at all. Indeed, it looks pretty affirmative—effectively ordering the railroads to charge their customers more. For our purposes, all that matters is that the injunction against the railroads did not prohibit anybody from bringing an action to enforce the state-established rates. The idea that the state's immunity was avoided by an action to restrain an attempt to enforce a nullity is counterfactual. The shareholders were not asking to be let alone.

Finally, Harrison's argument that the right of action in *Young* came from general law and equity is right in general, but wrong in particular. For reasons we have just gone through, we should conclude that the historical *Young* is not precedent for the proposition that the Constitution itself warrants private suits to preserve the supremacy of federal law. Yet Harrison picks the wrong feature of federal equity on which to ride. Equitable actions for anti-suit injunctions were recognized in 1908 (as they are today). But that is not the kind of action that was at the bottom of *Young*. Here again, Harrison neglects what should be crucial—namely, that the suit actually brought was a shareholder action.

Formalities matter. If *Young* is understood in hindsight as exclusively a case about the railroads' entitlement to sue for an anti-suit injunction, then *Young* is not authority for the proposition that plaintiffs today can sue for injunctions running to defendants who do not threaten the plaintiffs with actions of their own. Such a limitation of *Young* would not merely rob the argument for more generally available preemption suits of a prominent precedent. It would make of *Young* a back-side citation for denying that plaintiffs in general have a time-honored authority to seek judicial relief with respect to preemption claims without congressional approval, but

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injunction requiring recalcitrant state officers to hand over documents in their possession. *See supra* text accompanying notes 99-101.

[126] Order in Perkins v. Northern Pac. Ry. Co., 155 F. 445 (C.C.D.Minn. 1907), *Ex parte* Young, 209 U.S. 123 (1908), Exhibit A, at 113-14. The injunction the shareholders requested would have "enjoined and restrained" the railroads from "continuing to observe or keep in force" the state rate schedules, or from "publishing or adopting" the state rates, or from "reducing" rates to conform to the state schedules. Bill of Complaint, *supra* note 83, at 15.

making an exception for plaintiffs who face the threat of suit by somebody else.

The losers in this game would be plaintiffs like the Medicaid recipients in *Douglas*, who faced no threat of enforcement actions.[127] Of course, not all individual plaintiffs would be boxed out of federal court. Individuals, too, sometimes sue for declaratory or injunctive relief from potential prosecution.[128] Moreover, in many civil rights and civil liberties cases, the plaintiffs claim violations of personal rights and thus can rely on § 1983 for their authority to sue. But § 1983 is not always available.[129] An amicus brief in *Douglas* cited numerous instances in which individual plaintiffs' right of action arguably rested on the Supremacy Clause.[130] Plaintiffs in civil rights and civil liberties cases who are not threatened with enforcement actions and cannot proceed via § 1983 would be turned away at the door.

The winners would largely be businesses—plaintiffs far more likely to be subject to state regulation and thus to face enforcement actions brought by state officials in state court.[131] In an attempt to persuade the Court that the Supremacy Clause is routinely sufficient in the preemption context, the respondents in *Douglas* listed sixty-one prior cases in which plaintiffs were permitted to press preemption claims without benefit of any statute

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[127] The participants in *Douglas* fully appreciated this. Many of the briefs urging the Court to disapprove the preemption suits by beneficiaries and providers expressly invoked Harrison's argument. *See* Brief for Petitioners (California state officials) at 43-45, Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S.Ct. 1204 (2012) (Nos. 09-958, 09-1158, 10-283) (citing and relying on Harrison); Brief of National Governors Association, et al. at 24-25, *Douglas*, 132 S.Ct. 1204 (2012) (No. 09-958) (same); *cf.* Brief for the United States as Amicus Curiae at 19-21, *Douglas*, 132 S.Ct. 1204 (2012) (No. 09-958) (acknowledging Harrison's reading of *Young* but contending that the Court did not have to determine its validity in the case at bar).

[128] *E.g.*, Steffel v. Thompson, 415 U.S. 452 (1974) (involving a suit for a declaratory judgment that a threatened prosecution would violate the First Amendment).

[129] Judge Berzon cites one of the desegregation cases, *Bolling v. Sharpe*, 347 U.S. 497 (1954), where the defendants were school officials in the District of Columbia. It was many years later that Congress amended § 1983 to reach action under color of law in the District. Berzon, *supra* note 22, at 686.

[130] Brief for the American Civil Liberties Union, et al., *Douglas*, 132 S.Ct. 1204 (2012) (No. 09-958).

[131] *See* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 371 (allowing for the possibility that the Court's preemption jurisprudence is being written by justices who are "predisposed against government regulation"); Sloss, *supra* note 22, at 372 (acknowledging that the plaintiffs in most preemption cases are corporations but largely rejecting favoritism as the rationale for allowing the suits in those cases to proceed without statutory authorization).

conferring a right of action.[132] In forty-two of those cases, the plaintiffs were for-profit corporations hoping to escape state regulation. Admittedly not all, but decidedly most, of the statutes and rules corporations meant to frustrate promoted public health and safety, fair labor relations, consumer protection, and environmental quality. Small wonder the Chamber of Commerce filed an amicus brief in *Douglas*, contending that preemption claims require no authorizing legislation.[133]

It is sobering that Chief Justice Roberts may have this future in mind for us. Consider a familiar pattern. Let's state it starkly for clarity and emphasis. Companies resist any interference with their businesses that may diminish profits. They use political muscle in Congress to avert regulation if they can, to dilute any regulation they cannot avoid, and to frustrate the implementation of enacted federal measures. One means of limiting enforcement is to deny the beneficiaries of regulation the ability to press their own suits. Some states, wise to this pattern and disappointed by the results, adopt their own regulatory schemes to make up the difference. Companies then mount suits in federal court, using (modest, unevenly enforced) federal regulation as a club against more effective local programs.

This basic pattern was apparent in the railroads' conduct at the time of *Young*. The railroads contrived to make federal regulation less rigorous than it might have been.[134] Then they complained that more demanding state regulation was preempted—albeit not by the federal statute, but by the further power Congress had not yet exercised. Illustrations of a similar pattern in our own time are not far to seek.[135]

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[132] Brief for Dominguez Respondents, *Douglas*, 132 S.Ct. 1204 (2012) (No. 09-958).

[133] Brief of the Chamber of Commerce of the United States of America, *Douglas*, 132 S.Ct. 1204 (2012) (No. 09-958).

[134] *See supra* notes 48-49 and accompanying text.

[135] Financial institutions campaigned against the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and, since enactment, they have lobbied for implementing regulations that will be difficult to enforce. Pat Garofalo, *Wall Street Spending as Much To Undermine Dodd-Frank Regulations as It Spent Trying to Block Dodd-Frank*, THINK PROGRESS (Apr. 22, 2011, 12:00 PM), http://thinkprogress.org/ politics/2011/04/22/160524 /banks-spending-2011/?mobile=nc (describing the lobbying effort generally); Robert Schmidt & Phil Mattingly, *Bank Lobby's Onslaught Shifts Debate on Volcker Rule*, BLOOMBERG (Mar. 25, 2012, 6:01 PM), http://www.bloomberg.com/ news/2012-03-26/bank-lobby-s-onslaught-shifts-debate-on-volc (offering a particular illustration). The Act contains provisions ostensibly meant to avoid preempting state arrangements in many instances. Yet preemption arguments are already surfacing. *E.g.*, Baptista v. JPMorgan Chase Bank, 640 F.3d 1194 (11th Cir.), *cert. denied*, 132 S.Ct. 253 (2011) (sustaining a preemption claim on the basis of industry-friendly regulations issued by the Office of the Comptroller of the Currency).

The question, then, the real practical question, is whether the Supreme Court will be complicit in these machinations. The Court has already undermined federal social welfare legislation by insisting that private enforcement suits must have express statutory authorization.[136] If the Court disclaims preemption actions generally, but makes an exception for plaintiffs pursuing anti-suit injunctions, the Court will *foster* federal litigation meant to frustrate similar legislation at the state level.[137]

CONCLUSION

The source of the right of action in *Young* has importance today inasmuch as *Young* is cited as a precedent in the modern debate over private plaintiffs' ability to take preemption claims to court without express authorization from Congress. A disciplined historical examination of *Young* demonstrates, however, that *Young* has little to say about that question. The original action in *Young* was a shareholder suit against railroad corporations and other defendants. The shareholders' authority to sue was a feature of general law and equity.

This historical account of *Young* does not foreclose a holding that the supremacy principle *now* provides a right of action in preemption cases. It does resist another position, suggested but not fully fleshed out by some of the justices, that the right of action in *Young* was located in a different aspect of federal equity—namely, the ability of the railroads to sue for an anti-suit injunction. That account of *Young* is ahistorical and thinly theorized. It is also bad policy. If accepted, it would suggest that business interests should be able to sue without congressional authorization in hopes of thwarting state social welfare legislation.

The question whether preemption suits require congressional authorization is real, and it is hard. The Court may plausibly draw

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[136] *See supra* text accompanying note 13.

[137] If the Court were to follow this course in reliance on Harrison's treatment of the right of action in *Young*, a reassessment of *Young's* significance for sovereign immunity might not be far behind. The Court now seems committed to the conventional understanding of *Young* where immunity is concerned. Sovereign immunity is defused in any suits in which private plaintiffs sue state officers for prospective relief regarding ongoing violations of federal law. *See supra* text accompanying note 101. This familiar proposition does not restrict *Young* to actions in which plaintiffs request an anti-suit injunction. The defendants in *VOPA* certainly threatened no such action, yet they could not set up the state's immunity. But, according to Harrison, the existence of a right of action in *Young* and the absence of a sovereign immunity issue drew upon the same explanation—namely, that plaintiffs could maintain their action in federal court because, and only because, they were in substance offering a defense to an imminent enforcement proceeding.

distinctions within the mass of preemption actions, permitting some suits while disallowing others.[138] This essay has not contended for any particular results or mix of results. The argument is only that the Court is not obliged, by the precedent set in *Young*, to sort preemption cases in a way that further skews the federal judicial system in favor of those who would confound social welfare programs, both national and local.

[138] Numerous distinctions might conceivably be drawn—e.g., cases in which the Constitution is said to preempt state law versus cases in which the federal law at work is nonconstitutional; cases in which only equitable or declaratory relief is sought versus cases in which plaintiffs demand compensatory damages; cases in which plaintiffs contend that federal law preempts state statutes versus cases in which only action by state executive officers is implicated; cases in which plaintiffs raise preemption claims in suits against state officers versus cases in which the defendants are other private parties; and cases in which the federal law said to have preemptive effect is a condition on federal spending versus cases involving other forms of federal regulation.

Texts Versus Testimony: Rethinking Legal Uses of Non-Legal Expertise

Karen Petroski*

Current legal vocabularies are ill equipped to regulate the channels through which legal actors receive and process much of the non-legal information they use. Sophisticated legal tools have been developed in only a single area: the screening of expert witness testimony. Disproportionate focus on this format is the best explanation for the Supreme Court's otherwise perplexing 2012 decision in Williams v. Illinois, *which revealed deep disagreements among the Justices on a basic issue in hearsay analysis.* Williams, *this Article argues, is a sign of the much more pervasive analytical problems caused by treating all non-legal expert information as if it fit the model of a live witness's oral testimony. The Article maps these problems, revealing inexplicable inconsistencies in the legal treatment of non-legal information; it also outlines basic principles developed in other disciplines to study and explain the generation of specialized information and proposes modest, practical changes to the rules of evidence on judicial notice to address some of the most troubling problems. Above all, it argues that we need to discuss and develop doctrine concerning the textual presentation of information generated within specialist discourse communities. As long as this issue remains unaddressed, our law will lack any systematic account of one of its main channels of information reception.*

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INTRODUCTION

Much of our law regulates human communication, both within and outside the legal system. Procedural law and the law of evidence, in particular, largely consist of rules prescribing and restricting certain communications made during litigation. For centuries, courts and lawmakers have been adjusting legal rules in these areas to accommodate changes in the social context of and functions of litigation. But contemporary law, especially the law of evidence, has never been satisfactorily adjusted to modern information formats. The law of evidence and procedure remain poorly equipped to handle many of the communications involved in contemporary legal actions.

A recent Supreme Court decision illustrates the consequences of this shortcoming. *Williams v. Illinois*, decided in June 2012, concerned a criminal defendant's Sixth Amendment right to confront the witnesses against him.[1] In two earlier decisions, the Court had held that this right allows a defendant to insist on the production at trial of the individuals responsible for preparing forensic reports used by the prosecution, so that the defendant may "confront"—or cross-examine—those individuals in person.[2] In *Williams*, the defendant argued that this precedent barred the

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[1] Williams v. Illinois, 132 S. Ct. 2221 (2012).

[2] Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).

prosecution from questioning a police forensic specialist, called as an expert witness at trial, about whether the DNA profile described on a report prepared by a private laboratory was a "match" for a profile belonging to the defendant and contained in a law-enforcement database, if the prosecution did not also call as witnesses those responsible for preparing the private lab's report.[3] Surprising many observers, five Justices rejected this argument.[4] But the decision revealed deep disagreements among the Justices, not only on the constitutional issue presented, but also on a more basic evidentiary principle applicable outside the Confrontation Clause context: determining when an out-of-court statement—in *Williams*, the private lab's DNA report, as described in the forensic specialist's testimony—is "used for its truth," and therefore forbidden hearsay, or instead used only as "basis evidence" to clarify the grounds for an expert witness's orally delivered opinion.[5] Four Justices[6] took the position that the report counted only as "basis evidence" in the circumstances of this case.[7] The remaining five considered the report to have been "offered for its truth," although they split on the constitutional implications of this conclusion, yielding a majority favoring rejection of the defendant's constitutional argument.[8] The Justices' inability to agree on this basic point about the analysis of hearsay statements reveals a much wider, if seldom discussed, set of problems in American evidence law. That law lacks any agreed-upon vocabulary for discussing or regulating the use of expert documentation, especially collectively generated texts like forensic reports.

This Article argues that these problems stem from two related distortions in the way legal rules have come to refer to the activities of non-legal experts and the information they generate. Although the focus in this Article is on the law of evidence, the phenomenon in question is in fact much broader. For another example, consider Justice Kennedy's majority opinion in *Citizens United v. Federal Election Commission*, the 2010 Supreme Court decision invalidating some restrictions on corporate campaign spending.[9] In explaining how and why corporations may be

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[3] *Williams*, 132 S. Ct. at 2228.

[4] *See, e.g.*, David G. Savage, *Supreme Court Backs Away on Courtroom "Confrontation Right" Issue*, L.A. TIMES (June 18, 2012), http://articles.latimes.com/2012/jun/18/nation/la-na-nn-supreme-court-lab-technicians-20120618.

[5] *Williams*, 132 S. Ct. at 2239-40.

[6] Justices Alito, Kennedy, Breyer, and Chief Justice Roberts.

[7] *Williams*, 132 S. Ct. 2221 (2012).

[8] Justice Thomas maintained that although the report was used for its truth, it did not trigger the Confrontation Clause. *Id.* at 2265. Justices Kagan, Ginsburg, and Sotomayor contended that the report had been used for its truth and did trigger the Confrontation Clause. *Id.* at 2276.

[9] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

considered to "speak" in the same sense as individuals and thus have some First Amendment rights, Justice Kennedy wrote, "[o]n certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials," and therefore able to discharge one of the social functions promoted by modern First Amendment law.[10] Note how this sentence invokes corporate "expertise" as a socially valuable possession, and further how it describes expertise as activity that is directly equivalent to, and indeed in conversation with, the speech of individuals. As this Article will explain, such casual equations between "expertise" and individual "speech" are symptoms of the same problem that divided the Justices in *Williams*.

The effects of confusion about what counts as "expertise," how courts should access it, and when courts and parties may justifiably rely on it spread far beyond evidence and First Amendment law. Appeals to "expertise" have appeared in a variety of recent Supreme Court opinions to explain judicial deference (or acknowledge decisions not to defer) to a wide variety of other authorities, including not only administrative agencies,[11] but also trial courts,[12] on-the-ground officials,[13] and, of course, individual

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[10] *Id.* at 912.

[11] *See, e.g.*, United States v. Home Concrete & Supply, L.L.C., 132 S. Ct. 1836, 1852 (2012) (Kennedy, J., dissenting) ("Agencies with the responsibility and expertise necessary to administer ongoing regulatory schemes should have . . . discretion to implement their interpretation of provisions reenacted in a new statutory framework."); Talk America, Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254, 2265 n.7 (2011) ("[T]he Commission . . . has greater expertise and stands in a better position than this Court to make the technical and policy judgments necessary to administer the complex regulatory program at issue."); Astra USA, Inc. v. Santa Clara Cnty., 131 S. Ct. 1342, 1349 n.6 (2011) ("HHS can use its expertise to ascertain and balance the competing interests. . . . Courts as first-line decisionmakers are not similarly equipped to deal with the whole picture."); Pepper v. United States, 131 S. Ct. 1229, 1247 (2011) ("[W]e have recognized that the [Sentencing] Commission post-*Booker* continues to 'fil[l] an important institutional role' because '[i]t has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'" (citation omitted)).

[12] *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1929 (2011) ("Deference to trial court factfinding reflects an understanding that '[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.'" (citing Anderson v. Bessemer City, 470 U.S. 564, 574 (1985))). *See also* United States v. Marcus, 130 S. Ct. 2159, 2169 (2010) (Stevens, J., dissenting) ("[A]ppellate courts must repeatedly confront the question whether a trial judge's mistake was harmless . . . . They become familiar with particular judges and with the vast panoply of trial procedures, [and] they acquire special expertise in dealing with recurring issues[.]").

[13] *See, e.g.*, Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 132 S. Ct. 1510, 1515 (2012) (Kennedy, J.) ("Maintaining safety and order at [crowded correctional facilities] requires the expertise of correctional officials, who must have substantial

researchers[14] and other individuals outside the legal system.[15] These references to "expertise" all refer to the competency of "outsiders" to the judicial forum to explain why those outsiders' authority should normally be respected. This is not a peculiarly judicial gambit, nor is it necessarily a sign of weakness. Reliance on the authority and accuracy of other individuals, and of the artifacts they create, has probably always been necessary to organized human functioning. Certainly such reliance is unavoidable in complex groups like the Supreme Court itself and the groups it addresses.[16] Not all references to extra-judicial authority describe that authority as "expertise," but many do, and as the discussion below will clarify, acting in reliance on extra-judicial authority is a pervasive legal phenomenon apart from the use of particular terms.

Despite the ubiquity of this practice, there is no uniform and nuanced legal conception of "expertise." Depending on their age and practice area, most lawyers probably associate the term with one of two different topics: administrative agency decision making, or individual expert witnesses offering opinions on scientific issues.[17] The legal approaches to these topics have little in common. Lawyers and judges seem to conceive of agency expertise as an organizational resource enabling agencies to

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discretion to devise reasonable solutions to the problems they face."). *See also* Christian Legal Soc'y. v. Martinez, 130 S. Ct. 2971, 2988 (2010) ("Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts . . . to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'" (citation omitted)).

[14] *See, e.g.*, Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2769 (2011) (Breyer, J., dissenting) ("Experts debate the conclusions of . . . studies [of the psychological effects of violent video games]. . . . I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games . . . are particularly likely to cause children harm."); Ricci v. DeStefano, 557 U.S. 557, 571 (2009) (discussing trial testimony of expert witness "Janet Helms, a professor at Boston College whose 'primary area of expertise' is . . . in 'race and culture as they influence performance on tests and other assessment procedures.'").

[15] *See, e.g.*, Filarsky v. Delia, 132 S. Ct. 1657, 1665-66 (2012) ("[I]t is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force[.]"); Conkright v. Frommert, 130 S. Ct. 1640, 1649 (2010) ("[Under the Court's *Firestone* deference doctrine,] an employer can rely on the expertise of the [ERISA] plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from de novo judicial review.").

[16] For the philosophical perspective on this phenomenon, see C.A.J. COADY, TESTIMONY: A PHILOSOPHICAL STUDY (1992); THE EPISTEMOLOGY OF TESTIMONY (Ernest Sosa & Jennifer Lackey eds., 2006). For the anthropological perspective, see EDWIN HUTCHINS, COGNITION IN THE WILD (1996). The sociological perspective is discussed at more length *infra* Part II.A.

[17] *See infra* notes 26, 31, & 45.

generate authoritative, and usually written, output.[18] Discussions of expert witness testimony, in contrast, start from what Mark Spottswood has recently called the "presumption of presence—a default assumption that adjudication of a dispute requires the physical, visual, and aural immediacy furnished by a traditional trial environment."[19] Although Justice Kennedy's *Citizens United* comment arguably draws on the first of these models, it also suggests the recent ascendancy of the latter view, which identifies expertise with an individual's in-person oral speech. *Williams*, too, like evidence law in general, clearly endorses this presumption of presence.[20] Describing and challenging the dominance of this conception is the main goal of this Article.

Two familiar simplifications have enabled this dominance. First, the identification of expertise with an individual's speech avoids confronting the fact that expertise is a fundamentally social phenomenon, rather than an individual characteristic or possession.[21] Individual experts achieve that status through specific types of social processes. While the Justices do seem aware that expertise depends on collective activity,[22] they do not

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[18] *See infra* Part I.C.

[19] Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 828 (2011). John Leubsdorf has made a similar point in the specific context of evidence law. *See* John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1234-44 (2006).

[20] *See infra* notes 38, 41, 146 and accompanying text.

[21] This Article discusses expertise in general, rather than particular domains of expertise (such as medical expertise and forensic expertise, to take just two commonly examined domains). A general approach is justified for several reasons. First, a number of themes are common to most of the instances of judicial reliance on others' epistemic authority: experts are relied upon because of their familiarity with circumstances and the better grounds for judgment that this familiarity gives them, and the reasons experts provide for their conclusions are usually opaque to non-experts. Second, with some exceptions discussed in Part III, different types of expertise tend to "look the same" to the legal system; the products of such expertise arrive before legal actors in similar packages, making analogous claims to authority. Third, the scholarly study of expertise has identified several common features of expert activity in different domains, as discussed in Part II.A. Developing a more comprehensive legal approach to intellectual specialization does not rule out the possibility of domain-specific studies and suggestions.

[22] *See, e.g.*, Williams v. Illinois, 132 S. Ct. 2221, 2244 (2012) ("The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both .... [I]n many labs, numerous technicians work on each DNA profile .... When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures."); *id.* at 2249 (Breyer, J., concurring) ("[T]he need for cross-examination is considerably diminished when the out-of-court statement was made by an accredited laboratory employee operating at a remove from the investigation in the ordinary course of professional work.... For one thing, as the hearsay exception [for business

completely integrate this insight into their discussions of the issue. Part of the reason might be the second, and more fundamental, simplification involved in most judicial treatments of expertise: the trend toward reducing every type of communication to the model of oral speech. This reduction is a feature of both First Amendment law (as in *Citizens United*) and Anglo-American evidence law, which privileges first-person oral presentations ("speech") and disfavors recorded or reported presentations, such as hearsay.[23] It is, however, at odds with our cultural practices. In fact, the social institutions within which we live, including legal institutions, depend just as basically on textual as on oral communication. Think for a moment about how, in a complex organization such as a corporation—or a legislature, administrative agency, or appellate court—most communication circulates in written form, and must do so, since that form allows communications to be preserved and disseminated.[24]

Integrating these two insights within a more nuanced, comprehensive legal approach to cognitive specialization and its products is not a merely theoretical project. It is an increasingly urgent practical issue. Social, economic, technological, and intellectual specialization show every sign of continuing to exert increasing pressure on American legal systems and the legal profession, and as this happens it will become increasingly important to be able to handle the products of that specialization wisely. To make the case for consolidation capable of handling this task, Part I below explains in more detail the basic problems with existing practices. The discussion focuses on reviewing how trial courts receive and process non-legal expert information, and on how the "presumption of presence" has impaired our ability to discuss those practices with precision. This impairment comes

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records] itself reflects, alternative features of such situations help to guarantee its accuracy. An accredited laboratory must satisfy well-established professional guidelines that seek to ensure the scientific reliability of the laboratory's results."). *See also infra* note 173 (discussing Justice Breyer's appendix in *Williams* diagramming the multiple "authorship" of DNA profiles).

[23] To be more precise, Anglo-American evidence law measures the evidentiary status of recorded and reported communications against the yardstick of first-person oral testimony subject to cross-examination. *See* Leubsdorf, *supra* note 19, at 1234-44. The main exception to this tendency is in those areas of the law that treat utterances as the subjects of property rules, such as intellectual property law, in which the distinction between nonrecorded (i.e., nontextual) and recorded utterances is meaningful. A similar conflation is present in some other disciplines, such as philosophy, where the "epistemology of testimony" addresses the status and function of both written and oral communications, generally without distinguishing between them. *See generally* THE EPISTEMOLOGY OF TESTIMONY, *supra* note 16; COADY, *supra* note 16.

[24] *See* discussion *infra* Part II.B; *see also* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1304 (2008); Spottswood, *supra* note 19, at 844.

most clearly into focus through comparison of trial court practices with analogous practices in the appellate court, legislative, and administrative settings. The comparative institutional view presented in Part I shows that prevailing judicial and scholarly discourse about non-legal expertise remains silent about much that actually occurs in these institutions.

Seeing the inconsistencies and omissions that generate problems like *Williams* is only a first step toward their correction. We also need something to put in their place: a nuanced account of how expertise is produced and packaged that can be tailored to legal needs. To this end, Part II considers some resources for reconceiving legal approaches to non-legal expertise. It first outlines pertinent conclusions from the cross-disciplinary academic study of cognitive expertise as a social phenomenon, explaining the features shared by expertise in different domains. Then it discusses how other fields of inquiry have avoided reducing all communication to the model of oral "speech." As this Part shows, neither the tendency to think of expertise as an individual possession nor the tendency to consider all communication on the oral model is inevitable. Indeed, entire fields of cognitive specialization are devoted to studying the social dimensions of expertise and the implications of different modalities of communication. There is no reason these areas of inquiry—which we could understand as forms of "meta-expertise" about features of cognitive expertise itself—cannot be as familiar and comfortable to legal professionals as areas like history, economics, and statistics.

Part III maps out some paths we might consider taking in developing legal vocabularies to deal with these issues. As the discussion in Part I reveals, existing legal tools for regulating the reception of non-legal expertise are mostly concentrated in one narrow area: the screening of expert witness opinion testimony. Tools for receiving and systematically processing the products of expertise presented in other formats simply do not exist. Confronting this phenomenon requires us to acknowledge often-overlooked features of non-legal expert information and to develop ways to discuss and decide about them. To orient this task, Part III.A sketches a preliminary taxonomy of the legal uses of non-legal expertise, based on the information presented in Parts I and II. Part III.B turns to a specific recommendation: amendment of the Federal Rules of Evidence on judicial notice to provide a basis for a body of law on specialist texts complementing existing law on expert witness opinion testimony.

I. PRACTICES AND PROBLEMS: LEGAL USES OF NON-LEGAL INFORMATION

This Part surveys how non-legal information comes to the attention of different legal institutions and is processed by those institutions, how legal

doctrine tends to describe these practices, and what attitudes the doctrine encourages toward them. The sources of non-legal information and the channels of its transmission to some institutions are similar, but commentators seldom acknowledge the similarities. In recent decades, most discussions of the legal use of specialist information have focused on the implications of the Supreme Court's 1993 decision in *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*,[25] which set forth a standard for the admissibility of individual expert witness testimony in trial court. Because the trial court setting has received the greatest attention over the past few decades, this Part first focuses on developments in that context, before moving on to consider practices and doctrines relating to other legal institutions.

A. Trial Courts: Daubert*'s Hegemony and the Eclipse of Judicial Notice*

When they see the term "expertise," lawyers and law professors trained since the early 1990s tend to think immediately of the *Daubert* decision. Indeed, some seem to conceive of that decision and its progeny as addressing the one and only form in which the law confronts expertise.[26] As this Part explains, however, this is a misconception. It is the result of two only partly related developments: the rhetoric and influence of *Daubert* and its progeny, and the earlier process by which the doctrine of judicial notice was rendered largely irrelevant in American evidence law.

1. Daubert*'s Hegemony*

Decided in 1993, *Daubert* addressed a question that has prompted controversy ever since the first use of party-affiliated expert witnesses in early modern England:[27] under what conditions should such experts be permitted to offer their opinions on issues in litigation? At the time of the *Daubert* decision, many were concerned about how to handle advocates'

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[25] Daubert v. Merrell-Dow Pharm., Inc., 509 U.S. 579 (1993).

[26] *See, e.g.*, D. Michael Risinger, *Preliminary Thoughts on a Functional Taxonomy of Expertise for the Post-*Kumho *World*, 31 SETON HALL L. REV. 508, 510 (2000) ("[E]xpertise, whatever it is, is important in the courtroom only as it is manifested in particular testimony."). The term "expertise" appears more often in legal commentary on *Daubert* than in commentary on any other topic. As of July 2012, Westlaw indexed 9,229 articles containing both terms ("*Daubert*" and "expertise"), and 8,371 containing only the latter term.

[27] TAL GOLAN, LAWS OF MAN AND LAWS OF NATURE: THE HISTORY OF SCIENTIFIC EXPERT TESTIMONY IN ENGLAND AND AMERICA (2004); Jennifer L. Mnookin, *Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence*, 52 VILL. L. REV. 763, 770 (2007).

increasing reliance on the findings and opinions of scientific and technical experts in litigation, especially on issues of injury causation, identification, and mental state.[28] These concerns drew on and in turn fueled wider discussions in American popular and elite culture about the status and authority of science.[29] The topic provided rich ground for discussion by legal commentators, and their attention fed back into appellate courts' elaboration of doctrine on the issue.[30]

The legal frame for this elaboration in the federal courts was the Federal Rules of Evidence, which address "expert" information explicitly in a handful of rules within Article VII, covering "Opinion and Expert Testimony."[31] Despite its eventual broad influence, *Daubert* explicated the meaning of only part of one of these Rules.[32] In an action brought by children born with birth defects to women who had taken a drug manufactured by the defendant during pregnancy, the plaintiffs sought to submit expert evidence supporting a causal relationship between the drug and their injuries. The Court held in *Daubert* that Rule 702 requires trial court judges to review the "reliability" of proposed expert witness testimony, like that offered by the plaintiffs, to determine its admissibility as evidence.[33] According to Justice Blackmun, author of the majority opinion, scientific knowledge is reliable because it is generated through

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[28] *See, e.g.*, SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA (1997); PETER HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1993).

[29] *See, e.g.*, PAUL R. GROSS & NORMAN LEVITT, HIGHER SUPERSTITION: THE ACADEMIC LEFT AND ITS QUARRELS WITH SCIENCE (1994).

[30] The number of articles indexed in Westlaw's Law Reviews and Journals database and addressing the subject of expert evidence exploded following the *Daubert* decision: the database indexes 603 articles on the subject originally published in the 1980s; 3,076 originally published in the 1990s; and 4,789 originally published in the 2000s. *Daubert* itself cited eight law review articles in support of its departure from a doctrine that had been in place for sixty years. *See* Daubert v. Merrell-Dow Pharm. Inc., 509 U.S. 579, 586 n.4 (1993).

[31] Article VII currently contains six rules, five of which specifically pertain to expert opinion testimony. The remaining one addresses lay witness opinion testimony. FED. R. EVID. 701-706.

[32] Moreover, the decision did not address its implications for the Federal Rules of Civil and Criminal Procedure that also relate to the use of partisan expert witnesses. *See e.g.*, FED. R. CIV. P. 26(a)(2), FED. R. CRIM. P. 12.2(b).

[33] At the time of the *Daubert* decision, Rule 702 provided, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (amended 2000). Rule 702 was amended in 2000 to incorporate the reliability standard from the *Daubert* decision.

conventionalized processes of socially acknowledged specialization:[34] "factors" pertinent to assessing this reliability of such knowledge include testing of the principles expressed in the expert's opinion, peer review of those principles, their known or potential error rate, and their general acceptance in the field.[35]

Several less often-noted features of Justice Blackmun's opinion in *Daubert* seem to have influenced the direction of later discussion. First, the opinion contained a number of sweeping statements about the meanings of the terms "scientific" and "knowledge" and the similarities and differences between adjudication and "the scientific endeavor."[36] The breadth of this language has encouraged legal audiences to treat *Daubert* as a tool for handling a wide range of issues and practices, even though the decision in fact considered just part of one of several evidentiary rules governing expert opinion testimony.[37] Second, the opinion treated oral testimony and texts interchangeably. In the trial court, the case had been decided on summary judgment; the plaintiffs had supplied their experts' testimony in affidavit form.[38] Justice Blackmun's focus was on the content of this testimony, not its mode of delivery. The analysis he prescribed thus assumed that written submissions could and should be treated identically to oral statements and colloquies. And yet, third, the factors Justice Blackmun identified as pertinent to assessing this "testimony" assumed the availability of further textual submissions—or at least the authority of textual communications—in the form of publication, peer review, and "the

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[34] Daubert v. Merrell-Dow Pharm., Inc., 509 U.S. 579, 592 (1993) ("Presumably, this relaxation of the usual requirement of firsthand knowledge [as the foundation for expert witness opinions, recognized in the Federal Rules of Evidence]—a rule which represents 'a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information,"' . . . —is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." (citations omitted)).

[35] *Id.* at 593-95.

[36] *Id.* at 590, 597 n.13.

[37] *See* discussion *infra* note 45 and accompanying text.

[38] *See* discussion *infra* note 45 and accompanying text. In general, even when the parties do employ partisan experts, it is not a foregone conclusion that those experts will offer live testimony, given that Rule 26(a)(2) of the Federal Rules of Civil Procedure requires parties to file comprehensive written expert reports, together with the prevalence of summary judgment in contemporary federal trial courts. Rule 26(a)(2) requires written reports to contain "a complete statement of all opinions the writer will express and the basis and reasons for them"; "the facts or data considered by the witness in forming them"; "any exhibits that will be used to summarize or support them"; "the witness's qualifications, including a list of all publications authored in the past 10 years"; "a list of all other cases in which, during the previous 4 years, the witness testified as an expert"; and "a statement of the compensation to be paid for the study and testimony in the case." FED. R. CIV. PROC. 26(a)(2)(B).

decisions of other courts."[39] Together, these features of the decision convey an appearance of rigor: the term "*Daubert*" is now shorthand for a multifactor standard aimed at ensuring that only scientifically accurate information plays a role in the decisional process. But that appearance of rigor is in some respects misleading, since the decision does not specify how the reliability factors are to be assessed or acknowledge the need to assess the reliability of the information contained in materials that are in turn used to assess the reliability of expert testimony.

The appearance of rigor has proven compelling anyway. Six years after *Daubert*, the Court extended the approach prescribed in that case beyond the strictly scientific setting addressed in *Daubert* to the context of "technical, and other specialized" information also covered by Rule 702.[40] *Kumho Tire Co. v. Carmichael*, like *Daubert*, involved a written evidentiary submission—in this case, a deposition transcript—that the Court treated as equivalent to oral testimony;[41] the Court in this opinion also acknowledged the role of texts in the reliability analysis[42] while shying away from considering any features of such texts in detail,[43] and remained relentlessly general in its recommendations.[44] The influence of *Daubert* may also be seen in other areas of evidence law. Discussion of the decision and its progeny has dominated the academic and popular literature on the relation between law and expertise ever since its issuance.[45] Although the doctrine has critics, they are outnumbered by its strong supporters, and commentators have even recommended the extension of the *Daubert*

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[39] *Daubert*, 509 U.S. at 597.

[40] Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[41] *Id.*

[42] *Id.* at 157 (noting that no party had "refer[red] to any articles or papers that validate[d] Carlson's [the expert witness's] approach" to tire failure analysis).

[43] *See id.* at 148 ("Pure scientific theory itself may depend for its development upon observation and properly engineered machinery.").

[44] *Id.* at 150 ("[W]e can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence."); *id.* at 151 ("We do not believe that Rule 702 creates a schematism that segregates expertise by type[.]").

[45] *See* Risinger, *supra* note 26. The decision has influenced court practices as well as commentary, even in jurisdictions that do not follow Rule 702, although it may have affected such practices less than some commentators assume. *See, e.g.*, Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert *World*, 25 LAW & HUM. BEHAV. 433 (2001); Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the* Daubert *Decision*, RAND INSTITUTE FOR CIVIL JUSTICE (2001), http://www.rand.org/pubs/monograph_reports/2005/MR1439.pdf.

standard to other legal settings, such as administrative law and regulatory decisions.[46]

Very little of this literature considers the possibility that *Daubert*'s framework might be in important respects incomplete, given its genesis as a gloss on the standard for admissibility of expert witness testimony. The Court's recent forensic-science Confrontation Clause decisions—most recently, *Williams*—clarify both the scope of the *Daubert* paradigm and the unfortunate side effects of cabining trial judges' role so narrowly with respect to expert information. These constitutional decisions do not directly engage the issue of expert opinion testimony or even expertise, but like *Daubert* and *Kumho*, they treat written documentation as interchangeable with live witness testimony and yet also describe laboratory technicians' group activity as a kind of safeguard of neutrality and accuracy.[47] In a way that *Daubert* and *Kumho* did not, *Williams* makes painfully clear the analytical problems caused by collapsing all expert information into the model of the individual witness's live oral testimony.[48]

2. Judicial Notice Adrift

Both *Daubert* and its predecessor standard in federal court, the *Frye* "general acceptance" standard,[49] acknowledge that no expert acts alone.[50] Yet both standards assume that the information to which that expert has access will be conveyed to the adjudicator through the testimony of an individual human being—ideally, through that individual's live, in-person

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[46] *See, e.g.*, Alan Charles Raul & Julie Zampa Dwyer, *"Regulatory* Daubert*": A Proposal to Enhance Judicial Review of Agency Science by Incorporating* Daubert *Principles into Administrative Law*, 66 LAW & CONTEMP. PROBS. 7 (2003); *but see* Thomas O. McGarity, *On the Prospect of "Daubertizing" Judicial Review of Risk Assessment*, 66 LAW & CONTEMP. PROBS. 155 (2003) (criticizing proposal); Wendy E. Wagner, *Importing* Daubert *to Administrative Agencies Through the Information Quality Act*, 12 J.L. & POL'Y 589 (2004) (criticizing proposal).

[47] *See supra* text accompanying notes 2-3 (discussing assumptions made in *Williams* opinions).

[48] *See supra* text accompanying notes 5-7 (discussing problems revealed by *Williams* opinions).

[49] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) ("[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.")

[50] The *Frye* standard does so more directly than *Daubert*, by conditioning admissibility on "general acceptance" of the scientific principle or principles at issue and thus on the existence of a community of experts. *Daubert*, in contrast, acknowledges the importance of peer review and acceptance as factors relevant to assessing the reliability of the principles and methods relied on by an expert witness.

statements. This assumption has a number of effects. For one thing, it focuses attention on the feasibility of a judge's assessment of the content of testimony given by an expert witness called to "help the trier of fact," that is, called precisely because he or she supposedly knows things the jury and often the judge do not.[51] The apparent paradox presented by this scenario has inspired many suggestions for elaborate mechanisms to regulate discretion on the part of both witness and judge,[52] and has understandably monopolized the attention of those thinking about the use of expert information in the trial-court setting. But this focus on the individual expert witness has left largely undiscussed and unregulated the other channels through which expert information enters adjudication. These channels include a few formally recognized by the Federal Rules of Evidence: judicial notice[53] and the "documentary" exceptions to the rule barring hearsay evidence for "ancient documents," "market reports," and "learned treatises."[54]

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[51] FED. R. EVID. 702(a) ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue[.]").

[52] *See, e.g.*, Christopher Tarver Robinson, *Blind Expertise*, 85 N.Y.U. L. REV. 174 (2010).

[53] FED. R. EVID. 201(b).

[54] FED. R. EVID. 803(16)-(18). Compared to the literature on Rule 702 and *Daubert*, which is too voluminous to be listed comprehensively in a single footnote (*see supra* notes 26 & 30), the literature on these Rules is much more modest. On Rule 803(16), *see generally* Thomas B. Aquino, *The Ancient Documents Rule: Ancient Is Not as Old as You Think*, 85 FEB. WIS. LAW. 12 (2012); Jonathan D. Frieden & Leigh M. Murray, *The Admissibility of Electronic Evidence Under the Federal Rules of Evidence*, 17 RICH. J.L. & TECH. 5, 25 (2010); Gregg Kettles, *Ancient Documents and the Rule Against Multiple Hearsay*, 39 SANTA CLARA L. REV. 719 (1999); Dylan O. Keenan, *Bullcoming and Cold Cases: Reconciling the Confrontation Clause with DNA Evidence*, 30 YALE L. & POL'Y REV. INTER ALIA 13 (2012); Donald I.J. Kelso, *Exceptions to the Hearsay Rule: Admission of Ancient Documents as Evidence*, 32 COLO. LAW. 59 (2003); Donald F. Paine, *Ancient Documents*, 41 TENN. B.J. 40 (2005); G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. REV. 1 (1993); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339 (1987). On Rule 803(17), *see generally* Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665 (1986); Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893 (1992). On Rule 803(18), *see generally* Christopher W. Dysart & Tracy L. Zuckett, *The Permissible Scope of Cross-Examination of Expert Medical Witnesses*, 56 J. MO. B. 258 (2000); Edward J. Imwinkelried, *A Comparativist Critique of the Interface Between Hearsay and Expert Opinion in American Evidence Law*, 33 B.C. L. REV. 1 (1991); Michael W. Kessler & Christine A. Caputo, *Appropriate Use of Scientific Literature at Trial in New York and Other Jurisdictions: Is "Authoritative" a Magic Word?*, 61 ALB. L. REV. 181 (1997); Robert F. Magill, Jr., *Issues Under Federal Rule of Evidence 803(18): The "Learned*

The story of the gradual eclipse of the doctrine of judicial notice is somewhat better documented and for that reason especially telling. In its current form, as expressed in Rule 201 of the Federal Rules of Evidence, this doctrine allows a court to recognize as established "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[55] (Note that the Rule does not specify the format of acceptable "sources"; they may be oral or written and are often the latter.)[56] This standard is substantially identical to that proposed by James Bradley Thayer in 1898 and by Edmund Morgan in the early twentieth century.[57] As they recognized, the doctrine recognizes a necessary judicial function, so the activity to which it refers is as old as adjudication itself, even though it was first linked with the field of evidence law in the early nineteenth-century writings of Jeremy Bentham and Thomas Starkie.[58] The practice does resemble other evidentiary practices in that it involves the formal recognition of facts relevant to the decision of a dispute. But it differs from them most fundamentally in its refusal to place any restrictions on the sources of information that may be used to generate that knowledge (a feature that might explain Bentham's interest).[59] Because of this feature, commentators on evidence and judicial notice from Thayer through the mid-twentieth century insisted that judicial notice be understood as a complement to evidence law—the set of legal rules regulating the flow of information to the (primarily lay) factfinder—and not a part of that law.[60]

Thayer's 1898 treatise was the source of most of the basic principles underlying contemporary American evidence law,[61] and Thayer, together with John Henry Wigmore and Morgan, hashed out the basic terms on which judicial notice would be codified in America in the mid-twentieth

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Treatise" Exception to the Hearsay Rule, 9 ST. JOHN'S J. LEGAL COMMENT. 49 (1993); Charles F. Redden, *Limits on Admitting Learned Treatises*, 82 ILL. B.J. 186 (1994).

[55] FED. R. EVID. 201(b).

[56] *See infra* note 73.

[57] JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 299-301 (1898); Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 280 (1944).

[58] *See* THAYER, *supra* note 57, at 279; John T. McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779, 782, 785-87 (1961); Charles Edward Suffling, *Judicial Notice*, 48 MISS. L.J. 919, 919 n.2 (1977).

[59] *See* McNaughton, *supra* note 58, at 785-87.

[60] *See, e.g.*, THAYER, *supra* note 57, at 278; McNaughton, *supra* note 58, at 781-82; Morgan, *supra* note 57, at 280.

[61] *See* Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437 (2000).

century.[62] Before that codification occurred, discussion of judicial notice focused mainly on two issues. First was the issue of whether judicially noticed facts should be treated as "conclusive" or, instead, rebuttable by party-presented evidence.[63] This debate was in part one about whether judicial notice was a mode of receiving evidence or, rather, a distinct type of judicial act.[64] Second was the issue of whether, assuming evidence codes were to include rules on judicial notice, those rules should govern judicial notice of "legislative facts" (general principles forming the factual premise for legal rules) as well as "adjudicative facts" (concrete propositions regarding particular facts needing determination in specific legal disputes), or of adjudicative facts only.[65] If judicial notice were viewed as different from the reception of evidence, its scope could logically include the recognition of both kinds of facts; if it were viewed as a part of the law of evidence, it seemed appropriate to restrict judicial notice to adjudicative facts only.

Two codifications of evidence rules preceded the enactment of the Federal Rules of Evidence in 1975: the American Law Institute promulgated a Model Code of Evidence in 1942, and the National Conference of Commissioners on Uniform State Laws issued a set of Uniform Rules of Evidence in 1953. Both addressed judicial notice.[66] Both explicitly provided that there were to be no restrictions on the materials a court might consult to arrive at a judicially noticed factual finding.[67] Both contained standards for judicial notice derived from Thayer's and Morgan's

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[62] *See* THAYER, *supra* note 57; McNaughton, *supra* note 58.

[63] *See, e.g.*, Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 982-84 (1955) (discussing rebuttable treatment of judicially noticed facts); Arthur John Keeffe, William B. Landis, Jr. & Robert B. Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 667-68 (1950) (discussing conclusive treatment of judicially noticed facts); McNaughton, *supra* note 58, at 806 (conclusive); Morgan, *supra* note 57, at 287 (conclusive).

[64] *See, e.g.*, McNaughton, *supra* note 58, at 781 n.2 ("'[E]vidence' and 'judicial notice' (though not strictly parallel terms) are complementary: That which is proved by evidence is not judicially noticed, and that which is judicially noticed is not proved by evidence.").

[65] The legislative-adjudicative fact distinction was first made by Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942). *See also* discussion *infra* text accompanying notes 84-85.

[66] MODEL CODE OF EVIDENCE R. 801-06 (1942); UNIFORM RULES OF EVIDENCE R. 9-12 (1953).

[67] MODEL CODE OF EVIDENCE R. 804(2) ("In the judge's investigation to determine the propriety of taking judicial notice of a matter . . ., (b) the judge may consult and use any source of pertinent information, whether or not furnished by a party."); UNIFORM RULE OF EVIDENCE R. 10(2) ("In determining the propriety of taking judicial notice of a matter or the tenor thereof, . . . the judge may consult and use any source of pertinent information, whether or not furnished by a party[.]") (on file with author).

formulations: trial court judges were authorized to take judicial notice of "such specific facts and propositions of generalized knowledge as are so universally known that they cannot be the subject of reasonable dispute" and of "specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy."[68] Both adopted Thayer's and Morgan's view of judicially noticed facts as non-evidentiary and therefore conclusive.[69] Yet, although they were not explicit on this point, both also appeared to authorize judicial notice of legislative facts and legal authorities from outside the noticing court's jurisdiction, as well as adjudicative facts.[70]

The Federal Rules of Evidence devoted far less attention to judicial notice than these earlier codes did, including only one Rule in the Article on judicial notice.[71] This Rule conforms to the earlier codifications in most respects. It does, however, omit the earlier codes' explicit renunciation of restrictions on sources germane to judicial notice. Its most significant departure from the earlier codes appears in Rule 201(a), which provides, "[t]his rule governs judicial notice of an adjudicative fact only, not a legislative fact."[72] But the Federal Rules' refusal to deal with the sources of "proof" of judicially noticeable adjudicative facts or to prescribe any standard at all for judicial notice of legislative facts did not reflect or, apparently, impel any real change in practices. Trial court judges have continued to—and often have had to—notice legislative facts,[73] and they have continued to conduct their own research on general factual matters, as the earlier evidence codifications explicitly authorized them to do.[74] The

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[68] *Compare* UNIFORM RULE OF EVIDENCE R. 9, *with* MODEL CODE OF EVIDENCE R. 801; Morgan, *supra* note 57, at 273-74; THAYER, *supra* note 57, at 299-301.

[69] MODEL CODE OF EVIDENCE R. 805; UNIFORM RULE OF EVIDENCE R. 11.

[70] *See* Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *in* PERSPECTIVES OF LAW 69, 82 (1964).

[71] FED. R. EVID. 201.

[72] FED. R. EVID. 201 does not authorize judicial notice of foreign law, unlike the earlier codifications.

[73] *See, e.g.*, Peggy Davis, *"There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1598-1603 (1987) ("The laissez-faire policy with respect to judicial notice of legislative facts has failed. Rules of evidence should meet this important issue with something other than silence."); Fortunata Guidice & William Kraft, Comment, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 545 (1968) (noting that Morgan's reference to "sources of indisputable accuracy" "nowhere . . . defin[es] what constitutes competent or authoritative sources for purposes of verifying judicially noticed facts"); Christopher Onstott, *Judicial Notice and the Law's "Scientific" Search for Truth*, 40 AKRON L. REV. 465, 487 (2007) (proposing new Federal Rule of Evidence 201 1/2 "specifically for scientific and technical judicial notice questions.").

[74] *See, e.g.*, Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56

result of these successive codifications was, then, the gradual disappearance of specific legal standards for much of what were formerly considered matters of judicial notice.

The sources presented to or consulted by a trial court judge for purposes of judicial notice are often the written output of experts.[75] But as a result of the developments just described, the rules on judicial notice impose virtually no constraints on the use of these sources.[76] No "gate" analogous to the *Frye* or *Daubert* standards regulates their flow into the adjudicative process. And the scholarly focus on *Daubert* as the framework for considering the trial court reception of expert information has left us with comparatively little knowledge about the exact scope and prevalence of these practices, the extent to which they do substitute for live testimony, and the distinct problems they might generate. As the discussion in Part II will suggest, however, we cannot safely conclude from our ignorance of these facts that it is more important to regulate the reception of orally delivered expert testimony than it is to regulate the reception of expert information provided to trial courts in textual form.

B. Appellate Courts: The Free Flow of Texts

We also know little about the regularities, if there are any, in appellate courts' reception of non-legal expert information. We do know that such information almost always comes before appellate courts in textual, not oral, form: either the trial court record of testimony, or, more commonly, briefing, which will often, in turn, cite non-legal texts as support for the positions presented.[77] The theoretical problem in considering the use of expert information by appellate courts, therefore, arises not from an overly narrow focus but, even more strikingly than in the case of judicial notice,

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DUKE L.J. 1263 (2007); Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909 (2011); Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J. L. & TECH. 1 (2009); Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145; Frederick Schauer & Virginia Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495 (2000).

[75] *See* Davis, *supra* note 70.

[76] The same is true of the documentary exceptions to the hearsay rule.

[77] The general equation of oral and written testimony in legal doctrine might spring from the fact that appellate courts—the creators of doctrine—are less immersed than trial courts in an environment of "multimodal" (oral and written) communication. This point does not, however, explain why appellate courts would choose oral communication as the paradigmatic mode. *See* JOHN W. JOHNSON, THE DIMENSIONS OF NON-LEGAL EVIDENCE IN THE AMERICAN JUDICIAL PROCESS: THE SUPREME COURT'S USE OF NON-LEGAL MATERIALS IN THE TWENTIETH CENTURY (1990); *see also* Davis, *supra* note 70, at 85.

from an absence of doctrinal focal points. There are very few procedural controls on appellate courts' consideration of non-legal information, even though that information is often crucial to decision.[78]

The Supreme Court litigation of *Citizens United* supplies a good example. The original complaint filed by the plaintiff organization in that case challenged the laws at issue "as applied," arguing that the plaintiff's polemical documentary on Hillary Clinton was not the type of communication that the laws regulated.[79] In the lower court proceedings, the chief issue for decision was therefore one of statutory application. The Supreme Court, however, after initial briefing and argument of that issue, ordered re-briefing and re-argument on the issue of whether the laws in question were facially unconstitutional.[80] This argument required consideration of new factual questions, including the intended and actual consequences of enforcement of the laws at issue, as well as the social and political mechanisms of political corruption and voter decision making—quintessential legislative facts, but still clearly factual matters that had previously been extensively considered by legal and non-legal experts.[81] The Court received information on these matters exclusively through briefing and arguments that referred to textual authorities only.[82] And in their written opinions in the case, the Justices cited an enormous variety of non-legal texts, many written by specialists, to support their contentions about the purposes of campaign finance regulation, the scope of campaign finance corruption, and corporate power and rights.[83]

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[78] *See* discussion in the sources cited *supra* note 74; *see also* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012); Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197 (2000).

[79] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

[80] *Id.* at 888.

[81] *See* Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in* Citizens United v. Federal Election Commission, 42 LOY. U. CHI. L.J. 295 (2011).

[82] *See infra* note 88.

[83] Sources cited by the Justices included monographs on American history, economics, and politics. *See Citizens United*, 130 S. Ct. at 900, 906, 912 (citing BRADLEY SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 23 (2001); BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REPUBLIC 5 (1967); GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 6 (1969); ROBERT MUTCH, CAMPAIGNS, CONGRESS, AND COURTS 33-35, 153-57 (1988)); *Citizens United*, 130 S. Ct. at 922 n.2 (Roberts, C.J., concurring) (citing RICHARD HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 114 (2003)); *Citizens United*, 130 S. Ct. at 925-26, 926 n.3, 927-28 (Scalia, J., concurring) (citing JOSEPH S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 24 (1917); LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 194 (2d ed., 1985); RONALD E. SEAVOY, ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855, at 5 (1982); SHAW LIVERMORE, EARLY

Although *Citizens United* is an especially conspicuous and dramatic example of unfettered appellate court fact determination, it is not unique. The standard defense of this practice turns on the distinction between adjudicative facts and legislative facts mentioned above.[84] In theory, this distinction clearly allocates responsibilities with respect to fact determination between trial and appellate courts. According to the conventional wisdom, appellate courts should defer to trial court findings on adjudicative facts, but not on legislative facts, since appellate courts have law-making responsibility, and legislative facts are premises for legal rules. One could use this model to explain the Supreme Court's actions in

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AMERICAN LAND COMPANIES: THEIR INFLUENCE ON CORPORATE DEVELOPMENT 216 (1939); PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 79-80 (1972); THE PRESS AND THE AMERICAN REVOLUTION 151, 161-62 (Bernard Bailyn & John B. Hench eds., 1980); FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 250 YEARS 3-164 (1941); JAMES MORTON SMITH, FREEDOM'S FETTERS (1956)); *Citizens United*, 130 S. Ct. at 948 n.52, 949 & nn.53-54, 952 n.58, 971 n.71, 976 (Stevens, J., dissenting) (citing ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 59-60 (1978); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 39-40 (1965); EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, at 197 (1954); FRIEDMAN, *supra*; JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 15-16 (1970); SEAVOY, *supra*; THE WORKS OF THOMAS JEFFERSON 42, 44 (P. Ford ed., 1905); LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF PRESS AND SPEECH IN EARLY AMERICAN HISTORY 4 (1960); Milton Regan, *Corporate Speech and Civic Virtue, in* DEBATING DEMOCRACY'S DISCONTENT 298, 302 (Anita L. Allen & Milton C. Regan eds., 1998); GEORGE BERKELEY, THE PRINCIPLES OF HUMAN KNOWLEDGE/THREE DIALOGUES 38 (R. Woodhouse ed., 1988)); news articles, *see Citizens United*, 130 S. Ct. at 916 (citing Eric Smoodin, *"Compulsory" Viewing for Every Citizen: Mr. Smith and the Rhetoric of Reception*, 35 CINEMA JOURNAL 3, 19 n. 52 (1996); *Mr. Smith Riles Washington*, TIME, Oct. 30, 1939, http://www.time.com/time/magazine/article/0,9171,931818,00.html; Frank S. Nugent, *Capra's Capitol Offense*, N.Y. TIMES (Oct. 29, 1929), http://www.umsl.edu/~gradyf/film/NYTimesonMrSmith.pdf; *Citizens United*, 130 S. Ct. at 981 (Thomas, J., concurring in part and dissenting in part) (citing John R. Lott, Jr., & Bradley Smith, *Donor Disclosure Has Its Downsides*, WALL ST. J. (Dec. 26, 2008), http://online.wsj.com/article/SB123025779370234773.html; Steve Lopez, *Prop. 8 Stance Upends Her Life*, LOS ANGELES TIMES (Dec. 14, 2008), http://articles.latimes.com/2008/dec/14/local/me-lopez14; Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. TIMES (Aug. 8, 2008), http://www.nytimes.com/2008/08/08/us/politics/08donate.html?_r=0; Kimberley A. Strassel, *Challenging Spitzerism at the Polls*, WALL ST. J. (Nov. 15, 2009), http://online.wsj.com/article/SB121754833081202775.html; and dictionaries, *see Citizens United*, 130 S. Ct. at 928 n.6 (Scalia, J., concurring) (citing NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (reprinted 1970)); *Citizens United*, 130 S. Ct. at 950 n.55, 963 (Stevens, J., dissenting) (citing SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed., 1773) (reprinted 1978); WEBSTER, *supra*); in addition to numerous scholarly articles from history and economic history journals as well as law reviews and bar journals.

[84] *See* discussion *supra* notes 64 and accompanying text; *see also* Davis, *supra* note 73.

Citizens United, but this argument depends on some questionable assumptions.[85] It is not always easy to distinguish adjudicative facts from legislative facts, and even if the distinction were clear, it does not necessarily follow that the determination of adjudicative facts should be regulated, while that of legislative facts should not.[86]

The standards for submission and consideration of information bearing on legislative facts, often through amicus briefs, have if anything become more relaxed over time.[87] The deluge of amicus briefs on the facial challenge in *Citizens United* provides a good example of the absence of restrictions on the use of non-legal information in appellate litigation.[88] But given the range of cases that legislative fact determinations may affect, it is not self-evident that such decisions should be unconstrained.[89] Good arguments may be made both for and against greater constraint, and no consensus comparable to the focus on *Daubert* has coalesced on this point.[90]

Perhaps it is not surprising that appellate courts have been more eager to restrict the exclusively trial-level reception of expert testimony than to fetter the form of trial court information reception (i.e., through specialist texts) that most resembles appellate courts' own main mode of information reception. But it is not clear that, simply because appellate courts are used to receiving all information in textual form, they have expertise in

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[85] *See* Teachout, *supra* note 81, at 302.

[86] *See, e.g.*, DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008); Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); A. Christopher Bryant, *The Empirical Judiciary*, 25 CONST. COMMENT. 467 (2009) (review of FAIGMAN, *supra*); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1 (1988); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115 (2003).

[87] *See* Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

[88] Almost forty groups filed amicus briefs in connection with the reargument of the case as a facial challenge, including publishers, state and federal chambers of commerce, think tanks and policy centers, scholars, and then-current and former members of Congress. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

[89] *See* Davis, *supra* note 73, at 1598; FAIGMAN, *supra* note 86. *See also infra* text accompanying notes 164-74.

[90] Similarly, as *Williams* demonstrates, no consensus has developed on the analogous issues raised in the trial court context by the rule of evidence permitting expert witnesses to rely on otherwise inadmissible "basis evidence," including hearsay in the form of specialist texts, in forming and expressing their opinions. *See* FED. R. EVID. 703; *see also supra* text accompanying notes 5-7.

analyzing and using all such information. Indeed, with respect to the types of information considered in the next Part, appellate courts routinely assert that they lack such expertise.

C. Legislatures: Deference to Distributed Expertise

Legislative practices with respect to the reception and processing of non-legal information are, if anything, more unregulated than the corresponding appellate court practices.[91] But even though the federal legislature in the United States probably receives more information from expert sources than any other branch of government in the country,[92] courts and other legal observers do not generally see the irregularity of these practices of information flow and control as problematic. Courts' standard assumption is, instead, that whatever those legislative practices may be, they are adequate and legitimate.[93] The reasons for and propriety of this assumption lie largely outside the scope of this Article; for purposes of understanding how courts use non-legal specialist information, and whether their practices make sense, the most important points to note are, first, that litigators and courts treat such information as crucial to modern legislative functioning[94] and, second, that the circulation of this information is not regulated.

Much of what we know about legislative practices in this area has been described by political scientists and journalists for audiences who are not legal specialists. From these accounts we know that the non-legal expert information considered by United States legislatures is generated by a wide variety of actors, ranging from specialized research bureaus to generalist committee personnel.[95] Most often, the non-legal information that legislators and their staffers receive comes from experts with institutional homes outside the legislature.[96] The federal Congress is unusual in also

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[91] *See, e.g.*, Emily Hammond Meazell, *Scientific Avoidance: Toward More Principled Judicial Review of Legislative Science*, 84 IND. L.J. 239 (2009).

[92] *See* BRUCE BIMBER, THE POLITICS OF EXPERTISE IN CONGRESS: THE RISE AND FALL OF THE OFFICE OF TECHNOLOGY ASSESSMENT 41 (1996).

[93] The Supreme Court has occasionally departed from this posture of deference to legislative factfinding, but its few departures have generally prompted very critical commentary. *See, e.g.*, Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1208 (2001); Harold J. Krent, *Turning Congress Into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 741 (1996); Wendy M. Rogovin, *The Politics of Facts: "The Illusion of Certainty,"* 46 HASTINGS L.J. 1723, 1739 (1995).

[94] *See, e.g.*, BIMBER, *supra* note 92, at 16. *See also* BIMBER, *supra* note 92, at 2 (noting that the role expert knowledge plays in legislative policymaking is an "enigma").

[95] *See, e.g., id.*

[96] *Id.*

receiving information from "internal" expert bodies, which currently include the Congressional Budget Office, the Congressional Research Service, and the General Accounting Office.[97] One might consider legislative committees to be another kind of internal expert body, composed of individual legislator-experts on particular subject areas.[98] But individual committee members are probably more accurately described as brokers of expert information for use by their committees; committee members are experts relative to non-committee-member legislators, but not relative to internal or external researchers.

Regardless of the ultimate source of the expert information that flows to legislatures, these bodies receive most of that information in textual form. Even committee hearing testimony is usually read rather than extemporized.[99] But in addition to formal hearing testimony and written reports, some experts do convey information, especially initially, through informal, face-to-face exchange with legislators and staffers. In fact, both modes of communication are integral to legislatures' use of expert information, but in different ways. The personal reception of information from a trusted interlocutor gives the information credibility. But its backing up by extensive written reports adds specifics, makes the information widely distributable, and gives it rhetorical heft.[100] Oral communication seems to be important mainly at certain pivot points in the legislative process: the rituals of opening a channel of communication and solemnizing the body's consideration of a matter.

As this sketch suggests, the forms in which legislators receive non-legal expert information are neither designed nor regulated to ensure any particular level of impartiality or accuracy. Although a reputation for expert impartiality can be a political asset to those who generate, process, and deliver specialized information, securing such a reputation may also be subordinated to other concerns. As Bruce Bimber has explained, experts and expert bodies serving legislators must continually adjust their research agendas and products to avoid competition with legislator-experts, who have different goals and incentives.[101]

Few of these details ever surface in legal discussions of legislative factfinding. Instead, legal scholars and judges treat the legislature as a "black box" with respect to the use of non-legal information.[102] They

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[97] *See id.* at 47-49.

[98] *Cf.* RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973).

[99] *See, e.g.*, Julius Cohen, *Hearing on a Bill: Legislative Folklore?*, 37 MINN. L. REV. 34 (1952).

[100] *See* BIMBER, *supra* note 92, at 35.

[101] *Id.* at 60-68.

[102] This term has a specific meaning in the sociology of science, drawn from the work of

assume that legislatures will receive a variety of informational input, process it, and generate an output pertinent to the adjudicative system. Scholars and courts focus on that output, and not on the input or the process by which input becomes output. Avoidance of this topic might be justified on several grounds, but it unquestionably has the effect of reinforcing the simplified conception of non-legal expertise discussed above.

D. Administrative Agencies: Regulating the Texts of Technocracy

Matters are different with respect to the final institutional setting this Article considers, the administrative agency. There was a time when the term "expertise" would have called to mind, for most lawyers, government agencies, and not *Daubert* and expert witnesses. There is also a long tradition of extensive legal control and review of information flow in the agency setting. In this context, as in the appellate court context, non-legal information circulates in largely if not exclusively textual form. Nevertheless, the presumption of presence applied in the trial court setting has come to dominate in the agency setting as well: judicial scrutiny of agency consideration of non-legal expert information generally does not consider the implications of the form in which that information circulates.[103]

The legal association of government agencies with expertise draws on a faith in the neutrality and social commitment of intellectual specialists that became widespread by the late nineteenth century, around the time the first modern administrative agencies were established.[104] In the 1930s and

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Bruno Latour, who uses it to refer to:

> [T]he way scientific and technical work is made invisible by its own success. When a machine runs efficiently, when a matter of fact is settled, one need focus only on its inputs and outputs and not on its internal complexity. Thus, paradoxically, the more science and technology succeed, the more opaque and obscure they become.

BRUNO LATOUR, PANDORA'S HOPE: ESSAYS ON THE REALITY OF SCIENCE STUDIES 304 (1999); *see also, e.g.*, BRUNO LATOUR, SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY (1987); JASANOFF, *supra* note 28; Gethin Rees, *"Morphology Is a Witness Which Doesn't Lie": Diagnosis by Similarity Relation and Analogical Inference in Clinical Forensic Medicine*, 73 SOC. SCI. & MED. 866 (2011).

[103] On the implications of this failure, see Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010). Other executive branch lawmakers, including the President, also rely on expert advisors, but regulators and judges generally do not consider this form of executive action to be within their purview. *Cf.* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2004).

[104] *See* David A. Hollinger, *Inquiry and Uplift: Late Nineteenth-Century American Academics and the Moral Efficacy of Scientific Practice*, *in* THE AUTHORITY OF EXPERTS: STUDIES IN HISTORY AND THEORY 141, 142-45 (Thomas L. Haskell ed., 1984).

1940s, this faith became part of a "technocratic" justification for agency authority and decision making, blending recognition of the technical benefits that often flow from cognitive specialization with political separation-of-powers principles.[105] A champion of this view, James Landis, was also instrumental in the 1946 enactment of the Administrative Procedure Act ("APA"),[106] which inaugurated the tradition of judicial review of agency decision making along adversarialized lines. Ironically, that tradition ultimately contributed to the demise of the expertise-based justification for agency activity, which suggested a deferential judicial posture toward agency action. Since the mid-twentieth century, judicial review of agency decisions has just as often proceeded in the name of rights protection[107] or a more purely formal separation-of-powers principle[108] and has become increasingly rigorous, at least in theory.

Unlike the contexts discussed above, in the agency context, legislatures have also gotten heavily involved in regulating the use of expert information. Much modern legislation bearing on the work of agencies—from the APA itself to the National Environmental Policy Act of 1970 ("NEPA")[109] and the less well-known Federal Advisory Committee Act of 1972 ("FACA")[110] and Information (Data) Quality Act of 2001 ("DQA")[111]—aims specifically at controlling the provision and flow of technical information to and within regulatory agencies.[112] The FACA, responding to organizational irregularities like those in the legislative setting,[113] sets rules for the formation of expert advisory committees and subjects them to open-government laws.[114] The DQA more bluntly directs the Office of Management and Budget to issue general guidelines that "provide . . . guidance to Federal agencies for ensuring the quality, objectivity, utility, and integrity of information (including statistical

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[105] *See, e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); Charles H. Koch Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419, 426-27 (1996).

[106] 5 U.S.C. §§ 500-596 (2006).

[107] *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, (1975).

[108] *See, e.g.*, John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1940 (2011).

[109] 42 U.S.C. §§ 4321-4370H (2006).

[110] 5 U.S.C. App. 2 (2006).

[111] Consolidated Appropriations Act 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000).

[112] *See especially* SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS (1998).

[113] *See, e.g., id.* at 47-48.

[114] 5 U.S.C. App. 2 (2006).

information) disseminated by Federal agencies."[115] While many legal academics are skeptical about the utility of such regulation, they generally do not disagree with the premise that the information flows in question need controlling.[116] Instead, they propose different approaches, often based on adversary principles, such as trial-type processes[117] or *Daubert*-style review.[118]

Through a series of changes in the regime applying to judicial review of agency action, and with varying degrees of rigor, courts have continuously scrutinized agencies' use of expert information. All of the legislative and judicial schemes for controlling this resource presuppose that it takes an overwhelmingly textual form. The APA, NEPA, FACA, and DQA all mandate the creation of certain kinds of written records memorializing agency processing of non-legal expert information.[119] "Hard look" review of agency rulemaking under the APA likewise scrutinizes the written record of agency deliberation on information submitted largely in writing.[120] Strangely, however, even though the mode of communication involved is no secret, the doctrine has increasingly embraced a presumption of presence similar to that shaping trial-court doctrine. Review focuses on the propositional content of the record, rather than the form the record takes.[121] This approach makes it possible to attribute expertise to individuals who "speak," even if they are sometimes understood to have done so subject to self-interest and cognitive bias. The approach does not seek to regulate the provision or use of expertise embodied in organizationally produced texts, except insofar as those texts can be analogized to individual speech.

E. Inconsistencies and Blind Spots

Much more could be said about each of the contexts discussed above. This Article, however, seeks only to show that legal approaches to the reception and processing of non-legal expert information are inexplicably

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[115] Consolidated Appropriations Act 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2000).

[116] *See, e.g.*, Stephen M. Johnson, *Junking the "Junk Science" Law: Reforming the Information Quality Act*, 58 ADMIN. L. REV. 37 (2006).

[117] *See, e.g.*, Thomas O. McGarity, *The Complementary Roles of Common Law Courts and Federal Agencies in Producing and Using Policy-Relevant Scientific Information*, 37 ENVTL. L. 1027 (2007); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011); Wagner, *supra* note 103.

[118] *See* sources cited *supra* note 46.

[119] 5 U.S.C. § 555 (2006); *see* sources cited *supra* note 109-111.

[120] *See* Wagner, *supra* note 103.

[121] *Id.*

irregular. Depending on the institution involved, contemporary judges and commentators sometimes treat expertise as a social phenomenon. But explicit legal standards for its review and analysis as such do not exist. And when expert information is regulated by law, it is virtually always reduced to the model of in-person oral speech.

The assumption that the flow of expert information into the legal system can be regulated only insofar as it takes the form of oral testimony is pervasive but hardly universal or inevitable. European systems of dispute resolution, for example, do not share it.[122] Nor is the assumption even consistent with most American lawyers' intuitions. Consider how odd it would seem if we were to accept as authoritative a single legislator's oral testimony about the purpose of legislation, a single corporate director's oral testimony about corporate policy, or a single juror's oral testimony about the standard of care expected by the community.

These analogies, as the next Part will explain, should be recognized as directly on point, and they indicate a need to revisit the doctrines discussed in Part I.A in particular. As scattered references in opinions like *Daubert*, *Citizens United*, and *Williams* recognize, expertise arises and is recognizable as such only through organized human group activity. It is not most fundamentally a characteristic of individuals, nor of their face-to-face communication with each other, even though this is currently how the law treats it.

II. RESOURCES FOR RETHINKING EXPERTISE

More flexible vocabularies for describing the social generation of expertise and the modes of transmission of expert information do exist. These vocabularies are accessible and could easily be adapted to existing legal frameworks. Offering a brief introduction to some of those vocabularies, this Part focuses on defining and explaining the phenomenon of cognitive expertise, or intellectual specialization, through review of the psychological and sociological literature on the topic, and on examining why it is important to be alert to the mode in which expert information is communicated.

A. Expertise as a Social Practice

Experts and expertise are so deeply embedded in our lives that it is easy to forget what recent inventions they are. In English usage, the term

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[122] *See, e.g.*, Ian S. Forrester, *The Judicial Function in European Law and Pleading in the European Courts*, 81 TUL. L. REV. 647, 711, 714 (2007).

"expert" first appeared in something like its current sense only in the nineteenth century,[123] and the systematic study of the phenomenon of expertise had to await the maturing of numerous expert systems, most notably those of the academic social science disciplines, in the late twentieth century.

But over the past forty years, work on the topic by psychologists, sociologists, anthropologists, philosophers, and others has identified some common features of what we call expertise in many domains of human activity.[124] Today, we call an individual an expert when one or more of the following is true: the individual has the consistent ability to "exhibit superior performance for representative tasks in a domain," such as chess playing or medical diagnosis;[125] the individual possesses specialized knowledge in a particular domain and can communicate some part of that knowledge to others;[126] or the individual is recognized as an expert by peers or other more or less formally acknowledged individuals or institutions.[127] Those who are experts in the second sense most clearly deserve the label "cognitive expert," in that they count as experts because of their command of skills and information obtained through specifically cognitive (rather than, for example, physical) training. But there is a cognitive component to expertise in any sense, since the attainment of any type of expertise presupposes the expert's repeated exposure to information (including instruction and feedback) and his or her internalization of cognitive

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[123] *See* Mnookin, *supra* note 27, at 770 (quoting OXFORD ENGLISH DICTIONARY); Harald A. Mieg, *The Societal Attribution of Expertise*, 1 AM. J. PSYCH. 311, 315 (2005) (reviewing EXPERTS IN SCIENCE AND SOCIETY (Elke Kurz-Milcke & Gerd Gigerenzer eds., 2004)). The term "expert" was used before the nineteenth century in France, however, to refer to a type of healing technician "who performed particular operations on specific parts of the body." GEORGE WEISZ, DIVIDE AND CONQUER: A COMPARATIVE HISTORY OF MEDICAL SPECIALIZATION 3-4 (2006).

[124] *See* THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE (K. Anders Ericsson et al. eds., 2006) [hereinafter HANDBOOK].

[125] K. Anders Ericsson, *An Introduction to Cambridge Handbook of Expertise and Expert Performance: Its Development, Organization, and Content*, in HANDBOOK, *supra* note 124, at 1, 3; Mieg, *supra* note 123, at 312-13.

[126] Mieg, *supra* note 123, at 312-13, 316 (describing "agency theory" of experts as those with the ability to "manage knowledge transfer"); *see also* Chad M. Oldfather, *Judging, Expertise, and the Rule of Law* 879 (March 30, 2011) (on file with the Washington University Law Review, Vol. 89, No. 5, 2012; Marquette Law School Legal Studies Paper No. 11-07), *available at* http://ssrn.com/abstract=1799568 ("Whenever someone is in a position to provide useful information to another, that person counts as an expert relative to the person seeking the information."); Marc R. Poirier, *On Whose Authority?: Linguists' Claim of Expertise to Interpret Statutes*, 73 WASH. U. L.Q. 1025, 1027 (1995) (distinguishing "discovery" and "interpretive" experts).

[127] *See* Ericsson, *supra* note 125, at 4; Mieg, *supra* note 123, at 316-17.

schemata for the performance of tasks.[128] Expertise in any form implies the expert's ability to "detect and see features that novices cannot";[129] all expertise involves an acquired ability to "decod[e]" and "encod[e]" information automatically.[130]

Expertise in the senses discussed so far is a characteristic of individuals. But individuals cannot be experts without, at the very least, recognition from others. The acquisition, transmission, and recognition of expertise are all fundamentally social activities. Historically, the earliest forms of recognized expertise emerged alongside economic and occupational specialization and professionalization; in many cases, all of these terms just name different perspectives on the same phenomena.[131] An expert is always a specialist and often also a professional. Every expert belongs to a community, and communities of experts themselves form a community of sorts, whose members interact with other expert communities and with laypeople, all defined as non-experts from within particular expert communities. Experts' activities include acts of self-definition and group definition, since their status as experts depends not only on the existence of others in their community but even more basically on the existence of non-experts. Thus, some of the work experts do involves the creation of a resource—expertise—that non-experts will demand.[132] This resource often consists in part of information, but it is always information that is recognized as in some way difficult to access. And it is above all this

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[128] Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1589 (1998) ("An expert is a person who has or is regarded as having specialized training that yields sufficient epistemic competence to understand the aims, methods, and results of an expert discipline."); Paul J. Feltovich, Michael J. Prietula & K. Anders Ericsson, *Studies of Expertise from Psychological Perspectives*, in HANDBOOK, *supra* note 124, at 41, 49-60; Mieg, *supra* note 123, at 316 (noting view of experts "as having acquired cognitive patterns through extended domain-specific problem solving"); Oldfather, *supra* note 126, at 34.

[129] *See* Michelene T.H. Chi, *Two Approaches to the Study of Experts' Characteristics*, in HANDBOOK, *supra* note 124, at 21, 23-25; Ericsson, *supra* note 125, at 11-13.

[130] Chi, *supra* note 129.

[131] *See* ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1998); HARRY COLLINS & ROBERT EVANS, RETHINKING EXPERTISE (2009); Ericsson, *supra* note 125, at 5; Mnookin, *supra* note 27.

[132] *See* ABBOTT, *supra* note 131; Brewer, *supra* note 128, at 1632 (discussing COADY, *supra* note 16, at 286); Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 VA. L. REV. 1723, 1822 (2001) (noting that for handwriting experts, "[s]elling their skills . . . was a form of 'boundary work'" that "set professional experts apart from their testimonial competitors."). This basic feature of expertise might have contributed to the nineteenth-century legal tendency to apply a "commercial marketplace test" to the determination of whether a particular witness was qualified as an expert. *Id.* at 1827.

scarce epistemic resource, rather than the individual experts themselves, that the legal system treats as valuable.

The fact that experts and groups of experts define themselves *vis-à-vis* outsiders, including other expert groups, has several important implications. For one thing, it means that expert domains, especially the domains of cognitive experts, tend to respond to the presence and pressures of other domains.[133] Many readers are probably familiar with the ways interaction with the legal system has affected the formation and boundaries of a number of fields of expertise, especially forensic domains such as fingerprint and DNA analysis.[134] Bruce Bimber has described another example of this phenomenon, in the context of the U.S. Congress, in his portrait of the successful self-definition of the now-defunct Office of Technology Assessment as a nonpartisan bureau offering a neutral informational resource to its partisan legislator-clients.[135] The formation of and competition between various medical specialties provides another familiar example,[136] and the sociology of the professions is full of others. These kinds of group dynamics—the existence of communities with privileged access to information, know-how, and/or key communication channels,[137] and their competition with other such groups for retention of that privilege—cannot be fully accounted for, however, in a vocabulary that treats expert knowledge as limited to the oral statements of individuals. The focus on this mode of communicating expert information prevents judges and lawmakers from accurately discussing or effectively regulating the flow of the resource of expertise.

The social dynamics that generate expertise have further features with important ramifications for legal activity. Most important, recognizing the presence of these dynamics makes it difficult to think of experts as having better, more accurate access to the truth about the fact of any matter. In all of the legal settings discussed in Part I, the tendency is to assume that non-legal information, if properly sourced, is useful because it is likely to be accurate; indeed, it is in this connection that legal vocabularies do most

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[133] *See, e.g.*, ABBOTT, *supra* note 131; RAPHAEL SASSOWER, KNOWLEDGE WITHOUT EXPERTISE: ON THE STATUS OF SCIENTISTS (1993).

[134] For detailed examples, *see* JASANOFF, *supra* note 28; Mnookin, *supra* note 132, at 1727, n.13, 1729 (2001); William G. Childs, *The Overlapping Magisteria of Law and Science: When Litigation and Science Collide*, 85 NEB. L. REV. 643, 645, 667 (2007).

[135] *See* BIMBER, *supra* note 92, at 107.

[136] *See* WEISZ, *supra* note 123; ABBOTT, *supra* note 131.

[137] *See, e.g.*, David S. Caudill & Lewis H. LaRue, *Why Judges Applying the* Daubert *Trilogy Need to Know About the Social, Institutional, and Rhetorical—and Not Just the Methodological—Aspects of Science*, 45 B.C. L. REV. 1, 13 (2003).

often recognize the necessarily social dimension of all expertise.[138] The assumption that the collective generation of information strengthens its claim to accuracy is buttressed by its parallel to familiar legal concepts such as the "marketplace of ideas" and the notion that the adversary process helps us determine the truth behind disputed accounts. But outside the law it is widely accepted that contestation does not guarantee accuracy and indeed can create distortions.[139] Even if a community of experts agrees on certain points, for example, members of that community also share an interest in maintaining demand for their expertise, so their agreement cannot in itself guarantee the accuracy of their positions.[140] In rejecting the *Frye* "general acceptance" standard, *Daubert* implicitly recognized this point.

But it can be taken even further. In fact, expertise—both the characteristic and the commodity—is created through practices that foster and perpetuate mutual incomprehension.[141] Possessing expertise involves possessing an ability to encode information in a way decodable only by other experts (or to perform in a way that others cannot reproduce). It also depends on communication with fellow experts, present and future; these communications are among the forms in which the resource of expertise becomes usable by courts. Legal reliance on these communications seems warranted only if, first, they can somehow be made comprehensible to non-

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[138] *Cf.* the passages from *Williams v. Illinois* quoted *supra* note 22.

[139] *See, e.g.*, Charles Bazerman, *How Does Science Come to Speak in the Courts? Citations, Intertexts, Expert Witnesses, Consequential Facts, and Reasoning*, 72 LAW & CONTEMP. PROBS. 91, 99 (2009); Jack P. Lipton, Maureen O'Connor, & Bruce D. Sales, *Rethinking the Admissibility of Medical Treatises as Evidence*, 17 AM. J.L. & MED. 209, 233, 248 (1991) (noting that "many [medical] treatises are published not to disseminate information, but because publication brings prestige, credit and job stability to the author-scientist").

[140] *See, e.g.*, Simon A. Cole, *Out of the Daubert Fire and Into the Fryeing Pan?: Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in* Frye *Jurisdictions*, 9 MINN. J.L. SCI. & TECH. 453, 480 (2008); Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231, 2253-54 (2009) (discussing how "[c]ommon professional training" can lead to epistemic problems such as copying, information cascades, epistemic free-riding and cognitive loafing, and reputational cascades).

[141] *Cf.* Harold L. Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1094 (1966) ("[T]he law sometimes deals with the subject matter of a science in terms that are foreign to the conceptual system of the scientist. The concepts of monopoly and competition in the antitrust laws find no exact counterpart in analogous concepts used by the economist[.] In each of these cases the law deals with a subject within the special province of one of the sciences but utilizes a concept which has been skewed from analogous scientific ones by policy and value considerations which do not concern the scientist."); Oldfather, *supra* note 126, at 29 (noting likely tendencies of specialist judges "toward jargon and 'inside baseball' that seem to affect experts of every stripe").

experts (expert witnesses are commonly understood to perform this role),[142] and, second, the mechanisms of information flow within and out of the particular expert community in question justify reliance. Both of these prerequisites would seem to be essential, but legal doctrine pays very little attention to the second beyond checking, in a rudimentary way, for the presence of such mechanisms in *Daubert* screening. And this check does not extend to expert information conveyed outside the limited channel of testifying experts' statements. This limitation is both unnecessary and counterintuitive, since these mechanisms of information flow—unlike the informational content of expert communications—are distinguishable from the propositional content of expert knowledge and therefore can be assessed by non-experts.

B. Mode Matters

The social dynamics that generate cognitive expertise are partly matters of face-to-face interpersonal interaction, but they also have a crucial material dimension. Any community of experts needs a system for recording and distributing information. Its members must be able to develop and verify membership and to make claims to expertise that outsiders may see and use.[143] And information must also be recorded in some form to serve as a commodity.[144]

Legal commentators have occasionally recognized that expertise is always embodied in informational artifacts, but the legal literature and decisional law have not pursued this insight beyond casual observation.[145]

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[142] *See* Risinger, *supra* note 26, at 511-18; *infra* text accompanying notes 166-67.

[143] *See, e.g.*, STEVEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND (1994); Bazerman, *supra* note 139, at 93 ("Whatever the world is outside . . . textualized endeavors, the facts must be inscribed within the relevant texts in a way that will be perceived as having both standing within its field and the robustness to continue that standing."); Effie J. Chan, Note, *The "Brave New World" of* Daubert*: True Peer Review, Editorial Peer Review, and Scientific Validity*, 70 N.Y.U. L. REV. 100, 115 (1995) ("The closest approximation to a repository of scientific progress is the collective body of published scientific literature.").

[144] *See, e.g.*, Mieg, *supra* note 123, at 313 (discussing ABBOTT, *supra* note 131, at 102); Mnookin, *supra* note 132, at 1820.

[145] *See, e.g.*, 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 665(b), at 919 (Chadbourn ed., 1979) ("No one professional man can know from personal observation more than a minute fraction of the data which he must treat every day as working truths. Hence a reliance on the reported data of fellow scientists, leaned by perusing their reports in books and journals."), *quoted in* Charles J. Walsh & Beth S. Rose, *Increasing the Useful Information Provided by Experts in the Courtroom: A Comparison of Federal Rules of Evidence 703 and 803(18) with the Evidence Rules in Illinois, Ohio, and New York*, 26 SETON HALL L. REV. 183, 196 (1995); Richardson v. Richardson-Merrell, Inc., 649 F. Supp.

As Part I explained, legal vocabularies instead tend to treat oral and written communication as interchangeable, with the oral mode as the default model.[146] Contemporary specialists in the analysis of information and communication, however, know well that mode makes a difference—with respect to information content, cognitive processing, and the social function and authority of communication.

The mode in which information is communicated affects the content of the information communicated. In some ways, oral communication is richer than written communication, since the delivery of oral communication conveys nonverbal information such as intonation, demeanor, and gesture.[147] In-person oral communication also allows for interlocutory exchange, holding a communicator immediately accountable for his or her statements. It is these features that traditionally justify the preference for oral testimony in Anglo-American evidence law.[148] They may also account for a frequent tendency to refer to oral, in-person communication as the most fundamentally trustworthy form of communication.[149] On the other hand, most textual communication also includes non-verbal information, such as font, design, and the visible imprimatur of the organizations responsible for creation and dissemination of the text, as well as implications of reproducibility and publicity. Textual communication thus can and does foster a kind of trust unavailable to oral

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799, 802 (D.D.C. 1986) (observing that literature on a subject "collectively represents the sum of all that can be said to be scientifically 'known' of the matter[.] [T]he 'literature' is to scientists both the ultimate authority as to and the most respected repository of scientific knowledge."), *quoted in* Walsh & Rose, *supra* note 145, at 223.

[146] There are only a handful of exceptions to this default assumption. *See* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007); Paul Bergman, *The War Between the States (of Mind): Oral Versus Textual Reasoning*, 40 ARK. L. REV. 505 (1987); Cyril Glasser, *Civil Procedure and the Lawyers: The Adversary System and the Decline of the Orality Principle*, 56 MOD. L. REV. 307 (1993); Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229 (1994); Steven Kay, *The Move from Oral Evidence to Written Evidence: The Law Is Always Too Short and Too Tight for Growing Humankind*, 2 J. INT'L CRIM. JUSTICE 495 (2004); Oldfather, *supra* note 24; Spottswood, *supra* note 19. But none of these scholars focuses specifically on the issue of modalities in the legal reception of information in the United States.

Curiously, this particular simplification seems to have become more, rather than less, widespread over the past century or so. Thayer, for example, paid considerable attention to the differences between written and oral modalities in the presentation of evidence in his PRELIMINARY TREATISE. THAYER, *supra* note 57.

[147] *See, e.g.*, Spottswood, *supra* note 19; BRIAN ROTMAN, BECOMING BESIDE OURSELVES: THE ALPHABET, GHOSTS, AND DISTRIBUTED HUMAN BEING 3, 36-53 (2008).

[148] *See, e.g.*, Leubsdorf, *supra* note 19.

[149] *See, e.g.*, BIMBER, *supra* note 92, at 60-68.

communication. The opinions in *Citizens United*, *Daubert*, and *Williams* all, in different ways, acknowledged this specifically textual variety of trust.[150] But none of those opinions examined whether and how it might differ from the trust generated by in-person communication, much less the relative value of these distinct strains of interpersonal authority.

Mode also matters to the cognitive processing of information—how its content is perceived—and this difference has further ramifications for information content. Oral and written communications are processed by different parts of the brain, which are also used for different nonlinguistic purposes.[151] Even were this not true, the material features of textual communication would still make a difference to its processing. As Chad Oldfather has put it, written communication

> can be more easily manipulated in thought. While speech exists only for an instant, text remains to be reviewed and reconsidered. Because the reader need not devote great effort to storing the content of text in his memory, he can expend more energy on understanding and assessing the material. This enables more complex processing. Indeed, written text may be essential to the widespread use of syllogistic reasoning[.][152]

Written communication enables articulation and discussion of the kinds of concepts involved in the adjustment of legal relations as well as in the generation and assessment of expert competencies. We would have neither the legal systems we do nor the kinds of social systems that generate and sustain expertise without written communication.

Finally, in part due to these differences, oral and written communications have different social functions and exert different kinds of authority. Not only does written communication persist in time for a single reader, as Oldfather notes; it may also be conveyed to a greater number of readers more widely dispersed in space and time than oral communication can. This feature of written communication explains its central role in the development of the forms of complex social organization (including polities like the United States)[153] that in turn made possible the development of

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[150] *See supra* notes 22, 39, 83, 88 and accompanying text.

[151] *See, e.g.*, ROTMAN, *supra* note 147, at 16-31.

[152] Oldfather, *supra* note 126, at 1304.

[153] The legal literature has recognized this point in the constitutional law context, but has not tended to note its pertinence beyond that context. *See, e.g.*, Steven G. Calabresi, *The Tradition of a Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435 (1997); Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635 (2006); Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 46 WAYNE L. REV. 1305 (2000); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1

expertise.[154] Whether the special kind of authority enjoyed by written communication is merely an incidental effect of the capacities of written communication or a more fundamental property of such communication, it is an ineradicable part of our culture, including our legal and expert systems. And this authority is not entirely attributable to the accuracy of written communication, though it is sometimes taken to be.[155]

Theorists and popular authors in a number of fields, including history, philosophy, communications, education, and psychology, have been exploring these and related issues since the mid-twentieth century. But legal scholarship has paid little attention to this work, and it is virtually unacknowledged in legal doctrine, including numerous areas, like evidence law, that thoroughly scrutinize other aspects of human communication.[156] Failure to confront these issues has had significant consequences. The Justices' basic disagreement in *Williams v. Illinois* is an example, and the less obvious inconsistencies traced throughout Part I of this Article provide others. To put it more directly, even if the application, scope, and implications of the *Daubert* standard could be settled to everyone's satisfaction, a great many legal practices with respect to the reception of expert information would remain unregulated. As long as the current state of affairs persists, our law will lack any systematic account of one of its main channels of information reception. As a result, it will also lack any principled foundation tying the rationale for the *Daubert* standard itself to other rules of evidence and conventions surrounding the use of legal authority.[157] We need discussion and doctrine devoted to analyzing the

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(1984); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Michael Moore, *The Written Constitution and Interpretation*, 12 HARV. J.L. & PUB. POL'Y 3 (1989); Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991 (2009).

[154] *See, e.g.*, BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983); JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., The Johns Hopkins Univ. Press Corrected ed. 1997) (1976); ELIZABETH EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE: COMMUNICATIONS AND CULTURAL TRANSFORMATIONS IN EARLY MODERN EUROPE (1979); MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964); WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD (2d. rev. ed. 2002); ROTMAN, *supra* note 147.

[155] *See supra* notes 102, 138-42 and accompanying text (discussing blackboxing and inaccuracy in expert communication); *see also, e.g.*, Lars Noah, *Sanctifying Scientific Peer Review: Publication as a Proxy for Regulatory Decisionmaking*, 59 U. PITT. L. REV. 677, 705-09 (1998) (discussing biases inherent in peer-reviewed scientific publication process); Joseph Sanders, *Science, Law, and the Expert Witness*, 72 LAW & CONTEMP. PROBS. 63, 66 (2009).

[156] *See* discussion *supra* note 23.

[157] *See, e.g.*, Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931 (2008);

textual provision of information generated within specialist discourse communities.

One point of clarification: just as it is problematic to reduce all communication to the model of oral speech, so would it be problematic to reduce all communication to the model of writing. Each mode makes possible things that are impossible with the other. Oral, in-person communication might be an important prerequisite for trust, but it lacks precision with respect to highly abstract concepts and cannot anchor broader forms of legitimacy necessary to the complex social scenarios with which law is now overwhelmingly concerned. The "versus" in the title of this Article should therefore be understood to refer not to an oppositional relationship, but to a complementary one. If we really want our legal practices to aspire to accuracy and authority, we should strive to understand when testimony is to be preferred to text and vice versa. Trial advocates (and many other legal actors) implicitly recognize this point. But most legal rules, and commentators on those rules, do not seem to.

III. RETHINKING THE LEGAL USE OF NON-LEGAL EXPERTISE

The doctrinal vocabularies of law are currently poorly equipped to analyze or police the channels through which legal actors receive and process much non-legal expert information. If we assume that legal actors need this information and that the information may be subject to misapprehension, distortion, or misuse—widely shared assumptions that this Article does not question—then this incapacity is a problem. But we are not stuck with it. There is no reason we cannot extend the kind of attention devoted to the *Daubert* scenario to adjoining areas. In the process, we might even see ways to improve the *Daubert* standard itself. This Part first maps a context for this extension, situating *Daubert* within the broader landscapes described in Parts I and II, and then turns to one concrete way in which the extension might get started: through the revival of more detailed standards for judicial notice.

A. Dimensions of Non-Legal Information

Part I explained how existing legal rules address only some of the features of the non-legal information sources used in trial and appellate adjudication. Mainly, these rules focus on ensuring the accuracy of the propositional content of the information being communicated. To this end,

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John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986).

the *Daubert* standard does take into account some features of the community within which the proffered expert information originated, but it does so in an incomplete and haphazard way. As Part II explained, features of expert information other than those mentioned in *Daubert* may affect the accuracy and authority of that information. The relevant features differ along at least three dimensions. Expert information will differ with respect to the source domain in which the information was originally generated or collected; it will perform different functions in legal decision making (its function will be partly, but not solely, a matter of the propositional content of the information); and it will be communicated in different forms.

The most basic distinction among source domains for non-legal information would seem to be the difference between law-independent and law-dependent, or forensic, domains. Some commentary has already implicitly addressed this distinction, although the Supreme Court has not explicitly recognized it.[158] Much of the discussion on this point recommends that law-dependent domains be remodeled after law-independent domains, specifically those of the university and private-sector research and development settings.[159] Other law-independent specialist domains include quasi-government domains, like advisory committees,[160] and independent non-profit domains. Practices in each of these domains (as well as, of course, within more specific domains of expertise) vary on a number of points, including differences in the typical course of training of new specialists and the rigor of barriers to entry by newcomers;[161] the size of the community of specialists; the extent to which the domain competes with others for final authority over particular matters or problems;[162] the mechanisms of funding for research and the relation of these mechanisms to the selection of research questions and emphases;[163] the recognition and oversight of the domain by government or other bodies; and the acknowledgement of domains by other specialized systems (something that can be assessed by examining such matters as typical career paths of specialists and the rate and success of collaborations across domains). All of these features affect the reliability of information generated within a domain—its suitability to be relied upon—and therefore should be part of the calculus in screening non-legal expert information for reliability,

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[158] *See, e.g.*, DAVID S. CAUDILL, STORIES ABOUT SCIENCE IN LAW: LITERARY AND HISTORICAL IMAGES OF ACQUIRED EXPERTISE 60 n.5, 111-30 (2011).

[159] *See, e.g.*, Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 725 (2011).

[160] *See* JASANOFF, *supra* note 112.

[161] *See* ABBOTT, *supra* note 131.

[162] *Id.*

[163] *See, e.g.*, JASANOFF, *supra* note 112.

regardless of the format of the information. These are issues that can and should be briefed in connection with *Daubert* hearings or hearings on the propriety of judicial notice, considered in the final Part of this Article.

The non-legal information used by courts and other legal actors also performs different functions in legal decision making. D. Michael Risinger has already proposed an initial taxonomy of expertise based on such functional distinctions, identifying three functions that expert witnesses perform in adjudication.[164] The first is that of "educator" or summarizer; this type of witness communicates an overview of the information collected by experts in a domain.[165] The second is that of "translator," which Risinger—consistent with the theorists of expertise discussed in Part II.A, although he does not discuss or cite their work—identifies as the most important role played by expert witnesses.[166] "In its most general sense," Risinger explains, "a translational system exists when there is an assertion that A means or indicates B."[167] The expert witness performing this function translates information from the code used in a particular specialist domain into an ordinary and/or legal vocabulary for use by legal decision makers. The expert testimony in *Daubert* (on causation), *Kumho* (also on causation), and *Williams* (on the match between two DNA samples) played this role. Risinger's third function is that of "normative expertise," which offers translation plus a normative conclusion based on the translation.[168] Risinger offers the example of a psychologist's testimony on the insanity of a defendant.[169]

While Risinger explicitly addresses only the function of live expert witness testimony,[170] his taxonomy need not be limited to that mode of communication. We might, for example, think of the functions he identifies as corresponding to "slots" in the structure of proof or reasoning used by trial and appellate courts. From this perspective, Risinger's taxonomy maps partly onto the taxonomies of facts and authority proposed by other commentators, usually in discussions of appellate court factfinding.[171] The educative expert communicates accepted propositions about general features of the world—legislative or "background" facts.[172] An example would be the fact that the generation of a DNA profile is typically

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[164] Risinger, *supra* note 26.

[165] *Id.* at 511-18.

[166] *Id.* at 518-26; *see also* Poirier, *supra* note 126.

[167] Risinger, *supra* note 26, at 520.

[168] *Id.* at 526-29.

[169] *Id.* at 527.

[170] *See* discussion *supra* note 26.

[171] *See, e.g.*, Davis, *supra* note 73; FAIGMAN, *supra* note 86; Sherry, *supra* note 74.

[172] *See* Davis, *supra* note 73; Monahan & Walker, *supra* note 157.

performed by a group of technicians acting in sequence and not by a single individual, a fact that several Justices found pertinent in *Williams*.[173] The translational expert usually conveys information with a more direct bearing on a proposed change in a legal rule or its application to a case—adjudicative facts. Examples would include information about symptoms of battered woman syndrome for the purpose of determining whether a murder defendant may assert self-defense, or information about toxicological findings concerning the links between particular chemical agents and particular injuries, as in *Daubert*. Perhaps because of its presence in *Daubert*, this function of non-legal expert information has generally received the greatest attention. The normative expert, finally, supplies information that feeds directly into a specific legal conclusion; in this situation, the law directly absorbs the normative conclusions reached in another domain, and in this sense, the information involves a kind of hybrid of legislative and adjudicative fact. Reliability seems pertinent to each of these functions, not just the second. Indeed, because the last-mentioned function has the greatest potential effect on legal norms going forward, it would seem advisable to scrutinize facts playing this role most carefully for reliability.[174] Non-legal information performing the second function affects only the particular action in which it is used, so heightened scrutiny seems less important in this situation. A moderate level of scrutiny would then seem appropriate to summarizational expertise, although current practice does not routinely recognize the need for such scrutiny, as Part III.B discusses more fully.

Last but by no means least, the form in which non-legal expert information is provided is also relevant to assessing its reliability. This form may differ in several ways. First, the information may be delivered orally or textually. If the information is textual, it may have had a single author, or it may be attributed to a group of authors; in either case, the author or authors may or may not have generated the information subject to some kind of institutional imprimatur. Whether oral or textual, the information will also often incorporate further communications, which may in turn be either oral or textual and either individual or collective. Finally, the information may or may not have been produced within a specialist discourse domain in the same form in which it is being presented to the court. Determining whether it was so produced will overlap with determining the source domain in which the information originated; good

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[173] Justice Breyer's opinion in *Williams v. Illinois* includes an Appendix devoted to presentation of this particular fact. Williams v. Illinois, 132 S. Ct. 2221, 2252-54 (2012). This Appendix does not cite the source of the information it contains.

[174] *Cf.* Davis, *supra* note 73; Monahan & Walker, *supra* note 157.

proxies for these determinations will be the publication forum, if any, in which the information originally appeared and that forum's original audience. While much of this analysis closely tracks the kind of analysis already applied to multiple hearsay and expert "basis evidence," *Williams* has dramatically demonstrated the need for focused discussion and clarification of these legal conventions. *Daubert* is not sufficient to the task, but it has attuned lawyers and judges to some of the basic issues involved by encouraging consideration of matters that presuppose the embedding of information within a specialist discourse community, such as publication and peer review.

As this overview indicates, the problems described in Part I are not problems with the *Daubert* standard itself. That standard, after all, is based on interpretation of a Federal Rule of Evidence governing opinion testimony. The problem is, rather, with the generalization of *Daubert* beyond the particular setting addressed by that Rule. The generalization is perhaps understandable, given the absence of any statutory standard for assessing the reliability of non-testimonial expert information. The next Part further explores why we have tended to overlook the most obvious tool for this purpose, judicial notice, and how we might reengineer that tool to fit the realities of contemporary adjudication.[175]

B. Reviving Judicial Notice

As Part II.A explained, the doctrine of judicial notice was largely frozen in place, in a stunted form, in the mid-twentieth century. At the start of that century, Thayer had forcefully argued that the doctrine should not be considered part of the law of evidence.[176] The result was that evidence reformers and practitioners tended not to see judicial notice as amenable to elaboration by rule, and accordingly pared down the scope of the formal doctrine of judicial notice over the first two-thirds of the twentieth century.[177] Judicial notice of legislative facts thus remains entirely unregulated,[178] even though it could easily be argued that regulation is especially important with respect to notice of such facts.[179]

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[175] Other candidates for this role also exist in the Federal Rules of Evidence, notably the textual hearsay exceptions. *See supra* note 54 and accompanying text. This article focuses on judicial notice for clarity and in the interest of space; a comprehensive solution to the problems outlined here would also address these hearsay exceptions.

[176] THAYER, *supra* note 57, at 278, 280 n.2, 299-301.

[177] *See* FED. R. EVID. 201 advisory committee's note; *see also, e.g.*, Keeffe et al., *supra* note 63; Cheng, *supra* note 74.

[178] *See* Guidice & Kraft, *supra* note 73.

[179] *Cf.* Davis, *supra* note 73.

It is difficult to justify this state of affairs on any basis other than historical accident. Thayer, Wigmore, and Morgan, who determined the contours of modern judicial notice, shared a particular understanding of knowledge, expertise, and cognitive specialization with their contemporaries.[180] They regarded specialist knowledge as capable of unlimited improvement and growth, as morally and epistemologically unproblematic (indeed, morally valuable), and as likely to resolve all issues eventually. They did not consider in any critical detail the mechanisms by which specialist knowledge was generated and disseminated. Ironically, intellectual specialization within the academy itself eventually prompted such consideration, starting in the 1960s and 1970s.[181] But even as some turned their attention to analyzing the processes of creation and dissemination of specialist information, and as their insights were incorporated into legal doctrine in *Daubert* and its progeny,[182] the much earlier Thayerian view of the appropriate legal attitude toward that information persisted in the doctrine of judicial notice.

The Advisory Committee Note to the existing Rule 201 of the Federal Rules of Evidence explains the reason for its exclusion of legislative facts from the scope of judicial notice by quoting Kenneth Culp Davis's characterization of such facts as having "a way of being outside the domain of the clearly indisputable."[183] Thayer and Morgan had defined judicial notice as being appropriate only for those facts "not subject to reasonable dispute," and every committee of evidence codifiers in the twentieth century adopted this view of the appropriate scope of judicial notice.[184] On these premises, it would seem that judicial notice of legislative facts is by definition impossible, as the Advisory Committee Note asserts. But when he wrote the words quoted in the Advisory Committee Note, Davis, like other late twentieth-century students of evidence, was applying a twentieth-century skepticism about the fixity of "facts" to legal categories developed in a pre-skeptical, positivist universe. He was pointing out that general propositions about the world are rarely clearly indisputable,[185] and thus that they cannot be accommodated within a Thayerian conception of judicial notice. This position might be less faithful to Thayer's original conception than it initially seems. As Davis and Thayer both recognized, judicial notice is a valuable tool; neither of these men advocated abandonment or

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[180] *See* Hollinger, *supra* note 104.

[181] *See, e.g.*, JASANOFF, *supra* note 28; MCLUHAN, *supra* note 154.

[182] *See, e.g.*, Caudill & LaRue, *supra* note 137.

[183] FED. R. EVID. 201 advisory committee's note (citing Davis, *System*, *supra* note 70).

[184] *See, e.g.*, FED. R. EVID. 201(b).

[185] *See* Davis, *supra* note 73, at 1540 n.8.

even narrowing of the doctrine.[186] A modern doctrine of judicial notice would adapt the legal category itself to modern skeptical conceptions of information, knowledge, and truth, as Davis did not. Instead of the all-or-nothing conception of indisputability that Davis used, it would adopt something more like *Daubert*'s context-sensitive scale of reliability as a standard for judicial noticeability.

This account suggests that the *Daubert* revolution has in a sense been conceived too narrowly. Considered alongside the recent history of judicial notice, *Daubert* implies a need to revisit the scope and use of that doctrine. The doctrine could be a device for regulating the legal use of non-legal information more systematically, especially if it were to take into account all of the features of non-legal information provision considered in Part III.A,[187] including, but not limited to, the need to regulate the reception of legislative facts as well as adjudicative facts. Revision of the current Federal Rule of Evidence on judicial notice could accomplish this end through either addition of a subsection to the existing Rule 201 or addition of a second Rule 202 to handle judicial notice of legislative facts. The Appendix to this Article contains proposed text taking the latter approach. In the space remaining, I focus on the changes and additions embodied in that proposal, before considering and responding to some possible criticisms.

The principal addition to Rule 201 is simple: inserting a standard of "reliability," in the sense used in *Daubert* and *Kumho*, into the existing standard that sources of judicially noticed adjudicative facts must meet. This addition would clarify the complementary relationship between noticed non-legal information, received through texts alone, and non-legal information transmitted through expert witness testimony. To reinforce this point, a new subsection provides that, in making findings of fact based on judicial notice or basing conclusions on judicially noticed facts, the court "shall identify the sources of information used and explain the factors supporting the reliability and accuracy of those sources."[188] Relevant factors would include the organization responsible for the creation and dissemination of the source, its readership, and any criticism to which it has been subjected. A new subsection allows the court to ask parties or third parties to brief these issues and allows the parties to stipulate to facts and authorities.

The new Rule 202 would address judicial notice of legislative facts. What one could call a "post-positivist" understanding of legislative fact is

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[186] *See* THAYER, *supra* note 57; Davis, *supra* note 73.

[187] *See* discussion *supra* Part III.A.

[188] *See* APPENDIX.

not difficult to formulate: A legislative fact is one asserted by enough authoritative sources to form a legitimate basis for a legal rule, not necessarily a fact that is literally undisputed. The addition of this definition to the proposed Rule on judicial notice of legislative facts is one of only two departures this Rule makes from the format of the revised Rule 201. The other is to impose a slightly higher standard of reliability on the sources used for determination of noticed legislative facts: the court should ask whether the reliability and accuracy of the source have been "widely recognized and have not been significantly questioned," using factors similar to those used for assessing the propriety of judicial notice of adjudicative facts. As with that form of judicial notice, the court may ask for briefing, and the parties may stipulate.

Had a regime like this been in place at the time of the decisions in *Daubert*, *Kumho*, *Citizens United*, and *Williams*, those cases might have looked quite different. Assuming that the recommended parameters of judicial notice would be applied to and observed by appellate courts (either through inclusion in the Federal Rules of Appellate Procedure or a further amendment to the Federal Rules of Evidence enunciating this applicability), the parties and courts would have been encouraged to perform a more systematic analysis of the accuracy of the sources submitted on important factual issues, instead of cherry picking.[189] Going forward, moreover, a regime like this would tend to equalize litigation resources in cases turning on non-legal information. A more disciplined approach to judicial notice would encourage parties to seek its use in situations now left to more expensive expert testimony.[190]

This proposal will likely be greeted by the standard criticisms of suggestions for reform: it is unlikely to be adopted given the interests of key actors in maintaining the status quo; it is insufficiently precise to provide guidance and will therefore offer loopholes inviting abuse; and it will increase costs for litigants and courts without sufficient compensating benefits. None of these criticisms seems conclusive. If implemented, the proposal would most directly impair the interests of those who currently work as expert witnesses, but their role is not eliminated by the suggested reform. It might even afford them new opportunities, for example in supervising assembly of the information needed to brief judicial notice requests. Courts arguably also have an interest in retaining a status quo with which they are familiar, and transition costs are to be expected. But it is not self-evident that these costs would exceed the costs of the current system, which include both direct costs (in the form of expert fees) and

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[189] *See supra* note 84 (discussing sources cited in *Citizens United* opinions).

[190] *See, e.g.*, Spottswood, *supra* note 19.

those indirect and partly nonmonetary costs deriving from decisions of questionable legitimacy (like *Citizens United* and *Williams*) and uncertain application. Likewise, the fact that similar proposals by respected commentators[191] have not been adopted to date does not invalidate the wisdom of those earlier proposals, and recent developments—the wholesale "restyling" of the Federal Rules of Evidence in 2011, and the almost wholly negative reactions of observers to *Williams*—suggest that the time might be ripe for this long-recommended change. Nor is the standard-based form of the proposed approach a fatal flaw. It is modeled on another standard-based approach—that of *Daubert*—that has been widely implemented, largely without too much difficulty.[192] If anything, complementing *Daubert* with a sister standard for the processing of expert texts is likely to encourage the clarification and development of both doctrines and to habituate lawyers and judges to more careful thought about the sources and reliability of non-legal information in general. They already use this information, and usually, they want to use it wisely. They need the tools to do so.

CONCLUSION

Most of the non-legal expert information that our legal system uses is produced and circulated, in the first instance, within specialized discourse communities and in written form. Despite long-standing legal and popular concern with the prudent use of this information, and despite a well-developed system of legal rules for handling other texts of many kinds, current law leaves this resource entirely unregulated, except insofar as it fits the model of an individual witness's live oral testimony. This model is inappropriate, since the information in question is not conventionally recorded orally, nor is it fundamentally the product of individual efforts. Recent legal doctrine—particularly *Daubert* and its progeny—have sporadically recognized this point, but have lacked a basis for integrating its implications into legal doctrine and practices. Addressing the issue, however, will only become more important as the volume of specialized information, and the number of forms that information takes, continue to multiply in the twenty-first century. At the very least, we need discussion and doctrine devoted to analysis of the textual presentation of information generated within specialist discourse communities. A good start, this Article has argued, would be to map out the universe of non-legal expert

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[191] *See, e.g.*, Davis, *supra* note 73; Monahan & Walker, *supra* note 157; Onstott, *supra* note 73.

[192] *See, e.g.*, Gatowski, *supra* note 45; Dixon & Gill, *supra* note 45.

information on which litigants and courts draw, and to begin to develop a general standard of reliability review for information not taking the form of testimony. Eventually, we will probably also want to revisit hearsay doctrine, perhaps reframing it fundamentally to deal more directly with communication formats. Whatever course we choose, it is becoming increasingly difficult to deny that our existing legal practices with respect to the use of non-legal information are inconsistent for no good reason. The practical costs of that inconsistency are accumulating.

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APPENDIX: PROPOSED REVISED RULES ON JUDICIAL NOTICE

New matter is underlined, and matter in Rule 202 that differs from the corresponding provisions of Rule 201 is highlighted in bold type.

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose reliability and accuracy cannot reasonably be questioned.

(c) Taking Notice. Subject to the requirements of subsection (g), the court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Court-Ordered Briefing and Stipulation. The court may request briefing from the parties and third parties, including experts specially appointed pursuant to Rule 706, on the propriety of taking judicial notice of an adjudicative fact. The parties may stipulate to the notice of particular facts.

(g) Nonjury Trials. In a bench trial, in making a finding of fact based on judicial notice, the court shall identify the sources of information used and explain the factors supporting the reliability and accuracy of those sources.[193]

(h) Jury Trials. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must

[193] Note: Relevant factors may include, but are not limited to, the organization responsible for creation and dissemination of the source, the audience and readership of the source, and any criticism to which the source has been subjected.

instruct the jury that it may or may not accept the noticed fact as conclusive.

Rule 202. Judicial Notice of Legislative Facts.

(a) Definition of Legislative Fact. A judicially noticeable legislative fact is a general factual proposition that (a) must be assumed for purposes of interpreting a legal rule or applying a legal rule to the facts and circumstances of a case; and (b) is asserted by enough authoritative sources to form a legitimate basis for such an interpretation or application.

(b) Kinds of Legislative Facts That May Be Judicially Noticed. The court may judicially notice a legislative fact meeting the definition in subsection (a) that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose reliability and accuracy are widely recognized and have not been significantly questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Court-Ordered Briefing and Stipulation. The court may request briefing from the parties and third parties, including experts specially appointed pursuant to Rule 706, on the propriety of taking judicial notice of a legislative fact. The parties may stipulate to the notice of particular facts.

(g) Nonjury Trials. In a bench trial, in making a finding of fact based on judicial notice, the court shall identify the sources of information used and explain the factors supporting the significant reliability and accuracy of those sources.[194]

(h) Jury Trials. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must

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[194] Note: Relevant factors may include, but are not limited to, the organization responsible for creation and dissemination of the source, the audience and readership of the source, and any criticism to which the source has been subjected.

instruct the jury that it may or may not accept the noticed fact as conclusive.

Review Essay

Learning Contracts through Current Events: Lawrence Cunningham's *Contracts in the Real World: Stories of Popular Contracts and Why They Matter*

Miriam A. Cherry*

In his recent book published by Cambridge University Press, Professor Lawrence Cunningham explores the nuances of contract law through current events.[1] His decision to use the contracts of modern-day singers, actors, and entertainers to illustrate contract law principles is an inspired choice that will appeal to today's law students. The book guides the reader down the well-trodden path of classic contract doctrines and applies those classics in modern, celebrity-laden contexts. In this regard, the book reads like an updated version of Marvin Chirelstein's classic contracts primer[2]—an easy-to-read and clearly written commentary. Cunningham's version adds rollicking celebrity stories to the mix, simultaneously educating and entertaining the reader. Both students and contract law experts will find much here to enjoy, and find new stories that appeal as much as the old common law chestnuts. But, perhaps because of the broad appeal and audience to which the book is aimed, there may be too optimistic a view about the received wisdom of contract law, inasmuch as existing doctrines have not addressed many of the new consumer law issues raised by modern technology.

In this review essay, I first start with a brief summary of Professor Cunningham's book and how I believe it will appeal to a wide audience. In the second portion of the review, I focus on Cunningham's thesis about contract law, to wit, his view that contract law doctrine as it is currently constituted has struck an appropriate balance between the formalists and

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[1] LAWRENCE A. CUNNINGHAM, CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER (2012).

[2] MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS (6th ed. 2010).

realists. In other words, Cunningham argues that modern contract law allows for the advancement of individual autonomy, but at the same time that current doctrine allows for appropriate court intervention to police overreaching or other problems with the bargain. In the third portion, I explain why, despite all the best intentions of the author, I find myself only partially persuaded by the optimistic view of existing contract doctrine.

In my view, modern technology has exacerbated many of the existing tensions within contract law, stretching the concept of mutual assent to its outer limits to cover methods of transacting like clickwraps and browsewraps. Further, these tensions are not necessarily reducible to the formalist-realist dichotomy on which Cunningham focuses. Despite this divergence, I conclude that Professor Cunningham has taken on a subject of surprising scope and breadth and made his obvious joy and excitement in writing about contract law fully accessible to a wide audience. Along the way, he holds the reader's attention and illuminates the overarching doctrinal themes of contract law.

I. SUMMARY OF CONTRACTS IN THE REAL WORLD

After a general introduction to the field of contract law, as well as a list of celebrities that the reader will meet throughout the book, the table of contents lists contract formation, defenses, remedies, interpretation, performance, conditions, and ends with third parties. The appropriate organization of a contracts treatise or textbook is a matter of longstanding debate amongst contracts scholars. Some professors begin a class by teaching remedies, others with consideration, and others still with offer and acceptance.[3] Despite this ongoing pedagogical debate, the organizational structure that Professor Cunningham has selected is logical and works well even if some might prefer a different order of topics. Only on a rare occasion was there any reason to question the book's placement of a story or an issue.

In the first chapter, concerning formation, the stories immediately grabbed the reader's attention, turning ancient questions over consideration

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[3] Professor Lon Fuller suggested that students begin their study of contract law with damages, so that they would understand the consequences of what it meant to breach a contract. *See* Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook That Never Was*, 72 FORDHAM L. REV. 595 (2003). Other professors (myself included), begin with contract formation, because students find it easier to understand breach and damages if they first understand how a contract comes into existence, and what types of promises will be legally enforced. I have often said that in some sense it does not make much difference at what point one begins one's study of contracts, because it all wraps around again, like the mythical serpent eating its own tail.

and the necessity of a bargain into a lively discussion of the ownership of the archives of civil rights leader Martin Luther King, Jr.[4] Reading the chapter provides an insight into the ambiguous language surrounding those papers left with Boston University, which had awarded him the degree that made him "Dr. King."[5] From there, Cunningham turns his attention to issues of offer and acceptance, mostly the question of mutual assent and offers made in jest, based on *Leonard v. Pepsico*, the recent "Pepsi Points" for a harrier jet case.[6] The chapter finishes with a discussion of mutual assent, by reviewing the Peerless ship case, *Raffles v. Wichelhaus,*[7] and then applying the concept of objective intent to several internet contracting cases, including *Specht v. Netscape*[8] and *ProCD v. Zeidenberg.*[9]

Chapters Two and Three focus on contract defenses, including unconscionability, public policy, mistake, impossibility, and infancy. While Chapter Two starts off with an ordinary case by way of example, the chapter quickly moves back to more celebrity-friendly terrain. Raising issues of the bounds of the law and unconscionability, the book discuses the attempted blackmail of entertainer David Letterman and a palimony lawsuit against rapper 50-Cent.[10] The chapter continues with the story of a contract to split gambling winnings—made between two octogenarian sisters.[11] Finally, the Baby M case, with its multi-dimensional discussion of contracts against public policy, rounds out the chapter.[12] Chapter Three begins with a discussion of mistake, in the context of a divorce in which a portion of the divided joint assets disappeared in Bernard Madoff's notorious recent Ponzi scheme.[13] Other stories in this section use celebrity contracts to great

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[4] CUNNINGHAM, *supra* note 1, at 11-14; King v. Trustees of Boston Univ., 647 N.E.2d 1196 (Mass. 1995).

[5] CUNNINGHAM, *supra* note 1, at 12; *King,* 647 N.E.2d 1196.

[6] CUNNINGHAM, *supra* note 1, at 16-18; Leonard v. Pepsico, Inc., 88 F.Supp. 2d 116, *aff'd,* 210 F.3d 88 (2d Cir. 2000).

[7] CUNNINGHAM, *supra* note 1, at 26; Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (Ct. of Exchequer); 2 Hurl. & C. 906.

[8] CUNNINGHAM, *supra* note 1, at 27-28; Specht v. Netscape Communications, Corp, 306 F.3d 17 (2d Cir. 2002).

[9] CUNNINGHAM, *supra* note 1, at 28-29; ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

[10] CUNNINGHAM, *supra* note 1, at 42, 44-47; Bill Carter & Brian Steltier, *Letterman Extortion Raises Questions for CBS,* N.Y. TIMES, Oct. 2, 2009, http://www.nytimes.com/2009/ 10/03/business/media/03extort.html?_r=1&pagewanted=all; Tompkins v. Jackson, No. 104745/2008, 2009 WL513858 (N.Y. Sup. Ct. Feb. 3, 2009).

[11] CUNNINGHAM, *supra* note 1, at 49-52; Sokaitis v. Bakaysa, 293 Conn. 17 (Conn. 2009).

[12] CUNNINGHAM, *supra* note 1, at 52-58; In re Baby M, 537 A.2d 1227 (N.J. 1988).

[13] CUNNINGHAM, *supra* note 1, at 59-66; Simkin v. Blank, 80 A.D.3d 401 (N.Y. App. Div. 2011).

effect. For example, Cunningham's discussion of impossibility includes Donald Trump's attempts to cancel a contract via a force majeure clause,[14] while Craig Traylor of "Malcolm in the Middle" television fame takes center stage in illustrating the defense of infancy.[15] The chapter ends with a discussion of the contracts and defenses in the AIG bonus scandal[16] and sports sponsorship contracts made by Citigroup and Enron.[17]

Chapters Four and Five turn to remedial issues, including expectation damages, reliance damages, and restitution. Celebutante Paris Hilton plays a major role in this discussion, as she was alleged to be in breach for contracts for a movie promotional appearance as well as hair extension promotions.[18] Cunningham uses these examples to walk through a general discussion of damages, which are enlivened through a recounting of some of Hilton's antics. The doctrine of mitigation and the lost volume seller both receive a thorough and interesting treatment in the discussion of the Redskins football team's decision to pursue breaching season ticket holders, despite the fact that some of those tickets could presumably be resold.[19] The discussion of restitution revolves around the development of the hit television show *The Sopranos*, and whether one of the contributors of ideas had a right to share in the profits.[20] The chapter ends with a discussion of the off-contract remedies awarded when rock singer Rod Stewart was unable to perform in Las Vegas due to vocal chord problems.[21]

Chapters Six, Seven, and Eight deal with interpretation of the contract, the implied duty of good faith, and the effect of conditions. Rapper

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[14] CUNNINGHAM, *supra* note 1, at 66; Trump v. Deutsche Bank Trust Co. Americas, 65 A.D.3d 1329 (N.Y. App. Div. 2009).

[15] CUNNINGHAM, *supra* note 1, at 70; Berg v. Traylor, 56 Cal. Rptr. 3d 140 (Cal. Ct. App. 2007).

[16] CUNNINGHAM, *supra* note 1, at 73-78; Lawrence A. Cunningham, *A.I.G.'s Bonus Blackmail*, N.Y. TIMES, March 17, 2009, http://www.nytimes.com/2009/03/18/opinion/18cunningham.html.

[17] CUNNINGHAM, *supra* note 1, at 78-83; Richard Sandomir, *Citigroup Puts Its Money Where Its Name Will Be*, N.Y. TIMES, July 20, 2008, http://www.nytimes.com/2008/07/20/sports/baseball/20sandomir.html.

[18] CUNNINGHAM, *supra* note 1, at 84-94; Goldberg v. Paris Hilton Entm't, Inc., No. 08-22261-CIV, 2009 WL 2525482 (S.D. Fla. Aug. 17, 2009); Hairtech Int'l, Inc. v. Hilton, No. BC443465, 2010 WL 3300058 (Cal. Superior) (Trial Pleading) (Aug. 11, 2010).

[19] CUNNINGHAM, *supra* note 1, at 94-99; James V. Grimaldi, *Washington Redskins React to Fans' Tough Luck With Tough Love*, WASHINGTON POST, Sept. 3, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/09/02/AR2009090203887.html.

[20] CUNNINGHAM, *supra* note 1, at 118-22; Baer v. Chase, No. 02-2334, 2007 WL 1237850 (D.N.J. Apr. 27, 2007).

[21] CUNNINGHAM, *supra* note 1, at 122-25; Rio Properties v. Armstrong Hirsch, 94 Fed.App'x. 519 (9th Cir. 2004); Rio Properties v. Armstrong Hirsch, 254 Fed.App'x. 600 (9th Cir. 2007).

Eminem's recording contract provides an excellent illustration of what happens when a new technology—in this situation, ringtones and iTunes downloads—is invented after the contract is signed.[22] How to sort out payment for these new technologies was the subject of a heated debate—with Eminem's legal fight winning him millions of dollars.[23] Best efforts clauses are illustrated in poet Maya Angelou's disagreement with promoter Butch Lewis over her agreement to license her poetry to Hallmark greeting cards.[24] Comedian Conan O'Brien's dispute over the change in time of his show is an issue that many watched closely as it unfolded, and it is used to discuss the concept of material breach and adjustment.[25] The discussion of conditions benefits from the example of troubled actor Charlie Sheen, as it raises questions about whether particular conditions were either waived or estopped since the network had previously chosen to ignore his drug-fueled antics.[26] Finally, the book ends—as most contracts books do—with the obligatory chapter about third-party beneficiaries. This portion of the book is timely and important, thanks to its use of Wal-Mart's ongoing labor disputes and discussion of how third-party beneficiary doctrine might be helpful in thinking through those issues.[27] Overall, the book covers a vast scope of issues and doctrine, inviting its readers along for an exciting intellectual journey through the field of contract law.

II. DIFFERING VIEWS OF CONTRACT LAW, AND PROFESSOR CUNNINGHAM'S ARGUMENT

Some would claim that contract law is revolutionary; others would argue that it is reactionary. Compared to the status relationships of the Middle Ages, in which economic power was primarily determined through feudal or family relationships, contract and market relations promised a more egalitarian alternative. In the classic text *Ancient Law*, Sir Henry Maine described the radical transformation from a feudal society governed by custom and hierarchy to one transformed by the industrial revolution, in

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[22] CUNNINGHAM, *supra* note 1, at 126-30; F.B.T. Productions v. Aftermath Records, 621 F.3d 958 (9th Cir. 2010).

[23] CUNNINGHAM, *supra* note 1, at 126-30.

[24] *Id.* at 148-52; B. Lewis Productions, Inc. v. Angelou, No. 06 Civ. 6390 (DLC), 2008 WL 1826486 (S.D.N.Y. Apr. 22, 2008).

[25] CUNNINGHAM, *supra* note 1, at 167-71; Bill Carter, *Fingers Still Pointing, NBC and O'Brien Reach a Deal,* N.Y. TIMES, Jan. 21, 2010, http://www.nytimes.com/2010/01/22/business/media/22conan.html.

[26] CUNNINGHAM, *supra* note 1, at 176-86; Sheen v. Lorre, No. SC111794, 2011 WL 817781 (Cal. Superior) (Trial Pleading) (Mar. 10, 2011).

[27] CUNNINGHAM, *supra* note 1, at 194-98; Doe v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009).

which socio-economic mobility was not only possible, but which was expected.[28] On the other hand, there are those who would argue that contract law acts as a reactionary force insofar as enforcing bargains strictly as written could result in reinforcing power imbalances that already exist in society.[29]

Professor Cunningham's work notes these various arguments, and strikes a middle ground between them. He characterizes the schism in contract law as a dispute between formalists and the realists. This schism applies even to foundational matters, such as the question of whether a contract has been formed. Cunningham notes that extreme formalists would champion a return to the days of the seal and enforce only those deals that meet the strict definitions of offer, acceptance, and consideration.[30] Realists, on the other hand, favor scrutinizing the context of every bargain, accepting the most informal of deals and even enforcing promises to make gifts as contracts.[31] This divide becomes both more interesting and perhaps controversial in examining the outer limits of acceptable contracts. Formalists, Cunningham notes, would like to see the ability of judges to scrutinize adequacy of consideration, even purely nominal consideration, severely circumscribed so as to expand the freedom of contract.[32] Conversely, Cunningham asserts that realists would want to empower judges fully to scrutinize not only the adequacy of consideration, but also to police contracts that may violate a social norm, value, or policy.[33] Thus the dichotomy between formalists and realists turns into a debate over the extent of government or court involvement in private ordering.

Cunningham walks a tightrope between these positions, often making reference to contract law's "sensible center," and noting that with many common problems, the rules that have evolved over the years make a good deal of sense. In essence, he makes a case for the status quo, eschewing reform in either the direction of more government interference in contract, or government withdrawal from contract. Cunningham suggests that current law strikes the proper balance between two rather extreme positions.

Reading Professor Cunningham's discussion will likely be a comforting experience for many readers, especially law students. While formalists and

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[28] SIR HENRY MAINE, ANCIENT LAW (1886).

[29] *See, e.g.*, Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925 (2006).

[30] CUNNINGHAM, *supra* note 1, at 34.

[31] *Id.*

[32] *Id.* at 57.

[33] *Id.* at 57-58, 82-83, 146-47, 212.

realists may debate and bicker and try to push the law too far in one direction or another regarding government intervention, the old wisdom of the common law knows best. The book extols the earthy pragmatism of old precedents and wise judges, and suggests that these doctrines will ultimately win out and reach a balance. This soothing vision, however, smoothes over ongoing debates among modern contract law scholars. Modern technology, in particular, proves to be a particular challenge for the soothing discussion.

III. MODERN TECHNOLOGY AS A CHALLENGE TO EXISTING CONTRACT DOCTRINE

Modern technology has exacerbated the doctrinal tensions within contract law. Currently, clickwraps and browsewraps stretch the notion of mutual assent to its extreme, perhaps warping it in the process. The recent literature on form contracting online has been substantial.[34] While some of this literature sees online contracting as a natural inheritance to traditional contract law doctrine,[35] other commentators have argued that contracting online has distorted the doctrine.[36]

Professor Cunningham discusses the recent cases *Specht v. Netscape*[37] and *Pro-CD v. Zeidenberg*[38] as part of his treatment of the theme of contract formation and mutual assent. *Netscape* involved an instance where Internet users were invited to download a program without first seeing a license agreement or any mention of one, as it was contained on a lower part of the screen that could not be seen.[39] When users alleged that the download contained spyware and filed a lawsuit, Netscape countered by pointing to the arbitration provision in the license.[40] The Second Circuit, per Judge Sonia Sotomayor, held that these terms were not binding, since users did not have an opportunity to read the license and thus could not have assented to the terms.[41]

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[34] *See, e.g.*, Nancy Kim, *Internet Challenges to Business Innovation*, 12 J. INTERNET L. 3 (2008); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006).

[35] *See, e.g.*, Robert A. Hillman & Jeffrey J. Rachlinsky, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

[36] *See, e.g.*, Richard Warner, *Turned on its Head?: Norms, Freedom, and Acceptable Terms in Internet Contracting*, 11 TUL. J. TECH. & INTELL. PROP. 1 (2008).

[37] Specht v. Netscape Communications, Corp, 306 F.3d 17 (2d Cir. 2002).

[38] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

[39] *Netscape*, 306 F.3d at 21-25.

[40] *Id.* at 25.

[41] *Id.* at 31-32.

In *Pro-CD v. Zeidenberg* the Seventh Circuit, per Judge Frank Easterbrook, held that the terms of use inside a software package—commonly known as a shrink-wrap license—would be binding on the purchaser, Zeidenberg.[42] The court reasoned that the purchaser was on notice that the software came with terms, even though the terms were not revealed at the time of purchase.[43] The book reconciles these conflicting precedents in the following way:

> Zeidenberg's acceptance is analogous to download offers on the Internet, where users are invited to click *Yes* to signal they accept the terms. Cases like ProCD seemed to favor Netscape's stance, but they actually support Netscape users' case. After all, in ProCD's case, the box of software noted it was subject to the terms listed inside. . . . These details made ProCD an easy case on which to conclude that a contract was formed. In contrast, the Netscape users never saw—and they could not reasonably have seen—the clause at all. There was no chance to click *No*.[44]

This explanation is not entirely satisfactory, as *Netscape* and *Pro-CD* are fundamentally in tension. Further, given the realpolitik of adhesion contracts, it is difficult to say that an opportunity to "click no" would be anything but a distinction without a difference. The fact is, these cases conflict, and do so on a pro-business versus pro-consumer axis. In fact, two well-known additional cases that dealt with late-arriving terms inside a computer box, *Hill v. Gateway*[45] and *Klocek v. Gateway*,[46] blatantly contradict each other, with contrary holdings on virtually identical facts. These disputes, which are governed by the Uniform Commercial Code, should lead to a uniform result. When instead they result in inconsistent holdings, it only intensifies the debate about how to deal with online contracting and adhesion contracts online.

Of course, not all commentators view online contracts of adhesion disfavorably.[47] Some authors take an explicit pro-business stance, and thus support contracts of adhesion as assisting businesses in becoming more efficient. Others advocate that contracts of adhesion are by nature efficient and that cost savings will be passed along to consumers—a type of "trickle

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[42] *ProCD*, 86 F.3d at 1449.

[43] *Id.* at 1452.

[44] CUNNINGHAM, *supra* note 1, at 29.

[45] Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

[46] Klocek v. Gateway 2000 Inc., 104 F.Supp. 2d 1332 (D. Kan. 2000).

[47] Randy E. Barnett, *Consenting to Form Contracts, Symposium: A Tribute to Professor Joseph M. Perillo*, 71 FORDHAM L. REV. 627 (2002).

down" justification for the existence of the adhesion contract.[48] From a libertarian perspective, contracts of adhesion may be viewed as simply the private ordering of the market, to be left to a laissez-faire determination.[49] Still others view adhesion contracts as bad, but perhaps a necessary evil. Some commentators point to the presence of the free market as all the protection that consumers need. If the terms that one firm provides on its form contract are too harsh, the consumer, after all, can choose to contract elsewhere, at a firm offering better terms. Perhaps, if the terms are harsh enough and demand is elastic enough, the consumer will choose to forgo contracting altogether. To retain a competitive advantage, firms will of necessity have to offer terms that are more-consumer friendly.

Professor Todd Rakoff's germinal article on adhesion contracts, however, pointed to the converse trend—the tendency of form terms to become more entrenched, rigid, and harsh over time, despite, or perhaps because of, the other players in an industry.[50] The harsher a drafter makes the terms, the more likely it is that other drafters in the same industry will "borrow" the same harsh terms.[51] The tendency of firms to adopt a set of ever-harsher terms turns on its head the notion that competition will protect the consumer's interests.[52] Unfortunately, online terms only exacerbate the existing situation. The doctrine appears rigid, almost frozen in time.

In contrast, tort law doctrine has been capacious enough to cover related new developments. When mass-market goods failed or caused serious injury, plaintiffs at first attempted to bring cases via the contractual doctrine of breach of warranty.[53] These claims, however, were often stymied because of either lack of privity or the low damages awarded in a warranty action.[54] Due to this inflexibility in contract law, plaintiffs instead looked to tort law for redress for their injuries. Tort law was seen as less formalistic (in the area of consumer affairs, at least),[55] and plaintiffs were

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[48] Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255-58 (2006); *see also* Carnival Cruise Lines Inc. v. Shute, 499 U.S. 585 (1991).

[49] Ware, *supra* note 48, at 259.

[50] Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1228 (1983).

[51] *Id.* at 1226-27.

[52] *Id.*

[53] William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099-1101 (1960).

[54] *Id.* at 1128-34.

[55] However, that is not the case when it comes to employment-related torts, or torts that an employee would bring against an employer. The fellow-servant rule, as well as other rules, served as methods that effectively prevented an employee from bringing a claim against his or her employer. *See generally* MORTON J. HOROWITZ, THE TRANSFORMATION OF

able to bring lawsuits to seek recompense not only for the cost of their defective goods, but also for compensation for their injuries. In the 1960s Justice Roger Traynor pioneered the field of products liability, with its subdivisions of design and manufacturing defect and its standard of strict liability.[56] Under this rubric, the plaintiff need only cover the proof of the existence of the defect, not that the defendant knew about the concern or that the defendant acted without a reasonable standard of care.[57] In this way tort law seems to have been more flexible in dealing with new claims than contract law has been.

As we continue to click our way through countless EULAs and are told that we are subject to "terms and conditions" that no reasonable consumer has had the time to read, I maintain that we are obligated to make changes—perhaps akin to those made in the field of torts—in order to continue to build on the wisdom of contract law. While there is much to celebrate in the received wisdom of ancient doctrines, we must also recognize that it is the common law's dynamism and adaptability that have led to its genius.

IV. CONCLUSION

Overall, *Contracts in the Real World* is worthwhile reading for anyone interested in gaining a more complete understanding of contract law doctrine. First year law students will find insights in the book's inspired treatment of classic cases, and they will also learn how those classic cases can be applied to modern disputes. The book manages to be entertaining without simplifying the issues being discussed. The only aspect of debate is whether the book's positive treatment of the state of current contract doctrine is warranted in light of recent developments in online contracting. While I might advocate for more change in the doctrine, Professor Cunningham's view is certainly reasonable and understandable. Overall the book is an excellent resource for anyone who wants to learn about contract law and leads the reader on an exciting intellectual journey.

AMERICAN LAW, 1780-1860 (1979). In fact, they did so in such an effective way that an alternate path for bringing forward a claim, i.e. the no-fault system of worker's compensation, had to be developed. *See* Samuel Estreicher, *Predispute Agreements To Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997).

[56] Fleming James, Jr., *A Tribute to the Imaginative Creativity of Roger Traynor*, 2 HOFSTRA L. REV. 445 (1974).

[57] RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

Diminishing Role of Islands in Maritime Boundary Delimitation: Case Studies of Dokdo/Takeshima Island and the Senkaku/Diaoyu Islands

Heeyong Daniel Jang*

Judicial partitioning of the maritime area will proceed in three stages, namely by (1) identifying provisional equidistance line using geographical factors, (2) adjusting the line taking into account relevant circumstances, and (3) applying the proportionality rule. Here, the outcome-determinative factor is the relevant coast, not minor protrusions far offshore. Indeed, Romania v. Ukraine,[1] Bangladesh v. Myanmar,[2] *and* Nicaragua v. Colombia[3] *reaffirmed the trend that small offshore islands are only entitled to less than full effect on the delimitation line. In light of the pro-mainland jurisprudence, there is no longer meaningful economic incentive to prolong sovereignty dispute over de minimis islands that only have minimal impact on maritime boundary delimitation.*

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[1] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 62 (Feb. 3).

[2] Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012 (ITLOS Reports 2012), *available at* http://www.worldcourts.com/itlos/eng/decisions/2012.03.14_Bangladesh_v_Myanmar.pdf.

[3] Territorial and Maritime Dispute (Nicar. v. Col.), 2012 I.C.J. 1 (Nov. 19), *available at* http://www.icj-cij.org/docket/files/124/17164.pdf.

I. INTRODUCTION

The status of islands in international law has drastically changed over time. In fact, the affirmation of early customary international law in the Anglo-Norwegian *Fisheries* case[4] (the "*Fisheries*" case) *vis-à-vis* maritime delimitation only created a chaotic "sea-rush" to claim exorbitant baselines, especially through islands. Articles 7 and 121 of the United Nations Convention on the Law of the Sea ("UNCLOS"), which bestowed islands analogous rights applicable to the mainland, only reinforced the notion that islands play an integral role in maritime delimitation.[5] A small island, notwithstanding its minimal importance as a landmass, can arguably claim a disproportionately large maritime boundary, up to 350 nautical mile ("nm") continental shelf. Hence, countries have been stubbornly claiming sovereignty over small islands, claiming them as capable of sustaining "human habitation or economic life of their own."[6] Such practice often escalates into political dispute, if not military conflict.

Be that as it may, the legal significance of islands has gradually eroded to the point that land dominates the sea and associated maritime features. It is now settled that international tribunals will not treat an island and the mainland as equals. Simply put, the maritime boundary between two states will largely reflect the coastal shape irrespective of islands. Judicial and arbitral decisions, *Romania v. Ukraine* (the "*Black Sea*" case), *Bangladesh v. Myanmar* (the "*Bay of Bengal*" case) and *Nicaragua v. Colombia* being three of the latest, have set the tone for this trend, departing from the codified rule and promulgating a new norm that islands no longer generate

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[4] Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18).

[5] United Nations Convention on the Law of the Sea (*UNCLOS*), arts. 7, 121, Dec. 10, 1982, 1833 U.N.T.S. 397.

[6] *Id.* art. 7.

substantial rights in maritime boundary delimitation. Although islands clearly occupy a subordinate status *vis-à-vis* the mainland under contemporary international law, the size of the gap may vary on a case-by-case basis.

The purpose of this research is twofold. First, it seeks to analyze how this trend evolved over time, to the extent that it is manifested through judicial or arbitral proceedings and state practice. In order to achieve this objective, the paper catalogs the treatment of islands in six ways—1) islands located in the straight baseline, 2) islands that are in competition with the mainland, 3) islands located on "the wrong side"[7] of the median line, 4) islands located on "the right side"[8] of the median line, 5) islands within the maritime boundary of adjacent states, and 6) *de minimis* islands.

Second, the paper will examine the implications of the latest developments on islands that are the subject of sovereignty disputes or that have questionable status under the international law. Indeed, islands located close to the mainland are unable to significantly alter the maritime boundary with the exception of generating a twelve nm territorial sea enclave. As a consequence, fewer resources are at stake in these disputes; hence countries have less incentive for conflict. In light of the recent judicial and arbitral decisions, the paper will also project, by drawing maps to illustrate the point, how sovereignty over controversial islands (e.g., Dokdo/Takeshima Island and Senkaku/Diaoyu Islands) will affect the delimitation of maritime boundaries.

II. RISE OF THE PRO-MAINLAND REGIME

A. Definition and Rights of an Island

Much to the surprise of a layman, the international community does not have a clear definition that distinguishes islands from rocks. UNCLOS defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide."[9] Such a broad characterization fails to answer an important question: how much of an "area of land" is required so that it no longer constitutes a rock? Indeed, this is a critical distinction because rocks "have no exclusive economic zone or continental shelf."[10] On the contrary, Article 121(2) of UNCLOS confers on islands the same

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[7] Islands located outside the maritime zone of the dependent State after the delimitation line is drawn.

[8] Islands located inside the maritime zone of the dependent State after the delimitation line is drawn.

[9] *UNCLOS*, *supra* note 5, art. 121, para. 1.

[10] *Id.* art. 121, para. 3.

rights as other land territory: "Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory."[11]

Simply put, Saint Helena, with a sixty kilometer ("km") coastline and an area slightly more than twice the size of Washington, D.C., generates an exclusive economic zone ("EEZ") of approximately 410,000 km^2. If countries and courts strictly adhere to black letter law, islands should be able to generate as much maritime zone as the mainland. Actual practice, however, greatly deviates from the codified rule.

Islands that were once considered a treasure chest are increasingly losing their value in international law, especially those that lie within the median line and are distant from the coast. Although the written law remains intact, courts have gradually stripped islands of various privileges. Small islands are being treated as secondary to nearby land territory. If located far off the coast, those islands have minimal impact on the maritime boundary delimitation: "[T]he size of an island can be relevant . . . [s]o too is the island's location."[12] Although states unilaterally claim various rights, such as EEZs, around islands which could conceivably be regarded as uninhabitable rocks, it is doubtful that international courts will uphold such practices any longer.

B. Summary of Major Cases and Laws

Various aspects of the diminishing status of islands are evident in the case law. In fact, the presumption seems to lie in favor of the mainland when islands are used to challenge its rights. Before analyzing how islands have gradually lost their significance, the following chart offers an overview of the transformation in a nutshell:

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[11] *Id.* art. 121, para. 2.

[12] Rodman R. Bundy, *Preparing for a Delimitation Case: The Practitioner's View*, *in* MARITIME DELIMITATION 95, 107 (Rainer Lagoni & Daniel Vignes eds., 2006).

Chart 1: The Treatment of Islands by International Actors

Year	Case/Law	Statement
1951	The *Fisheries* Case[13]	The straight baseline was drawn on the low-water mark located at the outer line of "skjaegaard," or a cluster of islands.[14]
1977	The *Channel Islands* Arbitration[15]	The panel partially accorded twelve nm boundary line to the Channel Islands while the Scilly islands were given a "half-effect."[16]
1981	*Dubai/Sharjah* Arbitration[17]	The island of Abu Musa had no effect on the continental shelf boundary; it received only a twelve nm territorial sea.[18]
1982	UNCLOS III[19]	Article 121(2) states that islands are entitled to the same maritime zones as other land territory.[20]
1982	*Tunisia/Libya* Case[21]	The island of Djerba had no effect on the boundary line between the states and the Kerkennah islands received a modified version of "half-effect."[22]
1984	The *Gulf of Maine* Case[23]	Machias Seal Island had only a partial effect on the boundary line. "Tiny island, uninhabited rocks or low-tide elevations,

[13] Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18).

[14] *Id.* at 127.

[15] Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf, 18 I.L.M. 397 (1979) (the "*Channel Islands*" Arbitration).

[16] *Id.* at 455, ¶ 251.

[17] Dubai/Sharjah Border Arbitration, Award, 91 I.L.R. 543 (1981) (the "*Dubai/Sharjah*" Arbitration).

[18] *Id.* at 677, ¶ 265.

[19] *UNCLOS*, *supra* note 5.

[20] *Id.* art. 121, para. 2.

[21] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Feb. 24).

[22] *Id.* at 89, ¶ 129.

[23] Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States), 1984 I.C.J. 246 (Oct. 12).

Year	Case/Law	Statement
		sometimes lying at a considerable distance from terra firma" was discounted.[24]
1985	*Guinea/Guinea Bissau* Arbitration[25]	The tribunal identified three categories of islands. First, the coastal islands were considered as integral parts of the mainland. Second, the Bijagos archipelago was considered as a factor (i.e., given partial effect) in determining the general direction of the coast. Third, the scattered islands, except Alcatraz, in the south were largely ignored.[26]
1985	*Libya/Malta* Case[27]	The island state of Malta received less than full equidistant line. Filfla, a small rock, was ignored.[28]
1992	*Canada/France* Arbitration[29]	St. Pierre and Miquelon were accorded twenty-four nm partial enclaves and a strip of continental and EEZ entitlement 188 nm in length and 10.5 nm in width.[30]
1993	*Denmark v. Norway* Case[31]	Jan Mayen Island was not accorded full equidistance effect.[32]
1999	*Eritrea-Yemen* Arbitration[33]	The islands of Al-Zubayr and Jabal el-Tair had no effect on the delimitation line.[34]
2001	*Qatar v. Bahrain* Case[35]	The island of Qit'at Jaradah had no effect on the delimitation line.[36]

[24] *Id.* at 329.

[25] Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau), 77 I.L.R. 635 (1985) (the "*Guinea/Guinea-Bissau*" Arbitration).

[26] *Id.*

[27] Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13 (June 3).

[28] *Id.* ¶¶ 42-44.

[29] Delimitation of Maritime Areas between Canada and France, June 10, 1992, *reprinted in* 31 I.L.M. 1145 (1992) (the "*Canada/France*" Arbitration).

[30] *Id.* at 1163, ¶ 39.

[31] Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.) 1993 I.C.J. 38 (June 14).

[32] *Id.* ¶¶ 55, 65.

[33] Award of the Arbitral Tribunal in the Second State (Eri. v. Yemem) (Perm. Ct. Arb. Dec. 17, 1999), http://www.pca-cpa.org/showfile.asp?fil_id=459 (the "*Eritrea/Yemen*" Arbitration).

[34] *See id.*

[35] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v.

Year	Case/Law	Statement
2009	The *Black Sea* Case[37]	Serpents' Island was given a twelve nm territorial sea, but had no effect on the delimitation line.[38]
2012	The *Bay of Bengal* Case[39]	St. Martin's Island was given full effect with respect to delimitation of the territorial sea between Bangladesh and Myanmar, but was ignored for the purpose of drawing the delimitation line of the EEZ and continental shelf.[40]
2012	*Nicaragua v. Colombia* Case	Quitasueño and Serrana, small maritime features, were not selected as base points. Furthermore, considering significantly shorter coastlines of Colombian islands compared to that of mainland Nicaragua, the Court adjusted the provisional line in favor of Nicaragua.

Over the course of a few decades, islands, especially those that are tiny, received a discounted value compared to the landmass. While island states and countries with islands of strategic significance continue to protest, decisions of the International Court of Justice ("ICJ") and other third-party adjudicatory bodies indicate a pro-mainland trend. There is no reason to believe that such inclination will reverse in the future.

C. Islands Located in the Straight Baseline

The UNCLOS rules governing the baseline are likely to clash with the actual baseline claimed by the coastal state, especially apropos of coastlines fringed with islands. Such disparity is partially due to the substantial development of the norm *vis-à-vis* islands nearby the coast. Coastlines are often far from being straight and unindented. The presence of islands, islets, and rocks exacerbates the conundrum of precisely delineating the line

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Bahr.) 2001 I.C.J. 40 (Mar. 16).

[36] *See id.*

[37] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 62 (Feb. 3).

[38] *Id.* ¶ 12.

[39] Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012 (ITLOS Reports 2012), *available at* http://www.worldcourts.com/itlos/eng/decisions/2012.03.14_Bangladesh_v_Myanmar.pdf.

[40] *See id.*

"so that two cartographers, asked to draw the baselines along a particular stretch of coast, would ideally both arrive at the same result."[41] Countries with irregular coastline often claim straight baselines beyond the permissible margin of the international standard.[42] These coastal states, in order to claim more internal waters, strategically assert that small islets or rocks not in the immediate vicinity of the mainland can qualify as base points. Unfortunately, undue maritime projections from islands far off the coast encroach upon the area legitimately claimed by contiguous countries.

The early concept of straight baselines conferred significant privileges on islands. Aside from upholding historical title to territorial or internal waters, the ICJ in the *Fisheries* case assimilated fringing islands as an integral part of the coast and measured the baseline from the outer line of "skjaergaard." Islands along Norway's outer perimeter that were over twelve nm away from the *terra firma* thus functioned as base points; for that matter, Norway claimed vast maritime area landward of the islands as internal waters while extending other maritime zones further seaward.

The *Fisheries* case, which was later codified in Article 4 of the Geneva Convention on the Territorial Sea, represents how lax the judicial standard was *vis-à-vis* straight baseline. The case identified three principal considerations for determining the appropriate straight baseline:

> [T]he drawing of base-lines (i) must not depart to any appreciable extent from the general direction of the coast, (ii) the sea area lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters, and (iii) may take into account economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.[43]

Such a broad standard, as well as the Court's rejection of the ten-mile baseline rule as customary international law, allowed the coastal state to subjectively and arbitrarily judge its baseline by "apprais[ing] the local conditions dictating the selection."[44] There was no precise mathematical formula to properly apply the rule; in fact, the determination of the baseline "remain[ed] essentially subjective."[45] The Court further noted that such method "had been consolidated by a constant and sufficiently long practice,

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[41] ROBIN R. CHURCHILL & ALAN V. LOWE, THE LAW OF THE SEA 32 (3d ed. 1999).

[42] Some of these countries include Vietnam, Burma, Pakistan, China, and South Korea.

[43] Convention on the Territorial Sea and Contiguous Zone art. 4, Apr. 29, 1958, 516 U.N.T.S. 205.

[44] Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18).

[45] HIRAN W. JAYEWARDENE, THE REGIME OF ISLANDS IN INTERNATIONAL LAW 57 (1990).

in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law."[46]

By declaring the Norwegian practice permissible under customary international law, the Court invited other countries to declare baselines as they see fit. Countries swiftly and aggressively accepted this invitation. The rule of law was essentially absent as remote islands were up for grabs to justify excessive baselines.

These initial attempts by the ICJ to codify a manageable standard led to a "veritable explosion of unilateral straight baseline delimitations . . . to take bigger and bigger bites of waters proximate to the coastline and, as a result, to push the variety of other maritime zones further and further seaward."[47] Rejection of the so-called "coastline rule"—the baseline must follow the actual coastline except in the case of internal waters—prompted, if not validated, excessive claims by countries. For instance, Ecuador, Iceland, Iran, Italy, Malta, Thailand, and Vietnam selected distant islands as base points for their straight baselines.[48] A great "sea-rush" ensued in the post-*Fisheries* era in which vast maritime claims were allegedly justified by remote islets. It was essentially a free-for-all: an estimated two-thirds of all countries took advantage of the vague rule.[49] At this stage, islands have functioned as base points for the *terra firma* to validate disproportionately long baselines.

Although actual state practice is still somewhat slow to respond, the case law governing straight baselines underwent a significant transformation. The subjective determination by the coastal state "to appraise the local conditions" was replaced by a more objective, albeit far from being perfect, standard. Instead of drawing straight baselines from the outermost islands, so long as the line follows the general direction of the coast, the ICJ now requires states to adhere more closely to the established rules. In *Qatar v. Bahrain*, Bahrain contended that the cluster of Hawar Islands constituted relevant base points for the straight baseline.[50] Under the *Fisheries* case, Bahrain could claim a disproportional baseline on the basis of subjective determination accounting for its peculiar economic interests. Nevertheless,

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[46] *Fisheries Case*, 1951 I.C.J. at 138.

[47] Gayl S. Westerman, *Straight Baselines in International Law: A Call for Reconsideration*, 82 AM. SOC'Y INT'L L. PROC. 260, 261, 264 (1988).

[48] "Perhaps the most extreme example is Vietnam, which has used the isolated islet of Hon Hai, [l]ying seventy-four miles from the mainland coast, as a basepoint for its straight baseline system, and connected it northwards to Hon Doi Islet and southwestwards to Bay Canh islet, each of which is 161 miles away." CHURCHILL & LOWE, *supra* note 41, at 39.

[49] *Id.*

[50] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.) 2001 I.C.J. 40, ¶32 (Mar. 16).

the Court explicitly denounced the application of subjective criteria in lieu of "a number of conditions . . . applied restrictively."[51] In other words, a country is entitled to straight baselines if "either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity,"[52] not when "certain sea areas lying within these [base]lines are sufficiently closely linked to the land domain."[53] Countries can no longer establish a line "within reasonable limits";[54] only those islands that are in the immediate vicinity of the coast can now be considered as base points for the straight baseline. Accordingly, the Court ruled that Bahrain could not apply the method of straight baseline to Qit'at Jaradah Island.

In the *Black Sea* case, the ICJ reaffirmed the rule that a small island remotely situated off the coastline is insufficient to constitute a base point.[55] In doing so, the *Black Sea* case devalued islands that are far off the coast: "[T]o count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline: the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes."[56]

Serpents' Island, located twenty nm from the mainland, "is not one of a cluster of fringe islands constituting "the coast" of Ukraine."[57] Though Ukraine did not claim a straight baseline along its coast, this case represents how far the ICJ has come from the *Fisheries* case. Instead of espousing indeterminate criteria that accorded islands great significance for the purpose of drawing the straight baseline, the Court disregarded islands not in the immediate vicinity of the coast. In short, the geographical proximity rule deters an arbitrary selection of remote islands, rocks, and other *de minimis* low-tide elevations as base points.

The unmistakable move against subjective determination of straight baselines is, however, more abstract than concrete. International courts are insisting on a more strict application of the straight baseline rule, the requirement of the coastline being deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity. Unfortunately, the standard fails to clarify qualitative and quantitative aspects of the conundrum: it is unclear what the depth requirement is for "deeply," how many is "a fringe of," what is an "island," and how near is

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[51] *Id.* ¶ 212.

[52] *Id.*; *see UNCLOS*, *supra* note 5, art. 7(1).

[53] Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 133 (Dec. 18).

[54] *Id.* at 129.

[55] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 62, ¶ 149 (Feb. 3).

[56] *Id.*

[57] *Id.*

"immediate."[58] States, international courts, and scholars by no means have reached a consensus on these issues. For the purpose of measuring the impact of islands in boundary delimitation, it would be sufficient to set forth the two controlling arguments. First, rocks or islets that "cannot sustain human habitation or economic life would not appear to qualify as base points in a straight baseline regime, even if the preliminary geographical test and the other preconditions are fulfilled."[59] Article 7(1) specifically refers to only islands, which is different from rocks defined in Article 121(3).[60] Second, the term "immediate vicinity" should be "construed to mean not more than the distance of the territorial sea from the low-water mark, i.e., not more than twelve miles seaward from the coast of the *terra firma* and the inner edge of the islands in question."[61] Islands that lie beyond the twelve nm limit should not be considered as base points but as separate maritime features with the potential of affecting the median line. This analysis is consistent with Article 13(1) of UNCLOS that permits the use of a low-tide elevation "situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island" as the baseline.[62]

Rule. Aside from drawing twenty-four nm closing line across bays, the method of straight baseline delimitation involves choosing islands in the "immediate vicinity" of the coast as base points. There are two caveats: (i) the exact meaning of "immediate vicinity" is unclear and (ii) the island must follow the general direction of the coastline.

D. Islands in Competition with the Mainland

Islands are often in competition with the mainland over inshore marine resources. In order to buttress their rights to maritime zones, these islands—some of them island nations in and of themselves—cite Article

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[58] One seemingly economic method for achieving a rational regime might be simply to introduce a limit on the maximum permissible *length* of a straight baseline . . . Another method might limit the permissible *distance* the straight baseline might depart from the coast of the *terra firma*. Another might limit the freedom of selection of base points and confine those not on the coast of the *terra firma* to a certain distance from it, perhaps the width of the territorial sea.

W. MICHAEL REISMAN & GAYL S. WESTERMAN, STRAIGHT BASELINES IN INTERNATIONAL MARITIME BOUNDARY DELIMITATION 74 (1992).

[59] *Id.* at 85.

[60] *UNCLOS*, *supra* note 5, arts. 7(1), 121(3).

[61] REISMAN & WESTERMAN, *supra* note 58, at 89. The Court in the *Black Sea* case did not select Serpents' Island, which is located 20 nm from *terra firma* as a base point. *Romania v. Ukraine*, 2009 I.C.J. 62, ¶ 149.

[62] *UNCLOS*, *supra* note 5, art 13(1).

121(2) of UNCLOS, which unmistakably states that islands are entitled to equal breadth of territorial sea, contiguous zone, EEZ, and the continental shelf as other land territory.[63] This definition, strictly applied, indicates that the location of the island, the length of its coastline, or other special considerations should have no bearing on the delimitation of maritime boundaries. If the area overlaps with the maritime zone generated by the mainland or other islands, it should simply be divided equally. Yet, "[b]oth State practice and jurisprudence on delimitation provide that islands may be characterized as "limited" or "no-effect" in a delimitation process depending on the various characteristics."[64] The *Libya/Malta* case significantly undermined the rights accorded to island states whose maritime zones are in conflict with the *terra firma*.

The *Libya/Malta* case stands for the proposition that the median line between an island state and the mainland will be adjusted in favor of the latter. The Court ruled that the coastal length is a "pertinent circumstance . . . in assessing ratios of proportionality" to shift the initial median line for the purpose of continental shelf delimitation.[65] The underlying principle is that sovereign equality is not absolute *vis-à-vis* maritime boundary delimitation: "it is evident that the existence of equal entitlement, *ipso jure* and *ab initio*, of coastal States, does not imply an equality of extent of shelf, whatever the circumstances of the area; thus reference to the length of coasts as a relevant circumstance cannot be excluded *a priori*."[66] Rather, the default position seems to be that the longer the coast, the greater the maritime area. This standard is a *prima facie* proof of bias against islands in light of the fact that islands, sub-continental pieces of land, are likely to be substantially smaller in size, hence enjoy a shorter coastal length than the *terra firma*. The Court not only ignored the uninhabited Maltese island of Filfla, which is another example of how a minor maritime feature was erased from the map to concoct an equitable median line, but also compared the length of relevant coasts to move the median line towards Malta:

> Having drawn the initial median line, the Court has found that that line requires to be adjusted in view of the relevant circumstances of the area, namely the considerable disparity between the lengths of the coasts of the Parties here under consideration, the distance between the coasts, the placing

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[63] *Id.* art. 121, para 2.

[64] YUCEL ACER, THE AEGEAN MARITIME DISPUTES AND INTERNATIONAL LAW 189 (2003).

[65] Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13 (June 3).

[66] *Id.* ¶ 54.

> of the basepoints governing any equidistance line, and the general geographical context.[67]

When two opposite states share a continental shelf, the coastal state with a longer coastline has a greater entitlement over the area. Simply put, the rights of the coastal state will eclipse those of an island when the two are in conflict because island states typically have significantly shorter coastlines than nearby mainland states.

The *Libya/Malta* case left open the question of whether, and if so, to what extent, it was relevant that Malta was an independent island state. The implication of the ruling was that "the [median] line would have been even more unfavorable to Malta had it not been an independent state."[68] That was precisely what happened to St. Pierre and Miquelon in *Canada/France* arbitration over these French islands along the Canadian coast. In *Canada/France* arbitration, the arbitral panel was asked to determine the status of two small French islands located twelve nm from the Canadian coast. Canada argued that they can have only a partial effect, while France pressed for the use of the equidistance line that accorded them full weight. The panel applied the principle of proportionality[69] to accord the islands a reduced value, namely a limited EEZ and twenty-four nm of partial enclave toward the west. Much like the *Libya/Malta* case, the rights of the French islands were considerably compromised when they were in competition with the mainland.

In *Nicaragua v. Colombia*, the Court faced a similar question of having several offshore Colombian islands within Nicaragua's maritime zones. San Andrés, Providencia and Santa Catalina, three relatively sizeable islands, were selected as base points from which the provisional delimitation line was drawn. The Court then followed the *Libya/Malta* analysis by comparing the huge disparity in length between the relevant Colombian coast and that of Nicaragua.[70] The disproportion, which was measured to be approximately 1:8.2, became a major impetus for the Court

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[67] *Id.* ¶ 78.

[68] Ted L. McDorman, *The Canada-France Maritime Boundary Case: Drawing a Line Around St. Pierre and Miquelon*, 84 AM. J. INT'L L. 157, 180 (1990).

[69] Although the *Libya/Malta* case stated that the proportionality of coastlines was not an independent principle of boundary construction, the Court nonetheless adjusted the provisional equidistance line in favor of Libya accounting for the disproportionate length of the coastline. *See Libya/Malta*, 1985 I.C.J. 13, ¶ 58. The *Gulf of Maine* case noted that the principle of proportionality could be considered. Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States), 1984 I.C.J. 246 (Oct. 12).

[70] *See* Territorial and Maritime Dispute (Nicar. v. Col.), 2012 I.C.J. 1, ¶ 211 (Nov. 19), *available at* http://www.icj-cij.org/docket/files/124/17164.pdf.

to adjust the provisional line further seaward from Nicaragua. Moreover, the Court deemed that the cut-off effect on Nicaragua produced by a few small Colombian islands that are not a "continuous mainland coast . . . is a relevant consideration which requires adjustment or shifting of the provisional median line in order to produce an equitable result."[71]

Rule. In this scenario, courts will (i) draw a provisional equidistant line and (ii) adjust the line against the island (more so if the island is not an independent state) considering the length of its coastline. The proportionality principle seems applicable even in the absence of a precise formula.

E. Islands Located on "the Wrong Side" of the Median Line

Land dominates the sea in determining the maritime boundary even when the island is located closer to the neighboring state.[72] The presence of islands on "the wrong side" of the median line, i.e., within the maritime boundary of a neighboring state, also does not alter the general location of the median line. The conventional rule is that these islands, notwithstanding Article 121(2) of UNCLOS, cannot claim more than a territorial sea enclave. Moreover, the opposite or adjacent state is entitled to adjust the median line to compensate for the lost area. Courts are reluctant to give islands full effect applying the principle of equity, since doing so would disrupt the allocation of maritime zone that are highly prejudicial to the mainland states with long coastlines.

In the *Channel Islands* arbitration, the arbitral panel determined that the primary boundary of the continental shelf, despite the presence of the Channel Islands, was the median line.[73] The Channel Islands, totally detached geographically from the United Kingdom, were located within the arms of a gulf on the Normandy coast. The presence of the Channel Islands on the French side of the median line was considered in accordance with the principle of equity, as developed in *North Sea Continental Shelf Cases* and Article 6(2) of the 1958 Convention on the Continental Shelf.[74] Thus,

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[71] *Id.* ¶ 215.

[72] Jiuyorig Shi, *Maritime Delimitation in the Jurisprudence of the International Court of Justice*, 9 CHINESE J. INT'L 271, 275 (2010).

[73] *Channel Islands* Arbitration, 18 I.L.M. 397, ¶ 201 (1979).

[74] Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Convention on the Continental Shelf, art. 6(2), Apr. 29, 1958, 499 U.N.T.S. 311.

these islands were accorded a twelve nm belt, while the median line was adjusted in proportion to compensate for the area taken away from France. Major redrawing of the median line accounting for these islands was deemed tantamount to "a radical distortion of the boundary creative of inequity."[75] This case illustrates how islands will be treated when located on "the wrong side" of the median line. Unlike the mainland that is entitled to areas beyond the territorial sea, islands possess a markedly diminished right under the "only-12-nm-territorial-sea" rule.

Rule. If islands exist on "the wrong side" of the median line, it is likely that the court would support a three-step solution: (i) the primary boundary will be drawn on an inter-coastal equidistant line, (ii) twelve nm enclaves will be given to the islands, and (iii) the neighboring state will acquire area along the median line proportional to that was taken away.

F. Islands Located on "the Right Side" of the Median Line

Similarly, the juridical value of islands located on "the right side" of the median line is also significantly depreciated. "The right side" for both adjacency and oppositeness refers to the situation in which the island is located within its maritime zone after the provisional equidistant line had been drawn. Again, the pendulum has greatly shifted against according equal juridical value to islands as the mainland. In *Tunisia/Libya*, the ICJ reaffirmed the trend that "only partial effect has been given to islands situated close to the coast."[76] The existence of islands within one's provisional equidistant line is a special consideration, but not a dispositive factor that can significantly alter the position of the median line. The judgment suggests that islands have minimal impact on the equidistant line. In fact, the Court dismisses the possibility that the small Filfla Island could have a disproportionate effect on the equidistant line.[77] Therefore, this case illustrates the continuing trend that the presence of islands does not have much impact in shaping the median line. In *Qatar v. Bahrain*, the Court endorsed the principle of adjusting the median line in light of special circumstances, including islands. Yet, more often than not, islands are only entitled to a partial effect:

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[75] JAYEWARDENE, *supra* note 45, at 444.

[76] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, ¶ 129 (Feb. 24).

[77] In *Libya/Malta*, the island of Filfla that was two and a half miles from Malta had no effect on the delimitation of the median line: "the equitableness of an equidistant line depends on whether the precaution is taken of eliminating the disproportionate effect of certain 'islets, rocks and minor coastal projections.'" Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13, ¶ 64 (June 3).

> In most cases, however, the Court will give the maritime feature a partial effect on the delimitation line . . . generally the further out to sea an island is located, the more partial will be the effect given because of the greater potential for distortion of the boundary. In some cases, such as the *Qatar v. Bahrain* case, the island will be given almost no effect.[78]

The inconsistency between Article 121(2) of UNCLOS and the recent jurisprudence over the significance of islands is apparent; also, the diminished impact of islands will be directly proportional to their size and inversely proportional to their distance from the coast.

In the *Black Sea* case, the Court declared that it "may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration."[79] Serpents' Island not only failed to generate a maritime zone beyond the twelve nm territorial sea, but proved to be irrelevant in drawing the maritime boundary between the two states.[80] The Court pointed to its distance from the coast as a critical factor in denying the right to serve as a base point.[81] Also, since the territorial sea enclave is located within the maritime zone of the coastal state, the median line was not adjusted to account for the carved-out area. As a consequence, the rights that the coastal state can claim over an island located on "the right side" of the median line is considerably limited.

In addition, the *Black Sea* judgment dodged the question of whether Serpents' Island falls under Article 121(1) of UNCLOS, and ruled that the twelve nm territorial sea was granted not because of its status as an island, but pursuant to bilateral agreements between the two states.[82] Customary international law and the UNCLOS state that "every island, no matter what its size has a territorial sea."[83] The *Black Sea* court made a strategic move to avoid peripheral, yet sensitive subjects such as (i) clarifying the definition of an island under Article 121(1) of UNCLOS and (ii) verifying whether a twelve nm arc around an island or islet will be recognized in the absence of an explicit bilateral agreement. The answer to the latter could have far-reaching implications *vis-à-vis* tiny maritime features, such as

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[78] Shi, *supra* note 72, at 280.

[79] Maritime Delimitation in the Black Sea (Rom. v. Urk.), 2009 I.C.J. 62, ¶ 185 (Feb. 3).

[80] Jon M. Van Dyke, *The Romania v. Ukraine Decision and Its Effect on East Asian Maritime Delimitations*, 15 OCEAN & COASTAL L.J. 261, 261 (2010).

[81] "However, Serpents' Island, lying alone and some 20 nautical miles away from the mainland, is not one of a cluster of fringe islands constituting 'the coast' of Ukraine." *Romania v. Ukraine*, 2009 I.C.J. 62, ¶ 149.

[82] *Id.* ¶ 188.

[83] CHURCHILL & LOWE, *supra* note 41, at 49.

Okinotorishima. Still, such reluctance is yet more evidence of the controversy—namely the discord between Article 121(2) and judicial interpretation—surrounding the juridical status of islands in maritime boundary delimitation.

Rule. When an island is located landward of the median line but too far to constitute the coast, the proper rule is to (i) draw a provisional equidistant line between the two states and (ii) draw a twelve nm territorial belt around the island. The median line will remain intact according to the principle of equity.

G. Adjacent States: Territorial Sea v. Exclusive Economic Zone

Delimitation of maritime areas between two adjacent states is a two-part process, one pertaining to the territorial sea under Article 15 and the other concerning the partitioning of EEZ under Article 74.[84] Despite the obvious differences in the letter, the spirit of these two provisions is the same: both seek to achieve an equitable solution either by specifically requiring the median line or a line that is equitable.[85] But what is equitable for splitting the territorial sea does not necessarily extend to EEZ. Existence of a non-negligible island near the coast that is detached from the baseline is an additional complication. The rule of thumb is that even if the island may have an important bearing on the delimitation of the territorial sea, the greater EEZ boundary will remain unaffected.

In the *Bay of Bengal* case, the Tribunal was faced with the issue of St. Martin's Island that has a surface area of some 8 km^2 and is located approximately 6.5 nm southwest of the Bangladesh land boundary terminus.[86] Although the island belongs to Bangladesh, it is closer to the coast of Myanmar, while being situated within the territorial sea of both states.[87] The Tribunal concluded that St. Martin's Island is a significant maritime feature—considering its size, population, and economy—that

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[84] *UNCLOS*, *supra* note 5, arts. 15, 74.

[85] Article 15 specifically requires that, absent contrary agreement, parties must draw "the median line every point of which is equidistant from the nearest points on the baselines," whereas Article 75 refers to the application of "international law . . . in order to achieve an equitable solution." *Id.* arts. 15, 75.

[86] *Bangladesh v. Myanmar* further claims that the island sustains a permanent population of about 7,000 people, while serving as "an important base of operations for the Bangladesh Navy and Coast Guard." Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ¶ 143 (ITLOS Reports 2012), *available at* http://www.worldcourts.com/itlos/eng/decisions/2012.03.14_Bangladesh_v_Myanmar.pdf.

[87] *Id.* ¶ 149.

deserves "full effect in drawing the delimitation line of the territorial sea."[88] Yet, beyond the outermost point of the island's territorial sea, the judgment takes a 180-degree turn. It seems as if the Tribunal implemented a balancing test between (i) the right of a middle-size, non-negligible island to generate maritime areas and (ii) the application of equitable principles considering the coastal length of the two states. The former eclipses the latter with respect to the territorial sea—i.e., disproportionate effect on the median line of the dominant coastal relationship is acceptable to give full effect to a significant maritime feature *a propos* territorial sea—but the opposite is true for EEZ and continental shelf delimitation.

While upholding the equidistance-relevant circumstances method, the Tribunal rejected St. Martin's Island as a relevant circumstance once the territorial sea delimitation was over. According to Myanmar, if St. Martin's Island were given full effect on EEZ delimitation, it would "generate at least 13,000 square kilometres of maritime area for Bangladesh in the framework of the delimitation between continental masses . . . [which] is manifestly disproportionate."[89] The Tribunal sided with Myanmar, declaring that "giving effect to St. Martin's Island in the delimitation of the exclusive economic zone and the continental shelf would result in a line blocking the seaward projection from Myanmar's coast in a manner that would cause an unwarranted distortion of the delimitation line."[90] An island can be relevant for the delimitation of the territorial sea between two adjacent states; yet, the *Bay of Bengal* case is in line with the proposition that islands are treated inferior in the delimitation of ocean boundary in entirety. Even a middle-size island is unlikely to constitute a relevant circumstance to substantially shift the median line beyond the territorial sea limit.

H. The Plight of De Minimis Islands

The ambiguity of Article 121 of the Convention has been a constant source of political and academic dispute. Indeed, the provision leaves several important questions unanswered:

> Can a lighthouse be considered as sustaining "human habitation"? Does "economic life" necessarily include production of food? Does this expression mean economic activities which would make the people inhabiting the rock self-sufficient? What is the relationship between the size of the rock and the two conditions in paragraph 3 of Article 121? . . . Is the reference to "or"

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[88] *Id.* ¶ 152.
[89] *Id.* ¶ 314.
[90] *Id.* ¶ 318.

> between "human habitation" and "economic life" to be interpreted as being conjunctive or disjunctive?[91]

Still, several conclusions can safely be drawn amidst these uncertainties. First of all, the size of the protruding portion of the land in the ocean is germane as a yardstick to measure the likelihood of habitability and availability of resources. That is, the smaller the size of the island, the lower the possibility of supporting human habitation and economic activity. It is unsurprising that the Tribunal in the *Bay of Bengal* case cited the size of St. Martin's Island as one of the factors for giving it full effect in the delimitation of the territorial sea.[92] Second, self-sufficiency, or lack thereof, is a decisive proof for or against the classification as an island, as opposed to a rock. Such economic independence posits the existence of human population, as well as the production and consumption of goods.[93] Third, notwithstanding the conjunctive and disjunctive divide, the absence of both is conclusive evidence against according the island status.

The rights accorded to *de minimis* islands are marginal 1) as a source of maritime zones in and of themselves, and 2) when in conflict with a larger landmass. Insignificant maritime features are unpromising as autonomous sources of rights. Can they claim their own territorial sea? UNCLOS is silent on this issue and silence in effect could signify approval, i.e., *expressio unius est exclusio alterius*.[94] In the absence of an explicit prohibition, a country may be able to demand this tacit right.[95] However, area beyond the territorial sea is a different issue because there is an express prohibition in Article 121(3) that rocks may not generate EEZ.[96] It is highly doubtful if Okinotorishima, "which consists of two eroding protrusions no larger than king-size beds [and] meets the description of an

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[91] BUDISLAV VUKAS, THE LAW OF THE SEA: SELECTED WRITINGS 45 (2004).

[92] "In the view of the Tribunal, St. Martin's Island is a significant maritime feature by virtue of its size and population and the extent of economic and other activities." *Bangladesh v. Myanmar*, Case No. 16, Judgment of Mar. 14, 2012, ¶ 151.

[93] Therefore, the argument naturally follows that an island state, however small, cannot be categorized as a rock. Definition of a rock espoused by Article 121(3) and characteristics of a nation-state are inherently contradictory. The latter, by definition, entails the existence of "inhabitants" and "resources," i.e., human habitation and economic life. *See UNCLOS, supra* note 5.

[94] *Id.*

[95] "(1) Japan's statement that Okinotorishima is an island as defined in Article 121 Paragraph 1 of the Law of the Sea Convention is not in violation of the provision of the treaty; (2) Japan is entitled in accordance with international law to claim a 12-nm territorial sea and 24-nm contiguous zone for Okinotorishima." YANN-HUEI SONG, OKINOTORISHIMA: A "ROCK" OR AN "ISLAND"? 176 (Seong-Yong Hong et al. eds., 2009).

[96] *UNCLOS, supra* note 5.

uninhabitable rock that cannot sustain economic life of its own,"[97] can generate an EEZ; at the very least, China has vocally objected.[98] Judges are equally likely to be critical of a small island appropriating a vast EEZ that is unduly larger than its landmass.[99] Both in *Volga*[100] and *Monte Confurco*,[101] Judge Budislav Vukas, former Vice-President of the International Tribunal for the Law of the Sea ("ITLOS"), opposed the practice of conferring EEZ rights on tiny islands.[102] It is no secret that some countries attempt to grab vast areas of the ocean with small coastal features far offshore.[103] Such controversial conduct, whether successful or not, will hit tough political and judicial snags.

The fate of *de minimis* islands is even grimmer as a reason to adjust the equidistant line between two neighboring states. These insignificant features are not only unable "to generate exclusive economic zones," but

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[97] Jon Van Dyke, *Speck in the Ocean Meets Law of the Sea*, N.Y. TIMES, Jan. 21, 1988. He further argues that Okinotorishima "is not, therefore, entitled to generate a 200-mile exclusive economic zone." *Id.*

[98] Starting in 2004, China began raising questions concerning the legal status of Okinotorishima and the Japanese claims regarding sovereign rights and jurisdiction in the waters surrounding this feature[.] In July 2005, Taiwan also raised questions against Japan concerning the legal status of Okinotorishima, and, mirroring china's viewpoint, Taiwan took the position that Okinotorishima's 200 nm EEZ is insupportable in light of the relevant international legal regulations.

SONG, *supra* note 95, at 146.

[99] *See* Volga Case (Russ. Fed'n v. Austl.), Case No. 11, Prompt Release, Judgment of Dec. 23, 2002, at 30, ¶ 10 (ITLOS Reports 2002), *available at* http://www.worldcourts.com/itlos/eng/decisions/2002.12.23_Russian_Federation_v_Australia.pdf; *see also* Monte Confurco Case, (Sey. v. Fr.), Case No. 6, Prompt Release, Judgment of Dec. 18, 2000, ¶ 86 (ITLOS Reports 2000), *available at* http://www.worldcourts.com/itlos/eng/decisions/2000.12.18_Seychelles_v_France.pdf.

[100] *See Volga*, Declaration of Vice-President Vukas, at 30, ¶ 10.

[101] *Monte Confurco*, Declaration of Judge Vukas, at 31.

[102] In *Monte Confurco*, he filed a declaration stating that:

> [I]t is highly questionable whether the establishment of an exclusive economic zone off the shores of these 'uninhabitable and uninhabited' islands [the Kerguelen Islands] . . . is in accordance with the reasons which motivated the Third United Nations Conference on the Law of the Sea to create that specific legal régime, and with the letter and spirit of the provisions on the exclusive economic zone[.]

Id. Similarly, in *Volga*, he analyzes the initial reasons why countries agreed to establish EEZ regime to explain that "the establishments of exclusive economic zones around rocks and other small islands serves no useful purpose and that is contrary to international law." *Volga*, ITLOS Reports 2002, Declaration of Vice-President Vukas, at 30, ¶ 10.

[103] *See* Wyatt Olson, *"Sea Grab" Sparks Tensions in South China Sea*, STARS AND STRIPES (Aug. 13, 2012), http://www.stripes.com/news/sea-grab-sparks-tensions-in-south-china-sea-1.185646; *see also* Fred Weir, *Russia's Arctic "Sea Grab"*, THE CHRISTIAN SCIENCE MONITOR (Aug. 14, 2011), http://www.csmonitor.com/world/Global-Issues/2011/0814/Russia-s-Arctic-sea-grab.

also "should be ignored in delimiting a maritime boundary."[104] There is a growing consensus among international courts to discount tiny maritime features in boundary delimitation cases.[105] If, at any point, these "uninhabitable and uninhabited" islands produce a disproportionate effect on the boundary line, they will be entirely ignored:

> The Court observes that Qit'at Jaradah is a very small island, uninhabited and without any vegetation. This tiny island . . . is situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently, if its low-water line were to be used for determining a basepoint in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature.[106]

Furthermore, according to Judge Vladlen Vereshchetin, Qit'at Jaradah, which measures a mere twelve by four meters at high tide,[107] cannot be viewed as having "the legal status of an island as provided for in the 1982 Convention[.]"[108] Island or not, a rock-like trivial maritime feature is evidently irrelevant for drawing the median line between two dominant coasts. In *Libya/Malta*, the uninhabited islet of Filfla met the same fate: "[To] eliminat[e] the disproportionate effect of certain 'islets, rocks and minor coastal projections' . . . [t]he Court thus finds it equitable not to take account of Filfla in the calculation of the provisional median line between Malta and Libya."[109] Significant treatment of uninhabitable protrusions in the ocean also runs afoul of the principle of proportionality. Though they may generate territorial sea of their own, rights emanating from relatively miniscule coastlines will be dwarfed by that of the mainland or islands with significant coasts. Article 121(3) of UNCLOS, if not the rule of proportionality espoused in *Libya/Malta* Case, thus renders tiny islands irrelevant for the purpose of maritime boundary delimitation.[110]

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[104] Van Dyke, *supra* note 80, at 273.

[105] *See* Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. 40 (Mar. 16).

[106] *Id.* ¶ 219.

[107] *Id.* ¶ 197.

[108] *Id.* ¶ 13.

[109] Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13, ¶ 64 (June 3).

[110] *Id.* ¶ 59; *see UNCLOS*, *supra* note 5.

I. Island State v. Island Belonging to a State

UNCLOS does not differentiate between island states and dependent islands in terms of the size of maritime area they generate;[111] in fact, their legal entitlement is politically neutral at least on its face. The application, however, is not so straightforward. Notwithstanding the reluctance to openly bestow more rights on independent island states, political status frequently becomes a factor in the analysis.[112] In *Libya/Malta*, the ICJ stated that:

> Malta being independent, the relationship of its coasts with the coasts of its neighbors is different from what it would be if it were a part of the territory of one of them. In other words, it might well be that the sea boundaries in this region would be different if the islands of Malta did not constitute an independent State, but formed a part of the territory of one of the surrounding countries.[113]

The principles of non-encroachment and proportionality, in theory, take into account the ratio of coastal lengths irrespective of the status of the island as an independent or dependent state. Yet, the Court tends to grant equal or greater rights to island states: "But the Court seems to imply that, as a dependent territory, Malta's entitlement would have been reduced."[114] The panel in the *Channel Islands* arbitration unequivocally framed the issue as between islands of the United Kingdom and France, not as between the Channel Islands and France.[115] The treatment of Channel Islands "only as islands of the United Kingdom, not as semi-independent States entitled in their own right" was the core reason why only twelve nm enclaves were formed around the baselines with slight adjustment of the median line to account for what was given to the United Kingdom.[116] The implication of the award was that the islands could claim more rights if they were independent states. Some scholars argue that "even relatively small islands

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[111] *UNCLOS*, *supra* note 5.

[112] *Libya/Malta*, 1985 I.C.J. 13.

[113] *Id.* ¶ 53.

[114] Derek Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations*, *in* 1 INTERNATIONAL MARITIME BOUNDARIES 134 (Jonathan I. Charney & Lewis M. Alexander eds., 1993). The Court further suggests that independent island states, at minimum, cannot be worse off than dependent territories: "Since Malta is not party of Italy, but is an independent State, it cannot be the case that, as regards continental shelf rights, it will be in a worse position because of its independence." *Libya/Malta*, 1985 I.C.J. 13, ¶ 72.

[115] *Channel Islands* Arbitration, 18 I.L.M. 397, ¶ 186 (1979).

[116] *Id.*

. . . [that] constitute a single State . . . will in principle be given full effect."[117]

An island state, however small, should be able to claim more than a mere twelve nm territorial sea around its coast, unless geographical circumstances dictate otherwise.[118] No straightforward rule outlines how much more maritime area should be ascribed to an island if it were a nation-state, rather than a dependency. Yet, a small country surrounded by water must automatically be able to assert island status, as opposed to being classified as an islet or a rock. Statehood inherently implies sufficient territory to sustain human population and economic activity; therefore, island states are entitled to all maritime zones under Article 121(2) of UNCLOS subject to the proportionality rule.[119] When the maritime zone of a small island overlaps with that of a coastal state, the court will apply the equidistance-relevant circumstance principle.[120] That is, a provisional median line will be drawn regardless of the size of the island, which could be modified so that there is a reasonable degree of proportionality. All decisions by international courts or arbitral panels would have been much closer to *Libya/Malta* if the disputed islands were independent states. It was determined that Malta as "an independent State . . . cannot be . . . in a worse position because of its independence,"[121] which implies that independent island states have a greater chance of receiving more maritime area than dependent islands.

III. APPLICATION OF THE RULE IN DISPUTED REGIONS

The paper will apply the abovementioned rules to determine the appropriate maritime boundary in contentious areas. All geographic illustrations for this study were generated under the World Geodetic System ("WGS") 84 as geodetic datum through ArcMap 10. Maps were drawn under the geographic coordinate system to minimize distortions and inaccuracies that are inherent in a projected coordinate system.[122] All lines/buffers are geodesic lines/buffers to reflect the earth's curvature.[123]

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[117] CHURCHILL & LOWE, *supra* note 41, at 189.

[118] Here, geographical circumstances could include the total area of available nearby sea being less than twelve nm limit or the drawing of the median line in a narrow ocean resulting in apportionment of less than the ordinary territorial sea.

[119] *UNCLOS*, *supra* note 5.

[120] *Libya/Malta*, 1985 I.C.J. 13, ¶¶ 67-68.

[121] *Id.* ¶ 72.

[122] Due to the limitation of the program, the area was calculated after transposing the relevant coordinates to a projected coordinate system.

[123] Geodesic line is the line of shortest distance between any two points described on a

Buffers, because they are rendered in a geographic coordinate system, appear somewhat distorted, more so as the location moves further away from the equator. Despite the shape of an ellipse to the east and west direction, these buffers are nevertheless an accurate collection of equidistant lines from selected points. Distance scale bar is not included for similar reasons: The absolute distance along the X- and Y-axis measured directly from the illustration is inaccurate, hence misleading.

A. The Outcome-Determinative Step: Identifying Relevant Coasts

The demise of the pro-island regime coincided with a subtle, yet drastic change in the rules of maritime boundary delimitation. Over time, identifying the relevant coast unquestionably became the single most critical step. The configuration of the relevant coast determines the baseline, the initial projection of the maritime area, as well as the final apportionment under the rule of proportionality. The extent and shape of maritime zone is in essence contingent upon the coast, both in the beginning and end of the process:

> [Relevant coasts are used to] determine what constitutes in the specific context of a case the overlapping claims to these zones . . . [and] to check, in the third and final stage of the delimitation process, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas falling either side of the delimitation line.[124]

The provisional equidistance line drawn on the basis of the costal configuration is also subject to change in the final stage to ensure that the area is roughly proportional to the length of relevant coasts.

In the *Black Sea* case, the Court adopted a three-step methodology to delimit the maritime boundary between two states. First, the Court used objective geometrical criteria to determine base points along the relevant coasts to draw the provisional equidistance and median lines for adjacent and opposite areas, respectively. Particularly pertinent is Tsyganka Island. The effect of an island on boundary delimitation is maximized if it is selected as a base point for being close to the *terra firma*. In other words, Tsyganka Island, being part of the relevant coast, suddenly became a dispositive factor in determining the equidistance line. By contrast, Serpents' Island, which lies approximately 20 nm to the east of Ukraine's Danube delta, was deemed inappropriate as a base point and irrelevant throughout the delimitation process.

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reference spheroid that represents the earth.

[124] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 62, ¶ 78 (Feb. 3).

Second, the Court considered potential relevant circumstances—namely, the disparity between relevant coasts,[125] the enclosed nature of the Black Sea, the presence of Serpents' Island, and economic activities in the region—that would require adjustment of the provisional equidistant line. None of these factors were recognized as a relevant circumstance, which substantiates the claim that small islands, compared to the mainland coast, wield insignificant authority in boundary delimitation.

Finally, the Court analyzed whether the envisaged delimitation line "does not lead to any significant disproportionality by reference to the respective coastal lengths and the apportionment of areas that ensue."[126] The ratio of the coastal length and the relevant area, respectively, were determined to be 1:28 and 1:21, which was not so disproportionate as to warrant adjustment of the delimitation line. Even though the Court did not specify the degree of disproportion needed to trigger an adjustment, the judgment clearly indicates the principle that the ratio of relevant coasts must approximate the delimited area.

The *Bay of Bengal* case also employed the three-prong delimitation process. The Tribunal selected base points on relevant coasts, considered relevant circumstances, and checked whether the delimited line "results in any significant disproportion between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas allocated to each Party."[127] After adjusting the provisional equidistance line to make up for the cut off effect created by the concavity of the coast of Bangladesh, the Court proceeded to check if the ratio of allocated areas reflects the ratio of the length of relevant coasts.[128] In short, relevant coasts will have far-reaching implications, both in the process of drawing the provisional equidistance line and in finalizing the approximate ratio of allocated areas. Islands that are not part of the relevant coast will have negligible impact on the amount of maritime area generated by the *terra firma*.

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[125] The Court qualified the statement by stating that the adjustment of the provisional equidistance line accounting for disparities between the coastal lengths is unwarranted "at this juncture." *Id.* ¶ 168.

[126] *Id.* ¶ 67.

[127] Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ¶ 240 (ITLOS Reports 2012), *available at* http://www.worldcourts.com/itlos/eng/decisions/2012.03.14_Bangladesh_v_Myanmar.pdf.

[128] The Court determined the ratio of the relevant coasts of the Parties to be 1:1.42 in favor of Myanmar and the ratio of the allocated areas to be approximately 1:1.54 in favor of Myanmar. The disparity in the ratios did "not lead to any significant disproportion in the allocation of maritime areas to the Parties relative to the respective lengths of their coasts that would require the shifting of the adjusted equidistance line in order to ensure an equitable solution." *Id.* ¶ 499.

Likewise, *Nicaragua v. Colombia* implemented the three-prong delimitation process. As a result, recent delimitation cases by major international dispute resolution bodies highlighted the length of relevant coasts as an outcome-determinative factor. The relevant coast was again a critical factor in the first stage of establishing the provisional delimitation line and in the final stage of conducting the disproportionality test.[129] Here, the Court reaffirmed the definition of the relevant coast as the "coast which projects into the area of overlapping potential entitlements and not simply those parts of the coast from which the 200-nautical-mile entitlement will be measured."[130] Not all coasts that face the relevant area can "generate projections which overlap with projections from the coast of the other Party."[131] This is a critical distinction, especially in light of the widespread use of the disproportionality test, because the possibility of obtaining greater allotment increases with a longer relevant coast.

B. The Relevant Area

It is important to ascertain beforehand what the relevant area means in international law. The relevant area is, and should be limited to "the overlapping entitlements of the Parties that is relevant to . . . delimitation."[132] Despite such a clear definition, the Tribunal in *Bay of Bengal* conflated the relevant area and the relevant coast:

> [T]he segment of Myanmar's coast that runs from Bhiff Cape to Cape Negrais is to be included in the calculation of the relevant coast. Therefore, the southern maritime area extending to Cape Negrais must be included in the calculation of the relevant area for the purpose of the test of disproportionality.[133]

This statement is erroneous because the projections of relevant coasts do not necessarily correspond to the relevant area. The two are distinctive terms of art with an increasing significance because the disproportionality test compares their ratios to shift the equidistance line if necessary.

The relevant area must strictly be the disputed area where both parties can legitimately claim ownership rights in the absence of the other. Bangladesh's southern maritime entitlement extends only as far as the outer boundary of the 200 nm buffer from the Naaf River base point.

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[129] Territorial and Maritime Dispute (Nicar. v. Col.), 2012 I.C.J. 1, ¶¶ 190-93 (Nov. 19).

[130] *Id.* ¶ 145.

[131] *Id.* ¶ 150 (citing Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 62, ¶ 99 (Feb. 3)).

[132] *Id.* ¶ 477.

[133] *Id.* ¶ 491.

Figure 1.1: 200 nm Buffers from Coastal Points in *Bay of Bengal*[134]

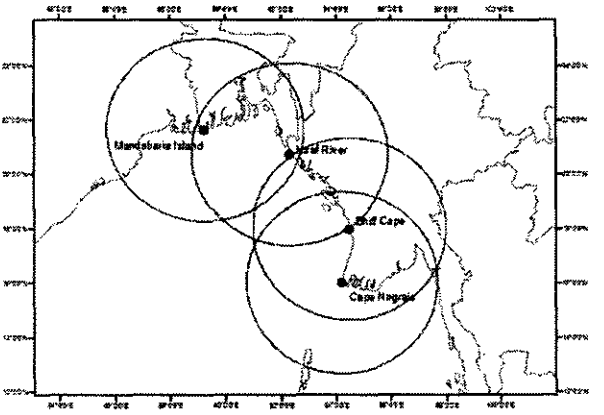
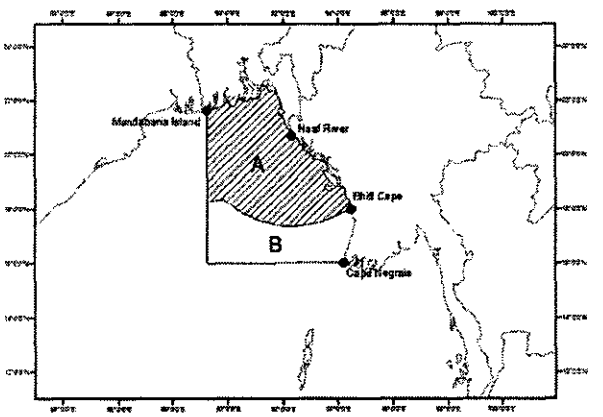


Figure 1.2: The Modified Disputed Area for Bangladesh and Myanmar[135]



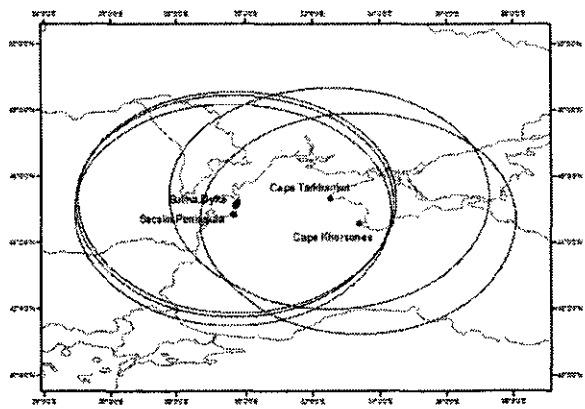
[134] In *Bay of Bengal,* the Tribunal selected five points along the coast of both nations to draw the relevant coast. The Kutubdia Island point was omitted because the point does not produce a projection beyond that from the Mandabaria Island and Naaf River points; hence, immaterial for the purpose of showing the boundary of the appropriate relevant area. *See* Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ¶¶ 198-205 (ITLOS Reports 2012), *available at* http://www.worldcourts.com/itlos/eng/decisions/2012.03.14_Bangladesh_v_Myanmar.pdf.

[135] This map is quite different from the relevant area identified by the Tribunal. Indeed, the Tribunal identified both Area A and B as the relevant area. The boundary between A and B represents the limit of 200 nm projections from the Naaf River, which is close to β1 base point used to draw the equidistance line, and Mandabaria Island. β1 is the southernmost base point for Bangladesh. Simply put, Bangladesh does not have a base point that could project into Area B; therefore, it is inaccurate to include Area B in the calculation of the relevant area.

As drawn in *Figure 1.1*, the 200 nm buffer from that base point roughly intersects with Bhiff Cape, but clearly does not extend beyond that intersection. In other words, the area seaward of the Naaf River base point buffer, marked B in *Figure 1.2*, evidently belongs to Myanmar. This area cannot be considered "relevant" for not being in "dispute"; hence, the Tribunal technically did not have jurisdiction over the area south of Bhiff Cape without showing that the natural prolongation of the continental shelf extends beyond 200 nm. Therefore, the relevant area in *Bay of Bengal* should have been limited to A in *Figure 1.2*.

The coast from Bhiff Cape to Cape Negrais, however, is still a part of the relevant coast because it could generate projections that overlap with that from the coast of Bangladesh. In *Nicaragua v. Colombia*, the Court stated that the mainland coast of Colombia facing the disputed region but lies beyond 200 nm from the Nicaraguan EEZ/continental shelf terminus is not the relevant coast because it "does note generate any entitlement in [the relevant] area."[136] If, however, the coast generates projection into the relevant area, it must be considered the relevant coast. A portion of the 200 nm buffer from Cape Negrais overlaps with the Naaf River buffer, as shown in *Figure 1.1*.

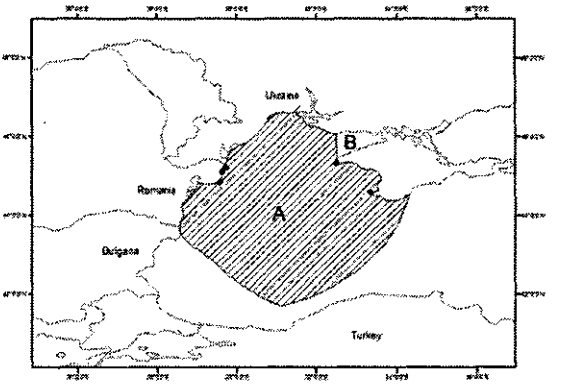
Figure 2.1: 200 nm Buffer from Coastal Points in *Romania v. Ukraine*[137]



[136] Territorial and Maritime Dispute (Nicar. v. Col.), 2012 I.C.J. 1, ¶ 151 (Nov. 19).

[137] The coastal points function as the center of ovals. The 200 nm buffers have such an oval shape, instead of a circle, because geodesic lines in the geographic coordinate system reflect the curvature of the earth. This map clearly shows that the 200 nm projection from Romania and Ukraine in the Black Sea, i.e. the maritime area they could claim in the Black Sea, completely overlaps. If so, all relevant coasts of both parties will adjoin the relevant area.

Figure 2.2: 200 nm Buffer from Coastal Points in *Romania v. Ukraine*[138]



This issue was absent in the *Black Sea* case because base points generated overlapping titles, i.e., the Area A shown in *Figure 2.2*, which represents the intersection of buffers in *Figure 2.1*. In this case, almost all coastlines of both countries had a stake in the relevant area, which is not necessarily true in other situations, including the delimitation of the East Sea and the Taiwan Strait.

C. Relevant Circumstances

International courts and tribunals have identified relevant circumstances other than the relevant coast, the relevant area, and islands that could have either an absolute or relative effect on the delimitation line. A few general guiding features have emerged over the years. First, principles respecting geography take precedence over other "secondary" considerations. Geographical features are "at the heart of the delimitation process."[139] Although international law does not recognize a universally applicable formula to partition the ocean accordingly to the principle of equity, it is commonly understood that the configuration of the land presents a more objective basis for determination than the subjective political, historical, and socio-economic considerations. Geomorphological features of the land also "have no bearing on the elements of . . . physical geography which are

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[138] Area A is the relevant area discounting third party entitlements. Unlike the *Bay of Bengal* case that has the coast from Bhiff Cape to Cape Negrais that should have been considered part of the relevant coast without abutting upon the relevant area, the entire relevant coasts of both countries touch on the relevant area. Area B is excluded because the coasts in this region "do not themselves project on the area to be delimited and thus do not generate any entitlement to the continental shelf and the exclusive economic zone" in Area A. Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 62, ¶ 100 (Feb. 3).

[139] *Canada/France* Arbitration, 31 I.L.M. 1145, ¶ 24 (1992).

relevant for maritime delimitation."[140] In the *Black Sea* case, the Court further stated that artificial installations that do not constitute permanent harbor works are not part of the geography of the coast; hence the seaward end of the Sulina Dyke did not constitute a base point. Geography, in practice, has predominantly been the basis of judicial deliberation: "[i]t is the geographical circumstances which primarily determine the appropriateness of the equidistance or any other method of delimitation in any given case."[141] For example, the configuration of the coast is a dispositive factor for determining the equidistant or median line. The general direction, shape and length of the coast are assessed in their totality to ascertain proportionality, which is "a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion."[142] The dominance of geography accordingly serves as the backbone of maritime boundary delimitation in which deviations are permitted in rare circumstances.

Second, other non-geographical factors could modify the median line. These factors include, *inter alia*, (i) consent-based delimitation lines and (ii) economic parity.[143] Article 15 of the UNCLOS adopts such equidistance-relevant circumstances principle *vis-à-vis* delimitation of overlapping territorial seas:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.[144]

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[140] *Romania v. Ukraine*, 2009 I.C.J. 62, ¶ 129.

[141] *Channel Islands* Arbitration, 18 I.L.M. 397, ¶ 96 (1979).

[142] Arbitration between Barbados and the Republic of Trinidad and Tobago, 27 R.I.A.A. 147, ¶ 238 (2006) (the "*Barbados/Trinidad*" Arbitration), *available at* http://untreaty.un.org/cod/riaa/cases/vol_xxvii/147-251.pdf; "It is therefore primarily the features of geography that have dominated the matter of delimitation. The 'three-dimensional' analyses of geomorphologists, and the structural implications of deep oceanic geology, have played but a relatively small part in the actual delimitation of maritime boundaries." Keith Highet, *The Use of Geophysical Factors in the Delimitation of Maritime Boundaries*, *in* 1 INTERNATIONAL MARITIME BOUNDARIES 164 (Jonathan I. Charney & Lewis M. Alexander eds. 1996).

[143] Other secondary factors include, but not limited to, socio-economic situation, historical title, interest of third states, and security consideration.

[144] *UNCLOS*, *supra* note 5, art. 15.

Agreement between the interested parties could supersede the objective delimitation formula. In the *Eritrea/Yemen* arbitration, the mutually-accepted historical line for fisheries purpose was recognized as a reference point.[145] If such agreement exists, the jurisdiction of an international court or arbitral tribunal can be limited by the boundary prescribed by the arrangement.[146] In addition, economic factors, such as coastal fisheries, oil-wells, and other natural resources, could alter the equidistant line.[147] The *Barbados/Trinidad* arbitration considered at length whether the deprivation of flyingfish fishery constitutes a relevant circumstance. Although the panel ultimately rejected Barbados's claim to adjust the equidistance line in the west much closer to the coast of Tobago, the reasoning was due to the failure to prove the "contention that its fisherfolk have traditionally fished for flyingfish off Tobago for centuries,"[148] not because of an absolute rejection of the relevant circumstances rule.

For the purpose of this study, secondary non-geographical factors will largely be discarded. These considerations are not only changeable over time, but also have a weak foundation in international law:

> Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking.[149]

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[145] *Eritrea/Yemen* Arbitration, ¶¶ 139-64 (Perm. Ct. Arb. Dec. 17, 1999), http://www.pca-cpa.org/showfile.asp?fil_id=459.

[146] Treatment of islands varies from agreement to agreement. The general trend of state practice reflected in agreements is beyond the scope of this paper, but is not inconsistent with judicial decisions. Islands that do not fit to the method of delimitation—i.e., Ecuadorian islands in the Gulf of Guayaquil and the islands of Le Grand Connetable in the Peru-Ecuador agreement and the Brazil France agreement, respectively—are ignored. Likewise, if their sovereignty is in dispute, islands often have no effect on the delimitation line, as was the case of the island of Halul in the Iran-Qatar agreement. Even with respect to agreements, there are numerous instances in which islands have been ignored or received a partial effect. *See* Bowett, *supra* note 114, at 134-47.

[147] The *Channel Islands* arbitration considered the coastal fisheries *vis-à-vis* the delimitation of the continental shelf boundary around the Channel Islands. *Channel Islands* Arbitration, 18 L.L.M. 397, ¶ 187 (1979). The *Tunisia/Libya* case standards for the proposition that the existence of oil-wells is a relevant factor for delimitation. *See* Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Feb. 24). Likewise, the *Libya/Malta* Case stated that the natural resources in general are germane for an equitable delimitation. In the *Denmark* Case, the court shifted the line eastwards to assure equitable access to the capeline stocks by both countries. *See* Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.) 1993 I.C.J. 38 (June 14).

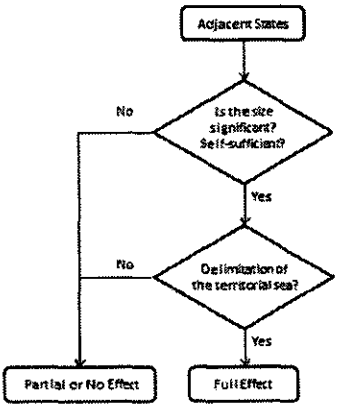
[148] *Barbados/Trinidad* Arbitration, 27 R.I.A.A. 147, ¶¶ 266-71 (2006).

[149] *Id.* ¶ 269.

Maritime boundary, much like a territorial border, must be precise and stable to preserve peaceful coexistence. If the delimitation line is contingent upon the availability of natural resources, depletion or discovery of new resources can be a constant source of border dispute. In order to evaluate the role island plays in delimitation in light of the evolving jurisprudence, this paper will discount all non-geographical elements, such as resources, treaties, and agreements. The Court in *Nicaragua v. Colombia* did not consider decades of fishing regulation enforcement and scientific activities as a relevant circumstance requiring adjustment of the provisional median line; in fact, "the jurisprudence of the Court and of arbitral tribunals shows that conduct will not normally have such an effect" for purposes of boundary delimitation.[150] In addition, agreement is only good as long as it lasts. When parties no longer agree, there needs to be an objective principle for equitably partitioning the ocean. This paper will only take into consideration the permanent and objective geographical considerations in drawing up the equidistant line by which the effect of islands will be measured.

The degree to which islands receive a reduced effect varies depending on their size and location from and in relation to the *terra firma*. The procedure for measuring the weight accorded to islands can be broken down into several steps identified in the flowchart:

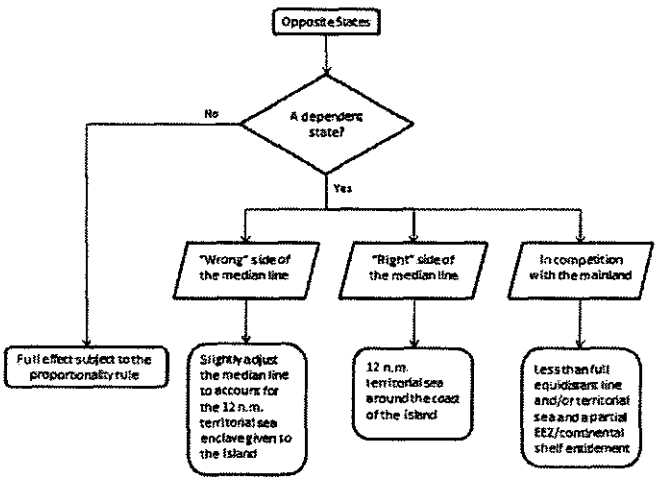
Chart 2: Maritime Boundary Delimitation between Two Adjacent States[151]



[150] Territorial and Maritime Dispute (Nicar. v. Col.), 2012 I.C.J. 1, ¶ 220 (Nov. 19).

[151] If the maritime feature can sustain self-sufficient living, it is an island *per se* regardless of size. Despite the absence of a bright-line rule, if a piece of land is unable to sustain human habitation or economic life, the chances of it being recognized as an island increase with size.

Chart 3: Maritime Boundary Delimitation Between Two Opposite States



Every state has its unique baseline and possibly an island or set of islands that complicates the process of maritime boundary delimitation. Over time, a number of cases have been tried and rules have emerged to make this process more predictable. Following case studies will illustrate how delimitations of maritime boundaries in disputed regions are likely to come out—considering the presence of small islands—if the matters are submitted to an international court.

IV. CASE STUDIES

This research evaluates the recent developments in maritime jurisprudence on islands to prove a critical point: Unless the island is selected as a base point, its impact on the delimitation process will be minimal. Islands not in the immediate vicinity of the coast, i.e., at a distance of more than twelve nm, will either be (i) ignored due to their insignificant size or (ii) given territorial sea rights only.[152] Therefore, the rise of the pro-mainland regime disincentivizes sovereignty disputes over dependent islands driven, in part, by economic interests over the vast EEZ/continental shelf.

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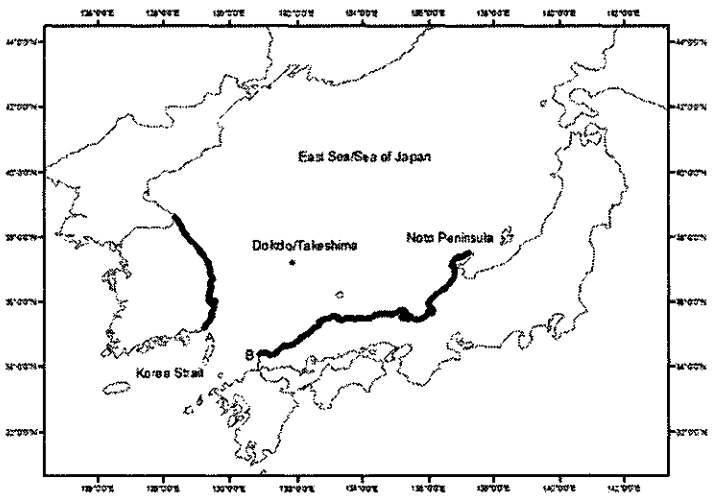
[152] There is, however, a caveat. If the island is an independent state, it is entitled to all maritime zones, only being subjected to the proportionality rule comparing the length of relevant coasts.

A. Case 1: Dokdo/Takeshima Island[153]

For purposes of maritime boundary delimitation, South Korea and Japan are opposite states with significantly overlapping claims. The first step of delimitation involves a good faith effort to select as many coastal points as possible along the coast of both parties whose seaward projection could produce overlapping entitlements.[154] Other areas in the East Sea "are not germane to the case in hand."[155] Therefore, points located east of Noto Peninsula are deliberately omitted. In other words, a 200 nm projection from the coast of South Korea and base points east of Noto Peninsula clearly does not produce any additional overlapping zone. Yet, this area becomes pertinent in drawing the relevant coast at the next stage.

Figure 3: Selecting All Possible Coastal Points



Also, the selection of points ended at points A and B in *Figure 3* where the coasts shift to face the Korea Strait. The coastlines beyond these southwestern points are hence germane for the delimitation of the Korea Strait, which is an entirely separate issue.[156] That is, the coastal length and

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[153] There is an ongoing sovereignty dispute over two rocky islets in the East Sea, named Dokdo in Korean and Takeshima in Japanese. Dokdo has a combined land area of 0.18 km^2. It is located 88 km (47 nm) from Ulleung Island and 158 km (86 nm) from the Oki Islands.

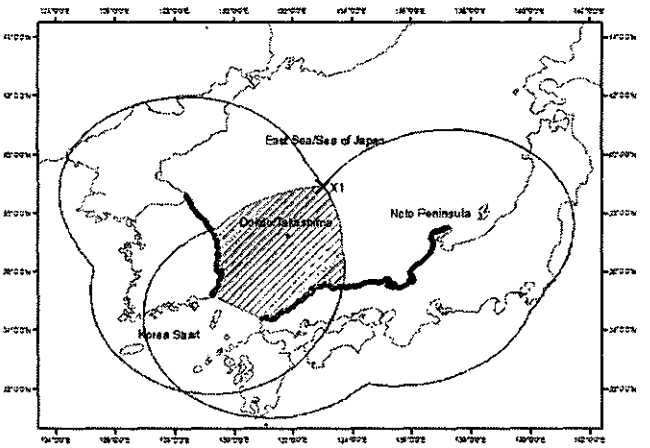
[154] *See infra* Figure 3.

[155] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 62, ¶ 110 (Feb. 3).

[156] The Tribunal in the *Barbados/Trinidad* arbitration rejected the separation of the relevant area into Caribbean and Atlantic sectors, but it did not outright denied the possibility that geographic features, such as "narrowness or cape or protuberance," could

area allocated westward of points A and B towards the Yellow Sea should have no bearing on the delimitation of the East Sea, which must be the product of apposite geographical features limited to the area at issue.

Figure 4: 200 nm Buffers from Coastal Points and the Relevant Area



After selecting coastal points for both countries, the next important step is to draw the 200 nm collapsed geodesic buffer[157] of all points, as shown in *Figure 4*. The 200 nm buffer represents default EEZ/continental shelf entitlements absent special circumstances in which one party can claim up to 350 nm outer limit of the continental shelf.[158] Beyond the outer limits of the shaded area, the area ceases to be relevant; only one or no country has rights over the area. For instance, the sea around Noto Peninsula strictly belongs to Japan because no base point from the coast of South Korea can reach that far. The total size of the shaded area in *Figure 4* is approximately 134,079 km^2.

The shaded portion in *Figure 4* represents the relevant area where both parties have conflicting rights: It is only this area that needs to be divided. In other words, if the situation is brought before a court, subject-matter

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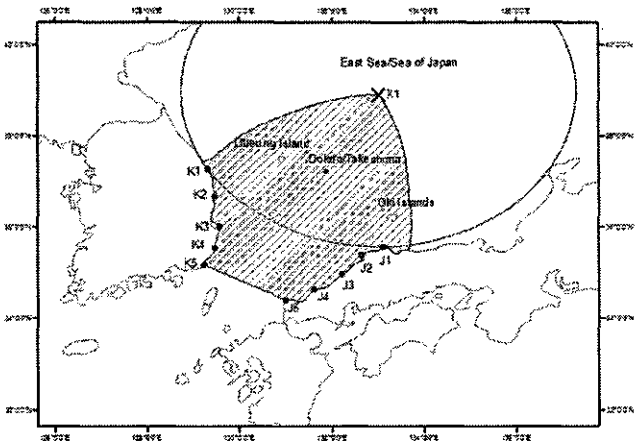
justify making such a distinction. *Barbados/Trinidad* Arbitration, 27 R.I.A.A. 147, ¶ 313 (2006). Here, taking into account the geographical consideration of the coast of Korea, it is legitimate to independently delimit the maritime area in the East Sea and the Korean Strait. The length of the relevant coast or the size of the allocated areas in the former should not affect the latter, and *vice versa*.

[157] A collapsed geodesic buffer refers to a collection of buffers from various base points using geodesic lines. The collapsed buffer connects the furthest points created by each buffer.

[158] *UNCLOS*, *supra* note 5, art. 76(5).

jurisdiction exists only with respect to the shaded area. Also, this area is particularly important because its apportionment must largely reflect the ratio of the respective lengths of relevant coasts. Point X1 in *Figure 4* is an intersection that signifies the furthest seaward point of overlapping rights. This point will, *a priori*, produce two 200 nm equidistant lines from respective coastal points. In order to equitably divide the relevant area, X1 will be the endpoint of the provisional equidistance line. Although this point is not necessary to produce an equitable result, X1 is much like a vertex of a polygon that allows the area to be easily bifurcated.

Figure 5: The Process of Determining Base Points



Base points are the building blocks of the relevant coast, which became an outcome-determinative factor in maritime boundary delimitation. The parties now have a strong incentive—instead of wrangling over a *de minimis* maritime protrusion that, at best, generate twelve nm territorial sea arc—to search for the most favorable points along its coastline for the purpose of drawing the provisional equidistance line. In the *Black Sea* case, the base points are characterized as follows: "[T]he appropriate points on the Parties' relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines."[159]

Courts tend to select seaward protuberant coastal points, which can be a prolongation of the *terra firma* or an island, as base points. In the East Sea, South Korea and Japan have sizeable islands; nonetheless, both Ulleung

[159] *Romania v. Ukraine*, 2009 I.C.J. 62, ¶ 127.

Island and Oki Islands are too far—over 30 nm—from the mainland to be reasonably recognized as base points.

Figure 5 identifies five potential seaward-most base points for both countries. In *Figure 5*, the outer limit of the 200 nm buffer from X1 intersects with K1 and J1, which are base points that generate 200 nm geodesic lines to X1. K5 and J5 are turning-points that, considering the geographical configuration, comprise the southern or western limit of the relevant coasts *vis-à-vis* boundary delimitation in the East Sea. Other selected base points are relatively prominent coastal points in the wavelike coastlines. Since their coastlines are fairly smooth without any point in which the direction of the coast drastically changes, strong arguments can be made for choosing different points between K1 and K5, as well as J1 and J5. Sensible repositioning or choosing different corresponding base points, nonetheless, will not produce a markedly different equidistance line in the present case.

Various combinations of the five base points can produce a number of possible equidistance lines, yet the line connecting median points of corresponding base points seems most equitable. *Black Sea* and *Bay of Bengal* used the circumcenter method to identify points where the perpendicular bisectors of the sides intersect. That is, many of the points used to construct the median line had three equidistant edges with base points as their vertices. This technique is appropriate when the coast of an adjacent state is manifestly concave. By choosing the intersection of perpendicular bisectors of two straight lines connecting base points, one near the territorial boundary between the two states (i.e., Sulina Dyke/Sacalin Peninsula and β1/μ1- μ4) and the other at the opposite end (i.e., Cape Tarkhankut/Cape Khersones and β2), the provisional equidistance line achieves the "equitable solution" by accounting for the concavity, something that cannot be achieved by connecting the midpoints of lines with base points as vertices.[160]

Here, considering how the geographical shape of the relevant area resembles a pentagon, there is no particular reason to adopt the circumcenter method in lieu of connecting midpoints of corresponding base points between the two states. This line in *Figure 6* that roughly connects the midpoint of a side, M5, with the farthest vertex, X1, will equitably bisect the pentagon. Points M1 through M5 are simply midpoints of their respective lines connecting the two coasts.

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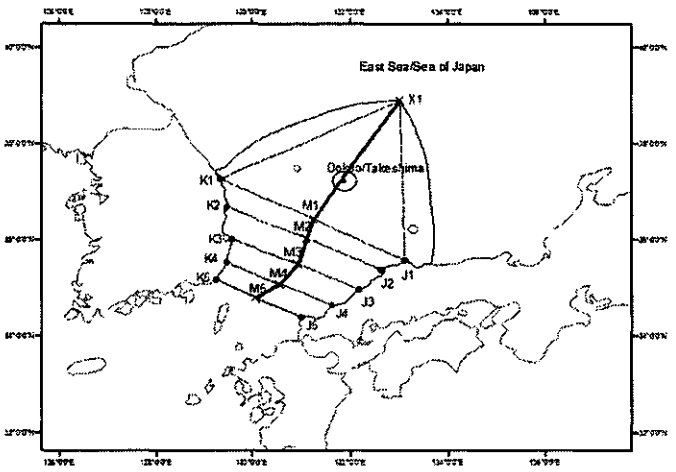
[160] Examples of base points are those used in *Black Sea* and *Bay of Bengal*. *See Romania v. Ukraine*, 2009 I.C.J. 62; *see also* Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012 (ITLOS Reports 2012), *available at* http://www.worldcourts.com/itlos/eng/decisions/2012.03.14_Bangladesh_v_Myanmar.pdf.

Figure 6: Connecting the Midpoints: The Provisional Equidistance Line



The twelve nm territorial sea enclave around the coast of Dokdo[161] is the amount of maritime area it will generate. The location of the island can be on the right or wrong side of the median line—in this case, there is even the possibility that the median line would run through the island. Regardless of its location with respect to the provisional equidistance line, Dokdo is a dependent island that is only entitled to a partial-effect. It is neither a relevant circumstance to significantly shift the median line nor a base point that could confer a vast amount of internal waters to its sovereign state. Furthermore, if it is determined that Dokdo is located on the wrong side of the median line and the court decides to apply the *Channel Islands* methodology, the country that owns the island would have to compensate for the size of the island's territorial sea by slightly adjusting the line towards its coast.[162]

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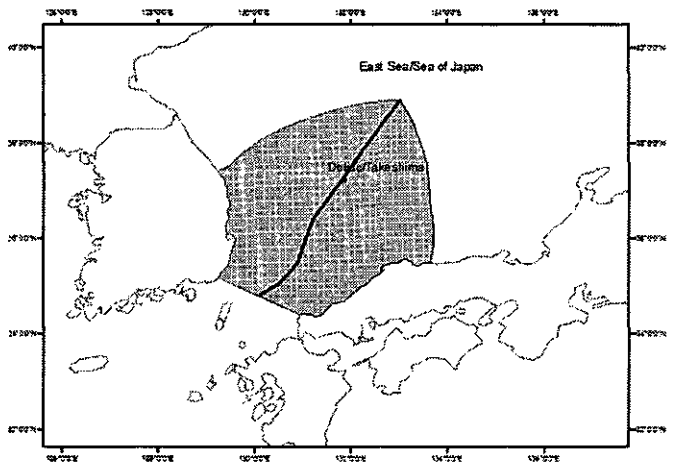
[161] *See supra* Figure 6.

[162] *Channel Islands* Arbitration, 18 I.L.M. 397, ¶ 167 (1979).

Figure 7: Allocation of the Relevant Area



After drawing the provisional equidistance line, the next step of the analysis is to identify relevant circumstances that warrant the shifting of this line.[163] The relevant circumstance for this research is geographical configuration, such as concavity of the coast. Taking into account the relatively smooth and straight coastlines of both countries, the provisional equidistance line should stand.[164]

The delimitation line roughly bisects the relevant area, as depicted in *Figure 7*, allocating approximately 64,866 km^2 to Korea and 69,213 km^2 to Japan. The ratio is approximately 1:1.07 in favor of Japan. This area excludes the entitlements to islands, which is in line with *Black Sea* and *Bay of Bengal*. The territorial sea entitlements to Ulleung Island and Oki Islands, considering their small size and the fact that much of their effects would cancel one another out, would only have a minor impact on the final ratio. It is also relevant to note that the final delimitation line is slightly west of Dokdo; therefore, the island is on the wrong side of South Korea, which presently exercises military control over the island.

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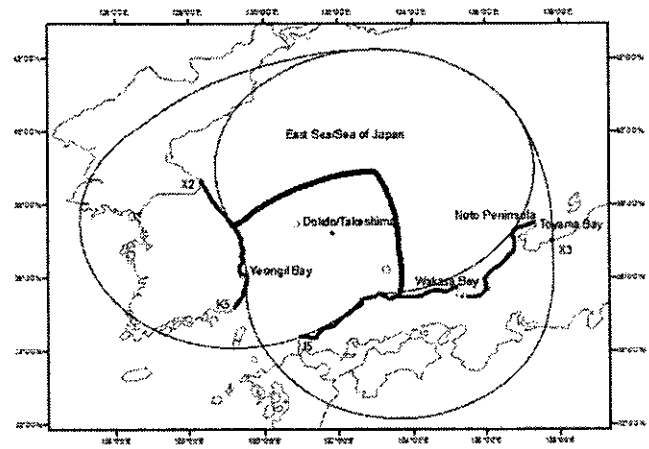
[163] Shi, *supra* note 72, at 276.

[164] *Id.* at 284 (citations omitted).

Figure 8: Determining the Relevant Coast



The relevant coast "must generate projections which overlap with projections from the coast of the other party."[165] Yet, the case law is unclear if all coastal points that generate overlapping projections with the other party will automatically be considered as the relevant coast.[166] Surprisingly, a precise definition of what constitutes the relevant coast is debatable; sometimes, courts have purposely avoided the issue stating that a "rigorous definition is not essential and indeed not appropriate."[167] In *Tunisia/Libya*, the Court stated that the "element of proportionality is related to lengths of the coasts of the States concerned, not to straight baselines drawn round those coasts."[168] Here, the Court suggested that the actual coastline, however indented, is relevant for the calculation of proportionality. The *Gulf of Maine* case "only [used] the coasts facing the Gulf of Maine itself, thereby excluding the coasts of Nova Scotia and New England facing the open Atlantic on either side of the entrance to the Gulf."[169] The implication of this statement is that only the coast facing the

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[165] *Romania v. Ukraine*, 2009 I.C.J. 62, ¶ 99; *see* Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ¶ 198 (ITLOS Reports 2012), *available at* http://www.worldcourts.com/itlos/eng/decisions/2012.03.14_Bangladesh_v_Myanmar.pdf. ("The Tribunal notes at the outset that for a coast to be considered as relevant in maritime delimitation it must generate projections which overlap with those of the coast of another party.").

[166] To date, there is no case law addressing this issue.

[167] Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13, ¶ 67 (June 3).

[168] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18, ¶ 104 (Feb. 24).

[169] Leonard Legault & Blair Hankey, *Method, Oppositeness and Adjacency, and*

disputed area will be considered relevant. Most recently, ITLOS in *Bay of Bengal* simply drew two straight lines as relevant coasts "to avoid difficulties caused by the complexity and sinuosity of that coast."[170] This kind of arbitrary determination of the relevant coast epitomizes the inherent inconsistency and unpredictability of the process.

In order to compare the ratios between the length of the relevant coasts and the size of the allocated area, this research would employ the general principle espoused by the *Black Sea* case, which was later reaffirmed in *Nicaragua v. Colombia*.[171] First, the coast must face the disputed area. The coasts of Karkinits'ka Gulf, Yahorlyts'ka Gulf and Dnieper Firth that "face each other" and not the Black Sea were ignored.[172] For the same reason, Toyama Bay and the western portion of Wakasa Bay will be excluded; however, Yeongil Bay and other parts of Wakasa Bay will count as the relevant coast for facing the disputed area.[173] Second, normal or straight baselines, including closing lines if the enclosed area faces the area with overlapping titles, will determine the length of the relevant coasts.

Third, all coastal points that are within the 200 nm buffer from the outer limits of the relevant area can be considered relevant. It is mistaken to limit the relevant coast to the coast abutting upon the relevant area, as the tribunal suggested in the *Barbados/Trinidad* arbitration: "The identification of the relevant coasts abutting upon the areas to be delimited is one such objective criterion."[174] The tribunal further stated that "to the extent that a coast is abutting on the area of overlapping claims, it is bound to have a strong influence on the delimitation."[175] This statement can only be correct, but not necessarily so, insofar as it means that the coast abutting upon the relevant area should receive greater weight in measuring the disparity between the lengths of relevant coasts.

Coasts that do not abut upon the relevant area also have decisive influence on the delimitation. In fact, in situations where the distance between the two opposing states is over 200 nm but less than 400 nm, the relevant coast never touches the overlapping area.[176] The relevant coast, therefore, must include all base points that could project into the

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Proportionality in Maritime Boundary Delimitation, in 1 INTERNATIONAL MARITIME BOUNDARIES 218 (Jonathan I. Charney & Lewis M. Alexander eds., 1996).

[170] *Bangladesh v. Myanmar*, Case No. 16, Judgment of Mar. 14, 2012, ¶¶ 201, 204.

[171] Territorial and Maritime Dispute (Nicar. v. Col.), 2012 I.C.J. 1, 150-51 (Nov. 19).

[172] *Romania v. Ukraine*, 2009 I.C.J. 62, ¶ 100.

[173] *See supra* Figure 8.

[174] *Barbados/Trinidad* Arbitration, 27 R.I.A.A. 147, ¶ 231 (2006).

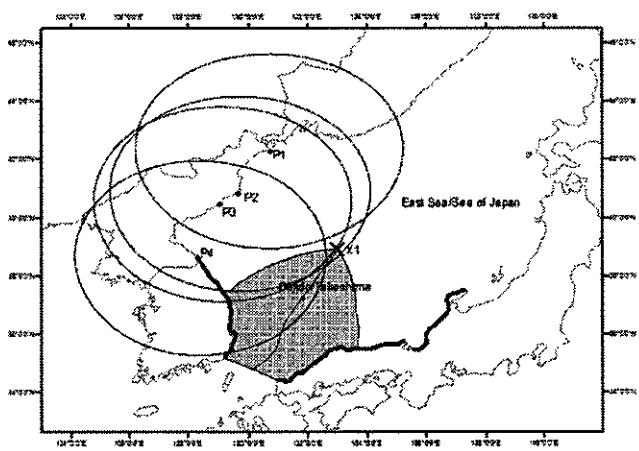
[175] *Id.* ¶ 214.

[176] The tribunal failed to consider this scenario, in part because the 200 nm projection of Tobago includes the entire territory of Barbados. *Id.*

overlapping area, which becomes particularly relevant *vis-à-vis* the disproportionality test.

Figure 8 indicates that the whole South Korean coast from X2 to K5 is within the 200 nm buffer zone created by points running through the northwestern portion of the relevant area border. This signifies that any base point from the South Korean coast can "generate projections which overlap with projections from the coast of the other party."[177] On the other hand, the 200 nm buffer from the eastern border of the relevant area intersects with the Japanese coast at X3.[178] The relevant coast for Japan, therefore, should run from J5 to the tip of Noto Peninsula. Hence, the total lengths of the relevant coasts are 232 nm and 425 nm for South Korea and Japan, respectively, with a ratio of 1:1.83 favoring Japan.

Figure 9.1: The Effect of the North Korean Coast



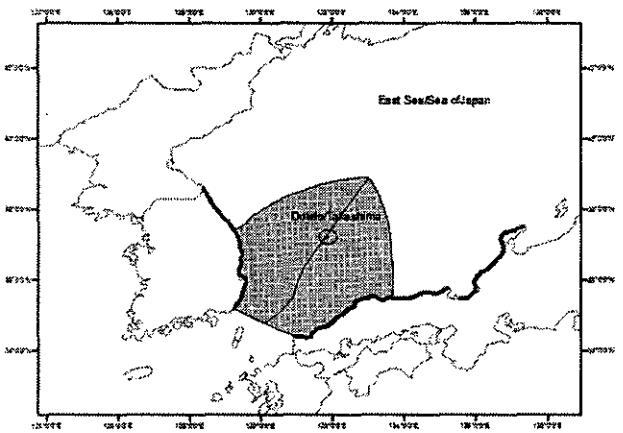
One circumstance that could affect the delimitation line is the projection of the North Korean coast. Indeed, as the 200 nm geodesic buffers in *Figure 9.1* show, there are several protruding points (P1 through P4) along the coast of North Korea that could project into the area allocated to South Korea, the tip of which even overlies the Japanese maritime zone. Yet, the apportionment of areas between the two Koreas produces a median line north of the South Korea-Japan delimitation line. In other words, P4 is the landward endpoint of the delimitation line between North Korea and South

[177] Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ¶ 198 (ITLOS Reports 2012), *available at* http://www.worldcourts.com/itlos/eng/decisions/2012.03.14_Bangladesh_v_Myanmar.pdf.

[178] *See supra* Figure 8.

Korea, whereas the seaward endpoint lies somewhere between P1 and X1, most likely to be closer to X1 taking into account, *inter alia*, the length and concavity of the North Korean coast. This delimitation line certainly does not affect the final equidistance line between South Korea and Japan.

Figure 9.2: The Relevant Coasts and the Allocated Areas



Post-*Black Sea*, the ratios of relevant area and relevant coast became the basis for a mathematical *ex post facto* test to adjust the delimitation line. This is significantly different from previous cases that simply assessed disparities in coastal lengths without comparing it to the ratio of the allocated areas. Yet, the principle that the "checking can only be approximate"[179] and the disproportion must be "significant"[180] to justify adjustment of the delimitation line remains valid. *Black Sea* and *Bay of Bengal* have respectively ruled that slight differences in the ratio—1:2.8 and 1:2.1, and 1:1.42 and 1:1.54—do not warrant any change in the delimitation line.[181] Due to the limited number of precedents, however, it is unclear what degree of disparity would constitute a significant disproportion.

The ratio of the length of the relevant coasts between South Korea and Japan is approximately 1:1.83, and the ratio of the allocated areas is approximately 1:1.07, both in favor of Japan.[182] The Court in *Libya/Malta* found that the difference between the 192-mile Libyan coast and 24-mile Maltese coast "is so great as to justify the adjustment of the median line so

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[179] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 62, ¶ 212 (Feb. 3).

[180] *Bangladesh v. Myanmar*, Case No. 16, Judgment of Mar. 14, 2012, ¶ 499.

[181] *Id.*; *Romania v. Ukraine*, 2009 I.C.J. 62, ¶¶ 215-16.

[182] *See supra* Figure 9.2.

as to attribute a larger shelf area to Libya[.]"[183] This 8:1 ratio warranted the adjustment, yet "the degree of such adjustment does not depend upon a mathematical operation and remains to be examined."[184] Although the case is now less pertinent for not comparing the ratio to that of the allocated areas,[185] it is important to consider the magnitude of the difference that troubled the Court.

Here, the difference between two ratios is 1:1.71.[186] In addition, 200 nm projections from Wakasa Bay and the Noto Peninsula—a significant portion of the relevant coast of Japan—only marginally overlaps with that from the South Korean coast. In *Nicaragua v. Colombia*, the ratios of relevant area and relevant coast were 1:3.44 and 1:8.2, respectively. The Court ruled that the difference between the two ratios, which is 1:2.38, "does not entail such a disproportionality as to create an inequitable result."[187] The final delimitation line in *Figure 19.2*, therefore, does not lead to any significant disproportion.

B. Treatment of Dokdo/Takeshima Island

All islands in the East Sea that are not selected as base points, much like Serpents' Island and St. Martin's Island, played no role in the delimitation process. The three-step methodology for drawing an equidistance line discounts dependent islands, especially if they are small, that are far off the coast. Dokdo, irrespective of its nationality, will only have a twelve nm territorial sea enclave around the coast, as illustrated in *Figure 9.2*.[188] Dokdo is geographically closer to mainland Japan and this study indicates that it lies within the Japanese maritime area in the East Sea. If South Korea has sovereignty over Dokdo, the final median line could slightly shift towards its coast to compensate for the maritime area taken away from Japan. Similarly, if the island belongs to Japan and the median line cuts through the territorial sea of Dokdo as shown in *Figure 9.2*, Japan will be

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[183] Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13, ¶ 68 (June 3).

[184] *Id.*

[185] The court in *Libya/Malta* simply compared the lengths of relevant coasts without taking into account the size of the area given to each party. *See Libya/Malta*, 1985 I.C.J. 13. This is markedly different from *Romania* and *Bangladesh* where courts compared the ratio of the length of relevant coasts to the size of allocated areas. *See Romania v. Ukraine*, 2009 I.C.J. 62; *Bangladesh v. Myanmar*, Case No. 16, Judgment of Mar. 14, 2012.

[186] The original numbers used were 1.83/1.07.

[187] Territorial and Maritime Dispute (Nicar. v. Col.), 2012 I.C.J. 1, ¶ 246 (Nov. 19).

[188] In *Nicaragua v. Colombia*, the Court ruled that an island is entitled to 12 nm, not 3 nm, territorial sea irrespective of its size unless it overlaps with the territorial sea entitlement of another country. *Id.* ¶ 179.

asked to compensate for the area that lies in the South Korean side of the median line. In any case, no country would claim more maritime area by having sovereign rights over Dokdo that does not serve as a base point for the relevant coast. The sovereignty dispute over Dokdo is likely to persist for political reasons; nevertheless, it is doubtful if the economic value of this small island is worth the fight in light of the recent pro-mainland jurisprudence.

C. Case 2: Senkaku/Diaoyu Islands[189]

The Republic of China ("Taiwan") is a prime example of an unrecognized state, largely due to its thorny relationship with the People's Republic of China ("China"). Although the political issues are beyond the scope of this paper, it is safe to conclude for purposes of international law that Taiwan is a *de facto* state: "The judicial recognition of treating Taiwan as a foreign State has risen to the level of an 'international custom.'"[190] In this case study, Taiwan is treated like an independent island state that is geographically in competition with mainland China for maritime area in the Taiwan Strait and beyond.

The Senkaku Islands consist of five small, uninhabited islands and three rocks. They are located approximately 100 nm northeast of Taiwan and 200 nm west of the Okinawa Islands. Both Japan and Taiwan claim sovereignty over them; China admits them as belonging to Yilan County, Taiwan, but maintains the One-China policy that includes Taiwan as its territory.[191] The potential impact of the Senkaku Islands on delimitation of boundary in the East China Sea is extremely limited in light of the three recent delimitation cases.

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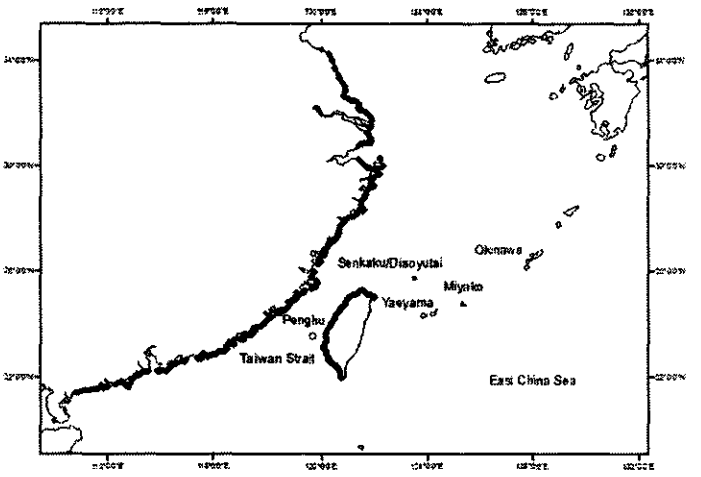
[189] The set of small islets or rocks are called the Senkaku islands by Japan, the Diaoyu islands by China, and the Diaoyutai by Taiwan.

[190] Pasha Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of The Republic of China on Taiwan*, 28 MICH. J. INT'L L. 765, 814 (2008).

[191] According to the Chinese government white paper published through the Xinhua News Agency, Diaoyu Islands are referred to as being "affiliated to China's Taiwan Island." Full Text: Diaoyu Dao, an Inherent Territory of China, ENGLISH.NEWS.CN (Sep. 9, 2012, 4:27 PM), http://news.xinhuanet.com/english/china/2012-09/25/c_131872152.htm. Scholars similarly point out that "Beijing sees the Diaoyu Islands as a part of Taiwan and validates its claim to the islands by its claim to Taiwan." Zhongqi Pan, *Sino-Japanese Dispute over the Diaoyu/Senkaku Islands: The Pending Controversy from the Chinese Perspective*, 12 J. CHINESE POLITICAL SCI. 1, 86 (2007).

Figure 10: Selecting Possible Coastal Points that Could Project into the Taiwan Strait

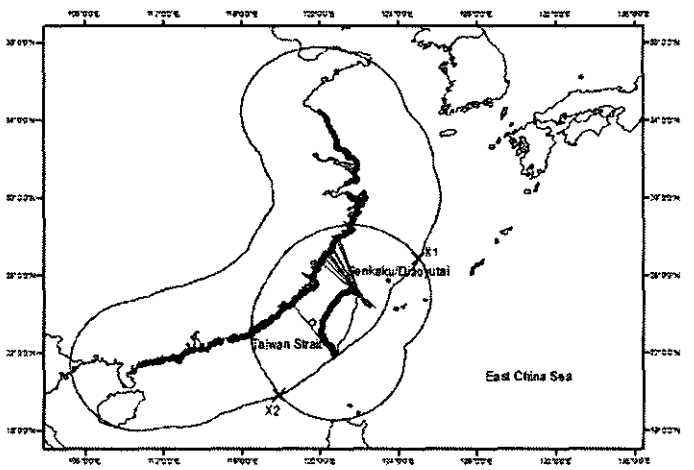


The first step towards identifying the relevant area is to select points along the coast that could generate overlapping titles. Although it is irrefutable at the outset that the relevant coast of China is significantly longer than that of Taiwan, not all points along the relevant coast produce the relevant area. The projection of coastal points along the mainland, irrespective of its size, is contingent upon the projection of its island counterpart.

Figure 10 shows all base points that could potentially produce overlapping rights over the Taiwan Strait. The coastal points of Taiwan facing the East China Sea are omitted for not being "germane to the issue at hand."[192] In other words, only those points that face the disputed region can determine the size of the relevant area and the length of the relevant coast. Neither the Penghu Islands nor the Senkaku Islands can be considered as base points because they are over twelve nm off the coast of Taiwan, as well as China and Japan. The chain of Japanese islands from Okinawa to Yaeyama that could affect the delimitation is also identified in *Figure 10*.

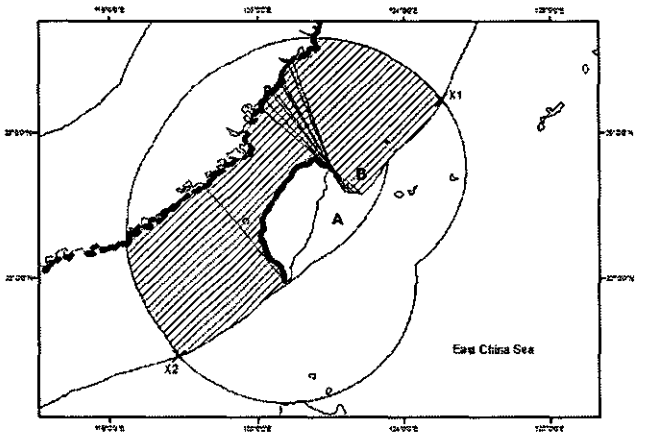
[192] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 62, ¶ 110 (Feb. 3).

Figure 11: 200 nm Collapsed Geodesic Buffers and Extra Projections from the Coast of China into the East China Sea



The relevant area is the area within 200 nm from coastal points of both countries. Therefore, the overlapping maritime area between the two 200 nm collapsed geodesic buffers along both coasts indicates the shape and amount of area in dispute. X1 and X2 in *Figure 11* are farthest seaward intersections, vertices of the polygon that represents the relevant area. Another important element of Figure 11 is the collection of 200 nm straight lines originating from base points along the coast of China. Indeed, although the area near the coast of Taiwan facing the East China Sea almost entirely belongs to Taiwan, these lines illustrate how several base points from China can project into this seemingly undisputed region. The physical presence of Taiwan blocks the seaward projection of China's coast, but the cut off effect is limited to coastal points that directly face each country. If there are base points that can project into the overlapping area without being interrupted by a significant territorial feature, the area within 200 nm limit of these straight lines must be considered as part of the relevant area.

Figure 12: The Relevant Area



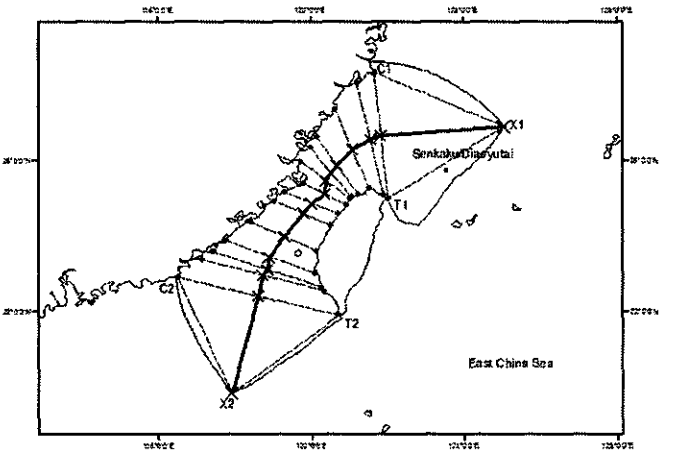
In contrast, *Nicaragua v. Colombia* rebuffed the notion that a small territorial feature could have such cut off effect. The Court did not confine the relevant area to the area west of Colombian islands because "Nicaragua's coast, and the Nicaraguan islands adjacent thereto, project a potential maritime entitlement across the sea-bed and water column for 200 nautical miles."[193] The Court ruled that the relevant area should extend further seaward until 200 nm is reached despite the physical presence of minor maritime features. If so, Area A, bordering the eastern coast of Taiwan and the seaward-most limit of 200 nm collapsed geodesic buffer from the coast of China, in *Figure 12* would be part of the relevant area. It remains to be seen whether this rule applies to sizeable islands, such as Taiwan, especially if only a part of EEZ/continental shelf that overlays Taiwan's territorial sea and contiguous zone is at stake. Yet, delimitation must account for all areas in which entitlements of the parties indisputably overlap, including the convex protrusion east of Taiwan, marked B in *Figure 12*.

The total size of the shaded area in *Figure 12*, which represents the relevant area, is approximately 302,902 km^2. The endpoint of 200 nm lines extending from base points on China's coast form the outermost boundary of the northeast section of the relevant area, the segment bulging southward of the Taiwan Strait towards the East China Sea. This is a necessary adjustment to adhere to the definition of the relevant area, which includes "maritime areas subject to overlapping entitlements of the Parties to the

[193] *Nicaragua v. Colombia*, 2012 I.C.J. 1, ¶ 159.

present case."[194] As a corollary, the relevant coast of Taiwan comprises of more points along Taiwan's coast that face the convex area.

Figure 13: Connecting the Midpoints: The Provisional Equidistance Line



After isolating the relevant area, appropriate points along the coast of both countries are selected to draw the provisional equidistance line. This line should roughly bisect the relevant area regardless of the length of the relevant coast, which will be taken into account at the last stage to measure the degree of disproportionality. Indeed, the configuration of the line could be slightly different depending on the selection of base points, the general shape should resemble the X1-X2 line shown in *Figure 13*. Triangles at both ends of the line with X1 and X2 as vertices are isosceles triangles with X1-C1/X1-T1 and X2-C2/X2-T2 being 200 nm in length. Other base points between C1 and C2, as well as T1 and T2, are selected at the most protruding points along the coast. In addition, lines connecting corresponding base points along respective coasts all have midpoints, which are marked in *Figure 13*. The provisional equidistance X1-X2 line connects these midpoints.

[194] Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ¶ 493 (ITLOS Reports 2012), *available at* http://www.worldcourts.com/itlos/eng/decisions/2012.03.14_Bangladesh_v_Myanmar.pdf.

Figure 14: Allocation of the Relevant Area

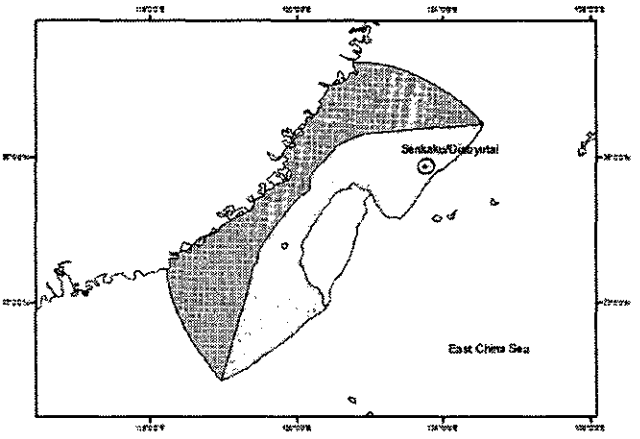


Figure 14 illustrates the allocation of the relevant area between the two parties. The total area allocated to China and Taiwan is approximately 159,807 km^2 and 143,095 km^2 respectively. The ratio is approximately 1:1.12 favoring China.

Distant islands along the coast, i.e., those that are more than twelve nm away, had no effect in charting the provisional equidistance line. These islands can merely claim a twelve nm territorial sea. For instance, the territorial sea around the Senkaku Islands is roughly shown in *Figure 14*.[195] The country that can ultimately claim sovereignty over these islets will have small enclaves within the EEZ of China or Taiwan. Giving full effect to these insignificant maritime features, which are also not independent states, would unduly distort the delimitation line. Even if Japan is determined to be the rightful owner, it would be inequitable to consider such *de minimis* islands as the basis for claiming vast EEZ rights that conflict with the projection of the mainland. Much like Serpents' Island and St. Martin's Island, the Senkaku Islands are not a relevant circumstance or a significant factor that affects the disproportionality test in delimiting the EEZ between China and Taiwan.

The relevant coast includes coastline that can project into the relevant area, i.e., the area with overlapping entitlements. Here, as shown in *Figure 15.1*, the 200 nm buffer from the coast of China technically extends beyond the outer boundary of the eastern coast of Taiwan; therefore, the entire coast of Taiwan facing China is deemed relevant. In order to identify the endpoints of China's relevant coast, appropriate points along the boundary

[195] Again, the arc resembles an oval rather than a circle because the program uses a geographic coordinate system that reflects the earth's curvature.

of the relevant coast are selected to discover the furthest possible point along the coast of China that could project into the relevant area.[196]

Figure 15.1: Identifying the Relevant Coast: Selecting the Outer Boundary of the Relevant Area

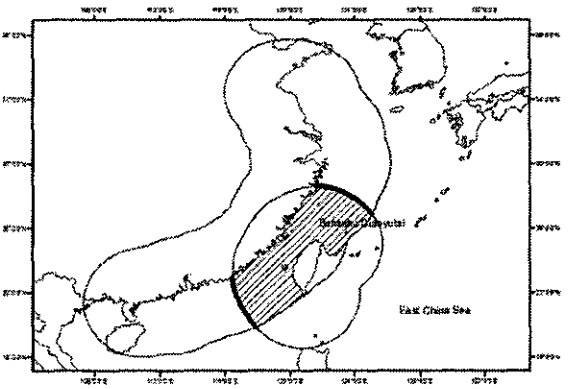
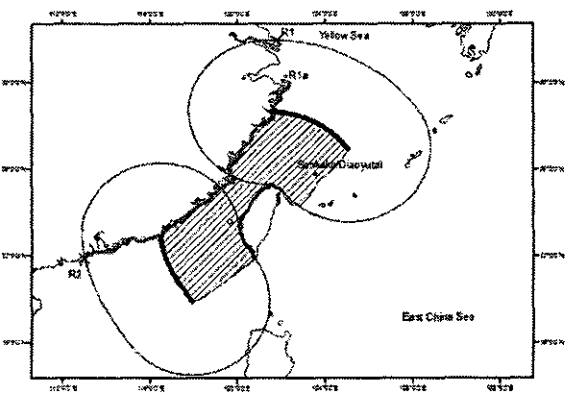


Figure 15.2: Identifying the Relevant Coast: Determining the Endpoints of the Coast of China



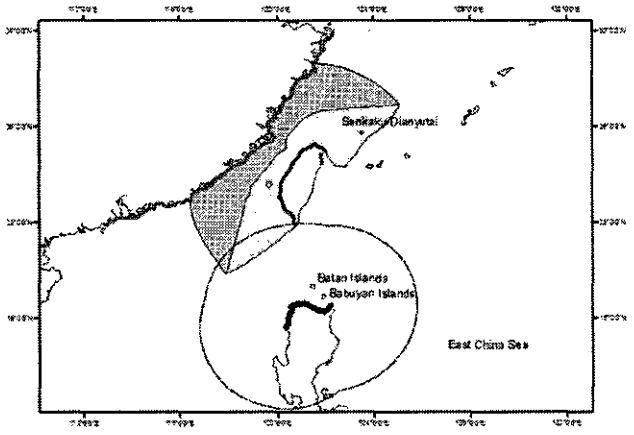
Points R1 and R2 in *Figure 15.2* represent the endpoints along the coast of China that are 200 nm from the outer boundary of the relevant area. They are found at the intersection of 200 nm collapsed geodesic buffer of points selected in *Figure 15.1*. Since the coast of China drastically changes direction beyond point R1a to face the Yellow Sea, the straight baseline from R1a and R2 is China's relevant coast. When appropriate, twenty-four

[196] *See infra* Figure 15.1.

nm closing lines were drawn. The total length of China's relevant coast is approximately 929 nm.

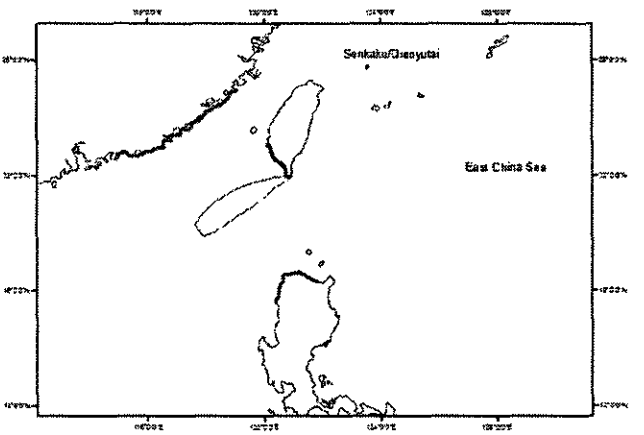
The entire coast of Taiwan facing China constitutes the relevant coast. In order to account for the protruding area near the northeast coast of Taiwan, a short line along the coast that faces this area is added to the relevant coast. The total length of Taiwan's relevant coast is approximately 309 nm. The ratio of the lengths of two relevant coasts favors China, 1:3.

Figure 16.1: A Relevant Circumstance: The Philippines



The provisional equidistance line is likely to be adjusted in light of the presence of the Philippines. Indeed, there is no other major geographically relevant circumstance, such as concavity of the coast or existence of a major island, than the Philippines that could affect the delimitation line between China and Taiwan. *Figure 16.1* shows how points along the northern coast of the Philippines produce a 200 nm collapsed geodesic buffer that overlaps with the relevant area previously identified. Batan Islands and Babuyan Islands are not selected because they are over twelve nm from *terra firma*.

Figure 16.2: The Relevant Coasts for the Intersecting Area of Three Countries



It is unclear how to trifurcate the area—here, with a size of approximately 25,716 km^2—in which three concerned states have overlapping rights. In the absence of a clear rule, the principle of equity that characteristically compares the ratio of relevant coasts to the ratio of the allocated areas must be employed. The lengths of relevant coasts for three countries are 93 nm, 138 nm, and 329 nm respectively for Taiwan, the Philippines, and China. The ratio of these lengths is 1:1.48:3.53. The allocation of the area between the three countries should by and large correspond to the ratio of the lengths of their respective coasts.[197] There is, however, a caveat: the delimitation line should also take into account the proximity of the area to Taiwan's relevant coast.[198] In *Nicaragua v. Colombia*, the Court opined that coastal states possess sovereignty over its territorial sea; therefore, rights over EEZ/continental shelf must yield if it overlaps with the territorial sea of another state.[199] While the relevant area in Figure 16.2 is produced by the tip of projections from China and the Philippines, it includes the territorial sea and contiguous zone of Taiwan. The ratio of allocated areas should be adjusted in favor of Taiwan to factor

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[197] *See generally Bangladesh v. Myanmar*, Case No. 16, Judgment of Mar. 14, 2012, ¶¶ 498-99.

[198] *See infra* note 199.

[199] While the territorial sea of a State may be restricted, as envisaged in Article 15 of UNCLOS, in circumstances where it overlaps with the territorial sea of another State, there is no such overlap in the present case. Instead, the overlap is between the territorial sea entitlement of Colombia derived from each island and the entitlement of Nicaragua to a continental shelf and exclusive economic zone. The nature of those two entitlements is different. Territorial and Maritime Dispute (Nicar. v. Col.), 2012 I.C.J. 1, ¶ 177 (Nov. 19).

in the distance of the relevant coasts to the overlapping titles, as well as superior entitlements of the territorial sea.

Figure 17.1: Adjusting the Provisional Equidistance Line: Various Alternatives

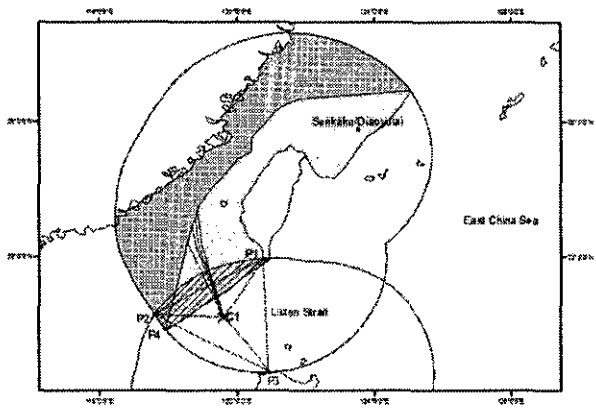
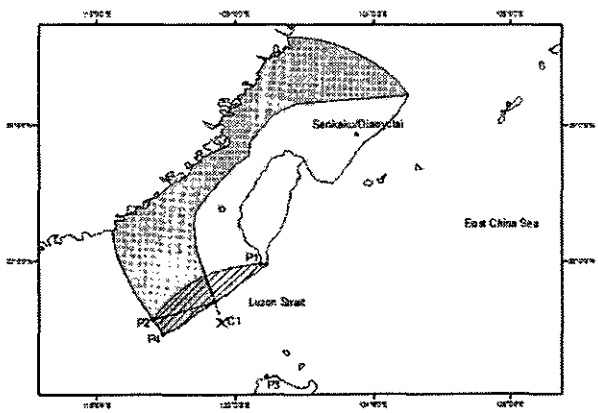


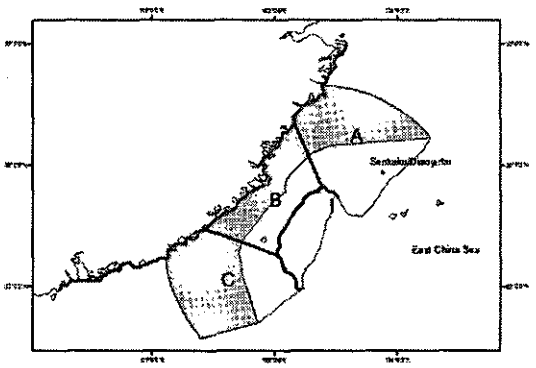
Figure 17.1 proposes various ways to adjust the provisional equidistance that could equitably partition the area where three countries have overlapping titles. P1 and P3 are the most protruding points facing the Luzon Strait between Taiwan and the Philippines. P2 is where the 200 nm buffer from Taiwan and the Philippines intersect. C1 is the circumcenter of the triangle with P1, P2, and P3 as vertices. P1-C1 and P3-C1 lines are thus equal in length, and C1 is one of the points that fairly splits the maritime area in the Luzon Strait. This is not an absolute point, but a point that is deemed equitable considering the geographical configuration.

Figure 17.2: The Adjusted Provisional Equidistance Line



Shifting the endpoint of the provisional equidistance line to C1 divides the shaded area into three parts, as shown in *Figure 17.2*. The adjusted delimitation line is definitely not the sole answer, but one of many equitable solutions that objectively and practically accommodate the ratio of relevant coasts of all parties. Taiwan, China and the Philippines respectively acquire 8,942 km^2, 10,819 km^2, and 5,935 km^2. Although Taiwan has the shortest relevant coast of the three, it received a relatively large piece of the ocean due to its proximity to the shaded area.[200] The ratio of the allocated area between China and the Philippines is approximately 1:1.82, which is roughly comparable to the ratio of the relevant coast, which is 1:2.38.

Figure 18: The Relevant Coasts and the Allocated Areas Before Applying the Disproportionality Test



The test of disproportionality demands that the ratio of allocated areas to roughly match the ratio of the lengths of their respective coasts.[201] There is no need for the ratios to be identical:

> The Court further observes that for the purposes of this final exercise in the delimitation process the calculation of the relevant area does not purport to be precise and is approximate. The object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas.[202]

The adjusted equidistance line allocates a maritime area of approximately 120,277 km^2 to Taiwan and 176,778 km^2 to China, which yields a ratio of approximately 1:1.47.

Whether the difference between the ratios, 1:2.04 (1:3 for the relevant coast and 1:1.47 for the relevant area) amounts to a significant disproportion is debatable. Although the test of disproportionality is by all means lenient, adjustment of the provisional equidistance line seems

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[200] *See supra* Figure 16.2.

[201] *Bangladesh v. Myanmar*, Case No. 16, Judgment of Mar. 14, 2012, ¶¶ 489-99.

[202] Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 62, ¶ 111 (Feb. 3).

warranted in the present case. The disparity between two ratios is 1:2, which is similar to the disproportionality between South Korea and Japan, which is 1:1.71. Not only is the disparity greater here than the apportionment in the East Sea, there is a significant reason why further adjustment is necessary: Unlike China, only a small portion of the Taiwanese coast directly faces Area A.[203] In other words, the general direction of the coast of China remains constant, whereas the coast of Taiwan shifts three times to create distinctive areas A, B, and C.[204]

It would be a gross oversimplification to implement an unconditional rule that compels the entire maritime boundary between two states be delimited in totality. Indeed, as shown in *Figure 18*, an equitable method of delimitation on one side of the relevant coast, i.e., Area B, could produce significant disproportion in another, i.e., Area A and C, before it was adjusted. Not only can the area be adjusted at the third stage of the delimitation, the methodology can also divide, *ab initio*, the process of apportioning the relevant area into three segments reflecting the general direction of Taiwan's coast. In any case, the disproportionality in Area A, especially taking into account the adjustment made in Area C, is striking.

Figure 19: The Relevant Coasts and the Allocated Areas

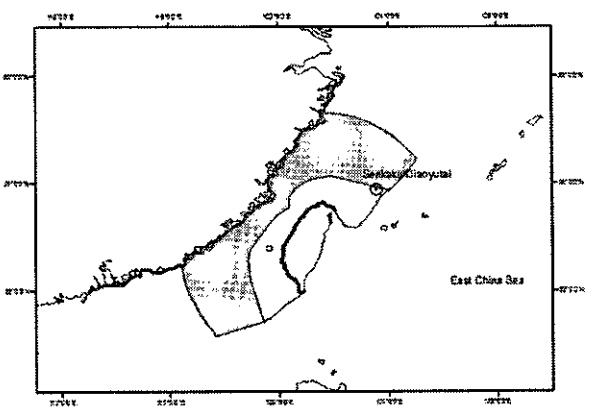

Figure 19 depicts the final delimitation line between China and Taiwan. It allocates approximately 203,978 km^2 of the relevant area to China and approximately 93,077 km^2 to Taiwan. The ratio of the two is

[203] *See supra* Figure 18.

[204] In the Dokdo case study, this is precisely why the disputed area in the East Sea was separated from the Korea Strait. *See supra* Figure 3.

approximately 1:2.19 in favor of China, which roughly corresponds to the ratio of the relevant coasts, which is 1:3 also in favor of China.

D. Treatment of the Senkaku/Diaoyu Islands

Figure 19 shows the amount of territorial sea the Senkaku Islands could generate. If China ultimately concedes that they belong to Taiwan, Taiwan would need to give up the size of territorial sea that encroaches upon the maritime area of China. Yet, if Japan were deemed the rightful owner of the Senkaku Islands, the twelve nm territorial sea would be all that they could claim. In light of the pro-mainland jurisprudence, the economic incentive, if any, to prolong the sovereignty dispute must be reassessed.

V. CONCLUSION

For several decades following the *Fisheries* case, islands surfaced as controversial sources of rights for maritime boundary delimitation. On the one hand, countries began to claim minor protrusions along the coast as base points; on the other hand, islands were claimed as independent sources of all maritime zones. Article 121(2) of the UNCLOS did not help to curtail such contentious practices by stipulating that island and mainland are equals in terms of their ability to generate maritime zones. As a corollary, small dependent islands purportedly justified vast legal entitlements over the ocean that often encroached upon the projections from mainland coasts. Countries, therefore, had an added incentive to instigate or sustain sovereignty disputes over *de minimis* maritime protrusions.

The case law no longer confers on such generous rights for small islands. Recent maritime delimitation cases accorded only partial rights to small islands in delimiting their maritime boundaries. Indeed, the three cases reaffirmed the clear judicial trend following the *Fisheries* case that small islands are only entitled to less than full-effect, often a mere twelve nm territorial sea. Such pro-mainland regime that largely discounts small islands far offshore is a clear trend that is likely to persist in the post-*Nicaragua v. Colombia* era.

Applying this standard, as well as various methods in which international courts have partitioned the boundary between opposing or adjacent states, to two disputed set of "islands"—Dokdo/Takeshima Island and Senkaku/Diaoyu Islands—this paper concludes that economic interest should no longer be a serious factor motivating the sovereignty disputes. As the case studies show, the maritime boundary delimitation between two states are by and large unaffected by the presence of small offshore rocks. Although it is difficult to empirically quantify the current and future

economic value associated with contested islands, at a minimum, the enormous political and diplomatic costs associated with sovereignty disputes dwarf the commercial value of the twelve nm territorial sea around these protrusions.

Homeless Property Rights: An Analysis of Homelessness, Honolulu's "Sidewalk Law," and Whether Real Property is a Condition Precedent to the Full Enjoyment of Rights under the U.S. Constitution

Wayne Wagner[a1]

There was a big high wall there that tried to stop me;
Sign was painted, it said private property;
But on the back side it didn't say nothing;
This land was made for you and me.
—Woody Guthrie "This Land is Your Land"

TABLE OF CONTENTS

[a1] J.D. Candidate 2013, William S. Richardson School of Law, University of Hawai'i at Manoa. My respect and gratitude go out to Dean Aviam Soifer and Professors Charles Lawrence and Mari Matsuda for sharing so generously of your time and knowledge. Thank you to my wife, Tasha, my mother, Young-ja, and my father, Howard, for ending every conversation with, "I love you."

I. INTRODUCTION

According to a recent poll, "[a]n overwhelming majority of Hawai'i voters—96 percent–consider homelessness[1] a serious problem."[2] After all, the State of Hawai'i (hereinafter referred to as either "the State" or "Hawai'i") is tied for the highest ratio of homeless to residents in the country.[3] A familiar refrain of the State, the City and County of Honolulu (hereinafter referred to as either "the City" or "Honolulu"), and many citizens is that the homeless are pockmarks scarring the good looks of Hawai'i and scaring tourists (and their money) away.

For the homeless, Hawai'i is indeed no paradise, despite the lush vegetation and perennial absence of a hypothermia season. In 2009, Honolulu garnered the title of "eighth meanest city in the country in dealing with the homeless," according to the National Coalition for the Homeless.[4] In the past few years, both State and City officials have targeted the homeless in several ways: anti-camping ordinances that forbid homeless people from sleeping and setting up shelter at parks; "sweeps" to "disinfect" public property, most prominently before the Asia-Pacific

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[1] I define "homeless" as any individual or family who does not own or have the right to use and stay in a private residence. This lack of property is key to the paper, as will be clear, so I exclude from the term individuals such as runaways, who may have a property interest that allows them access and use of real property. However, I do include temporary homeless, so long as at some time they have no rights to access and use their own private property. This is for two reasons: first, I want to push back against the commonly held misconception that homelessness is permanent. Second, I want to stress that even a temporary deprivation of certain rights can devastate a person's welfare.

[2] *Homeless in Plain Sight: By the numbers*, HONOLULU STAR-BULLETIN 2 (Feb. 15, 2010, 01:30 AM), http://www.ihsHawaii.org/newsArchives/2010/02.15.10%20By%20the%20numbers.pdf. "The poll was conducted among 800 registered voters statewide by telephone Jan. 8 to 12 by Mason-Dixon Polling & Research Inc. of Washington, D.C. The margin of error is plus or minus 3.5 percentage points." *Id.*

[3] Peter Witte, National Alliance to End Homelessness, Homelessness Research Institute, *A Research Report On Homelessness January 2012: An examination of homelessness, related economic and demographic factors, and changes at the national, state, and local levels*, STATE OF HOMELESSNESS IN AMERICA 2012, 20 (2012), http://b.3cdn.net/naeh/9892745b6de8a5e f59_q2m6yc53b.pdf. Among states, Hawai'i is tied with Oregon at forty-five homeless per ten thousand.

[4] Adam Nagourney, *For Honolulu's Homeless, an Eviction Notice*, NEW YORK TIMES (Mar. 14, 2011), http://www.nytimes.com/2011/03/15/us/15homeless.html. The list was based on such factors as "the number of anti-homeless laws in a city has," "the enforcement of those laws and severity of penalties related to them," " the general political climate toward homeless people," and "the existence of pending or recently enacted criminalization legislation." *Homes Not Handcuffs: The Criminalization of Homelessness in U.S. Cities*, NATIONAL COALITION FOR THE HOMELESS (July 2009), http://www.nationalhomeless.org/factsheets/criminalization.html.

Economic Cooperation (APEC) Conference last November; and a "sidewalk law," which makes it illegal for the homeless to store their belongings on public property throughout Honolulu County, which encompasses the entire island of O□ahu and approximately 75% of the State's population.[5]

This paper analyzes homeless property rights, specifically how homeless persons possess fewer and lesser legal rights[6] because they lack access to and use of their own real property.[7] The paper started as a critique of a new breed of anti-homeless legislation like Honolulu's "sidewalk law," which regulates homeless by regulating their personal property. Though I argue that the "sidewalk law" is legally invalid, attacking anti-homeless legislation and not its root is like treating a symptom without diagnosing the disease—the relief is short-lived before other legislation follows. So after discussing how the "sidewalk law" should be invalidated, I attend to causes of legal and social discrimination against the homeless in America,[8] then offer a remedy.

In part II, I briefly describe the most current data on homeless demographics in Hawai'i. This undermines the conventional view that homelessness is a permanent condition defined by mental illness, lack of education, laziness, and addiction. Instead, the data indicate that a sizable portion of homeless individuals are educated, employed, and succeed in escaping homelessness.

In part III, I scrutinize the State and City's anti-homeless legislation and practices. My particular focus is on the City's "sidewalk law," Revised

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[5] *State And County Quick Facts Honolulu County, Hawaii*, U.S. Dep't of Commerce, U.S. Census Bureau, (last updated Sep. 18, 2012, 05:12 PM), http://quickfacts.census.gov/qfd/states/15/15003.html. 69% of the homeless counted in the "Homeless Service Utilization Report 2012" live in Honolulu. Center on the Family at U.H., *infra* note 11, at 4.

[6] I do not intend to create confusion between "property right" and "rights conditioned upon access to real property." These rights are related but different. When I analyze "rights conditioned upon access to real property," I do not mean "property right," which refers to the right to exert some kind of decisional authority regarding property, including the right to possess, use, dispose of, or exclude others from interfering with property. BLACK'S LAW DICTIONARY 1217-18 (6th ed. 1994). Instead, by "rights conditioned upon access to real property," I want to raise the question of how access to real property conditions the quality and extent of other rights, such as the right to privacy or the right to defend oneself.

[7] "Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Real property can be either corporeal (soil and buildings) or incorporeal (easements)." *Id.*

[8] To understand why legal and social discrimination against the homeless is so deeply-rooted and tenacious, I use a co-constitutive theory analysis, which in its simplest form "explores both how law shapes society and how society shapes law." *See* Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, 1392 (2000).

Ordinances of Honolulu (ROH) § 29-19, which is among the most insidious methods of regulating homeless behavior because it targets their personal property by exploiting their lack of real property. I argue that the law should be overturned because it is unconstitutionally vague and overbroad, and it has been used to systematically strip the homeless of their property and to regulate their movement.

By exposing how real property rights ensure personal property rights, the "sidewalk law" raises a larger question about how real property acts as a condition precedent for the full enjoyment of other rights, such as those enshrined in the federal and Hawai'i Constitutions. Thus, I next offer several ways to explain the legal and social privileging of the propertied and discrimination against the homeless.

In part IV, I argue that there are two causes, in particular, that account for the deep-seated legal and social discrimination against the homeless. The first is constitutional. I discuss several rights in both constitutions that require real property for their full enjoyment and that, in doing so, expose a constitutional bias for the propertied and against the propertyless. As the supreme law of the land, and as a prime source of American identity, the federal Constitution's pro-property/anti-propertyless vision has contributed to, but does not fully explain, the tenacity and excesses of both positive stereotypes of the homeowner and negative stereotypes of the homeless.

The tenacity and excesses of those stereotypes are rooted in a cognitive cause: anti-homeless prejudice is a byproduct of the default tendency for humans to think in binaries, with the homeless bearing the consequences of living on the wrong side of the window. In particular, the image of the homeless forms one half of a binary with that of the homeowner.[9] This binary leads to a distortion of both images in the sense that each part of the binary reinforces and amplifies the other's opposite traits, and obscures the diversity of homeless individuals by creating a false choice between two exaggerated stereotypes. In this way, the binary also influences how the law and courts privilege the propertied and discriminate against the homeless, and how the public supports or at least tolerates anti-homeless practices. I discuss the late 2000s financial crisis as a prime example of the binary's inaccuracy.

Finally, in part V, I look for a constitutional solution to the constitutional discrimination by considering the equal protection doctrine's[10] applicability

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[9] Besides those who own real property, I also include renters or lessees of real property because anyone who has dependable access to and use of real property enjoys greater constitutional rights than those who lack real property rights.

[10] U.S. CONST. amend. XIV, § 1 reads in relevant part: "No State . . . deny to any person within its jurisdiction the equal protection of the laws." Though the Equal Protection Clause in the 14th Amendment only requires states to provide equal protection of their laws, the

to homeless legal rights. I make a case for the homeless both *needing* and *deserving* equal protection solicitude. The need arises from homeless persons' unique vulnerability to arbitrary governmental interference. Not only do homeless persons lack the real property that has been regarded as a physical shield against such interference, but in lacking real property, they are also legally more vulnerable because the Constitution requires such property for full benefit of its protections against governmental interference. Though the equal protection doctrine will not correct the constitutional discrimination against the propertyless, the constitutional discrimination does strengthen homeless claims for suspect class status under the equal protection doctrine. Finally, I discuss how the homeless deserve suspect status by satisfying the factors that courts should use to make that finding.

II. HOMELESSNESS IN HAWAI'I: A BACKGROUND

Though there are no exact figures for the homeless population in Hawai'i, the most reliable data estimate that a total of 14,200 homeless individuals received shelter and outreach services from July 1, 2011, to June 30, 2012.[11] This number almost surely "undercounts" homeless in Hawai'i because it excludes those homeless persons who did not receive services.[12]

On any given night, the State of Hawai'i and private providers of services or shelter appear to lack space to accommodate all homeless. This is important to counter the argument that homelessness is avoidable if only the homeless would seek shelter. For example, in September of 2012, the State offered 1,018 transitional housing units and 931 emergency shelter

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Supreme Court in *Bolling v. Sharpe*, 347 U.S. 497 (1954) construed the 5th Amendment's Due Process Clause as prohibiting discrimination by the federal government by.

As for Hawai'i, HAW. CONST. art. I, § 5 reads: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

[11] Center on the Family at the University of Hawaii and the Homeless Programs Office of the Hawaii State Department of Human Services (hereinafter referred to as "Center on the Family at U.H."), *Homeless Service Utilization Report 2012* 2, 11 (2011), http:/uhfamil.hawaii .edu/publications/brochures/HomelessServiceUtilization2012.pdf. The shelter program consists of emergency or transitional shelters that receive State and Federal Department of Housing and Urban Development Funds and report data to the State's Homeless Management Information System (HMIS). Outreach services targeted homeless that did not use the shelter programs, and consisted of "outreach teams, drop-in centers, Care-A-Vans, and food programs." *Id.*

[12] *Id.* at 3.

beds.[13] Though some homeless people avoid shelters for a variety of reasons, this should not detract from the fact that many homeless simply have nowhere to go besides parks, sidewalks, or other public places. To compound the problem, the State is seeking to close off its waiting list for public housing.[14] This would further clog shelters because homeless families who would have opened up shelter space by moving to public housing will be forced to remain in the shelters.[15]

Significantly, the best information available on homeless people in Hawai'i undermines the dominant stereotype of a homeless person as dirty, mentally ill, lazy, and fully to blame for his or her condition.[16] It is easy to forget that people become homeless for many different reasons.[17] Factors such as domestic violence, sudden health problems combined with a lack of affordable health care, forced eviction, and little to no employment opportunities may quickly thrust someone into homelessness, despite their best efforts.[18]

In Hawai'i, the lack of affordable housing is a prime cause of homelessness. Hawai'i has one of the most expensive housing markets in the nation but a relatively low average income. Hawai'i also has the highest cost of living, by far, of any state.[19] Among cities, Honolulu trails only New York City for the highest cost of living.[20] As a result, the number of poor in Hawai'i who must spend more than 50% of their incomes on

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[13] *Id.* at 10.

[14] *See* Mary Vorsino, *Homeless Might Lose Preference: The State Wants To Accept Tenants First Come, First Served*, HONOLULU STAR-ADVERTISER (Jun. 7, 2011), http://www.staradvertiser.com/news/20110605_Homeless_might_lose_preference.html?id=123182253; *Hawaii Public Housing Authority Meeting Minutes of the Regular Meeting*, HAWAII PUBLIC HOUSING AUTHORITY, 135(Nov. 17, 2011), http://www.hcdch.state.hi.us/boardinfo/minutes/2011/11.17.11-HPHA-REGULAR.MTG.PDF.

[15] *Id.*

[16] KATHLEEN R. ARNOLD, HOMELESSNESS, CITIZENSHIP, AND IDENTITY: THE UNCANNINESS OF LATE MODERNITY 7-8 (2004). *See infra* Part IV. C.

[17] Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 Yale L. & Pol'y Rev. 1, 8 (1996).

[18] *Id.*

[19] *Cost of Living Data Series 2nd Quarter 2012*, MISSOURI ECONOMIC RESEARCH AND INFORMATION CENTER (2012), http://www.missourieconomy.org/indicators/cost_of_living/index.stm.

[20] *The 10 Cities with the Highest Cost of Living: Report*, HUFFINGTON POST (Jan. 27, 2012), http://www.huffingtonpost.com/2012/01/27/cities-high-cost-ofliving_n_1236841.html #s644533&title=2_New_York (based on research by the Council for Community and Economic Research); *see also Kiplinger's Best Value Cities of 2011*, KIPLINGER (July 2011), http://www.kiplinger.com/tools/bestcities_sort/ (based on research by the Bureau of Labor Statistics, U.S. Census Bureau, The Martin Prosperity Institute).

housing is nearly 83%.[21] This factor, which experts call "severely housing cost burdened," is important because when the cost of "housing accounts for 50 percent or more of a household's resources, any unexpected financial crisis tends to jeopardize housing stability and to lead to increased risk of homelessness."[22] According to the "severely housing cost burdened" index, Hawai'i shares top spot in the nation with Nevada.[23] Unsurprisingly, the lack of affordable housing even threatens employed, tax-paying citizens with homelessness.

What may come as a surprise, however, is how many homeless people are educated and employed. About 70% of the homeless adults in both the shelter and outreach programs had a high school diploma or GED, with about a quarter of homeless adults graduating from or attending some college.[24] Additionally, the data undercuts the notion that homelessness equals joblessness. In terms of work, just under 30% of adults who used the State's shelter program were employed either full time or part time.[25]

Further, most homeless also do not fit the traditional stereotype of chronic or permanent homelessness. Among the 10,940 adult homeless from July 1, 2010 to June 30, 2011, only about 12% were "long-term homeless"—defined as "continuously homeless for at least one year or having at least four episodes of homelessness in the past three years."[26] Nine percent of the adult homeless also qualified as "chronically homeless"—"an unaccompanied homeless person with a disabling condition who is also long-term homeless."[27] Many people who have been homeless eventually secure housing,[28] which undermines the prevalent image of the homeless as "lost causes."

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[21] National Alliance to End Homelessness, *supra* note 3, at 24-25.

[22] *Id.*

[23] National Alliance to End Homelessness, *supra* note 3, at 24-25 (based on data for 2009-2010 from the U.S. Census Bureau's American Community Survey Public Use Microdata Sample (PUMS) files, the U.S. Department of Labor, and RealtyTrac, a private real estate research group).

[24] Center on the Family at U.H., *supra* note 11, at 7, 9. Though some may argue that these numbers are skewed by the financial collapse of 2008, which led to more educated and more employed people losing their homes, a similar analysis in 2006 also showed a high level of work-force participation (28% part-time and full-time employment) and education (49% high school diploma or GED and 29% some college, college degree, or more). *Homeless Service Utilization Report,* CENTER ON THE FAMILY AT THE UNIVERSITY OF HAWAII 4 (2006), http://www1.honolulu.gov/housing/hsur2006.pdf.

[25] *Id.* at 7.

[26] *Homeless Service Utilization Report,* CENTER ON THE FAMILY AT THE UNIVERSITY OF HAWAII 4 (2011), http://www1.honolulu.gov/housing/hsur2011.pdf. This statistic was not included in the 2012 report.

[27] *Id.*

[28] *Id.* at 12-13.

III. ANTI-HOMELESS STATE AND CITY LEGISLATION AND ACTIVITY

Whether because of mistaken notions of the homeless, or extensive recent coverage of "homeless tourists,"[29] Hawai'i continues to be very tough on the homeless. In the past few years, both the State and the City have aggressively targeted the homeless in several ways: anti-camping ordinances that prevent homeless from sleeping and setting up shelter at parks;[30] a "sidewalk law" that makes it illegal for homeless to store their property on sidewalks and other public property;[31] and "sweeps" that "disinfect" public property of homeless.[32]

Like many other states, Hawai'i has used "sweeps" to harass the homeless or to expel them from tourist areas. The most notable sweeps came before the Asia-Pacific Economic Cooperation (APEC) Conference in October and November of 2011,[33] which was to be an unparalleled opportunity for Hawai'i to gain positive exposure worldwide. Officials such as the State's homeless coordinator, Marc Alexander, and Bridget Holthus, the deputy director of Honolulu's Department of Community Services, assured lawmakers that the homeless would not be rounded up because doing so would violate people's constitutional rights. According to Holthus:

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[29] The media has promoted another image of Hawaii's homeless: the homeless tourists either sent by another state or coming on their own will because they think Hawai'i is a paradise for the homeless. *See, e.g.*, Denby Fawcett, *Expert Says 30 Percent Of Hawaii Homeless From Out Of State*, KITV4 (June 2, 2010), http://www.youtube.com/watch ?v=HMCM7sj3Neg; *Hawaii's Homeless to be sent back to US Mainland*, THE TELEGRAPH (July 27, 2010), http://www.telegraph.co.uk/news/ worldnews/australiaandthepacific /Hawaii/7911685/Hawaiis-homeless-to-be-sent-back-to-US-mainland.html. It is unclear to what extent the media exaggerates this influx of homeless. Of those homeless who received outreach services from July 1, 2010, to June 30, 2011, 13 percent had been in Hawai'i for less than a year. Audrey McAvoy, *Hawaii's Other Side Of Paradise: Homelessness, It Threatens To Mar Perfect Picture Honolulu Would Like To Present To APEC*, MSNBC (May 20, 2011), http://www.msnbc.msn.com/id /43114284/ns/us_news-life/t/Hawaiis-other-side-paradise-homelessness/#.TyJe52BkiqE. What is clear is that this image ties homelessness to vacationing, which only reinforces the unhelpful stereotype that homeless do not want to work.

[30] REVISED ORDINANCES OF HONOLULU (ROH) § 10-1.2 (2009), http.www1.honolulu.gov/council/ocs/roh/rohchapter10.pdf.

[31] ROH § 29-19.3 (2011), http://www1.honolulu.gov/council/ocs/roh/rohchapter29.pdf.

[32] Larry Geller, *State Sweeps the "aloha" from the "Aloha State,"* DISAPPEARED NEWS (Nov. 23, 2011), http://www.disappearednews.com/2011/11/state-sweeps-aloha-from-aloha-state.html.

[33] Nick Castele, *Report on Hawaii's Homeless Doesn't Tell Whole Story*, HONOLULU CIVIL BEAT (Nov. 23, 2011), http://www.civilbeat.com/articles/2011/11/23/13985-report-on-Hawaiis-homeless-doesnt-tell-whole-story/.

> The idea is that somehow the city or the state government would somehow go in and round people up. Maybe in other places in the world. Not in this country, not in this state, not in this city. Even if we wanted to, and we don't, that would be an unconstitutional move . . . . A sweep in terms of a roundup of people - compelling them to move against their will to another location - can't happen.[34]

Governor Neil Abercrombie also denied that such sweeps would occur,[35] These denials were hardly surprising. However, the media reported numerous instances of City and State sweeps in the run up to APEC.[36]

Another pervasive form of anti-homeless legislation has been "anti-camping" ordinances. The current ordinance, Revised Ordinances of Honolulu (ROH) § 10-1.2 (2009), replaced a version that was invalidated as unconstitutionally vague and overbroad by the Hawai'i Supreme Court in *State v. Beltran.*[37] ROH § 10-1.2 prohibits any person from entering or remaining in a public park when it is closed.[38] So far, the ordinance's constitutionality has been challenged only once. In *State v. Hitchcock*[39], the homeless defendant, convicted of violating ROH § 10-1.2(a)(13), raised the issue of whether "ROH § 10-1.2(a)(13) is unconstitutional as applied to him because it is vague, overbroad, and constitutes cruel and unusual punishment."[40] The Hawai'i Supreme Court declined to address this argument, however, because instead it reversed his conviction for

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[34] Audrey McAvoy, *State Homeless Coordinator: Safe Zones Ineffective*, DESERET NEWS (July 28, 2011), http://www.deseretnews.com/article/700166697/State-homeless-coordinator-Safe-zones-ineffective.html?pg=2.

[35] Guy Adams, *America's Homeless Crisis Washes Up in Obama's Birthplace*, THE INDEPENDENT (Sept. 19, 2011), http://www.independent.co.uk/news/world/americas/americas-homeless-crisis-washes-up-in-obamas-birthplace-2356870.html.

[36] *See* Chad Blair, *Homeless Evicted In Sweep Say They'll Be Back, Honolulu Civil Beat*, HONOLULU CIVIL BEAT (Oct. 28, 2011), http://www.civilbeat.com/articles/2011/10/28/13481-homeless-evicted-in-sweep-say-theyll-be-back; Dan Nakaso, *State Clearing Homeless from APEC Sight Lines*, HONOLULU STAR-ADVERTISER (Oct 26, 2011), http://www.staradvertiser.com/news/apec2011/apecstories/20111026_State_clearing_homeless_from_APEC_sight_lines.html?id=132604508.

[37] State v. Beltran, 116 Haw. 146, 172 P.3d 458 (2007).

[38] ROH§ 10-1.2 (2009). ROH § 10-1.2, which duplicates the language of Haw. Code R. § 15-210-13 (West 2011), reads in relevant part:

> (a) Within the limits of any public park, it is unlawful for any person to:
>
> (12) Enter or remain in any public park during the night hours that the park is closed, provided that signs are posted indicating the hours that the park is closed;
>
> (13) Camp at any park not designated as a campground.

[39] 123 Haw. 369, 235 P. 3d 365 (2010).

[40] *Id.* at 371-72, 235 P. 3d at 367-68.

insufficiency of the evidence.[41] Whereas the earlier ordinance ran into constitutional problems for potentially criminalizing activities that public park users might engage in without notice,[42] the current ordinance avoids those problems by simply criminalizing the entering or using of public parks when they are closed.

The newest and most insidious addition to the City's anti-homeless laws and practices is the "sidewalk law," ROH § 29-19.[43] The "sidewalk law" is part of a growing trend of laws across the nation that allow government officials to regulate and harass homeless individuals by targeting their property.[44] In the short time the law has been enforced, City officials seem to be focusing on the homeless,[45] despite protestations to the contrary.[46]

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[41] *Id.* Similar ordinances in other jurisdictions have been challenged and overturned on Eighth Amendment grounds. In *Jones v. City of Los Angeles*, 444 F.3d 1118, 1137 (9th Cir. 2006) *vacated*, 505 F.3d 1006 (9th Cir. 2007), a circuit court found the anti-camping ordinance to criminalize status in violation of the Eighth Amendment. The Ninth Circuit held that the state may not "criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets of Los Angeles's Skid Row." *Id.* at 1137.

Another Eighth Amendment challenge to an anti-camping ordinance occurred in *Anderson v. Portland*, No. 08-1447-AA, 2009 WL 2386056 (D. Or. July 31, 2009). The *Anderson* Court also held that the Eighth Amendment protected conduct integral to status. Like the *Jones* Court, the *Anderson* Court determined that the "City's enforcement of the anti-camping and temporary structure ordinances criminalizes them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property." *Id.* at *7. However, the *Anderson* Court "decline[d] to adopt the pronouncement that the Eighth Amendment limitation on criminalizing 'mere status' depends *solely* on whether the challenged law or its enforcement targets derivative, 'involuntary' conduct." *Id.* The *Anderson* Court also required the prohibited conduct to be both innocent and involuntary to be actionable under the Eighth Amendment. *Id.* For more discussion on both these cases and anti-camping ordinances, see Kathryn Hansel, *Constitutional Othering: Citizenship and the Insufficiency of Negative Rights-Based Challenges to Anti-Homeless Systems*, 6 NW. J. L. & SOC. POL'Y 445 (2011).

[42] *Beltran*, 116 Haw. at 149-53, 172 P.3d at 462-65. Writing for the majority, Justice Acoba concluded that the ordinance relied on a vague and overbroad definition of "camping," which allowed officials to enforce the ordinance on an ad hoc basis "when it reasonably appears, in light of the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging." *Id.* at 152-54, 172 P.3d at 464-66 (citing ROH § 10–1.3).

[43] ROH § 29-19.3 (2011).

[44] *See* The National Law Center on Homelessness & Poverty and The National Coalition for the Homeless, *Homes not Handcuffs: The Criminalization of Homelessness in U.S. Cities* 165-71 (2009), http://www.nlchp.org/content/pubs/2009HomesNotHandcuffs1.pdf. The 2009 study revealed that over 40% of the states had at least one municipality that targeted homeless by "storage of property" or "maintaining junk" ordinances.

[45] The City officially began to enforce the "stored property" ordinance on January 6,

On its face, the law allows City officials to impound any personal property "stored" on public property.[47] According to ROH § 29-19.3(a):

> No person shall store personal property on public property. All stored personal property may be impounded by the city. In the event personal property placed on public property interferes with the safe or orderly management of the premises or poses a threat to the health, safety, or welfare of the public, it may be impounded at any time by the city.[48]

To qualify as "stored personal property," a City official must first "tag" a piece of personal property with written notice.[49] This notice informs the owner that the property will become "stored personal property" if the owner does not remove it from public property within twenty-four hours.[50] The notice reads: "[n]o person shall store personal property on public property. Personal property stored on public property shall be impounded if not removed within twenty-four hours."[51] The notice lists the city ordinance number, but provides no information on where impounded property will be stored or how it can be retrieved.[52] Impounded property is then stored in large green bins.[53] The owner has thirty days to retrieve the property by

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2012. *Enforcement of Stored Property Ordinance Begins*, HONOLULU.GOV (Jan. 6, 2012), http://www1.honolulu.gov/csd/publiccom/honnews12/EnforcementStoredPropertyOrdinance6Jan12.htm; *see also* Ramsay Wharton, *City Enforcing Stored Property Ordinance At 3 Oahu Parks*, KGMB HAWAII NEWS NOW (Jan. 10, 2012), http://www.Hawaiinewsnow.com/story/16488436/deadline-nearing-for-homeless-to-relocate. So far, homeless and Occupy Protesters appear to be the targets, though the City has denied this. *See, e.g.*, Michael Levine, *Honolulu Homeless Frustrated as Belongings Taken*, HONOLULU CIVIL BEAT Jan. 10, 2012, http://www.civilbeat.com/articles/2012/01/10/14500-honolulu-homeless-frustrated-as-belongings-taken/.

[46] Gordon Y.K. Pang, *Council Might Ban Personal Property On City Sidewalks A Bill Would Allow The Removal Of Items Owned By Homeless*, HONOLULU STAR-ADVERTISER (Sept. 29, 2011), http://www.staradvertiser.com/newspremium/Hawaiinewspremium/20110929_Council_might_ ban___personal_property_on_city_sidewalks.html (Tulsi Gabbard, creator of the bill, said "the bill is not designed to clear the streets of homeless people, but to ensure that sidewalks, parks and other city facilities are available for use by everyone." "This bill only deals with improperly stored possessions and has nothing to do with people[.]" "This is truly a safety and health issue dealing with material possessions.").

[47] *Id.*

[48] ROH § 29-19.3(a) (2011).

[49] Gregg K. Kakesako, *Homeless Ordered To Remove Property: Officials Are Enforcing A New City Ordinance That Bans Personal Items In Public Areas*, HONOLULU STAR-ADVERTISER (Jan. 10, 2012), http://www.staradvertiser.com/newspremium/20120110_Homeless_ordered_ to_remove_property.html.

[50] ROH § 29-19.3(b) (2011).

[51] For a picture of the notice, see H. Doug Matsuoka, *Repeal Bill 54*, THE DOUG NOTE BLOG (Feb. 12, 2012, 11:00AM), http://dougnote.blogspot.com/2012/02/repeal-bill-54.html.

[52] *Id.*

[53] Ramsay Wharton, *City Enforcing Stored Property Ordinance At 3 Oahu Parks*,

showing proof of ownership and paying the costs of impoundment, or else the property is auctioned off or destroyed.[54]

Those are the mechanics, now the problems: First, the written notice belies the lack of constitutional notice. The ordinance is vague[55] and overbroad[56] because it vests too much discretion in City officials without adequate notice to those potentially harmed. Specifically, the law gives no guidance to City officials to determine when property is "stored" and thus subject to being tagged. Without any such guidelines, the ordinance permits officials to initiate stored property proceedings against any personal property that is on public property: the slippers left on the beach before a swim, the bicycle chained to a bike rack, the cellphone placed momentarily on a picnic table. Officials do not have to observe that a piece of personal property has been on public property for any specified time before they can tag it—the twenty-four hour waiting period covers personal property after it is tagged, not before. Thus, the law does not really target "stored property." Instead, the law gives officials the discretion to transform any property placed anywhere in the public domain into a candidate for "stored property." By allowing the City officials to tag any and all personal property, no matter how long it remains on public property prior to tagging, the law raises the suspicion that officials will selectively enforce the law.[57] Officials are likely to target certain types of people and property—*i.e.*, the homeless.

Further, the law is designed in such a way that only the truly homeless have no recourse. The law requires that once personal property is tagged, the owner must remove it from public property within twenty-four hours.[58] However, the law further states that "moving the personal property to

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KGMB HAWAII NEWS NOW (Jan. 10, 2012), http://www.Hawaiinewsnow.com/story/16488436/deadline-nearing-for-homeless-to-relocate.

[54] ROH § 29-19.5(b) (2011); ROH § 29-19.7 (2011).

[55] State v. Beltran, 116 Haw. 146, 152, 172 P.3d 458, 464 (2007) (A law that implicates due process rights is void for vagueness unless it: "1) gives the person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may act accordingly, and 2) provides explicit standards for those who apply the statute, in order to avoid arbitrary and discriminatory enforcement and the delegation of basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis.").

[56] *Id.* at 151, 172 P.3d at 463 (stating, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement") (citation omitted).

[57] Without any guidelines for what to tag, uniform enforcement would require City officials to tag every piece of personal property. This would effectively create a comprehensive twenty-four hour limit for all personal property on public property.

[58] ROH § 29-19.3(b) (2011).

another location on public property shall not be considered to be removing the personal property from public property . . . ."[59] To avoid impoundment, therefore, a person must have access to private property to which s/he can transfer his or her belongings. For the truly homeless person, the twenty-four hour period merely delays the inevitable because s/he cannot nullify the tagging by moving belongings from public property. According to City spokesperson Louise Kim-McCoy, once property is tagged with written notice "there will not be another notice. Property owners have already been warned that items identified in their notification are fair game for impoundment anywhere on public grounds."[60] It seems telling that the City spokesperson uses the hunting image of "fair game"[61] to describe the act of tagging. The 24-hour period merely gives the homeless a head start in the City's hunt for their property.

The law also grants overbroad discretion to City officials to impound personal property "at any time" if the personal property "interferes with the safe or orderly management" of public property.[62] This creates a loophole even for the twenty-four hour period that officials otherwise must wait before impounding personal property "stored" on public property. In effect, so long as an official claims that personal property interfered with the City's orderly management of public property, the official can confiscate the property without granting its owner even the opportunity to remove his or her belongings from public property. Though the city has to provide the owner with a chance to collect his or her belongings within thirty days, the law requires that the owner pay any moving, storage, or other related costs.[63] The owner also must bear the risk of any loss or damage to the property,[64] and s/he can only repossess the property by showing satisfactory proof of ownership or entitlement to the property.[65] For homeless people without identification, money, or receipts, this process makes repossession practically impossible. In fact, homeless people may lose their identification in this very process of impoundment. Even a non-homeless

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[59] *Id.*

[60] Wharton, *supra* note 53.

[61] ALBERT JACK, RED HERRINGS & WHITE ELEPHANTS: THE ORIGINS OF THE PHRASES WE USE EVERYDAY 186-87 (2005). The term "fair game" originates from the 1700s, during which "King George III introduced 32 new hunting laws to reduce poaching and protect landowners from livestock theft. The idea was to keep hunting the privilege of the aristocracy, but was cloaked in the notion that without controls game stock would be severely depleted." However, certain "small animals and birds, main vermin, were not included in the legislation and these were listed in the regulations as 'fair game.'"

[62] ROH § 29-19.3(a) (2011).

[63] ROH § 29-19.5(a) (2011).

[64] *Id.*

[65] ROH § 29-19.7 (2011).

person with identification and money is unlikely to have proof of ownership for confiscated belongings. Predictably, most individuals who have lost their property under this ordinance have not claimed it.[66]

As a result of the "sidewalk law," homeless in Honolulu County hold their property conditionally, entirely subject to the discretion of City officials.[67] This law enables City officials to treat homeless individuals as presumptive criminals unless they are on the run every day, and to regulate homeless behavior effectively even if indirectly by regulating personal property. For example, because neither the State nor City have any general loitering laws,[68] it was generally difficult to relocate homeless if they were on public property. Homeless could, and still can, remain and sleep in many public places. Now, because of the "sidewalk law," even if a homeless person can sleep in public places such as bus stops, s/he can longer do so while keeping any personal property.[69]

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[66] Leong, *supra* note 45; *see also* Kuramoto, *supra* note 45.

[67] The ordinance arguably penalizes an activity that is correlated with homelessness—the lack of private property to store one's personal property. If so, the law may violate the federal Constitution's Eighth Amendment and Hawai'i Constitution's article 1, section 12 ban against "cruel and unusual punishment." For a discussion of how laws that target status violate the Eighth Amendment, see Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 YALE L. & POL'Y REV. 1, 3 (1996).

[68] The State only prohibits loitering related to specific activities such as prostitution and tampering with elections. *See, e.g.*, HAW. REV. STAT. § 712-1206 (West 2011); HAW. REV. STAT. § 19-6 (West 2011).

[69] Many advocates for the homeless in Hawai'i look specifically to a provision within the Hawai'i Constitution to protect the homeless: the Law of the Splintered Paddle, or *Mamala-hoe Kanawai*, which was Hawaii's first official law under King Kamehameha I and is now enshrined in the Hawai'i Constitution as article IX, section 10. Article IX, section 10 reads:

> The law of the splintered paddle, mamala-hoe kanawai, decreed by Kamehameha I—Let every elderly person, woman and child lie by the roadside in safety—shall be a unique and living symbol of the State's concern for public safety. The State shall have the power to provide for the safety of the people from crimes against persons and property.

Haw. Const. art. IX, § 10. The plain language seems to state that people, such as the homeless, should be allowed the freedom to reside in public places without harassment. However, article IX, section 10 does not provide the homeless much legal protection, if any. First, article IX, section 10 explicitly declares itself to be symbolic. Second, the provision does not create an affirmative duty of the State either to safeguard homeless rights or to ensure that homeless can reside anywhere on public lands. In fact, the Standing Committee Report No. 36 detailing the creating of the proposed amendment states that it creates no standing to sue the State. STAND. COMM. REP. NO. 36, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 583-584 (1980).

IV. CO-CONSTITUTIVE ANALYSIS OF HOMELESS PROPERTY RIGHTS

The "sidewalk law" raises two related questions about the legal rights of homeless in Hawai'i and in the United States generally: Is access to real property a condition precedent to other rights, such as those enshrined in the U.S. and Hawai'i Constitutions? And, what are some meaningful ways to explain this disparity in rights between those with access to real property and those without?

One way to address the second question is to look to the supreme law of our land, our federal Constitution. I briefly discuss the intellectual basis for the Constitution's privileging of property, then catalog several rights enshrined in the federal and Hawai'i Constitutions, which both require real property as a condition precedent for full enjoyment. I further argue that the privileging of the real propertied must be seen in tandem with the legal and social discrimination that homeless individuals endure.

A. Real Property's Link to Liberty in Early American Legal Thought

The federal Constitution privileges property owners because property was widely regarded as a safeguard of liberty.[70] The Preamble to the Constitution states that one of the Constitution's basic purposes is "to secure the Blessings of liberty . . . ."[71] Many framers shared the belief that liberty required property, according to James Ely Jr.[72] John Adams evidenced this sentiment by proclaiming in 1790, "[p]roperty must be secured or liberty cannot exist" because once "the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[73] Consequently, as stated by Alexander Hamilton, "One great obj[ect] of Gov[ernment] is personal protection and the security of Property."[74]

Then, as now, property was said to foster several forms of liberty. First, property represented liberty from government coercion.[75] According to this

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[70] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 43 (3rd ed. 2007).

[71] U.S. CONST. pmbl.

[72] ELY, *supra* note 70, at 43.

[73] *Id.*

[74] *Id.*

[75] *Id.* According to Ely, "envisioning property ownership as establishing the basis for individual autonomy from government coercion, the framers of the Constitution placed a high value on the security of property rights." In this way, "the framers saw property ownership as a buffer protecting individuals from governmental coercion."

conception of freedom as "negative liberty," a system of private property owners would guard against tyranny by diffusing material power instead of centralizing it in the government. However, as property prevented the centralization of power, property also reserved power to that class of persons who could own it, namely white propertied males. At the time the Constitution was formed, in nearly every state, a person had to own property or pay taxes to vote, and he would have to satisfy even higher property classifications to hold public office.[76] Second, property fostered liberty as material independence from others; with his own land and material resources, a man could rely only upon himself for his wants and needs. In this way, he could avoid exploitive dependence on another. Third, property fostered liberty as physical privacy, a place apart. This form of liberty required land and shelter where one could enjoy a physical zone of autonomy to be oneself. Though each strand of liberty contemplated tangible personal property, it was real property that provides the literal ground upon which liberty rests.

The link between property and liberty, and the resulting conclusion that government must protect both, originated from several sources. First was the English constitutional tradition. In particular, the Magna Charta (1215) provided a reference point for the Constitution's drafters. "Originally forced on a reluctant King John to protect the privileges and property of the nobility,"[77] the Magna Charta upheld property ownership as a guarantee of freedom from governmental abuse.[78] The Magna Charta would prove to be a direct ancestor of due process provisions in early state constitutions such as Massachusetts' and Pennsylvania's, and the 5th Amendment of the Bill of Rights.[79]

Second, and perhaps more influential, was the political philosophy of John Locke. Locke argued that private property reflected a natural law that preexisted government. Accordingly, "the principal purpose of government

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[76] *Id.* at 47.

[77] *Id.* at 13.

[78] *Id.*

[79] *Id.* The Magna Charta stated that officials of the King could not "take corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment." By recognizing the government's duty to compensate an owner when it takes private property, this provision would act as a precursor to the U.S. Constitution's Takings Clause. The Magna Charta further declared that, "No freeman shall be taken, imprisoned, disseised ... except by the lawful judgment of his peers or by the law of land." This provision would protect owners from arbitrary deprivation of property without due process of law. ELY, *supra* note 70, at 13. Before the federal Constitution was ratified, five states, including Massachusetts and North Carolina, modeled their constitutions on the Magna Charta by providing that no person could be "deprived of his life, liberty, or property but by the law of the land." ELY, *supra* note 70, at 30. .

was to protect these natural property rights, which Locke fused with liberty."[80] Thus, when people formed government, they did so specifically to preserve their "Life, Liberty, and Estate."[81] And any arbitrary government taking of property, even the levy of taxes without popular consent, was a fundamental subversion of government's role.[82] As many scholars have noted,[83] Locke's "Life, Liberty, and Estate" would become Thomas Jefferson's "Life, Liberty, and the Pursuit of Happiness" in the preamble to the Declaration of Independence. Besides drawing from the Magna Charta, the federal Constitution's Fifth Amendment also imitates Locke's "Life, Liberty, and Estate" with its guarantee that no one shall be "be deprived of life, liberty, or property, without due process of law . . . ."[84] Influenced by Locke, the founding fathers designed a Constitution that understood property as a natural right, fundamental to personal liberty, which government existed to protect. And so, the supreme law of the land became, and is, property-oriented.

Thus, both the intellectual milieu at the time of framing and the language of the Bill of Rights, as discussed below, suggest rather forcefully that the Constitution served to protect property as a means of protecting liberty. This is why, to enjoy the fullest benefits of the Constitution, one had not only to be free, white and male, but also propertied. The Constitution contemplated protection of several forms of property, including tangible and intangible personal property (personalty) and landed wealth (realty).[85] However, at a time in which land was the primary form of wealth,[86] the Constitution took for granted that its fullest beneficiaries would own, or at the very least, would have access to and use of real property in the form of land and shelter. In patterning their own constitutions after the federal

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[80] *Id.* at 17.

[81] *See* JOHN LOCKE, TWO TREATISES ON GOVERNMENT 229-253 (McMaster University, 2000) (1690).

[82] ELY, *supra* note 70, at 17.

[83] *See, e.g.*, Will Sarvis, *Land and Home in the American Mind*, 22 J. NAT. RESOURCES & ENVTL. L. 107, 108 (2009).

[84] US CONST. amend. V. James Madison drafted the Fifth Amendment to include criminal trial safeguards as well as the Due Process Clause and the Takings Clause. The Due Process Clause guarantees procedural safeguards against deprivation of "life, liberty, and property" while the Takings Clause prohibits the government from taking private property for a "public purpose" without "just compensation." This "decision to place guarantees of property in the Fifth Amendment next to criminal justice protections underscores the close association of property rights with personal liberty in the mind of the framers of the Constitution." THE BILL OF RIGHTS IN MODERN AMERICA X(David J. Bodenhamer & James W. Ely, Jr. eds., 2008).

[85] ELY, *supra* note 70, at 32.

[86] *Id.* at 6.

Constitution,[87] state governments further ingrained this core concern with property as a fundamental tenet of American constitutionalism.[88]

B. Real Property as a Condition Precedent to Certain Rights

Real property is a condition precedent to a fuller enjoyment of many rights that are enshrined in the federal and Hawai'i Constitutions and/or granted by other sources of law. Conversely, when someone lacks real property, s/he is accorded markedly lesser citizenship rights. The following discussion is a narrow sketch of certain rights that homeless people do not enjoy to the same extent as those with access to and use of real property, particularly homes.[89] One recurrent theme is that the physical structure of the residence and the curtilage are not the inevitable source of these rights. Instead, the rights reflect a value choice to privilege persons with homes versus persons without homes.

One right conditioned upon real property is the right to privacy. Though the U.S. Supreme Court has construed this right of privacy to include certain decisional or autonomy freedoms,[90] the Court has also carved out a physical component to this right—a "zone of privacy" for activities that occur "in the most private of places, the home."[91] Hawai'i has gone two steps further: the State has enshrined the right to privacy in art. I, § 6 of its Constitution[92] and the Hawai'i Supreme Court has stated that the right to

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[87] On the other hand, the federal Constitution itself adopted language from other state constitutions. When James Madison drafted the Bill of Rights, as a compromise for ratification, he drew heavily from such state constitutions such as Virginia's, where Madison himself was a delegate.

[88] *Id.* at 57. Though the 1887 Constitution of the Kingdom of Hawai'i possesses the infamous nickname of the "Bayonet Constitution" because King Kalākaua signed it under threat from an armed militia of anti-monarchists, it was the first in Hawaii's history to adopt much of the language of the federal Constitution. Regardless of the 1887 Constitution's controversial beginnings, it has played an important part in institutionalizing the values of real property and liberty in the State of Hawai'i.

[89] By "homes," I include any legal dwelling fixed on land such as a single-family home, an apartment, or a unit in a condominium or co-op.

[90] The U.S. Constitution does not explicitly mention a "right to privacy." However, the Supreme Court has nonetheless construed such a right, which encompasses such rights as the right to reproductive autonomy, *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965), Roe v. Wade, 410 U.S. 113 (1973); the right to make certain other medical decisions, *see, e.g.*, Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990); the right to consensual sexual activity with an adult in one's home, Lawrence v. Texas, 539 U.S. 558 (2003); the right to read obscene materials in one's home, *see, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969).

[91] *Lawrence*, 539 U.S. at 567.

[92] HAW. CONST. art. I, § 6.

privacy in Hawai'i is broader than that provided under the federal Constitution.[93]

Both the U.S. Supreme Court and Hawai'i Supreme Court consider the home a special situs of privacy. In *United States v. Orito*,[94] for example, the Court stated that "[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education."[95] *Orito* involved a prosecution for transporting obscene material knowingly in interstate commerce by common carrier. The Court held that Congress could prevent obscene material from entering the stream of commerce because the "zone of constitutionally protected privacy [does not follow] such material when it is moved outside the home . . . ."[96] In reaching this result, the Court reaffirmed its earlier holding in *Stanley v. Georgia*,[97] which overturned a criminal conviction for mere private possession of obscene material.[98] There, the Court stated that the home creates a physical zone of privacy from which individuals may be free of certain governmental intrusion.[99]

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[93] State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988) (internal citation omitted): The Hawaii Constitution article I, section 6, though, affords much greater privacy rights than the federal right to privacy, so we are not bound by the United States Supreme Court precedents. As the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, we are free to give broader privacy protection than that given by the federal constitution.

See also State v. Mallan, 86 Haw. 440, 448, 950 P.2d 178, 186 (1998) ("unlike the federal constitution, our state constitution contains a *specific* provision *expressly* establishing the right to privacy as a constitutional right. Thus, our case law and the text of our constitution appear to invite this court to look beyond the federal standards in interpreting the right to privacy." (emphasis in original)); State v. Viglielmo, 105 Haw. 197, 210-11, 95 P.3d 952, 965-66 (2004) ("We have long recognized . . . that 'as the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i Constitution, we are free to give broader protection under the Hawai'i Constitution than that given by the federal constitution.'") (internal citations omitted).

[94] United States v. Orito, 413 U.S. 139 (1973).

[95] *Id.* at 142.

[96] *Id.* at 141-42.

[97] Stanley v. Georgia, 394 U.S. 557 (1969).

[98] *Id.* at 565.

[99] *Id.* at 563-64. For a recent case affirming the privacy of the home, see also Kyllo v. United States, 533 U.S. 27, 40 (2001). In a 5-4 majority comprised of Justices Souter, Thomas, Ginsburg, Breyer, and Scalia, the Court held that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40.

Hawai'i has also adopted the home as a situs of privacy, citing both *Stanley* and *Orito* approvingly.[100] In *State v. Kam*,[101] the Hawai'i Supreme Court referred to both *Stanley* and the Hawai'i Constitution's article I, § 6 "Right to Privacy" to uphold the home as a zone of privacy in which "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[102] The *Kam* Court found this right of privacy in the home to be so strong that it held the privacy right to include a "correlative right to purchase" obscene material outside the home.[103]

Although a later Hawai'i case, *State v. Mallan*,[104] declined to extend *Kam's* "correlative right to purchase" to marijuana, *Mallan* nonetheless reaffirmed "the home as the situs of privacy."[105] The *Mallan* Court upheld Mallan's conviction for using and possessing marijuana in a car parked in public.[106] In relying on *Kam*, Mallan's lawyer tried to extend the right to privacy to "any time he subjectively feels that he is 'in privacy.'"[107] Mallan argued that his car was a situs of privacy. The Court rejected this attempt "to sever *Stanley* and *Kam* from the concept of privacy within the home . . . ."[108] Noting that "[t]o do so would give 'talismanic effect' to the phrase 'in privacy,'"[109] the Court resisted this possibility, fearing that the "right of privacy" would become an all-encompassing defense that individuals would invoke for any obscene or illegal activities done outside their places of residence. The *Mallan* holding could have extended privacy beyond the house, but chose not to do so. *Mallan* also reveals that the home is a practical, but not inevitable, place to draw a line in which a person can feel he is "in privacy" versus "beyond privacy."[110]

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[100] *See, e.g.*, State v. Mallan, 86 Haw. 440, 445, 950 P.2d 178,183 (1998); State v. Kam, 69 Haw. 483, 489-90, 748 P.2d 372, 376 (1988).

[101] 69 Haw. 483, 748 P.2d 372 (1988).

[102] *Id.* at 494, 748 P.2d at 379 (quoting *Stanley*, 394 U.S. at 564-65) (emphasis omitted). *Kam* involved the conviction of two sales clerks for promoting pornographic adult magazines. The Hawai'i Supreme Court reversed the district court convictions, and held, *inter alia*, that a statute that prohibits the promotion of pornographic magazines infringes on a customers' right to privacy under the State Constitution. The court controversially held that the right to view obscene material in the privacy of one's own home also created a correlative right to purchase obscene material.

[103] *Id.* at 495, 748 P.2d at 380.

[104] 86 Haw. 440, 950 P.2d 178 (1998).

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

[106] *Id.* at 441-42, 950 P.2d at 179-80.

[107] *Id.* at 447, 950 P.2d at 185.

[108] *Id.*

[109] *Id.*

[110] *But see* State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983), in which the Court upheld the defendant's conviction for engaging in sex for hire with adults in her home. The

Homeless people also lack equivalent constitutional rights to be free from unreasonable governmental searches and seizures of private property.[111] These constitutional rights are enshrined in the Fourth Amendment of the U.S. Constitution and in article I, § 7 of the Hawai'i Constitution.[112] To determine whether someone has a legitimate right of privacy, courts generally use the two-part test that Justice Harlan formulated in his concurrence in *Katz v. United States*:[113] 1) a person must have an actual subjective expectation of privacy; and 2) "society must be prepared to recognize that expectation as objectively reasonable."[114] Though both the majority opinion and Justice Harlan's concurrence acknowledged that "the Fourth Amendment protects people, not places,"[115] and though the case held that Katz had a reasonable expectation of privacy for a conversation in a public phone booth, this test has not offered protection for tangible

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defendant argued that her right of privacy in the home extended to prostitution. But the Court firmly rejected this based on its conclusion that the "decision to engage in sex for hire at home" was not a fundamental right. *Id.* at 628, 671 P.2d at 1359.

[111] For more scholarship on the lack of homeless rights from unreasonable search and seizure, see, for example, Jordan Gross, *A Reasonable Expectation of Privacy? Homelessness and the Fourth Amendment—State v. Mooney*, 36 HOW. L.J. 75 (1993); Gregory Townsend, *Cardboard Castles: The Fourth Amendment's Protection of the Homeless's Makeshift Shelters in Public Areas*, 35 CAL. W. L. REV. 223 (1999); Nicholas May, *Fourth Amendment Challenges To "Camping Ordinances": A Legal Strategy To Force Legislative Solutions To Homelessness*, 11 RICH. J.L. & PUB. INT. 1 (2008). There also is considerable scholarship on how "the ideal of the inviolate home dominates the Fourth Amendment." *See, e.g.*, Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905 (2010); Lee C. Milstein, *Fortress of Solitude or Lair of Malevolence? Rethinking the Desirability of Bright-Line Protection of the Home*, 78 N.Y.U. L. REV. 1789 (2003); Evan B. Citron, *Say Hello and Wave Goodbye: The Legitimacy of Plain View Seizures at the Threshold of the Home*, 74 FORDHAM L. REV. 2761 (2006).

[112] Though the U.S. Constitution's amendment IV and Hawai'i Constitution article I, section 7 are nearly identical, one of the differences is that Hawai'i's Constitution specifically protects the individual's right to be free from unreasonable "invasions of privacy." The other difference is that Hawaii's article I, section 7 also makes explicit that a warrant must describe "communications sought to be intercepted." Hawai'i Constitution article I, section 7 reads as follows, with the underlined portions the only parts that U.S. Constitution amendment IV does not include:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted. (emphasis added).

[113] Katz v. United States, 389 U.S. 347 (1967).

[114] *Overview of the Fourth Amendment*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 3, 5-6 (2008).

[115] *Katz*, 389 U.S. at 351, 361.

personal items in public. As Justice Harlan said immediately after introducing his two-part test, "[i]tems exposed to the public, abandoned, or obtained by consent are not protected because an individual does not have a legitimate expectation of privacy in those items."[116] In the wake of *Katz*, courts have held that homeless people do not have an objectively reasonable expectation of privacy.[117]

This is not surprising given that the underpinnings of the search and seizure law derived from the basic notion that a "man's home is his castle; and while he is quiet, he is well guarded as a prince in his castle."[118] In requiring specific warrants, the Fourth Amendment was a response to colonial English practices, in which officials would use general warrants (writs of assistance) to conduct searches of colonists' homes for smuggled goods.[119] Along with the Third Amendment, which barred the quartering of private soldiers, the Fourth Amendment reveals that privacy, and the limits of search and seizure, were intimately tied to the sanctity of the home. In contrast, because "the Fourth Amendment has drawn a firm line at the entrance to the house,"[120] those without a home do not have the same constitutional right to be free of unreasonable search and seizure.

One case that reveals that a privacy-based right is not an inevitable concomitant of having a physical dwelling is *Amezquita v. Hernandez-Colon*.[121] In *Amezquita*, members of a squatter community brought suit against their governmental landowner following their eviction and the destruction of the shacks they had called home.[122] The plaintiffs brought a Fourth Amendment claim based on the defendants "looking into and poking through the homes of some of the plaintiffs without a search warrant"

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[116] *Overview of the Fourth Amendment*, *supra* note 114, at 5-8.

[117] *See, e.g.*, People v. Thomas, 45 Cal. Rptr. 2d 610, 613 (1995).

[118] Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1358 (1992) (quoting *Paxton's Case*, Superior Ct. 1761, *reprinted in* Quincy's Mass.Rep. 1761-62, 51 (1865). According to Gorley, "[t]his maxim derived from the early English case of Y.B. 21 Hen. 7, fo. 39, pl. 50 (1499), *cited in* 2 THE REPORTS OF SIR JOHN SPELMAN 316 n. 2 (J.H. Baker ed., 1978)").

[119] According to Boyd v. United States, 116 U.S. 616 (1886), John Adams denounced English use of general warrants by saying, "Then and there . . . then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Id.* at 625.

Boyd also relates James Otis' condemnation of these practices as "'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.'" *Id.* (citation omitted).

[120] Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 361 (2010).

[121] Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975).

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

before bulldozing plaintiffs' property—the structures they had established.[123] However, the *Amezquita* Court denied this claim, stating:

> Without question, the home is accorded the full range of Fourth Amendment protections. But whether a place constitutes a person's "home" for this purpose cannot be decided without any attention to its location or the means by which it was acquired; that is, whether the occupancy and construction were in bad faith is highly relevant. Where the plaintiffs had no legal right to occupy the land and build structures on it, those *faits accomplis* could give rise to no reasonable expectation of privacy even if the plaintiffs did own the resulting structures.[124]

In this case as well as others,[125] judges have denied claims for an objective expectation of privacy based on being in a "home" because the plaintiff did not have a legitimate property interest in the land on which the home existed. In denying an individual's expectation of privacy even though s/he occupied a walled enclosure, the First Circuit revealed that privacy-based rights are not inevitable concomitants of having a home. In other words, it is not the house that begets the right to privacy, even though this naturally seems the case because a physical barrier curtains one's body and actions. *Amezquita* underscores that legal privacy and physical privacy are two different things.

Self-defense is another example of how those who own or have access to residential properties enjoy greater legal rights. Even more than the other rights conditioned on real property, this right reveals a value-choice that greatly privileges those with a home. For example, many jurisdictions, Hawai'i included,[126] employ the "castle doctrine" to permit a person to use justifiable deadly force when fearing the imminent peril of death or serious bodily harm to him or herself or others in the home. Also arising from the English common law dictum, "a man's home is his castle,"[127] this doctrine

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[123] *Id.* at 10.

[124] *Id.* at 12 (quoting Lewis v. United States, 385 U.S. 206, 211 (1966)) (internal quotation marks omitted).

[125] *See* United States v. Ruckman, 806 F.2d 1471, 1473 (10th Cir. 1986).

[126] According to HAW. REV. STAT. §703-304 (5)(b)(i) (West 2012), the use of force is not justified if the actor knows he can retreat safely; however, "[t]he actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor . . . ."

[127] The castle doctrine dates back to at least the early sixteenth century common-law cases. Jonathan L. Hafetz, *"A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 180 n.22 (2002) (citing Thomas Y. Davies, *Rediscovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 642 n.259 (1999); and 4 WILLIAM BLACKSTONE, COMMENTARIES 223 ("[The law has] so particular and tender a regard to the immunity of a man's house that it stiles it his castle, and will never suffer it to be violated with impunity.")).

removes the duty to retreat if a person is in his or her residence, whether s/he owns or rents it. In a notorious Oklahoma case last year, an 18-year-old Oklahoma widow, Sarah McKinley, phoned 9-1-1 after realizing that two men were trying to break into her house. Barricading the front door with a sofa, she asked the 9-1-1 dispatcher, "'I've got two guns in my hand. Is it OK to shoot him if he comes in this door?"[128] The dispatcher then told her, "Well, you have to do whatever you can do to protect yourself."[129] McKinley eventually shot and killed one of the men with a 12-gauge shotgun.[130] Because of Oklahoma's "Make My Day" law, McKinley was not charged with any crime.[131]

As with the rights discussed above, the right/immunity of the housed versus the homeless does not arise inevitably from the physical structure of a home. Being in one's home does not make lethal self-defense any less lethal, thought out more carefully, or safer. But the law does hold that killing someone within one's own home is more justifiable, whereas a homeless person under the same threat risks serious criminal liability for the same actions, even if s/he has family close by.[132]

As the previous discussion shows, real property enables privacy. It is also a threshold requirement for fuller control of one's personal property and it protects against arbitrary or unreasonable interference with one's personal property. The physical structure of the home also provides a practical means of delineating certain rights such as the right to privacy. But this should by no means be taken as the inevitable point at which rights such as the right to privacy naturally arise. Instead, these laws reveal a policy choice to extend certain rights to those with real property rights but to withhold the same or similar rights from those without real property. Though the intellectual milieu at the time of the federal Constitution's framing goes some way toward explaining why persons with real property enjoy privileged legal status, there is still the question of why legal and political institutions continue to denigrate homeless people, their civil liberties, and their personal property rights.

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[128] Phil Gast, *Oklahoma Mom Calling 911 Asks if Shooting an Intruder Is Allowed*, CNN (Jan. 4, 2012), http://articles.cnn.com/2012-01-04/justice/justice_oklahoma-intruder-shooting_1_affidavit-walters-ill-husband?_s=PM:JUSTICE.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Though immunizing lethal self-defense in the home may seem reasonable to many, certain hypotheticals could pose as critiques to this naturalized notion that homes are privileged places. For example, what if the law valued the sanctity of country clubs, and immunized only those persons who acted in self-defense at country clubs?

C. Views of Homeless and Qualitative Prejudice Against their Property in Courts of Law and the Court of Public Opinion

Stripping homeless persons of their property rights depends largely on the tenacity of one view of the homeless—as deviants—and one view of their property—as junk. Despite the diversity of homeless people, the dominant view of a homeless individual is of someone riddled with some or all of the following traits: dirty, lazy, insane, irresponsible, prone to crime, uncivilized, and unredeemable.[133] According to a 2007 Gallup survey about the perceived causes of homelessness, 85% of the respondents believed alcohol and drug abuse were the major causes of being homeless, followed by mental illness or mental disability, such as post-traumatic stress disorder.[134] This survey of more than 5,000 interviews of people in major cities all over America indicates the widespread public perception that homeless are deviants.[135]

There is also a pervasive qualitative bias against homeless property as trash, and this allows government officials to treat homeless property as abandoned or "non-property."[136] This bias undergirds citizen support for, or apathy about, anti-homeless property legislation such as the City's "sidewalk law." Even the way that the "sidewalk law" is administered suggests that City officials consider the personal property of homeless people to be garbage. It is suggestive that any impounded property the City takes to its baseyard in Halawa is stored in large green bins, which are the same type of trashcans the City distributes to its residents for trash pickup.[137] This qualitative view of homeless property as "junk" makes it not only easier to justify lesser personal property rights, but also helps

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[133] ARNOLD, *supra* note 16, at 8.

[134] Gallup, Inc., Fannie Mae, *Homelessness in America: Americans' Perceptions, Attitudes and Knowledge: General Population Survey & City Surveys,* 4 (Nov. 2007), http://shnny .org/uploads/2007_Gallup_Poll.pdf.

[135] *Id.*

[136] For example, in the comments section to the latest article about the City's enforcement of the "sidewalk law," Gregg K. Kakesako, *City Crews Return To Occupy Honolulu Protest Site,* HONOLULU STAR-ADVERTISER (Feb. 29, 2012), http://www.staradvertiser.com/news/breaking/140901433.html?id=140901433, "Classic_59Chevy" simply wrote, "Burn the trash!!" Though the comments sections for online newspaper articles are not representative of everyone, they provide a fascinating and unfiltered view of public opinion. *See also* Wes Daniels, *"Derelicts," Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687 (1997); 68 AM. JUR. 2d *Searches and Seizures* § 26 (2012) (discussing whether trash or garbage constitutes abandoned property for search and seizure analysis).

[137] Wharton, *supra* note 53.

justify stripping homeless persons of property in order to "sanitize" public places.

A prominent case that exposed this qualitative bias against homeless property was *Pottinger v. Miami*.[138] In *Pottinger*, the court issued an injunction against Miami police practices aimed at the homeless, such as destruction of homeless property without any notice or hearing.[139] The court found that the police often destroyed homeless property instead of preserving it because, as one officer testified, the homeless property looked like "junk to him."[140] The judge noted that "a homeless person's personal property is generally all he owns; therefore, while it may look like 'junk' to some people, its value should not be discounted."[141]

In *Love v. Chicago*,[142] the District Court in effect held that the homeless plaintiffs had the burden to prove that their property was not trash. Homeless individuals living in Chicago's Lower Wacker Drive area brought a class action alleging that the City of Chicago violated their Fourth, Fifth, and Fourteenth Amendment rights with its practice of destroying homeless property during street cleaning.[143] After suspending the cleanings, the City adopted temporary procedures to resume the cleanings. One of the procedures permitted homeless people to remove their belongings to a safe area where their property would be secure during the cleaning process.[144] Unfortunately, on at least three occasions, City officials continued to destroy homeless property after it was moved to these safe areas.[145] The court found that it was "impractical and inappropriate" for City officials to separate out "items of value" because "[v]ermin, other pests, and human waste are frequently found in the materials stored by the homeless in the Lower Wacker Drive area."[146] There actually was no evidence that when the homeless moved some of their belongings to the safe area, they also took "vermin, other pests, and human waste" with them.

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[138] Pottinger v. Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

[139] *Id.* at 1570-73.

[140] *Id.* at 1556. For another case dealing with unconstitutional confiscation and destruction of homeless property, see Lavan v. Los Angeles, 797 F. Supp. 2d 1005, 1016 (C.D. Cal. 2011) (stating that under the Fourteenth Amendment of the U.S. Constitution, and Article I, section 7 of the California Constitution, "'person may not be deprived of life, liberty, or property without due process of law.' Plaintiffs' personal possessions, perhaps representing everything they own, must be considered 'property' for purposes of this due process analysis.") (internal citations omitted).

[141] *Pottinger*, 810 F.Supp. at 1559.

[142] Love v. Chicago, No. 96 C 0396, 1998 WL 60804 (N.D. Ill. Feb. 6, 1998).

[143] *Id.* at *1.

[144] *Id.* at *2.

[145] *Id.* at *9.

[146] *Id.* at *6.

The court's reasoning suggests that it simply relied on the prejudice of homeless property as junk to justify the behavior of city workers. District Judge Andersen concluded that "Plaintiffs have the burden to separate out and move items they find valuable and wish to retain."[147] But this was exactly what the homeless individuals did when they moved the property they valued to the secure area, to no avail. In other words, the court found that the homeless individuals did not do enough to prove that their property was worth preserving. In effect, this judicial bias against homeless property evolved into a presumption that homeless property was "trash."

For something to be "trash," the underlying assumption is that it lacks utility or emotional value for the owner. One corollary of perceiving all or virtually all homeless as suffering from severe mental illness, and homeless property as trash, is the idea that homeless people are less entitled to an emotional attachment to their property—that such a connection is irrational or worse—a sign of madness. In fact, homeless property is not only comprised of items that homeless people have as much a right to be emotionally attached to as people with real property, homeless property may also include necessaries such as bedding, clothing, and medications. Moreover, laws and practices that strip homeless of their birth certificates and identification and social security cards effectively disenfranchise the homeless, and make it virtually impossible for homeless people to secure legal employment.[148] One man's trash is not only another man's treasure—as the old saying goes—it may also be another man's right to political and economic participation.

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[147] *Id.*

[148] *See* Michael Levine, *A Look at How the City's Storing Homeless Property*, HONOLULU CIVIL BEAT (Jan. 27, 2012), http://www.civilbeat.com/articles/2012/01/27/14739-look-at-where-the-citys-storing-homeless-property:

> The experience of one of those individuals, according to Sugihara, shows the trouble that can arise when the government takes possession of personal items.
>
> He said a woman showed up on Jan. 11, the day after two bins of her belongings were impounded. She specifically needed a piece of medical equipment—the connector piece for a urine drainage bag. The city was unable to locate it for her, and needed to review video it shot during the collection process four times to make sure it never put the item into the storage bin. She showed up with a pastor to help plead her case, and left with four suitcases.
>
> The other individual, a man, originally told city workers when given the 24-hour warning to move his stuff from the sidewalk that he planned to take it to an apartment. But he was called into work the next day and wasn't present when his stuff was impounded. He first scheduled time to come reclaim his belongings the following day, but had to cancel, again because of work, before coming the second day to take his two bins worth of items—including work clothes—back with him.

Finally, homeless as a group suffer from a visual bias in which certain overt traits[149] reinforce prejudices against the homeless, but positive traits, such as employment and education, remain invisible. And in a cruel twist of fate, homeless who exhibit these positive traits but none of the negative visible "tags" of homelessness may, in fact, reinforce the positive image of those with homes. Consider the following hypothetical: If I dressed in the clothes I normally wear around my house—usually very worn but very comfortable old t-shirts and shorts—then went to a public place and acted oddly, it is likely that many onlookers would assume I was homeless, even though I am not. On the other hand, there are no visible markers that connect homelessness with normality, education, and employment. Nor do people tend to ask themselves if every person who is dressed normally and shows signs of education or employment is homeless or not. Thus, when a homeless individual with ordinary clothing goes to his or her job, it is unlikely that people would infer s/he was homeless. Instead, if asked, onlookers would probably assume s/he was not homeless.

As this eye-opening hypothetical reveals, at times the positive traits we associate with those who have homes and the negative traits we associate with the homeless may become unmoored from the actual housing status of the person in question. In my hypothetical, I am a person with a home who nonetheless reinforces prejudices against the homeless. While, on the other hand, the employed and educated person who currently does not have access to real property reinforces the positive image of those who own or can use real property. Perforce, the visual bias reinforces an essentializing and prejudicial vision of the homeless by obscuring a more accurate vision that reflects the diversity of homeless people described earlier.[150] As I discuss below, this negative visibility may strengthen the claims of the homeless for suspect class status under the Equal Protection Clause of the Fourteenth Amendment. The law does not have to compensate for this visual bias, but courts should recognize this negative visibility in answering a question implicitly fundamental to suspect classification: to what extent is the potential class like or unlike the paradigmatic classes for suspect classification, those classified by race and gender?[151]

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[149] Such traits include lack of hygiene, mental illness, begging, or carrying many belongings.

[150] *See supra* Part II.

[151] *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 559 (1998).

D. The Homeless/Homeowner Binary

"[B]inary thinking is the brain's favored method," according to a professor of neuroscience, Olivier Oullier, because of its ease.[152] Acknowledging this, I argue that to better understand the negative attitudes about the homeless requires understanding attitudes about the home. Over time, the home has become an axis for a moral vision of those who live within it as opposed to those who live outside. As one scholar writes, "the politicization of home and homelessness signals a political splitting between normal/abnormal, rational/irrational, economically independent/dependent, and so on that is radically signified in the perception of home as the repository for positive attributes and homelessness, that of negative characteristics."[153] Forming a classic either/or of homeless/homed, such binaries mutually reinforce one another and exclude gradations or alternative viewpoints. This partly explains the tenacity of this negative, one-size-fits-all image of the homeless despite the diversity of homeless individuals.

Homes, particularly home ownership, serve as a proxy for upstanding citizenship and national prosperity. Presidents often have praised the home as the foundation for American domestic tranquility and ascendancy abroad. Calvin Coolidge once said, "No greater contribution could be made to the stability of the Nation, and the advancement of its ideals, than to make it a Nation of homeowning families."[154] Similarly, Franklin D. Roosevelt declared that "[a] nation of homeowners, of people who own a

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[152] Thierry Malleret & Olivier Oullier, *Greece and the Power of Negative Thinking*, THE NEW YORK TIMES (July 30, 2010), http://www.nytimes.com/2010/07/31/opinion/31iht-edmalleret.html. For scholarly work on binary thinking in fields such as behavioral science, see, for example, Adrian Carr & Lisa A. Zanetti, *Metatheorizing the dialectic of self and other - The psychodynamics in work organizations*, 43 AM. BEHAVIORAL SCIENTIST 324 (1999); Jack Denfeld Wood & Gianpiero Petriglieri, *Transcending Polarization: Beyond Binary Thinking*, 35 TRANSACTIONAL ANALYSIS JOURNAL 31 (2005).

For legal studies on binary thinking, see, for example, Yoshino, *supra* note 151, at 556 (critiquing social insistence on the heterosexual-homosexual binary even though sexuality is a continuum that can be stretched to accommodate finer gradations of same-sex and cross-sex preference); Juan Perea, *The Black-White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997) (critiquing the effect that binaries have had on Supreme Court jurisprudence and legal thinking on race); Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1757 (2001) ("The Black-White binary as a way of conceptualizing race dominates not only legal scholarship, but scholarly books about White racism, law school texts, and—perhaps most importantly—such vehicles of popular culture as media and film.").

[153] ARNOLD, *supra* note 16, at 4-5.

[154] Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 327-28 (1998).

real share in their own land, is unconquerable."[155] Reflecting the home's perceived value to the nation, federal laws privilege homeowners with favorable tax benefits—such as tax exemptions for mortgage interest—and protective bankruptcy rights—such as post-foreclosure rights of redemption. Though renters cannot claim these benefits, renters still enjoy the constitutional rights given to those with real property rights but denied to the homeless.

Specifically, homeowners make better overall citizens, so the argument goes, because they are hard-working, familial, responsible, and committed long-term to the political, civic, and economic health of their community. According to William Fischel's THE HOMEVOTER HYPOTHESIS,[156] homeowners become more active citizens to protect the value of their single most valuable asset, the home. Homeowners vote more frequently in local elections and are more likely to participate in community affairs.[157] By buying the house, the owner displays both a long-term commitment to the community and apparent financial discipline. To earn the large amount of money necessary for a house, the owner has shown a certain amount of economic self-sufficiency, and a minimum competence at social mores. In sum, homeownership is an important way in which the individual incorporates his or her private interest into the public good and connects to the maximization of social wealth.

In this sense, real property represents an alternative kind of liberty to those discussed previously: liberty as a form of human flourishing. Liberty as human flourishing offers individual material wealth and opportunities to participate in the cultural and material resources of the community. In exchange, the individual must show commitment to the community's political, civic, and economic health.[158] Liberty as human flourishing is compatible with two of the other forms of liberty mentioned—liberty from government coercion and liberty as a physical zone of privacy. However, liberty as human flourishing moderates these forms of liberty by acknowledging that they are not absolute. Part of the bargain between the individual and society is that, under certain circumstances, the government may regulate or invade the individual's zone of privacy. Thus, liberty as

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[155] Bindu T. Desai, *Crabgrass Frontier: The Suburbanisation of the United States by Kenneth T. Jackson*, 20 ECON. & POL. WKLY. 8, 323, 324 (1987).

[156] WILLIAM FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 4 (2001).

[157] *Id.* at 80-81.

[158] *See* Eduardo M. Peñalver, *Property As Entrance*, 91 VA. L. REV. 1889, 1938 (2005). Homeowners represent the strongest form of commitment, but renters also display a general commitment to basic economic and social norms, if not the particular neighborhood or physical community in which they reside. *Id.*

human flourishing emphasizes that individual self-interest is still subsumed in the public good. In a sense, this is "liberty as not liberty" in that it denies the purest form of liberty—the choice to seek total self-sufficiency by bowing out of society.[159]

If this form of liberty as human flourishing pervades our legal and social culture, as Eduardo Peñalver seems to argue,[160] then, first, it suggests that real property has enjoyed an overblown importance because it does not offer this purest form of liberty. Second, this form of liberty also explains antipathy toward the homeless, who represent the worst kinds of liberty: rejection of the nuclear family,[161] little political participation, financial irresponsibility, and the constant surrender to destructive short-term desires such as drink and drugs. The idea of homelessness as voluntary interlocks with these narratives. The overarching message is that homeless make a mess of their freedom—and should be regulated more severely.

To further unpack some of these ideas, it is worth looking at the recent financial crisis. This crisis exemplifies two aspects worth stressing: First, the persistent centrality of the home to American social and political values, and to personal identity.[162] In debates about the foreclosure crisis, Senator Christopher Dodd argued that homeownership "is at the heart of who we are and the dreams that people have."[163] Hawaii's own Senator Daniel K. Akaka described the loss of home as "emotionally devastating."[164] Speaking about the Housing and Economic Recovery Act, Senator Mel Martinez stated, "[p]eople are being foreclosed on, and there are families sitting at the kitchen table to see how to save that precious piece of the American Dream they have—their home."[165] In response to the crisis, the U.S. Department of Housing and Urban Development developed a program to help low-income, first-time homebuyers purchase a single-family home

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[159] Of course, if this form of liberty was conceivable at the time of the founding because of the wide and untapped wilderness that lay beyond the colonies, it no longer is possible now.

[160] Peñalver, *supra* note 158, at 1894, 1939-62.

[161] Gallup, Inc., *supra* note 134, at 4. Moreover, more than 77% perceived homeless people as individuals, with only 22% perceiving the homeless as either mainly families or that there are both individuals and families in the homeless population. *Id.* at 4-5.

[162] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

[163] Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1107 (2009) (quoting 154 CONG. REC. S5797 (daily ed. June 19, 2008) (statement of Sen. Dodd).

[164] *Id.* (quoting 154 CONG. REC. S2842 (daily ed. Apr. 10, 2008) (statement of Sen. Akaka)).

[165] Stern, *supra* note 163, at 1107 (quoting 154 CONG. REC. S1359-60 (daily ed. Feb. 28, 2008) (statement of Sen. Martinez)).

by supplying funds for down payment, closing, and other costs.[166] The initiative tellingly is called, "The American Dream Downpayment Initiative."[167]

Second, the financial crisis undermines both the rigidity of the homeless/homeowner binary and the traits allocated to each half of the binary. The crisis arose when financial institutions invested in high-risk securities with little government regulation, leading to a credit and housing bubble. Nonetheless, individuals helped blow these bubbles, often overextending themselves financially to purchase their dream homes. As a result of the high number of job losses and foreclosures, many individuals and families became newly homeless. For many former homeowners or renters, the financial crisis and their loss of domicile resulted from the interplay of structural and individual factors: they were victims of their own financial irresponsibility and/or the structural problems that led to the bubble bursting and to staggering losses of employment.[168] These homeless were not people who refused to buy into the idea of the home. Instead, they bought into the idea of the home too much, which refutes the image of homeless as rebelling against social norms such as home ownership. As homeowners, they did not exemplify many of the positive traits assigned to homeowners. But as homeless, neither did they exemplify many of the negative traits assigned to the homeless.

Perhaps most powerfully, the crisis reveals how permeable the line is between those with homes and those without. For example, in a Gallup poll conducted on behalf of Fannie Mae, twenty-eight percent of respondents admitted to concern at one time about being homeless.[169] Forty-four percent stated that they had taken in a friend or relative who was facing homelessness.[170] This large population of homeless people tempers the stereotypes of the homeless by publicizing how a large portion of people who were once employed and homeowners have now slipped into a role that is often viewed as arising from drug abuse, mental illness, and anti-social behavior.

The Gallup poll exposed how deeply embedded this bias is, however, which projects traits onto a person depending on whether or not s/he is

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[166] U.S. Department of Housing and Urban Development, *American Dream Downpayment Initiative*, http://www.hud.gov/offices/cpd/affordablehousing/programs/home/addi/index.cfm (Sept. 15, 2012).

[167] *Id.*

[168] For an analysis of the financial crisis, see U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE (2011).

[169] Gallup, Inc., *supra* note 134, at 6.

[170] *Id.*

homeless. As discussed earlier, when Gallup asked respondents who were not homeless what the primary cause of homelessness was, it mostly presented causes attributable to the individual—substance abuse, mental disease, mental illness, or posttraumatic stress disorder (PTSD).[171] Yet, when Gallup asked these respondents with homes what might cause them to become homeless, Gallup almost exclusively offered reasons outside of the respondent's control: "mortgage payment increase," "the price of housing," "medical costs," "job loss, unemployment, or insufficient income," and "a change in family situation."[172] Here was a double standard: the poll assumed that a homeowner might become homeless because of structural problems lying outside of the individual, but a homeless person became homeless because of individual problems lying within him or herself.

V. HOMELESS AS SUSPECT CLASS UNDER THE EQUAL PROTECTION CLAUSE

As argued earlier, many of the prejudices against the homeless are likely rooted to some extent in the federal Constitution's prejudices against the propertyless. The Constitution originally reserved full citizenship rights to free land-owning white males. When one separates "free land-owning white male" into its four constituent elements, it becomes apparent that most of those who have been excluded for lacking these characteristics—slaves, blacks, other non-whites, and women—have received substantial constitutional redress either through Amendments or Supreme Court decisions. But the same does not hold true for those who lack real property. Granted, non-propertied individuals have received expanded constitutional protection of the right to vote, like women and non-whites.[173] Beyond this, however, non-propertied individuals do not enjoy the same equal protection rights that blacks/non-whites [174] and women now possess. Thus, of the

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[171] *Id.* at 14-20.

[172] *Id.* at 37-38. The only choice that suggested respondent's control was "lack of education or skills." *Id.*

[173] The 15th Amendment enfranchised black males in 1870, though blacks and other racial and ethnic minorities had to wait for the Voting Rights Act of 1965 for substantial protection against discriminatory voting practices. The 19th Amendment enfranchised women in 1920. The 24th Amendment, ratified in 1964, prohibited poll taxes in federal elections. Soon thereafter, the Supreme Court held that the poll tax for state elections were a violation of the Equal Protection Clause in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

[174] *See, e.g.*, Bowman, *supra* note 152, at 1753 (discussing problems with the Supreme Court's use of the White-Black binary, then White-Non-white binary, in school desegregation jurisprudence); RICHARD J. PAYNE, GETTING BEYOND RACE: THE CHANGING AMERICAN CULTURE 136 (1998).

original classifications at the heart of the Constitution's earliest requirements for full citizenship, only the non-propertied still seem to be excluded.[175]

To redress this inequality, we ought to consider to what extent homeless individuals can look to the equal protection doctrine for fuller citizenship rights. The doctrine encompasses not only the 14th Amendment's Equal Protection Clause, which declares that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[176] but also the 5th Amendment's Due Process Clause, which the U.S. Supreme Court interpreted in *Bolling v. Sharpe*[177] as creating the same equal protection standard for the federal government.[178]

Equal protection jurisprudence develops in part from the famous footnote four in *United States v. Carolene Products Co.*[179] In footnote four, Justice Stone wrote that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[180] This footnote signaled an intent to scrutinize statutes that "affect socially isolated minorities which have no reasonable hope of redress through the (formally available but, to them, useless) political processes."[181] But the footnote left for another day the specific contours of the standard of review.[182]

Subsequently, the Court decided that unless a group is a "discrete and insular minority," or that the law interferes with a fundamental right, courts must defer to the legislature by applying minimal scrutiny.[183] Thus, suspect classification, which can be seen as shorthand for a court's analysis of

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[175] I do not treat the classification of "slave" because the 13th Amendment abolished slavery in 1865, rendering the status categorically illegal. U.S. CONST. amend. XIII.

[176] U.S. CONST. amend. XIV, § 1. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court held that equal protection applies to the federal government through the Fifth Amendment's Due Process Clause.

[177] 347 U.S. 497 (1954).

[178] *Id.*

[179] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[180] *Id.*

[181] Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1103 (1982).

[182] *Carolene Products*, 304 U.S. at 152 n.4 (1938) ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.").

[183] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 678 (3d ed. 2006).

whether a group is a "discrete and insular minority" worthy of heightened protection, becomes key to homeless rights. Unfortunately, neither the U.S. nor Hawai'i Supreme Court[184] has answered whether or not homeless persons constitute a suspect class. Moreover, lower courts have used this lack of precedent perfunctorily to deny that the homeless are a suspect class.[185]

I argue that those who lack real property—the homeless—deserve some form of heightened scrutiny either as a suspect or quasi-suspect class[186] for

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[184] The Intermediate Court of Appeals did state that homeless are not a suspect class in *State v. Sturch*, 82 Hawaii 269, 276, 921 P.2d 1170, 1177 (Haw. Ct. App. 1996). Then-ICA Judge Acoba wrote, "[f]or purposes of equal protection analysis, we note at the outset that the statute in question does not discriminate on the basis of suspect categories and Defendant does not belong to any suspect class." *Id.* In reaching this conclusion, he cited the Hawai'i Supreme Court's statement of suspect classification in *Nachtwey v. Doi,* 59 Haw. 430, 434 n. 5, 583 P.2d 955, 958 n. 5 (1978) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)):

> [a] suspect classification exists where the class of individuals formed has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Sturch, 82 Hawaii at 276, 921 P.2d at 1177 n.8. Acoba problematically conflates homeless people with poor people in citing to this quotation, which arguably makes a strong case for homeless as a suspect class, as discussed below.

[185] *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1357-58 (11th Cir. 2000); Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1269 n.36 (3rd Cir. 1992) (though the *Kreimer* court provided no discussion for holding that homeless are not a suspect class, eight cases cited *Kreimer* for support); Garber v. Flores, No. CV 08-4208DDPRNB, 2009 WL 1649727, at *10 (C.D. Cal. June 10, 2009). For cases that denied homeless suspect classification based on the Supreme Court's conclusion that wealth does not create a suspect classification; see, for example, Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996). *But see*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992):

> This court is not entirely convinced that homelessness as a class has none of these "traditional indicia of suspectness." It can be argued that the homeless are saddled with such disabilities, or have been subjected to a history of unequal treatment or are so politically powerless that extraordinary protection of the homeless as a class is warranted.

[186] It is more likely that courts will grant homeless quasi-suspect class status versus suspect class status. The difference in status depends on whether the government may have legitimate reasons for treating members of a group differently than other people. The Supreme Court has extended suspect classification to race, national origin, and state discrimination against alienage. However, for discrimination against gender and non-marital children, the Court has applied intermediate scrutiny. According to Erwin Chemerinsky:

> the Court's choice of strict scrutiny for racial classifications reflects its judgment that race is virtually never an acceptable justification for government action. In contrast, the Court's use of intermediate scrutiny for gender classifications reflects its view that the biological differences between men and women mean that there are more likely to

two reasons: First, unlike other groups, homeless by definition lack a fundamental buffer against arbitrary governmental interference—real property. Second, the homeless satisfy the factors that courts have used to determine suspect classification, but only when the third factor, immutability, is reformulated to better accord with current understandings of identity politics and with footnote four's process-based concerns.

In one sense, homeless deserve greater Equal Protection Clause solicitude because their lack of real property uniquely exposes them to governmental interference. Regardless of whether the Constitution should impose affirmative duties on the government, at the very least, the Constitution provides individuals with "negative liberties," which protect them from certain forms of governmental interference. Harking back to the earlier discussion of real property as fundamental to political liberty, the purpose of the Constitution aligns with the purpose of real property to the extent that both "house" liberty from governmental interference. As Charles Reich wrote in *The New Property*:

> Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done. . . . Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.[187]

Because homeless persons generally reside in public zones, where government exercises more regulatory power, they are exposed to greater risk of governmental interference than people who can retreat into the sanctity of their homes. Without the real property that not only serves a parallel function to the Bill of Rights in protecting liberty, but also enables an individual to access the benefits of the Bill of Rights fully, the homeless suffer the unique disadvantage of being doubly exposed to greater governmental interference.

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be instances where sex is a justifiable basis for discrimination.

CHEMERINSKY, *supra* note 183, at 672-73. For a discriminatory law to survive intermediate scrutiny, it "must serve important governmental objectives and must be substantially related to those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

[187] Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

This lack of real property also makes the homeless better candidates for suspect classification than the poor. This is a necessary distinction because lower courts have generally denied suspect classification to the homeless by applying the U.S. Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*[188] that the poor do not constitute a suspect class.[189] In rejecting the district court's holding that wealth was a suspect classification,[190] the *Rodriguez* majority suggested that two questions were vital to determining whether the poor constitute a suspect class: 1) "whether . . . the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms"; and 2) "whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence."[191] The majority linked the two questions by concluding that a class might be identified by the fact that its members experienced an absolute deprivation because of a shared trait, such as the inability to pay for a desired benefit.[192] Because the plaintiffs could only allege the relative deprivation of having less ability to pay for an education, the majority refused to find the plaintiffs constituted a "definable category of 'poor' people."[193] *Rodriguez* suggested that the poor have failed to achieve suspect class status because poverty is an inherently relative term.[194] As a relative term, poverty creates an amorphous and unwieldy class unless there is an absolute deprivation to limit and frame the class. In contrast to the category of "poor," however, the homeless are a discrete and identifiable class to the extent that their lack of real property creates an

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[188] San Antonio Indep. Sch. Dist. v. Rodriguez,411 U.S. 1, 28 (1973); *see also* Harris v. McRae, 448 U.S. 297, 323 (1980) (citing Maher v. Roe, 432 U.S. 464, 470-71 (1977) ("this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis").

[189] *Rodriguez* involved a class action lawsuit brought by the San Antonio School District on behalf of families residing in poor districts. Texas's school system relied on local property taxes, which lead to great disparities in education funds between wealthy and poor districts. Plaintiffs alleged that this system discriminated against the poor and violated the Fourteenth Amendment's Equal Protection Clause. *San Antonio v. Rodriguez*, 411 U.S. at 1.

[190] Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 282-84 (W.D. Tex. 1971) *rev'd*, 411 U.S. 1 (1973).

[191] *San Antonio v. Rodriguez*, 411 U.S. at 19.

[192] *Id.* at 20, 25 (The Court concluded that "the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education-the disadvantaged class is not susceptible of identification in traditional terms.").

[193] *Id.* at 25.

[194] *See* JEAN BAUDRILLARD, THE CONSUMER SOCIETY: MYTHS AND STRUCTURES (1998), a seminal work arguing that modern consumer society relies on a logic of difference in defining affluence and poverty. Thus, poverty is always a relative term that is unintelligible by itself.

absolute deprivation of the rights conditioned on real property. For this very reason, the homeless are better candidates for suspect classification than the poor.

To determine suspect classification, courts generally have applied some combination of the following criteria: 1) whether a particular group has suffered a history of discrimination;[195] 2) whether the group is politically powerless;[196] and 3) whether the group is differentiated by an "obvious, immutable, or distinguishing characteristic . . . ."[197]

The first two factors patently favor suspect classification for the homeless. First, the homeless have suffered a well-documented history of discrimination, with courts recognizing that "discrimination against the homeless is likely to be a function of deep-seated prejudice."[198] As discussed above, there is considerable evidence of state and municipal governments continuing to engage in long-standing practices of discrimination against the homeless, both through harassing sweeps and various kinds of anti-homeless legislation.

Second, by almost any measure, homeless people lack political power.[199] Justice Marshall so noted when he wrote that:

> the homeless are politically powerless inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion. Moreover, homeless persons are likely to be denied access to the vote since the lack of a mailing address or other proof of residence within a State disqualifies an otherwise eligible citizen from registering to vote.[200]

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[195] Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (citing *San Antonio v. Rodriguez*, 411 U.S. at 28).

[196] *Id.*

[197] Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

[198] *See, e.g.*, Johnson v. City of Dallas, 860 F. Supp. 344, 356 (N.D. Tex. 1994) *rev'd in part, vacated in part sub nom.* Johnson v. City of Dallas, Tex., 61 F.3d 442 (5th Cir. 1995) (citing Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 Tul.L.Rev. 631, 635–45 (1992)).

[199] According to Kenji Yoshino, the Court has used three tests for political powerlessness. In *Carolene Products*, the Court analyzed whether groups were "discrete and insular minorities." A plurality in *Frontiero* asked whether a group was underrepresented in the "[n]ation's decisionmaking councils." And the Court in *Cleburne* looked to whether the group was unable "to attract the attention of the lawmakers." Yoshino, *supra* note 151, at 565. For a discussion of the homeless' lack of participation in the political process, see Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 338 (2000).

[200] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting).

Justice Marshall acknowledged an obvious truth—that homeless cannot participate effectively in the political processes because they lack two main conditions for political participation: genuine voting power and money. Anti-homeless legislation such as Honolulu's "sidewalk law" further erodes the already attenuated ability of homeless to vote by putting them at considerable risk of losing identification and voting documents. Moreover, several states have recently scaled back voting procedures that homeless people especially rely upon, such as third-party registration, same-day voting and registration, and provisional ballots.[201] To the extent that homeless are effectively disenfranchised, one can argue that homeless share the same characteristic that the Supreme Court used in *Graham v. Richardson*[202] to extend suspect classification to aliens—the inability to protect themselves via the political process because of their inability to vote.[203]

The third factor has arguably garnered the most attention (and contention) in its focus on whether a potential suspect class possesses an immutable trait.[204] This factor has been savaged by scholars for its many flaws,[205] the first of which is that the word itself is highly misleading in that "immutability's" substantive legal definition does not match its lay definition of "unalterable."[206] Despite this, and despite not being a requirement, but a factor that courts have at times excluded,[207] immutability deserves in-depth treatment because it serves an important gatekeeping function to exclude potential groups. And so many courts have refused to surrender this factor.[208]

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[201] *See* Letter from Neil Donovan, Exec. Dir., National Coalition for the Homeless, to Eric H. Holder, Jr., Attorney Gen. of the United States (Aug. 17, 2011), *available at* http://www.nationalhomeless.org/projects/vote/NCH_HolderLetter_Aug11.pdf.

[202] 403 U.S. 365 (1971).

[203] *Id.* at 367.

[204] *See, e.g.*, M. Katherine Baird Darmer, *"Immutability" and Stigma: Towards A More Progressive Equal Protection Rights Discourse*, 18 Am. U. J. Gender Soc. Pol'y & L. 439, 448 (2010) ("While the Supreme Court has 'never held that only classes with immutable traits' can achieve suspect classification status, the Court has 'often focused on immutability' in its equal protection jurisprudence.").

[205] *See infra* note 226 & accompanying text.

[206] *See* THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1317 (Thumb Indexed Edition 1993).

[207] Darmer, *supra* note 204, at 448-49; *see also* Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 Va. J. Soc. Pol'y & L. 169, 172 n.16 (2011); *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973) (not listing immutability as one of the "traditional indicia of suspectness"); Able v. United States, 968 F. Supp. 850, 863 (E.D.N.Y. 1997) *rev'd*, 155 F.3d 628 (2d Cir. 1998) (noting that the Supreme Court has declined to apply immutability on several occasions).

[208] Yoshino, *supra* note 151, at 558.

Because the current inquiry is analytically problematic but jurisprudentially useful, immutability likely will not be abandoned by the courts. But it should be revised. If the immutability inquiry must ask for a deep-seated trait, I argue that this inquiry should look at the trait as a prejudice held by the majoritarian society rather than as an inherent part of an individual. But before offering my alternative form of immutability, I begin by discussing the current form of immutability, specifically the considerations that shape it and the problems that discredit it.

The Court first introduced immutability in *Frontiero v. Richardson*[209] to explain why the classification of sex deserved heightened scrutiny:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ..' And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.[210]

The passage states that a central consideration of the Court's immutability analysis is whether the trait is within one's control.[211] The Court claims that this concern is borne out of a commitment to fairness expressed in the principle "legal burdens should bear some relationship to individual responsibility."[212] However, courts that have used the lack of immutability to disqualify a group show that the underlying rationale is none other than fault.[213] Such courts countenance majoritarian discrimination through the

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[209] 411 U.S. 677 (1973).

[210] *Id.* at 686-87 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

[211] *See* Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989). In *Watkins*, Judge Norris suggested three possible interpretations of immutability: 1) "strictly immutable"; "effectively immutable"; and what Kenji Yoshino refers to as "personhood immutability." *Id.*; Yoshino, *supra* note 151, at 494. However, Judge Norris argued that the Supreme Court could not have intended "strict immutability," or the inability to change, because people can have sex-change operations, aliens can naturalize, and blacks may "pass" or change their racial appearance through pigment injections. *Watkins*, 875 F.2d at 726. Instead, Judge Norris argued that the Supreme Court implicitly adopted the "effectively immutable" interpretation because "the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity." *Id.*

[212] *Id.*

[213] *See infra* note 246 & accompanying text.

"prism of fault"[214] by exposing their willingness to withhold suspect status from groups who theoretically can change the trait-in-question. This is tantamount to a court announcing its unwillingness to help those that do not help themselves. Unfortunately for the homeless, courts are well-equipped to find against the homeless under this lack of control/fault-based rationale by resorting to longstanding beliefs that individuals are ultimately homeless because they have made poor decisions.[215]

Another consideration that disfavors homeless immutability is whether the trait exists within the individual class member—hence, courts have based immutability on the presence of permanent and visible biological traits comparable to race and sex that are said to inhere in the individual.[216] With race and sex as paradigms for immutability, homelessness again fails as a rationale for immutability, because although homelessness may in some cases be an "accident of birth," homelessness is not seen as biologically fixed like one's skin color or sex.

There are two considerations under the current immutability analysis that may or may not favor homeless immutability. The first is visibility, which courts have sometimes analyzed by construing the third factor as "an "obvious, immutable, or distinguishing characteristic."[217] Visibility, as a factor, encompasses at least two variations: "social visibility," or the power to attract political support[218] and "corporeal visibility," which describes a conspicuous physical trait that allows dominant groups to identify and harass minority groups.[219] On first glance, homeless should fare well under either form of visibility because the group has little power to attract political support and, as discussed earlier, there is a visual bias that skews the perception of homeless individuals as all exhibiting such negative traits as filth, mental disease, irresponsibility, and crime.[220] Moreover, homeless are more visible than other groups insofar as they predominantly reside in

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[214] Graham, *supra* note 202, at 185.

[215] *See* Wes Daniels, *"Derelicts," Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687 (1997).

[216] Yoshino, *supra* note 151, at 498; *see, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

[217] *See, e.g.*, Bowen, 483 U.S. at 602 (asking whether the group is differentiated by an "obvious, immutable, or distinguishing characteristic"); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Witt v. Dep't of Air Force, 527 F.3d 806, 809 (9th Cir. 2008).

[218] Yoshino, *supra* note 151, at 494-95 (citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973), which defined "visibility" in part as the amount of representation a group has in government).

[219] *Id.*

[220] *See supra* Part IV.C & Lee, *infra* note 248.

public spaces. However, as Professor Yoshino notes, courts have tended to require a specific form of corporeal visibility—i.e., visibly immutable traits such as skin or male/female physical characteristics.[221] To this extent, visibility does not favor homeless suspect classification because homelessness is not identifiable with any physical traits individuals are born with.

The second consideration that may go either way is whether the characteristic "frequently bears no relation to ability to perform or contribute to society."[222] Courts use this inquiry to differentiate between "such non-suspect statuses as intelligence or physical disability,"[223] which may be legitimate bases for differentiation, and such statutes as race or gender, which are illegitimate bases for differential treatment. This rationale disfavors homeless if based on the very prejudices that homeless are incompetent, incapable, and/or insane. Rid of these prejudices, homeless as a class only possesses one trait that qualifies them as homeless, with that trait much more neutral as to homeless individual's ability to perform: the simple lack of real property. That said, courts are not immune to those negative stereotypes, as the court in *Love v. Chicago* showed,[224] and so it is difficult to predict how the homeless would fare under this consideration.

In sum, homelessness is seen as behavioral rather than corporeal, and to that extent, it fails arguably the two most important considerations under the current test: whether group members lack control over their trait and whether the trait exists in the individual as a corporeal trait.[225] Thus, under the current form of immutability, it is no surprise that homeless are still a group on the outside looking in when it comes to suspect classification.

But the present test is a mistake, as shown by over two decades of scholarly criticism of immutability.[226] In fact, the calls for immutability's

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[221] Yoshino, *supra* note 151, at 499.

[222] Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973).

[223] *Id.*

[224] Love v. Chicago, No. 96 C 0396, 1998 WL 60804 (N.D. Ill. Feb. 6, 1998); see *supra* note 142 & accompanying text.

[225] These considerations are arguably the most important because they enable a court to narrow the spectrum of groups that could qualify for suspect status. *Cf.* Yoshino, *supra* note 151, at 557 (arguing that courts have retained the immutability factor because of its vital gatekeeping function in excluding potentially suspect classes).

[226] *See, e.g*, JOHN HART ELY, DEMOCRACY AND DISTRUST 150 (1980); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507-16 (1994); Marc R. Shapiro, Comment, *Treading the Supreme Court's Murky Immutability Waters*, 38 GONZ. L. REV. 409 (2003).

demise have been so compelling that Kenji Yoshino analogized further critique of immutability as "tantamount to cataloguing new ways to flog a dying horse."[227] For example, Laurence Tribe has pointed out the ways in which "features like immutability are neither sufficient nor necessary."[228] Immutability in itself is insufficient to determine whether a group deserves suspect classification when one considers that "[i]ntelligence, height, and strength are all immutable for a particular individual, but legislation that distinguishes on the basis of these criteria is not generally thought to be constitutionally suspect."[229] Immutability is unnecessary, as Professor Tribe goes on to explain, "[because] even if race or gender became readily mutable by biomedical means, I would suppose that laws burdening those who choose to remain black or female would properly remain constitutionally suspect."[230] Additionally, other scholars have criticized how courts have pegged immutability's criteria to the pre-existing suspect classifications of race and gender, thus rigging immutability to deny new candidate groups. [231] As a result, immutability has "evolved without a definite substantive definition because the [U.S. Supreme C]ourt tended to define 'immutability' by analogizing it to race or gender."[232]

Indeed, the U.S. Supreme Court itself has even questioned the wisdom of immutability. In *City of Cleburne, Tex. v. Cleburne Living Ctr.*,[233] the Court admitted to doubts about whether immutability provided a principled way to determine which groups merited heightened scrutiny:

> if the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a

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[227] Yoshino, *supra* note 151, at 491.

[228] Tribe, *supra* note 226, at 1073.

[229] *Id.* at 1080 n.51.

[230] *Id.*; *see also*, e.g., Graham v. Richardson, 403 U.S. 365 (1971) (applying heightened scrutiny to alienage even though it is not immutable).

[231] ELY, *supra* note 226, at 150 ("[N]o one has bothered to build the logical bridge, to tell us exactly why we should be suspicious of legislatures that classify on the basis of immutable characteristics. Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that those characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?"); *see also* Yoshino, *supra* note 151, at 559. According to Kenji Yoshino, "tracing the immutability and visibility factors to their roots demonstrates that they were formulated in an attempt to isolate the commonalities between the paradigm groups of race and sex in the early 1970s." *Id.* at 559.

[232] Shapiro, *supra* note 226, at 437.

[233] 473 U.S. 432 (1985).

> variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm.[234]

Worryingly, the Court appears less concerned with the risk of excluding deserving classes and more concerned with potentially including underserving classes. As Kenji Yoshino states, "it can be read as an argument against "too much justice[.]"[235] This is further reason that it may be time to reformulate immutability, in light of immutability's failure to provide a principled way to determine suspectness and the Court's willingness to respond to this uncertainty by erring on the side of denying too many so as not to admit too many. Moreover, as the Supreme Court and many lower courts have failed to heed scholarly calls for immutability's demise, revising immutability perhaps offers a more realistic alternative than discarding immutability altogether.

What the immutability inquiry should ask is: to what extent is there a deep-seated—i.e., an immutable[236]—prejudice that the majoritarian society has created to identify and discriminate against a particular group? At its essence, this revised immutability still focuses on identifying a suspect trait, but simply situates the trait in the majoritarian society's prejudices rather than the minority's body. By doing so, this revised factor offers advantages

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[234] *Id.* at 445-46.

[235] Yoshino, *supra* note 151, at 491 (quoting McClesky v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting)).

[236] Though critics may claim that "deep-seated" is not the same as "immutable," courts have never actually used "immutable" in its strict sense as "changeless" or "unalterable." *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 506 (2004) ("The immutability requirement also finds itself in conflict with the factual reality that purportedly fixed traits, such as sex, are in fact more alterable and flexible than commonly presumed. Other characteristics deemed suspect or quasi-suspect, such as alienage and illegitimacy, may also be changed."); *see also* ELY, *supra* note 226, at 150 (criticizing the Court's reliance on immutable traits for suspect classification status, noting that "even gender is becoming an alterable condition"). The Ninth Circuit in *Watkins v. U.S. Army* has gone on record to state that "it is clear that by 'immutability' the [U.S. Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class" because no current suspect class, whether national origin, sex, alienage, illegitimacy, or even race—could satisfy that requirement." Watkins v. U.S. Army, 837 F.2d 1428, 1446 *superseded*, 847 F.2d 1329 (9th Cir. 1988) *opinion withdrawn on reh'g*, 875 F.2d 699 (9th Cir. 1989). The word "immutability" has been a misnomer as "the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty . . . ." *Id.* As such, "deep-seated" is appropriate because it more closely approaches the factor's focus on the difficulty, rather than the impossibility, of change.

over the current version of immutability: it moves away from a problematic fault-based model; it better fits with current understandings of identity politics; and it better serves the equal protection doctrine's promise, as suggested in footnote four of *Carolene Products*, of applying heightened scrutiny when "prejudice against discrete and insular minorities . . . [may] curtail the operation of political processes ordinarily to be relied upon to protect minorities[.]"[237]

The first reason for this shift is that current understandings of identity—racial, sex, and otherwise—require revised immutability. Cadres of scholars now accept that even race and gender are products of social construction.[238] It is society—not biology or nature—that identifies traits and instills them with meaning.[239] The so-called "accidents of birth"[240]—corporeal traits such as skin color or anatomy—are devoid of harmful meaning in themselves. The same is true of non-corporeal traits such as one's religion or country of origin. This understanding of identity reveals that focusing on a corporeal trait without reference to its social construction, as the current immutability analysis does, is like hearing a word but deciding to ignore its meaning. Instead, immutability analysis should focus on group traits as manifestations of social perception rather than biology realities, as revised immutability does.

Second, the version of immutability I propose also interlocks better with the vision laid out in footnote four of *Carolene Products*, which still merits our admiration despite the footnote's shortcomings.[241] Footnote four

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[237] *Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

[238] *See, e.g.*, IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (Lopez goes a step further by showing how laws actually helped to construct socio-racial identities in America in the 19th and 20th centuries); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 27, 28 (1994) ("Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization. . . . [A]s human constructs, races constitute an integral part of a whole social fabric that includes gender and class relations.").

[239] *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (recognizing belief among some in the scientific community that "racial classifications are for the most part sociopolitical, rather than biological, in nature"); *see also, e.g.*, Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 Stan. L. Rev. 747, 777 (1994) ("Race cannot be self-evident on the basis of skin color, for skin color alone has no inherent meaning."); Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392 (2001) ("gender identity, rather than anatomy, is the primary determinant of sex")

[240] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

[241] *See, e.g.*, David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. Ill. L. Rev. 1251, 1265 (2010) (noting the footnote's disregard for "anonymous and diffuse" minorities who are likely to be more systematically disadvantaged than "discrete and insular" minorities);

expresses a vision of the court's role in a democratic society that can be summarized as follows: In a well-functioning democracy, majorities should be allowed to do what they choose. However, if illegitimate prejudice systematically barricades certain groups from effective participation in the political process, the court's role is to cure the defect, protect these groups, and, in doing so, to maintain the integrity of the democratic political process.[242] The existence of illegitimate prejudice is key to any analysis under footnote four because the footnote did not intend to simply protect minorities from majorities. Justice Stone, its author, understood that "there are winners and losers in the democratic process, and the losers should not be able to reverse their losses by appealing to the courts."[243] Footnote four thus regards a group's persistent failures in the democratic process as symptomatic of a defect in the democratic process only when those failures are caused by majoritarian "prejudice."

To be more specific, the problem with the current form of immutability is that it conceptualizes traits as inhering within individuals, but also separates these traits as a distinct third factor. Footnote four shows that isolating these "inherent" traits is an analytical mistake, and the footnote does so by coupling prejudice and "discrete and "insular" minorities under the same analysis. After all, it is not the inherent trait *per se* that makes a group "discrete and insular." Rather, it is the prejudice that makes the group "discrete" in the sense that the majoritarian society can identify the group, and "insular" in the sense that the prejudice prevents other groups from forming coalitions with the group, leaving it systematically isolated. Unlike current immutability analysis, revised immutability is faithful to footnote four's identification of the "defect" as really being the majoritarian prejudice, which is always relational in nature, and not the minority's inherent trait, which is supposed to exist independently within the individual.

Arguably, the first two factors for suspect classification—the lack of political powerlessness and the history of purposeful discrimination—are attuned to these process concerns, but perhaps not sufficiently so. These factors may, but do not require, a court to extrapolate the specific prejudice(s) that led to the discrimination, and therein lies the insufficiency.[244] By not forcing the court to identify the specific prejudices

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Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 Colum. L. Rev. 1087, 1090 (1982) (obversing that the footnote is not, nor was never intended to be, a fully developed theory of heightened scrutiny).

[242] Powell, Jr., *supra* note 241, at 1088-89.

[243] Strauss, *supra* note 241, at 1257.

[244] *See, e.g.*, Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (applying a cursory one-sentence review of the "history of purposeful unequal treatment to the aged"

that led to a process defect, the two factors lack the predictive power of this revised immutability to anticipate the strength and longevity of the discrimination. In this way, this revised immutability does not simply repeat the first and second factors but in fact improves the court's predictive power regarding what should be a central concern: what is the likelihood that the majority's discrimination of a group based on a particular prejudice or trait will continue into the future without the court's intervention?

Third and finally, revised immutability is desirable because it corrects the current version's fault-based orientation,[245] which has led courts to deny protection if they judged the victim to bear some responsibility, regardless of whether the majoritarian society was guilty of discriminating against the victim. Correction is all the more important because certain lower courts have applied an uncompromising fault-based test by misinterpreting the Supreme Court's own use of immutability. The Supreme Court has never stated that an immutable characteristic was necessary for suspectness—the presence or absence of an immutable trait is just a factor to be considered.[246] However, lower courts have read the Supreme Court's immutability jurisprudence to impose such a condition—as a result, disqualifying potential suspect classes like homosexuals and the homeless because the class could not prove that the trait in question was immutable.[247]

By requiring an immutable trait, and punishing those that do not have it, the lower courts use immutability as a barricade to minorities who seem complicit in the discrimination they suffer—the tortured reasoning being that a minority is responsible for any harm s/he suffers because of a trait, if that trait is possible to control, but s/he refuses to change it. The problem with such a fault-based model is crystal clear. Such an argument is akin to

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without considering the actual prejudices involved).

[245] *See, e.g.*, Graham, *supra* note 202, at 185.

[246] Frontiero v. Richardson, 411 U.S. 677, 686 (1973); *see also, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) (listing immutability as a factor but not stating that it is a requirement for suspect class status); Plyler v. Doe, 457 U.S. 202, 220 (1982) (applying intermediate scrutiny despite finding that undocumented status is not immutable); Craig v. Boren, 429 U.S. 190, 212, n.2 (1976).

[247] *See, e.g.*, Andersen v. King County, 138 P.3d 963, 974 (2006); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) ("To be a 'suspect' or 'quasi-suspect' class, homosexuals *must* 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless.") (emphasis added); *see also* Johnson v. City of Dallas, 860 F. Supp. 344, 357 (N.D. Tex. 1994) *rev'd in part, vacated in part sub nom.* Johnson v. City of Dallas, Tex., 61 F.3d 442 (5th Cir. 1995) (noting that homeless satisfied a showing of a history of discrimination and perhaps political powerlessness, but had a weak case for suspectness because homelessness is not immutable).

saying that the perpetrator is innocent because the victim was asking for it. The revised factor shifts the "prism of fault" from the victim to the perpetrator, not to also shift punishment to the perpetrator, but to justify heightened protection of the victimized group.

Homeless as a class satisfy this revised immutability. They have been perpetual victims of deep-seated prejudices by the overarching society, which continues to associate the homeless with many of the same negative traits, like criminality, instability, mental illness, indolence, and filth, that have afflicted the homeless throughout America's history.[248] For example, in 1837, the U.S. Supreme Court, in upholding a law that allowed New York to deny admission to paupers arriving on ship, stated that it was "competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infections articles . . . ."[249] This is but one instance in a long tradition of legislation, jurisprudence, and policies that at their core viewed vagrancy and homelessness as crimes of condition or behavior because they associated such people with the negative traits listed at the start of this paragraph.[250] To the extent that these specific stereotypes have endured, the homeless can claim that they suffer from "immutable" negative traits woven into the very social fabric of our country. Satisfying this revised immutability, and fulfilling the other two factors courts use to determine suspect classification, the homeless deserve heightened scrutiny under the equal protection doctrine.

Now is a good time to link the earlier part of this section, which argues that homeless *need* the equal protection doctrine's help because their lack of real property makes them uniquely vulnerable to arbitrary governmental interference, with the second part of this section, which argues that homeless *deserve* equal protection doctrine's help because they satisfy the factors that courts should use to determine a group's suspectness. One of the main observations in the earlier part of this section was that the

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[248] *See, e.g.*, Barrett A. Lee, Chad R. Farrell & Bruce G. Link, *Revisiting the Contact Hypothesis: The Case of Public Exposure to Homelessness*, 69 AM. SOCIOLOGICAL REV. 40, 42 (2004) ("The substantial percentages of survey respondents blaming homeless people for being homeless and attributing deviant properties (substance abuse, mental illness, dangerous-ness, etc.) to them would seem to confirm the public's negative view of the homeless") (citing Barrett A. Lee, Sue Hinze Jones, & David W. Lewis, *Public Beliefs About the Causes of Homelessness*. 69 SOCIAL FORCES 253 (1990).

[249] Mayor, Aldermen & Commonalty of City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), *quoted in* Simon, *infra* note 250.

[250] *See, e.g.*, Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 Tul. L. Rev. 631, 639 (1992).

Constitution discriminates against the homeless. Recognizing this constitutional discrimination, and recognizing that the equal protection doctrine prohibits both federal and state governments from arbitrary discrimination,[251] I wondered if the equal protection doctrine could not also be interpreted to impose a duty on the Constitution to purge itself of any discrimination against groups such as the homeless. The Constitution's "do as I say not as I do" approach to equal protection almost seems like a flawed contradiction. Almost. But the bottom line is that the Constitution does not require itself to adhere to the standards of equal protection. The equal protection doctrine, then, does not come along to erase the Constitution's preference for property, in general, even if the Fourteenth Amendment did help to erase the Constitution's preference for a specific type of property, slaves.[252]

Nonetheless, if scholars may not be able to argue that the equal protection doctrine revises the whole Constitution's discrimination against the propertyless, there is an argument that the Constitution's discrimination against the propertyless further intensifies an already strong claim by the homeless for suspect or quasi-suspect status under the equal protection doctrine. This constitutional discrimination makes the homeless uniquely deserving of equal protection solicitude in a few ways.

First, homeless are more vulnerable to government interference than perhaps any other groups because of their lack of real property, which translates into lesser constitutional protections. Second, homeless are uniquely deserving under the process-based concerns of *Carolene Products* footnote four and under revised immutability's concern with the immutability of social prejudices. For example, one critique of footnote four is that it seems to permanently extend heightened scrutiny to classes that eventually may not need it.[253] On this, Justice Powell once said, "Over our history many have been minorities, ineffective in politics, and often discriminated against. But these conditions do not remain static. Immigrant groups that once were neglected have become influential participants in the political process."[254] The two paradigmatic suspect classes—women and African Americans—are cited as groups with ever-increasing political participation and power,[255] perhaps in large part as a result of the equal

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[251] *See supra* note 10.

[252] *See* the "Reconstruction Amendments"—U.S. CONST. amends. XIII, XIV, XV.

[253] Strauss, *supra* note 241, at 1267.

[254] Powell, Jr., *supra* note 241, at 1091; Strauss, *supra* note 241, at 1267.

[255] Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 744 (1985) ("Thanks largely to the achievements of the generation that looked to *Carolene* for inspiration, black Americans today are generally free to participate in democratic politics—and do so by the millions in every national election.").

protection doctrine. In contrast, it is hard to foresee homeless ever becoming "influential participants in the political process,"[256] in part, because the discrimination also remains interwoven into the constitutional fabric of the country, which is no longer the case for other suspect classes. Though the federal Constitution, and state constitutions such as Hawaii's, are not the only forms of official discrimination against the homeless, their durability and ideological and legal power leave no doubt that the homeless both *need* and *deserve* equal protection solicitude because the prejudices they face threaten to be immutable.

VI. CONCLUSION

It may be time to rethink the metaphor of property as "a bundle of rights."[257] The metaphor traditionally emphasized that "property" is not the thing itself, but the aggregation or "bundling" of legal rights that government recognizes and protects. It may be more accurate, however, to see the "bundle" as a container in which the rights are housed. In Honolulu and a growing number of other municipalities, this bundle is the only place in which one can secure other forms of tangible personal property.

Based on analysis of Honolulu's "sidewalk law" and the federal and Hawai'i Constitutions, these sources of law privilege the real propertied by making real property a condition precedent to a fuller enjoyment of many rights. However, to say that a law privileges those with real property is also to say that it discriminates against those without real property. Though Justice Jackson once wrote that, "[p]roperty can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights[,]"[258] this is what appears to be happening in municipalities with laws or practices that strip homeless of their property and other rights. The uneasy truth is that such laws and practices exploit the unwillingness of both constitutions and courts to extend full protection to homeless people. Needless to say, these practices risk wreaking significant collateral damage. Though municipalities may intend to prevent the stereotypical homeless from accumulating junk, such laws and practices also affect the many homeless who need their own personal tangible property to work, vote, and one day return to having a place to call one's own.

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[256] Powell, Jr., *supra* note 241, at 1091.

[257] Conversation with Aviam Soifer, Dean, William S. Richardson School of Law, in Hon., Haw. (Apr. 17, 2012).

[258] Edwards v. People of State of California, 314 U.S. 160, 185 (1941) (Jackson J., concurring).

In this sense, it is important for lawmakers, courts, and all who participate in these legal and political systems to recognize that the line between the homeless and those with homes is very permeable. This line is borne out by the statistics if not by the dominant stereotypes. But as the late-2000s financial crisis painfully exposed, thousands of individuals and families can find themselves on the wrong side of this line in an instant. Though it is important to push back against unconstitutional laws such as Honolulu's "sidewalk law," the bigger fight involves the equal protection doctrine. In a time marked by ever-increasing inequality,[259] this doctrine may present an opportunity for courts to try to counter some of the discrimination against the propertyless that inheres in the federal Constitution itself.

[259] For example, the wealthiest 1% own 40% of the Nation's wealth and earn 20% of the Nation's pre-tax income. Nobel Laureate in Economics Joseph E. Stiglitz, *Of the 1%, by the 1%, for the 1%*, VANITY FAIR (May 2011), *available at* http://www.vanityfair.com/society/features/2011/05/top-one-percent-201105.

Determining the Expiration Date of an Environmental Impact Statement: When to Supplement a Stale EIS in Hawai'i

Annie J Okazaki[1]

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[1] J.D. candidate 2013, William S. Richardson School of Law. I would like to dedicate this article to my parents, Kelly and Yong Pong; to my husband, Travis; and my sons, Kingston and Royal—your sacrifices have allowed me to follow my dreams. Mahalo nui loa to D. Kapua'ala Sproat, for giving me the support and courage to trust my voice. Special thanks to my mentor, David E. Callies, for always believing in me.

I. INTRODUCTION

Does an Environmental Impact Statement ("EIS")[2] have a shelf life in Hawai'i? The Hawai'i Supreme Court answered "yes" in *Unite Here! Local 5 v. City & County of Honolulu* ("*Turtle Bay*")[3] and concluded that a 1985 EIS prepared by Kuilima Resort ("Kuilima") had expired.[4] The Hawai'i Supreme Court decision in *Turtle Bay* ("Decision") invalidated many long-standing practices and assumptions held by administrative agencies and stakeholders in the development community including, environmental planners, financiers, community members, attorneys, and developers.[5] In particular, the Decision upended the assumption that once an EIS had been accepted in accordance with Hawai'i Revised Statutes ("HRS") section 343-5(g), "no other statement for the proposed action shall be required."[6]

Hawaii's EIS law, HRS chapter 343, is widely regarded as Hawaii's Environmental Policy Act ("HEPA").[7] HEPA requires an applicant to prepare an EIS if an "action"[8] may have a significant environmental effect.[9]

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[2] "An EIS is a thorough study of a project's potential impacts and often includes an evaluation of mitigation measures and alternatives." Zhao Ma, Dennis R. Becker & Michael A. Kilgore, *Characterising the Landscape of State Environmental Review Policies and Procedures in the United States: A National Assessment*, 52 J. ENVTL. PLAN. & MGMT. 1035, 1044 (2009) [hereinafter Ma, et al.] (discussing types of required review and environmental significance criteria in states' environmental review procedures).

[3] 123 Haw. 150, 231 P.3d 423 (2010).

[4] *Id.* at 179, 231 P.3d at 452 (holding "that the project constitutes 'an essentially different action . . . under consideration' and, based on the plain language of HAR § 11-200-26, a supplemental statement should have been prepared and reviewed." (internal citation omitted) (internal quotation marks omitted)).

[5] Interview with Jamie Pierson, Planner, Department of Planning and Permitting, in Honolulu, Haw. (Jan. 4, 2012) ("[W]hat has been well understood for decades has now been left in some chaos . . . in terms of how we're suppose to deal with these kinds of things, [there is] uncertainty . . . developers aren't certain whether they can move forward, they're having to go through the process over again.").

[6] HAW. REV. STAT § 343-5(i) (2012).

[7] *See* 'Ohana Pale Ke Ao v. Bd. of Agric., 118 Haw.247, 248, 188 P.3d 761, 762 (2008); Sierra Club v. Haw. Tourism Auth., 100 Haw.242, 264 59 P.3d 877, 899 (2002); Citizens for Prot. of N. Kohala Coastline v. Cnty. of Hawai'i, 91 Haw. 94, 103, 979 P.2d 1120, 1129 (1999); Kahana Sunset Owners Ass'n v. Cnty. of Maui, 86 Haw. 66, 68, 947 P.2d 378, 380 (1997).

[8] "Action" is broadly defined as "any program or project to be initiated by any agency or applicant. HAW. REV. STAT § 343-2 (2012).

[9] "Significant effect" is the "sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State." HAW. REV. STAT § 343-2 (2012); *see also*

The EIS process can be costly and time consuming.[10] An EIS for a project of Kuilima's size and scope could take between twelve to eighteen months to complete and cost between half a million to three quarters of a million dollars.[11] HRS section 343-5(i) provides a degree of finality in Hawaii's environmental review process[12] and addresses private parties' concerns that repeated requests for EISs and requiring multiple EISs would cause uncertainty and delay in completing a project.[13] Notwithstanding, Hawai'i's Administrative Rules ("HAR")[14] require a Supplemental EIS ("SEIS") under certain circumstances.[15]

The Hawai'i Supreme Court appropriately validated the Environmental Council's authority to promulgate SEIS rules in *Turtle Bay*[16] and held that "allowing an outdated EIS to 'remain valid in perpetuity' directly undermined HEPA's purpose."[17] Although the court provided much needed clarity regarding the Environmental Council's role and authority,[18]

HAW. CODE. R. § 11-200-2 (1996).

[10] Janis L. Magin, *Turtle Bay Supplemental EIS Ruling Could Be Far-Reaching,* PACIFIC BUSINESS NEWS (Aug. 23, 2011, 2:53pm), http://www.bizjournals.com/pacific/blog/2011/08/turtle-bay-supplmental-eis-ruling.html; *see also* Kepo'o v. Kane, 106 Haw. 270, 287, 103 P.3d 939, 956 (2005) (holding "[p]rojects or developments within the State of Hawai'i may be subject to the Hawai'i EIS laws that require the developer to begin an *extensive* environmental review process to determine if the benefit of the proposed development outweighs any detriment to the surrounding community.") (emphasis added) (citing Price v. Obayashi Haw. Corp., 81 Haw. 171, 180, 914 P.2d 1364, 1373 (1996)).

[11] Interview with George Atta, Principal, Group 70 International, in Honolulu, Haw. (Mar. 19, 2012).

[12] *See infra* Part II for a discussion on Hawaii's environmental review process.

[13] Unite Here! Local 5 v. City & Cnty. of Honolulu, 120 Haw. 457, 469, 209 P.3d 1271, 1283 (Ct. App. 2009) (Nakamura, J., dissenting), *vacated,* 123 Haw. 150, 231 P.3d 423 (2010).

[14] The Environmental Council promulgates the Hawai'i Administrative Rules. *See* HAW. REV. STAT. § 343-6 (2012); *see also* Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 176, 231 P.3d 423, 449 (2010) (holding that "[HRS § 343-6] expressly grants to the Environmental Council the power to promulgate rules regarding EISs.").

[15] *See* HAW. CODE. R. § 11-200-26 to 27 (1996). *See infra* Part II.C for a discussion on Hawaii's SEIS rules.

[16] Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 176, 231 P.3d 423, 449 (2010) (holding "that the Environmental Council did not exceed its authority in promulgating rules to guide the SEIS process, including HAR §§ 11-200-26 and 11-200-27.").

[17] *Id.* at 179, 231 P.3d at 452.

[18] KARL KIM, DENISE ANTOLINI, PETER RAPPA, SCOTT GLENN, NICOLE LOWEN, UNIVERSITY OF HAWAI['I], FINAL REPORT ON HAWAI['I]'S ENVIRONMENTAL REVIEW SYSTEM PREPARED FOR THE HAWAI['I] STATE LEGISLATURE 92 (2010) [hereinafter FINAL UH REPORT] ("Although prior cases had acknowledged the role of the Environmental Council in promulgating rules for Chapter 343, not until the 2010 *United Here! v. City & Cnty. of Honolulu ("Turtle Bay")* case did the courts directly address the issue of the scope of the Council's authority to interpret the statute." *Id.* at 18.).

more must be done to elucidate the issues now surrounding EISs for long-term projects.[19] This article agrees with the outcome of the *Turtle Bay* decision: permitting an EIS to remain valid in perpetuity if there are no substantive changes to a project would allow unlimited delays and negative impacts on the environment to go virtually unchecked.[20] Nonetheless, this article argues that the court's application of Hawaii's SEIS rules left the development community with significant uncertainty. The reason for this uncertainty is not only a result of *Turtle Bay*, but also due to Hawaii's imprecise SEIS rule.

Irregularity in the law's application spurs needless litigation and runs afoul of one of the purposes of Hawaii's system of environmental review: to give environmental and cultural concerns appropriate consideration in decision making along with technical and economic factors.[21] Transparent and clear SEIS rules to guide developers and administrative agencies in completely and accurately fulfilling their obligations to Hawaii's natural and cultural resources and to the community at large would benefit everyone involved.

This article proposes amendments to update Hawaii's current SEIS rule. Part II discusses Hawaii's current EIS law and SEIS rules to provide the context in which the proposed rule operates. Part III examines the facts, the background, and procedural history of the *Turtle Bay* Decision and applies Hawaii's current SEIS rules to the *Turtle Bay* Decision. The new rule this article proposes is derived from various components of California's, New York's, and Washington's SEIS provisions in conjunction with the *Turtle Bay* decision. Therefore, Part IV of this article provides an overview of California's, New York's, and Washington's environmental review systems, including a discussion of each states' SEIS provisions and case law. Finally, Part V proposes amendments and additions to improve Hawaii's current SEIS rules and discusses the rationale for the new rules.

II. OVERVIEW OF HAWAII'S ENVIRONMENTAL REVIEW PROCESS

The statutory and regulatory authorities governing HEPA include the text of HRS chapter 343 ("chapter 343"), its implementing administrative rules,

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[19] *Id.* at 92 ("The Hawai'i Supreme Court's Turtle Bay decision clarifies the scope and authority of the current administrative rules and provides a strong endorsement of supplementation for certain long-pending projects, but does not resolve all of the confusion on this issue."). The Rules Committee of the Environmental Council met on February 16, 2012 to discuss the issues and proposed solutions associated with Supplemental EISs/Shelf Life. Agenda from the Rules Committee Meeting 1 (Feb. 16, 2012) (on file with author).

[20] *Unite Here! Local 5*, 123 Haw. at 179, 231 P.3d at 452.

[21] *Id.*

HAR chapters 11-200 and 11-201, and HRS chapter 344 ("HRS 344").[22] Chapter 343 is a system of environmental review that is designed to ensure that decision makers give environmental concerns appropriate consideration, along with economic and technical factors.[23] The Environmental Council promulgates the rules implementing chapter 343.[24] Chapter 343 "primarily establishes procedural and informational requirements."[25] HRS 344, on the other hand, contains Hawaii's comprehensive environmental policy, goals, and objectives.[26]

A. HRS 344: Hawaii's Environmental Policy

Hawaii's policy, according to HRS 344, is to (1) conserve, preserve, augment and safeguard Hawaii's natural resources "in a manner which will foster and promote the general welfare, create and maintain conditions under which humanity and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of the people of Hawai[']i" and; (2) enhance the quality of life of Hawaii's people by setting population limits, creating opportunities for Hawai'i residents to improve their quality of life, to establish communities that will provide identity and "social satisfaction in harmony with the natural environment which is uniquely Hawaiian," and to establish a "commitment on the part of each person to protect and enhance Hawaii's environment and reduce the drain on nonrenewable resources."[27]

B. Chapter 343: Hawaii's Environmental Review Process

An applicant must prepare an Environmental Assessment ("EA")[28] if any proposed development or "action" falls within any of the seven

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[22] STATE OF HAWAI[']I OFFICE OF ENVIRONMENTAL QUALITY CONTROL, *Guide to the Implementation and Practice of the Hawai[']i Environmental Policy Act*, 3 (2012), *available at* http://oeqc.doh.hawaii.gov/Shared%20Documents/Misc_Documents/Guide%20to%20the%20Implementation%20and%20Practices%20of%20the%20HEPA.pdf [hereinafter OEQC GUIDEBOOK]; *see also* FINAL UH REPORT, *supra* note 18, at 4 (stating that Act 246, chapter 343, chapter 344, HAR chapters 11-200 and 11-201, along with policy guidance documents published by OEQC, and judicial decisions, form the legal foundation for Hawaii's environmental review system).

[23] HAW. REV. STAT. § 343-1 (2012).

[24] HAW. REV. STAT. § 343-6 ("After consultation with the affected agencies, the council shall adopt, amend, or repeal necessary rules for the purposes of . . . chapter [343].").

[25] Kepo'o v. Watson, 87 Haw. 91, 100, 952 P.2d 379, 388 (1998).

[26] OEQC GUIDEBOOK, *supra* note 22, at 2.

[27] HAW. REV. STAT. § 344-3 (2012).

[28] An Environmental Assessment is a "written evaluation to determine whether an action

geographical or two administrative categories established in chapter 343.[29] Certain activities may be exempt from this requirement if they fall within the eleven classes of actions under either HRS section 183B-2 or HAR section 11-200-8.[30] HEPA requirements extend to state, as well as private and municipal actions.[31] The applicant must prepare an EIS if the accepting authority[32] determines that the proposed action may have a significant effect[33] on the environment.[34] HAR Section 11-200-12 "outlines 'significance factors' for determining whether a project 'may have a significant effect on the environment.'"[35]

An EIS is an informational document, which discloses: the (1) environmental effects of a proposed action; (2) effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State; (3) effects of the economic activities arising out of the proposed action; (4) measures proposed to minimize adverse effects; and (5) alternatives to the action and their environmental effects.[36] The EIS must contain an explanation of the environmental consequences of the proposed action.[37] It must fully declare the proposed action's environmental implications and discuss all relevant and feasible consequences.[38] The EIS must also include opposing views, if any, so "the public can be fully informed and that the agency can make a sound decision based upon the full range of responsible opinion on environmental effects."[39]

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may have a significant effect." HAW. REV. STAT. § 343-2.

[29] HAW. CODE. R. § 11-200-6 (1996); *see* HAW. REV. STAT. § 343-5 (2012).

[30] OFFICE OF ENVIRONMENTAL QUALITY CONTROL, http://hawaii.gov/health/environmental/oeqc/environmental/oeqc/index.html (last visited Nov. 11, 2012).

[31] Lisa A. Bail, Maren Calvert, Robert D. Harris, Lea Hong, Naomi U. Kuwaye & Paul J. Schwind, *Emerging Environmental and Land Use Issues*, 9-JUN HAW. B.J. 4, 11 (2005).

[32] "Accepting Authority" means "the final official or agency that determines the acceptability of the EIS document." HAW. CODE. R. § 11-200-2 (1996).

[33] *See supra* note 9 (defining "significant effect"); *see also* Kepo'o v. Kane, 106 Haw. 270, 289, 103 P.3d 939, 958 (2005) (holding "the proper inquiry for determining the necessity of an EIS based on the language of HRS § 343-5(c) then, is whether the proposed action will 'likely' have a significant effect on the environment.").

[34] *Kane*, 106 Haw. at 287, 103 P.3d at 956 (2005) (citing HAW. REV. STAT § 343-5(c)).

[35] *Kane*, 106 Haw. at 287, 103 P.3d at 956 (2005) (citing Price v. Obayashi Haw. Corp., 81 Haw. 171, 180 n.8, 914 P.2d 1364, 1373 n.8 (1996)).

[36] HAW. REV. STAT. § 343-2 (2012).

[37] HAW. CODE. R. § 11-200-16 (1996).

[38] *Id.*

[39] *Id.*

C. Understanding Hawaii's SEIS Regulations

HRS chapter 343 is silent on the issue of SEISs; however, the Environmental Council promulgated rules governing the same, HAR sections 11-200-27 through 29.[40] The General Provisions of Hawaii's SEIS rules, HAR section 11-200-26, provide that no other EIS for a proposed action shall be required "to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things."[41] If there is a change in any of these characteristics, which may have a significant effect, the original EIS that was changed, is no longer valid because an "essentially different action would be under consideration" and a SEIS must be prepared.[42]

HAR section 11-200-27, Determination of Applicability, provides that a SEIS may be warranted when "the scope of an action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigating measures originally planned are not to be implemented, or where new circumstance or evidence have brought to light different or likely increased environmental impacts not previously dealt with."[43] Under these Rules, the accepting or approving agency,[44] in coordination with the original accepting authority, is responsible for determining whether to require a supplemental statement.[45]

HAR 11-200-28 outlines the contents of a SEIS.[46] The contents of a SEIS are the same as required by chapter 343; however, the SEIS may incorporate, by reference, unchanged material from the EIS.[47] The SEIS must fully document the proposed changes from the EIS, "including changes in ambient conditions or available information that have a bearing on a proposed action or its impacts, the positive and negative aspects of these changes, and shall comply with the content requirements of HAR section 11-200-16[48] as they relate to the changes."[49] The procedures for a SEIS are the same as the procedures for an EIS.[50]

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[40] *Id.* §§ 11-200-26 to 29 (1996).

[41] *Id.* § 11-200-26 (1996).

[42] *Id.*

[43] *Id.* § 11-200-27 (1996).

[44] "'Approving Agency' means an agency that issues an approval prior to actual implementation of an action." *Id.* § 11-200-2 (1996).

[45] *Id.* § 11-200-27 (1996).

[46] *See id.* § 11-200-28 (1996).

[47] *Id.*

[48] HAR section 11-200-16 states:

> The environmental impact statement shall contain an explanation of the environmental consequences of the proposed action. The contents shall fully declare the environmental implications of the proposed action and shall discuss all relevant and

III. THE HAWAI'I SUPREME COURT SUPPLEMENTS HAWAII'S EIS LAWS IN THE *TURTLE BAY* DECISION

In April of 2010, the Hawai'i Supreme Court, in a "precedent setting case of first impression,"[51] vacated the Hawai'i Intermediate Court of Appeal's decision, which had affirmed the trial court's[52] decision not to require a SEIS for Kuilima Resort's proposed expansion at Turtle Bay.[53] The Hawai'i Supreme Court ruled that Kuilima's twenty-year-old EIS for a proposed expansion of its resort was an "essentially different action" requiring a SEIS.[54] The criteria under which a SEIS is warranted became the center of the *Turtle Bay* dispute and is the motivation for this article's proposed rule.

A. The Significant Facts of the Turtle Bay *Litigation*

Kuilima is a resort at Kawela Bay on the North Shore of O'ahu.[55] The proposal "consisted of a 487–room hotel and an 18–hole golf course."[56] Kuilima sought to expand its existing hotel by constructing: three hotels with a total of 1,450+ units, 2,060+ condominium units, a 70,000+ square feet ("sq. ft.") commercial complex, an 18-hole golf course and clubhouse,

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> feasible consequences of the action. In order that the public can be fully informed and that the agency can make a sound decision based upon the full range of responsible opinion on environmental effects, a statement shall include responsible opposing views, if any, on significant environmental issues raised by the proposal.

Id. § 11-200-16 (1996).

[49] *Id.* § 11-200-28 (1996).

[50] *Id.* § 11-200-29 (1996) ("The requirements of the thirty-day consultation, filing public notice, distribution, the forty-five-day public review, comments and response, and acceptance procedures, shall be the same for the supplemental statement as is prescribed by this chapter for an EIS.").

[51] Motion for Leave to Appear and File a Brief of Amicus Curiae Of: Land Use Research Foundation of Hawai[']i et al. as Amici Curiae Supporting Appellee, at 2, Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 179, 231 P.3d 423, 452 (2010) (No. 28602).

[52] Proceeded by then-trial judge, the Honorable Sabrina S. McKenna. Unite Here! Local 5 v. City & Cnty. of Honolulu, 120 Haw. 457, 459 n.1, 209 P.3d 1271, 1273 n.1 (Ct. App. 2009), *vacated*, 123 Haw. 150, 231 P.3d 423 (2010). Justice McKenna is currently an Associate Justice for the Hawai'i Supreme Court.

[53] Unite Here! Local 5 v. City and County of Honolulu, 123 Haw. 150, 155, 231 P.3d 423, 428 (2010).

[54] *Id.* at 178, 231 P.3d at 451.

[55] *Id.* at 155, 231 P.3d at 428 (citing Unite Here! Local 5 v. City & Cnty. of Honolulu, 120 Haw. 457, 459, 209 P.3d 1271, 1273 (Ct. App. 2009), *vacated*, 123 Haw. 150, 231 P.3d 423 (2010).

[56] *Id.*

a tennis center, and an equestrian center.[57] The proposed expansion would introduce a new visitor population averaging about 4,783 persons on any given day.[58] Kuilima proposed completing the project in three phases with the last phase ending in 1996.[59] In accordance with HRS chapter 343, Kuilima prepared and filed an EIS, which was accepted by the then accepting authority, the Department of Land Utilization ("DLU"), in October of 1985.[60]

The EIS evaluated the natural and cultural setting and the proposed project's environmental impacts.[61] The document looked at various effects on infrastructure, coastal water quality, endangered species, and air quality.[62] Additionally, the EIS analyzed the adverse and unavoidable impacts of the project's development such as "drainage, traffic, dust generation, water consumption, marsh drainage input, loss of agricultural uses, construction noise, air quality, and solid waste disposal."[63] With regard to the project's traffic impacts on the community, the EIS "examined the traffic conditions caused by an increase in visitors to the North Shore region on O'ahu (between Haleiwa and Punalu'u), with projections through the year 2000."[64] The government approvals that Kuilima needed to develop the project included DLU's rezoning approval, grading and building permits, a shoreline certification, a Special Management Area Use Permit, and subdivision approval.[65] The EIS, as well as the unilateral agreement that Kuilima entered into with the Honolulu City Council to rezone certain portions of their property, contemplated the last phase of the project to be completed before the year 2000.[66] However, the unilateral agreement "noted that development may deviate from the phased development schedule due to the occurrence of changed economic conditions, lawsuits, strikes or other unforeseen circumstances."[67] "As of November 2005, construction on the major components of the project, including the hotel rooms and the remaining condominium units, had not begun."[68]

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 154, 231 P.3d at 427.
[61] *Id.* at 155, 231 P.3d at 428.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 157, 231 P.3d at 430.
[66] *Id.*
[67] *Id.*
[68] *Id.*

In November of 2005, Kuilima submitted an application to the Department of Planning and Permitting ("DPP") to subdivide approximately 744 acres of its 808-acre property.[69] In January of 2006, two letters were sent to DPP: a letter from a North Shore resident, and a letter from a member of Unite Here! Local 5 union, the labor organization representing 350 Kuilima employees.[70] The union member's letter explained that a SEIS was required because twenty years had passed since the approval of the original EIS and "changes had occurred in the traffic, water availability, hotel and housing needs, endangered species habitat needs, and the like."[71] The letter from the North Shore resident stated that because much had changed since the approval of the 1985 EIS, Kuilima needed to prepare a SEIS to "allow for some community input and to address new concerns regarding transportation, sewage, housing, water, cultural issues, and the Master Plan for the Ko'olauloa region."[72] The DPP responded to both letters noting that:

> No time frame for development was either implied or imposed by the City Council as part of its approval. Accordingly, the developer is entitled to proceed with the project as approved. By not imposing any time limits at the time, the City Council indicated that the project could be developed at its own pace. Further, as a matter of law, the County cannot retroactively impose time limits or unilaterally rescind an entitlement like an approved discretionary permit.[73]

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[69] *Id.* at 159, 231 P.3d at 432.

[70] *Id.* In 2003, Unite Here! Local 5 initiated a consumer boycott of Turtle Bay Resort claiming the hotel was stalling negotiations over the contract covering about 300 workers, which was last renewed in 1999. CENTER FOR LABOR EDUCATION & RESEARCH UNIVERSITY OF HAWAI'I (CLEAR)-WEST O'AHU, *CLEAR Timeline of Hawai'i Labor History* (hereinafter CLEAR Timeline) (Nov. 12, 2012), http://clear.uhwo.hawaii.edu/Timeline.html. In February of 2006, Unite Here! Local 5 filed a lawsuit against Kuilima and City & Cnty. of Honolulu in connection with DPP's decision not to require a SEIS for the project. *Unite Here! Local 5*, 123 Haw. at 160, 231 P.3d at 433. In July of 2006, the union successfully negotiated a four-year contract for its employees. CLEAR Timeline, *supra*. In August of 2006, the union dismissed all claims concerning the February 2006 lawsuit. *Unite Here! Local 5*, 123 Haw. at 160, 231 P.3d at 433.

[71] *Unite Here! Local 5*, 123 Haw. at 159, 231 P.3d at 432.

[72] *Id.*

[73] *Id.* (original emphasis removed). The Environmental Council ("EC") stated in a subsequent letter to the DPP that it believed that "based on the information available to it regarding changing environmental conditions in the project over the last twenty years and changes in the project's timing and scope," the EC believed the DPP should require Kuilima to prepare a SEIS for the project. *Id.* at 159-60, 231 P.3d at 432-33 (2010).

B. Procedural History: Turtle Bay's *Voyage Through Hawaii's State Courts*

Two civil lawsuits were filed in circuit court and eventually consolidated. One, by Unite Here! Local 5, and the other by Keep the North Shore Country, a Hawai'i non-profit organization consisting of North Shore residents and/or property owners, and the Hawai'i Chapter of Sierra Club, a California non-profit organization.[74] Both sought declaratory and injunctive relief.[75] Kuilima filed a motion for summary judgment arguing that HAR sections 11–200–26 and 11–200–27 did not require that Kuilima prepare a SEIS because the plaintiffs had (1) no evidence of a "substantive change" in the project; (2) no evidence of "significant effects" on the environment likely "resulting from" its alleged change in the project (timing); (3) no evidence that any of the alleged environmental impacts of the project, which resulted from a change in timing of the project, were not originally disclosed or previously dealt with; and (4) not considered DPP's extensive record regarding the planning and permitting process for the North Shore, and therefore, applying the "rule of reason," DPP's decision not to require a SEIS was neither arbitrary nor capricious.[76] The plaintiffs countered, arguing that the:

> (1) enforceable HEPA rules required a SEIS either when there are substantive project changes or new circumstances and evidence; (2) the substantive change in the timing of the project caused, and new circumstances and evidence brought to light, increased environmental impacts to traffic and species not previously dealt with in the 1985 EIS; [and] (3) Kuilima's subdivision application triggered HEPA's supplemental review.[77]

The Circuit Court granted Kuilima's motion for summary judgment, agreeing with Kuilima's interpretation of HAR sections 11–200–26 and 11–200–27 that "a SEIS is required *only* when there is a substantive project change and determined that, as a matter of law, the timing of the project had not substantively changed."[78] The plaintiffs appealed.[79] The Hawai'i Intermediate Court of Appeals ("ICA") affirmed the Circuit Court's

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[74] *Id.* at 160, 231 P.3d at 433.

[75] *Id.*

[76] *Id.* at 161, 231 P.3d at 434.

[77] *Id.* (emphasis omitted). Additionally, plaintiffs argued that the "rule of reason" applied to DPP's decision, and considering the agency's extensive record regarding the planning and permitting process for the region and for the Turtle Bay project, DPP's decision not to require a SEIS could not be deemed arbitrary or capricious. *Id.*

[78] *Id.* at 166-67, 231 P.3d at 439-40 (emphasis in original).

[79] *Id.* at 168, 231 P.3d at 441.

decision with a dissenting opinion by the Honorable Judge Nakamura.[80] The ICA majority concluded that pursuant to HAR section 11-200-26, the DPP is required to conduct the following two-step inquiry to determine whether a SEIS is required: first, has the "action ("the Project")"[81] changed substantively in size, scope, intensity, use, location or timing? Second, if the project has so changed, "[w]ill the change in any of these characteristics likely have a significant effect and result in individual or cumulative impacts not originally disclosed in the EIS?"[82] In his dissent, Judge Nakamura, argued that:

> Under Kuilima's and the City's interpretation of the applicable rules and circumstances, because no specific deadline was established for the project's completion, the 1985 EIS would remain valid in perpetuity and no SEIS could ever be required, so long as no substantive changes to the design of the project were made.[83]

Judge Nakamura asserted that the applicable rules required the completion of a SEIS "when significant changes to the anticipated environmental impacts of a proposed action become apparent such that 'an essentially different action' is being proposed."[84] Additionally, Judge Nakamura opined that not only could significant changes to the anticipated environmental impacts of a development project arise from changes to the design of the project itself, but also as a result of changes to conditions surrounding the project or the discovery of new information, even if the project's design had not changed.[85] The Hawai'i Supreme Court granted plaintiff's writ of certiorari[86] and subsequently vacated the ICA's decision.[87]

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[80] *Id.* Judge Nakamura is the current Chief Judge of the Hawai'i Intermediate Court of Appeals; however at the time of this decision, Judge Watanabe was Acting Chief Justice. Unite Here! Local 5 v. City & Cnty. of Honolulu, 120 Haw. 457, 458, 209 P.3d 1271, 1273 (Ct. App. 2009), *vacated*, 123 Haw. 150, 231 P.3d 423 (2010).

[81] *Unite Here! Local 5*, 120 Haw. at 465, 209 P.3d at 1279.

[82] *Id.*

[83] *Id.* at 472, 231 P.3d at 1286 (Nakamura, J., dissenting).

[84] *Id.* at 468, 231 P.3d at 1282 (Nakamura, J., dissenting).

[85] *Id.*

[86] *See* Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 154, 231 P.3d 423, 427 (2010) ("[P]laintiff's urge [the Hawai'i Supreme Court] to adopt Judge Nakamura's view that HEPA mandates the completion of a SEIS where there has been a change in circumstances or increased environmental impacts[.]")

[87] *Id.* at 155, 231 P.3d at 428.

C. The Hawai'i Supreme Court Supplements Hawaii's SEIS Rules and Requires Kuilima to Prepare a SEIS

Turtle Bay was the first time the Hawai'i Supreme Court addressed the parameters of a SEIS.[88] The court concluded that twenty years had passed since the approval of Kuilima's original EIS.[89] Accordingly, it held that environmental impacts had been examined only through 2000.[90] In addition, because the project had not yet been completed—due to the change in timing—the project was an essentially different action,[91] despite being unchanged in terms of size, scope, location, intensity, and use.[92] The original EIS was, thus, no longer valid and a SEIS may be required if the change in timing of the project "may have a significant effect."[93]

Consistent with the decision in *Kepo'o v. Kane*,[94] the Hawai'i Supreme Court held that in the context of Hawaii's EIS statute, "may have a significant effect," means "whether the proposed action *will 'likely'* have a significant effect on the environment."[95] Moreover, rather than having to show that significant effects will in fact occur, plaintiffs "need only raise substantial questions whether a project may have a significant effect."[96] The court concluded that "new evidence that was not considered at the time the 1985 EIS was prepared [] could likely have a significant impact on the environment."[97] The new evidence included documented changes in traffic patterns in the area along with the likelihood of an increased impact on

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[88] FINAL UH REPORT, *supra* note 18, at 26.

[89] *Unite Here! Local 5*, 123 Haw. at 178, 231 P.3d at 451.

[90] *Id.*

[91] Judge Nakamura's dissenting opinion in the ICA decision opined that requiring a project to be an "essentially different action" to trigger a SEIS was a relatively high threshold. Unite Here! Local 5 v. City and County of Honolulu, 120 Haw. 457, 471, 207 P.3d 1271, 1285 (Ct. App. 2009) (Nakamura, J., dissenting), *vacated*, 123 Haw. 150, 231 P.3d 423 (2010). Judge Nakamura further opined that this requirement was the Environmental Council's way of addressing the tension between the need to ensure that an agency is apprised of relevant environmental impacts so that it can make informed decisions and the need for finality in an agency's decision-making. *Id.*

[92] *Unite Here! Local 5*, 123 Haw. at 178, 231 P.3d at 451.

[93] *Id.*

[94] 106 Haw. 270, 289, 103 P.3d 939, 958 (2005).

[95] *Unite Here! Local 5*, 123 Haw. at 178, 231 P.3d at 450 (citing Kepo'o v. Kane, 106 Haw. 270, 289, 103 P.3d 939, 958 (2005) (emphasis added) (internal quotation marks omitted) (construing HAW. REV. STAT. § 343–5(c)).

[96] *Id.* (quoting Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 562 (9th Cir. 2006) (emphasis omitted)).

[97] *Id.* at 179, 231 P.3d at 452 (quoting *Kane*, 106 Haw. at 289 n. 31, 103 P.3d at 958 n. 31) (internal quotation marks omitted).

monk seals and sea turtles.[98] Consequently, DPP, the accepting authority, had not taken a "hard look" at the allegations and evidence presented to it with respect to Kuilima's subdivision application in finding that a SEIS was not required.[99]

The court correctly concluded that there was a substantive change in the timing of Kuilima's proposed action. It found that according to HAR section 11-200-26, "[a] statement that is accepted with respect to a particular action is *usually qualified* by the size, scope, location, intensity, use and *timing of the action*, among other things."[100] The court held that based on the plain language of section 11-200-26, every EIS was inherently "limited" by some sort of time frame.[101] Instead of next considering whether that change in timing had a significant effect, however, the court concluded that the EIS was no longer valid because the change in timing rendered Kuilima's proposed action an essentially different action.[102]

HAR section 11-200-26 provides that if the change in the project may have a significant effect, *then* the original EIS is no longer valid and an essentially different action is under consideration.[103] The court erred by rendering the original statement invalid before first discussing whether Kuilima's change in timing "may have a significant effect."[104] The final sentence of section 11-200-26 provides that, "[a]s long as there is not [sic] change in a proposed action resulting in individual or cumulative impacts not originally disclosed, the statement associated with that action shall be deemed to comply with this chapter."[105] Section 11-200-26, therefore, suggests that the central question when deciding whether to require a SEIS rests on if the change in the proposed action results in a significant effect.[106]

The court ruled that the project would likely result in increased impacts on monk seal and green sea turtle populations.[107] Further, none of the traffic studies involved any regional impacts, only impacts on the areas fronting the resort and within the resort itself.[108] Given that the entire North Shore area is served by one two-lane highway, it was important that the

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[98] *Id.*

[99] *Id.* at 150, 181, 231 P.3d at 454.

[100] *Id.* at 177, 231 P.3d at 450 (emphasis in original).

[101] *Id.*

[102] *Id.* at 178, 231 P.3d at 451.

[103] HAW. CODE. R. § 11-200-26 (1996).

[104] Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 178, 231 P.3d 423, 451 (2010).

[105] HAW. CODE. R. § 11-200-26 (1996).

[106] *Id.*

[107] *Unite Here! Local 5*, 123 Haw. at 178-79, 231 P.3d at 451-52.

[108] *Id.* at 178, 231 P.3d at 451.

agency scrutinize these increased impacts.[109] Considering HAR section 11-200-27, which states that a SEIS is warranted where new circumstances or evidence has brought to light different or likely increased environmental impacts not previously dealt with, the court concluded that the monk seal, green turtle, and traffic information "clearly qualifie[d]" as new circumstances or evidence.[110] The court did not consider, however, whether the discovery of new circumstances or evidence alone, could grant an accepting agency the authority to compel an applicant to prepare a SEIS.

IV. THE NEED TO IMPROVE HAWAII'S SEIS RULE

On April 19, 2010, Kuilima filed a Motion for Reconsideration with the Hawai'i Supreme Court.[111] Alternatively, Kuilima requested that the court clarify the scope of the required SEIS—namely, whether Kuilima was required to only discuss the changed traffic conditions and visitor impacts on the monk seals and green sea turtles.[112] On May 18, 2010, over two dozen organizations including banks, development companies, unions, and resorts requested leave to file amicus curiae briefs in support of Kuilima's Motion for Reconsideration because, among other reasons, unless the court reconsidered, uncompleted projects were subject to a "cloud of uncertainty and time limitations and other new requirements not known to exist until the Decision."[113]

Hawaii's people and those seeking to conduct business in the state must be able to more accurately discern the role of SEISs in Hawaii's environmental review process. Although Hawaii's SEIS rules, HAR sections 11-200-26 to 28, contain all the elements of a strong SEIS rule, the current form is imprecise and requires clarification. *Turtle Bay*[114] adds another layer of uncertainty, leaving the community with questions regarding the shelf life of an EIS and how an accepting authority should determine when a SEIS is needed.[115] In addition, the

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[109] *Id.* at 178-79, 231 P.3d at 451-52.

[110] *Id.* at 179, 231 P.3d at 452.

[111] Motion for Reconsideration of Defendant/Counterclaim-Plaintiff/Appellee Kuilima Resort Company, Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 231 P.3d 423 (2010) (No. 06-1-0265) [hereinafter Motion for Reconsideration].

[112] *Id.* at 1. Kuilima's Motion for Reconsideration also requested the court to clarify the scope of the injunction granted by the court and whether it enjoined only the work on the portions of land covered by the subdivision approval. *Id.* at 1-2.

[113] Motion for Leave to Appear and File a Brief of Amicus Curiae of: Land Use Research Foundation of Hawai[']i, et al. at 2, Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 231 P.3d 423 (2010) (No. 28602).

[114] *Unite Here! Local 5*, 123 Haw. at 181, 231 P.3d at 454.

[115] Two interviews were conducted where the following question was asked: "What questions did you have remaining after the Kuilima decision?" George Atta replied, "What is the shelf life of an EIS? How do we determine when a supplemental is needed? Do only the items or issues raised

Decision did not clearly specify what items or issues in an original EIS need to be updated when an accepting authority determines that a SEIS is required. Questions remain whether only the items or issues raised by the agency need to be updated, or whether other areas of the original EIS also need to be updated.

California, Washington, and New York have well developed approaches to environmental review.[116] Although these three states have different EIS procedures, all share similar SEIS laws and regulations.[117] Aligning Hawaii's SEIS laws with other State Environmental Policy Acts ("SEPAs") has the benefit of providing more case law for guidance. Moreover, California's, New York's, and Washington's SEPAs share foundational similarities with HEPA. The following section first discusses the origin of SEPAs and subsequently provides an overview of California's, New York's, and Washington's SEPAs and SEIS laws to provide a framework for this article's proposal to amend Hawaii's SEIS rules.

A. Hawaii's Sister SEPAs: The Commonalities in California's, New York's, and Washington's State Environmental Policy Acts

This article focuses on state SEIS laws; however, a discussion of California's, New York's, and Washington's SEPAs would not be complete without first discussing the inspiration for creating each State's Environmental Policy Acts. The National Environmental Policy Act of 1969 ("NEPA") has often been called our nation's environmental Magna Carta.[118] NEPA is widely recognized as the world's first comprehensive

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in a trial need to be updated or do other areas also need to be updated? Who decides what needs to be updated?" Interview with George Atta, Principal, Group 70 Int'l, in Honolulu, Haw. (Mar. 19, 2012). Lee Sichter opined that the Hawai'i Supreme Court called "into question the content of the EIS upon which [the development] was predicated," because the Court recognized that a project's development life can be longer than what the information in an EIS provides. Interview with Lee Sichter, Turtle Bay Resort Supplemental EIS Consultant, in Honolulu, Haw. (Feb. 3, 2012). Mr. Sichter emphasized, however, that "we don't have any criteria yet for evaluating what's the reasonable life of a [HRS chapter] 343 document." *Id.*; Don S. Kitaoka, Deputy Corporation Counsel, City & Cnty. of Honolulu, Environmental Council Rules Committee Meeting Discussing Issues Associated with Supplemental EISs, in Honolulu, Haw. (Feb. 16, 2012) ("We believe that the Hawai'i Supreme Court did not provide guidance that would provide a degree of certainty as to when a SEIS is required.").

[116] FINAL UH REPORT, *supra* note 18, at 52.

[117] *See infra* Part IV.A.

[118] Kenneth S. Weiner, *NEPA and State NEPAs: Learning From the Past, Foresight for the Future*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10675, 10675 (2009); Daniel R. Mandelker, *The National Environmental Policy Act: A Review of Its Experience and Problems*, 32 WASH. U. J.L. & POL'Y 293, 293 (2010) ("The National Environmental Policy Act ("NEPA"), the Magna Carta of environmental law[.]").

statement of environmental policy.[119] "Prior to 1970, few federal or state agencies considered the environmental consequence of human activities and environmental matters were generally not part of any decision making process."[120] NEPA was the cornerstone of a new era of environmental protection and has become a model for environmental policy and law for thirty-seven states that have adopted some form of environmental review requirement.[121] Among the thirty-seven states, sixteen have adopted SEPAs modeled after NEPA.[122] Of those sixteen states, ten require environmental review for private projects requiring government permits or approvals.[123] California, New York, and Washington, like Hawai'i, are among the states that require environmental review for private projects.[124]

California, New York, and Washington all have "clearly defined environmental review policy goals, which [similar to Hawai'i,] generally include encouraging harmony between human beings and their environment, enriching the understanding of ecological systems, and utili[z]ing a systematic and interdisciplinary approach in planning and decision making regarding a project that may or will damage environmental quality."[125] All three states also have administrative rules interpreting their environmental policies.[126] The three, like Hawai'i, share the requirement of an EA[127] to evaluate a project's potential impacts and to determine whether further analysis is warranted.[128] Each state requires an EIS for projects that may significantly affect environmental quality and have explicit criteria for determining environmental significance.[129]

California's, Washington's, and New York's SEIS provisions are markedly similar to NEPA's SEIS regulations. NEPA's regulations require a SEIS in two instances: where "[(1)] The agency makes substantial

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[119] Weiner, *supra* note 118, at 10675.

[120] Ma, et al., *supra* note 2, at 1036

[121] *Id.*

[122] "California, Connecticut, Georgia, Hawai'i, Indiana, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New York, North Carolina, South Dakota, Virginia, Washington, Wisconsin." Ma et al., *supra* note 2, at 1040; *see also* Kathryn C. Plunkett, *Local Environmental Impact Review: Integrating Land Use and Planning through Local Environmental Impact Reviews (Comment)*, 20 PACE ENVTL. L. REV. 211, 214 n. 19 (2003) (listing statutes substantially modeled after NEPA).

[123] California, Connecticut, Hawai'i, Massachusetts, Minnesota, Montana, New York, South Dakota, Washington, and Wisconsin. Ma et al., *supra* note 2, at 1042.

[124] *Id.*

[125] *Id.* at 1041.

[126] *Id.*

[127] *Id.* at 1044 ("An EA presents information about a project's potential impacts and is prepared to determine whether further analysis is warranted.").

[128] *Id.*

[129] *Id.*

changes in the proposed action that are relevant to environmental concerns; or [(2)] There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[130] NEPA's SEIS regulations also gives an agency the discretion to require a SEIS if it determines that the purposes of NEPA would be furthered by doing so.[131] Moreover, "[a]s a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old"[132] are "presumed stale."[133]

B. Overview of California's Environmental Review Process

1. California's Environmental Quality Act

California's Environmental Quality Act ("CEQA")[134] permeates the daily practice of local planning and is arguably the most significant law governing land-use planning.[135] CEQA administers the review and approval process for all large developments in California and produces far more Environmental Impact Reports ("EIRs")[136] than even NEPA.[137] The high level of development and planning activity in California makes CEQA of national interest.[138]

"CEQA applies to projects[139] proposed to be undertaken or requiring approval by State and local government agencies."[140] The lead agency[141]

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[130] 40 C.F.R. § 1502.9(c)(1)(i)-(ii) (2012); *see also* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989) ("It would be incongruous with . . . the Act's manifest concern with preventing uninformed action, for the blinders to adverse effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.").

[131] 40 C.F.R. § 1502.9(c)(2).

[132] COUNCIL ON ENVIRONMENTAL QUALITY, *NEPA's Forty Most Asked Questions* 32, http://ceq.hss.doe.gov/nepa/regs/40/30-40.htm#32 (last visited Nov. 20, 2012).

[133] FINAL UH REPORT, *supra* note 18, at 6-12. For information about NEPA SEIS requirements, see Robert F. Blomquist, *Supplemental Environmental Impact Statements Under NEPA: A Conceptual Synthesis and Critique of Existing Legal Approaches to Environmental and Technological Changes*, 8 TEMP. ENVTL. L. & TECH. J. 1 (1989); Michael Hoggan, *NEPA and ANILCA Requirements Concerning Supplemental Environmental Impact Statements and the Consideration of Alternatives*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 147 (1996); *NEPA's Forty Most Asked Questions*, *supra* note 132.

[134] CAL. PUB. RES. CODE § 21100 (2012).

[135] Robert B. Olshansky, *The California Environmental Quality Act and Local Planning*, 62 J. AM. PLAN. ASS'N 313, 313 (1996).

[136] California's equivalent of an EIS.

[137] Olshansky, *supra* note 135, at 313 (citation omitted).

[138] *Id.*

[139] "'Projects' are activities which have the potential to have a physical impact on the

first determines if an activity is a "project" subject to CEQA.[142] Next, the agency determines if the project is exempt from CEQA.[143] A project may be statutorily exempt[144] or categorically exempt.[145] A project is also exempt from CEQA "if it can be seen with certainty that there is no possibility of a significant effect."[146] Finally, the lead agency must perform an Initial Study to identify the environmental impacts of the project and determine whether the identified impacts are "significant."[147] If the lead agency finds that a project has significant environmental effects, the lead agency must prepare an EIR.[148]

Similar to HRS chapter 343,[149] CEQA mandates that "[w]hen an [EIR] has been prepared for a project . . . no subsequent or supplemental [EIR] shall be required."[150] Notwithstanding, CEQA statutorily provides three exceptions: (1) substantial changes are proposed to the project requiring major revisions of the EIR; (2) "[s]ubstantial changes occur with respect to the circumstances under which the project is being undertaken[,] which will require major revisions in the [EIR]"; and (3) "[n]ew information, which

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environment and may include the enactment of zoning ordinances, the issuance of conditional use permits and the approval of tentative subdivision maps." CALIFORNIA RESOURCES AGENCY, CALIFORNIA ENVIRONMENTAL QUALITY ACT: SUMMARY (May 25, 2005), http://ceres.ca.gov/ceqa/summary.html [hereinafter CEQA SUMMARY]; *see also* CAL. PUB. RES. CODE § 21065 (2012); *see also* CAL. CODE REGS. tit. 14, § 15378 (2012), *available at* http://ceres.ca.gov/ceqa/guidelines/.

[140] CEQA SUMMARY, *supra* note 139.

[141] "'Lead agency' is the public agency with the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." CAL. PUB. RES. CODE § 21067 (2012).

[142] CEQA SUMMARY, *supra* note 139.

[143] *Id.*

[144] Statutory exemptions are descriptions of types of projects for which the California Legislature has provided a blanket exemption from CEQA procedures and policies. *See* CAL. CODE REG. tit. 14, § 15282 (2007).

[145] Categorical exemptions are types of projects, which the Secretary of the Resources Agency has determined do not have a significant effect on the environment." *See* CAL. CODE REG. tit. 14, §§ 15300-333 (2007).

[146] CALIFORNIA RESOURCES AGENCY, *California Environmental Quality Act: Types of Exemptions* (May 30, 2001), http://ceres.ca.gov/ceqa/flowchart/exemptions/.

[147] CAL. CODE REGS. tit. 14, § 15168(d)(1) (2007).

[148] CEQA Guidelines provide criteria to lead agencies in determining whether a project may have a significant effect. *See* CAL. CODE REG. tit. 14, § 15064 (2009). For more information about CEQA, *see* CECILIA TALBERT BARCLAY, CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 151 (13th ed. 2010).

[149] *See also* HAW. CODE R. § 11-200-26 (1996) (stating "no other statement for that proposed action shall be required, *to the extent* that the action has not changed substantively[.]" *Id.* (emphasis added)).

[150] CAL. PUB. RES. CODE § 21166 (2012).

was not known and could not have been known at the time the [EIR] was certified as complete becomes available."[151]

California's Code of Regulations implements CEQA and to add certainty to the process, provides extensive guidance regarding when a lead agency may require either a Subsequent EIR ("SubEIR") or Supplemental EIR ("SEIR").[152] A SEIR augments a previously certified EIR to the extent necessary to address the events described in CEQA's SubEIR and SEIR section, California Public Resources Code section 21166; therefore, a SEIR requires only minor additions or changes, and revises the previous EIR through supplementation[153] so that it continues to apply in the changed situation.[154] Moreover, a SEIR's scope is limited, and need only contain the information necessary to revise the previous EIR so that it is again adequate for the project.[155] In contrast, a SubEIR is a completely new EIR, which focuses on the events described in CEQA section 21166.[156]

2. Supplementing a Stale EIR in the California Courts

California's SEIR laws are the most comprehensive of the three states. The issue of whether an agency could require a SEIR has been considerably litigated in California state courts. California courts have interpreted CEQA to create a "low threshold requirement for preparation of an EIR."[157] CEQA's SEIR provision, however, "indicates a quite different intent, namely, to restrict the powers of agencies by prohibiting [them] from requiring a subsequent or supplemental environmental impact report unless the stated conditions are met."[158] California courts have held that the "purpose behind the requirement of a subsequent or supplemental EIR . . . is to explore environmental impacts not considered in the original environmental document."[159] CEQA's SEIR section, § 21166, "comes into

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[151] *Id.* § 21166(a)-(c).

[152] CAL. CODE REGS. tit. 14, § 15162 (2007).

[153] *Id.* § 15163 (2007).

[154] *See id.*

[155] *Id.* § 15163(a)(2), (b). Although a SEIR must be given the same kind of notice and public review as the draft EIR, an SEIR may be circulated by itself without recirculating the previous draft. *Id.* § 15163.

[156] *Id.*

[157] Sierra Club v. Cal. Dept. of Forestry and Fire Prot., 59 Cal. Rptr. 3d 9, 17 (Cal. Ct. App. 2007) (internal citations omitted).

[158] Bowman v. City of Petaluma, 230 Cal. Rptr. 413, 417 (Cal. Ct. App. 1986) (internal citations omitted).

[159] Save Our Neighborhood v. Lishman, 45 Cal. Rptr. 3d 306, 311 (Cal. Ct. App. 2006) (citing Fund for Environmental Defense v. Cnty. of Orange, 252 Cal. Rptr. 79, 82 (Cal. Ct. App. 1988)).

play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired . . . and the question is whether circumstances have *changed* enough to justify *repeating* a substantial portion of the process."[160] California courts, therefore, hold that CEQA creates a high threshold for requiring a SEIR.[161]

Similar to HRS section 343-5(g),[162] California courts have concluded that "[s]ection 21166 is intended to provide a balance against the burdens created by the environmental review process and to accord a reasonable measure of finality and certainty to the results achieved."[163] Moreover, "[t]his purpose appears not only from its prohibitory language ('no subsequent or supplemental environmental impact report . . . unless . . .') but also from legislative context and history."[164] A majority of California decisions overturning an agency determination not to require a SEIS have been due to a change in project.[165] The sole California Supreme Court case overturning an agency's decision not to require a SEIR, was due to a change in an amphitheater construction project.[166] The project's size had increased from six to ten acres, the project's seating capacity had increased two hundred percent, and the project's stage had moved to face single-family dwellings north of the fairgrounds.[167] These changes were "sufficiently important to require consideration of their effects in a later EIR."[168]

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[160] *Id.* (emphasis in original); *Bowman*, 230 Cal. Rptr. at 417.

[161] *Bowman*, 230 Cal. Rptr. at 416-417; *see also* Friends of Davis v. City of Davis, 100 Cal. Rptr. 2d 413, 423 (Cal. Ct. App. 2000) ("The low threshold for requiring the preparation of an EIR in the first instance is no longer applicable; instead, agencies are prohibited from requiring further environmental review unless the stated conditions are met.").

[162] "The evident purpose of HRS § 343-5(g) is to provide a degree of finality in the environmental review process. It addresses the concern, particularly of private parties, that repeated requests for EIS[]s and requiring . . . multiple EIS[]s could create uncertainty and undue delay in completing a proposed project." Unite Here! Local 5 v. City & Cnty. of Honolulu, 120 Haw. 457, 469, 209 P.3d 1271, 1283 (Ct. App. 2009) (Nakamura, J., dissenting), *vacated*, 123 Haw. 150, 231 P.3d 423 (2010).

[163] *Bowman*, 230 Cal. Rptr. at 417; *Friends of Davis*, 100 Cal. Rptr. 2d at 423 ("At this point, the interests of finality are favored over the policy of encouraging public comment[.]").

[164] *Bowman*, 230 Cal. Rptr. at 417.

[165] DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 12:28 n. 9 (2d ed. 2011).

[166] Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agric. Ass'n, 727 P.2d 1029 (Cal. 1986).

[167] *Id.* at 1034.

[168] *Id.*

Alternatively, California's administrative rules allow for an addendum[169] rather than a SubEIR or SEIR "if some changes or additions [to a project] are necessary" but none of the conditions described in the sections requiring SubEIRs or SEIRs have occurred.[170] Addenda may not be used to cure an inadequate EIR.[171] California courts have, however, upheld the use of addenda and have not required a SEIR in the following circumstances even where a project had markedly changed: (1) when the change in project did not produce any significant adverse environmental impacts that were not raised, analyzed or discussed in the original EIR,[172] (2) when the record did not contain substantial evidence that the change in the project had any environmental impacts that were substantially different or greater than the impacts in the previous studies,[173] and (3) when a project's changes did not require major revisions in the original EIR, despite a project's change in design, increase in square footage by 30%, and where the number of buildings in the projects had increased.[174]

Addenda are useful in assisting reviewing agencies in making informed decisions about whether a SEIR is required when a project has changed subsequent to its EIR certification. For example, in *Mani Brothers Real Estate Group v. City of Los Angeles*,[175] a court found that modifications in a proposed development project that included an increase in square footage and building height, as well as a change in use from office to residential, did not require a SEIR based on the information provided in the Addendum.[176] The court found substantial evidence on the record, particularly in the Addendum, that supported the reasons for the modifications in the project and concluded that there were no new or more severe impacts caused by the modifications, or any changes to the existing

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[169] "An addendum does not need to be circulated for public review or comment but can be included in, or attached to, the final EIR, and it is then considered by the agency before making its decision on the project." Mani Bros. Real Estate Grp. v. City of Los Angeles, 64 Cal. Rptr. 3d 79, 90 (Cal. Ct. App. 2007).

[170] CAL. CODE REGS. tit. 14, § 15164(a) (2007).

[171] Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist., 71 Cal. Rptr. 2d 1, 11 (Cal. Ct. App. 1997) ("The [Monterey Peninsula Water Management District ("District")] has no discretion to cure an inadequate EIR by means of a subsequent EIR or an addendum. The judgment ordering the District to void its certification of the EIR and to prepare a supplemental EIR was correct.").

[172] River Valley Preservation Project v. Metro. Transit Dev. Bd., 43 Cal. Rptr. 2d 501 (Cal. Ct. App. 1995) (raising the elevation of a segment of a berm by a factor of two to three times the original height for a light rail project and replacing a golf course with a wetland).

[173] Santa Teresa Citizen Action Grp. v. City of San Jose, 7 Cal. Rptr. 3d. 868 (Cal. Ct. App. 2008) (eight year lapse between the original EIR and later proposed revisions).

[174] Fund for Envtl. Def. v. Cnty. of Orange, 252 Cal. Rptr. 79 (Cal. Ct. App. 1988).

[175] 64 Cal. Rptr. 3d 79 (Cal. Ct. App. 2007).

[176] *Id.* at 94.

mitigation measures.[177] Notably, the approval process for the modified project and the addendum included several public meetings before the City of Los Angeles Council and the approving agency.[178]

Similar to project changes, a change in circumstances alone is not sufficient to mandate preparation of a subsequent EIR unless the change is so substantial it requires major revisions in the EIR.[179] When circumstances change in a relatively minor fashion or do not cause any significant impacts other than those already contemplated by the EIR, CEQA does not require preparation of a subsequent EIR.[180] In *Fund for Environmental Defense v. County of Orange*,[181] a wilderness park was expanded to completely surround a proposed medical resource and laboratory complex.[182] Nonetheless, the court affirmed the accepting agency's decision not to require a SEIR.[183] Although the "bald fact that a project is suddenly surrounded by a wilderness park does sound like a substantial change[,] . . . the record clearly demonstrates the change raises no new adverse effects that were not raised, analyzed and discussed in the original EIR."[184] CEQA regulations provide that a subsequent change in the circumstances surrounding the project must be due to the involvement of new significant environmental impacts not considered in a previous EIR.[185] The record did not reflect an *adverse change* in any of the physical conditions within the area of the Nichols site.[186] The only real change was

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[177] *Id.*

[178] *Id.* at 86. The court, however, held that the City had erred in failing to prepare a SEIR to evaluate the substantial impact that the modified project would have on police services. *Id.* at 94-95. The court found that given the increased size and addition of residential units to the modified project, a SEIR should have been prepared to properly analyze impacts on police services and mitigation measures to reduce the impact. *Id.* 94-96.

[179] A Local & Reg'l Monitor v. City of Los Angeles, 16 Cal. Rptr. 2d 358, 376 (Cal. Ct. App. 1993) (holding that a letter containing traffic information "did not invoke preparation of a [Sub]EIR because it was not new information and it could have been known and was known at the time the EIR was certified.").

[180] El Morro Cmty. Ass'n v. Cal. Dept. of Parks & Recreation, 19 Cal. Rptr. 3d 445, 460 (Cal. Ct. App. 2004) (holding that a deletion of a pedestrian crossing "was not a substantial change in the project requiring a major revision of the EIR.").

[181] 252 Cal. Rptr. 79 (Cal. Ct. App. 1988).

[182] *Id.* at 86.

[183] *Id.* at 88-89.

[184] *Id.* at 86.

[185] *Id.* at 87 (citing CAL. CODE REGS. tit. 14, § 15162(a)(1)-(2) (defining significant effect as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project.") (emphasis omitted)).

[186] *Fund for Envtl. Def*, 252 Cal. Rptr. at 87.

the fact the site was surrounded by, rather than adjacent to, a wilderness park.[187]

A vacated approval has been considered by a California court as a change in circumstance. In *Save Tara v. City of West Hollywood*,[188] a community group sought judicial review to set aside agreements made by the city to develop real property by claiming that the city could not commit to a project without first preparing an EIR.[189] The EIR had been prepared after the City Council executed an important development agreement that indicated its commitment to the project and had not conditioned the agreements upon CEQA compliance.[190] The approvals in the agreement were subsequently vacated.[191] The original EIR's discussion of project alternatives and mitigation measures had been premised on the vacated approvals.[192] Additionally, two years had passed since the EIR had been certified.[193] The court held that it did not believe the City necessarily had to prepare a new EIR before reconsidering the approvals; however, it was possible that substantial changes had occurred with respect to the circumstances under which the project was being undertaken or that new information, unknown at the time of the original EIR, could be available.[194] "Whether this is so must be decided in the first instance by [the] City[.]"[195] The California Supreme Court remanded the decision back to the lower court to order the City to decide whether a subsequent or supplemental EIR was required.[196]

In a case in which the sole inquiry was whether there was a substantial change in circumstances, the court reversed the lower court's decision not to require a SEIS because the court found that CEQA regulations required a mandatory finding of significance.[197] CEQA regulations require a

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[187] *Id.* at 88. The court opined that the essence of the project opponent's argument was disappointment over the county's policy decision to proceed with the project now that the site was in the middle of the park. *Id.* The agency's decision, however, was beyond the scope of the proceedings. *Id.*

[188] 84 Cal. Rptr. 3d 614 (Cal. 2008).

[189] *Id.* at 622.

[190] *Id.* at 621.

[191] *Id.* at 637.

[192] *Id.*

[193] *Id.*

[194] In the alternative, the court held that new information, which was not known and could not have been know at the time the EIR was certified, could be available. *Id.*

[195] *Id.*

[196] *Id.*

[197] Mira Monte Homeowners Ass'n v. Cnty. of Ventura, 212 Cal. Rptr. 127, 130 (Cal. Ct. App. 1985) ("Our inquiry focuses on whether the newly discovered "E" Street encroachment involves a substantial change in circumstances . . . since no changes in the project were proposed and the new information was available at the time the EIR was certified.").

mandatory finding of significance where a project has potential to threaten to eliminate a plant or animal community, or reduce the number or restrict the range of a rare or endangered plant.[198] Further, a project may have a significant effect on the environment if it will substantially affect a rare or endangered species of plant or its habitat, or substantially diminish habitats for fish, wildlife, or plants.[199] In *Mira Monte Homeowners Ass'n v. County of Ventura*,[200] the County of Ventura discovered that a street in a proposed development would pave over part of protected wetlands[201] adjacent to the development.[202] A study advised that the wetlands were "one of the last, if not the only remaining habitat types of its kind"[203] and five rare plant species endemic to the area had been discovered.[204] The court, not only reversed the accepting agency's decision not to require an EIR, but remanded the decision back to the trial court to issue a writ of mandate voiding certification of the final EIR and to enjoin all parties from carrying out the project until an EIR was in full compliance with CEQA.[205]

Importantly, the court's determination was guided by CEQA's legislative intent and the policy[206] of the state to afford the fullest possible protection to the environment within the reasonable scope of the statute.[207] The court opined that a paramount consideration in reviewing an EIR was "'the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision.'"[208] Outsiders and public decision makers could balance a proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal and weigh other alternatives in the balance, only

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[198] *Id.* (citing CAL. CODE REGS. tit. 14, § 15065).

[199] *Id.* at 130-31.

[200] *Id.* at 127.

[201] The ecological importance of the wetlands, both as a scarce habitat and the location of rare plant species, had been established in previous hearings. *Id.* at 131.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.* at 133.

[206] The policy of the state was "to prevent the elimination of wildlife species due to man's activities, insure that wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant communities." *Id.* at 133 (citations omitted) (original formatting omitted).

[207] *Id.* at 132.

[208] *Id.* (quoting Karlson v. City of Camarillo, 161 Cal. Rptr. 260, 269 (Cal. Ct. App. 1980)).

through an accurate view of the defined project; not some different project.[209]

Finally, CEQA provides that new information, without substantial changes to a project, can trigger an EIR if the information is of substantial importance, regardless of whether the information reveals environmental bad news.[210] The information must have been unknown "and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete."[211] CEQA regulations further provide that "new information" must show one of the following: (1) The project will have one or more significant effects not discussed in the previous EIR; (2) Significant effects previously examined will be substantially more severe than shown in the previous EIR; (3) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or (4) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[212] California courts have found "new information" in cases involving significant impacts to species of special concern[213] and when specific impacts of a proposal could not have been identified at the time the original EIR was certified.[214]

California courts have declined to find "new information" requiring an EIR unless the record is supported with substantial evidence.[215] A

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[209] *Id.*

[210] Moss v. Cnty. of Humboldt, 76 Cal. Rptr. 3d 428, 442 (Cal. Ct. App. 2008); River Valley Pres. Project v. Metro. Transit Dev. Bd., 43 Cal. Rptr. 2d 501, 508 (Cal. Ct. App. 1995); Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 864 P.2d 502, 509 (Cal. 1994).

[211] CAL. CODE REGS. tit. 14, § 15162(a)(3) (2007).

[212] *Id. § 15162(3)(A)-(D).*

[213] *Moss*, 76 Cal. Rptr. 3d at 442 (concluding substantial evidence supported an agency's finding that further review of the project's impacts on the population of coastal cutthroat trout was required).

[214] Eller Media Co. v. Cmty. Redevelopment Agency, 133 Cal. Rptr. 2d 324, 335-37 (Cal. Ct. App. 2003) (concluding that an EIR was required because a proposal to build two billboards, subsequent to the acceptance of the now 13 year old EIS, was "new information" and the specific impacts of billboards "could not possibly have been identified at the time the final EIR was certified.") (citations omitted) (original formatting omitted).

[215] *Moss*, 76 Cal. Rptr. 3d at 445 (holding that there was no evidence that the project would in fact contribute contaminants to a creek, much less that it would so to any significant degree). "Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative . . . . [O]bservation alone . . . is not new information of substantial

California court declined to consider new information pertaining to drought, greenhouse gas emissions, and climate change because the challengers had failed to present the administrative agency with the exact issue that required a SEIS: "generalized environmental comments at public hearings, relatively bland and general references to environmental matters or isolated and unelaborated comments will not suffice . . . objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them."[216]

C. Overview of Washington' Environmental Review Process

1. Washington State's Environmental Policy Act

The heart of Washington State's Environmental Policy Act ("SEPA") is its extensive threshold determination process.[217] The threshold determination is the decision of a responsible official regarding whether a project is likely to have a "probable significant adverse impact" on the environment.[218] The threshold determination is designed to aid the lead agency in determining the significance of an action.[219] Washington's Administrative Rules ("WARs") provide extensive guidelines on the

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importance showing the project will have significant or substantially more severe environmental effects than were previously understood." *Id.* at 445.

[216] Citizens for Responsible Equitable Environmental Dev. v. City of San Diego, 129 Cal. Rptr. 3d 512, 521 (Cal. Ct. App. 2011) (citations omitted) (original formatting omitted); *see also* Silverado Modjeska Recreation and Parks Dist. v. Cnty. of Orange, 128 Cal. Rptr. 3d 772, 778 (Cal. Ct. App. 2011) (holding that information about an endangered toad, despite increased possibility of their presence near the vicinity of the project, was not "new information" because the EIR had provided sufficient information about the toad).

[217] Kathryn C. Plunkett, *Local Environmental Impact Review: Integrating Land Use and Planning through Local Environmental Impact Reviews (Comment)*, 20 PACE ENVTL. L. REV. 211, 231 (2003) (stating that the SEPA process "is not as important as the substantive results of the impact review . . . [an agency's determination] whether the project will have a significant effect on the environment."); *see also* William H. Rodgers, Jr., *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 68 (1984) ("The Washington approach is short on process, long on substance."); *see also* Keith H. Hirokawa, *The Prima Facie Burden and the Vanishing SEPA Threshold: Washington's Emerging Preference for Efficiency Over Accuracy*, 37 GONZ. L. REV. 403, 404 (2002) ("Although the informational goals of SEPA culminate with the EIS, the heart of agency efficiency and informed decision making lies in the threshold environmental determination.").

[218] CITY OF MOUNT VERNON COMMUNITY & ECONOMIC DEVELOPMENT DEPARTMENT, *The SEPA Process*, http://www.mountvernonwa.gov/documentcenter/home/view/147 (last visited Nov. 21, 2012).

[219] Plunkett, *supra* note 217, at 231.

procedure for making a threshold determination.[220] If the lead agency reasonably believes that a proposal may have a significant adverse impact, an EIS is required.[221]

WARs encourage EISs to be clear, concise, and to the point.[222] "Larger documents may even hinder the decision making process."[223] Only significant impacts must be discussed,[224] duplication should be avoided,[225] and "[e]lements of the environment that are not significantly affected need not be discussed."[226] SEPA is "inattentive to high standards of articulation in the statements, receptive to avoid-the-paperwork and exhaust-proper-channels arguments . . . slick statements are no substitutes for clean water."[227] "Washington will be best known as the state whose SEPA elevates substance over form."[228]

Similar to California, Washington State gives agencies the option of submitting a SEIS or an addendum[229] to modify an EIS.[230] SEPA, like HEPA, does not mention SEISs or addenda; however, WARs provides the relevant SEIS rules.[231] Unlike California and New York, Washington's SEIS regulations do not include "change in circumstance" as a possible

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[220] WASH. ADMIN. CODE § 197-11-330 (2012), *available at* http://www.leg.wa.gov/CodeReviser/WACArchive/Pages/2012WACArchive.aspx .

[221] *Id.* § 197-11-330(4); *see also* WASH. REV. CODE § 43.21C.031 (2012) ("[An EIS] shall be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact.").

[222] "[EISs] shall be readable reports . . . shall be concise and written in plain language . . . most of the text shall discuss and compare environmental impacts and their significance . . . rather than . . . the proposal and the environmental setting." WASH. ADMIN. CODE § 197-11-425(1)-(3) (2012).

[223] *Id.* § 197-11-400(3) ("The volume of an EIS does not bear on its adequacy.").

[224] *Id.* § 197-11-440(6)(b).

[225] *Id.* § 197-11-440(6)(b)(iii).

[226] *Id.* § 197-11-440(6)(a).

[227] Rodgers, *supra* note 217, at 68; *see also* WASH. ADMIN. CODE § 197-11-400(3) ("[EISs] shall be concise, clear, and to the point, and shall be supported by the necessary environmental analysis. The purpose of an EIS is best served by short documents containing summaries of, or reference to, technical data and by avoiding excessively detailed and overly technical information.").

[228] Rodgers, *supra* note 217, at 68.

[229] "An addendum may be used for either a new or revised proposal, if the analysis in the existing [EIS] addresses all likely significant adverse impacts. *State Environmental Policy Act (SEPA), Frequently Asked Questions, Use of Existing Documents*, STATE OF WASH. DEPT. OF ECOLOGY (Apr. 22, 2012, 1:28 PM), http://www.ecy.wa.gov/programs/sea/sepa/faq.htm [hereinafter SEPA FAQ]. The addendum would explain the differences between the original and the current proposal, and other minor new information. *Id.*

[230] WASH. ADMIN. CODE § 197-11-600(4)(c) (2012).

[231] *Id.* § 197-11-600.

trigger for a SEIS.[232] "Any agency acting on the same proposal" must use an "unchanged" EIS except if there are substantial changes "likely to have a significant adverse environmental impact" or when there is new circumstances or information[233] indicating a "proposal's probable significant adverse environmental impacts."[234] "Probable" is used to distinguish likely impacts from those that are remote or speculative and is not meant as a strict statistical probability test.[235] "Significant" involves context and intensity.[236] "'An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.'"[237]

Washington's SEIS rule, therefore, provides that a SEIS must be prepared if there are substantial changes to a project likely to have significant adverse environmental impacts or if there is "new information indicating a proposal's probable significant adverse environmental impacts."[238] New information includes the discovery of a misrepresentation or lack of material disclosure in the original EIS.[239] A SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.[240]

2. Supplementing a Stale EIS in the Washington State Courts

Whether "new information" indicates a proposal's probable significant adverse environmental impact, has been a key issue in SEIS litigation.[241]

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[232] *Id.* § 197-11-600(4)(d)(i)-(ii) ("Preparation of a SEIS if there are: (i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or (ii) New information indicating a proposal's probable significant adverse environmental impacts."); *see also id.* § 197-11-600(3)(b)(i)-(ii).

[233] *Id.* § 197–11–600(3)(ii).

[234] *Id.* § 197-11-600(3)(b)(i)-(ii).

[235] West 514, Inc. v. Cnty. of Spokane, 770 P.2d 1065, 1069 (Wash. Ct. App. 1989) (holding that testimony from an environmental engineer about a proposed mall's impact on water quality had been examined in the EIS were too "speculative" and did not establish the probability of likelihood of significant adverse impacts.).

[236] *Id.*

[237] *Id.* (citing WASH. ADMIN. CODE § 197–11–794(2)).

[238] WASH. ADMIN. CODE § 197-11-600(3)(b)(i)-(ii) (2012).

[239] *Id.* § 197-11-600(3)(b)(ii); *see* Kiewit Constr. Grp., Inc. v. Clark Cnty., 920 P.2d 1207, 1212 (Wash. Ct. App. 1996) (holding that failure to discuss the impact of increased truck traffic on planned bicycle path in the EIS, and the failure to discuss meaningful alternatives in the EIS required a supplemental statement).

[240] *Id.* § 197-11-600(3)(b)(ii).

[241] *See* Barrie v. Kitsap Cnty. Boundary Review Bd., 643 P.2d 433, 435-36 (Wash. 1982) (holding that when a proposed action is a shopping center, announcements subsequent to the

Proponents of a SEIS must "demonstrate a reasonable probability that [new information] will produce 'more than a moderate effect' on the quality of the environment."[242] "[I]t is not enough simply to claim the existence of 'new information.'" [243] In *Barrie v. Kitsap County Boundary*,[244] the Supreme Court of Washington held that "[a]ny project, although it may undergo no "change" during its evolution, will, undoubtedly, generate "information" as it progresses."[245] New circumstances or information becomes "significant" where it reasonably becomes necessary to focus attention once more upon the environmental aspects of a project.[246] "An otherwise unguarded reading of this [new circumstances or information] subpart could unleash a procedural plague repeatedly impairing worthwhile projects even though there might be environmental data sufficient for the 'hard look.'"[247]

Similar to California, Washington utilizes addenda for analyzing the impacts of a project's post-EIS modifications. A SEIS is not required in Washington when an applicant submits an addendum "that adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document."[248] In *Preserve Our Islands v. Shorelines Hearings Bd.*,[249] a

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EIS "that other shopping centers will be built in that area are not new information."); DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 12:30 (2nd ed. 2011); West 514, Inc. v. Cnty. of Spokane, 770 P.2d 1065, 1069 (Wash. Ct. App. 1989) (holding testimony that is too speculative is not new information); Citizens for Clean Air v. City of Spokane, 785 P.2d 447, 455 (Wash. 1990) (en banc) (holding that new information, the fogging problem that may arise from the incinerator's proximity to the airport, was too insubstantial to justify overturning the agency's decision not to file a SEIS).

[242] Thornton Creek Legal Def. Fund v. City of Seattle, 52 P.3d 522, 533 (Wash. Ct. App. 2002) (holding that proponents of a SEIS had not offered any evidence or authority supporting their claim that erecting buildings over a pipe would change the physical conditions of the waters in the drainage pipe or the waters flowing upstream and downstream from the pipe).

[243] *Barrie*, 643 P.2d at 435 (citations omitted).

[244] 643 P.2d 433 (Wash. 1982).

[245] *Id.* at 435 (quoting Nat'l Indian Youth Council v. Andrus, 501 F. Supp. 649, 663-64 (D.N.M. 1980) (citations omitted in original)) ("The passage of time alone is not 'significant new information' which requires a new or amended EIS." *Id.*).

[246] *Id.*; *see also* Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (9th Cir. 1980) (holding that reasonableness depends on factors such as "the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data.").

[247] *Id.* (citations omitted in original) (original formatting retained).

[248] WASH. ADMIN. CODE § 197-11-600 (2012).

[249] 137 P.3d 31 (Wash. Ct. App. 2006).

Washington court affirmed an agency's decision not to require a SEIS, despite extensive post-FEIS modifications to a proposal.[250] An environmental group claimed that the agency should have required a SEIS to adequately address concerns about potential impacts on eelgrass beds. Eelgrass is a blooming underwater grass that supports multiple endangered and distressed stocks of Pacific salmon and other priority fishes.[251] The court held that the agency had correctly concluded that a SEIS would do nothing more to enhance the information available to the decision-maker.[252] The court accorded substantial weight to the responsible agencies, and agreed with their conclusion that although impacts to eelgrass remained possible and were somewhat uncertain, the applicant's mitigation measures, analyzed in the post FEIS addendum, reduced the potential and likelihood of those impacts to non-significant levels.[253]

D. Overview of New York's Environmental Review Process

1. New York State's Environmental Quality Act

The New York State Environmental Quality Review Act ("SEQRA") requires agencies,[254] or applicants, to prepare an EIS for an action[255] that "may have a significant adverse impact on the environment."[256] New York courts have interpreted the threshold for EIS preparation as relatively low and have held that EISs should be required when an action may "fairly be said to have a potentially significant adverse effect on the environment."[257]

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[250] *Id.* at 36.

[251] JEFFERSON CNTY. MARINE RESOURCES COMMITTEE, *Eelgrass Protection, available at* http://www.jeffersonmrc.org/Projects/Eelgrass-Protection.aspx (last visited Nov. 21, 2012). Eelgrass beds are ranked as Priority Habitat by the Washington Department of Fish and Wildlife. *Id.*

[252] *Preserve Our Islands*, 137 P.3d at 52.

[253] *Id.* at 51.

[254] Agency is defined as a "state or local agency." N.Y. ENVTL. CONSERV. LAW § 8-0105(3) (McKinney 2012).

[255] "Actions" include: (1) "[P]rojects or activities directly undertaken by any agency;" (2) "projects or activities supported in whole or part" through forms of funding assistance from one or more agencies; (3) "projects or activities involving the issuance" of any entitlement for use or permission to act by one or more agencies; or (4) "policy, regulations, and procedure-making." *Id.* § 8-0105(4)(i)-(ii).

[256] Plunkett, *supra* note 217, at 216 (citing N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney, 2012)).

[257] Kahn v. Pasnik, 647 N.Y.S.2d 279, 281 (App. Div. 1996) (citing H.O.M.E.S. v. N.Y. State Urban Dev. Corp., 418 N.Y.S.2d 827, 832 (App. Div. 1979)); *see* Teich v. Bucheit, 633 NY.S.2d 805, 806 (App. Div. 1995) ("A Type I action has a relatively low threshold for the preparation of a[n] [EIS]."); *see also* Eggert v. Town Bd. of Westfield, 630 N.Y.S.2d

The first step in New York's environmental review process is defining whether a proposal is a Type I or Type II action.[258] Type I actions are "more likely" to require an applicant to prepare an EIS.[259] Type II actions "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review[.]"[260] Although neither category encompasses all actions that may or may not have a significant adverse impact on the environment, they are useful in establishing what is considered "significant" for the purposes of determining whether or not to require an EIS.[261]

New York's SEIS laws differ from California and Washington in one critical respect: the lead agency *may* require a SEIS.[262] The highest state court in New York, the New York Court of Appeals, held that based on this language, a lead agency's determination whether to require a SEIS is discretionary.[263] An agency may require a SEIS, *limited* to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that, similar to California's SEIS law, arise from a change in circumstances related to the project, changes in the project, or newly discovered information.[264] In the case of newly discovered information, the agency's decision to require a SEIS must be based on the importance and relevance of the information and the EIS' present state.[265]

2. Supplementing a Stale EIS in New York State Courts

New York's original regulations did not have explicit requirements for Supplemental Statements prior to 1987.[266] New York first articulated its standards for requiring a SEIS when a court overturned a lead agency's determination that a SEIS was not required in *Glen Head-Glenwood Landing Civil Council v. Town of Oyster Bay* ("*Glen Head*").[267] The Town

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179, 180 (App. Div. 1995).

[258] N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.4 to 617.5 (2012), *available at* http://www.dos.ny.gov/info/nycrr.html.

[259] *Id.* § 617.4.

[260] *Id.* § 617.5(a).

[261] Peter R. Paden, *DEC's Part 617 Regulations, as Amended: A Guide to the Implementation of SEQRA*, 5 PACE ENVTL. L. REV. 51, 72-73 (1987).

[262] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7)(i) (2012).

[263] Riverkeeper, Inc. v. Planning Bd. of Southeast, 881 N.E. 2d 172, 177 (N.Y. 2007) (holding that this discretion is distinguished from EIS regulations, in which lead agencies *must* prepare or require the applicant to prepare).

[264] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7)(i)(a)-(c).

[265] *Id.* § 617(a)(7)(ii)(a)-(b).

[266] DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 12:29 (2d ed. 2011).

[267] 453 N.Y.S.2d 732, 739 (App. Div. 1982).

of Oyster Bay had adopted rezoning to allow condominium construction on property previously zoned for single-family dwellings.[268] The EIS had relied heavily on an adjacent city's promise to provide a sewer hook up, which was subsequently withdrawn after the EIS was prepared.[269] Alternatives for sewage disposal in the EIS was found to be deficient because the town had relied on the adjacent city's promise to provide a hook up.[270] The court ruled that the lead agency's failure to require a supplement was contrary to the law.[271] "The responsibility for environmental review is vested with the agencies making the final decisions."[272] When an action taking body fails to fulfill this responsibility, the various mechanisms SEQRA has designed to require agencies to consider the environmental impacts of their actions, "simply become additional passages in a bureaucratic maze that inhibits economic growth and inflates public and private expense without compelling the decision-maker to give the environment the attention it merits in determining the outcome of a proposal."[273]

Glen Head was the first instance in New York State to recognize that a lead agency had the "continuing duty to evaluate new information relevant to the environmental impacts of its actions[.]"[274] The court provided guidance regarding the exercise of this duty: the decision whether to require a supplement should be based on the information's probative value, accuracy, and present state in the EIS.[275] Largely in response to *Glen Head,* the Department of Environmental Conservation ("DEC")[276] promulgated SEIS rules in their 1987 regulations that provided "SEQRA's maturity has created the need to clearly delineate when an agency should be required to

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[268] *Id.* at 735.

[269] James Bryan Bacon, *Is the Public Being Protected? A Lead Agency's Duty Under SEQRA to Review Newly Discovered Information*, 79 N.Y. ST. B.A.J. 32, 33 (2007).

[270] *Glen Head*, 453 N.Y.S.2d at 739.

[271] *Id.* at 738.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 739.

[275] *Id.*

[276] The DEC, similar to Hawaii's Environmental Council, had been challenged on their authority to require a SEIS because there were no specific provisions relating to SEISs in SEQRA. *See* Matter of Sour Mtn. Realty v. New York State Dept. of Envtl. Conservation, 688 N.Y.S.2d 842, 846 (App. Div. 1999). A New York appellate court dismissed this claim holding that the "regulation authorizing preparation of a SEIS furthered, and is fully consistent with, SEQRA's stated purpose and statutory scheme requiring a detailed analysis of significant environmental effects of proposed projects[.]" *Id.* at 922; *see also* N.Y. ENVTL. CONSERV. LAW § 8-0113 (McKinney 2012) (delegating broad authority to the DEC to promulgate regulations governing the EIS process).

prepare or cause to be prepared a supplemental draft or final EIS.[277] Despite requests to limit "newly discovered information" to information that related to "sponsor-caused changes,"[278] the DEC declined, stating that "[a]gencies have a continuing responsibility under the statute to consider significant environmental impacts. New information, or changes concerning significant adverse impacts, *from whatever source*, must be considered."[279]

Recognizing that newly discovered information was a broad category and "could include any information from any source that might be relevant to adverse environmental impacts,"[280] the regulations safeguarded this provision from misuse by providing criteria by which to evaluate new information.[281] New York's SEIS regulation along with the holding in *Glen Head* provide that the following elements must be present to require a SEIS in the case of newly discovered information:

> 1. the information can be from any source and does not have to involve an action by the sponsor;
>
> 2. the information must be newly discovered. It cannot be information that could have been included in comments filed on the original Draft EIS ("DEIS") or Final EIS ("FEIS");
>
> 3. the information must relate directly to one or more of the specific significant adverse environmental impacts identified in the prior EIS;
>
> 4. the information must be important; and
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> 5. the information must not have been addressed in the prior EIS, or it must have been inadequately addressed.[282]

The decision to prepare a SEIS as a result of newly discovered information is a "fact-intensive determination" giving a lead agency the "discretion to weigh and evaluate the credibility of the reports and comments submitted to it and must assess environmental concerns in conjunction with other economic and social planning goals."[283]

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[277] Bacon, *supra* note 269, at 33.

[278] The definition of "sponsor" is not statutorily provided; New York SEQRA regulations define "project sponsor" as "any applicant or agency primarily responsible for undertaking an action." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2 (2012).

[279] Bacon, *supra* note 269, at 33 (citation omitted).

[280] *Id.*

[281] *Id.*

[282] *Id.* (original formatting omitted).

[283] Riverkeeper, Inc. v. Planning Bd. of Southeast, 881 N.E.2d 172, 176-77 (N.Y. 2007); *see also* Oyster Bay Assocs. Ltd. v. Town Bd. of Oyster Bay, 874 N.Y.S.2d 492 (App. Div. 2009).

New information is particularly important in cases involving aged EISs in New York. In *Doremus v. Town of Oyster Bay*,[284] an agency approved a rezoning application based upon a ten-year-old EIS.[285] The court ruled that new information—environmental impacts regarding water use, water quality, and the loss of open space—had changed in the more than ten years since the FEIS, requiring a Supplemental EIS.[286] The court held that "[a]lthough the passage of time, standing alone, does not warrant the preparation of a SEIS," New York's regulations permit the lead agency to require a SEIS to address specific significant adverse environmental impacts which were not addressed or were inadequately addressed in the prior EIS.[287]

Additionally, lead agencies in New York, similar to California, may require a SEIS when significant adverse environmental impacts arise from a change in circumstances related to the project.[288] "A 'change in circumstances' means any change in the physical setting of, or regulatory standards applicable to, the proposed project."[289] The DEC posits that an example of a change in circumstance is "if nearby land uses have changed since the original site assessment was conducted, or the municipality has enacted new land use rules, and these changes are relevant to significant adverse environmental impacts, then a supplemental EIS may be warranted."[290]

New York courts give substantial deference to lead agencies and in almost all cases, have upheld an agency's determination on whether a SEIS is required.[291] The courts maintain that "a lead agency's determination whether to require a SEIS . . . is discretionary" as reflected in the

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[284] 711 N.Y.S.2d 443 (App. Div. 2000).

[285] *Id.* at 447.

[286] *Id.* ("[The] Town Board could not have met its obligation under SEQRA without requiring a SEIS to analyze the proposed rezoning in light of the change in circumstances since 1985.").

[287] *Id.* at 446; *cf.* Riverkeeper, Inc. v. Planning Bd. of Southeast, 851 N.Y.S.2d 76 (App. Div. 2007) (holding that the lead agency took a "hard look" at the project and regulatory changes that arose after the EIS that had been submitted twelve years ago).

[288] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7)(i)(c) (2012).

[289] DEPARTMENT OF ENVIRONMENTAL CONSERVATION, SEQRA HANDBOOK ch. 5.G.4 (2010), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf.

[290] *Id.*; *see* Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency, 646 N.Y.S.2d 741 (Sup. Ct. 1996) (holding that when a court annulled an agency's determination and findings, this constituted the "change in circumstances" contemplated by the regulations). The agency's decision to proceed with a SEIS to specifically address those areas that were found wanting in a court's earlier decision was reasonable and appropriate. *Id.* at 748.

[291] *See* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 12:29 (2d ed. 2011).

regulation's use of "may" require a SEIS.[292] Judicial review of an agency determination under SEQRA is limited to "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination."[293] This limitation also applies to agency determinations on whether to require a SEIS.[294] "The lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts."[295]

Despite this substantial deference to an agency's decision, on April 12, 2012, the New York Appeals Court in *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corporation* ("*Develop Don't Destroy*")[296] unanimously affirmed a lower court judge's decision to require an agency to prepare a SEIS for the Atlantic Yards project due to a change in timing.[297] The Atlantic Yards project is "the largest redevelopment project in recent New York City history."[298] It is a twenty-two-acre development near Brooklyn's downtown that is to include a sports arena and eight million square feet of apartments, offices, and stores.[299] The $4.9 billion development has been mired in controversy, lawsuits, and community opposition[300] in addition to plan changes and delays due to a worldwide economic collapse.[301]

A lower court had originally denied the community group's motion for preliminary injunction and then later granted rehearing upon discovering evidence of a twenty-year build out date rather than the ten-year build out date reflected in the final EIS.[302] The court remanded the decision to the

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[292] *Riverkeeper*, 851 N.Y.S.2d at 80.

[293] *Id.* at 81 (citing Jackson v. New York State Urban Dev. Corp., 494 N.E.2d 429, 436 (N.Y. 1986)).

[294] *Id.*

[295] *Id.*

[296] 942 N.Y.S.2d 477 (App. Div. 2012).

[297] *Id.* at 478.

[298] John Farley, *Timeline: Atlantic Yards Grows, Slows in Brooklyn*, METROFOCUS (July 19, 2011 9:09 AM), http://www.thirteen.org/metrofocus/news/2011/07/timeline-atlantic-yards-grows-slows-in-brooklyn/.

[299] Chang W. Lee, *Times Topics: Atlantic Yards (Brooklyn)*, NEW YORK TIMES (April 17, 2012), http://topics.nytimes.com/top/reference/timestopics/subjects/a/atlantic_yards_ brooklyn/index.html. The project plans to build approximately fifteen residential towers, of which at least 30 percent would be reserved for low- to middle-income families. *Id.*

[300] *Id.* "Critics say the project, approved in 2006, required condemning too many properties in Brooklyn. They also say the complex of high rises is too dense, and that it is incompatible with Brooklyn's neighborhoods of low historic buildings." *Id.*

[301] *Id.*

[302] *See* Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp., 914 N.Y.S.2d 572, 619 (Sup. Ct. 2010) (stating that in the prior decision, the court found that the

lead agency to determine whether a SEIS was warranted.[303] Despite the court's efforts to give the lead agency an opportunity to correct its failure to address the impact of an extended build out date, the agency "insisted" it was reasonable to rely on a ten-year build out date.[304] The court, therefore, ordered the agency to prepare a SEIS assessing the environmental impacts of the delay in construction.[305]

On appeal, the Appellate court held that the lead agency's failure to give adequate consideration to the environmental impacts resulting from the change in the construction schedule was sufficient to require a SEIS.[306] The court affirmed the lower court's findings that the lead agency had relied on a ten-year construction schedule that analyzed environmental impacts only until 2024, despite evidence that construction could continue through 2035.[307] The lead agency maintained that construction impacts would be the same and denied that the impacts would be more severe because an increased build-out would be less "intense if it were delayed."[308] This conclusion, the court stated, was a "mere assertion that the build-out will result in prolonged but less 'intense' construction and that most environmental impacts are driven by intensity rather than duration."[309] Moreover, the record did not contain any evidence that protracted construction would not have significant adverse environmental impacts not already addressed in the FEIS.[310] The project also failed to consider an alternative scenario in which years would go by before any construction began, leaving the area residents to tolerate vacant lots, above ground arena parking, and construction staged for decades.[311] Any mitigation measures in the original EIS was also inadequate because it failed to consider whether

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10 year build out used in the FEIS was, albeit "only minimally" supported, not irrational as a matter of law; however on reargument motions, the lead agency, for the first time acknowledged the existence of a Development Agreement that evidenced a 25 year build out).

[303] *Id.* at 632.

[304] Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp., 927 N.Y.S.2d 571, 578 (Sup. Ct. 2011).

[305] *Id.* at 584 ("The public relies on a meaningful environmental review process, and SEQRA requires no less.").

[306] Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp., 942 N.Y.S.2d 477, 511 ("[The lead agency] failed to take a 'hard look' at the relevant areas of environmental concern and failed to make a 'reasoned elaboration' of the basis for its determination that it was not required to prepare an SEIS before approving the [Modified General Project Plan].") (internal citations omitted).

[307] *Id.*

[308] *Id.*

[309] *Id.*

[310] *Id.*

[311] *Id.* at 512.

the measure would be adequate in the case of a protracted period of construction.[312]

V. PROPOSED AMENDMENTS AND ADDITIONS TO HAWAII'S SEIS REGULATIONS

California's, New York's, and Washington's SEPAs (Hawaii's sister SEPAs) require supplementation when a change in a project requires a reexamination of a project's environmental impacts. Likewise, new information indicating significant environmental impacts can also require a supplemental document even if a project has not changed. This article proposes that harmonizing Hawaii's SEIS regulations with NEPA and its sister states, which share similar goals and foundations, is an effective approach to improving Hawaii's current SEIS rule. Moreover, this article reasons that this approach is in accordance with the Environmental Council's original intent when it drafted HAR sections 11-200-26 and 11-200-27.

A. The History of HAR Sections 11-200-26 & 11-200-27: Exploring the Original Intent and Progression of Hawaii's SEIS Regulations

The Environmental Quality Commission ("Commission") originally promulgated Hawaii's EIS rules pertaining to HRS chapter 343 in September of 1975.[313] In 1983, Hawaii's legislature abolished the Commission and transferred rulemaking authority to the Environmental Council ("Council").[314] The Council adopted the HAR in December of 1985 and amended it in August of 1986.[315] Hawaii's current SEIS rules in large part remain similar to its 1985 counterparts with a few critical changes. In 1985, Hawaii's SEIS rule, HAR section 11-200-26, required a SEIS if there was a "major change" in an action's "size, scope, location and timing, among other things."[316] Note that the word "major" has since been removed from the text of the statute. As introduced in 1985, if there was a "major" change in any of these characteristics, the original statement would no longer be "completely" valid because an essentially different action

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[312] *Id.*

[313] COUNCIL ON ENVIRONMENTAL QUALITY, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR NEPA LIAISONS app. D (Jan. 19, 1979), *available at* http://ceq.hss.doe.gov/nepa/regs/exec11979.html; *see also* FINAL UH REPORT, *supra* note 18, at 6 (noting that "[a] major structural change was the abolition of the Environmental Quality Commission in 1983 and the transfer of its rulemaking, exemption list, and limited appeal duties to the Environmental Council established under Chapter 341.").

[314] FINAL UH REPORT, *supra* note 18, at 6.

[315] HAW. CODE R. § 11-200-26 (1985) (on file with author).

[316] *Id.*

would be under consideration.[317] As long as there was no "substantial" change in the proposed action, the original EIS was deemed to comply with the HAR.[318]

Section 11-200-27, titled "Determination of Applicability," clarified that proposed agencies were required to prepare a SEIS for public review "whenever the proposed action for which a statement was accepted has been modified to the extent that new or different environmental impacts are anticipated."[319] A SEIS was:

> [W]arranted when the scope of an action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigating measures originally planned are not to be implemented, *or* where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.[320]

Section 11-200-26 read together with section 11-200-27 of the 1985 SEIS rules, suggests that new or different environmental impacts that had not been previously anticipated could essentially "modify" a project. A "substantial" change in a project included the discovery of new circumstances or evidence that brought to light different or likely increased environmental impacts not previously dealt with in the original EIS—even if the scope of an action, the intensity of the action's environmental impacts, or the planned mitigation measures for the action, remained unchanged.[321]

In 1993, the Council began meeting to discuss revisions to these HAR.[322] In a 1994 draft letter, which requested gubernatorial review of the proposed amendments, the Council explained its reasons for amending parts of the SEIS rules.[323] The Council's predecessors, the Commission, in a 1984 petition, had attempted to alleviate the confusion regarding when an applicant was required to produce a SEIS.[324] The Commission ruled that the respondent in that petition had to submit a supplemental statement when proposed changes to the "plan *substantially alter* [emphasis supplied] the original plan."[325] According to the

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317 *Id.*

318 *Id.*

319 HAW. CODE R. § 11-200-27 (1985).

320 *Id.* (emphasis added). This language remains exactly the same in the current SEIS rule.

321 *Id.*

322 STATE OF HAW. ENVTL. COUNCIL, MINUTES OF MEETING 93-01 OF THE STATE ENVIRONMENTAL COUNCIL (Jan. 13, 1993) (discussing Committee Assignments for the Environmental Council) (on file with author).

323 Draft Letter from Muriel Roberts, Chairperson, Envtl. Council, to John D. Waihe['']e, Governor of Hawai['']i (May 18, 1994) (on file with author) [hereinafter 1994 Environmental Council Letter to Governor].

324 *Id.* at 47-48.

325 *Id.* at 48 (emphasis in original).

Council, this 1984 ruling, coupled with the word "major" in the administrative rule, spawned many requests to the Office of Environmental Quality Control[326] to clarify the procedural aspects of the Supplemental Statement process.[327]

The Council reasoned that "due to a long time frame between acceptance of a statement for a proposed action and its implementation, the area of Supplemental Statements has been fraught with administrative difficulties."[328] The Council believed that evaluating changes to a project based on the "significance" criteria set forth in HAR section 11-200-12,[329] rather than on whether a project's change was "major," would further alleviate confusion.[330] Additionally, the Council sought to delete the word "completely" in the phrase "the original statement shall no longer be completely valid."[331] The Council asserted that the deletion, combined with specific qualifying language that invalidated only the portion of the project containing any significant changes, would prevent the "absurd conclusion that the entire statement was no longer valid."[332]

The Council also sought to add a sentence to section 11-200-27 providing that "[t]he accepting authority shall examine EIS's [sic] that are more than five years old and the proposed action has not yet been initiated to determine whether a supplemental statement is required."[333] The Council argued that "[f]or projects with large periods of time between EIS acceptance and implementation, the *environmental setting of a project* may have changed significantly rendering such a statement not completely valid."[334] In response to this addition, the Department of Land Utilization, the agency tasked at that time with granting zoning permits, saw "no need for this provision as the current rules provide adequate criteria for allowing agencies to decide when a supplemental statement is warranted."[335]

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[326] "The Office of Environmental Quality Control ("OEQC") was established in 1970 to help stimulate, expand and coordinate efforts to maintain the optimum quality of the State's environment." DEP'T OF HEALTH, OFFICE OF ENVTL. QUALITY CONTROL, http://Hawaii.gov/health/environmental/oeqc/index.html (last visited Nov. 22, 2012). Additionally, OEQC implements Haw. Rev. Stat chapter 343 and provides support to the Environmental Council regarding amendments to the administrative rules. *Id.*

[327] *See* 1994 Environmental Council Letter to Governor, *supra* note 323, at 48.

[328] *Id.* at 47.

[329] *See* HAW. CODE R. § 11-200-12 (1996) (providing "significance criteria").

[330] 1994 Environmental Council Letter to Governor, *supra* note 323, at 47.

[331] *Id.* at 48.

[332] *Id.; see also* STATE OF HAW. ENVTL. COUNCIL, MINUTES OF MEETING 93-07 OF THE STATE ENVIRONMENTAL COUNCIL 5 (Nov. 17, 1993) (suggesting, by Environmental Council member Kenneth Fukunaga, that to prevent an absurd conclusion that the entire statement is no longer valid, the wording be as follows: "if there is any change in any of these characteristics, that *portion* of the original statement that was significantly changed shall no longer be valid.") (emphasis added) (on file with author).

[333] 1994 Environmental Council Letter to Governor, *supra* note 323, at 48.

[334] *Id.* at 49 (emphasis added).

[335] STATE OF HAW. ENVTL. COUNCIL, DRAFT RESPONSIVENESS SUMMARY TO COMMENTS ON THE

Then-Chair of the Department of Land and Natural Resources, Keith W. Ahue, commented that five years was "entirely arbitrary; such should be routine in every agency assessment, anyway, regardless of age, so . . . [the] need for this provision is unclear."[336] A former Environmental Council Chair, George Krasnic,[337] however, supported the addition, explaining that it was the general consensus of the former rules revision committee to place a finite time limit on the validity of an EIS.[338] Mr. Krasnic commented that after five years, "*baseline conditions* would likely have changed sufficiently to warrant giving the potential impacts another look."[339]

In 1996, after three years of working on administrative rule revisions, the Council promulgated a revised version of HAR, which included changes to the SEIS rule.[340] The Council added the terms, "intensity" and "use," to the list of characteristics that qualified a particular action. Additionally, the Council removed the word "major" from the phrase that had formerly read, "[i]f there is any major change in any of these characteristics" and added "which may have a significant effect," resulting in the sentence as it stands today: "[i]f there is any change in any of these characteristics[,] which may have a significant effect[.]"[341] This change created what many regard today as a "two step" process. This process first requires examining whether the project has changed in size, scope, location, intensity, use, or timing. Next, if, and only if, the project has changed, can new circumstances or evidence that bring to light different or likely increased environmental impacts, not previously considered in the original EIS, be considered.[342]

MAY 18, 1994, RAMSEYER DRAFT OF AMENDMENTS TO TITLE 11, CHAPTER 200, HAWAI['I] ADMINISTRATIVE RULES 34 (May 18, 1994) (on file with author) [hereinafter 1994 HAR Draft Amendment Comments].

[336] *Id.* at 35.

[337] George Krasnic was the Chair of the Environmental Council from 1986 to 1990.

[338] 1994 HAR Draft Amendment Comments, *supra* note 335, at 34; *see also* FRANKLIN Y.K. SUNN, EXECUTIVE DIRECTOR, HAW. HOUS. AUTH., MEMORANDUM TO ENVIRONMENTAL QUALITY COMMISSION (Aug. 16, 1979) (noting that "[a]n approved assessment/EIS can be considered applicable for how long? It's conceivable that after a project is approved, several years could pass before implementation.").

[339] 1994 HAR Draft Amendment Comments, *supra* note 335, at 34 (emphasis added).

[340] HAW. CODE R. tit. 11, ch. 200 (1996).

[341] HAW. CODE R. § 11-200-26.

[342] In an interview with Jamie Pierson, a senior planner at the Department of Planning and Permitting, he stated:

> To us it's always been, it has to show that the project has changed, and if the project's changed, is that change significant? It's a two-step. In fact, the ICA conferred [sic] with that and the [Hawai'i] Supreme Court didn't challenge it. As far as we're concerned, that's accepted for this [*Turtle Bay* Hawai'i Supreme Court] decision . . . that any time you're looking at the question of a SEIS, you're always looking at those two things: so, number one: is there change to the project? And number 2, is that

Notably, the "two step" process is one interpretation of Hawai'i's SEIS rules; however, HAR does not unequivocally state that section 11-200-26 must be satisfied to consider section 11-200-27. Moreover, the criteria provided in section 11-200-27 essentially expands on the characteristics provided in section 11-200-26. Over time, the development community came to regard HAR section 11-200-27 to require a SEIS only when the project had changed in "size, scope, location, intensity, use, or timing."[343] The proposed addition, which required accepting authorities to revisit EISs that were more than five years old and for which construction work had not been initiated, never made it into the final 1996 HAR amendments.[344]

The *Turtle Bay* Decision is an accurate interpretation of the 1985 SEIS rules, but not of the current HAR. In *Turtle Bay,* the Hawai'i Supreme Court held that there was a "substantive"[345] change in the project's characteristics, namely the timing, which rendered the project an essentially different action.[346] Based on this change, the statement was no longer valid.[347] The court concluded, based on HAR section 11-200-27, there was new evidence that could have a substantial effect on the environment that had not been previously disclosed.[348] The court, however, did not consider whether new circumstances or evidence that had a significant effect on the environment could require a SEIS, absent a change in the project's size, scope, intensity, use, location, or timing.

B. A Proposal To Improve Hawaii's SEIS Rules

Chief Judge Nakamura's dissent in the ICA's *Turtle Bay* decision rationalized that HAR section 11-200-27 supported the view "that different or increased environmental impacts unrelated to design changes in the proposed project itself

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change significant or potentially significant? Does it involve potential significant impact? If the answer is yes to both, then they have to do something now.

Interview with Jamie Pierson, Planner, City & Cnty. of Honolulu Dep't of Planning & Permitting, in Honolulu, Haw. (Jan. 4, 2012).

[343] Memorandum in Opposition to Petitioners' Application for Writ of Certiorari to Review the Judgment on Appeal of the Intermediate Court of Appeals of Kuilima Resort Company at 5, Unite Here! Local 5 v. City & Cnty. of Honolulu, 120 Haw. 457, 209 P.3d 1271 (Ct. App. 2009) (No. 28602) ("The language is clear. Unless there is a 'change in a proposed action resulting in individual or cumulative impacts,' there is no basis to require an SEIS.") (internal citations omitted).

[344] *See* HAW. CODE R. §§ 11-200-26 to 27 (1996).

[345] Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 181, 231 P.3d 423, 454 (2010) (noting that "evidence in the record indicated that there was, indeed, a substantive change in the timing of the project such that an 'essentially different action' was under consideration[.]").

[346] *Id.*

[347] *Id.*

[348] *Id.* at 179, 231 P.3d at 452.

can create 'an essentially different action' and trigger the need for an SEIS."[349] Chief Judge Nakamura believed that this was a more reasonable interpretation of the rules than an interpretation that would impose an absolute bar on an agency's authority to order a SEIS unless substantive changes were made to the project's design.[350] This article agrees and proposes that Chief Judge Nakamara's interpretation of the current HAR correctly reflects the Environmental Council's true intent. The idea that a twenty year old development will never have to revisit environmental impacts as long as the project has not changed, regardless of important outside circumstances or new information, raises significant concerns.[351]

This article proposes adding the phrase, "of the environmental impacts," after the word, "intensity," in HAR section 11-200-26. The introductory sentence thus would read as follows: "A statement that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity *of the environmental impacts*, use, and timing of the action, among other things." HAR section 11-200-27 provides that a supplemental statement is warranted when the intensity of environmental impacts will be increased. This suggests that "intensity" in HAR section 11-200-26 refers to an "action's environmental impacts" rather than an "action's intensity." Adding "environmental impacts" to section 11-200-26 will properly unify the two sections.

Second, this article proposes amending the next sentence in HAR section 11-200-26 to include new information, which NEPA and Hawaii's sister SEPAs all have in common, as a condition that may require a SEIS. The new sentence would read as follows:

> A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter, and no other statement for that proposed action shall be required unless:
>
> (a) A project has changed in size, scope, intensity of environmental impacts, use, location or timing, among other things, which may have a significant effect; or

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[349] Unite Here! Local 5 v. City & Cnty. of Honolulu, 120 Haw. 457, 470-71, 209 P.3d 1271, 1284-85 (Ct. App. 2009) (Nakamura, J., dissenting), *vacated*, 123 Haw. 150, 231 P.3d 423 (2010).

[350] *Id.* at 472, 209 P.3d at 1286.

[351] For example, Judge Nakamura presented an example of a devastating hurricane that drastically changed conditions in the surrounding community and the community's capacity to accommodate additional visitors and residents. *Id.* Under Kuilima's and the City's interpretation of the rules, as long as no substantive changes were made to the proposed project, "the DPP would be powerless to require an SEIS to address the project's significantly different environmental impacts resulting from the changed circumstances." *Id.* Absent a change to the project, the DPP could not "order the preparation of an SEIS even if the discovery of new information or evidence brings to light significant environmental impacts that had not previously been disclosed." *Id.*

> (b) New circumstances or evidence that were not previously considered in the original EIS, brings to light different or a likely increased significant effect on the environment.

This proposed language more precisely reflects the high threshold necessary to balance the tension between the need to ensure that environmental concerns are given appropriate consideration with the burden of requiring a SEIS. The new information must not have already been addressed in the original EIS and, like its counterpart "change in project" provision, must have a significant effect on the environment. The proposed language addresses the concern that *any* new information could trigger a SEIS, and therefore, the "type and measure of conditions and information would be limitless."[352] HRS section 343-2 defines "significant effect,"[353] and HAR section 11-200-12 provides significance criteria. The two provisions already limit the "type and measures of conditions and information" that have a "significant effect on the environment."[354]

The determination of the "new circumstances and evidence" justifying a SEIS is a fact-intensive inquiry. Agencies in Hawai'i must have a standard that gives them the discretion and deference to engage in this inquiry. This article, therefore, proposes adding a section to the HAR that provides an agency with standards to evaluate "new circumstances or evidence." This would assist agencies in taking a "hard look" at the new information.[355] Moreover, a standard would encourage agencies to develop a procedure to substantiate its decision-making. This article recommends the following addition to HAR section 11-200-27:

> The decision to require preparation of a SEIS, in the case of a new circumstances or evidence must be based on the following criteria:
>
> (a) The importance and relevance of the new circumstances or evidence; and

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[352] Response to Petition for Certiorari of Respondents-Defendants-Appellees City & Cnty. of Honolulu and Henry Eng, Director of Department of Planning and Permitting at 8, Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 231 P.3d 423 (2010) (No. 28602). *See supra* Part IV.B.2 (discussing "new information" that would necessitate a Supplemental Environmental Impact Report in California).

[353] HAW. REV. STAT. § 343-2 (2012) (defining "Significant effect" as "the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State.").

[354] HAW. CODE R. § 11-200-2 (1996).

[355] Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 181, 231 P.3d 423, 454 (2010) (holding that DPP had not taken a "hard look" at environmental factors given the new evidence with respect to traffic, monk seals, and green sea turtles).

(b) The present state of the information in the EIS.[356]

This article also recommends more effectively utilizing addendums to support agencies with making the fact intensive inquiry of whether a change in a project or new information warrants a SEIS. HAR provides that addendums function as attachments to *draft* environmental assessments or statements.[357] Addenda are prepared at the discretion of the proposing or approving agency for the purpose of disclosing and addressing clerical errors, such as inadvertent omissions, corrections, or clarifications to information already contained in the drafts.[358] Addendums may be useful tools for Hawai'i agencies in cases where several years have passed since the EIS was accepted and questions arise whether there are significant environmental effects due to a change in the project or a change in environmental factors. California and Washington provide models of how useful addendums have been for agencies reviewing a project's post EIS changes.

Finally, this article recommends that the Contents section of the SEIS rules, HAR section 11-200-28, more explicitly limit the contents of a SEIS. The SEIS should be limited to the information that pertains to the project change, or new circumstance or evidence, which may have a significant effect. Additionally, the SEIS should be limited to information "not addressed or inadequately addressed" [359] in the original statement. The current language in section 11-200-26, "the original statement that was changed shall no longer be valid," suggests that only the portion of the EIS affected by the new circumstance or evidence is no longer valid. This needs to be further clarified in the Contents section of the rules. The history of the administrative rules suggests that the Environmental Council did not intend to completely invalidate the original EIS.[360]

VI. CONCLUSION

SEISs are a largely misunderstood and underutilized part of Hawaii's environmental review process. The *Turtle Bay* Decision made a significant impact on the community's perception of SEISs[361] and was a valuable addition to Hawaii's EIS jurisprudence. The Decision not only provided

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[356] *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7)(ii)(a)-(b) (2012).

[357] HAW. CODE. R. § 11-200-2 (1996) (emphasis added).

[358] *Id.*

[359] N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(7)(i) (2007).

[360] *See* 1994 Environmental Council Letter to Governor, *supra* note 323, at 48.

[361] Amicus Curiae Brief Of: Land Use Research Foundation of Hawai[']i, et al. at 2 Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Hawai'i 150, 179, 231 P.3d 423, 452 (Haw. 2010) (No 28602) ("The implications of the Court's Opinion stunned the assembled representatives into silence.").

much needed clarification on the Environmental Council's authority to promulgate rules for supplemental documents, but also raised important questions about the shelf life of an EIS.[362]

Hawaii's community needs further clarification on when a SEIS is required. At some point, the time for challenging and revisiting an EIS must expire. Applicants undertake extensive environmental review and Hawai'i needs worthwhile development for its economic growth and stability. Nonetheless, the public has a right to be informed and given an accurate representation of a project and its environmental effects if the project or its effects are so significant that the original EIS no longer applies to the present state of the proposed project. The Environmental Council has a meaningful opportunity to improve Hawaii's environmental review process by refining and amending the SEIS rules to promote careful consideration of environmental impacts while providing predictability and efficiency in the EIS process. California's, New York's, and Washington's case law illustrate that the question of when an EIS must be supplemented is a contemporary challenge in the environmental review process.

The Hawai'i Supreme Court did not have to decide whether new evidence or circumstances alone, without a change in the project, could warrant a SEIS because the court concluded that Kuilima's timing had changed.[363] New circumstances or evidence, however, that were not dealt with in an EIS that significantly impact Hawaii's natural and cultural resources—regardless of whether the project has changed in size, scope, intensity, use, location or timing—can render a project "an essentially different action."[364] This understanding has been adopted and firmly established in NEPA and Hawaii's sister states.

Providing transparent rules and standards enable accepting agencies to properly decide whether new information justifies further review. The goal is not to halt development nor is it to encourage development in Hawai'i; rather the goal is to provide certainty to the development process by protecting and improving the law for every stakeholder in the environmental review process. The Environmental Council must amend the SEIS rules to more accurately define when a stale EIS warrants supplementation. The proposed amendments and additions to the SEIS rules balance Hawaii's environmental and cultural concerns with the community's desire to advance economic growth and activity, and can

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[362] *See supra* note 115 and accompanying text.

[363] Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Haw. 150, 180, 231 P.3d 423, 454 (2010).

[364] *Id.* at 179, 231 P.3d 452.

assist the Environmental Council in achieving the certainty and predictability the community requires.

Demolition of Native Rights and Self Determination: Act 55's Devastating Impact through the Development of Hawaii's Public Lands

Teri Māhealani Wright*

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* Juris Doctor Candidate 2013, William S. Richardson School of Law. This article is dedicated to the memory of my father, John Francis Wright, Jr. My sincerest thank you to Prof. Kapua'ala Sproat for her invaluable guidance, wisdom, and encouragement. Thank you to Natasha Baldauf for her unwavering assistance. Special thanks to my mother, Rochelle Wright, for her unconditional love, strength, and sacrifice. Mahalo nui loa to my brother, Ikaika Wright, a true aloha 'āina warrior. Lastly, thank you to Michael Keliipuleole for his ever-enduring patience and support.

I. INTRODUCTION

If just for a day our king and queen
Would visit all these islands and saw everything
How would they feel about the changes of our land?
Could you just imagine if they were around
And saw highways on their sacred grounds
How would they feel about these modern city lights?
Tears would come from each other's eyes
As they stop to realize
That our people are in great, great danger now
How would they feel?
Would their smiles be content, then cry[1]

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[1] ISRAEL KAMAKAWIWO'OLE, HAWAI'I 78 (Mountain Apple Company 1993). Singer and song writer Israel Kamakawiwo'ole was known for his relentless promotion of Native Hawaiian rights both through his lyrics and in his life. CARROLL, RICK, IZ: VOICE OF THE PEOPLE 61 (2006). His song *Hawai'i '78* exhibits his beliefs and hopes for the people of Hawai'i. The State of Hawai'i motto is a recurring line in the song and encompasses the

The history of land management in Hawai'i is a tumultuous story of the transition from indigenous land tenure to modern private ownership.[2] Privatization of public land is a national trend used to invigorate state economies.[3] States entice the private sector into entering sweetheart deals by deregulating industry at the expense of the public interest.[4] This trend is not unique to the State of Hawai'i.[5] However, this national trend raises unique issues for Hawaii's environmental and cultural landscape, which requires more protection than other states across the nation.

In 2011, controversy surrounded the construction of the Thirty Meter Telescope atop Mauna Kea on the Island of Hawai'i.[6] The state hoped the $1.2 billion Thirty Meter Telescope would reinvigorate Hawai'i Island's dilapidated construction industry.[7] In 1968, the Board of Land and Natural Resources ("BLNR") provided a sixty-five year lease to the University of Hawai'i for 13,321 acres of ceded lands[8] on Mauna Kea's summit.[9] That same year, the first telescope on Mauna Kea was built.[10] The University of Hawai'i subleased the lands to various private entities, which led to the construction of thirteen additional telescopes.[11] Existing regulations regarding wahi pana,[12] or culturally sacred sites, forced the state to closely

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meaning of his message: Ua Mau ke Ea o ka 'Āina i ka Pono, roughly translated: "The life of the land is perpetuated in righteousness." His song so eloquently captures Native Hawaiians' relationship to land and their sadness over the loss of culture and ancestral lands. For this reason, this song sets the theme for this article, that without these lands, the Hawaiian way of living will cease to exist.

[2] DAVIANNA PŌMAIKA'I MCGREGOR, NĀ KUA'ĀINA: LIVING HAWAIIAN CULTURE 31-48 (2007) [hereinafter MCGREGOR].

[3] Marti Townsend, *Keeping our eye on the PLDC,* KAHEA (Sep. 24, 2011 6:40 PM), http://www.kahea.org/blog/keeping-our-eye-on-the-pldc.

[4] Arnie Saiki, *PLOP: Act 55-DLNR's Public Land Optimization Plan,* STATEHOOD HAWAII (Jun. 28, 2011), http://statehoodhawaii.org/2011/06/28/dlnr_plop/.

[5] *See* Mike Axsom, *Privatization in Local Government Public Parks,* HEALTH COMMUNITY INITIATIVES (Mar. 3, 2011), http://www.healthycommunityinitiatives.com/privatization-in-local-government-parks/.

[6] Tiffany Hervey, *Mauna Kea-Sacred Summit or Cash Cow?: Controversy over the Thirty Meter Telescope,* HONOLULU WEEKLY (Sept. 14, 2011), http://honoluluweekly.com/feature/2011/09/mauna-kea-sacred-summit-or-cash-cow/.

[7] *Id.*

[8] Ceded lands are lands formerly classified as government or crown lands prior to the overthrow of the Hawaiian monarchy in 1893. Pele Def. Fund v. Paty, 73 Haw. 578, 585, 837 P.2d 1247, 1254 (1992). For more detail on ceded lands see *infra* Part II(B)(2).

[9] Hervey, *supra* note 6.

[10] *Id.*

[11] *Id.*

[12] Wahi pana means "legendary place." MARY KAWENA PUKU'I & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 252 (1986). Edward Kanahele explains the significance of *wahi pana* like Mauna Kea:

consider the Native Hawaiian community's outcry over the desecration of this sacred site and participate in assessment processes before proceeding.[13] Due to the Native Hawaiian community's unique relationship to land and natural resources, desecration of culturally significant sites causes spiritual-religious, cultural, psychological and sociological injuries.[14] The events at Mauna Kea brought the lyrics of *Hawai'i '78* to life, showcasing the presence of modern day structures upon sacred grounds. Unfortunately, even more was yet to come.

In May 2011, Governor Neil Abercrombie signed a bill into law that dramatically changed Hawaii's environmental and cultural landscape.[15] Act 55[16] provides private corporations an opportunity to develop Hawaii's public lands including but not limited to shorelines, harbors, and state parks.[17] The Act snuck through the Hawai'i Legislature with little to no objection under the guise of small boat harbor renovation; however, very little of the Act's text actually pertains to harbor renovations.[18] Instead, Act 55 established the Public Land Development Corporation ("PLDC"), a for-profit development arm of the Department of Land and Natural Resources ("DLNR")[19] that allows private companies to develop and profit from all

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> [a]s a Native Hawaiian, a place tells me who I am and who my extended family is. A place gives me my history, history of my clan, and the history of my people. . . . Spiritual knowledge and the wahi pana are ancestrally related, thus spiritual strength connects the ancestral guardians, or 'aumakua.

MCGREGOR, *supra* note 2, at 5-6 (2007). According to Tiffany Hervey:

> [t]o Hawaiians, the top of Mauna Kea is the pinnacle of prayer, where Papa and Wākea meet. The world's tallest mountain, at 13,769 feet, is also the only tropical alpine desert in the world. For these reasons, advocates for cultural and environmental conservation have been challenging the proposal of a new Thirty Meter Telescope (TMT) on its summit for a while now.

Hervey, *supra* note 6.

[13] William Cole, *Mauna Kea Telescope OK'd: Opponents will get one last chance to appeal for site's cultural significance*, STAR ADVERTISER (Feb. 26, 2011), http://www.staradvertiser.com/news/20110226_mauna_kea_telescope_okd.html?id=116973108. Miwa Tamanaha, executive director of KAHEA: The Hawaiian Environmental Alliances, stated, "When you bulldoze the highest temple, the highest church of a people, we as a society are saying something about what those people are worth[.]" *Id.*

[14] *See* MCGREGOR, *supra* note 2, at 188.

[15] Sophie Cocke, *New Law Jumpstarts Hawaii Land Development*, HONOLULU CIVIL BEAT (Jul. 25, 2011), http://www.civilbeat.com/articles/2011/07/25/12204-new-law-jumpstarts-hawaii-land-development/.

[16] HAWAI'I REVISED STATUTES § 171C (2011).

[17] Cocke, *supra* note 15.

[18] Saiki, *supra* note 4.

[19] DLNR is a state agency, headed by an executive board called the Board of Land and Natural Resources ("BLNR"), responsible for the management of public lands including water resources, state parks, and forests. *See* HAW. REV. STAT. § 171-3 (2008 & Supp.

public lands held by DLNR.[20] The Act exempts such development from state and county zoning and regulatory requirements, as well as building and construction codes.[21] The most threatening aspect of this law to Native Hawaiians is that ceded lands will likely be affected because ninety-nine percent of DLNR's public holdings are ceded lands.[22] Any development, sale, or lease of ceded lands, the former lands of the Kingdom of Hawai'i, is considered highly controversial because these lands were acquired by the United States without compensation and thereby form a basis of Native Hawaiians' claims against the United States.[23] Additionally, the Act exempts private corporations from existing constitutional and statutory mandates to assess, preserve, and protect Native Hawaiian rights.[24]

This article examines the legality of Act 55's exemption from mandates to assess the impact that development of ceded lands would have on Native Hawaiian rights and practices. Section II outlines the historical and legal background of land management in Hawai'i.[25] Section III provides the legal framework of Act 55.[26] Section IV explains how the Act opens the door to potential violations of existing law and policy and employs an indigenous people's contextual legal analysis to analyze the Act's impact on ceded lands and the rights of Native Hawaiians.[27] Section V provides potential solutions.[28]

2011).

[20] HAW. REV. STAT. § 171C-3 (Supp. 2011).

[21] *Id.*; Joan Conrow, *No Man's Land: Who's Reaping Benefits of Development Resources?*, HONOLULU WEEKLY (OCT. 12, 2011), http://honoluluweekly.com/feature/2011/10/no-mans-land/.

[22] Cocke, *supra* note 15.

[23] Brian Duus, *Reconciliation Between the United States and Native Hawaiians: A Duty of the United States to Recognize a Native Hawaiian Nation and Settle the Ceded Lands Dispute*, 4 ASIAN-PAC. L. & POL'Y J. 469, 475 (2003).

[24] *See* HAW. REV. STAT. § 171C-19 (Supp. 2011).

[25] *See infra* Part II.

[26] *See infra* Part III.

[27] *See infra* Part IV.

[28] *See infra* Part V.

II. BACKGROUND AND CONTEXT

A. The Cultural and Historical Significance of Land to Native Hawaiians

1. Native Hawaiian relationship to land

Native Hawaiians have a deep, spiritual connection to their lands and other natural resources.[29] This relationship is embedded in the Kumulipo, a cosmogonic genealogy chant.[30] The Kumulipo explains that the union of Papa and Wākea, the Earthmother and Skyfather, created the Hawaiian Islands.[31] Papa and Wākea's first human offspring was a daughter named Ho'ohōkūkalani.[32] Ho'ohōkūkalani's great beauty enchanted Wākea.[33] Thereafter, Wākea seduced Ho'ohōkūkalani, which led to the birth of their first child Hāloanaka, or "quivering long stalk."[34] Hāloanaka was born unformed and premature.[35] "They buried Hāloanaka in the earth, and from that spot grew the first kalo plant."[36] Wākea and Ho'ohōkūkalani's second child, named Hāloa in honor of his elder brother, was the first man and is the ancestor of all Native Hawaiians.[37] Thus, the Native Hawaiian value of "mālama 'āina,"[38] stems from an inherent responsibility to respect and care for the elder brother, the kalo plant, and in turn, all natural and cultural resources.[39]

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[29] "'Āina is the specific term meaning land. In relationship to birth and family, 'āina conveys the sense of homeland, birthplace, and one's country." E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY, NATIVE PLANTERS IN OLD HAWAII 42 (1991) [hereinafter HANDY & HANDY].

[30] LILIKALĀ KAME'ELEHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEALĀ E PONO AI? 2 (1992). This relationship was "abundantly exemplified in traditional mele (songs), in pule (prayer chants), and in genealogical records which associate the ancestors, primordial and more recent with their individual homelands, celebrating always the outstanding qualities and features of those lands." HANDY & HANDY, *supra* note 29, at 42.

[31] ROY KAKULU ALAMEIDA, STORIES OF OLD HAWAI'I 1 (1997).

[32] KAMAE'ELEHIWA, *supra* note 30, at 23.

[33] *Id.*

[34] *Id.* at 24.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] "Mālama 'āina" means to serve and care for the land. KAME'ELEHIWA, *supra* note 30, at 25.

[39] KAMAE'ELEIHIWA, *supra* note 30, at 24.

2. Ahupua'a land tenure system

In ancient Hawai'i, land was not owned, rather it was held in trust for all.[40] In fact, there are no words in the Hawaiian language for the Western concept of private ownership.[41] Native Hawaiians had a "communal system of land management where all people had access to land, which was administered by the Chiefs and cultivated by the commoners."[42] This traditional ahupua'a system, shaped all aspects of societal structure and self-governance.[43]

A moku[44] or mokupuni[45] was divided into the primary land divisions of the traditional land tenure system called ahupua'a. An ahupua'a typically extended from the mountain out into the sea,[46] encompassing all of the different products of the forest, soil, and sea, so that residents could generally sustain themselves without leaving its boundaries.[47] In the traditional system, the hierarchical stratification of ali'i,[48] konohiki,[49] and maka'āinana[50] administered and cultivated each ahupua'a.[51] This

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[40] *Id.* at 10.

[41] *Id.* at 9.

[42] *Id.* at 8-9 ("Communal access to land, meant easy access to the source of food and implied a certain generosity in the sharing of resources.").

[43] *See generally* D. Kapua Sproat, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321 (1998); *see also* Ryan Kananiokahome Poiekeala Kanaka'ole, *The Indivisible 'Ohana: Extending Native Hawaiian Gathering Rights to Non-Hawaiian Family Members*, 12 ASIAN-PAC. L. & POL'Y J. 145, 149 (2011).

[44] "District." PUKU'I, *supra* note 12, at 252.

[45] "Island." *Id.*

[46] *Id.* at 9.

[47] *Id.* The name "ahupua'a" was "derived from the ahu or altar (literally, pile, kuahu being the specific term for altar) which was erected at the point where the boundary of the land was intersected by the main road, alaloa, which circumvented each of the islands." MCGREGOR, *supra* note 2, at 26-27 (explaining that an ahupua'a is "typically bound by geographical features such as mountain ridges.").

[48] "Chiefs." PUKU'I, HAWAIIAN DICTIONARY, *supra* note 12, at 20.

[49] "Designated person having charge of the land on behalf of the king or chief or other person to whom the ahupua'a had been assigned or awarded." *Id.* at 166.

[50] "The common people were called maka'āinana, literally 'on the land folk' . . . . They were the planters, fishermen, and the craftsmen." HANDY & HANDY, *supra* note 29, at 323.

[51] KAME'ELEHIWA, *supra* note 30, at 9; HANDY & HANDY, *supra* note 29, at 323 ("The supreme chief or mō'ī of an island held the land in trust for all of his people. For the purposes of utilization and taxes, the mō'ī partitioned the land into districts under his high chiefs, or ali'i nui. The high chiefs then apportioned out their portions to the lesser chiefs, dependent, supervising agents (konohiki) and the final subdivision was made to the maka'āinana or commoners who cultivated the soil for themselves and for their overlords, to whom they rendered, in addition to a share of the products, certain other services of labor

arrangement ensured coordinated cultivation by the maka'āinana between and throughout each ahupua'a, "with each level of people having overlapping rights to, and interests in, the products of the 'āina."[52] Additionally, the traditional subdivision of lands and responsibilities ensured sharing of reciprocal benefits between chiefs and other people of the land.[53] Overall, the hierarchical class system enabled efficient management of land and resources in the ahupua'a, assuring an abundant share in food, fish, firewood, house timbers, thatch, amongst all people regardless of social classification.[54]

B. The Historical and Legal Background of Land Management in Hawai'i

1. The first occurrence of privatization in Hawai'i: the Māhele of 1848

In 1848, one of the first instances of privatization of lands in Hawai'i occurred with the Māhele.[55] The Māhele not only drastically "transformed the traditional [l]and system from one of communal tenure to private ownership,"[56] but it altered a "relationship between man and nature that Hawaiians had practiced for centuries."[57] The process began with a division of lands between the king and his 248 chiefs and was followed by the division of lands for maka'āinana in 1850 with the passage of the Kūleana Act, which provided maka'āinana the opportunity to "apply for permanent titles to their lands."[58] For various reasons including the lack of familiarity with this new relationship to land, the short time period to file claims, and the difficulties of filing claims and surveying lands, very few maka'āinana actually acquired titles to the land.[59] Additionally, very few

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and homage.").

[52] KAME'ELEHIWA, *supra* note 30, at 9.

[53] HANDY & HANDY, *supra* note 29, at 48.

[54] *Id.*

[55] KAME'ELEHIWA, *supra* note 30, at 8.

[56] *Id.*

[57] Kahikino Noa Dettweiler, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 5 (2005) [hereinafter Dettweiler, *Racial Classification*]. The king hoped Māhele would protect his and his peoples' lands "from confiscation in the event of foreign conquest." SALLY ENGLE MERRY, COLONIZING HAWAII: THE CULTURAL POWER OF LAW 93 (2000).

[58] MERRY, *supra* note 57, at 93-94.

[59] *See* DONOVAN C. PREZA, THE EMPIRICAL WRITES BACK: RE-EXAMINING HAWAIIAN DISPOSSESSION RESULTING FROM THE MĀHELE OF 1848 47 (May 2010) (unpublished M.A. thesis, University of Hawai'i at Mānoa). The thesis details that the maka'āinana subsequently purchased lands via government grants, which are not accounted for by the 28,658 statistic. *Id.* at 48; MERRY, *supra* note 57, at 94.

maka'āinana knew how to apply for titles and many wanted to remain on the lands under their chiefs.[60] When chiefs leased their lands to the foreigners, maka'āinana were forced to leave their lands and were left to "wander in tears on the highway."[61]

In 1850, relentless pressure from foreigners led to the passage of the Alien Land Ownership Act, which enabled foreigners to buy and sell land for the first time in Hawaii's history.[62] Foreigners justified their desire for privatization by emphasizing a need for foreign capital, skill, and labor to develop agricultural resources and by promising that foreign ownership would mean great wealth and prosperity for the kingdom.[63] Immediately after the passage of this Act, land quickly passed out of the hands of the ali'i and maka'āinana, leaving many as landless laborers.[64] In the end, the chiefs ended up with approximately 1.6 million acres of land, the government received about 1.5 million,[65] the king received slightly over 1 million acres,[66] and the maka'āinana received a mere 28,658 acres.[67] Although expected to receive a much larger share of lands during the distribution, maka'āinana ended up owning less than one percent of the total acreage of lands in Hawai'i and only nine percent of the population received any land in the Māhele.[68] By 1896, fifty-seven percent of the land area paying taxes belonged to whites and fourteen percent to Native Hawaiians.[69] This transformation in land ownership replaced the reciprocal relationship of land tenure between maka'āinana and ali'i with relations of inequality based on property ownership and land status.[70] Following the Māhele, maka'āinana living conditions worsened considerably by becoming an "increasingly displaced, mobile population migrating to the towns, occasionally employed in the new sugar plantations although the long

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[60] *See* PREZA, THE EMPIRICAL WRITES BACK, *supra* note 59, at 47; MERRY, *supra* note 57, at 94.

[61] MERRY, *supra* note 57, at 94.

[62] *See* MELODY MACKENZIE, HISTORICAL BACKGROUND, NATIVE HAWAIIAN RIGHTS HANDBOOK 5-6 (Melody Kapilialoha MacKenzie ed., 1991); MERRY, *supra* note 57, at 94.

[63] MERRY, *supra* note 57, at 94.

[64] *Id.* at 95.

[65] These are the lands that became the "Government Lands." KAME'ELEHIWA, *supra* note 30, at 210-18.

[66] These are the lands that became the "Crown Lands." *Id.*

[67] PREZA, THE EMPIRICAL WRITES BACK, *supra* note 59, at 13 (explaining that maka'āinana received less than one percent of Hawaii's total land area through the Kūleana Act); MERRY, *supra* note 57, at 94.

[68] According to Preza, the King's intention was to put maka'āinana back onto the land. PREZA, *supra* note 59, at 13; MERRY, *supra* note 57, at 94.

[69] MERRY, *supra* note 57, at 95.

[70] *Id.*

hours, arduous and repetitive labor, and strict discipline were not appealing."[71] Additionally, by the late 1800's, Native Hawaiians experienced massive land alienation and [were] considered the "worst-case scenario" in the Pacific."[72]

2. The Admissions Act

In 1898, the United States illegally annexed the Kingdom of Hawai'i through a Joint Resolution "without the consent of or any compensation to the Native Hawaiian people of Hawai'i or their sovereign government."[73] During this time, systematic efforts were made to suppress the Hawaiian culture and the use of Hawaiian language.[74] More than half of the Native Hawaiian population actively opposed the annexation of Hawai'i, confirmed by petitions signed by 21,269 people.[75] Through the 1898 Joint Resolution and the 1900 Organic Act,[76] 1.8 million acres of Crown and Government lands of the Kingdom of Hawai'i were ceded to the United States.[77] Congress exempted these lands from existing United States public land laws by mandating that the revenue and proceeds of the land be "used solely for the benefit of the inhabitants of the Hawaiian Islands for education and other public purposes[,]"[78] thus establishing a special trust relationship between the United States and the original inhabitants of Hawai'i.[79] These lands are most commonly referred to as the "Ceded Lands" or "Public Lands Trust."[80]

From 1900 through 1959, the United States governed Hawai'i as its territory.[81] In 1959, Congress admitted Hawai'i into the Union as the fiftieth state through the enactment of the Admissions Act,[82] which

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[71] *Id.*

[72] *Id.*

[73] Pub. L. 103-150, 107 Stat. 1510 (1993); MCGREGOR, *supra* note 2, at 42.

[74] KAME'ELEHIWA, *supra* note 30, at 316.

[75] NOENOE SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 24 (Duke University Press 2004); Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the Rights of the Native Hawaiian People*, 10 HAW. B.J. 63, 63-64 (2006).

[76] An Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900), *reprinted* in 1 HAW. REV. STAT. 43 [hereinafter Organic Act].

[77] MCGREGOR, *supra* note 2, at 42.

[78] *Id.*

[79] *Id.*

[80] Van Dyke & MacKenzie, supra note 75, at 64. Crown lands are the former personal lands of the king. JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 30 (2008).

[81] MCGREGOR, *supra* note 2, at 42.

[82] An Act to Provide for the Admission of the State of Hawaii into the Union, approved March 18, 1959, Pub. L. No. 86-3, 73 HAW. REV. STAT. 4 [hereinafter Admission Act].

conveyed in trust approximately 1,200,000 acres of lands that had been previously ceded to the United States in 1898 by the Republic of Hawai'i.[83] "The Admission Act reaffirmed the trust relationship between the United States and native Hawaiians[84] and transferred part of the trust responsibility to the new State of Hawai'i."[85]

"Statehood stimulated unprecedented economic expansion in Hawai'i."[86] Though the pineapple and sugar agribusiness boom of the Territory period slowly dissipated and moved to cheaper labor markets in Southeast Asia,[87] these former agriculture lands were "developed into profitable subdivisions, condominium, and resort developments."[88] Rapid changes and development in rural and agricultural areas deeply concerned the Native Hawaiian community because of its traditional concentration in rural pockets.[89] American progress seemed to be overrunning the islands and replacing Native Hawaiian and local ways of life.[90] An excerpt from an impact statement offers insight into the frustrations and social pressures that Native Hawaiians began to associate with development:

> [s]ome long time residents have the feeling that they are being dispossessed of their traditional access to the beauties and bounties of nature around them. Anxieties arise as open space is filled up by newcomers and the taxes on land keep going up. Frustration is felt as the future character of their shrinking world is being decided by landowners and developers, government planners and elected officials in offices and meeting rooms far away. And there is a problem of the carryover of these insecurities to the younger generation. There are indications of social breakdown as reflected in the rate of

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[83] Van Dyke & MacKenzie, *supra* note 75, at 63-64.

[84] The term "native Hawaiian" refers to those with fifty percent or more Hawaiian blood entitled to benefit under the Hawaiian Homes Commission Act. HAW. CONST. art. XII, §§ 5-6. For this paper, the term "Native Hawaiian" will be used because it applies to Native Hawaiians generally without blood quantum specification.

[85] Van Dyke & MacKenzie, *supra* note 75, at 64.

[86] MCGREGOR, *supra* note 2, at 46. During the sugar industry boom, vast irrigation systems were developed to carry millions of gallons of water to the plantation fields. *Id.* at 43. As a result:

> [t]he impact of these irrigation systems upon rural Hawaiian taro farmers reverberated throughout the twentieth century. Cut off from free flow of stream waters into their *lo'i kalo* or taro pond fields, many *kua'āina* gave up taro farming and moved into the city to find new livelihoods. Some of these families stopped paying taxes on their rural lands when they moved into the city and as a result eventually lost ownership of their ancestral lands through adverse possession by planters and ranchers. *Id.* at 43-44 (italics in the original).

[87] *Id.* at 46.

[88] *Id.*

[89] *Id.* at 47.

[90] *Id.*

> unemployment, the growing incidence of family separations, the heavier welfare loads and the increase in juvenile delinquency and adult crimes.[91]

The unregulated and excessive development occurring since statehood led to the creation of the Land Use Commission (LUC), based on laws adopted in England to regulate reconstruction after World War II ("WWII").[92] Hawai'i Revised Statutes chapter 205 was the first statewide zoning measure in the United States.[93] Creation of the LUC was "viewed as a response to conditions unique to the fiftieth state: a relatively small land mass, concentrated ownership of land, and a history of centralized government."[94] The LUC was specifically designed to address the excesses of Hawaii's land boom that were beyond the powers of the counties' small and not well organized planning bodies.[95] Subsequently, the LUC implemented a bevy of state and county land use regulations to protect and preserve Hawaii's unique environmental and cultural landscape.[96]

3. The Public Land Trust

The Public Land Trust encompasses all lands granted to the State of Hawai'i by section 5(b) of the Admissions Act, "held by the State as a

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[91] *Id.*

[92] GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII: THE DEMOCRATIC YEARS 86 (1985) [hereinafter COOPER & DAWS].

[93] *Id.*

[94] *Id.*

[95] *Id.* According to Cooper and Daws:

> [f]oremost among these excesses was the scattering of urban subdivisions in prime agricultural lands, not only undercutting Hawaii's farming potential but also leading to the inefficiencies in providing government services to new communities that were spread all over the place. On the Big Island, a speculative subdivision boom was creating tens of thousands of house lots on remote lava fields, often in volcanic hazard zones, practically no improvements, without no [sic] basic amenities such as county standard roads and utilities.

Id.

[96] The state preserves open space chiefly through its land use law, enacted in 1961 to preserve prime agricultural land from the effects of urban sprawl on O'ahu. DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAI'I 9 (2d. ed. 2010). All state lands are classified into one of four districts: conservation, agriculture, rural and urban. DAVID KIMO FRANKEL, PROTECTING PARADISE: A CITIZEN'S GUIDE TO LAND & WATER USE CONTROLS IN HAWAI'I 4 (1997); *see* HAW. REV. STAT. ch. 205 (2008); *see also* HAW. CODE R. § 15-15. Generally, development cannot take place unless it is consistent with state land use law (in all but the conservation district) and county regulations, including standards of height, setback, lot size, and open space. FRANKEL, *supra*, at 9; *see* HAW. REV. STAT. ch. 205 (2008); *see also* HAW. CODE R. § 15-15. For more information see FRANKEL, *supra*, at 13, 56.

public trust for native Hawaiians and the general public."[97] In the Act, section 5(f) requires the State of Hawai'i to use the revenues generated from the ceded lands "for the betterment of the conditions of native Hawaiians and the general public."[98] These lands, "together with the proceeds from the sale or other disposition of [these] lands and the income there from, shall be held by [the] State as a public trust" to promote various public purposes, including supporting public education, bettering conditions of Native Hawaiians, developing home ownership, making public improvements, and providing lands for public use.[99] At the 1978 Constitutional Convention, the people of Hawai'i amended the constitution to create the Office of Hawaiian Affairs ("OHA") and its indigenous Hawaiians-only voting structure, which was later ratified by Hawai'i voters.[100] As a part of that constitutional amendment, OHA was delegated the responsibility of administering the 5(f) trust.[101] The State, however, encounters great difficulty in carrying out the directives of the 5(f) trust. Two cases highlighting such struggles and the controversial topic of ceded lands and possible development thereon are *Office of Hawaiian Affairs v. State*[102] ("*OHA v. State*") and *Hawaii v. Office of Hawaiian Affairs* ("*State v. OHA*").[103]

a. Ceded lands revenues: The case of OHA v. State

In 2001, the Hawai'i Supreme Court issued a ruling in *OHA v. State* that OHA was entitled to a portion of state revenues connected to the use of ceded lands beneath the Honolulu International Airport.[104] OHA initially

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[97] HAW. CONST. art. XII, § 4 (1978).

[98] Trustees v. Yamasaki, 69 Haw. 154, 163, 737 P.2d 446, 451 (1987). The Hawai'i Supreme Court held that by virtue of section 5(f) of the Admission Act, the ceded lands are "held by the State as a public trust for native Hawaiians and the general public." The State interpreted section 5(f) as allowing it to use the revenues for "any one of five stated trust purposes and allocated all revenues to public education." Van Dyke & MacKenzie, *supra* note 75, at 66.

[99] HAW.CONST. art XII, § 4 (1978).

[100] *Id.* OHA, whose assets from ceded lands revenues now exceed one-half billion dollars, monitors the State's use of ceded lands and spends millions annually on programs addressing social, economic, and cultural needs of Native Hawaiians. *See* 1997 Haw. Sess. Laws 240.

[101] HAW.CONST. art XII, § 5 (1978).

[102] Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 31 P.3d 901 (2001).

[103] Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009).

[104] Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 395-6, 31 P.3d 901, 908 (2001). Accordingly, "under HRS § 10-2, as amended by Act 304, OHA is entitled to twenty percent of the rent paid for its lease or use of that portion of the Airport premises situated on ceded land, irrespective of whether that rent is calculated at a flat rate or is based on DFS [Duty

filed suit against the State to seek "its pro rata share of revenues received by the State based . . . on Waikiki Duty free receipts (in connection with the lease on ceded lands at the Honolulu International Airport)" dating back to 1980.[105] Although the court ruled in favor of OHA because existing legislation on revenues generated from ceded lands conflicted with federal regulations, the court held that public land payments to OHA must end until further legislative action resolves outstanding issues.[106] In February 2003, Governor Linda Lingle issued executive orders that awarded $2.8 million dollars to OHA and instructed State departments to resume ceded lands payments to OHA.[107]

b. Ceded Land Sales: The case of Hawaii v. OHA

In 2009, the United States Supreme Court ("U.S. Supreme Court") reversed and remanded then-circuit court Judge Sabrina McKenna's ruling against OHA's claim that the Apology Resolution[108] enjoined the State from selling ceded lands until all unresolved Native Hawaiian land claims are settled.[109] Individual Native Hawaiian plaintiffs and OHA initiated the lawsuit after notification of the State's plan to develop ceded lands at Leali'i[110] on Maui and La'i'ōpua on Hawai'i Island to be sold to private

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Free Store] receipts, including those from WDF." *Id.* at 395-6, 31 P.3d at 988-89.

[105] *Id.* at 392, 31 P.3d at 908.

[106] *Id.* at 397-9, 31 P.3d at 910.

[107] Pat Omandam, *Lingle Signs Bill to Restore Land Payments to OHA*, HON. STAR BULLETIN (Apr. 24, 2003), http://archives.starbulletin.com/2003/04/24/news/story12.htm. In April 2003, the governor signed into law a bill appropriating an additional $9.5 million to OHA. *See* H.R. 1307, 22nd Leg. (Haw. 2003) (appropriating about $9.5 million to OHA trust fund from various state funds, including for example general revenues, state parking revolving fund, agricultural park special fund, and state educational facilities improvement special fund).

[108] *See* Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009). In the Apology Resolution, Congress confirmed that Native Hawaiians are the indigenous people of the State of Hawai'i. Overthrow of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter Apology Resolution]. It also states that United States military and diplomatic support was essential to the success of the 1893 overthrow of the Hawaiian Monarchy and that this aid violated "treaties between the two nations and . . . international law." *Id.*

[109] Office of Hawaiian Affairs v. Hous. and Cmty. Dev. Corp. of Haw., 117 Hawai'i 174, 189, 177 P.3d 884, 899 (2008). Judge McKenna held the State of Hawai'i has the authority to sell the ceded lands, noting the plain language of the Admission Act provides authority for such sales; and the 1978 amendments creating OHA and the Article XII, § 4 public trust acknowledge and sustain that authority. *Id.*

[110] The "Leiali'i parcel" is a tract of former Crown land on the island of Maui that was among the lands that the Admission Act conveyed to the State of Hawai'i to be held in trust. Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, (2009).

owners.[111] The State justified its actions as necessary to meet a housing shortage in Maui and the Big Island.[112] The U.S. Supreme Court held that although the Apology Resolution did not reveal Congress' clear intent to amend or repeal the State's rights to sell ceded lands, "we have no authority to decide questions of Hawaiian law or to provide redress for past wrongs except as provided for by federal law."[113] The Hawai'i State Legislature responded to this case by passing Act 176, which prohibits the sale of ceded lands without a two-thirds vote of the Legislature.[114]

C. The Legal Framework Protecting Traditional and Customary Rights

1. State constitutional and statutory provisions

a. Const. Art. XII, § 7

In 1978, in response to Native Hawaiians' concerns about access and gathering rights, the people of Hawai'i amended the State Constitution during the Hawai'i State Constitutional Convention by adopting Article XII, section 7 to "raise current statutory protections to a constitutional level and thereby making traditional and customary rights an '*inviolate right.*'"[115] According to Article XII, section 7:

> [t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of [N]ative Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[116]

Article XII, section 7 mandates that the State respect and preserve traditional and customary rights.[117] The purpose behind Article XII, section 7 was "to preserve the small remaining vestiges of quickly disappearing culture by recognizing that traditional and customary rights are 'personal rights . . . inherently held by Hawaiians and do not come with the land.'"[118] The legislative history of the provision establishes that it was implemented "due to recent attempts to prevent practitioners from 'following subsistence

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[111] *OHA v. HCDCH*, 117 Hawai'i at 188, 177 P.3d at 898.

[112] *Id. at* 186, 177 P.3d at 896.

[113] *Hawaii v. OHA*, 556 U.S. at 177.

[114] Act 176, 2009 Haw. Sess. Laws, codified at HAW. REV. STAT. § 171.

[115] Sproat, *supra* note 43, at 335-36 (emphasis added).

[116] HAW. CONST. art. XII, § 7 (1978).

[117] Sproat, *supra* note 43, at 335-36 (quoting STAND. COMM. REP. No. 57, *reprinted in* 1 Proceedings of the Con. Convention of 1978, at 640).

[118] *Id.* at 336.

practices traditionally used by their ancestors.'"[119] Thus, this provision grants "the State regulatory authority 'to prevent possible abuse as well as interference with these rights.'"[120] Interpretation of this provision by the Hawai'i Supreme Court "significantly expanded the scope of protections for traditional and customary rights."[121]

b. Haw. Rev. Stat. § 1-1

Hawai'i Revised Statutes section 1-1, or the "Hawaiian Usage" exception,[122] codified "custom" in Hawai'i, subjecting Hawai'i common law to traditional and customary practices.[123] It provides:

[t]he common law of England as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian Usage.[124]

Additionally, it expressly "accedes to judicial precedent of the Kingdom of Hawai'i,"[125] thereby according substantial deference to Kingdom of Hawai'i law due to the significant role that custom played in early Hawaiian law.[126]

c. Haw. Rev. Stat. § 7-1

Hawai'i Revised Statutes section 7-1 preserves the rights of ahupua'a tenants to gather enumerated items for personal use and to access other portions of the ahupua'a.[127] The statute mandates:

> [w]here the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to

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[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Kanaka'ole, *supra* note 43, at 159.

[123] Sproat, *supra* note 43, at 330.

[124] HAW. REV. STAT. § 1-1 (2008) (emphasis added).

[125] D. Sproat, *supra* note 43, at 330.

[126] *Id.*

[127] This statute preserves section 7 of the Kūleana Act of 1850. *See* HAW. REV. STAT. § 7-1 (2008). The Kūleana Act originally required konohiki permission, but that provisional requirement was repealed by HRS § 7-1. *See, e.g.*, Rev. Law. 1925 § 576; Rev. Law. 1935 § 1694; Rev. Law. 1945 § 12901; Rev. Law. 1955 § 14-1.

> drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to well and watercourses, which individuals have made for their own use.[128]

Together, Hawai'i Constitution Article XII, section 7 and Hawai'i Revised Statutes sections 1-1 and 7-1 comprise "the legal foundation of Native Hawaiian traditional and customary rights."[129] "From this foundation of law, the Hawai'i Supreme Court built its interpretation of traditional and customary rights, which includes the articulation of standards to protect traditional and customary rights as well as the imposition of conditions on the exercise of such rights."[130]

2. *Hawai'i Supreme Court cases concerning traditional and customary rights*

a. *Expansion and contraction of such rights:* Kalipi

In 1982, the Hawai'i Supreme Court applied traditional and customary rights law for the first time in *Kalipi v. Hawaiian Trust Co.* (*"Kalipi"*).[131] Appellant William Kalipi, a Native Hawaiian residing on Moloka'i in the ahupua'a of Keawenui, brought suit claiming that he was wrongly refused the right to access and gather in the neighboring ahupua'a of 'Ōhi'a for "indigenous agricultural products for use in accordance with Hawaiian practices."[132] He sought relief in the circuit court, which consequently found that he had no such right because he was not a lawful occupant of the ahupua'a in which he sought to gather.[133]

The holding in *Kalipi* simultaneously expanded and contracted Native Hawaiian gathering rights.[134] While the court expressly limited the gathering rights accorded by Hawai'i Revised Statutes section 7-1 to lawful occupants of the ahupua'a where the gathering took place, it also recognized that gatherable items were not limited to those enumerated in that statute.[135] The court also restricted gathering rights to undeveloped land to avoid conflicts between landowners on developed land.[136] The *Kalipi* court

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[128] HAW. REV. STAT. § 7-1 (2008).
[129] Kanaka'ole, *supra* note 43, at 159.
[130] *Id.*
[131] Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982).
[132] *Id.* at 3-4, 656 P.2d at 747-48.
[133] *Id.* at 9, 656 P.2d at 745.
[134] Kanaka'ole, *supra* note 43, at 159.
[135] Dettweiler, *supra* note 57.
[136] *Kalipi*, 66 Haw. at 9, 656 P.2d at 750.

"acknowledged that gathering rights were necessary for the perpetuation of traditional and customary practices and 'thus remain, to the extent provided in the statute, available to those who wish to continue those ways.'"[137] A decade after the decision *Kalipi*, the court in *Pele Defense Fund v. Paty* revisited the issue of traditional and customary access rights and expanded them by holding that such rights "may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[138]

b. Exercise of such rights on "less than fully developed lands": PASH

In 1995, the court issued a landmark opinion regarding traditional and customary rights in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* ("*PASH*").[139] In that case, a public interest group brought suit against the Hawai'i County Planning Commission ("HPC"), challenging its issuance of a county-level Special Management Area ("SMA") Use Permit to Nansay Hawai'i, Inc. ("Nansay") that allowed for the development of a resort complex in the ahupua'a of Kohonaiki on the Island of Hawai'i.[140] First, the court clarified that an exercise of Hawaiian tradition or custom under Hawai'i Revised Statutes section 1-1 and article XII, section 7, requires that the practice must have been established prior to 1892, the year that the Hawaiian Usage exception was enacted.[141] Second, the court clarified that no minimum percentage of Hawaiian ancestry is needed to assert traditional and customary rights despite requirements by some programs benefitting Native Hawaiians.[142] Last, the court in PASH expanded the scope of traditional gathering rights as set forth in *Kalipi* by holding that an individual legitimately asserting his traditional and customary rights can enter onto undeveloped land and "land that is less than fully developed."[143]

c. Prohibition on the exercise of such rights on residential lands: Hanapi

In *State v. Hanapi*, Alapa'i Hanapī unsuccessfully asserted a traditional and customary rights defense in an attempt to overturn his criminal trespass

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[137] Sproat, *supra* note 43, at 337-38 (quoting *Kalipi*, 66 Haw. at 9, 656 P.2d at 750.

[138] Pele Def. Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992).

[139] Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 79 Hawai'i 425, 903 P.2d 1246 (1995).

[140] *Id.* at 429, 903 P.2d at 1250.

[141] *Id.* at 447, 903 P.2d at 1268.

[142] *Id.* at 449, 903 P.2d at 1270.

[143] *Id.* at 450, 903 P.2d at 1271.

charge.[144] Hanapī knowingly trespassed onto his neighbor's residential property.[145] Although Hanapī failed to establish a traditional and customary practice, the Hawai'i Supreme Court used this opportunity to assert that an exercise of traditional and customary rights or religious practices is not permitted on "fully developed" residential property.[146] Here, the Court also noted that, "property used for residential purposes [is] an example of 'fully developed' property. There may be other examples of 'fully developed' property as well where the existing uses of the property may be inconsistent with the exercise of protected native Hawaiian rights."[147]

Taken together, these cases indicate that to exercise traditional and customary rights: 1) one must be a Native Hawaiian; 2) the activity must be traditional and customary; 3) that exercise must be upon lands that are not "fully developed;" 4) and the exercise must not harm the landowner.[148]

d. Adoption of a new standard for criminal trespass: State v. Pratt

In 2004, Lloyd Pratt was charged with violating Hawai'i Administrative Rules ("HAR") § 13-1460-4 by illegally camping in a closed area in the Kalalau State Park on Kaua□i.[149] Pratt moved to dismiss the charges on grounds that he was a Native Hawaiian engaging in a constitutionally protected practice.[150] Pratt established the minimum *Hanapi* requirements: that he was a Native Hawaiian; that he was a kahu, or traditional and cultural caretaker of the valley; and that as part of his duties as a kahu, he goes into the Kalalau Valley to tend to a heiau and perform ceremonial rites.[151] In 2012, the Supreme Court affirmed the Intermediate Court of Appeals' conviction by holding that the State's interest in protecting and preserving the park outweighed Pratt's interests in frequenting the particular area of the park to exercise traditional and customary practices, and, thus, he had no right to reside in the closed area of the park.[152]

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[144] State v. Hanapi, 89 Hawai'i 177, 178, 970 P.2d 485, 486 (1998).

[145] *Id.* at 185-86, 970 P.2d at 493-94.

[146] *Id.* at 186-87, 970 P.2d at 494-95.

[147] *Id.* at 186 n.10, 970 P.2d at 495 n.10.

[148] *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745, 750 (1982); State v. Hanapi, 89 Hawai'i 177, 187, n.10, 970 P.2d 485, 495, n.10 (1998).

[149] State v. Pratt, 127 Hawai'i 206. 208, 277 P.3d 300, 302 (2012).

[150] *Id.*

[151] *Id.* at 211, 277 P.3d at 305.

[152] *Id.* at 214-16, 277 P.3d at 308-10.

e. Hawai'i Supreme Court mandates a three-pronged traditional and customary rights analysis for reclassification of lands: Kapa'akai[153]

In 2000, Native Hawaiian groups challenged the LUC's grant of a petition to reclassify roughly 1,000 acres of land from conservation to urban in the ahupua'a of Ka'ūpūlehu on the island of Hawai'i.[154] The Hawai'i Supreme Court held that the State and its agencies must protect reasonable exercises of traditional and customary rights of Hawaiians to the extent feasible.[155] The court further held, when evaluating a petition for land use boundary reclassification, the LUC must ensure the protection of traditional and customary Native Hawaiian rights while reasonably accommodating competing private development interests.[156] To fulfill this mandate, the LUC, in its review of a petition for reclassification of district boundaries, must, at a minimum, make specific findings and conclusions regarding:

> (1) the identity and scope of 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
>
> (2) the extent to which those resources-including traditional and customary native Hawaiian rights-will be affected or impaired by the proposed action; and
>
> (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.[157]

Additionally, the court held that the LUC may not delegate away its duty to protect Native Hawaiian rights.[158] A mandate of specific findings regarding traditional and customary rights in such land development decisions is necessary to implement the State's constitutional and statutory mandates.[159]

III. LEGAL FRAMEWORK OF ACT 55

A. Purpose of the Act

Hawai'i is one of many states to follow the national trend of turning to the private sector for assistance in improving public parks and harbors.[160]

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[153] Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000).

[154] *Id.* at 34, 7 P.3d at 1071.

[155] *Id.* at 35, 7 P.3d at 1072; *see* HAW. CONST. art. XII, § 7 (1978).

[156] *Ka Pa'akai O Ka 'Āina*, 94 Hawai'i at 45, 7 P.3d at 1082.

[157] *Id.* at 47, 7 P.3d at 1084 (footnotes omitted).

[158] *Id.* at 52, 7 P.3d at 1089.

[159] *See generally Ka Pa'akai O Ka 'Āina.*

[160] Sophie Cocke, *More States Turn to Private Companies to Develop Public Lands,*

Concerned with the State's inability to maintain infrastructure and optimize its land base due to the lack of government funds, Governor Neil Abercrombie signed a bill into law that created a revenue generating development arm of the Department of Land and Natural Resources (DLNR).[161] Under the guise of harbor renovation, the Act snuck through the 2011 legislative session without much public scrutiny.[162] The Legislature found that DLNR was not effectively using certain lands under its control because it is "hamstrung by its limited mission" and that the neglected public lands may serve the State and its people better, as explained by Senator Donovan Dela Cruz, "if managed and developed into recreational and leisure centers where the public can congregate and where visitors to our State can go as part of their holiday experience."[163] Senator Dela Cruz's statements indicated that the Act will make Hawai'i globally competitive by redeveloping local cities to look like larger cities across the country, such as Los Angeles, Chicago, and San Francisco.[164]

Act 55's purpose is to "create a vehicle and process to make optimal use of public land for the economic, environmental, and social benefit of the people of Hawaii."[165] The Legislature hopes the new development arm will create revenue-generating opportunities for the new corporation and, in turn, those revenues may offset the cost of DLNR's regulatory functions.[166] Thus far, the private development corporations of Aloha Stadium and Aloha Tower have introduced bills seeking to transfer their development rights over to a new public corporation responsible for administering the Act.[167]

HONOLULU CIVIL BEAT (Jul. 25, 2011), http://civilbeat.com/article/2011/07/25/12205-more-states-turn-to-private-companies-to-develop-public-lands/ (explaining that "about 10 states had passed legislation facilitating such partnerships. Cash-strapped governments have been deferring maintenance of public projects leading to potentially dangerous consequences.").

[161] *See* HAW. REV. STAT. § 171C (Supp. 2011).

[162] During the Act's first reading, William Ailā presented the only testimony on this Act. His testimony focused on harbor usage, which took focus away from the far-reaching implications of the Act. Saiki, *supra* note 4. Act 55 barely mentions Ala Wai Harbor or Ke'ehi Lagoon development; its primary focus is development for tourism and recreation. *See generally* HAW. REV. STAT. § 171C (Supp. 2011).

[163] *KAHEA weighs in on Public Land Devel. Corp*, MAUI TOMORROW (Sept. 29, 2012), http://maui-tomorrow.org/?p=3534. If done correctly, the Act could have great effect by providing a way to renovate decaying facilities in the urban core and raise money for DLNR; however the scope of this article will focus on the possible negative effects of Act 55 on the Native Hawaiian population.

[164] *See* Shantel Grace, *Macro Vision*, HONOLULU WEEKLY (Nov. 23, 2011), honoluluweekly.com/feature/2011/11/macro-vision/.

[165] HAW. REV. STAT. § 171C-1 (Supp. 2011).

[166] *Id.*

[167] *See* S.B. 2929, 26th Leg., Reg. Sess. (Haw. 2012).

B. General Explanation of the Major Provisions[168]

1. Establishment of the Public Land Development Corporation

Act 55 established a public corporation, the Public Land Development Corporation (PLDC), to administer an appropriate and culturally-sensitive public land development program.[169] The PLDC's responsibility is to coordinate and administer programs to make optimal use of public land, while ensuring that such land is maintained for the people of Hawai'i.[170] The PLDC may also enter into public-private agreements to develop public lands.[171] The PLDC is permitted to acquire, renovate, sell, lease, and develop public lands; permissible uses of these lands include but are not limited to "office space; vehicular parking; commercial uses; hotel, residential, and timeshare uses; fueling facilities; storage and repair facilities; and seawater air conditioning plants."[172]

Act 55 also establishes a Board of Directors (the Board) comprised of five members and primarily representing three state agencies: the director of Department of Business, Economic Development and Tourism (DBET); the director of Department of Budget and Finance (DBF) or its designee; and the chairperson of Department of Land and Natural Resources (DLNR).[173] The fourth member is appointed by the speaker of the House

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[168] Due to limitations on scope, this section will only address the major provisions of Act 55 that affect Native Hawaiians.

[169] HAW. REV. STAT. § 171C-1 (Supp. 2011).

[170] HAW. REV. STAT. § 171C-6(c) (Supp. 2011).

[171] HAW. REV. STAT. § 171C-1 (Supp. 2011).

[172] HAW. REV. STAT. § 171C-3(a) (Supp. 2011); *see* HAW. REV. STAT. § 171C-4 (Supp. 2011).

[173] HAW. REV. STAT. § 171C-3 (Supp. 2011). The board of directors consists of five voting members. The members include:

> (1) The chairperson of the board of land and natural resources, or the first deputy to the chairperson of the board of land and natural resources;
>
> (2) The director of finance, or the director's designee;
>
> (3) The director of business, economic development, and tourism, or the director's designee;
>
> (4) One member to be appointed by the speaker of the house of representatives; and
>
> (5) One member to be appointed by the president of the senate; provided that the persons appointed by the speaker of the house of representatives and the president of the senate shall possess sufficient knowledge, experience, and proven expertise in small and large businesses within the development or recreation industries, banking, real estate, finance, promotion, marketing, or management. The term of office of the two voting members appointed by the speaker of the House of Representatives and the president of the senate shall be four years each.

HAW. REV. STAT. § 171C-3(b) (Supp. 2011).

and the final member is appointed by the president of the Senate.[174] This Board appoints an executive director.[175]

The PLDC is responsible for identifying public lands that are suitable for development, procuring marketing analysis to determine the best revenue-generating programs for the public lands identified, entering into public-private agreements to appropriately develop those public lands, and providing leadership for their development, financing, improvement, or enhancement.[176]

2. Exemption from Land Use Requirements

From a Native Hawaiian and environmental perspective, Act 55's most troubling provision is Part I, Section 19 because it exempts development projects from State and County regulation. These exemptions include:

> [a]ll statutes, ordinances, charter provisions, and rules of any government agency relating to special improvement district assessments or requirements; land use, zoning, and construction standards for subdivisions, development, and improvement of land; and the construction, improvement, and sale of homes thereon; provided that the public land planning activities of the corporation shall be coordinated with the county planning departments and the county land use plans, policies, and ordinances.[177]

The exemptions do not directly address all of the statutory and constitutional protections for the exercise of traditional and customary Native Hawaiian rights.[178] Additionally, the Act excuses such development

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[174] HAW. REV. STAT. § 171C-3(b)(4)-(5) (Supp. 2011).

[175] HAW. REV. STAT. § 171C-3(c) (Supp. 2011).

[176] HAW. REV. STAT. § 171C-3(a) (Supp. 2011).

[177] *Id.* Surprisingly, in August 2012, PLDC executive director Llyod Haraguchi stated in a press release: "The PLDC is not exempt from federal laws, state environmental impact laws, nor state historic preservation laws. The PLDC is committed to working with county zoning and permitting requirements to ensure that its projects conform to county guidelines." Sophie Cocke, *PLDC Seeks to Quell Public Backlash*, HONOLULU CIVIL BEAT (Aug. 27, 2012), http://hawaii.land.blogs.civilbeat.com/post/30366499711/pldc-seeks-to-quell-public-backlash. However, neither the Act nor its draft administrative rules reflect his statement. Gary Hooser, director of the State Office of Environmental Quality Control, stated that Haraguchi's statement was misleading and that the PLDC's ability to circumvent some rules makes the state environmental laws the same as a "paper tiger." Leo Azambuja, *PLDC discusses developing state land at heated meeting*, THE GARDEN ISLAND (Sept. 2, 2012), http://m.thegardenisland.com/news/local/pldc-discusses-developing-state-land-at-heated-meeting/article_be2f4802-f4d6-11e1-87a5-0019bb2963f4.html.

[178] *See* HAW. REV. STAT. § 171C-19 (Supp. 2011).

from laws pertaining to ceded lands, such as the requirement specifying a two-thirds vote in both legislative houses to sell ceded lands.[179]

IV. ANALYSIS AND IMPLICATIONS

A. Act 55 Opens the Door to Violations of Existing Law and Policy

The controversy surrounding Act 55 pertains to its broad grant of powers to the PLDC, and its exemptions from and failure to affirm constitutional and statutory protections, which leave the door open for violations of such rights.[180] By failing to affirm these rights, Act 55 dismisses the legal foundation for Native Hawaiian traditional and customary practices and "allows a group of five men to decide whether to sell, lease, or develop Hawaii's long-coveted public trust lands—regardless of many laws established over the decades to protect those lands and ensure transparency."[181] An area of grave concern for Native Hawaiians is that the Act permits the PLDC to sell ceded lands, which comprise the majority of DLNR's land holdings, even though those lands are mandated to be held in trust for Native Hawaiians.[182]

1. Act 55 unreasonably regulates constitutionally and statutorily protected rights

In its current form, the PLDC's overreaching powers coupled with Act 55's broad exemptions facilitate blatant violations of existing constitutional and statutory provisions that govern the protection of traditional and customary rights for subsistence and cultural and religious purposes.[183]

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[179] *See* HAW. REV. STAT. § 171-50(c) (Supp. 2011).

[180] Sophie Cocke, *AG, DLNR Back Pedal On Problems With Land Development Corp*, HONOLULU CIVIL BEAT (Oct. 24, 2011), http://www.civilbeat.com/articles/2011/10/24/13421-ag-dlnr-back-pedal-on-problems-with-land-development-corp.

[181] Townsend, *supra* note 3.

[182] Cocke, *supra* note 180. According to Robert Harris, executive director of Sierra Club:

> there are still significant concerns about the agency . . . I think that there is a 'trust us attitude' about this new body. But the tremendous amount of power it has and the potential it has to allow development in areas [such as] pristine native Hawaiian forests, etc., just causes too much concern.

Sophie Cocke, *New State Land Development Head Known as Listener*, HONOLULU CIVIL BEAT (Nov. 21, 2011), http://www.civilbeat.com/articles/2011/11/21/13984-new-state-land-development-head-known-as-listener.

[183] *See Community Alliance on Prisons*, Testimony on Public Lands Development Administrative Rules, at 3 (Aug. 29, 2012), http://caphawaii.files.wordpress.com/2012/08/8-

Robert Harris, executive director of Sierra Club Hawai'i Chapter explained, "we are deeply concerned that while [the legislation] makes reference to culturally sensitive development, there are no opportunities for environmental or cultural input."[184] The text of the Act is ambiguous as to when in the development processes the PLDC will analyze traditional and customary rights issues.[185]

This is the most important yet unanswered question: when, if at all, will the PLDC analyze impacts on traditional and customary rights—during the negotiation stages of proposed projects, during development, or following development completion when a claim is brought forth regarding actual violations of traditional and customary rights?[186] If the answer is anything other than the first, then the negative ramifications of the Act on traditional and customary rights could be considerable.[187] Although the PLDC's proposed administrative rules allow individuals to petition the Board to request a contested case hearing, it is not clear whether the Board is adequately equipped to undertake a traditional and customary rights analysis because the Act does not provide guidance.[188] Thus, according to Jocelyn Doane, OHA's Senior Public Policy Analyst, "[i]f the PLDC is going to move forward it needs to establish sufficient protections and criteria to assist the board in making appropriate and culturally sensitive decisions."[189]

At least one member of the PLDC Board should be required to have experience or knowledge in traditional and customary rights law because DLNR's lands are subject to the public trust doctrine and such a requirement may ensure the Board properly addresses Native Hawaiian claims presented, while also respecting Hawaii's unique history, environment, and culture.[190] Currently, board members are not statutorily

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29-12-cap-pldc-testimony-1.pdf (explaining that "[e]xempting the PLDC from various laws that ensure protection for Native traditional and customary rights are sometimes the only way that Native Hawaiians are able to participate in development and land use processes and the only way that state agencies know about the existence of cultural practices and resources in an area.").

[184] Cocke, *supra* note 15.

[185] *See generally* HAW. REV. STAT. § 171C (Supp. 2011).

[186] Interview with Melody MacKenzie, Professor of Law, William S. Richardson School of Law, in Honolulu, Haw. (Apr. 15, 2012).

[187] *Id.*

[188] PLDC Administrative Rules Draft, at 11.

[189] Brianne Randal, *Selling state land for revenue generates heated debate*, KHON2 (Aug. 30, 2012), http://www.khon2.com/news/local/story/Selling-state-land-for-revenue-generates-heated/Vq-a0x0JZkqVy3h_SEfY1w.cspx.

[190] *See* D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. LAW REV. 127, 167 (2011).

required to have experience or knowledge in traditional and customary rights law. Because DLNR's lands are subject to the public trust doctrine, it is curious that the PLDC does not have this requirement like State entities such as the Commission on Water and Resource Management ("CWRM"),[191] an administrative agency also housed within DLNR. CWRM is subject to constitutional and statutory protections of traditional and customary and other rights[192] because it is responsible for managing and protecting Hawaii's water resources, which are part of the public trust.[193] Moreover, this requirement is necessary because when economy and politics compete with traditional and customary rights, history has demonstrated that the exercise of such rights will likely bend to the State's economic needs.[194]

Act 55's broad exemptions from land use law, its silence as to the timeframe for assessing impacts of development on traditional and customary rights, and its failure to require a Board member to possess a traditional and customary rights background or experience, likely allow for unreasonable regulation of traditional and customary Native Hawaiian rights. Act 55's failure to do so may not be found unreasonable because not all boards and commissions are mandated to adopt such requirements; however, a solution to this problem may be to add requirements to all the boards and commissions. Nonetheless, Act 55, in its current form, suggests that such rights are no longer inviolate rights because of the State's option to shirk its affirmative duty to protect and preserve such rights.

2. State and county zoning and regulation

Another related issue arising from Act 55 is whether the Act overturns the holding in *Kapa'akai* by exempting developers from the traditional and customary rights analysis required when petitioning for a reclassification, subdivision, or development of lands.[195] Act 55 and its draft administrative rules do not require the three-prong *Kapa'akai* analysis and the Act is silent regarding when in the development process the PLDC Board will apply the analysis to safeguard traditional and customary rights, if at all.[196]

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[191] *See* HAW. REV. STAT. § 174C-5 (2008) (detailing the Commission's general powers and duties).

[192] McBryde Sugar Co., v. Robinson, 54 Haw. 174, 186, 504 P.2d 1330, 1338 (1973).

[193] *Law & Regulations*, COMMISSION ON WATER RESOURCE MANAGEMENT, *available at* http://hawaii.gov/dlnr/cwrm/aboutus_regulations.htm.

[194] *See* Sproat, *supra* note 193, at 167-68.

[195] *Compare* HAW. REV. STAT. § 171C (Supp. 2011), *with* Ka Pa'akai O Ka'Āina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000).

[196] HAW. REV. STAT. § 171C (Supp. 2011).

Additionally, because all such development will be exempt from land use and zoning regulations, the PLDC and private corporations will be able to reclassify and develop DLNR lands without petitioning for approval from the LUC or the counties.[197] Without the *Kapa'akai* analysis, increased development of these lands may create a situation in which those lands no longer meet the *Hanapī* test for the legitimate exercise of traditional and customary rights on undeveloped or "less than fully developed lands."[198] Reclassifying and developing conservation lands, such as Mauna Kea and Haleakalā, will expressly prohibit Native Hawaiians from continuing to gather and exercise traditional practices in those areas.[199] Many native forests, traditional fishponds, and the last surviving natural and cultural resources are zoned conservation.[200] Disregarding protective rules for the conservation district can mean "irreversible loss of ha[b]itat, native species, and sacred wahi pana."[201]

B. Inquiry of Act 55's affects on Native Hawaiians through the "Four Indigenous Values for Contextual Legal Analysis"

To assess Act 55's effects on Native Hawaiians, it is imperative to employ a contextual legal analysis designed specifically for native peoples.[202] A contextual legal analysis is critical here because it provides a framework for native peoples' unique pursuit of justice, "which is less about equality and more about self-determination."[203] Native peoples' histories and claims are substantially different from other immigrant groups, imported slaves, and conquered indigenous populations in the United States and because of these differences, a contextual legal analysis of Native claims must "focus[] on the effects of land dispossession, cultur[al] destruction, loss of sovereignty, and, in turn, on claims to self-determination and nationhood (rather than on equality and integration)."[204]

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[197] *Id.*

[198] State v. Hanapi, 89 Hawai'i 177, 186-87, 970 P.2d 485, 494-95 (1998).

[199] *See* T. Ilihia Gionson, *What Will Become of Maunakea: E aha 'ana 'o Maunakea?: A proposed telescope reignites discussion of the future of astronomy on the piko of Hawai'i Island*, KA WAI OLA, Vol. 25 (Nov. 2008).

[200] *Conservation Lands*, KAHEA, http://kahea.org/issues/land-and-culture/conservation-lands-1.

[201] *Id.*

[202] Sproat, *supra* note 193, at 170.

[203] *Id.* at 167; *see* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 342 (1994); Rebecca Tsotsie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 45 (2005).

[204] Sproat, *supra* note 193, at 167 (citations omitted).

Additionally, contextual legal analysis is preferable over other analytical methods[205] because it reveals that decision-making in difficult cases is not necessarily objective and that choices are partially influenced by "the interests and values accommodation undergirding the law and by decision-makers' political and economic perspectives."[206] Therefore, contextual legal analysis also "interrogates the rule-related choice made (measured against rejected choices), the values and interests served by that choice, and its short and long-term consequences."[207] Assessment of Act 55's impact on Native Hawaiians through this analytical framework is imperative because Act 55 pertains specifically to lands, and Native Hawaiians have a spiritual relationship to those lands. This analysis facilitates a more thorough understanding of the specific short and long-term effects on Native Hawaiian land, culture, and self-determination.

Overall, contextual legal inquiry for native peoples requires attention to four values of restorative justice embodied in human rights self-determination principles: 1) cultural integrity; 2) lands and natural resources; 3) social welfare and development; and 4) self-government.[208] Each of these values is equally important because they are intimately intertwined.[209] Colonization significantly harmed native peoples in each of these four categories, thus the framework focuses on the rebuilding of suppressed culture, returning natural and cultural resources upon which culture depends to renew spirituality, and restoring self-government.[210]

In the context of Native Hawaiians, the arrival of Westerners in Hawai'i led to population decimation with the introduction of diseases.[211] The pre-

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[205] BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 2 (2009) ("We may characterize formalism as the descriptive theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required."); *see* Sproat, *supra* note 193, at 178.

[206] Sproat, *supra* note 193, at 170 (explaining that decisionmakers' ideological views impact their legal decisions, especially in difficult cases involving cultural, economic, legal, and political ramifications.).

[207] *Id.*

[208] *Id.* at 171-73 (explaining that a contextual analysis inquiry for Native Peoples requires refinement because "'Indigenous Peoples' who are differently situated from others because of the long-term impacts of colonial, contextual legal analysis need further refinement to explicitly integrate Native people's unique history and cultural values into a larger analytical framework that accounts for restorative justice and the key dimensions of self-determination"); *see* Anaya, *supra* note 206, at 342-60.

[209] Sproat, *supra* note 193, at 173.

[210] *Id.*; *see* Anaya, *supra* note 206, at 342.

[211] O.A. BUSHNELL, THE GIFTS OF CIVILIZATION: GERMS AND GENOCIDE IN HAWAI'I 132-54 (1993).

European Native Hawaiian population of approximately one million dropped to less than 40,000 within the first century of contact.[212] Westerners' colonization scheme included the imposition of English in all instructional schools and a ban on cultural activities and use of the Hawaiian language.[213] Included within this scheme was the displacement of Native Hawaiians from their homelands with the transition from communal ownership to a system of private property during the Māhele processes.[214] The disposession of lands severely restricted Native Hawaiians' access to land and water, devastating the Native Hawaiian psyche given the spiritual and familial connection to land.[215] For these reasons, issues affecting Native Hawaiians—like Act 55—are best analyzed within a contextual legal framework.

1. Cultural integrity

Cultural integrity is at the heart of a native peoples' ability to endure and thrive.[216] Culture determines identity and sense of place and thus it "cannot exist in a vacuum and its integrity is linked to land and other natural resources upon which Indigenous Peoples depend for physical and spiritual survival."[217] Indigenous peoples are in a constant struggle to preserve and perpetuate culture due to colonization and modernization.[218] For example, Ty Kāwika Tengan wrote:

> Hawaiian men in general have lost their sense of place and role in society. Often they link this to the loss of the old ways—the religious formations, political systems, cultural practices, and relationships to land that our ancestors knew. With the arrival of colonialism, Christianity, and

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[212] *Id.*

[213] RICHARD R. DAY, *The Ultimate Inequality: Linguistic Genocide, in* LANGUAGE OF INEQUALITY 163, 166-67 (Nessa Wolfsman & Joan Manes eds., 1985).

[214] MCGREGOR, *supra* note 2, at 37-40.

[215] Elizabeth Ann Ho'oipo Kāla'ena'auao Pa Martin et al., *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights,* 18 U. HAW. L. REV. 71, 90-93 (1996).

[216] Sproat, *supra* note 193, at 177; TY P. KAWIKA TENGAN, NATIVE MEN REMADE: GENDER AND NATION IN CONTEMPORARY HAWAI'I 5 (2008) (explaining that "culture, place, and gender are deeply intertwined and cannot be separated from one another"); *see* W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 ST. THOMAS L. REV. 25, 35 (1996) ("integrity of inner worlds of peoples—their rectitude systems or their senses of spirituality—that is their distinctive humanity. Without an opportunity to determine that integrity, their humanity—and ours—is denied.").

[217] Sproat, *supra* note 193, at 173.

[218] Kristin Ann Mattiske, *Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom,* 27 BROOK. J. INT'L L. 1105, 1109 (2002).

> modernization, all of these configurations of knowledge and power were radically transformed; some say there were lost to the Pō [darkness].[219]

Due to culture's integral role, it is analyzed first to determine "whether actions or decisions support and restore cultural integrity as a partial remedy to past harms, or perpetuate conditions that continue to undermine cultural survival."[220]

Act 55's broad exemptions may allow unreasonable regulation of rights valued by Native Hawaiians and guaranteed by Article XII, Section 7, Hawai'i Revised Statutes sections 1-1 and 7-1, and create a barrier to the perpetuation of traditional and customary practices.[221] In essence, Act 55 opens the floodgates to unprecedented development, "including a handful of rural community strongholds where native Hawaiian beliefs, values, traditions, and customs continue to be honored and practiced."[222] An example of the PLDC's ability to overstep constitutional and statutory provisions and stifle traditional and cultural practices is evidenced by the introduction of Senate Bill ("S.B.") 2325 on January 20, 2012.[223] S.B. 2325 provides the PLDC with the power to develop geothermal energy projects on public trust lands on Maui and the Island of Hawai'i.[224]

Many Native Hawaiians consider geothermal development a desecration of Pele, the volcano goddess.[225] Pele is genealogically connected to all

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[219] TENGAN, *supra* note 219, at 5-6; Sproat, *supra* note 193, at 178.

[220] Sproat, *supra* note 193, at 179.

[221] *Compare* HAW. CONST. art. XII, § 7, *with* HAW. REV. STAT. §§ 1-1, 171C (2008 & Supp. 2011).

[222] Sophie Cocke, *Hawaii Land Development Corp Still Controversial,* HONOLULU CIVIL BEAT (Feb. 8, 2012), http://www.civilbeat.com/articles/2012/02/08/14759-hawaii-land-development-corp-still-controversial/.

[223] S.B. 2325, 26th Leg. Reg. Sess. (Haw. 2012). Act 55's provisions and recently released draft administrative rules do not clearly indicate its effects on Native Hawaiians. Therefore, in order to analyze Act 55's possible effects on Native Hawaiians, this paper will employ an Indigenous Peoples' contextual legal analysis of S.B. 2325.

[224] *Id.* According to Hawai'i law, geothermal energy is:

> the natural heat of the earth, the energy, in whatever form, below the surface of the earth present in, resulting from, or created by, or which may be extracted from, such natural heat, and all minerals in solution or other products obtained from naturally heated fluids, brines, associated gases, and steam, in whatever form, found below the surface of the earth, but excluding oil, hydrocarbon gas, other hydrocarbon substances, and any water, mineral in solution, or other product obtained from naturally heated fluids, brines, associated gases, and steam, in whatever form, found below the surface of the earth, having a temperature of 150 degrees Fahrenheit or less, and not used for electrical power generation.

HAW. REV. STAT. § 182-1 (2008).

[225] Paul Faulstich, *Hawai'i's Rainforest Crunch: Land, People, and Geothermal Development,* CULTURAL SURVIVAL (Mar. 2, 2010), http://www.culturalsurvival.org/

Native Hawaiians through the Kumulipo and her very existence is indicative of the creation of land itself.[226] Therefore, for many years, Native Hawaiians adamantly protested geothermal development in Hawai'i and were effective in limiting such development by challenging the validity of a land exchange between the State and the Campbell Estate in *Pele Defense Fund v. Paty*.[227] In 1985, the State exchanged public 27,800 acres of ceded lands, including Wao Kele o Puna Natural Area Reserve on Hawai'i Island, for 25,800 acres of Campbell Estate's privately owned lands.[228] In 1989, a group of Native Hawaiians, Pele Defense Fund (PDF), brought suit against the Board of Land and Natural Resources and True Energy Geothermal for breach of the 5(f) trust responsibilities and violations of Art. XII, section 7 by limiting access to undeveloped areas of Wao Kele o Puna for traditional subsistence, cultural, and religious purposes because of the abundance of native plants and culturally significant resources in the area.[229] Leading up to litigation, many were unable to practice and perpetuate longstanding religious traditions as well as gathering and access to the Puna Forest Areas, thereby severely damaging their cultural integrity.[230] Although the Hawai'i Supreme Court ruled in favor of PDF, S.B. 2325 resurrects the Native Hawaiian concerns that fueled *PDF v. Paty*.[231]

Without proper consideration throughout the geothermal development processes, S.B. 2325 coupled with Act 55's broad exemptions severely undermines Native Hawaiian values and religious practices by "impinging upon the continuation of all essential ritual practices and [impacting] the ability to train young persons in traditional religious beliefs and practices, and the ability to convey these to future generations."[232] According to PDF, geothermal development will cause "spiritual-religious, cultural, psychological and sociological injury and damage to the people who worship and live with Pele."[233]

The entire Native Hawaiian community, however, does not oppose geothermal energy development. Richard Ha, co-chairman of the recently

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ourpublications/csq/article/hawaiis-rainforest-crunch-land-people-and-geothermal-development.

[226] MCGREGOR, *supra* note 2, at 187.

[227] Faulstich, *supra* note 228.

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

[229] *Id.*

[230] *See* Pele Def. Fund v. Estate of James Campbell, Civ. No. 89-089 (Hilo)(2002)(Findings of Fact, Conclusions of Law, and Order).

[231] Pele Defense Fund v. Paty, 73 Haw. 578, 621, 837 P.2d 1247, 1272-3 (1992); *see* S.B. 2325, 26th Leg., Reg. Sess. (Haw. 2012).

[232] *See* MCGREGOR, *supra* note 2, at 188.

[233] *Id.*

formed Geothermal Energy Working Group on the Big Island, claimed "[o]verwhelmingly [the Native Hawaiian community] is in favor, provided geothermal is done correctly and with respect," also noting that there will always be some resistance.[234] Even Mililani Trask, a Native Hawaiian activist and former opponent of the geothermal operations on the Big Island, is publicly advocating for increasing geothermal development.[235] She has been working with Honolulu-based Innovations Development Group ("IDG"), a Native Hawaiian renewable-energy development firm, which recently developed two geothermal plants in New Zealand.[236] The firm hopes to bring its knowledge of working with native cultures to developing geothermal energy in Hawai'i.[237] However, community opposition to these initiatives continues.[238] Given the Act's potential negative impact on the cultural integrity of Native Hawaiians, as exhibited by recent initiatives to develop geothermal energy, solutions should be aimed at legislation that requires appropriate assessment of such impacts before any development takes place.

2. Land and Resources

Land and resources are crucial for the survival of indigenous cultures.[239] Native Hawaiians have a sacred relationship with land, their ancestor, which foreigners trampled and decimated over time.[240] Thus, "the appropriation of ancestral homelands and resources facilitates Indigenous Peoples' loss of identity and culture."[241] Land also provides a means of self-determination because a land base allows indigenous peoples to live and develop freely to pursue cultural and political sovereignty.[242] This section will evaluate "whether a particular action perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way."[243]

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[234] Sophie Cocke, *Geothermal energy holds vast potential to power Big Island,* PACIFIC BUSINESS NEWS (Oct. 10, 2010), http://www.bizjournals.com/pacific/stories/2010/10/11/story6.html?b=1286769600%5E4066981&s=industry&i=energy#ixzz125iXkmbn.

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Video: Geothermal Disagreement Boils Over at County Council,* BIG ISLAND VIDEO NEWS.COM (Apr. 5, 2012), http://www.bigislandvideonews.com/2012/04/05/video-geothermal-disagreement-boils-over-at-county-council/.

[239] Anaya, *supra* note 206, at 346.

[240] *Id.* at 348.

[241] Sproat, *supra* note 193, at 181; Anaya, *supra* note 206, at 348-49.

[242] Sproat, *supra* note 193, at 181.

[243] *Id.*

Opponents of Act 55 characterize the law as so far-reaching that it opens up opportunities for abuse.[244] Others liken Act 55 to the Māhele and argue that it is reminiscent of the Admissions Act, which spurred mass international investment causing Hawaii's development explosion in the 1960s.[245] The Act allows the PLDC to enter into agreements with private corporations, many of which may not be sensitive to Hawaii's unique environment and culture.[246] According to one writer, "[b]y handing over public lands to major, often transnational or international corporations, we will essentially be giving control of the 'āina to for-profit companies with no long-term interests in Hawai□i and no reason to conserve the character of our islands."[247] This would once again subjugate land, resources, and rights to private economic desires.

The bulk of DLNR's land holdings are ceded lands, including ceded lands zoned for conservation.[248] These lands include the very last bits of accessible, undeveloped land containing the natural resources needed for subsistence and the continued exercise of traditional and customary rights.[249]

In the context of S.B. 2325, culturally significant lands and natural resources may be significantly affected by the PLDC's development of geothermal energy. For example, in *PDF v. Paty*, the litigation centered around Wao Kele o Puna on Hawai'i Island because of its potential for geothermal energy development.[250] Wao Kele o Puna[251] is a 25,856 acre

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[244] Conrow, *supra* note 21.

[245] Saiki, *supra* note 4.

[246] Cocke, *supra* note 225.

[247] Lauren Muneoka, PLDC Opens the Door to Unchecked Big Development, KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE (Oct. 29, 2011, 5:05PM), kahea.org/blog/pldc-opens-the-door-to-unchecked-big-development.

[248] *See* Kealoha Pisciotta, *Testimony in Opposition to House Bill 2737: Relating to the Disposition of Public Lands*, MAOLIWORLD (Feb. 17, 2010, 11:21AM), http://maoliworld.com/forum/topics/saying-no-to-selling the?page=1&commentId=2011971%3AComment%3A240782&x=1#2011971Comment240782; HAW. REV. STAT. § 183C-1 (2008) (stating that "the legislature finds that lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply. It is therefore, the intent of the legislature to conserve, protect and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare").

[249] *Natural Area Reserves, Land and Cultural Rights*, KAHEA: THE HAWAIIAN-ENVIRONMENTAL ALLIANCE, http://kahea.org/issues/land-and-culture/natural-area-reserves. Additionally, some of these undeveloped lands, for example Wao Kele o Puna, are on private lands and thereby even more at risk of development by the PLDC.

[250] Pele Def. Fund v. Paty, 73 Haw. 578, 587, 837 P.2d 1247, 1255 (1992).

[251] Literally translated as "rain belt of Puna." *See* MARY KAWENA PUKU'I & SAMUEL H.

native rainforest on the slopes of the Kīlauea Volcano[252] traditionally used by Native Hawaiians for subsistence, and cultural and religious purposes.[253] In ancient Hawai'i, Native Hawaiians used the lands for planting kukui, ginger, kalo, ti leaf, and awa.[254] In one area of Wao Kele o Puna, Native Hawaiian families residing in Kalapana cultivated mala'ai, or dryland garden lots, for subsistence and cultural purposes.[255] There are also at least two known lava tube systems in Wao Kele o Puna containing archeological evidence of historic use of the tubes and surface lands for hunting, gathering, warfare, and burial.[256] Moreover, Wao Kele o Puna provides habitat for more than 200 native plants and animals, including threatened and endangered species.[257] Because Wao Kele o Puna is the last intact large native lowland rainforest in Hawai'i, it is also serves as a protected passageway for native birds travelling between the mountains to the sea.[258]

The Sierra Club—Hawai'i Chapter strongly opposes geothermal development or leasing lands located within or adjacent to federal, state, or local parks, wildlife refuges and native ecosystems providing habitat for rare or endangered species because of the negative effects, including increased seismicity[259] and emmitance of toxic air pollutants such as hydrogen sulfide and nitrogen oxides.[260] Even DLNR recognizes the negative effects of privatization, conceding: "[m]any of Hawaii's cultural, natural, agricultural, historical, and recreational resources are lost when private lands possessing these resources are sold and developed."[261] Despite DLNR's recognition of the impacts of lost lands on Native Hawaiians, the language of Act 55 allows the PLDC to sell and develop

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ELBERT, HAWAIIAN DICTIONARY 382 (1986)

[252] Melody Kapilialoha MacKenzie, et al., *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources,* 21 NAT. RESOURCES & ENV'T 37, 38 (2007).

[253] *See* Press Release, Office of Hawaiian Affairs, *Agreement Announced to Protect More Than 25,000 Acres of Rainforest on Hawaii Island* (Sept. 12, 2005), *available at* http://www.enn.com/press_releases/823.

[254] *Id.*

[255] *See* Pele Def. Fund v. Estate of James Campbell, Civ. No. 89-089 (Hilo)(2002)(Finding of Fact, Conclusions of Law, and Order).

[256] *Id.*

[257] Andrew M. Crain, *Indigenous Land Regularization in Latin America,* NATIVE WEB, http://www.nativeweb.org/papers/essays/crain.html#_ftn51.

[258] *Id.*

[259] ALYSSA KAGEL, et. al, A GUIDE TO GEOTHERMAL ENERGY AND THE ENVIRONMENT 54 (2007), http://geo-energy.org/reports/environmental%20guide.pdf (explaining that "geothermal production and injection operations have at times resulted in low-magnitude events known as 'microearthquakes'").

[260] *Id.* at 22.

[261] *Legacy Land Conservation Program,* HAWAII.GOV, http://www.hawaii.gov/dlnr/dofaw/llcp.

these precious public lands permitting further alienation of ancestral properties and causing further devastation to the Native Hawaiian psyche.

3. Social Welfare and Development

As a direct result of colonization, most indigenous populations live in economically disadvantaged conditions because of progressive plundering of indigenous peoples' lands and resources over time, processes that have impaired Native Hawaiians, leaving them the poorest amongst the poor.[262] Native Hawaiians continue to face "economic deprivation, low educational attainment, poor health status, substandard housing and social dislocation."[263] Health, education, an adequate standard of living and other social welfare measures must be improved to ensure the continued survival of any group; therefore these socio-economic considerations must be examined.[264] This section analyzes whether or not the Act 55 improves social welfare conditions or perpetuates the status quo of Native Hawaiians.

Act 55 emphasizes the State's desire to enter into public-private agreements.[265] Some opponents have charged that private corporations, exempt from building and construction regulations, may likely employ out-of-state or even international laborers.[266] The economic advantages of deregulation in that scenario would flow to corporations but not laborers from Hawai'i. Even the initial revenues generated from such developments will benefit the companies first and not the State.[267] These sweetheart deals, structured to incentivize private corporations, allow for monetary gains to be felt initially by the company, then the State, and lastly by the residents of Hawai'i.[268] Most disconcerting is that "there is nothing in the bill to mitigate against corporate greed."[269] Public-private partnerships end up saddling "unnecessary risk onto taxpayers while protecting the interests of big developers, namely their bottom line."[270]

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[262] Sproat, *supra* note 193, at 181-82; Anaya, *supra* note 206, at 315 (The colonization of Hawai'i and loss of title forced Native Hawaiians to become members of the "floating population crowding into congested tenement districts of the larger towns and cities of the Territory under conditions which many believed would inevitably result in the extermination of the race.").

[263] Doe v. Kamehameha, 470 F.3d 827, 833 (9th Cir. 2006) (citations omitted).

[264] Sproat, *supra* note 193, at 182.

[265] *See* HAW. REV. STAT. § 171C-1 (Supp. 2011).

[266] Telephone Interview with Marti Townsend, Program Director, Staff Attorney, KAHEA: The Hawaiian-Environmental Alliance, in Honolulu, H.I. (Feb. 6, 2012).

[267] *Id.*

[268] *Id.*

[269] Muneoka, *supra* note 250.

[270] *Id.*

The Act specifically created the PLDC to generate profits for DLNR in order to assist DLNR with maintaining and enhancing its current landholdings.[271] The Act does not expressly provide a mechanism for revenues to be generated for health programs, educational programs, and living standards.[272] In other words, the PLDC alone would not generate money for Native Hawaiians.[273] Thus, whether the Act improves the health, education, and living standards of Native Hawaiians is unclear.[274] Until the revenues generated are so great that they flow into social welfare programs throughout the State, the Act itself will not better the condition of Native Hawaiians. Additionally, maintaining resources for the exercise of traditional and customary practices would improve the living conditions in rural communities thereby developing those resources to generate revenues could have the opposite impact.[275] However, when coupled with the right project, Native Hawaiians may be able to profit.

If enacted, S.B. 2325 may enable Native Hawaiians to benefit from revenues generated by geothermal development ventures.[276] For example, since 1993, Puna Geothermal Venture ("PGV") has delivered renewable energy to Hawai'i Electric Light Company, providing nearly twenty percent of the Big Island's electricity needs.[277] PGV is the only commercial geothermal power plant in the State and is located in the Puna District in Kilauea Volcano's East Rift Zone.[278] Most importantly, PGV is required by law to share a portion of its profits with DLNR, which, in turn, shares twenty percent of those royalties with OHA.[279] OHA uses those revenues for public trust purposes, including the betterment of conditions for Native

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[271] HAW. REV. STAT. § 171C-3 (Supp. 2011).

[272] *See id.*

[273] *Id.*

[274] *Id.*

[275] MOLOKAI: FUTURE OF A HAWAIIAN ISLAND, 10 (2008), http://molokai.org/fileadmin/user/pdf/molokai.pdf.

[276] S.B. 2325, 26th Leg., Reg. Sess. (Haw. 2012).

[277] Kayleen Polichetti, *Puna Geothermal Venture Celebrates 15 Years of Geothermal Power in Hawaii*, BLOOMBERG (Dec. 11, 2008), http://www.bloomberg.com/apps/news?pid=conewsstory&refer=conews&tkr=ORA:US&sid=acRZ78EIGRi0.

[278] *Id.*

[279] DLNR appropriates its geothermal royalties as follows: "1) Department of Land and Natural Resources receives 50%, 2) County of Hawai'i receives 30%, [as required by state law,] and 3) Office of Hawaiian Affairs (OHA) receives 20%." GEOTHERMAL WORKING GROUP REPORT 9 (2012), *available at* http://records.co.hawaii.hi.us/WebLink/DocView.aspx?id=56387&dbid=1; *see also* HAW. REV. STAT. § 182-18 (2008); HAW. REV. STAT. § 182-7(c)(2008); HAW. REV. STAT. § 171-29 (2008 & Supp. 2011). However, no law expressly requires DLNR to share its royalties with OHA. Therefore, it may be necessary to ensure this allocation scheme exists for all geothermal ventures.

Hawaiians, including scholarship programs, community grants, and business loans made available to Native Hawaiians yearly.[289]

Though geothermal could create opportunities to generate revenues for Native Hawaiians, the potential for revenues could be hindered by a 2006 settlement agreement between OHA and the State over ceded land revenues.[290] According to Act 178, the State must pay OHA $15.1 million annually and any change in that policy must be addressed by future legislation.[291] A subsequent problem may arise if geothermal energy development produces a substantial amount of revenue, or an amount greater than twenty percent of the generated revenues, requiring OHA to request the State to increase the $15.1 million annual payment so it better reflects the State's geothermal profits.[292] Alternatively, PGV created an Asset Fund that has helped Hawai'i County obtain two new county buses and a Geothermal Relocation and Community Benefits Fund that helped revamp the Pahoa Recycling and Transfer Station.[293]

On the other hand, health concerns surround geothermal development in Hawai'i. The Sierra Club of Hawai'i warns that:

> [g]eothermal . . . [is an] industrial activit[y] that may inevitably affect air, water and land resources. Among these impacts are the emissions of toxic gases into the air and the leaching of polluting brines into the groundwater aquifer. Development on conservation-zoned lands will adversely affect the viability of native rainforests. Noise pollution will adversely affect both the wilderness and the residents in neighboring communities.[294]

In 1991, a blowout during a drilling operation at PGV sent "a 60-foot tower of steam into the air and more than a ton of hydrogen sulfide to the surface, prompting the evacuation of nearby residents."[295] Moreover, complaints of health problems, noise and the disruption of Hawaiian cultural practices have made the road to geothermal a rocky one.[296] Today, PGV boasts about

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[289] *See generally* OFFICE OF HAWAIIAN AFFAIRS, http://www.oha.org (last visited Oct. 12, 2012).

[290] Act of June 7, 2006, No. 178, Haw. Sess. Laws 702.

[291] *Id.*

[292] Interview with Melody MacKenzie, Professor of Law, William S. Richardson School of Law, Honolulu, H.I. (Apr. 15, 2012).

[293] *What's happening at PGV, Hele On, Uahiapele!*, PUNA GEOTHERMAL VENTURE HAWAII (Feb. 12, 2010), http://www.punageothermalventure.com/News/92/hele-on-uahiapele (according to the article "$700,000 from the geothermal fund will allow a third trash chute to be added to meet the growing Pahoa district needs. The funds are part of an annual sum paid to the County by PGV").

[294] *Geothermal Energy Policy*, SIERRA CLUB HAWAI'I (Aug. 2012), http://www.sierraclubhawaii.com/geothermal-energy-policy.php.

[295] Cocke, *supra* note 237.

[296] *Id.*

its state-of-the-art technology, which generates power by extracting steam and hot water from this volcanic hot spot and converting it into electricity.[297] Additionally, PGV claims that one hundred percent of its fluids are injected back into the Earth's interior without exposure to the open air and as a result the plant has near zero emissions.[298] Despite these claims, it is acknowledged that there are general health hazards associated with geothermal development.[299] Because many Native Hawaiian communities live near or adjacent to geothermal cites, their health could be severely compromised.[300]

Geothermal development that is not culturally sensitive will impact Native Hawaiian social and psychological health through the loss of wahi pana, practices, and natural and cultural resources, which Native Hawaiians heavily depended on for subsistence practices.[301] Native Hawaiian engagement in subsistence practices provides a myriad of benefits related to family cohesion, health, and community well-being.[302] A subsistence economy promotes "sharing and redistribution of resources, which creates a social environment that cultivates community and kinship ties, emotional interdependency and support, prescribed roles for youth, and care for the elderly."[303] Moreover, engaging in subsistence practices cultivates a strong sense of environmental kinship that is the foundation of Hawaiian spirituality.[304] Therefore, geothermal development that restricts subsistence and traditional practices will adversely affect Native Hawaiians' sense of self and place by creating insecurity and frustration, which carry over from one generation to the next facilitating social breakdown.[305] Native Hawaiians expressed this same perpetual feeling of loss following Statehood with the urbanization of Honolulu, O'ahu, which is evidenced by

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[297] Polichetti, *supra* note 285.

[298] *Id.*

[299] *See* SIERRA CLUB HAWAI'I, *supra* note 294.

[300] *Id.* In April 2012, at a series of public meetings and council hearings, Hawai'i Island residents complained about "noxious smells and noise and of symptoms including burning eyes, headaches, nausea, bronchitis, asthma attacks and miscarriages []and [] more health problems, including tumors, cysts, autoimmune disorders and strokes." Alan D. McNarie, *Politics—A Geothermal Retrospective*, BIG ISLAND CHRONICLE (Sept. 1, 2012), *http://www.bigislandchronicle.com/2012/09/01/politics-a-geothermal-retrospective/.*

[301] MCGREGOR, *supra* note 2, at 17.

[302] *Id.*

[303] *Id.* at 18.

[304] *Id.* (explaining that engagement in subsistence practices "reinforce[s] [Native Hawaiians'] knowledge about the landscape, place-names and meanings, ancient sites, and areas where rare and endangered species of flora and fauna exist . . . . provid[ing] a critical link between the past and present.")

[305] *See* MCGREGOR, *supra* note 2, at 17.

the growing rate of unemployment, family separations, welfare loads, and juvenile delinquency, and adult crimes in the Native Hawaiian community.[306]

For many Native Hawaiians, subsistence practices are also a substantial part of the economy.[307] In Puna, Native Hawaiian residents supplement their incomes by engaging in subsistence fishing, hunting, and gathering.[308] In 1982, the U.S. Department of Energy conducted a subsistence activities survey of Native Hawaiians in Puna on Hawai'i Island to determine the social impact of geothermal energy development in the area.[309] Of those surveyed, thirty eight percent engaged in subsistence hunting in adjacent forests and forty eight percent gathered medicinal plants.[310] Over ten years later, in 1994, another study assessed the various cultural impacts of geothermal energy development in Puna, and again found continuity of subsistence farming, hunting, gathering, and fishing.[311] These surveys suggest that traditional subsistence activities have been an integral way of life for Native Hawaiians in Puna and that restricting such practices will negatively affect Native Hawaiians' economic sufficiency and their ability to provide themselves with food.

Overall, it is unclear whether geothermal development will improve health, education, and living standards. It may do so, but only if 1) there is an allocation of royalties to OHA or another Native Hawaiian agency; 2) the monies overflow into state health, education, or housing programs; and 3) precautions are made to guard health.

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[306] *Id.* (quoting an interview of Daniel Napela Aki by Mary Kawena Puku'i, March 6, 1961, no. 107.1.2.).

[307] *Id.* at 18. For example, subsistence accounts for thirty eight percent of Native Hawaiians' food source on Moloka'i. MCGREGOR, *supra* note 2, at 246. When Native Hawaiians on Moloka'i were forced to abandon subsistence practices due to lack of availability, the public assistance rates sky rocketed. *Id.* In March of 1993, 24.4 percent of the population received food stamps, twelve percent received Aid to Families with Dependent Children, and 32.5 percent received Medicaid. *Id.*

[308] *Id.* at 180. A survey conducted in 1971 by the University of Hawai'i revealed that "hunting in the Puna Forest Reserve [] yielded meat that comprised a significant amount of the regular diet of Native Hawaiian households in the area." *Id.* at 180-81.

[309] *Id.* at 181 (stating that the U.S. Department of Energy surveyed eighty five percent of the adult Native Hawaiian population, equaling 351 out of 413 Native Hawaiians).

[310] *Id.*

[311] *Id.* (the study was called the "Native Hawaiian Ethnographic Study for the Hawai'i Geothermal Project Proposed for Puna and Southeast Maui").

4. Self-governance

This history of United States colonization of indigenous peoples resulted in the loss of political autonomy, leaving many Native populations dependent on the federal government.[312] "Cultural and political sovereignty is essential for Indigenous peoples' self determination."[313] Given Native Hawaiians' painful history, this section of the analysis must address whether the Act "perpetuates historical conditions imposed by the colonizer or will attempt to redress the loss of self-governance."[314]

PLDC's broad power to further develop and alienate ceded lands will have catastrophic effects on the ability of Native Hawaiians to form a land base for a new governing entity.[315] The State has already sold thousands of acres of ceded lands since statehood.[316] Currently, about half of the remaining ceded lands are located in national parks.[317] DLNR controls roughly 1.2 million acres of state-owned lands, but is unable to distinguish which properties are ceded lands.[318] Other state agencies such as the University of Hawai'i own 102 acres of ceded lands.[319] These state-owned lands fit the description of what the PLDC will primarily seek to develop for tourism and recreation.[320]

Because all ancestral lands, including ceded lands, are of great historical and cultural significance to the Native Hawaiian community, a land base consisting predominantly, if not entirely of ceded lands is optimal to strengthen and perpetuate culture, socio-economic sufficiency, and self-governance.[321] The Act's silence regarding the requirement of a two-thirds

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[312] Sproat, *supra* note 193, at 183.

[313] *Id.* at 183. *See also* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 832 (2007).

[314] Sproat, *supra* note 193, at 183.

[315] An issue far too complex to adequately address within this section is the impact of selling and alienating ceded lands on federal recognition efforts. Federal recognition creates a government-to-government relationship between the United States and the government of the recognized indigenous peoples. *See* Le'a Malia Kanehe, *The Akaka Bill: The Native Hawaiians' Race For Federal Recognition*, 23 U. HAW. L. REV. 857, 859-60 (2001) (explaining that "the United States recognizes native peoples' right to self-determination through federal recognition.).

[316] Office of Hawaiian Affairs v. Hous. and Cmty. Dev. Corp. of Haw., 121 Hawai'i 324, 219 P.3d 1111 (2009).

[317] Duus, *supra* note 23, at 509.

[318] *Id.* at 511.

[319] *Id.*

[320] *Compare* HAW. REV. STAT. § 171C-6 (Supp. 2011), *with* HAW. REV. STAT. § 171-3 (2008).

[321] *Id.*

vote to sell ceded lands may have irreversibly disastrous impacts[322] on Native Hawaiian self-determination and self-governance efforts, further devastating Native Hawaiians' psyche.[323]

In the context of S.B. 2325, geothermal energy development will not directly redress the loss of self-governance.[324] Currently, the State of Hawai'i holds all mineral rights to geothermal energy resources found on state-owned lands.[325] For Native Hawaiians to exert control over these developments, the State would either need to transfer its development rights or Native Hawaiians would need to find a source of geothermal energy on privately owned lands.[326] These statutory mandates led to a recent public dispute over who owns the mineral rights to geothermal energies found below Department of Hawaiian Home Lands' (DHHL) property. DHHL claims that it has "inalienable rights to the minerals."[327] The state adamantly opposes DHHL's claims. According to Guy Kaulukukui, DLNR's Land Deputy, "the rights were not transferred to DHHL because the state had reserved that right on all state land, of which DHHL (in effect) is a subdivision."[328] Some local attorneys disagree.[329] Carl Christensen,

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[322] *See* HAW. REV. STAT. § 171-64.7 (Supp. 2011).

[323] The Native Hawaiian psyche is a "concept of self [] grounded in social relationships and tied to the view that the individual, society, and nature are inseparable and key to psychological health . . . . From a Native Hawaiian perspective, mental health is viewed holistically encompassing body, mind, and spirit, and is embedded in family, land, and the spiritual world." Anthony Marsella & Laurie D. McCubbin, *Native Hawaiians and Psychology: The Cultural and Historical Context of Indigenous Ways of Knowing*, 15 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 374, 376 (2009) (citations omitted).

[324] S.B. 2325, 26th Leg., Reg. Sess. (Haw. 2012).

[325] *See* HAW. REV. STAT. § 182-2(a) (2008). This statute holds:

> All minerals in, on, or under state lands or lands which hereafter become state lands are reserved to the State; provided that the board of land and natural resources may release, cancel, or waive the reservation whenever it deems the land use, other than mining, is of greater benefit to the State as provided for in section 182-4. Such minerals are reserved from sale or lease except as provided in this chapter. A purchaser or lessee of any such lands shall acquire no right, title, or interest in or to the minerals. The right of the purchaser or lessee shall be subject to the reservation of all the minerals and to the conditions and limitations prescribed by law providing for the State and persons authorized by it to prospect for, mine, and remove the minerals, and to occupy and use so much of the surface of the land as may be required for all purposes reasonably extending to the mining and removal of the minerals therefrom by any means whatsoever.

Id.

[326] *See* HAW. REV. STAT. § 182-2(a) (2008).

[327] Sophie Cocke, *Who Controls the Mineral Rights to Hawaiian Home Lands?*, HONOLULU CIVIL BEAT (Sept. 26, 2011), http://www.civilbeat.com/articles/2011/09/26/12937-who-owns-the-mineral-rights-to-hawaiian-home-lands/.

[328] *Id.* Josh Wisch, a special assistant to Attorney General David Louie, also contends

who served as senior counsel to the U.S. Senate Committee on Indian Affairs and worked as a staff attorney with the Native Hawaiian Legal Corporation, explained:

> The Hawaii state government has a history of ignoring bits in the law that they find inconvenient. Any pre-Statehood conveyances to DHHL under the authority of Congress and the Hawaiian Homes Commission Act would be governed by federal law, not the law of the Territory and the general rule in federal law is that a conveyance of public land by grant or patent *does* carry with it the mineral rights unless they are specifically reserved to the government. I know of no policy reason why Congress should have wanted to cripple DHHL by giving it more limited rights in its lands than that granted by it to other grantees, so I think the state is engaging in a case of serious wishful thinking[.][330]

Christensen's final remarks noted that the State would need to cite specific legal authority to validate its position.[331] Regardless, the State's current position on this issue will perpetuate historical traditions of subjugation and impede on Native Hawaiian self-governance efforts.

If Native Hawaiians, in an individual capacity or as a group, acquired legal rights to develop geothermal energy, then Native Hawaiians may be able to begin redressing the loss of self-governance through the revenue generation implemented towards governance efforts, but geothermal in and of itself would not promote Native Hawaiians' ability to govern themselves and their resources. For example, IDG, a Hawai'i-based renewable energy development company specializing in developing indigenous land and resources, boasts its mission is to partner with indigenous communities to deliver culturally appropriate oversight of geothermal development.[332] It

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that because the State has title to the lands, it also owns the mineral rights.

[329] *Id.*

[330] *Id.*

[331] *Id.*

[332] *Company Info*, INNOVATIONS DEVELOPMENT GROUP, http://geothermalenergyhawaii.com/company-info/ (last visited Nov. 20, 2012); Sophie Cocke, *Lighting a fire under geothermal energy: Native Hawaiian firm builds on New Zealand business model,* PACIFIC BUSINESS NEWS (May 20, 2011, 12:00AM), www.bizjournals.com/pacific/print-edition/2011/05/20/lighting-a-fire-under-geothermal-energy,html?page=all. IDG stated that:

> their business model gives indigenous landowners a seat at the table — a position on the project's governance board and an equity stake in the project. As developers, they also focus on providing employment, job training and scholarships for the local community. According to Cabral, typical benefits for landowners can include up to 50 percent equity ownership in the project, a signing bonus of at least $1 million, an annual administrative budget of $200,000, project liaison jobs and $20,000 worth of educational scholarships for five years.

Id.

also has a comprehensive management team of nine individuals including: Patricia K. Brant, former OHA Chief of Staff; Mililani Trask, former OHA Trustee at Large; and Patricia Medina Talbert, former Superior Court Judge.[333] Some Native Hawaiian communities oppose IDG developments, however, companies like IDG could provide Native Hawaiians with a greater role in the decision-making and processes pertaining to specific geothermal developments.

Native Hawaiian involvement is vital because it provides opportunities to voice concerns and actively challenge decisions.[334] Throughout the late 1900s, continued developments on State and federal lands exploiting former ancestral lands of the Kingdom of Hawai'i made it increasingly apparent that Native Hawaiians lacked legal standing to adequately protect lands and resources.[335] Many Native Hawaiians express a feeling of helplessness because of their lack of voice in the legislative and administrative decision-making processes.[336] Moreover, by allowing Native Hawaiians to actively participate and possess legally enforceable decision-making authority, the PLDC will provide Native Hawaiians greater self-determination over natural and cultural resources, thus, beginning to redress the impacts of past harms and the collective feeling of helplessness.[337]

Therefore, because of these two possible avenues, it is unclear what role Native Hawaiians will play in the regulation or development of geothermal energy. What is clear, however, is that geothermal development may hinder rather than help Native Hawaiian efforts at self-governance and self-determination,[338] if Native Hawaiians' cannot ensure that geothermal is developed in a culturally sensitive way. This is because developing geothermal without properly addressing cultural concerns would fracture the community along the fault lines of those who prioritize geothermal's economic potential versus those who believe the cultural losses are not worth the economic gains.

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[333] *Management Team*, INNOVATIONS DEVELOPMENT GROUP, http://geothermalenergyhawaii.com/company-info/management-team/ (last visited Oct. 12, 2012).

[334] Matthew Kekoa Keiley, *Ensuring Our Future by Protecting Our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection*, 33 U. HAW. L. REV. 321, 360 (2010).

[335] MCGREGOR, *supra* note 2, at 278.

[336] Keiley, *supra* note 334, at 360.

[337] *Id.* at 351.

[338] *See* Sophie Cocke, *Geothermal Push Makes for Strange Bedfellows*, HONOLULU CIVIL BEAT (Oct. 15, 2011), http://www.civilbeat.com/articles/2011/10/15/13275-geothermal-push-makes-for-strange-bedfollows/.

V. SOLUTIONS

A. OHA's Proposed Amendments[339]

A myriad of bills have been introduced during the 2012 legislative session that attempt to amend or repeal Act 55.[340] Most aim to restrict the PLDC's powers. However, the Act's sponsoring Senator, Donovan Dela Cruz, introduced five more bills of his own seeking to further expand the PLDC's powers, noting that many continue to support and hope to capitalize on the PLDC's powers.[341] The Office of Hawaiian Affairs drafted two identical bills for the 2012 Legislature, House Bill ("H.B.") No. 1981[342] and S.B. No. 2172.[343] OHA proposed the bills because it felt that the "Act is unclear about how certain interests of OHA and our Native Hawaiian beneficiaries will be protected."[344] H.B. No. 1981 seeks to add two more voting members to the PLDC Board of Directors; one must be the administrator of the Office of Hawaiian Affairs or the administrator's designee and one member must possess "sufficient knowledge of sustainable planning and natural and cultural resource management."[345] The identical bills require that a "culturally-sensitive plan" include compliance with Article XII section 7 and that the plan not only identify cultural practices and cultural, historic, and natural resources, but also assess the proposed project's effects on the cultural practices and resources and propose mitigation.[346] OHA also sought to prohibit the alienation of public lands,[347] continue payment of a pro rata share of revenues from the public land trust, and protect traditional and customary rights.[348] Only

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[339] Due to limitations on scope, this section will only address OHA's proposed amendments. *See* HB. 2814, 26th Leg., Reg. Sess. (Haw. 2012) (requesting that Act 55 require PLDC to address public health and safety issues in its projects as well as promoting environmental sustainability, and protecting historically significant sites and structures); H.B. 2782, 26th Leg., Reg. Sess. (Haw. 2012) (a bill seeking to repeal Act 55).

[340] *See, e.g.*, S.B. 2330, 26th Leg., Reg. Sess. (Haw. 2012); S.B. 2378, 26th Leg., Reg. Sess. (Haw. 2012); H.B. 2814, 26th Leg., Reg. Sess. (Haw. 2012).

[341] Cocke, *supra* note 225.

[342] H.B. 1981, 26th Leg., Reg. Sess. (Haw. 2012).

[343] S.B 2172, 26th Leg., Reg. Sess. (Haw. 2012). Because S.B. 2172 is identical to H.B. 1981, the analysis will focus on H.B. 1981.

[344] 2012 OHA Legislative Package, OHA at the Hawai'i State legislature, http://cust8554.lava.net/leg/legpack.php www.oha.org/legpack.php (last visited Oct. 12, 2012).

[345] Haw. H.B. 1981.

[346] *Id.*

[347] *Id.*

[348] *Id.*

Senate Bill 1981 passed through its first reading and the measure was deferred in January.[349]

B. Criticism of OHA's Proposed Amendments

Although OHA's proposed amendments are a step in the right direction, they do not completely redress Act 55's impacts on Native Hawaiians.[350] For example, OHA's amendments requiring that the protection of culturally sensitive areas also include "cultural practices and customary native Hawaiian rights protected pursuant to Article XII, section 7 of the state constitution" is important, but not wholly efficient because it is vague as to where in the process these rights would be safeguarded.[351] Failure to indicate when these rights will be analyzed may be counterbalanced by a proposed amendment in the bill that requires the PLDC to consult with OHA about the PLDC's proposed projects. This provision could provide needed oversight.[352] However, OHA's request that it receive its pro rata share of the revenues generated from the public trust may be an indication that an OHA appointee is also capable of being influenced by political and economic pressures.[353] As detailed in Part IV, OHA receives a $15.1 million pro rata share of the public trust land revenues pursuant to Hawai'i Revised Statutes § 10-13.3.[354] Therefore, an OHA appointee could be swayed by an opportunity to increase the pro rata share of revenues at the expense of wholly protecting Native Hawaiian rights and resources.

OHA's proposed amendments requiring the adoption of a culturally sensitive development plan reflect the requirements of the *Kapa'akai* analysis.[355] The amendments, like *Kapa'akai*, called for a three part analysis: 1) identify traditional and customary rights exercised upon the property and resources; 2) assess the project's impacts on those practices and resources; and 3) propose mitigation measures.[356] The only difference between H.B. 1981 and the *Kapa'akai* requirements is that *Kapa'akai* requires that feasible action be taken to reasonably protect Native Hawaiian rights.[357]

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[349] *Id.*
[350] *Id.*
[351] *Id.*
[352] *Id.*
[353] *Id.*
[354] HAW. REV. STAT. § 10-13.3 (2008).
[355] *See* Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000); H.B. 1981, 26th Leg., Reg. Sess. (Haw. 2012).
[356] Haw. H.B. 1981.
[357] *See Ka Pa'akai O Ka 'Āina*, 94 Hawai'i at 47, 7 P.3d at 1084 (2000).

However, this difference creates dramatically different results. *Kapa'akai* creates a standard and mandates action, while H.B. 1981 allows for inaction.[358] The development plan can merely propose mitigation measures and not be required to follow through with the proposal.[359] This creates a highly ineffective and empty requirement.

One of the most important and significant amendments proposed by OHA in H.B. 1981 is its prohibition on the alienation of public lands.[360] This amendment will uphold and affirm Act 176, and allow for continued Native Hawaiian efforts towards self-governance.[361] This provision is critical to improving Act 55 because it addresses the potential for loss of lands, which gravely affects Native Hawaiians' sovereignty and culture.[362]

C. Other Proposed Action

Contextual legal analysis demonstrates Act 55's profound negative impact on the four values of indigenous peoples, which are necessary to ensure the betterment of Native Hawaiians.[363] Because the current version of Act 55 is exceedingly adverse to Native Hawaiians, the best solution is to repeal Act 55. If Act 55 is not repealed or sufficiently amended, then there is a significant need for new law mandating that the *Kapa'akai* analysis take place during the PLDC's first review of a proposed development.[364] Because the third prong of the *Kapa'akai* analysis requires feasible mitigation, which is not attractive to interested developers, the law could create a statutory framework to assess mitigation fees and fines.[365] For example, the legislature could create a framework to assess a feasible amount to be paid for various types of impacts on traditional and customary rights and also a comprehensive list of non-monetary mitigation options when possible.[366] Under this process, the assessment of fines for civil penalties regarding the destruction of natural and cultural resources and the restriction of the exercise of traditional and customary practices would incorporate penalties similar to those found under the Native American

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[358] *Compare Ka Pa'akai O Ka 'Āina*, *with* Haw. H.B. 1981.

[359] *See* Haw. H.B. 1981.

[360] *Id.*

[361] *Compare* Haw. H.B. 1981, *with* Act 176, 2009 Haw. Sess. Laws, codified at HAW. REV. STAT. § 171.

[362] *See* Anaya, *supra* note 206, at 346.

[363] *See supra* Part II.

[364] *See* Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 47, 7 P.3d 1068, 1084 (2000).

[365] *See id.*

[366] *See* Native American Graves Protection and Repatriation Act, 25 U.S.C.A. §§ 3001-3013 (2011).

Graves Protection and Repatriation Act ("NAGPRA"),[367] which assesses fines and/or imprisonment,[368] or may prohibit a violator from construction in any State- or County-funded project for ten years.[369]

In the context of Act 55, the underlying purpose for imposing these penalties is deterrence. However, this interim solution is not perfect because it westernizes indigenous peoples' values. Generally, this approach is not culturally appropriate, and considered highly offensive to indigenous peoples because it places a monetary value on significant natural and cultural resources that are invaluable to indigenous peoples.[370] On the other hand, this framework does provide an avenue to punish violators.[371] Another problem with this solution is that not all incidences of desecration and destruction are reported, which would create the need for regulation and monitoring of development.[372]

Besides these suggestions, there is a need for entirely new law requiring that any new bill introduced into the Legislature that pertains to lands, whether public or private, must first pass through the Hawaiian Affairs Committee[373] of the House and Senate to consider the impact on Native Hawaiians.[374] Greater involvement from the Hawaiian Affairs Committee is important because it allows someone besides the PLDC Board to speak for Native Hawaiian interests and for many "a Hawaiian problem can only have a Hawaiian solution."[375] Moreover, by allowing the Hawaiian Affairs Committee to possess legally enforceable decision-making authority over

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[367] *See id.* The Hawai'i State Legislature adopted its own civil penalties for bone desecration in Hawai'i Revised Statutes section 6E. HAW. REV. STAT. § 6E (2011).

[368] HAW. REV. STAT. § 711-1107 (2008).

[369] HAW. REV. STAT. § 6E-11(g) (2008).

[370] *See generally* MIRIAM Z. HAMMER, VALUATION OF AMERICAN INDIAN LAND AND WATER RESOURCES: A GUIDEBOOK 12 (2002), http://www.usbr.gov/pmts/economics/reports/Valuation%20of%20Indian%20Resources%20Land%20and%20Water%20Resources.pdf.

[371] Joan Crow, *Cut to the bones: The state's handling of burial sites comes under fire*, HONOLULU WEEKLY (Apr. 7, 2010), http://honoluluweekly.com/cover/2010/04/cut-to-the-bones/.

[372] *See id.*

[373] The Hawaiian Affairs Committee is a committee of the Hawai'i State Legislature. Hawaiian Affairs Comm., HAWAI'I STATE LEGISLATURE, *http://www.capitol.hawaii.gov/session2011/HouseCommittees/committeepage.aspx?committee=HAW* (last visited Oct. 12, 2012). The "scope of this committee shall be those programs relating to persons of Hawaiian ancestry, including programs administered by the Department of Hawaiian Home Lands and the Office of Hawaiian Affairs." *Id.*

[374] Interview with Derek Kauanoe, Student and Community Outreach Coordinator, William S. Richardson School of Law, Honolulu, H.I. (Feb. 14, 2012).

[375] *See* Paul Curtis, *Burial Plan No. 16 Rejected*, GARDEN ISLAND, Feb. 11, 2010, http://thegardenisland.com/news/local/article_02ffd09a-17b8-11df-baf3-001cc4c002e0.html (quoting Nathan Kalama, a Native Hawaiian and resident of Kaua'i).

land development, it would allow for increased protection of Native Hawaiian natural resources.[376]

The greater role of the Hawaiian Affairs Committee may create an efficient filtering process so that no bills are able to creep through the Legislature unnoticed, as Act 55 did under the guise of harbor renovation.[377] Thus far, the requirement of feasible mitigation, as established in *Kapa'akai*, when the LUC finds that development impacts would negatively affect an exercise of traditional and customary rights, is simply not enough to incentivize compliance.[378] As a means to deter any future violations, fines should be imposed on developers who do not comply with existing constitutional and statutory provisions.[379]

VI. CONCLUSION

The controversy surrounding Act 55 epitomizes the State of Hawaii's longstanding struggle to remediate its budget woes while also upholding its affirmative duty to protect Native Hawaiian entitlements. The Act's wholesale failure to include provisions requiring the assessment of impacts on Native Hawaiians when dealing with the development of public lands subjugates the needs of Hawaiians while also allowing for blatant violations of existing constitutional and statutory provisions requiring such consideration.[380] Despite a legal and moral obligation to protect such rights, the PLDC continues to move forward in a manner that will frustrate efforts to better the Native Hawaiian community.[381] The PLDC must honor Hawaii's fragile environmental and cultural landscape by reaffirming the State's commitment to the perpetuation of Hawaiian culture and self-determination efforts.[382] If immediate action is not taken to prevent Act 55's devastation of traditional and customary rights and natural and cultural resources, then "our people are in great, great danger now."[383]

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[376] *See* Keiley, *supra* note 334, at 351.

[377] *See* Saiki, *supra* note 4.

[378] *See* Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 52, 7 P.3d 1068, 1089 (2000); Bryant, *supra* note 194, at 283.

[379] *See, e.g.*, HAW. REV. STAT. § 6E-71 (2008).

[380] *See generally supra* Part IV.

[381] *See generally supra* Part IV.

[382] *See generally supra* Part V.

[383] Kamakawiwo'ole, *supra* note 1.

Law Firms Competing on the "Edge of Chaos": Pro Bono's Role in a Winning Competitive Strategy

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I. INTRODUCTION

Lawyers generally love pro bono. The work is rewarding, interesting and almost always has an immediate, demonstrable, and profound effect on a client or community. For years, however, there has been a somewhat uncomfortable dichotomy between law firm profits and altruistic pursuits. While many now agree that lawyers should dedicate a portion of their practice to pro bono service, advocates sometimes struggle to create arguments of the benefits that fit within traditional law firm strategic plans and performance metrics. This Article argues[1] that a robust pro bono practice can play an extremely valuable role in a law firm's future strategy. First, however, law firms must embrace modern developments in strategic thinking.

II. "THE GREAT RECESSION" AND THE LEGAL INDUSTRY

For several weeks each fall, at law schools around the country, students beginning their second-year of legal study wander the halls in freshly pressed suits, carrying crisp copies of their resume. For decades, the nervous energy that on-campus interviewing creates quickly yields to excitement as the halls fill with discussions about which job offer, of many, to choose.[2]

In 2008, the world changed. The dream of guaranteed salaries large enough to comfortably cover three years' worth of educational expenses evaporated as the world sank into the clutches of the worst economic slump since the great depression.[3] The legal sector has suffered significantly as "recession-proof" legal qualifications have lost much of their luster. Today,

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[1] Whenever possible, I will use quantitative methods, but often with simplifying assumptions.

[2] *Entry-Level Recruiting Remains Strong Through 2007*, NALP THE ASS'N FOR LEGAL CAREER PROF'LS (Mar. 26, 2008), http://www.nalp.org/entry-levelrecruiting?s=hiring%202007.

[3] Chris Isidore, *It's Official: Recession Since Dec. '07*, CNN MONEY.COM (Dec. 1, 2008, 5:40 PM), http://money.cnn.com/2008/12/01/news/economy/recession/index.htm.

even at elite law schools where "BigLaw"[4] jobs were all but guaranteed, the halls are filled with terror and disillusionment as the realities of crushing debt and limited employment prospects sink-in.[5]

The scene outside the academic ivory towers is not much better. Law firms who expanded relentlessly and bragged of record profits year after year have dramatically scaled back to cut costs.[6] In the depths of the recession, nearly every firm in the country, regardless of whether they laid off attorneys, deferred the employment of their incoming associates for several months.[7] The legal industry's recruiting and hiring schedule, once so dependent on rigid timing and lock-step yearly advancement, has become increasingly uncertain. The backlog of attorneys eager to start their careers will have lingering effects as deferment plans have rippled through the next generations. The newly-minted lawyers lucky enough to find jobs were left guessing when they would actually begin their careers, sometimes moving and beginning hefty rent payments without a guarantee of when (if at all) they could begin earning a salary.[8]

Even law firm partners have not weathered the storm unscathed. At many of the most prestigious firms, profits-per-partner, the quintessential law-firm bragging-right, have fallen significantly.[9] To buoy these numbers, some firms have resorted to reducing their partner headcount by forcing retirement, reducing non-equity partners, or de-equitizing equity partners. Some firms have even gone so far as to dethroning the pinnacle of law firm achievement—by firing equity partners.[10]

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[4] "BigLaw" or "large law firm," generally refers to the Amlaw 100, or firms with more than four hundred attorneys. THE AMERICAN LAWYER, *The Am Law 100 2009*, LAW.COM (May 1, 2009), http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202430073120&slreturn=1&hbxlogin=1.

[5] Vivia Chen, *Which Law Firms Top the Layoff List?*, LAW.COM (Mar. 5, 2009), http://www.law.com/jsp/article.jsp?id=1202428800862; Mark Cohen, *Law Firm Layoffs and Indentured Associates*, MINNLAWYER BLOG (Feb. 16, 2009), http://minnlawyer.wordpress.com/2009/02/16/law-firm-layoffs-and-indentured-associates/.

[6] Lisa van der Pool, *Law Firms Cut Costs, Staff as Billings Slide*, BOSTON BUS. J. (Nov. 28, 2008, 12:00 AM), http://www.bizjournals.com/boston/stories/2008/12/01/story4.html.

[7] Jessica Dickler, *Getting Paid Not to Work*, CNN MONEY.COM (May 4, 2009, 9:48 AM), http://money.cnn.com/2009/04/30/news/economy/legal_deferrals/index.htm.

[8] Karen Sloan, *Delay of Game: More Incoming Associates Are Put on Hold*, NAT. L. J. (Mar. 23, 2009), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429212033.

[9] Aric Press & John O'Connor, *Lessons of The Am Law 100*, THE AMERICAN LAWYER (May 1, 2009), http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202430183962.

[10] Jerome Kowalski, *Law Firm Partner Layoffs? Hardly a New or Shocking Development*, KOWALSKI & ASSOCIATES BLOG (Mar. 16, 2010), http://kowalskiandassociates.wordpress.com/2010/03/16/law-firm-partner-layoffs-hardly-a-new-or-shocking-development/.

For those reading this Article, none of these new realities come as a surprise. I am not writing to reinforce the fears and apprehensions sweeping the legal industry. Rather, I want to discuss how the progress that law firms made in encouraging pro bono work during "the good times" must not wither during the difficult road ahead. Instead, as the economic crisis has forced law firms to consider their future competitive strategies, pro bono can fill a critical role in the industry's recovery. Combining legal, microeconomic, and management strategy analysis, I will analyze law firms as strategic companies and consider the many possible futures for the law firm staffing model, and why a robust pro bono practice can (and I contend must) integrate seamlessly into a law firm's long-term strategy.

In Part III, I will discuss the development of competitive strategic modeling. In Part IV, I will discuss the history of the large law firm hiring and staffing model in the context of traditional strategies, and why it has likely begun to fade to obsolescence. I will also discuss the pressures and strategic challenges in the economy that have necessitated fundamental changes in the big firm model, particularly how these challenges have strained commitments to pro bono work. In Part V, I will introduce Game Theory, and discuss some key insights that can be learned when applying this theory to law firm strategy. In Part VI, I will turn to the internal structures of law firms in terms of strategic resources and apply evolutionary organizational theory to consider how a firm can optimally organize internally. Finally in Parts VII and VIII, I will discuss a new strategic model, Complexity Theory, which fits the law firm model particularly well. Within each of these frameworks, I will show how law firms can (and should) use a robust pro bono practice as an important competitive tool.

III. THE RISE OF COMPETITIVE STRATEGY

Surprisingly, having a true "strategy" is a relatively recent phenomenon in major companies. Modern organizational scholars initially focused their research on methods to improve a company's internal operational efficiency.[11] As companies poured resources into optimizing their operational effectiveness, their marginal returns diminished as massive investments yielded only minimal process improvements. In the 1970s and 80s, Japan mastered efficient practices, and rose to dominate the increasingly globalized manufacturing sector.[12] Simply improving efficiency, however, is not a strategy. Efficiency improvements only focus

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[11] Michael E. Porter, *What is Strategy?*, 1996 HARV. BUS. REV. 61, 61-63.

[12] *Id.* at 63-64.

within a company, and generally ignore a company's place in an industry—a key element to true strategy. By the time the 90s arrived, the weakness of simply focusing on efficiency improvements became apparent as the Japanese economy collapsed through numerous mutually destructive price-wars not tied to actual value propositions.[13]

At the dawn of the digital age, improving operational efficiency no longer served as a viable way for companies to create and sustain value. Rather, increasingly perfect competitive forces *required* any company to continuously operate on the "efficient frontier," that is, operating efficiently at all times for their given product type.[14] Competitors quickly replicate any efficiency innovations, thus eliminating any temporary advantage gained by process improvements.[15] Furthermore, a company can only improve to the efficiency frontier. At that point, it achieves maximum efficiency for current technology, and cannot gain further long-term advantage. As technology improves, the efficiency frontier shifts outward, but uniformly.[16]

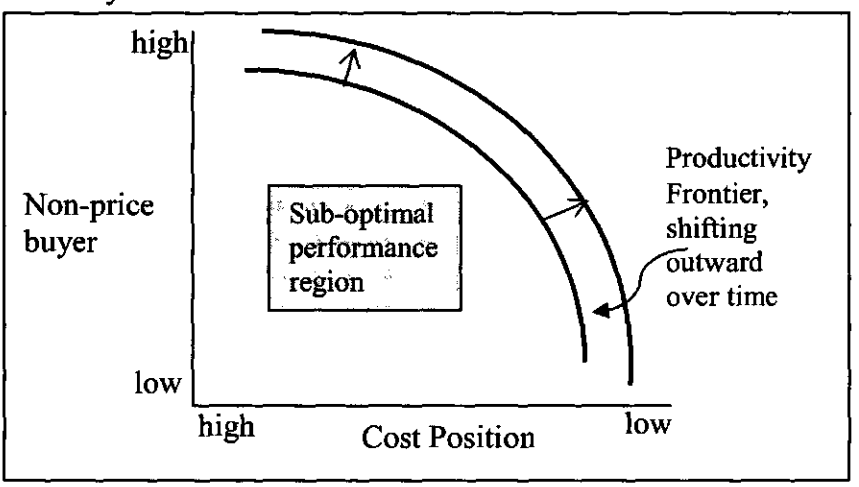

Figure 1 – The Efficient Frontier[17]

In this increasingly competitive atmosphere, companies no longer gain an advantage by merely improving efficiency; they must create true strategies to deliver something *different* to their customers.[18] This difference creates

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[13] *Id.*
[14] *Id.* at 62.
[15] *Id.* at 63-64.
[16] *See id.* at 62-63.
[17] *Id.* at 62.
[18] *Id.; see also* W. Chan Kim & Renee Mauborgne, *Blue Ocean Strategy*, 2004 HARV.

value that customers are willing to pay for. Furthermore, companies can no longer simply focus internally to create value; they must consider every action in the context of their competitors' likely courses of action.

Modern strategies arise from recognizing and exploiting opportunities. While there are countless methods to analyze and evaluate different strategies, I will focus first on a firm's external relationships, and then I will turn to look at internal structures. Two modern strategic models, Game Theory, and the new "Complexity Theory" recently developed by Stanford University researchers, perfectly fit the legal industry. While the Complexity Theory model has heretofore been applied only to "traditional" company types, particularly in the high-technology sector, I have found that law firms are structured to almost perfectly fit this model. Further, I contend that by using these strategies, firms can dramatically increase their success while simultaneously increasing their pro bono commitments.

IV. THE LAW FIRM STAFFING MODEL

The law firm model that dominated the industry prior to the recession, referred to as either "leveraged" or more unflatteringly the "pyramid model", began as an apprenticeship approach to legal practice.[19] A descendent of the professional apprenticeship model common to many industries before the industrial revolution, this training method survived from the Middle Ages until today.[20]

In 1960, the average size of the largest fifty law firms in New York was 45 attorneys,[21] a mere fraction of some of today's "mega" firms. As law firms expanded, the traditional apprenticeship model transformed into what many now call the "leveraged" model. In these firms, partner to associate ratios are significantly bottom-heavy with numbers of two to three associates for every partner.[22] Although this structure supports large profits for those lucky enough to rise to partnership, it has destroyed the process of personal, apprenticeship-like development and interaction between partners

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BUS. REV. 1 ("Blue Ocean Strategy" represents an extreme case of differentiation, where a product or service exists on its own in a new market space).

[19] *From Pyramid to Diamond: The De-Leveraging of the Law Firm Model*, LUMEN LEGAL, http://www.lumenlegal.com/from-pyramid-to-diamond-the-de-leveraging-of-the-law-firm-model/ (last modified 2012).

[20] A.W. Cissel, *The Apprentices*, THURMONT SCRAPBOOK, http://www.emmitsburg.net/history_t/archives/people/apprentices.htm (last visited Nov. 11, 2012).

[21] MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 61 (1991).

[22] Janet Ellen Raasch, *In Up or Over Making Partner*, AMERICAN BAR ASSOCIATION (June 2007), *available at* http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v33_is4_an1.html#.

and associates. Many associates no longer feel as though partners invest time to train them as the next generation of firm leaders, but feel that they are merely cogs in a profit-generating machine. Many disillusioned associates have abandoned even the small possibility of partnership, and view their time at large law firms as a useful entry on their resume as they transition to smaller firms, in-house counsel, or to other fields.

In this highly leveraged model, firms typically measure success only in terms of profits.[23] While this metric can help in assessing a strategy, it provides an extremely limited and incomplete picture. Profits give only a narrow insight into a firm's long-term success and ignore other key variables such as the ability to anticipate competitors' actions, the level of innovation, the firm's internal organizational effectiveness, and other important indicators.

A. The "Five Competitive Forces" in the Legal Industry

It is useful to consider the historic law firm staffing model through the lens of traditional competitive strategy. In many ways, the obsolescence of the "leveraged" model parallels a shift away from outdated strategic frameworks and performance metrics. One of the most "traditional" strategies, the "Industry Structure Framework" considers a firm's position relative to the industry it occupies.[24] Using this framework, company leadership considers the company as an activity system made up of various inputs and corresponding outputs.[25] The strategic framework generally considers five competitive forces in an industry that affect and stress the inputs and outputs of the company.[26] The optimal strategy seeks to identify and exploit potential advantages for sustainable industry dominance.[27]

In the Industry Structure Framework, a company analyzes the structure and slow changes in an entire industry and seeks to maintain a sustainable competitive advantage, measuring its performance simply by profitability. To analyze an industry's structure and identify opportunities, a company

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[23] Drew Combs, *The Am Law 100: How Badly Did Am Law Firms Really Fare Last Year?*, The AM LAW DAILY (Jan. 26, 2010, 6:00 AM), http://amlawdaily.typepad.com/amlawdaily/2010/01/amlaw2009.html.

[24] *See* MICHAEL E. PORTER, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS 3 (1998).

[25] *See* Michael E. Porter, *The Five Competitive Forces That Shape Strategy*, 2008 HARVARD BUS. REV. 1.

[26] PORTER, *supra* note 24.

[27] *Id.* at 34.

generally considers external pressures in terms of the "Five Competitive Forces":[28]

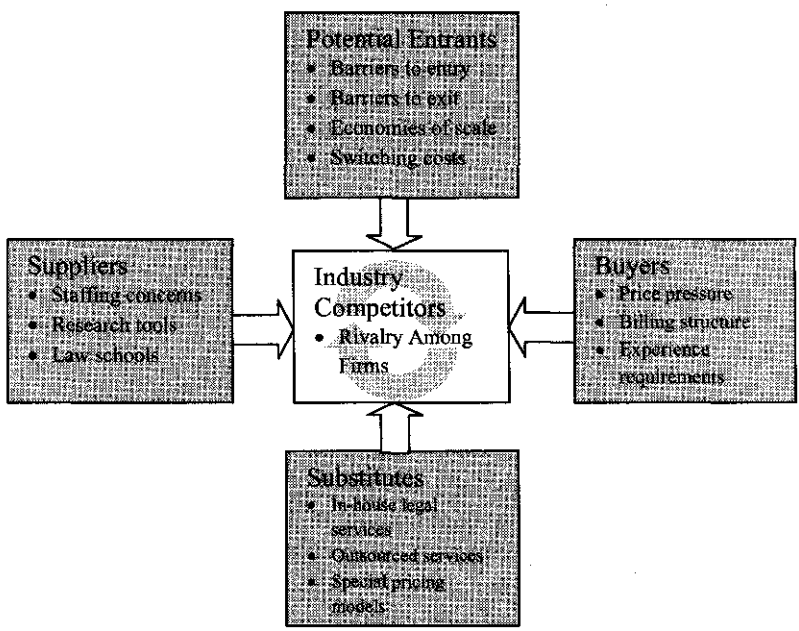

Figure 2 - The "Five Competitive Forces"

Forming a strategy as a set of responses to the shifting pressures of the five forces works effectively in relatively stable industries with a clear, slow rate of change.[29] This generally described the legal industry prior to the recent economic crisis. With well-established firms and relatively little change in the external pressures, each law firm could thoroughly analyze its place in the industry and formulate strategy at their leisure. This method of strategic development allowed for extensive planning and small changes, with little required emphasis on innovation. Dominant firms, therefore, could sustain their advantage by maintaining their market positions. Increases in profitability came from incremental growth in the economy in general, increasing leverage ratio within the firms, and from merging to form increasing synergies and economies of scale. The law firm hiring process, with extremely long lead times between hiring decisions and market conditions, functioned relatively well because of this slowly changing environment.[30]

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[28] *Id.* at 4.

[29] *See id.* at 3-4.

[30] Ross Todd, *JD Match Aims to Fix the Law Firm Recruiting Process*, The AM LAW

One reason that most firms did not prioritize a robust pro bono practice during the past involves the stability of the legal industry. Since firms jockeyed for long-term industry dominance, measured by profits, pro bono did not fit well within the Industry Structure Framework. Without an easily observable contribution to "the bottom line," firms often relegated their pro bono practices to marketing tools, underestimating their true strategic value. Even at the height of the economy, firms still focused on profits as their key performance metric, rarely treating pro bono as much more than an advertising or recruitment tool—treating it as an expense rather than an asset.[31] The increased commitment to pro bono in the 90s seems to generally reflect more of an inherent enjoyment in altruistic pursuits rather than recognition of pro bono's true value and a shift in strategy.[32]

What a difference four years make. In the legal industry, a five forces analysis no longer provides a particularly useful tool for forming strategy. While the industry managed to thrive on this deliberate planning process into the 21st Century, these days are at an end. With technology rapidly infiltrating all aspects of legal practice, law firms must adapt to a more agile method of strategy development.[33] The recent pressures have pushed from all sides: from the supply-side, an ever-increasing number of law schools have produced many more graduates than are necessary to accomplish the legal work available.[34] Electronic legal research databases such as LexisNexis and Westlaw have created programs that enable law firms to operate more efficiently and cheaply, with relatively low start-up costs. On the demand side, clients have started to cut costs and bring much of their legal work in-house.[35] Substitutes to BigLaw firms have appeared, providing an increasingly broad array of pricing models, and technological alternatives.[36] Finally, barriers to entry have eroded as technology has

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DAILY (Apr. 19, 2011).

[31] *See generally* David Bario, *Has Pro Bono Become Recession-Proof?*, LAW.COM (July 2, 2009), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202431958081&slreturn=20121016011758.

[32] Evidenced by the decline in pro bono work after the recession in the 1990s. *See* Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, NEW YORK TIMES, Aug. 17, 2000, at A1.

[33] *See* Orin Kerr, *Legal Research Using Google Scholar*, VOLOKH CONSPIRACY (Apr. 5, 2010, 1:18 AM), http://volokh.com/2010/04/05/legal-research-on-google-scholar/.

[34] Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J. (Sep. 24, 2007), http://online.wsj.com/article/SB119040786780835602.html.

[35] Amy Miller, *Are Things Looking Up? ACC Survey Suggests In-House Lawyers are Poised to Hire*, CORPORATE COUNSEL (Mar. 2, 2010), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202445342344&Are_Things_Looking_Up_ACC_Survey_Suggests_InHouse_Lawyers_Are_Poised_to_Hire.

[36] Knowledge@Wharton, *New Fee Structure for Law Firms*, FORBES.COM (Apr. 29,

enabled even the smallest law firms to operate in the legal market effectively. In the face of this torrent of accelerating changes, to survive, a law firm must become more agile. Those that do not embrace this change will be forced to constantly react to their more innovative peers, and to ultimately lose market share.

B. Early Moves Toward Strategy

Several firms have recognized the necessity to change strategy. Currently, however, these changes reflect a reaction to the industry climate and a response to traditional five-forces. Most firms generally seem to be shifting to one of three new "generic" strategies. First, some are adopting a "training" period, where associates are paid less, but focus their time on training, rather than performing work for clients.[37] Second, other firms have adopted a "merit-based" system of promotion for their associates.[38] Third, some firms have carried on their current "lock-step" system, but with significantly fewer staff-members.[39] While none of these models are necessarily wrong, they are simply reactive to the pressures in the industry and will not lead to long-term competitive advantage. Simply restructuring advancement, billing, and staffing decisions cannot, in isolation, make a firm more strategic. Instead, firms should take a holistic approach to strategy—using Game Theory to anticipate competitors' moves and taking the appropriate response, and using Complexity Theory to optimize internal organizations.

As recently as 2008, two Stanford Law School students, Andrew Cantor and Andrew Bruck, along with many other legal analysts predicted the death of the Billable-Hour.[40] The reports of its death have been greatly

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2009, 5:30 PM), http://www.forbes.com/2009/04/29/billable-hour-retainer-entrepreneurs-law-taxation-wharton.html.

[37] *See, e.g.*, Jeff Jeffrey, *Law Firm Apprentice Programs Add Extra Step for New Associates*, NAT. L. J. (June 30, 2009), http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202431845167&Law_Firm_Apprentice_Programs_Add_Extra_Step_for_New_Associates]; Zach Lowe, *Howrey's New Model: A Two-Year Associate Apprenticeship*, THE AM LAW DAILY (June 23, 2009, 9:52 AM), http://amlawdaily.typepad.com/amlawdaily/2009/06/howreys-new-model.html.

[38] *See, e.g.*, Amanda Royal, *Orrick Breaks Lockstep in Response to Clients' Cost Concerns*, LEGALWEEK.COM (Jul. 2, 2009, 3:27 PM), http://www.legalweek.com/legalweek/news/1432464/orrick-breaks-lockstep-response-client-cost-concerns?WT.rss_f=Orrick+herrington+%26+sutcliffe+-+Law+firms&WT.rss_a=Orrick+breaks+lockstep+in+response+to+client+cost+concerns.

[39] *See, e.g.*, Zach Lowe, *Linklaters Back to Full Lockstep*, THE AM LAW DAILY (Mar. 31, 2010), http://amlawdaily.typepad.com/amlawdaily/2010/03/linklaters-lockstep.html.

[40] Andrew Cantor & Andrew Bruck, *Supply, Demand, and the Changing Economics of*

exaggerated. But why? The resilience of the paradigmatic billable-hour structure in law firms stems from the fact that firms have not recognized that their strategy must fundamentally change by embracing modern strategic frameworks. For the rest of this Article, I will discuss how law firms can implement these modern strategies in their decision-making in the new, fast-paced competitive legal-industry, and how pro bono can provide a key tool to this success.

V. GAME THEORY

Game Theory provides a very useful tool to analyze law firm strategy. The theory began, logically, as a mathematical theory to describe games.[41] A "game" is simply a series of strategic moves exchanged between a group of players seeking to win by maximizing their utility.[42] Game theory differs from other strategic frameworks by focusing on strategic decisions in the context of *other* players' decisions. In other words, a company seeks to find an optimal strategy not only by making the right moves, but by making the right moves in anticipation of competitors' moves.[43] This framework largely ignores the internal company organization and assumes that a company can effectively execute its decisions.[44]

Game theory applies particularly well to law firms because the legal industry is, in the aggregate, generally oligopolistic. This allows us to satisfy the key conditions that make Game Theory predictions accurate—relatively few, known, and equally powerful players, with common knowledge of each others' payoff and decision set.[45]

A. Game Theory Background

At the beginning of the Industrial Revolution, mathematicians sought to use their skills to quantify social behavior. Early Game Theory models first emerged in 1838 when Antoine Augustin Cournot applied mathematical economic analysis to behavioral science when considering duopoly

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Large Law Firms, 60 STAN L. REV. 2087 (2008).

[41] ROGER B. MYERSON, GAME THEORY: ANALYSIS OF CONFLICT 1 (1997).

[42] *Id.* at 2.

[43] *Id.*

[44] I will relax this assumption and consider internal organizational optimization in Parts V, VI, and VII, *infra*.

[45] *See generally* Tom R. Burns & Ewa Roszkowska, *Generalized Game Theory: Assumptions, Principles, and Elaborations Grounded in Social Theory*, *in* STUDIES IN LOGIC, GRAMMAR AND RHETORIC 8 (Halina Swieczkowska & Kazimierz Trzesicki, eds., 2005).

behavior.[46] He theorized that a "Cournot Equilibrium" occurred when each player in an oligopoly maximizes profits given its competitors' outputs.[47]

Mathematics and social science became even more intricately intertwined when John von Neumann and Oskar Margenstern published their masterpiece *The Theory of Games and Economic Behavior* in 1944.[48] This contribution expanded the concept of equilibrated strategic decisions when choices are not simply binary (or "pure"), but are a series of probability distributions from which a player may choose.[49] They revealed that for any zero-sum game, an equilibrium of optimal moves for all players will exist.[50]

The most famous Game Theorist, John Nash (portrayed in the popular 2001 film, *A Beautiful Mind*), further expanded the theory in his 1951 article, *Non-Cooperative Games*,[51] which postulated that for *any* mixed-strategy game with a finite series of moves,[52] at least one equilibrium always exists.[53] At a Nash Equilibrium, no player can place itself in a better position by unilaterally altering its position.[54] Thereafter, the situation remains at the Nash Equilibrium unless an externality, such as a new player in the game or a change in the rules, stresses the system, establishing a new equilibrium.[55]

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[46] *See generally* AUGUSTIN COURNOT, RECHERCHES SUR LES PRINCIPES MATHEMATIQUES DE LA THEORIE DES RICHESSES (1838).

[47] *Id.* This simple form of Game Theory later became incorporated into the modern Nash Equilibrium as the "pure-strategy Nash Equilibrium."

[48] JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR 1 (1944).

[49] *Id.* at 65.

[50] *Id.* at 46.

[51] John Nash, *Non-Cooperative Games*, *in* 54 ANNALS OF MATHEMATICS 286 (1951).

[52] This theory can be further complicated if one considers the difference between moves with finite and infinite moves. For finite moves, cooperative behavior always ends on the last move when both players will shift to their Nash Equilibrium. For infinite moves, players can maintain their cooperative stance, using threat of deviation as an externality to maintain the "better" equilibrium. One can argue that every game (or interaction) has infinite moves because there is always a chance of meeting the player again in the future and "playing" again. In that case, one can add an additional discount factor to measure the probability of meeting the player again. The strategic move then moves back to a cooperative equilibrium if the chances of meeting again are high enough. Some theorize that this is the reason for "Good Samaritan" behavior. TOM SIEGFRIED, A BEAUTIFUL MATH: JOHN NASH, GAME THEORY, AND THE MODERN QUEST FOR A CODE OF NATURE 86 (2006). One could write an interesting follow-up to consider the mathematical link between this discount factor and altruistic work such as pro bono.

[53] Nash won the Nobel Prize in 1994 for this contribution. *See* LES PRIX NOBEL, THE NOBEL PRIZES 1994 (Tore Frangsmyr ed., 1995).

[54] SIEGFRIED, *supra* note 52, at 59.

[55] SIEGFRIED, *supra* note 52, at 60-61.

Game Theory has become increasingly complex, occasionally garnering criticism when economics seek to use its predictive power in overly complex systems.[56] For this Article, however, I will stay in a relatively simple (and demonstrable without the aid of a computer) realm. This level of approach still provides insight into optimal law firm strategy.

B. Foundation and Assumptions

Understanding Game Theory begins with a series of terminology:

- There are players, i, in the game, and $i \epsilon N = \{1, \ldots, n\}$
- There are A_i strategy spaces, with elements $a_i \in A_i$
- Payoffs for individual firms are given as $u_i(a)$, where:

$$a = (a_i, a_{-i}) \in A = A_1, \cdots, A_n$$

and

$$a_{-i} \in A_{-i} = A_1, \cdots, A_{i-1}, Ai + 1, \cdots, A_n$$[57]

- For mixed-strategies, $\sigma_i \in \Delta(A_i)$ and $\sigma_{-i} \in \Delta(A_{-i})$[58]
- A normal-form game function, Γ_N, is given as:

$$\Gamma_N = \{N, \{\Delta(A_i)\}, \{u_i(\cdot)\}\}, i$$

This expression represents a set of players, strategic spaces, and payoffs. And Assumptions:

- All players are *rational* (they want to maximize their utility).
- Every player knows the rules of the game and each player knows that every other player knows the rules of the game (action sets and payoff functions are common knowledge).[59]

A "Nash Equilibrium" is defined as the condition where no player in the game has a better position relative to the other players' decisions.[60] In

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[56] *See, e.g.*, Brian Martin, *The Selective Usefulness of Game Theory*, 8 SOC. STUD. OF SCI. 85-88 (1978). One final note, Game Theory sometimes seems paradoxical because the solutions are often not Pareto Optimal, that is, it is possible for both players to be in a better position without necessarily making one of the players worse off.

[57] $u(\cdot)$ is usually an increasing Von Neumann-Morgenstern utility function. For mixed-strategy games, one can consider the expected return, $Eu(\cdot)$ The payoff set is defined such that one's utility depends on all other players' action sets.

[58] Remember, for simple strategies each decision set was binary (simply elements of the strategy space, A_i. For mixed strategies, this becomes a series (which could be continuous) of possible probability density functions.

[59] This chain of inferences is infinite. If there is a break in this infinite belief hierarchy, one could get very different outcomes.

other words, any move away from the Nash Equilibrium would put a player in a worse position.[61]

C. Examples

Game Theory becomes clearer when considering a few examples. As an introduction, I will start with simple, pure-strategy games, then move on to non-cooperative mixed-strategy and discuss how this model can aid in forming law firm strategy.

1. The Prisoner's Dilemma

Since this is a legal Article, it seems fitting to start with the classic "prisoner's dilemma" game.[62] Consider a situation where the police question two suspects separately about a recent robbery. If both confess, they each receive five-year sentences. If both deny, they each receive one-year sentences. Finally, if either confesses, they are released, and the other suspect receives a ten-year sentence. This "payoff" matrix can be displayed as follows:

		Bonny	
		Confess	Deny
Clyde	C	$(-5,-5)$	$(0,-10)$
	D	$(-10,0)$	$(-1,-1)$

Figure 3 - The Prisoner's Dillema

Each suspect has a single, dominant strategy in response to the other's action. If Bonny denies, then Clyde's best response is to confess. If Bonny confesses, Clyde's best response is also to confess. The same logic applies for Bonny's responses to Clyde's actions. Therefore, regardless of one

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[60] SIEGFRIED, *supra* note 52, at 59.

[61] *Id.*

[62] Steven Kuhn, *Prisoner's Dilemma*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2009), *available at* http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=prisoner-dilemma.

suspect's action, the other should always confess to maximize their likely payoff. This is the pure-strategy Nash Equilibrium. Neither player can improve their position by shifting from this strategic position. Note that this equilibrium does not achieve social optimization; both suspects could maximize their welfare by agreeing to deny. However, as we will see later, for finite games, this cooperative equilibrium cannot persist—the players will gravitate toward their non-cooperative Nash Equilibrium for all finite games. In other words, players are trapped in a non-socially-optimal Nash Equilibrium.

2. Matching Pennies[63]

Next, let us go beyond a simple pure-strategy, to discuss mixed-strategy. This type of game more adequately models real-world scenarios, where a company must make choices based on a stochastic distribution of possible competitor actions. This type of non-cooperative game will give important insights on the legal industry as an oligopoly.

Consider a game with two players, Claire and Tom. ($N = \{Claire, Tom\}$). Each player has two choices, heads or tails ($A_i = \{H, T\}, i \in N$. The payoff matrix, $u_i(\cdot)$is given as follows:

		Tom	
		Heads	Tails
Claire	H	(2,1)	(0,0)
	T	(0,0)	(1,2)

Figure 4 – Matching Pennies

Here, there are *two* pure-strategy equilibriums, one where Claire and Tom each choose Heads, and one where they both choose Tails.[64] Shifting

[63] Thomas A. Weber provides an excellent presentation of these game examples in his class "Economic Analysis," MS&E 241, available through Stanford University's "Stanford Center of Professional Development." *See generally MSANDE241: Economic Analysis*, STANFORD UNIV., https://ccnet.stanford.edu/msande241.

[64] *See generally* Yoav Shoham & Kevin Leyton-Brown, *Multiagent Systems:*

to a mixed-strategy version of this game, where the choices are based on a probability density function (let the likelihood that Claire chooses H = p and the likelihood that she chooses T = (1 − p) (and the same for Tom using q as the probability)). Therefore, Claire's expected payoff will be:

$$\pi_C = p(1-q)\cdot 2 + (1-p)q \cdot 1$$

Solving for the first-order condition to maximize π_C, in terms of Tom's decision,

$$\frac{\partial \pi_C}{\partial q} = 2(1-q) - q = 2 - 3q$$

So, if $q < \frac{2}{3}$, $p = 1$; $q > \frac{2}{3}$, $p = 0$; and if $q = \frac{2}{3}$, $p \in [0,1]$. Graphically:

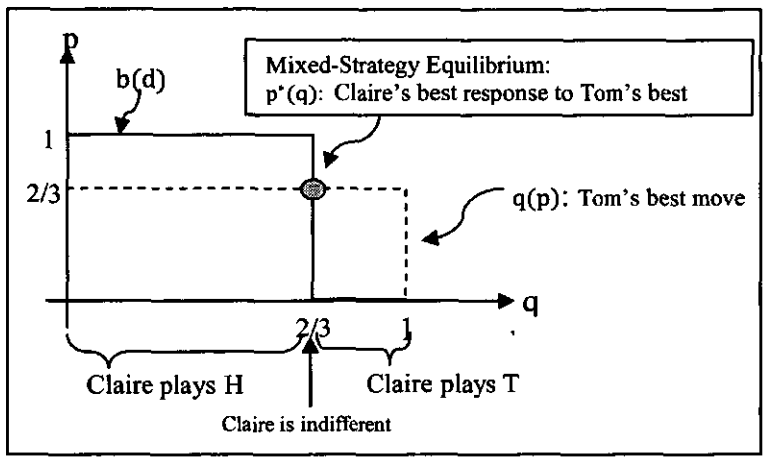

Figure 5 – Mixed-Strategy Equilibrium

We can see from the graph that Claire's best decision depends on the probability of Tom's choice. If there is more than a $\frac{2}{3}$ chance that Tom will play heads, then Claire's best response is to also play heads. Likewise, if there is less than a $\frac{2}{3}$ chance, then Claire's best response is to play tails. Performing a similar analysis for Tom, we see that the two utilities cross at $\frac{2}{3}$. Therefore, at equilibrium, both Tom and Claire will choose a probability

Algorithmic, Game-Theoretic, and Logical Foundations 62-65 (2010), *available at* http://www.masfoundations.org/mas.pdf (note that internet edition has different pagination than the book edition).

distribution of $\frac{2}{3}$ –the mixed-strategy Nash equilibrium.[65] This non-cooperative equilibrium will remain intact for all finite series of interactions.

3. Cooperation

By cooperating, both Tom and Claire could both improve their payoff. This proposition translates well to law firm "games." Within the payoff space, (π_T, π_C), if Tom and Claire can agree on a choice of H or T, or if they agree to use an external random result generator (such as a coin-flip), they can push the game's payoff to the frontier of the payoff space. These agreements are analogous to certain agreements, implicit or explicit, that many industries use. These constraints can benefit all of the firms within an industry. We can see the effects graphically:

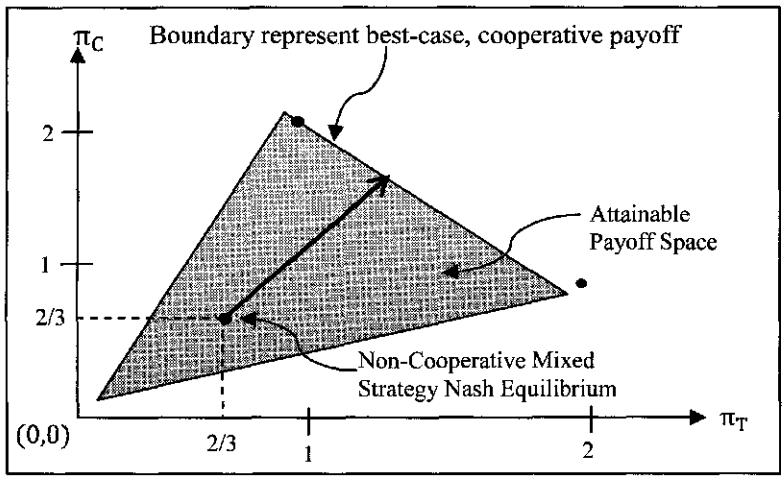

Figure 6 – Cooperative Payoff

By cooperating, the players can push their payoffs toward the boundary of the payoff space, increasing the overall welfare generated by the game. Industry players do not need to collude, or even communicate to achieve more optimal payoffs through cooperation (and thus will not violate anti-trust laws). Rather, by recognizing the operation of the game, firms can adjust their strategy to maintain their service in a mutually (and socially) beneficial region of the payoff curve, rather than enter a mutually

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[65] *See id.*

destructive price-war.[66] This type of cooperation, however, only works for games without a clear time-horizon. For finite games, prior to the last move, each player will anticipate other players' moves to optimize their payoffs and will take corresponding optimal positions, returning the industry to the Nash Equilibrium. Similarly, if any firm in the industry violates the rules of cooperation, the other players will follow suit, again returning to the less optimal non-cooperative Nash Equilibrium.

There are many mechanisms in place to engender cooperation amongst the law firm oligopoly. The very nature of the legal industry, with its high and costly barriers to entry creates the necessary conditions for an oligopoly.[67] Additional external cooperation mechanisms, such as marketing rules[68] or recruiting guidelines,[69] help to maintain the improved equilibrium. These guidelines are only effective as long as all of the players play by these external rules; the first to deviate will force all of the players to retreat to the non-cooperative Nash Equilibrium.

D. A Specific Law Firm "Game": Mergers

For many years, law firms have turned to mergers, either through acquiring smaller firms, "poaching" practice groups or partners from their rivals, or combining with equally large competitors, to increase profits.[70] However, two competitors simply merging cannot *create* value. Game Theory suggests two possible motivations for the persistent trend of law firm mergers.

1. Synergy

First, the merger can create a synergistic effect. Excluding the unquantifiable benefits of increased cooperation and interaction between professionals, I will consider an exemplary merger in terms of fixed cost,[71] production,[72] and pricing.[73] To maintain generality, assume:

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[66] *See supra* Figure 6.

[67] *Not Enough Lawyers?*, THE ECONOMIST (Sept. 3, 2011), http://www.economist.com/node/21528280.

[68] MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. (2004).

[69] *Principles and Standards for Law Placement and Recruitment Activities*, NALP THE ASS'N FOR LEGAL CAREER PROF'LS (Apr. 20, 2012), http://www.nalp.org/fulltextofnalp principlesandstandards.

[70] Ronald C. Minkoff, *Poaching Lawyers: The Legal Risks*, FRANKFURT KURNIT KLEIN & SELZ PC, http://fkks.com/article.asp?articleID=188# (last visited Nov. 16, 2012).

[71] These could be salaries, buildings, etc.

[72] One could use several metrics to measure this such as hours, legal services, deal flow, etc.

- A legal industry with N firms,
- Each firm chooses an output, q_i and the output of the industry is $\sum_{i=1}^{N} q_i = Q$,
- Pricing is linear with $p(a) = A - BQ$, where A and B are generic constants,
- Assume q for each firm is symmetric, $q_i = q_1 \ldots = q_N$,
- The per unit cost is constant, $c(q) = Cq$, making marginal cost constant (C),
- And the fixed cost for each firm is F.

Therefore, before fixed costs, a firm's profit, π_i, is:

$$\pi_i\left(q, Q_{-i}\right)^{74} = (A - Bq_i - BQ_i - C)q$$

To find the firm's best strategic position, we find the first-order condition, $\frac{\partial \pi}{\partial q} = 0$, to find optimal production to maximize profit:

$\frac{\partial \pi}{\partial q} = -2Bq + (A - BQ_{-i} - C) = 0$; where $Q_{-i} = (N - 1)q$

Therefore at the optimal q, $q^* = \frac{A-C}{B(N+1)}$. At this quantity, each firm will earn $\pi_i(q^*, (N-1)q^*) = \frac{(A-C)^2}{B(N+1)^2}$ in profit.

Using this expression, we can determine whether a prospective merger can improve the firms' profits. When the firms merge, $N \rightarrow N$-1, so a merger only adds value if:

$2\pi_i(N) - 2F < \pi_i(N-1) - F$, or rearranged, $F > 2\pi_i(N) - \pi_i(N-1)$

A firm will therefore only benefit from a merger when the combined profits from the two firms exceed gains achieved by fixed cost savings. For example, assume a simplified market with $A = 25, B = 1, C = 5$ with 4 firms each with a fixed cost of 15. If two of the firms merge, the combined profits $= \frac{(A-C)^2}{B}\left(\frac{2}{(N+1)^2} - \frac{1}{N^2}\right) = 7$ which is less than the fixed cost of 15, so the firms should merge.

From the previous example, we have seen that firms may have an incentive to merge. This is certainly not a new insight, nor does it have much to do with an argument for pro bono. To make this connection, we must consider the effect of such a merger on the *general welfare*.

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[73] Again, several variables could be used here, such as billable hours.

[74] Q_{-i} is the combined quantity produced by the other firms in the industry.

Welfare is defined as the sum of the industry's profits, plus any consumer surplus minus fixed costs. This can best be described graphically:

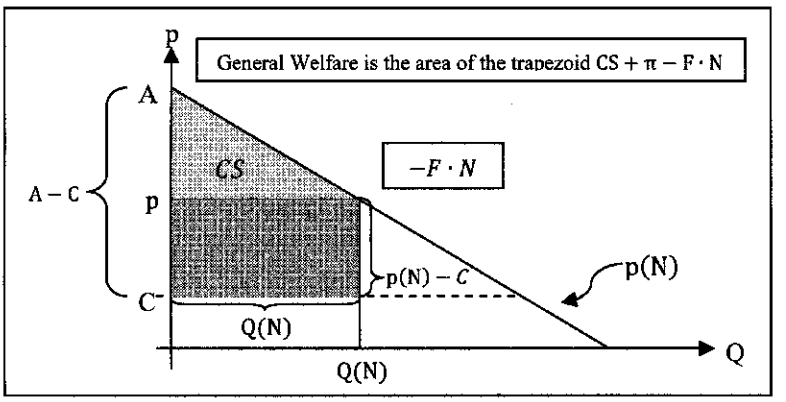

Figure 7 – General Welfare

$$Q(N) = Nq^* = N\left(\frac{A - C}{B(N+1)}\right)$$

$$p(N) = p\big(Q(N)\big) = c + \frac{A - C}{N+1}$$

When N decreases (and the industry becomes less competitive) the price increases (as firms are able to exert market power and hold back quantity), reducing consumers' welfare. But, counter-intuitively, the general welfare can actually *increase* because of some mergers. Take our previous example, where $A = 25, B = 1, C = 5$, $F = 15$, and N represents the number of firms in the industry:

$$\text{The general welfare, } W(N) = \frac{1}{2}(A - C + p(N) - C)Q(N) - F \cdot N$$

The welfare value with three firms, $W(3) = 142.5$, is actually more than that of four firms, $W(4) = 132$. This result comes from the fact that although consumers are worse off, the firms are so much better off from the reduction of fixed costs that overall welfare actually increases.

Firms can share at least some of this increase in welfare to offset some of the surplus captured through merging. Pro bono provides an excellent mechanism to share this welfare increase. Not only does pro bono work shift some of the producer surplus to consumers, it provides reciprocal internal benefits to the firm (described in more detail in Part VII). Therefore, one can argue that increasing pro bono work is actually a

Pareto[75] improvement over a post-merger equilibrium—the general welfare does not decline by shifting surplus, but the law firm gains additional training advantage from the pro bono work.

2. Oligopolistic Pricing

The second possibility is not as savory as the first. By merging, firms gain market power leading the industry closer to the "M"-word: monopoly. Although nearly anyone can recite the normative insight that monopolies are "bad," it is helpful to consider why.

With perfect competition, a company has no market power; therefore, they can only charge the price that their competitors charge. Consumers capture all of the surplus utility, leaving firms with limited profits, only equal to their marginal cost.[76] This fiercely competitive pressure encourages innovation as a firm can only increase profits by reducing its marginal costs.

A monopolist (or to lesser degree an oligopolist) has another, easier way to withdraw surplus from the market—she can artificially withhold production to charge a higher price.[77] Depending on the elasticity of the good, the firm can charge significantly more than the competitive price.[78] The Lerner index determines the extent of quantity (and thereby price) distortion that a monopolist can accomplish.[79]

Turning again to the depiction of how price and quantity depict welfare, where C again represents a fixed per-unit marginal cost, and a linear price:

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[75] *What is 80/20 Rule?*, MERX EQUITY MARKETING AND ADVERTISING PVT. LTD., http://www.80-20presentationrule.com/whatisrule.html (last visited Nov. 16, 2012).

[76] *See generally* A.P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. OF ECON. STUD. 157, 157 (1934).

[77] *Id.*

[78] *Id.*

[79] *See id.*

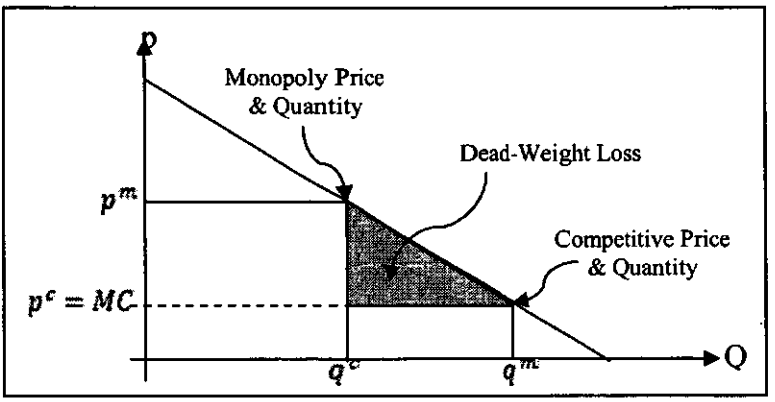

Figure 8 – Monopoly Pricing

Market power and monopoly pricing results in a dead-weight loss that society must bear. Although firms may gain valuable core competencies (discussed later), the consolidation of expertise and knowledge necessarily results in artificially withholding of quantity resulting in higher costs. Pro bono can serve as a perfect offset to the damaging effects that increased market power and a more monopolistic industry creates.

Let us consider a firm that hires a practice group. After the merger, the combined firm will choose which and how many clients to serve together (production outputs), q_1, q_2. Let us assume that the unit production cost is c (where $0 < c < 1$). We can represent the inverse demand function as $p(q_1, q_2) = 1 - q_1 - q_2$. Calculating the Nash Equilibrium for this merger:

Profit = $\pi_i(q_1, q_2) = (p(q_1, q_1) - c)q_i = (1 - c - q_1 - q_2)q_i$

Optimizing π: $\frac{\partial \pi_i(q_1, q_2)}{\partial q_i} = 1 - c - 2q_i - q_j = 0$ (concave)

The firm's best response $\therefore q_i^*(p_j) = \frac{1-c-q_i^*}{2}$

Graphically:

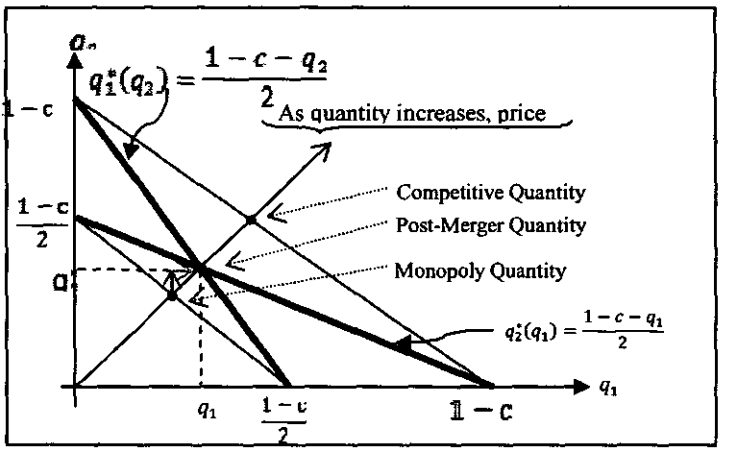

Figure 9 – Nash Equilibrium for Mergers

After merging, each group shifts its output to $q_1^* = q_2^* = \frac{1-c}{3}$.In summary, the monopoly quantity $= \frac{1-c}{4}$, the competitive quantity $= \frac{1-c}{2}$, and the post-merger Nash Equilibrium $= \frac{1-c}{3}$. So, when a firm absorbs a practice group, or merges with another firm, it can improve its market power, reduce quantity and charge higher prices.

This approach, however, only works if the new practice group perfectly integrates into the new firm. If integrated, then the firm can decrease quantity even further toward the monopoly quantity and pricing. If the group maintains autonomy (such as an acquired partner "hording" her clients) then each piece of the firm will retain an incentive to unilaterally increase production (moving vertically or horizontally on the graph)[80] prompting an equal response from the rest of the firm until returning to the Post-Merger Nash Equilibrium.[81]

This dead weight loss exists as a firm artificially lowers its output. By supplementing output (which is generally specific, and client driven) with pro bono work, (which is virtually unlimited) the firm can offset the dead weight loss that the merger creates. Pro bono work focuses on more general types of service, and can compensate for the consolidation of expertise after a merger or practice group absorption. The increase in pro

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[80] *See supra* Figure 9.

[81] This return to the Nash Equilibrium will occur through a series of unilateral actions regardless of the starting production level for each firm.

bono, therefore, can offset some of the negative societal economic effects that a merger produces.

E. Judo Economics

Game Theory can also explain the increasing trend in recent law school graduates that have entered the market as solo practitioners. "Hanging a shingle" seems to provide a viable lifeboat to escape the turmoil of the legal industry. Unfortunately, however, Game Theory shows that in a well-established industry, this business model faces severe limitations.

An offshoot of Game Theory, Judo Economics postulates that for a limited number of "turns" a new player can enter the game at a strategy set not occupied by any other players.[82] For a time, the dominant industry players will ignore the smaller entrant as an insignificant pressure to the equilibrium strategy.[83] Over time, if the smaller player seeks to grow, it will necessarily begin to influence the large players' strategy set.[84] At that point, the larger player will alter their strategy to compete with the new entrant.[85] This will likely not end well for the small player, as the large players have first-mover advantage.[86] In the long-run, therefore, unless solo practitioners do not seek to grow their business past a certain threshold, they will likely shift to the same equilibrium point as their larger competitors, but at the residual market share level provided by late-mover disadvantage.

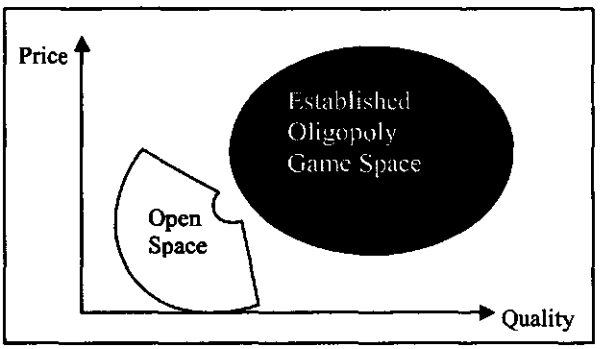

Figure 10 - Judo Economic Strategy Space

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[82] Judith R. Gelman & Steven C. Salop, *Judo Economics: Capacity Limitation and Coupon Competition*, 14 BELL J. ECON. 315, 315 (1983).

[83] *Id.* at 319.

[84] *Id.*

[85] *Id.*

[86] *See infra* Figure 10.

Although solo or small-firm practitioners can fill a gap left by large firms, in terms of pricing and types of service, they are not providing a truly differentiated "product." Therefore, unless the industry expands, additional and identical competitors will fill the market with first-mover advantage.

On the other hand, public interest pro bono organizations serve clients that are by definition underserved by the legal industry. Neither large nor small firms view these organizations as "threats" under the Game Theory model, rather they can serve as valuable complementors useful in developing additional core competencies and skills.[87] Instead of hanging a shingle and extracting residual market share, lawyers eager to leave the BigLaw game could therefore more effectively, in the aggregate, devote their efforts to public interest organizations.

F. Pro Bono as a Screening Mechanism

Although every lawyer strives to perform at his or her absolute best, legal work will necessarily have a certain quality level. In the aggregate, a brief proofread ten times will have more errors than one read one hundred times. A firm cannot simply *ask* what level of quality that a consumer will accept for a given price. This information has value, enabling a consumer to capture part of the surplus in the industry; receiving more utility than their willingness to pay. To illustrate the value of this information, if a firm were able to do "first-order" price discrimination, charging exactly each client its exact willingness to pay, it could extract all of the surplus utility, in the form of profits, from each client. While this approach would be efficient, with no wasted production or dead-weight loss, it is impossible, because a consumer will never willingly provide the exact amount they are willing to pay.

Instead, the best a firm can hope for is second-order price discrimination.[88] Under this approach, a producer can design a screening mechanism by providing two different products to retrieve information about consumer preferences.[89] Pro bono can provide a valuable screening mechanism to extract this preference and utility information.

Second-order price discrimination allows a firm to extract information from consumers by offering them choices of services based on a sorting mechanism.[90] By using this information, firms can set prices in order to

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[87] Discussed in more detail *infra* Part VII.

[88] Douglas A. Ruby, *Price Discrimination*, http://digitaleconomist.org/pd_4010.html (last visited Nov. 18, 2012).

[89] *Id.*

[90] *Id.*

extract revenue, originally part of the consumer surplus.[91] The firm subsidizes non-paying clients to extract this info. This does not mean that a firm should provide lower quality work, rather it is in the firm's best interest to minimize the quality gap between pro bono and for-profit work.[92]

The equations are beyond the scope of this Article, but displayed graphically, one can see that the maximum amount of information rent that a firm can extract results from minimizing the gap between the quality of paying and non-paying clients.

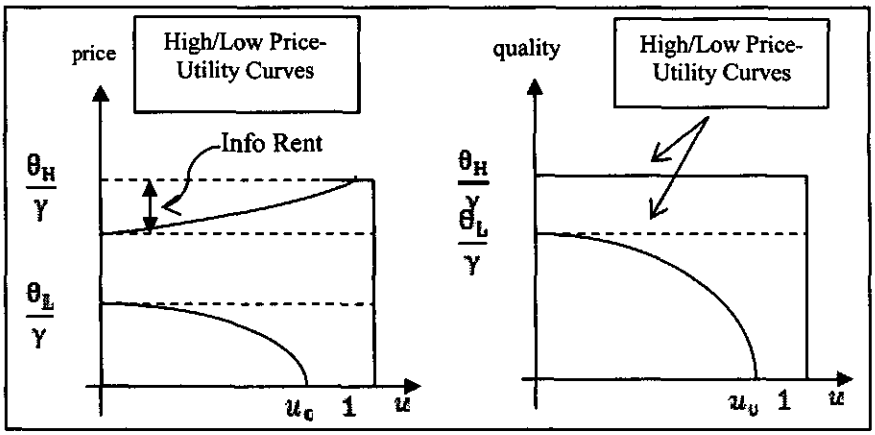

Figure 11 - Quality Screening

Finding this optimal level is a valuable outcome from pro bono. By not charging for the pro bono-type legal services, a firm subsidizes those clients, essentially paying for information instead of extracting this value directly from the lower service level consumers. Under the traditional strategy models, which measure only profit, this link is not obvious.

One might argue that this method would encourage firms to "skimp" on the level of service that they provide to their "non-paying" clients. On the contrary (and counter intuitively), a firm can maximize the information that it extracts by maintaining the quality as high as possible. Therefore, although pro bono represents the "lower-type" of service, the firm has an incentive to make the quality of pro bono and paid legal services as similar to the optimal level of service as possible.

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[91] *Id.*

[92] *See infra* Figure 11.

G. Conclusions from Game Theory Analysis

1. Mergers

Mergers can help a firm create value, but only if the fixed cost savings justify the strategic move. Mergers work particularly well in industries with high fixed costs. As firms struggle to reduce costs, mergers will become a less viable means of increasing profit through synergies. On the other hand, merging for the sake of merging does not create value, and can actually prove costly for a firm. Regardless, mergers have a negative effect on consumer surplus, despite sometimes having positive welfare effects.

Pro bono work provides as excellent way to offset some of the advantage that a firm absorbs from consumers and society by merging. This strategy does not imply a "share the wealth" requirement; rather, pro bono work can split the welfare measures gained by merging rather than maintaining the entire surplus exclusively within the firm.

2. "Partial" mergers

An ineffective integration of the merged "components" leads to even worse results than a non-cost-effective merger. A partial merger may temporarily enable cooperation, leading to an improved Nash Equilibrium position for the firm, but this cooperation cannot last if the components remain fragmented. This gives the insight that if a firm annexes a practice group or firm, to see the benefits, it must effectively integrate the new members into the firm.

I will discuss the mechanisms for internal organization in Part VII,[93] but here it is important to note that pro bono can serve as a binding mechanism to draw the firm together, and maintain the improved Nash Equilibrium gained from the merger. After the firm fully integrates, the risk dissipates that various practice groups will have an incentive to act non-cooperatively, forcing the firm to return to the previous equilibrium.

3. Pro Bono as a Pareto Improvement Externality

Once an industry reaches its Nash Equilibrium, it will remain in that position as long as the fundamental rules remain the same.[94] Despite the rapid changes that are affecting the legal industry, the well-established players will continue to remain within the game. While firms continue to

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[93] *See infra* Part VII.

[94] SIEGFRIED, *supra* note 52, at 59.

take the appropriate actions in response to their competitors, they will remain at the Nash Equilibrium—no firm will be able to improve its position by unilateral action.

Pro bono, on the other hand, can serve as an externality to the game. By drawing on experience and expertise gained from serving pro bono clients, a firm can improve its position by leveraging its relationships and improving skills and innovation, without worsening competitor positions.

This is a powerful argument for pro bono: the work does not reduce the general welfare improvement gained through a firm merger, it merely shifts surplus from producer to consumer. Simultaneously, the law firm benefits from increased training opportunities and the other internal organizational advantages discussed in Part VII.[95]

4. Cooperation

Forcing cooperation among industry players (sometimes disparagingly called collusion) only functions as long as all of the players agree to the external rules. As long as this cooperation exists, all firms in the industry can benefit from an improved mixed-strategy equilibrium. However, the mere "threat" of unilaterally retreating to the equilibrium position is often not enough to constrain the other players in the game. Several of these forced-cooperative mechanisms, such as the National Association for Law Placement ("NALP") recruiting guidelines, have fallen under significant scrutiny as the recent financial crisis arrived.[96] However, these mechanisms can actually benefit all the players in the industry just as actions in other industries prevent "mutually-destructive" price wars.

Pro bono requirements, although currently only "recommended" by the ABA, can serve as an additional hedge on non-cooperative gaming in the industry.[97] Shifting service from paying consumers to pro bono clients can serve as a relief valve for a mutually-destructive "race to the bottom." Law firms can remain in a Pareto improved position within the industry, yet still increase services to improve lawyer skills.

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[95] *See infra* Part VII.

[96] *See* Karen Sloan & Nate Raymond, *Firms Breathe Sigh of Relief Over NALP Change on Recruiting*, LAWJOBS.COM (Mar. 1, 2010), http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202444716489.

[97] MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

VI. TRANSLATING ORGANIZATIONAL OPTIMIZATION TO A COMPETITIVE EDGE

As discussed *supra* Part V,[98] law firms are running out of options to improve their strategic positions by focusing on external relationships among competitors. While some firms will enjoy continued success by focusing on their position in relation to their competitors, the true innovators will thrive in the fast-changing market of the future. To accomplish this innovative posture and gain a competitive edge, law firms should turn their focus internally to optimize their internal structure. This optimization does not refer to the outdated operational efficiency dismissed in Part III, rather it focuses on innovative ways to structure a firm to take advantage of strategic opportunities.

A. Resource-Based View; Core Competencies

One of the more traditional internal organization strategic frameworks, the Resource-Based View, considers a company as a bundle of valuable resources.[99] Each of these resources or skills contributes to the overall operational strategy of the company, ultimately leading to long-term industry dominance. Under this strategic view, a company need not focus on external pressures, but should seek to continually focus on and improve their core competencies, leading to sustainable advantage.[100] With this constant focus on improving skill-sets, success comes in time as a company learns how to best deploy these assets.

For a skill to truly be valuable, it must set a firm apart. This view focuses internally; a firm decides where and how it can best leverage its valuable resources—not focusing on direct competition—but understanding that competitive success will arrive in time by building on these competencies. These "strategic resources" can take many forms, including physical (a manufacturing plant), intangible (patents), processes (engineering excellence), or intellectual (legal expertise in a certain area). But all have one aspect, Valuable, Rare, Inimitable, Non-Substitutable ("VRIN"), in common.

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[98] *See supra* Part V.

[99] *See generally* David J. Collis & Cynthia A. Montgomery, *Competing on Resources: Strategy in the 1990s*, 1995 HARV. BUS. REV. 118, 119.

[100] *Id.* at 126-28.

B. Valuable resources—VRIN Resources & Core Competencies

A company, or firm, consists of immeasurably diverse skills, talents, backgrounds, and experiences. To narrow a firm's focus on the skills that play a critical strategic role, the Resource Based strategy focuses on VRIN expertise.[101] These skills satisfy four key requirements represented by the VRIN acronym: 1) they are valuable (can give a competitive advantage in the firm's competitive space), 2) rare (not possessed by all other players—gives this firm a unique advantage), 3) inimitable, and 4) non-substitutable (no substitute resource provides exactly the same functionality).[102]

Over time, a firm can further refine its most valuable resources into a few "core competencies." These competencies form the root of the company's internal strengths that allow the company to excel in its core mission. Traditionally, firms have been able to nurture their VRIN resources into several core competencies to facilitate long-term dominance. Many firms are well respected as corporate or litigation "powerhouses." Other firms have further specialized into boutiques, narrowly focusing on niche practices such as intellectual property or tax.

C. Lateral Hiring to Enhance a Law Firm's Competencies

Within the legal industry, many law firms recognized the opportunities to grow their skills to gain a competitive edge. For example, the number of lateral hires has exploded during the last decade.[103] While associates occasionally transferred between firms in the past, this practice has become common even among the partner ranks of major firms.[104] This increased mobility can provide both challenges and opportunities for firms.

For many years, this approach has been very effective in slowly growing skills within a firm. However, these acquisitions only actually benefit a firm if the firm fully integrates the new hires into the culture. Many elite firms have avoided this problem altogether by declining to hire laterals and instead growing talent from within the existing firm.

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[101] *See id.* at 120-24.

[102] *Id.*

[103] *Lateral Hiring Continues to Outpace Entry-level Hiring*, NALP THE ASS'N FOR LEGAL CAREER PROF'LS (May 2008), http://www.nalp.org/2008maylateralhiring?s=hiring%202007.

[104] John Hellerman, *"Lateral" Should Mean Up Not Sideways*, AMERICAN BAR ASSOCIATION (May 2008), http://apps.americanbar.org/lpm/lpt/articles/mkt05083.shtml.

D. Changes in the Legal Industry Outpace the Resource Based View

Resource Based Theory provided useful strategic insight in the legal industry prior to the crisis. Law firms could acquire partners or practice groups to increase their skill-sets in increments in "hot" areas for practice. However, the legal market has undergone such rapid changes that it has outgrown the core competency model. If a firm focuses exclusively on developing resources and competencies, it can find itself left behind and outdated in a fast-changing industry. Furthermore, a firm may choose to focus on resources that are the most profitable in today's market, investing extensive time and training in these areas, only to find that by the time they have the desired level of expertise, the market has shifted again. The time required to develop these competencies means that firms cannot anticipate the path the industry will take, but instead must rapidly change, adapt, and innovate to succeed.

As with the Industry Structure Framework,[105] a Resource Based view also does not provide a terribly useful tool for those advocating a robust pro bono practice. While many advocates correctly argue that pro bono work can supplement a junior lawyer's skills,[106] the fundamental legal skills that pro bono work provides fall short of satisfying the VRIN requirements. These skills may be valuable, but they are not rare, inimitable, or non-substitutable. Lawyers can easily gain similar skills, often simultaneously earning money for the firm (even at substantially reduced billing rates). Under this model then, the pro bono advocate must once again argue the benefits of pro bono work at a disadvantage by creating creative arguments under performance metrics that favor paid work.

We should turn, therefore, to Complexity Theory, a more malleable approach that can adapt to the fast changes in the modern legal industry.

VII. COMPETING ON THE EDGE OF CHAOS

Thinking about a law firm's organizational structure as a parallel to biological functions seems very odd at first glance. As Part V demonstrated, mathematics neatly explains the interaction between various pieces and forces throughout the industry. But how can the same theories that explain cellular growth or flight patterns of flocks of birds provide insights to law firm organizational optimization?

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[105] *See* PORTER, *supra* note 24, at 3.

[106] Roy S. Ginsburg, *Pro Bono: It Pays to be Good*, ATTORNEY AT WORK (Oct. 15, 2012), http://www.attorneyatwork.com/pro-bono-it-pays-to-be-good/.

While mathematical analysis provided relatively rigid analytics, Complexity Theory treads a narrow line between balance and chaos.[107] The link between biological systems and organizational behavior arises primarily from the space in which each operates.[108] Systems in nature must rapidly adapt and shift strategy to survive; gaining success not from long-term dominance, but from an iterative series of small wins.[109] Similarly, in fast changing and innovative industries, the competition space changes rapidly.[110] To survive in such an environment, a firm must be able to rapidly evolve and innovate to changes in market conditions.

This iterative, evolving strategy comes from a fragile balance between structure, which allows for planning and execution, and chaos, which allows for rapid change and innovation. If a firm can operate effectively at this optimal region, described by Professor Eisenhardt as "The Edge of Chaos", it can thrive in an uncertain and rapidly changing industry.[111]

A. What (or Where) is the Edge of Chaos?

Complexity Theory focuses on a company balancing on an operational region called "The Edge of Chaos."[112] This region describes an organizational structure where a firm exercises the perfect balance between structure and chaos.[113] This area is extremely difficult to obtain and achieve because these forces are often diametrically opposed—often a firm must trade perceived unity of focus and hierarchy to foster innovation.[114]

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[107] Gerald Schueler, *Chaos Theory: Interface With Jungian Psychology*, SCHUELER'S ONLINE (1997), http://www.schuelers.com/chaos/chaos1.htm.

[108] SHONA L. BROWN & KATHLEEN M. EISENHARDT, COMPETING ON THE EDGE: STRATEGY AS STRUCTURED CHAOS 18 (1998).

[109] *Id.* at 147-51.

[110] *Id.* at 18-19.

[111] *See id.* at 1-19.

[112] *Id.* at 14.

[113] *Id.*

[114] *Id.*

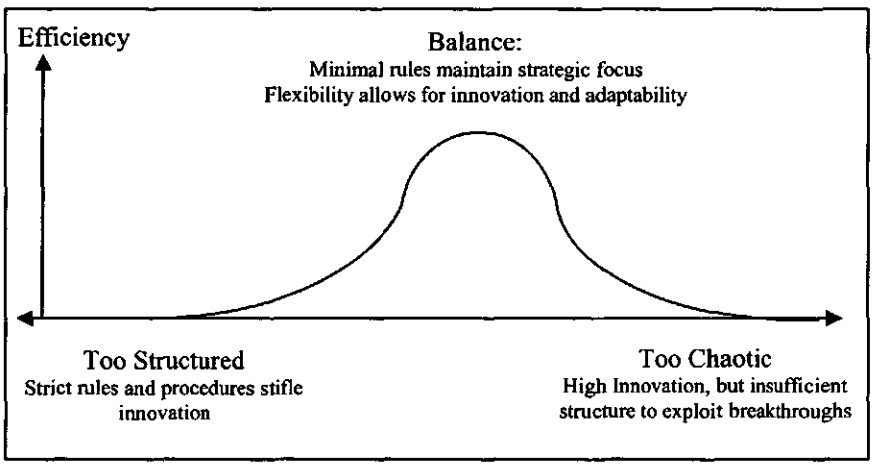

Figure 12 - Balance

B. Key Features of a Complexity Strategy

The key feature that distinguishes Complexity Theory from more traditional structures is its ability to adapt to rapidly changing environments.[115] This flexibility comes from the relatively loose structure that characterizes systems utilizing this strategy.[116]

Complexity Theory considers a company as a complex, adaptive system,[117] similar to biological functions, where systems achieve maximum efficiency in an indeterminable and constantly changing environment by self-organizing within a surprisingly loose structure.[118]

Biological functions typically operate as a collection of semi-autonomous entities, with minimal but extremely rigid rules.[119] The small number of rules keeps the entities focused on the long-term strategic goals while allowing for flexibility to innovate and exploit unexpected opportunities.[120] Also, this system allows for rapid shifts in strategy if one path closes or becomes impractical.[121]

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[115] *Id.* at 28.
[116] *See id.* at 24.
[117] *See Id.* at 4-5.
[118] *Id.* at 29.
[119] *Id.* at 31-33.
[120] *Id.*
[121] *Id.*

Along with the balance between rigidity and flexibility, a key feature of Complexity Theory involves an iterative probing process.[122] Through this process, an entity determines its surroundings and potential areas for growth or utility maximization by using numerous, low-cost, and diverse "probes."[123]

C. Examples[124]

Since the link from cell mutation behavior to pro bono work in law firms is not obvious at first glance, some examples of other applications of evolutionary theory are useful.

1. Biological Strategy

Ants are often considered the organizational masters of the animal kingdom. Their success seems impossible to quantify when looking at a chaotic mass of individual insects swarming across the landscape. However, we can use Complexity Theory to see the underlying organizational strategy that leads to a colony's success.

Each individual follows few, but extremely rigid rules. The social hierarchy within an ant colony assigns specific jobs to each individual.[125] These roles that are strictly maintained. Goals for various search or defense teams are given clear objectives and search radii through scent pheromones.[126] Within these few structural rules, each ant operates as a semi-autonomous agent of the hive by combining with various other colony members to accomplish tasks in ever-changing conditions.[127] For example, individuals fan out to probe their surroundings until they find the best areas to scavenge for food.[128] Once these areas that are ripe with opportunity are identified, the colony can commit its full resources to exploiting the

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[122] *See* Shona L. Brown & Kathleen M. Eisenhardt, *The Art of Continuous Changes: Linking Complexity Theory and Time-Paced Evolution in Relentlessly Shifting Organizations*, 42 ADMIN. SCIENCE QUARTERLY 1, 1 (Mar. 1997), *available at* http://www.jstor.org/stable/2393807.

[123] *Id.*

[124] For further examples, including companies that operate at the Edge of Chaos, *see generally* BROWN, *supra* note 108, at 1-20.

[125] Deborah M. Gordon, *The Dynamics of Foraging Trails in the Tropical Arboreal Ant* Cephalotes goniodontus, PLOS ONE (Nov. 28, 2012), *available at* http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0050472#ack.

[126] *Id.*

[127] *Id.*

[128] *Id.*

temporary advantage.[129] The rules maintain the colony's overall unity of effort; yet allow enough flexibility for each individual to explore surroundings and share information to rapidly adapt as its surroundings change.

2. The Grateful Dead[130]

Similarly, the link between the legendary psychedelic rock band, the Grateful Dead, and law firm strategy certainly seems strange. Yet by using Complexity Theory, the link becomes insightful.

Like any improvisational ensemble, the Grateful Dead's band members each bring individual sounds through their different instruments and techniques. Without following a set musical score, each individual contributes his or her expertise in a particular instrument to the overall performance. One would think that five musicians playing experimentally and without written music would sound completely disorganized and unmelodious. However, beneath the seemingly chaotic structure there are a few, but rigorously followed, rules that allow the band to function. First, one band member is designated the leader, and controls the pace and ultimate path of the tune. Second, a fixed set of allowable chords is allotted to each member. And third, the tune has a clear start and end.

These rules for the performance are simple, yet this skeletal framework provides sufficient structure to allow for constant innovation while keeping the tune on track. As the melody continues, each semi-autonomous band member continuously probes various chord combinations with ever-changing companion instruments. The music, therefore, constantly evolves (or innovates) within the established framework.[131] Each musician's musical experiment acts as a probe, sometimes creating effective melodies by combining tangents with other band members, which is then followed by the rest of the group. This process of probing within complementary chords to find effective melodies keeps the music innovative and fresh, yet still within the initial framework of the song that began the session.

If the band's structure becomes too rigid, the performance becomes boring and repetitive.[132] Too chaotic, and the music becomes a muddled cacophony with no theme or direction. When the band treads the balance between structure and chaos, the result is an innovative musical experience

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[129] *Id.*

[130] *See id.* at 30-33.

[131] *Id.*

[132] *Id.*

similar enough to provide a unity of effort yet varied enough to constantly find new directions to foster creativity.[133]

D. Law Firms, Pro Bono, and the Complexity Theory Framework

Law firms are well structured to take advantage of the Complexity Theory framework. Not only can firms use this strategic model to become more nimble and innovative, but proponents for robust pro bono practices also can find a strong argument for how pro bono work should be considered a strategic asset rather than a cost.

Law firms are essentially groups of semi-autonomous entities that combine to form groups in various ways. Traditionally, most firms have organized attorneys according to areas of expertise, often with rather rigid cultural barriers separating various practice groups.[134] Occasionally firms even organize around individual partners, with each partner leading a cadre of trusted associates that generally work together.[135]

This system does not allow for a nimble response to a rapidly shifting market. Instead, as industry requirements change, some practice groups find themselves incredibly busy while others sit idle. Instead of organizing in rigid practice groups, a law firm utilizing a Complexity Framework can loosely organize their lawyers to allow for rapid recombination of expertise in response to "problems." The problem-focused organization, rather than the traditional expertise-focused organization, allows the firm to rapidly change combinations of lawyers in response to shifting industry demands. It also helps to eliminate the partial merger problem discussed in Part V.G.2 by creating a more cooperative and integrated unity of effort.

Under this approach, a firm can straddle the edge of chaos by operating with minimal, but rigid rules (e.g., a process for setting priorities, seniority requirements to staff certain matters, etc.) yet balance this structure with the flexibility to improve skills and expand flexibility by removing artificial barriers to innovation (e.g., strict practice group boundaries).

E. Pro Bono's Critical Role in Complexity Theory

A robust pro bono practice finds its strategic place in Complexity Theory. Just as Game Theory showed that pro bono could help a firm find and take advantage of strategic opportunities through external competition,

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[133] *Id.*

[134] *See generally Avoiding Pitfalls in the Practice Group Structure*, EDGE INTERNATIONAL, http://www.edge.ai/Edge-International-1058628.html (last visited Nov. 20, 2012).

[135] *See generally id.*

so too can Complexity Theory provide an impetus for changes to internal firm structure.

Pro bono can serve many roles—an innovative force, encouraging a diverse range of lawyers to collaborate, a unifying "glue" to prevent the partial merger problem discussed in Part V, and a welfare increasing training mechanism.

1. Pro Bono as a Cost Effective Probe

Pro bono can provide a cost effective mechanism for law firms to probe effective strategic paths. Although the cost for a firm to perform pro bono work is debatable, because attorneys generally perform pro bono in addition to their normal practice, it generally costs less than a 1:1 loss of billable time.[136] Therefore, pro bono can operate as a cost-effective probing mechanism, allowing the firm to explore the legal strategic landscape—learning new skills, experimenting with new research tools, and sharing abilities across various attorney groups. Essentially, this low cost probe option allows the firm to invest (or subsidize) in information.

2. Creative Externality

Although it may seem that pro bono work does not directly translate to every lawyer's individual practice area, the innovative force of pro bono matters can act as a creative externality to spur innovation regardless of practice group. By forming pro bono teams that differ from each attorney's normal practice, knowledge, techniques, and skills can flow more fluidly throughout the firm. As social barriers erode and information flows more freely, innovation can result in unexpected and not strictly planned-for ways. This creative externality can increase the "chaos" side of the complexity equation, improving the firm's tendency toward creating innovative solutions to complex problems in its billable work.

3. Recombination; Unity of Effort

By pursuing various pro bono matters, a firm can utilize recombination effects to gain innovation and adaptability. In the past, firms spent large amounts of money on retreats or parties to artificially encourage increased integration and cooperation across practice groups, thus increasing the flow

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[136] Roy S. Ginsburg, *Pro Bono Makes Cents: The Business Case for Pro Bono*, http://www.royginsburg.com/pro-bono-makes-cents-the-business-case-for-pro-bono (last visited Feb. 4, 2013).

of knowledge and creativity through the firm, and produce shared experiences to foster unity of effort. A robust pro bono practice can replace the costly firm retreat in this unifying role while reducing costs and providing the other strategic advantages discussed in this Article. Since a pro bono practice can span the full range of legal services, pro bono matters create additional opportunities for cross-practice group teams to form and evolve. The firm can gain a significant strategic advantage as these increased collaborative opportunities, which allow attorneys that normally may not have worked together in their normal practice to share their knowledge and skills. The more fluidly knowledge and skills flow through the firm, the more rapidly innovation occurs. Additionally, the process of teams forming and dissolving as matters arise helps create a unity of effort as more individuals have an opportunity to interact and share common experiences across the organization.

VIII. CONCLUSION

Law firms are faced with incredible challenges in the rapidly shifting legal market. As pressures increase to cut costs without sacrificing quality or quantity of services, making a business case for a robust pro bono practice will become increasingly difficult under antiquated strategic frameworks.

However, as the successful firms reorganize and innovate, they will hopefully recognize the full potential of pro bono as a strategic asset, not merely for marketing or recruiting campaigns, but for long-term strategic benefit. I hope that this Article will help encourage law firms to rethink their strategies to become more innovative, more nimble, and more committed to pro bono work in the difficult years ahead.