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## ARTICLES



## COMMENT



## NOTES




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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'oloili 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 University of Hawai'i Law Review would like to express its appreciation to the administration, faculty, and staff of the William S. Richardson School of Law.

# The Supreme Court, Job Discrimination, Affirmative Action, Globalization, and Class Actions: Justice Ginsburg's Term*

William B. Gould IV**

## I. INTRODUCTION

Thirty-three years ago, I called the October 1980 term of the Supreme Court "Justice Brennan's Term," as he registered a number of important labor law dissents as well as authored some majority opinions. That term was just beginning to absorb the results of the 1968 elections, as a result of which President Richard M. Nixon was almost immediately able to appoint Chief Justice Warren Burger and soon thereafter Justice William Rehnquist. Justice Rehnquist, eventually Chief Justice when so nominated by President Reagan, was to push the Court far to the right from the beginning, even though he was sometimes at odds with the more moderate Justice Lewis Powell. The sharp shift to a conservative agenda unfolded anew at the beginning of the 1980s with a series of appointments by President Reagan and both Bushes in his wake.[1] The fairly uncontroversial appointments of Justices Ruth Ginsburg and Stephen Breyer by President Clinton were perceived to be judicial moderates or centrists.[2]

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* This article is based on a speech delivered to the Labor & Employment Section of the State Bar of Hawai'i in Honolulu, Hawai'i on October 11, 2013.

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[1] President Reagan's appointments to the Court included Justice Sandra Day O'Connor, Justice Antonin Scalia, and Justice Anthony Kennedy, although the nomination of Robert Bork was rejected by the Senate. *See* WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB--A MEMOIR 9-11 (2000); *see also Biographies of Current Justices of the Supreme Court*, SUPREME CT. OF THE U.S., http://www.supremecourt.gov about/biographies.aspx (last visited Feb. 1, 2014). President George H. W. Bush successfully nominated Justice Clarence Thomas, while President George W. Bush successfully nominated Chief Justice John Roberts and Justice Samuel Alito. *See id.*; *see also Bush Nominates Alito to Supreme Court*, CNN.COM (Nov. 1, 2005, 4:39 AM), http://www.cnn.com//2005/POLITICS/10/31/scotus.bush/index.html?section=cnn_world.

[2] *Cf.* Russell A. Miller, *Clinton, Ginsburg, and Centralist Federalism*, 85 IND. L.J. 225, 231-32 (2010) (stating that President Clinton's nominations of Justices Ginsburg and Breyer

But from 1980-1981, Justice William Brennan, along with Justice Thurgood Marshall, had begun to develop regular dissents, following in the footsteps of predecessors like Justices William Douglas and Hugo Black[3] and Justices Oliver Wendell Holmes and Louis Brandeis[4] before them. The pattern, which gathered momentum in the 1980s,[5] had begun to manifest itself at that juncture more than three decades ago. In discussing Justice Brennan's work, I quoted from Murray Kempton and what he had said of Cardinal Wyszynski: "The great lives are lived *against* the perceived current of their times."[6]

This term, that of October 2012, saw Justice Ginsburg playing a similar role, frequently with three colleagues joining her and at least one in solitary dissent. Though she had registered numerous earlier dissents, both persuasive and eloquent,[7] it seems as though she, as the senior Justice among the dissenters and thus able to assign herself the opinion, found her voice even more so in 2012-2013 as the Court drifted ever more to the right under the leadership of Chief Justice Roberts accompanied by Justice Alito.[8] For the most part, her dissents this term were in the areas of racial

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"reflected, with great precision, the moderate-to-liberal politics of the president").

[3] *See generally* HUGO L. BLACK, ONE MAN'S STAND FOR FREEDOM: MR. JUSTICE BLACK AND THE BILL OF RIGHTS (Irvin Dilliard ed., 1963); WILLIAM O. DOUGLAS, DOUGLAS OF THE SUPREME COURT: A SELECTION OF HIS OPINIONS (Vern Countryman ed., 2d ed. 1959); *see also* William B. Gould IV, Book Note, 45 CORNELL L.Q. 161 (1959) (reviewing DOUGLAS OF THE SUPREME COURT (Vern Countryman ed., 1959)).

[4] *See generally* SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS (1961); ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE (1956); THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS (Max Lerner ed., 1943); *cf.* MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882 (1963) (discussing Holmes's early years that would lay the foundation for his time on the Court).

[5] William B. Gould IV, *The Burger Court and Labor Law: The Beat Goes on—Marcato*, 24 SAN DIEGO L. REV. 51 (1987); *see also* WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 25-26 (1993).

[6] Murray Kempton, *On Cardinal Wyszynski*, N.Y. REV. BOOKS (July 6, 1981), http://www.nybooks.com/articles/archives/1981/jul/16/on-cardinal-wyszynski/ (emphasis in original). *See also* William B. Gould IV, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 4 (1981).

[7] *See, e.g.*, Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1339 (2012) (Ginsburg, J., dissenting); Ricci v. DeStefano, 557 U.S. 557, 608 (2009) (Ginsburg, J., dissenting); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., concurring in part and dissenting in part). *See generally* Pamela S. Karlan, *The Supreme Court, 2011 Term, Foreward: Democracy and Disdain*, 126 HARV. L. REV. 1 (2012).

[8] *But see* Adam Liptak, *How Activist Is the Supreme Court?*, N.Y. TIMES, Oct. 13, 2013, at SR4, *available at* http://www.nytimes.com/2013/10/13/sunday-review/how-activist-

discrimination, e.g., a memorable case relating to voting rights and in a number of cases concerning job-bias matters as well.

The terrain of the Supreme Court docket has shifted considerably since the earlier period of Justice Brennan thirty-three years ago. The October 1979 term consisted of 152 cases, 122 discounting the per curiam opinions.[9] Twenty of those could be characterized as labor or employment.[10] October 1980 saw the Court's docket diminish further to 138 cases, 113 excluding per curiam opinions.[11] In the October 2012 Term, the Court decided merely seventy-eight cases, eleven of them consisting of employment cases and none of the traditional labor law variety.[12] But the latter have not completely disappeared given a number of important matters before the Court in the October 2013 term involving labor law issues.[13]

## II. THE OCTOBER 2012 TERM

Though the focus here, when viewing the October 2012 term, is employment, some of the cases, though not explicitly employment, nonetheless have an impact on the employment arena.

The first of these are the same-sex marriage cases, where the Court held that in jurisdictions which have granted same-sex marriage, the refusal of the Defense of Marriage Act to grant benefits outside of marriages between a man and woman is unconstitutional,[14] and where the Court, in denying

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is-the-supreme-court.html?_r=0.

[9] William B. Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 4 (1981)

[10] *Id.*

[11] *Id.*

[12] Kedar Bhatia, *Final October Term 2012 Stat Pack*, SCOTUSBLOG (Jun. 26, 2013, 6:36 PM), http://www.scotusblog.com/2013/06/final-october-term-2012-stat-pack/.

[13] *See, e.g.*, Canning v. N.L.R.B., 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (U.S. Jun. 24, 2013) (No. 12-281) (involving the validity of recess appointments to the NLRB); Harris v. Quinn, 656 F.3d 692 (7th Cir. 2011), *cert. granted*, 134 S. Ct. 48 (U.S. Oct. 1, 2013) (No. 11-681) (involving a challenge to mandatory dues requirements); UNITE HERE Local 355 v. Mulhall, 134 S. Ct. 594 (2013) (per curiam) (dismissing writ of certiorari as improvidently granted in a case involving the validity of neutrality agreements under section 302 of the NLRA). Justices Breyer, Sotomayor, and Kagan dissented from the Court's dismissal of the *Mulhall* writ of certiorari and argued that the Court should have instead requested additional briefing on whether the case was moot due to the pre-decision expiration of the contract between the union and employer, whether the sole plaintiff in the case lacked proper standing, and whether section 302 authorizes a private right of action in the first place. *See id.* at 594 (Breyer, J., dissenting).

[14] United States v. Windsor, 133 S. Ct. 2675, 2695 (2013). *See also* Ashby Jones, *Judges Extend High Court Same-Sex Ruling*, WALL ST. J., Aug. 5, 2013, at A3, *available at* http://online.wsj.com/news/articles/SB10001424127887323971204578630261068093272.

standing to supporters of California's Proposition 8, left standing lower court decisions which had held that the denial of same-sex marriage under the circumstances of the case to be unconstitutional.[15]

Because of these landmark decisions, the United States Department of Labor, which oversees employer-based pension and health insurance plans, declared that same-sex spouses were entitled to the same protections as opposite-sex spouses.[16] Companies such as Exxon-Mobil Corporation, which provides benefits to 77,000 workers and retirees in the United States, have extended health insurance to married same-sex couples effective October 1, 2013, following the direction of the Internal Revenue Service, which has said that same-sex couples could be considered married for federal tax law purposes even if they do not live in a state that recognizes their union.[17]

The other backdrop against these cases is that twenty-two jurisdictions including the District of Columbia and twenty-one states now prohibit discrimination in the workplace on the basis of sexual orientation.[18] At

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[15] Hollingsworth v. Perry, 558 U.S. 183, 184-85 (2013). Seventeen states and the District of Columbia currently authorize same-sex marriages, including California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington. *See Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 14, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx. The recent Hawai'i marriage equality bill was signed into law in November 2013. *See Abercrombie Signs Same-Sex Marriage Bill into Law*, HONOLULU STAR ADVERTISER (Nov. 13, 2013, 9:54 AM), http://www.staradvertiser.com/news/breaking/20131113_Abercrombie_to_sign_samesex_marriage_bill_into_law.html. Litigation continues in Oklahoma, where a federal district court judge recently ruled the state's ban on same-sex marriage to be unconstitutional. *See* Bishop v. United States *ex rel.* Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014). A federal district court judge similarly found Utah's ban on same-sex marriage to be unconstitutional, Kitchen v. Herbert, No. 2:13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013), but the decision was stayed by Justice Sotomayor in January 2014 pending appeal to the Court of Appeals for the Tenth Circuit, *see* Herbert v. Kitchen, 134 S. Ct. 893 (2014) (mem.), *stay granted* No. 13A687, 82 USLW 3382 (U.S. Jan. 6, 2014)(stay previously denied in Utah District court on December 23, 2013).

[16] U.S. DEP'T OF LABOR, TECHNICAL RELEASE NO. 2013-04 (2013), *available at* http://www.dol.gov/ebsa/newsroom/tr13-04.html.

[17] Tara Siegel Bernard, *Exxon to Extend Health Care to Married Same-Sex Couples*, N.Y. TIMES, Sept. 28, 2013, at B1, *available at* http://www.nytimes.com/2013/09/28/business/exxon-to-extend-health-care-to-married-same-sex-couples.html?_r=0.

[18] *See* WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 390 (5th ed. 2013). In addition to the District of Columbia, statutory provisions regarding sexual orientation discrimination exist in California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. *See* U.S.

least 163 cities and counties have similar bans.[19] The issue continues to be debated at the federal level, and the Senate has passed legislation banning sexual orientation discrimination in 2013,[20] notwithstanding House Speaker John Boehner's contention that its enactment into law would promote frivolous litigation.[21]

Beyond the same-sex marriage cases and their relationship to employment, the Court decided another important case involving race and voting, *Shelby County v. Holder*,[22] and ruled in a manner which illustrates its treatment of cases involving racial discrimination generally.

## III. *SHELBY COUNTY* AND THE VOTING RIGHTS ACT OF 1965

In this case, a closely-divided Court examined the coverage formula and preclearance requirements contained in the Voting Rights Act of 1965, requirements providing for no change in voting procedures in covered jurisdictions prior to clearance.[23] Speaking on behalf of a sharply divided 5-4 Court, Chief Justice Roberts delivered an opinion holding that the Act, in relevant part, was unconstitutional.[24] The majority opinion, utilizing language that one would normally expect from Congress rather than the judiciary, declared that "conditions that originally justified these [preclearance] measures no longer characterize voting in the covered jurisdictions."[25] Though stating that no one doubted that "voting discrimination still exists,"[26] the Court stressed the "broad autonomy" that

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GOV'T ACCOUNTABILITY OFFICE, GAO-13-700R, UPDATE ON STATE STATUTES AND ADMINISTRATIVE COMPLAINT DATA ON EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY 2 n.4 (2013).

[19] GOULD, *supra* note 18, at 390 & n.194.

[20] Congress has been debating a bill prohibiting discrimination on the basis of sexual orientation or gender identity, the Employment Nondiscrimination Act, for the first time since a similar bill was rejected in 1996. *See* Jeremy W. Peters, *Bill Advances to Outlaw Discrimination Against Gays*, N.Y. TIMES, Nov. 5, 2013, at A10, *available at* http://www.nytimes.com/2013/11/05/us/politics/bill-on-workplace-bias-appears-set-to-clear-senate-hurdle.html; Jeremy W. Peters, *Senate Vote on Workplace Bias Against Gays Poses a Test for the G.O.P.*, N.Y. TIMES, Nov. 4, 2013, at A16, *available at* http://www.nytimes.com/2013/11/04/us/politics/senate-vote-on-workplace-bias-against-gays-a-test-for-the-gop.html.

[21] *See* Bob Egelko, *Boehner's Dismissal of Gay-Rights Bill: "Frivolous Litigation,"* SFGATE (Nov. 7, 2013), http://blog.sfgate.com/nov05election/2013/11/07/boehners-dismissal-of-gay-rights-bill-frivolous-litigation/.

[22] 133 S. Ct. 2612 (2013).

[23] *See generally id.*

[24] *Id.* at 2631.

[25] *Id.* at 2618.

[26] *Id.* at 2619.

the States possess in structuring government,[27] referenced the Tenth Amendment, which reserves powers to the States not "specifically granted to the Federal Government,"[28] and concluded that the 1965 statute's "disparate treatment" of the States was a sharp departure from state sovereignty.[29]

Said Chief Justice Roberts on behalf of the majority of the Court in reviewing practices that led to the Voting Rights Act of 1965: "Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force."[30]

Noting that the Voting Rights Act had "in large part" improved voting and the fact that the black voter turnout exceeded white voters in five of the six states originally covered, the Court observed that Shelby, Alabama, and Philadelphia, Mississippi, the locations of some of the most well-publicized civil rights demonstrations and their oppression, now had black mayors, concluding that "our Nation has made great strides."[31] Congress, said the Court, could not divide the states on the basis of data which did not comport with current conditions, and rejected the proposition that the procedures which result in the dilution of votes were those at which the statute was aimed, i.e., voting tests and access to the ballot.[32] Accordingly, the Court struck down as unconstitutional the statutory preclearance procedures requiring Justice Department approval before implementation of voting procedure changes, which, it claimed, it did not do "lightly" though it did not affect the permanent nationwide ban on racial discrimination in voting.[33]

Justice Ginsburg, in what can only be characterized as a tour de force, dissented on behalf of herself and three other Justices.[34] As she noted, the Voting Rights Act of 1965, the response to "rank discrimination against minority voting rights" a century after the Fourteenth and Fifteenth Amendments to the Constitution's right to vote free of discrimination, was more than a response to the ineffective legislation which preceded it.[35] Said Justice Ginsburg: "Early attempts to cope with this vile infection

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[27] *Id.* at 2623.

[28] *Id.* (citing U.S. CONST. amend. X).

[29] *Id.*

[30] *Id.* at 2625.

[31] *Id.* at 2626.

[32] *See generally id.* at 2628-31.

[33] *Id.* at 2631. Justice Thomas concurred. *Id.* (Thomas, J., concurring).

[34] Justices Breyer, Sotomayor, and Kagan joined in Justice Ginsburg's dissent. *See id.* at 2632 (Ginsburg, J., dissenting).

[35] *Id.* at 2633.

resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place."[36]

Her opinion noted that the Voting Rights Act had become "one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history," predicated as it was on the federal preclearance to voting laws in covered jurisdictions where opposition to the Constitution's commands had been most "virulent."[37] The Ginsburg dissent noted that Congress had reauthorized the statutory scheme in light of the so-called "second generation barriers," and that in conducting hearings Congress had not taken its task lightly, engaging itself in extensive hearings of considerable length.[38] Congress had noted that racially polarized voting in the covered jurisdictions "increased the political vulnerability of racial and language minorities" there.[39]

Justice Ginsburg stressed the fact that in enacting legislation dealing with voting and racial discrimination, the question was not whether Congress had chosen the wisest means available, but rather had it employed "rationally selected means appropriate to a legitimate end,"[40] noting that the Court had repeatedly affirmed the statute's constitutionality and that Congress had adhered to that "very model."[41]

Thus emphasizing the power possessed by Congress, the Ginsburg dissent also noted the frequency of voting changes blocked based upon a determination that the changes were discrimination (700 between 1982 and 2006) and the success that both the Justice Department and private plaintiffs had possessed in obtaining 100 actions to enforce the preclearance requirements.[42] Justice Ginsburg noted that ordinary litigation "was an inadequate substitute for preclearance in the covered jurisdictions" because it "occurs only after the fact," when voting has already occurred and candidates have obtained positions and "gain[ed] the advantages of incumbency."[43] Concluding that Congress had been particularly concerned about the potential for backsliding, Justice Ginsburg noted that the "covered jurisdictions have a unique history of problems with racial discrimination in

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[36] *Id.*

[37] *Id.* at 2634. *See generally* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013).

[38] *Shelby Cnty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting).

[39] *Id.*

[40] *Id.* at 2637 (citing Katzenbach v. Morgan, 384 U.S. 641, 653 (1966)).

[41] *Id.* at 2638.

[42] *Id.* at 2639.

[43] *Id.* at 2640.

voting" and that "[c]onsideration of this long history, still in living memory, was altogether appropriate."[44]

Contrasting the "great care and seriousness" of Congress in its reauthorization with the Court's majority *Shelby County* opinion, Justice Ginsburg derided the Court for disregarding precedent and "hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments" without even "grappl[ing] with the legislative record."[45] Her opinion cites Alabama's "sorry history" of voting rights violations, some of them in evidence in 2010-2011 based upon FBI investigations of the state senate, where members had referred to blacks as "Aborigines" and talked openly of the need to quash a particular referendum because it might increase black voter turnout.[46] Said Justice Ginsburg: "These conversations occurred not in the 1870s, or even in the 1960s, they took place in 2010. . . . Hubris is a fit word for today's demolition of the [Voting Rights Act]."[47] Said Justice Ginsburg, in a passage that will surely be quoted for generations to come: "Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[48]

Again, Justice Ginsburg stressed the voluminous history of recent discrimination relating to Alabama and its counties, and the fact that it still had a "substantial real-world effect."[49] Curiously, there is hardly a word in Chief Justice Roberts's opinion that is in any way responsive. He had the votes and no need to engage in argument based upon facts, and thus Justice Ginsburg's conclusion that the Court erred "egregiously" by substituting its determination for that of Congress in declaring the statute unconstitutional goes unrebutted.[50] In the wake of *Shelby County*, the Justice Department has now embarked upon a much more formidable and burdensome process than the preclearance procedures previously provided.[51] Additionally, new legislation has been introduced to fill some of the *Shelby County* void.[52]

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[44] *Id.* at 2642.

[45] *Id.* at 2644.

[46] *Id.* at 2646-74.

[47] *Id.* at 2647-48.

[48] *Id.* at 2650.

[49] *Id.* at 2651.

[50] *Id.* at 2652.

[51] *See* Sari Horwitz, *Justice Department to Challenge States' Voting Laws*, WASH. POST (July 25, 2013), http://www.washingtonpost.com/politics/justice-department-to-challenge-states-voting-rights-laws/2013/07/25/c26740b2-f49b-11e2-a2f1-a7acf9bd5d3a_story.html (discussing Attorney General Eric Holder's intention to "blunt the effect" of *Shelby County* through more active litigation to enforce voting laws). Since *Shelby County*, Attorney

## IV. *VANCE V. BALL STATE UNIVERSITY*:[53] THE NEXT CHAPTER IN HARASSMENT CASES

*Vance v. Ball State University*, presenting new issues arising under the hostile work environment line of authority, represents an important interpretation of Title VII of the Civil Rights Act of 1964,[54] the most comprehensive workplace antidiscrimination legal instrument, which now spans a half-century period. The statute is the major law aimed at the prohibition of discrimination on account of race, sex, religion, national origin, or color;[55] other statutes intervene in both age and disability discrimination issues.[56] In *Vance*, a sharply divided 5-4 Court addressed a supervisory harassment issue not explicitly resolved in precedent,[57] the question of what standard should be applied in defining a supervisor who could speak on behalf of the employer.[58] If such an individual fashioned a "tangible employment action," the employer was strictly liable—but if no tangible action was taken, the employer might escape liability by establishing as an affirmative defense that: (1) "the employer exercised

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General Holder has adopted an "aggressive approach" to attack discriminatory voting practices, including the use of section 3 of the Voting Rights Act, a previously "rarely used provision of the act," in place of the old preclearance procedures undermined by the Supreme Court's decision. The Editorial Board, *A New Defense of Voting Rights*, N.Y. TIMES, July 28, 2013, at SR10, *available at* http://www.nytimes.com/2013/07/28/opinion/sunday/a-new-defense-of-voting-rights.html?_r=0; *see also* Charlie Savage, *U.S. Is Suing in Texas Cases over Voting by Minorities*, N.Y. TIMES, Aug. 23, 2013, at A12, *available at* http://www.nytimes.com/2013/08/23/us/politics/justice-dept-moves-to-protect-minority-voters-in-texas.html; The Editorial Board, *The Dishonesty of Voting ID Laws*, N.Y. TIMES, Oct. 1, 2013, at A18, *available at* http://www.nytimes.com/2013/10/01/opinion/the-dishonesty-of-voter-id-laws.html; Adam Liptak, *Judge Reinstates Some Federal Oversight of Voting Practices for an Alabama City*, N.Y. TIMES, Jan. 15, 2014, at A11, *available at* http://www.nytimes.com/2014/01/15/us/judge-reinstates-federal-oversight-of-voting-practices-for-alabama-city.html.

[52] *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014); *see also* The Editorial Board, *A Step Toward Restoring Voting Rights*, N.Y. TIMES, Jan. 19, 2014, at SR10, *available at* http://www.nytimes.com/2014/01/19/opinion/sunday/a-step-toward-restoring-voting-rights.html.

[53] 133 S. Ct. 2434 (2013).

[54] 42 U.S.C. §§ 2000e to 2000e-17 (2012).

[55] *Id.* § 2000e-2(a).

[56] *E.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213.

[57] *See Vance*, 133 S. Ct. at 2439 (stating that Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998) left open the question of "who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment?").

[58] *Id.*

reasonable care to prevent and correct . . . any . . . harassing behavior"; and (2) the plaintiff "unreasonably failed to take advantage of the preventive or corrective opportunities" that the employer provided.[59]

Vance, the plaintiff in this case, filed internal complaints and charges with the Equal Employment Opportunity Commission ("EEOC"), prior to commencement of Title VII litigation, alleging harassment at work.[60] The district court held that because of the finding that the white employee alleged to have engaged in harassing conduct was not a supervisor and could not "hire, fire, demote, transfer, or discipline" the plaintiff, the defendant, Ball State University, could not be held vicariously liable for the alleged racial harassment, and as the employer, could not be "liable in negligence because it responded reasonably to the incident[]."[61] The Court of Appeals for the Seventh Circuit affirmed,[62] and the majority of the Supreme Court held likewise.[63]

Here, with Justice Alito writing for five of the nine Justices, the Supreme Court rejected what it characterized as the "nebulous definition" of a supervisor advocated by the EEOC in its Guidance, as well as several courts of appeals.[64] The Court noted that Title VII does not contain a definition of supervisor[65] and that the issue could be resolved more easily and clearly if the test was whether the employee had the power to take tangible employment actions.[66] Said the Court, speaking through Justice Alito:

> The ability to direct another employee's tasks is simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments . . . but so are many other co-workers. Negligence provides the better framework for evaluating an employer's liability when a harassing employee lacks the power to take tangible employment actions.[67]

The majority was of the view that the "strong implication" of the use of the words "tangible employment actions" means that the supervisor possessed official powers to bear on subordinate employees.[68] This approach, which requires hiring, firing, etc. authority, said Justice Alito, would provide more precision so that it would be known before litigation

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[59] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

[60] *Vance*, 133 S. Ct. at 2439.

[61] *Id.* at 2440.

[62] *Id.* (citing Vance v. Ball State Univ., 646 F. 3d 461 (7th Cir. 2010)).

[63] *Id.* at 2454.

[64] *Id.* at 2443.

[65] *Id.* at 2446 ("'Supervisor' is not a term used by Congress in Title VII.").

[66] *Id.* at 2443-44.

[67] *Id.* at 2448.

[68] *Id.*

who was a supervisor, whereas, in his view, the EEOC approach would be "very often . . . murky."[69] The Court contended that this would not leave employees unprotected against harassment inasmuch as they could establish liability by showing that the employer was negligent in permitting the harassment to occur.[70]

Justice Ginsburg dissented on behalf of three other Justices.[71] Said Justice Ginsburg:

> The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions. The limitation the Court decrees diminishes the force of [precedent on employer liability], ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces.[72]

Justice Ginsburg noted that "[w]orkplace realities fortify my conclusion that harassment by an employee with power to direct subordinates' day-to-day work activities should trigger vicariously employer liability" and then proceeded to detail examples from cases where a person vested with authority to control employment conditions had used that to aid harassment.[73] Justice Ginsburg derided the idea that the majority view had established a clear and workable definition.[74] She emphasized that

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[69] *Id.* at 2449.

[70] *Id.* at 2451.

[71] Justices Breyer, Sotomayor, and Kagan joined Justice Ginsburg's dissent. *Id.* at 2454 (Ginsburg, J., dissenting).

[72] *Id.* at 2455.

[73] *Id.* at 2459-60.

[74] *Id.* at 2461-62 ("A supervisor, the Court holds, is someone empowered to 'take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' . . . Whether reassignment authority makes someone a supervisor might depend on whether the reassignment carries economic consequences. . . . The power to discipline other employees, when the discipline has economic consequences, might count, too. . . . So might the power to initiate or make recommendations about tangible employment actions. . . . And when an employer 'concentrates all decisionmaking authority in a few individuals' who rely on information from 'other workers who actually interact with the affected employee,' the other workers may rank as supervisors (or maybe not; the Court does not commit one way or the other). . . . Someone in search of a bright line might well ask, what counts as 'significantly different responsibilities'? Can *any* economic consequence make a reassignment or disciplinary action 'significant,' or is there a minimum threshold? How concentrated must the decisionmaking authority be to deem those not formally endowed with that authority nevertheless 'supervisors'?" (emphasis in original) (internal citations omitted)).

supervisors, like workplaces, "come in all shapes and sizes."[75] Said Justice Ginsburg:

> Whether a pitching coach supervises his pitchers (can he demote them?), or an artistic director supervises her opera star (can she impose significantly different responsibilities?), or a law firm associate supervises the firm's paralegals (can she fire them?) are matters not susceptible to mechanical rules and on-off switches. One cannot know whether an employer has vested supervisory authority in an employee, and whether harassment is aided by that authority, without looking to the particular working relationship between the harasser and the victim.[76]

The dissent noted the fact that many in the workforce can control and have an impact on the employees' employment status and not fit the definition of a supervisor which the Court established—one that is akin to that provided by the National Labor Relations Act,[77] where the determination involves not only what kind of liability the employer possesses but also which individuals will vote in NLRB-conducted secret ballot box elections.[78] The example provided is that of the law professor whose judgments might affect the status of secretaries or administrative assistants, yet retains no power to hire, fire, etc., as set forth in the Alito opinion.[79] Justice Ginsburg's opinion recites other typical controversies as well.

In one example Justice Ginsburg subsequently provided: The case involved a female highway maintenance worker given assignments by

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[75] *Id.* at 2463.

[76] *Id.*

[77] 29 U.S.C. §§ 151-169 (2012).

[78] The NLRA statutory provision, section 2(11), is part of the Taft-Hartley Amendments, which arose from the Supreme Court's holding in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), *superseded by statute*, 61 Stat. 137-138, 29 U.S.C. § 152(3), *as recognized in* NLRB v. Town & Country Elec. Inc., 516 U.S. 85 (1995). *See* GOULD, *supra* note 18, at 56. Over Justice Douglas's dissent, the Court held that supervisors were protected by the Act. *Packard Motor Car Co.*, 330 U.S. at 489. Justice Douglas observed that protection of such individuals would create divided loyalties and conflicts of interest, *id.* at 493-501 (Douglas, J., dissenting), and his suggestion that Congress had intended to excluded such individuals from statutory protection, *id.* at 500, was confirmed by the 80th Congress. Congress defined "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (2012).

[79] *See Vance*, 133 S. Ct. at 2439-54.

employees called "lead workers."[80] Sex-based incentives were hurled at the female worker and a pornographic image was taped to her locker.[81] The lead worker forced her to wash his truck in sub-zero weather, assigned her to undesirable yard work instead of road-crew work, and directed other employees to give her no aid in fixing a malfunctioning heating system in her truck.[82] Harassing conduct? Concededly yes. Was the lead worker in charge of the harassed employee's daily work activities? Certainly. But the lead worker lacked authority to hire, fire, or take other tangible employment actions. So under the Court's decision, the lead worker would rank merely as a coworker, not a supervisor. Consequently, the maintenance worker would be left without an effective remedy unless she could prove that the employer knew or should have known of the harassment.[83]

The dissent emphasized that under the *Vance* Court's reasoning and holding, the harassment victims will be without an effective remedy, and that Title VII's "capacity to prevent workplace harassment" will be substantially limited.[84] Dismissing the majority's contention that it could all be resolved by establishing negligence, Justice Ginsburg noted that it is not:

> uncommon for employers to lack actual or constructive notice of a harassing employee's conduct. . . . An employee may have a reputation as a harasser among those in his vicinity, but if no complaint makes its way up to management, the employer will escape liability under a negligence standard.[85]

Thus, the *Vance* holding shifted the framework of harassment cases in a more "employer friendly" direction, and the limited scope of vicarious liability, i.e., to those supervisors "formally empowered" to take tangible employment actions, would diminish the incentive to "train those who control their subordinates' work activities and schedules . . . ."[86] In essence, the approach taken in *Vance* seems to have promoted a kind of "see no evil, hear no evil," though much evil could nonetheless be done.

Finally, Justice Ginsburg noted the frequency with which Congress has had to intervene to correct the Court's "wayward interpretations of Title

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[80] *Id.* at 2459 (Ginsburg, J., dissenting).

[81] *Id.*

[82] *Id.*

[83] Justice Ruth Bader Ginsburg, Address at Stanford Law School, Constitution Day 2013: Highlights of the Court's 2012-2013 Term (Sept. 17, 2013), *available at* http://www.youtube.com/watch?v=5ZcLY4rAQOo.

[84] *Vance*, 133 S. Ct. at 2463 (Ginsberg, J., dissenting).

[85] *Id.* at 2464 (citations omitted).

[86] *Id.* at 2463-65.

VII,"[87] the most recent illustration being the adoption of her dissenting opinion in the *Ledbetter*[88] decision involving discriminatory pay for women.[89] Similarly, as she had noted,[90] Congress was called upon to reverse the Court in numerous instances through the Civil Rights Act of 1991.[91] As Justice Ginsberg concluded: "The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."[92] The difficulty is that, as one can see in countless illustrations, the House of Representatives as presently constituted is unlikely in the near future to remedy this error.[93]

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[87] *Id.* at 2466.

[88] *See generally* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 643 (2007) (Ginsberg, J. dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[89] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[90] *Vance*, 133 S. Ct. at 2466.

[91] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The legislation was passed by Congress in direct response to a series of Supreme Court decisions. *See* Patterson v. McLean Credit Union, 491 U.S. 164 (1989), *superseded by statute*, Civil Rights Act of 1991, *as recognized in* CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008); Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, *as recognized in* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, *as recognized in* Burrage v. U.S., No. 12-7515, 2014 WL 273243 (Jan. 27, 2014); Martin v. Wilks, 490 U.S. 755 (1989), *superseded by statute*, Civil Rights Act of 1991, *as recognized in* Landgraf v. USI Film Products, 511 U.S. 244 (1994). For a general discussion of the 1991 amendments, see for example, William B. Gould IV, *The Law and Politics of Race: The Civil Rights Act of 1991*, 44 LAB. L.J. 323 (1993); Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of* Griggs, *a Partial Return to* Wards Cove, *or All of the Above?*, 43 CASE W. RES. L. REV. 287 (1993); Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993); Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923 (1993); Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305 (2001); *see also* William B. Gould IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990); Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583 (1991); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

[92] *Vance*, 133 S. Ct. at 2466.

[93] Even prior to the more recent Supreme Court decisions, Congress has never taken action to alter the Court's error in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *see also* WILLIAM B. GOULD IV, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 66-98 (1977); George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective*

## V. *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*:[94] WHAT CONSTITUTES PROOF OF DISCRIMINATION?

In this case, which involved how discrimination can be proved, the Court, again divided 5-4, noted the congressional mandate contained in the 1991 amendments that where lawful motives are causative in the employer decision along with those that are unlawful, i.e., the so-called "mixed motive" cases, and refused to extend this "lessened causation standard" to similar claims of retaliation under Title VII.[95] Here a majority of the Court, speaking through Justice Kennedy, relied upon an age discrimination ruling of four years ago, which had required proof that the employee must show that the unlawful motive would have caused the discrimination, under the so-called "but for" test, such that "but for" the unlawful reasons the employee would have been retained, promoted, or hired—a standard more difficult for plaintiffs to pursue successfully.[96] In the case before the Court, the University of Texas Southwestern Medical Center, an academic institution within the University of Texas system, affiliated with a hospital which had permitted students to gain clinical experience working in its facilities, and had an agreement with the hospital that required the hospital to offer empty staff position posts to the University's faculty members.[97]

The plaintiff was a medical doctor of Middle Eastern descent, who specialized in internal medicine and infectious diseases, hired to work as a member of the University's faculty and in a staff position at the hospital.[98] His ultimate superior, he alleged, was biased against him on account of his religion and ethnic heritage.[99] The plaintiff tried to arrange to continue working on a hospital assignment without continuing his position as a faculty member.[100] When it appeared that this may be possible, the plaintiff resigned his teaching post, sending a letter alleging harassment stemming from religious, racial, and cultural bias against Arabs and Muslims.[101]

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*Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); William B. Gould IV, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1 (1967); William B. Gould IV, *Seniority and the Black Worker: Reflections on* Quarles *and Its Implications*, 47 TEX. L. REV. 1039 (1969). *Cf.* William B. Gould IV, *The High Court Discriminates Between Sex and Race*, N.Y. TIMES, June 12, 1977, at 153.

[94] 133 S. Ct. 2517 (2013).

[95] *Id.* at 2523.

[96] *Id.*; *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

[97] *Nassar*, 133 S. Ct. at 2523.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 2523-24.

When the offer to work at the hospital was withdrawn, the plaintiff brought an action alleging both unlawful harassment as well as retaliation for complaining about the harassment.[102]

The jury found for the plaintiff on both claims, awarding damages on both constructive discharge grounds as well as retaliation.[103] The Court of Appeals for the Fifth Circuit, affirming in part and vacating in part, affirmed on the retaliation finding, holding that retaliation required only a showing that it was a "motivating factor for the adverse employment action, rather than its but-for cause"—the same standard adopted for liability purposes in the 1991 amendments to the Civil Rights Act.[104]

The Supreme Court majority noted that the Civil Rights Act of 1991 affirmed liability in mixed motive cases where the prohibited reason was simply one of a number of motivating factors, and simultaneously limited the remedy of both monetary damages and reinstatement where the employer proved that "it would still have taken the same employment action."[105] In so doing with regard to remedies, Congress codified the so-called *Price Waterhouse* test, which had established that where the discrimination was a "motivating" or "substantial" factor in the employer's adverse employment decision,[106] the employer could avoid liability by simply proving that it would have taken the same action in the absence of discriminatory animus.[107] The employer would be required to show that the discrimination was not a "but-for" cause of the action taken.[108]

Nonetheless, the 5-4 majority in *Nassar* concluded that notwithstanding the fact that *Gross* stood for the proposition that a different standard should apply to the Age Discrimination in Employment Act ("ADEA") since it provided for a separate statutory scheme, that standard was now

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[102] *Id.* at 2524.

[103] *Id.*

[104] *Id.*; *see also* Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 454 (5th Cir. 2012).

[105] *Nassar*, 133 S. Ct. at 2526-28.

[106] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994). However, there may be a different interpretation of the "but-for causation" requirement imposed by the Court. *See* Burrage v. U.S., 134 S. Ct. 881, 889 n.4 (2014) ("*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is not to the contrary. The three opinions of six Justices in that case did not eliminate the but-for-cause requirement imposed by the 'because of' provision of 42 U.S.C. § 2000e–2(a), but allowed a showing that discrimination was a 'motivating' or 'substantial' factor to shift the burden of persuasion to the employer to establish the absence of but-for cause. See *Nassar*, 133 S. Ct. 2517, 2525–2527 (2013). Congress later amended the statute to dispense with but-for causality. Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e–2(m)).").

[107] *Nassar*, 133 S. Ct. at 2526.

[108] *Id.*

appropriately incorporated into the antiretaliation cases of Title VII because the 1991 "motivating factor" standard relating to liability did not explicitly incorporate any provisions other than the substantive unlawful employment practices themselves, as opposed to the retaliation provisions of the statute.[109]

The majority seemed particularly concerned with the fact that antiretaliation charges had risen so appreciably in recent years,[110] a phenomenon caused, in substantial part, by the Court's decisions themselves (though the majority opinion did not allude to this).[111] The Court stressed that the causation issue involved has:

> central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency. . . . Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.[112]

Said the Court:

> [L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer [sic], administrative agencies, and courts to combat workplace harassment. Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage. . . . It would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent. . . . Yet there would be a

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[109] *Id.* at 2526-27 (citing Gross v. FBL Financial Servs., Inc., 557 U.S. 167, 178 n.5 (2009)).

[110] *Id.* at 2531 ("This is of particular significance because claims of retaliation are being made with ever-increasing frequency.").

[111] *Id.; see, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005); Gomez-Perez v. Potter, 553 U.S. 474 (2008); Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011).

[112] *Nassar*, 133 S. Ct. at 2531.

> significant risk of that consequence if respondent's position were adopted here.[113]

Justice Ginsburg, in her dissenting opinion, stressed the fact that a leading reason for employee silence about discrimination is the fear of retaliation,[114] and that retaliation complaints were "tightly bonded to the core prohibition [of discrimination] and cannot be disassociated from it."[115] Next the dissent pointed out that there is "scant reason" to accept the view that Congress intended to exclude retaliation claims from the newly enacted 1991 amendment's "motivating factor" provision, and that the 1991 amendments were focused upon "any employment practice."[116] Justice Ginsburg also relied upon the EEOC guidance that was contrary to the *Nassar* majority, referring to precedent in which retaliation had been prohibited under the antidiscrimination prohibitions even when the statute did not mention it.[117] Justice Ginsburg said: "It is strange logic indeed to conclude that when Congress homed in on retaliation and codified the proscription, as it did in Title VII, Congress meant protection against that unlawful employment practice to have *less* force than the protection available when the statute does not mention retaliation."[118]

The Ginsburg dissent noted that, on the one hand *Gross* had been decided because the age discrimination prohibitions were made under a different statutory scheme, and yet in *Nassar* the majority had concluded that there was no "meaningful textual difference" between the ADEA and Title VII.[119] Said the dissent: "What sense can one make from this, other than 'heads the employer wins, tails the employee loses'?"[120]

Penultimately, Justice Ginsburg noted that jurors would be confused by two different standards, i.e., one for status-based discrimination, and the

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[113] *Id.* at 2531-32. This, of course, is the same mantra put forward by Speaker Boehner, *see supra* note 21 and accompanying text, the difference being that Congress has already enacted the statute here, but that the Court nonetheless found this policy consideration relevant to its interpretation of the statute. For an excellent critique of *Nassar* and the Court's reasoning, see Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. (forthcoming 2014).

[114] *Nassar*, 133 S. Ct. at 2534-35 (Ginsburg, J., dissenting) (citing Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271 (2009)).

[115] *Id.* at 2535.

[116] *Id.* at 2539.

[117] Id. at 2541 (citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005)).

[118] *Id.* (emphasis in original).

[119] *Id.* at 2544-45.

[120] *Id.* at 2545.

other for retaliation, where both were at issue.[121] This would inevitably, noted the dissent, "sow confusion."[122]

Finally, the dissent noted that the majority opinion not only lacked "sensitivity to the realities of life at work," but also "appear[ed] driven by a zeal to reduce the number of retaliation claims filed against employers. . . . Congress had no such goal in mind when it added [the 1991 amendments] to Title VII."[123] At a minimum, a policy aimed at discouraging frivolous litigation is not at the core of the statute and has little to do with its overriding objectives.[124] Accordingly the dissent here again, as in *Vance*, called for another Civil Rights Restoration Act along the lines that Congress was called upon to enact more than two decades ago. In this arena, *Shelby County*, *Vance*, and *Nasser*, Justice Ginsberg's views were discounted for the moment—but the passage of time may render another verdict by Congress as well as the public.

## VI. AFFIRMATIVE ACTION: *FISHER V. UNIVERSITY OF TEXAS*[125]

This case involved the University of Texas's affirmative action plan.[126] As Justice Ginsburg has recently said: "Indicative of the contentiousness of the case, more than thirty-six weeks [257 days] elapsed from oral argument to decision."[127]

Texas had two procedures, the first of which guaranteed admission to students ranking in the top ten percent of any Texas high school graduating class—and the policy that triggered the litigation before the Court in *Fisher* was one in which the university counted race as a plus factor for applicants rankings below the top ten percent.[128] The plaintiff did not fall within the top ten percent, and when denied admission she attacked the University's policy as an unconstitutional racial preference.[129]

The most immediate backdrop to this litigation was the Supreme Court's decade-old decision in *Grutter v. Bollinger*,[130] where the Court had rejected a challenge to the University of Michigan's law school admission plan. The 8-1 *Fisher* Court, with Justice Ginsburg dissenting and Justice

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[121] *Id.* at 2546.
[122] *Id.*
[123] *Id.* at 2547 (citations omitted).
[124] *See* Sperino & Thomas, *supra* note 113.
[125] 133 S. Ct. 2411 (2013).
[126] *Id.* at 2415-17.
[127] Ginsburg, *supra* note 83.
[128] *Fisher*, 133 S. Ct. at 2415-17.
[129] *Id.* at 2417.
[130] 539 U.S. 306 (2003).

Kennedy writing the majority opinion, vacated a court of appeals' holding that denied the plaintiffs' challenge.[131]

The Court stated that the court of appeals had erred by not holding the University to the "demanding burden of strict scrutiny" articulated in the earlier *Grutter* decision, and that of Justice Powell in *Bakke*.[132] Accordingly, the decision was vacated and the case remanded for further proceedings.[133] In the Court's opinion, Justice Kennedy seemed to assume that the program first promulgated, i.e., the top ten percent procedure, did not consider race, even though "a more racially diverse environment" had been the result of it.[134] But this description was disingenuous inasmuch as the program had taken account of the segregated nature of Texas neighborhoods, thus providing for the admission of the top students in black and Latino schools, who might not qualify if considered in a pool of all students.

Regarding the second and more explicitly race conscious policy, the Court nonetheless said that it required a "searching examination" inasmuch as "strict scrutiny" assumed that the government would carry the burden to establish that the racial classification was "unquestionably legitimate."[135] The judicial deference to education authorities undertaken in *Grutter* seemed now forgotten.[136]

Justice Scalia concurred, noting that no party had suggested the overruling of the *Grutter* decision, but suggesting that he would seriously entertain this position if advanced.[137] Justice Thomas, not as concerned with what had been argued or advanced in *Fisher* itself, issued a lengthy concurring opinion stating that a "State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."[138] Justice Ginsburg dissented.[139]

Justice Ginsburg's opinion noted that the top ten percent rule was hardly race neutral, inasmuch as the "persistence of . . . segregation . . . [meant that] admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority

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[131] *Fisher*, 133 S. Ct. at 2411.

[132] *Id.* at 2415.

[133] *Id.* at 2421.

[134] *Id.* at 2416.

[135] *Id.* at 2419.

[136] Of course, whatever its rationale, the Court has lacked empathy for affirmative action. *See, e.g.*, *Bakke*, 438 U.S. 265; City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[137] *Fisher*, 133 S. Ct. at 2422 (Scalia, J., concurring).

[138] *Id.* at 2422 (Thomas, J., concurring).

[139] *See id.* at 2432-34 (Ginsburg, J., dissenting).

students was admitted to Texas universities."[140] Stating that she would not send the case back for a "second look," the dissenting opinion stated that Justice Powell's opinion in *Bakke* and the Court's holding in *Grutter* required "no further determinations."[141] The essence of Justice Ginsburg's position is that which she expressed a decade ago: "Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."[142] Nonetheless, given the present composition of the Court, the earlier opinions of Justice Kennedy,[143] the views of Justices Scalia, Thomas, and Alito,[144] as well as Chief Justice Roberts,[145] it would seem as though affirmative action is imperiled,[146] and that acceptance of Justice Ginsburg's view is for a future more distant than the civil rights cases of this past Term involving statutory interpretation.

## VII: CLASS ACTIONS

The Court continued its handiwork involving interpretations of the Federal Arbitration Act of 1925, which provides in relevant part that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[147] by utilizing short-form arbitration clauses devised by companies for frequently unsuspecting employees and consumers, to trump

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[140] *Id.* at 2433 (quoting H. COMM. ON HIGHER EDUC., BILL ANALYSIS, H.B. 588, 75th Leg., R.S. 4-5 (1997)).

[141] *Id.* at 2434.

[142] *Id.* at 2434 n.4 (quoting Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting)).

[143] *E.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring).

[144] *E.g.*, Ricci v. DeStefano, 557 U.S. 557, 597, 602 (2009) (Alito, J., concurring) (accusing the defendants of discriminating in order to "placate" racial minorities, and emphasizing alleged attempts to "exacerbate[] racial tensions").

[145] *E.g.*, *Parents Involved*, 551 U.S. at 748 (Roberts, C.J.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

[146] Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 49 (mem.) (2013) (involving a challenge to a Michigan constitutional amendment prohibiting racial preferences by government institutions). The Court of Appeals for the Ninth Circuit has upheld a similar amendment in California. *See, e.g.*, Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012); Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).

[147] 9 U.S.C. § 2 (2012). Beyond those cases discussed in the text, the Court also held that arbitrators are to decide in the first instance the validity of covenants not to compete, and that the prohibition is "outright" displaced by the Federal Arbitration Act. Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam).

litigation commenced by them. The question that arose in *American Express Co. v. Italian Colors Restaurant*,[148] involved the so-called effective vindication rule, which emerged in the 1980s to the effect that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum" arbitration may be maintained as a substitute for litigation.[149]

Until the 1980s arbitration had been perceived as inapplicable to public law statutory claims, though the Supreme Court in *Alexander v. Gardner-Denver Co.*[150] had held the view that "great weight" could be given to the arbitral award under some circumstances in a labor arbitration proceeding involving an employment discrimination complaint.[151] But beginning in the 1980s and eventually with the *Gilmer* decision the following decade,[152] the Court regarded arbitrators as capable to consider public law (specifically in antidiscrimination matters in the case of *Gilmer*[153]). The Court began to equate labor arbitration, which its earlier decisions had viewed as unique,[154] with commercial arbitration even though in contrast to the labor arbitration cases involving procedures negotiated between unions and employers where parties bargain in arms-length relationships, much of the arbitration in the commercial arena was of the adhesive short-form variety.

In the term preceding the past one, the Court, which in the 1980s and early 1990s had viewed arbitrators as public law experts,[155] now shifted

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[148] 133 S. Ct. 2304 (2013).

[149] *Id.* at 2310 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

[150] 415 U.S. 36, 60 n.21 (1974).

[151] *Id.* at 60 n.21 (noting that "[w]here an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight"). Initially, the Court in part relied upon some of the ideas I had put forward in William B. Gould IV, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PENN. L. REV. 40 (1969). In a rather confusing opinion, the Court seems to have repudiated much of the *Gardner-Denver* reasoning in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). *See* William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, *in* ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50, PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (Paul D. Staudohar & Mark I. Lurie eds., 2011).

[152] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[153] *Id.* at 30 (rejecting plaintiff's "host of challenges to the adequacy of arbitration" and suggesting that arbitrators are generally competent to decide statutory discrimination claims).

[154] *See* United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterp. Wheel & Car Corp., 363 U.S. 593 (1960).

[155] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989); Mitsubishi Motors

gears and held that arbitrators were ill-equipped to devise class action procedures and that, in any event, class actions would be inconsistent with the informality involved with arbitration.[156] Class actions, of course, were a major motivating consideration for employers that sought to avoid liability through the substitution of commercial arbitration for jury trials in courts of general jurisdiction.[157] On the other hand, class actions, regardless of the forum in which they are maintained, provide employees with leverage.[158]

Confronted with California's prohibition against arbitration that barred class actions as unconscionable,[159] the Court held that such a policy was inconsistent with the Federal Arbitration Act of 1925, which preempted state law and thus prohibited state policies in conflict with it.[160] In *AT&T v. Concepcion*, the Court stressed that class actions would undercut "confidentiality" and that arbitrators are "not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties,"[161] notwithstanding its previous pronouncement that arbitrators would be capable of handling public law issues.[162] Justice Scalia, speaking for the 5-4 majority, said (1) that class actions would sacrifice the "principal advantage of arbitration—its informality—and [would] make[] the process slower, more costly, and more likely to generate procedural morass than final judgment;"[163] (2) that it was unlikely that Congress, in passing the Federal Arbitration Act, had meant to leave these matters to arbitrators;[164] (3) that class actions would

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Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985).

[156] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 665 (2010); *cf.* Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523 (2013) (holding that a Rule 68 offer to an individual employee moots Fair Labor Standards Act claims for collective relief); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (holding that class action was improperly certified since the lower court's damages model did not consider whether damages could be shown on a classwide basis).

[157] William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPL. REL. L.J. 404 (1988); ADHOC COMMITTEE ON TERMINATION AT WILL AND WRONGFUL DISCHARGE, EMPLOYMENT LAW SECTION, STATE BAR OF CALIFORNIA, TO STRIKE A NEW BALANCE 8-9, *reprinted in* LABOR & EMP. L. NEWS (Spec. Ed. Feb. 8, 1984), *available at* http://www.law.stanford.edu/sites/default/files/publication/259017/doc/slspublic/gould_strikeanewbalance.pdf.

[158] *Cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (involving sexual discrimination claims by female employees).

[159] Discover Bank v. Super. Ct., 36 Cal. 4th 148 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)).

[160] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

[161] *Id.* at 1751.

[162] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[163] *Concepcion*, 131 S. Ct. at 1751.

[164] *Id.*

"greatly increase[] risks to defendants," i.e., a "small chance of a devastating loss" would pressure defendants into "settling questionable claims."[165] Though the *Concepcion* issue involved preemption, the decision, along with an earlier one,[166] indicated substantial hostility to class actions and to the difficulties that they pose to defendant companies, which might be "pressured" into settlements to which they otherwise would not agree.[167]

Last term, the Court decided three cases involving arbitration, two of them involving important policy issues regarding class actions under the 1925 Act.[168] In the first of these cases, *Oxford Health Plans LLC v. Sutter*,[169] in an opinion authored by Justice Kagan, the Court addressed an agreement where it was clear that the arbitrator *should* decide whether the contract authorized class action arbitration, and he had resolved the issue affirmatively.[170] The Court, noting that its jurisprudence allowed an arbitral award to be vacated "only in very unusual circumstances," held that the parties had bargained for the arbitrator's construction of the agreement.[171] The Court noted that the arbitrator had concluded that class actions were authorized and that the Act permitted "courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly."[172] Said the Court, without dissent:[173] "All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. . . . The arbitrator's construction holds . . . good, bad, or ugly."[174]

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[165] *Id.* at 1752.

[166] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

[167] *Concepcion*, 131 S. Ct. at 1752.

[168] *See, e.g.*, Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam); *see* also *supra* note 149 and accompanying text.

[169] 133 S. Ct. 2064 (2013).

[170] *Id.* at 2066-67.

[171] *Id.* at 2068 (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995)).

[172] *Id.* at 2070.

[173] *Cf. id.* at 2064 (Alito, J., concurring).

[174] *Id.* at 2070-71. The language employed here under the Federal Arbitration Act is more colorful and thus memorable, and perhaps more ambitious, than that contained in the Court's leading decisions involving section 301 of the National Labor Relations Act. *See e.g.*, United Steelworkers v. Enterp. Wheel & Car Corp., 363 U.S. 593 (1960). The Court reversed the lower court's refusal to enforce an arbitration award since it was not clear that the arbitrator had exceeded his authority, and instead the lower court "merely disagreed with the arbitrator's construction" of the contract. *Id.* at 598. The Court stated: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599; *cf.* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001) (noting the impropriety of courts

But a more important ruling was handed down in the above-noted *American Express Co. v. Italian Colors Restaurant.*[175] Here, the Court, 5-3,[176] upheld a waiver of class arbitration on the grounds that, notwithstanding the effective vindication rule, "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim,"[177] and that antitrust law itself did not indicate a prohibition against the waiver of class action procedures, relying in part upon *Concepcion.*[178] The Court, acknowledging the point that if the plaintiff was forced to stand alone, its costs as an individual would far exceed any recovery, and conceding that high filing and administrative fees constituting a prerequisite to arbitration could act as a bar to a remedy, nonetheless concluded that "the fact that [the claim] is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy,"[179] and that class actions were not suddenly required by virtue of the effective vindication rule, noting that *Concepcion* "[t]ruth to tell . . . all but resolves this case."[180]

Justice Kagan, in a stinging dissent—one joined by Justice Ginsburg and Justice Breyer—rendered in an informal vernacular prose, said:

> Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. . . . And here is the nutshell of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.[181]

Justice Kagan's opinion emphasizes that if class actions cannot implement the effective vindication rule, the sharing or shifting of costs

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weighing the merits of the grievance when hearing an arbitration appeal); E. Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000) (holding that public policy considerations did not preclude upholding of arbitrator's decision); W.R. Grace & Co. v. Local 759, 461 U.S. 757 (1983) (holding, inter alia, that upholding of arbitrator's award would not be counter to public policy requiring obedience of court orders). Further, the Court noted in *Sutter* that it would be confronted with a "different issue" if the availability of class arbitration could be viewed under the rubric of a "question of arbitrability," and that under such circumstances courts could review the matter "*de novo* absent 'clear[] and unmistakabl[e]' evidence that the parties wanted an arbitrator to resolve this dispute." *Sutter*, 133 S. Ct. at 2068 n.2 (alterations in original) (citation omitted).

[175] 133 S. Ct. 2304 (2013).

[176] Justice Sotomayor did not participate in the decision. *See id.* at 2304.

[177] *Id.* at 2309.

[178] *Id.* at 2312.

[179] *Id.* at 2311 (emphasis in original).

[180] *Id.* at 2312.

[181] *Id.* at 2313 (Kagan, J., dissenting).

can.[182] The fact of the matter is that *Italian Colors* leaves corporations with little incentive to provide such procedures given the fact that corporate defendants, through fashioning arbitration clauses, have given themselves such a broad de facto immunity from liability under public law. Noting that the agreement in question cut off not simply class arbitration, but also the reallocation of costs, the dissent would have refused to compel arbitration under these circumstances.[183]

Again, as in *Shelby County*, there was little if any response from the majority opinion to all of this. The business of the Court is business,[184] and *Italian Colors* represents how arbitration, initially promoted in the context of labor-management relations where the parties had truly bargained for it and costs were generally shared, made the Federal Arbitration Act a roadmap to the elimination of the implementation of statutory rights.[185]

## VIII. GLOBALIZATION: THE ALIEN TORT CLAIMS ACT OF 1789

Nearly a decade ago, the Supreme Court had placed its imprimatur upon causes of action brought under the 1789 statute enacted by the First Congress involving violations of the "law of nations" or the norms of international law against parties that have engaged in such conduct abroad.[186] A 5-4 majority of the Court, in an opinion authored by Chief

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[182] *Id.* at 2316-17.

[183] *Id.* In support of the majority view, see *Class Actions—Class Arbitration Waivers—*American Express Co. v. Italian Colors Restaurant, 127 HARV. L. REV. 278, 285-86 (2013) [hereinafter *Class Actions*].

[184] Undoubtedly, this fact prompted the National Football League, for instance, to enter into a fairly favorable settlement with plaintiffs' attorneys in the concussion cases, very much weighted toward the interests of the NFL. *See* Ken Belson, *N.F.L. Agrees to Settle Concussion Suit for $765 Million*, N.Y. TIMES, Aug. 30, 2013, at A1, *available at* http://www.nytimes.com/2013/08/30/sports/football/judge-announces-settlement-in-nfl-concussion-suit.html?pagewanted=2&_r=0; Ken Belson, *Many Ex-Players May Be Ineligible for Payment in N.F.L. Concussion Settlement*, N.Y. TIMES, Oct. 18, 2013, at B10, *available at* http://www.nytimes.com/2013/10/18/sports/football/many-ex-players-may-be-ineligible-to-share-in-nfl-concussion-settlement.html. It may be that plaintiffs' attorneys were legitimately concerned about their prospects in this area on the issue of preemption as it relates to labor arbitration as much as on the merits. *Cf.* William B. Gould IV, *Football, Concussions, and Preemption: The Gridiron of National Football League Litigation*, 8 F.I.U. L. REV. 55 (2012). For a further discussion of the Roberts Court, see generally MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION (2013).

[185] For a sensible legislative answer, see *Class Actions*, *supra* note 183, at 287.

[186] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *cf. Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171 (2005); William B. Gould IV, *Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America?*, 21 STAN. L. & POL'Y REV. 401, 409 (2010) (discussing cases utilizing the 1789 Act);

Justice Roberts, was of the view that nothing in the text of the statute provided a basis for the belief that Congress intended to recognize causes of action that had extraterritorial reach.[187] Seemingly forgotten was the Court's above-mentioned earlier ruling that under some circumstances international norms in the form of the law of nations could apply abroad under a statute that was jurisdictional and not regulatory.[188] To the argument that Congress obviously intended the law of nations to be applicable to piracy, the Court was of the view that piracy was different from conduct occurring in sovereign states inasmuch as it occurs "on the high seas, beyond the territorial jurisdiction of the United States or any other country," and that the law relating to pirates did not typically involve the imposition of American "sovereign will . . . onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences."[189] The Court stressed the point that there was "no indication" that Congress intended the United States to be a "uniquely hospitable forum for the enforcement of international norms."[190]

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William B. Gould IV, *Fundamental Rights at Work and the Law of Nations: An American Lawyer's Perspective*, 23 HOFSTRA LAB. & EMP. L.J. 1, 22-28 (2005) (discussing the impact of *Sosa* on the use of the 1789 Act on subsequent labor cases). Lower courts had begun to protect some constitutional claims involving, for instance, freedom of association where labor organizations attempt to recruit workers and were thwarted by violence and the like abroad. *See* Gould, *Fundamental Rights*, *supra*, at 27-38.

[187] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

[188] *Sosa*, 542 U.S. at 719-20.

[189] *Kiobel*, 133 S. Ct. at 1667.

[190] *Id.* at 1668; *see also* Balintulo v. Daimler AG, 727 F.3d 174, 189-90 (2d Cir. 2013) ("The Supreme Court's *Kiobel* decision, the plaintiffs assert, 'adopted a new presumption that ATS claims must 'touch and concern' the United States with 'sufficient force' to state a cause of action.' . . . The plaintiffs read the opinion of the Court as holding only that 'mere corporate presence' in the United States is insufficient for a claim to 'touch and concern' the United States, but that corporate citizenship in the United States is enough. . . . Reaching a conclusion similar to that of Justice Breyer and the minority of the Supreme Court in *Kiobel*, the plaintiffs argue that whether the relevant conduct occurred abroad is simply one prong of a multi-factor test, and the ATS still reaches extraterritorial conduct when the defendant is an American national. . . . We disagree. The Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States. . . . The majority framed the question presented in these terms no fewer than three times; it repeated the same language, focusing solely on the location of the relevant 'conduct' or 'violation,' at least eight more times in other parts of its eight-page opinion; and it affirmed our judgment dismissing the plaintiffs' claims because 'all the relevant conduct took place outside the United States . . . .' Lower courts are bound by that rule and they are without authority to 'reinterpret' the Court's binding precedent in light of irrelevant factual distinctions, such as the citizenship of the defendants. . . . Accordingly, if all the relevant conduct occurred abroad, that is simply the

Accordingly, the Court looked back to *EEOC v. Arabian American Oil Co.*,[191] a holding almost immediately repudiated by Congress,[192] where Title VII's prohibition against discrimination, in this case against Jews by American companies in Saudi Arabia, was beyond the scope of antidiscrimination law.[193] Again, not only was the holding which *Kiobel* relied upon reversed by Congress, but its reasoning seems to have been undercut by a wide variety of decisions by the Supreme Court applying antitrust and securities laws beyond our national boundaries.[194]

Justice Breyer, on behalf of Justices Ginsburg, Sotomayor, and Kagan, concurred in the judgment, but concluded that the presumption against extraterritoriality should not be invoked where:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind.[195]

The concurrence stressed the fact that a "modest number of claims" were contemplated by the Court's decision of a decade ago interpreting the 1789 statute, and stated that a ship is like land for the purpose of relevant international law.[196] Though Justice Breyer concurred in the judgment given that plaintiffs were not United States nationals, that the conduct took place abroad, and that those who helped defendants were not American nationals either, with regard to the statute's general multinational application he continued:

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end of the matter under *Kiobel*." (citations omitted)).

[191] 499 U.S. 244 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub L. No. 102-166, 105 Stat. 1071, *as recognized in* Arbaugh v. Y&H Corp., 546 U.S. 500 (2006).

[192] *See* Renee S. Orleans, *Extraterritorial Employment Protection Amendments of 1991: Congress Protects U.S. Citizens Who Work for U.S. Companies Abroad*, 16 MD. J. INT'L L.J. 147, 147 n.4 (2013) ("The Civil Rights Act of 1991 reversed the following cases: EEOC v. Arabian Oil Co., 11 S. Ct. 1227 (1991) . . . .").

[193] *Arabian Am. Oil Co.*, 499 U.S. at 246-47.

[194] *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005); Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010); *cf.* Cal. Gas Transp., Inc., 347 NLRB 1314 (2006), *enforced*, 507 F.3d 847 (5th Cir. 2007) (declining to rule on extraterritoriality issue); Int'l Longshoremen's Ass'n, AFL-CIO, 323 NLRB 1029, 1031 (1998) (Gould, Chairman, concurring). *See generally* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998).

[195] *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

[196] *Id.*

> [W]ho are today's pirates? Certainly today's pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are 'fair game' where they are found. Like those pirates, they are 'common enemies of all mankind and all nations have an equal interest in their apprehension and punishment.' . . . And just as a nation that harbored pirates provoked the concern of other nations in past centuries . . . so harboring 'common enemies of all mankind' provokes similar concerns today.[197]

The Breyer concurrence emphasized that there is no support for a presumption against extraterritoriality in the 1789 statute's jurisprudence, given the equivalence between the high seas and foreign soil for the exercise of jurisdiction, a feature which the Roberts majority opinion scarcely acknowledges.[198] The reasoning of the Court's opinion in *Kiobel* creates a kind of safe harbor for those who engage in conduct violative of the most "fundamental international norms."[199]

Though Justice Ginsburg[200] simply concurred in Justice Breyer's opinion, as she did with regard to Justice Kagan's position in *Italian Colors*, her previous writings make it clear that she is a staunch proponent of international norms that should be taken into account in constitutional adjudication as a general proposition.[201] The holding, a significant setback for international human rights,[202] leaves only a few relatively unappetizing escape valves through which to establish liability.[203]

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[197] *Id.* at 1672-73 (citations omitted).

[198] *Id.* at 1673.

[199] *Id.* at 1674.

[200] Subsequently, Justice Ginsburg has written the Court's opinion in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), holding that it was error "to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California," and that the Ninth Circuit had "paid little heed to the risks to international comity its expansive view of general jurisdiction posed[,]" since "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case." *Daimler AG*, 134 S. Ct. at 763. *See generally* Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457 (2007).

[201] *See e.g.*, Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004); Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address to the Annual Meeting of the American Society of International Law (Mar. 30 – Apr. 2, 2005), *in* 99 AM. SOC'Y. INT'L. L. PRO. 351 (2005).

[202] *A Giant Setback for Human Rights*, N.Y. TIMES, Apr. 18, 2013, at A24, *available at* http://www.nytimes.com/2013/04/18/opinion/the-supreme-courts-setback-for-human-rights.html.

[203] Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After* Kiobel, MICH. B.J., Nov. 2013, at 44.

## IX. CONCLUSION

The one area where this Court seems to have developed protection in the civil rights arena relates to homosexuality and, in particular, same-sex marriage—a development which is both fostered by and which will perhaps promote legislation comparable to that already afforded to race, sex, religion, national origin, age, disability, and the like. The changes in corporate behavior antedating the Court's 2013 rulings in this arena are even more startling and profound. The Court seems a step away from a judicial analogue to its ruling in *Loving v. Virginia*,[204] the last of the major desegregation cases of the 1960s, declaring prohibitions against interracial marriages unconstitutional, and one rendered subsequent to the eradication of job bias through Title VII. The most recent initiative regarding job-bias against gays has been undertaken as the result of congressional debate in 2013.[205]

But the broad themes of the Roberts Court all push in the opposite direction. *Shelby County*, *Vance*, and *Nassar* represent the erosion of civil rights protections provided a full century after the great post-Civil War constitutional amendments.[206] Here Justice Ginsburg took the lead in opposition to them, assigning these eloquent and farseeing dissents to herself.

"The great lives are lived *against* the perceived current of their times."[207] As we saw three decades earlier with Justice Brennan, this applies to Justice Ginsburg, most especially during the October 2012 term. She has already been successful in obtaining the reversal of the Court by Congress in civil rights cases, a phenomenon that irritates the Court's pro-business majority profoundly.[208] In contrast to the flag-salute cases, where the Court reversed itself within a few years,[209] it is unlikely that her dissents will become a majority in the next year or two. But given the always-possible composition of a new Court in the years to come, as was the case with the

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[204] 388 U.S. 1 (1967).

[205] *See* Peters, *Senate Vote on Workplace Bias*, *supra* note 18; *see also* Jeremy W. Peters, *Senate Approves Ban on Antigay Bias in Workplace*, N.Y. TIMES, Nov. 7, 2013, *available at* http://www.nytimes.com/2013/11/05/us/politics/bill-on-workplace-bias-appears-set-to-clear-senate-hurdle.html; 159 CONG. REC. S7,907-09 (daily ed. Nov. 7, 2013), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2013-11-07/pdf/CREC-2013-11-07.pdf.

[206] *See* Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1627 n.86 (2012).

[207] Kempton, *supra* note 6 (emphasis in original).

[208] Vance v. Ball State Univ., 133 S. Ct. 2434, 2452 (2013) (Alito, J.) (accusing Justice Ginsburg of "[i]mportuning Congress" in her dissent).

[209] *See, e.g.*, Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Warren Court,[210] her views may well see the light of day and become transformed into those of the majority in the years to come.

[210] Harry Kalven, Jr., *"Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289 (1968); *see also* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965).

# Memorializing the Meal: An Analogical Exercise for Transactional Drafting

William E. Foster* and Emily Grant**

*The legal academy is increasingly focused on producing practice-ready lawyers. For transactional practice, that notion requires that attorneys have the flexibility, creativity, and business acumen to draft documents that anticipate contingencies and accomplish clients' goals. Effective lawyers are able to structure their clients' affairs to provide a balance of flexibility for, and protection against, the predictably unexpected.*

*To further this goal, this article incorporates pedagogical theory to develop a classroom exercise that focuses on creativity and contingency planning in the transactional drafting context. It does so by introducing that process in a nonlegal context, specifically by having students plan a dinner party and memorialize the arrangements in a valid contract. By developing accessible classroom exercises that incorporate everyday contingencies, law professors can hone students' abilities to anticipate and adapt to factual and legal contingencies, and accordingly, to be effective planners and drafters as they transition to practice. Thus, this article augments the tools employed by law schools for developing this deeper concept of a practice-ready lawyer.*

## I. INTRODUCTION

The American Bar Association has recently renewed its call for the legal academy to develop practice-ready lawyers,[1] an evolving concept that

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[1] For the past two decades, the American Bar Association has encouraged law schools to incorporate practical legal training into the curriculum. *See, e.g.*, AM. BAR ASS'N SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 3-8 (1992), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_prof

encompasses far more than mastery of fundamental black-letter law. To be sure, that foundational understanding is crucial to being a successful attorney. But law students must also have the opportunity to immerse themselves in the legal system, in the business world, and in the litigation arena so that they develop the common business sense and institutional knowledge to solve problems for their clients. Thus, the concept of a practice-ready lawyer is not someone who is prepared to merely perform isolated legal tasks, but one who is also able to process the client's articulated goals and to fully comprehend the client's situation.[2]

This article seeks to advance the methods for producing multi-faceted practice-ready lawyers by detailing a classroom exercise that builds a foundation for thinking creatively about drafting legal documents. It does so by adapting existing pedagogical approaches traditionally used to map the fundamental legal landscape and to introduce basic legal concepts (e.g., case law synthesis). But this article focuses instead on upper-level students who have some command of legal terminology, systems, and processes, and on the transactional drafting context, where the established approach tends to focus on specific task-driven learning.

The exercise described in this article requires students to walk through the details of planning a dinner party, but it focuses attention on addressing specific factual contingencies that might thwart or otherwise ruin the event. From that point, the exercise evolves so that students draft contractual provisions addressing the specific contingencies they previously identified. The culmination of the exercise is a legal document memorializing the dinner party arrangements, complete with delivery obligations, closing details, representations and warranties, covenants, and conditions for performance. This article also provides detailed materials that demonstrate the evolution of the exercise, including a sample student contract that might be created at the conclusion of the class discussion. In this way, this article supplements the conventional approach of having students actually draft transactional documents to gain subject-matter expertise with a classroom exercise designed to facilitate a more expansive view of the value an

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essional_development_maccrate_report).authcheckdam.pdf; AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION 10B (Aug. 8-9, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_daily_journal_FINAL.authcheckdam.pdf.

[2] The practicing bar has become more vocal in its desire for graduating law students to have, in addition to technical skills, "general competencies," such as "problem solving, project management, teamwork, risk assessment, and emotional intelligence." *See* Carl J. Circo, *Teaching Transactional Skills in Partnership with the Bar*, 9 BERKELEY BUS. L.J. 187, 193 (2012). "[T]he essential skills of practice-ready lawyers are dominantly those that are transferrable across multiple practice contexts—general competencies." *Id.* at 200.

attorney can bring to a drafting task. At the same time, this method highlights the function and interrelatedness of various contract provisions and yet demystifies the contingency planning task, thus diminishing the intimidation many students (and new attorneys) feel when first approaching contract drafting.[3]

A recent conversation illustrates a common frustration of law school graduates, legal employers, and most of all, clients. In the discussion, one of the authors' neighbors, the owner of a web hosting and IT support business, relayed his disappointment in having to fire a newly-hired employee. The employee had previously worked as a contract laborer in the construction industry. He sought a career change, attended a nearby trade school, and obtained a certificate relevant to computer repair and IT support. In this training, he learned how to perform a variety of technology-support tasks (e.g., how to replace a motherboard or reinstall an operating system). But, in the workplace, the employee's limitations in actually being able to resolve client problems quickly became apparent.

For example, when he was called to assist a client who was having trouble with her office e-mail, the employee spent several hours trying to resolve the issue to no avail. He had her reboot her computer and ran through several diagnostic sequences. Near exasperation, he called the boss for help. The boss immediately asked if the client could access the internet through her web browser and if anyone else in the office was having e-mail problems. The employee had not considered either question, and in fact, no one at the office could access their email or internet. The problem was with a third-party-run server, and no diagnostics on a single workstation could reveal the issue.

Although it is certainly fair to cut the employee some slack when confronted with a problem with nearly endless possible causes, the boss's questions were the obvious starting point for anyone who has spent substantial time in an office working on computers. The first thing people ask (yell down the hall) when their e-mail is wonky is whether others are having problems. If so, then they know it is not just their system involved, and a whole universe of problems is off the table. The IT employee had never spent much time with computers before attending trade school, so he lacked the common sense that comes with relying on institutional e-mail in a workplace. The employee could competently perform individual tasks

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[3] Indeed, recent graduates have identified a paucity of practical training in transactional skills as a common inadequacy in law school curricula. Joanne Martin, *The Nature of the Property Curriculum in ABA-Approved Schools and Its Place in Real Estate Practice*, 44 REAL PROP. TR. & EST. L.J. 385, 424 (2009) ("[Young practitioners] also would like to have seen an emphasis on the practical aspects of transactional practice during their law school experience.").

necessary to provide IT support, but was unable to comprehend the client's problems enough to identify the steps necessary to resolve the issue.

And so it goes with new attorneys.[4] Yes, graduates possess many fundamental legal skills—they know basic causes of action; they know generally how to navigate the procedure; they know what kinds of documents they may have to draft; they know the structure of the appellate system.[5] But they lack understanding of the basic business context in which the legal issues arise, due in part to the traditional focus of legal education.[6] Less attention seems to be directed at transactional matters,[7] and from a very practical standpoint, students do not understand the basic

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[4] Law schools are addressing the challenge of graduates with insufficient practical skills and are recognizing the pressing need for law students to graduate ready to engage in the practice of law. *See, e.g.*, Barbara J. Busharis & Suzanne E. Rowe, *The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses*, 33 J. MARSHALL L. REV. 303, 304 (2000) ("[M]embers of the bar increasingly demand that students arrive for their first jobs with more than minimal competence in practical lawyering skills."); Bradley T. Borden, *Using the Client-File Method to Teach Transactional Law*, 17 CHAP. L. REV. 101, 101 (2013) (advocating the client-file method, which "combines the law school case method with the business school case-study method, and provides students an opportunity to study and apply legal doctrine to a real-world problem . . . ."); Michele Mekel, *Putting Theory into Practice: Thoughts from the Trenches on Developing a Doctrinally Integrated Semester-in-Practice Program in Health Law and Policy*, 9 IND. HEALTH L. REV. 503, 507 (2012); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (noting that law schools are moving toward theory while law firms are moving toward commerce).

[5] *See* Jonathan Todres, *Beyond the Case Method: Teaching Transactional Law Skills in the Classroom*, 37 J.L. MED. & ETHICS 375, 375-76 (2009) ("Immersed in case analysis, law students quickly grow accustomed to issue-spotting and identifying who committed a wrong and what the elements of that wrong are, but they are often far less familiar with how to approach a client's issue when nothing has happened yet. Teaching our students to think ex ante about clients' issues or legal matters is important to producing graduates who will excel in practice.").

[6] *See, e.g.*, Circo, *supra* note 2, at 198 (highlighting topics such as "Business acumen;" "Leadership and management;" "Financial/economic analysis;" and "Business development" that are practical skills not currently being effectively taught in law schools (citing HEATHER BOCK ET AL., NAT'L INST. FOR TRIAL ADVOCACY, THE FUTURE OF LEGAL EDUCATION: A SKILLS CONTINUUM 6 (2009))).

[7] "The scholarly and professional literature addressing why and how legal education should do a better job preparing law students for practice is more highly developed in addressing litigation and dispute resolution than business and transactional practice. This shortcoming reflects the strong advocacy bias in traditional legal education." Circo, *supra* note 2, at 188 (citing Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS'N LEGAL WRITING DIRECTORS 118, 120-22 (2008)).

job of an attorney when it comes to the anticipatory aspects of document drafting.[8]

In fact, practice-ready graduates must understand the significance of a client's articulated goals in the broader context of the business deal.[9] It is the job of the attorney to internally translate those goals into legal terminology, externally communicate them back to the client using layman's terms to come to an understanding of the work to be accomplished, and then perform the legal task (using the necessary legal language and documents) to achieve the client's goals.[10] The exercise described below introduces this translation process, a necessary component of document drafting, to students, focusing specifically on anticipating contingencies that may thwart a client's goals.

At different stages, both technical and psychological barriers impede effective contract drafting. Law students are often overwhelmed by what they do not know; conversely, new attorneys are overwhelmed by what they do know. Recent graduates, having just spent three years in law school and a summer studying intricate bar exam hypotheticals, are daunted by the myriad issues implicated in each provision they draft.[11] As a result, they get anxious about their drafting responsibilities. Some new transactional lawyers, confronting such apprehension, have a tendency to rigidly follow a form agreement without making any modifications beyond the names of the parties.[12] Others attempt to tackle the multitude of issues head-on and over-

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[8] "[T]he legal academy has yet to identify a satisfactory means for addressing the basic gap in our students' understanding of dealmaking." Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEGAL EDUC. 221, 226 (2009).

[9] "Not only do we need to broaden and strengthen our teaching of the elements of planning, negotiation and drafting, but we need to expose students to the ways in which these fundamentals interact in practice. We need to teach students not only how to structure a merger, but how to close a deal." *Id.*

[10] "In practice, we solve real, not abstract problems, translating the language and methodologies of the law to our clients." Susan R. Martyn & Robert S. Salem, *The Integrated Law School Practicum: Synergizing Theory and Practice*, 68 LA. L. REV. 715, 715 (2008).

[11] Much of this dynamic can be attributed to the retrospective bias in the law school curriculum—that students are analyzing issues ex post, as compared to the prospective nature of transactional drafting. *See* Todres, *supra* note 5, at 375-76.

[12] "A practitioner who, as a law student, never saw a form may tend to clutch it as a drowning person grabs whatever flotsam comes within reach. The form may represent the 'answer' . . . ." SCOTT J. BURNHAM, DRAFTING AND ANALYZING CONTRACTS 216 (3d. ed. 2003); *see also* Todres, *supra* note 5, at 377 ("When I practiced transactional law, litigator friends would tease that 'drafting' meant merely pulling a good template from the files and changing the names of the parties and the dates. Transactional law, like all areas of law, draws upon precedents to enhance efficiency, improve quality of work, and save clients money, but a good lawyer can draft precise, effective legal language on the spot and also

lawyer a document, getting mired in the details of every possible legal and factual scenario and trying to draft over-inclusively.[13] Obviously, neither of these approaches effectively serves clients. The dinner party exercise developed in this article pushes students toward overcoming these barriers by developing their mastery of the technical skills of drafting in a comfortable context.

This article is unique because it does not merely promote legal analysis or drafting skills in isolation, though a more robust command of each is a fortunate by-product of the exercise. Instead, this article encourages professors to challenge upper-level students to set aside their formulaic legal mindset and their narrow vision of a drafting task and to approach drafting with something akin to common sense.[14] In that way, students will be better prepared to view a client's needs as individualized rather than something that can be adequately addressed by rote fill-in-the-blank drafting.

To set the context for the ideas promoted in this article, Part II discusses the existing pedagogical theory that supports using nonlegal examples to introduce students to legal concepts and explains how we have combined that paradigm with introducing students to transactional drafting tasks. Part III describes the classroom exercise that focuses on getting students comfortable with their roles and responsibilities as a contingency planner for their clients. Part IV provides other similar nonlegal analogies that may be used to promote common sense thinking in various transactional drafting contexts. Part V reiterates the utility of this exercise given the need for innovative teaching and the directive to produce practice-ready lawyers. The Appendices include documents supporting the exercise at various stages of implementation, including a sample completed contract.

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understands the law that undergirds why a provision is drafted a certain way.").

[13] While thorough and thoughtful practice should certainly be encouraged, there are practical limits to what a client is willing to pay for and to what one is able to accomplish in any single document. The exercise described in this article seeks in part to demonstrate both the importance of anticipatory drafting and the inherent limitations of anyone's ability to anticipate everything. Finding a way to accomplish the client's goals without absolute certainty is a key learning point of the lesson.

[14] Although this type of business judgment is typically perceived to be acquired only through practice or life experience, "business acumen" has been specifically identified as one of the practical skills not effectively taught in law schools. *See* Circo, *supra* note 2, at 198, 201, 212-15. Professor Circo conducted a survey of law firm training and development professionals regarding entry-level transactional lawyer training. *Id.* at 213-14. Among the findings of the survey, almost seventy percent of respondents agreed or strongly agreed that law schools should devote more attention to developing "business acumen," even at the expense of substantive law courses. *Id.* at 213.

## II. THE THEORY

One key to maximizing the effectiveness of a class exercise is creating material that is relevant to the context of the students' existing framework.[15] Adult learning theory, drawing on cognitive science research, recognizes that "adult learners flourish when teachers make explicit connections between students' past experiences and prior learning . . . ."[16] Thus, taking into account the students' world of memory, experience, and response often lightens the mental load involved in mastering a new analytical framework or developing a new skill.[17] Professors can better engage adult learners by drawing explicit links between the subject matter at hand and past experiences of the students.[18] By seeing a connection between something familiar and the new material, the students will generally be able to understand the new material more quickly and effectively.[19]

Students exposed to legal rules and systems for the first time are often so focused on absorbing the content and implications of the rules that they are unable to use the material to develop analytical skills or legal methods. The rules get in the way of the larger lesson.[20] But teachers can aid in the

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[15] Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 943 (1997) ("Adults learn new concepts, skills, and attitudes by assigning meaning to them and evaluating them in the context of their previous experience.").

[16] Camille Lamar Campbell, *How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class*, 48 DUQ. L. REV. 273, 280-81 (2010).

[17] *See* Jane M. Goddard, *Building the Cathedral: Sculpting A Part-Time Legal Education in A Double-Time World*, 8 BARRY L. REV. 117, 135 (2007); Hess, *supra* note 15, at 943.

[18] Campbell, *supra* note 16, at 280-81.

[19] This challenge is made all the more difficult given that students come to law school with diverse backgrounds and a wide variety of experiences. Illig, *supra* note 8, at 224 ("Although we sometimes like to think of law school as a uniquely novel and even transformative experience, few first-year students arrive at our doors with an entirely blank slate."). "Because law students are the products of diverse intellectual and cultural backgrounds, they bring a wide variety of schemata to the classroom at the beginning of the first semester." Charles R. Calleros, *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 37, 39 (2001) [hereinafter Calleros, *Using*]. "Those differences include age, ethnicity, gender, life experience, sexual orientation, social and economic background, culture, learning style, disability, reasons for attending law school, and aspirations as lawyers. Legal educators must consider those differences to maximize learning for all students." Hess, *supra* note 15, at 941.

[20] "When an instructor introduces students to new legal rules as a means to teach analytic skills or other facets of legal method, however, the rules have a tendency to get in the way and capture an inordinate share of the students' attention and concern." Charles R.

learning process by "tying the new vocabulary, concepts, and skills to what [students] already know and to previous life experiences."[21] Using familiar nonlegal contexts to teach a particular legal skill or thought process is consistent with the research about how adult students learn,[22] and it can "help students develop the same kinds of analytical skills they might apply to a legal problem."[23]

A robust body of literature on pedagogical methods employs the use of nonlegal analogies to help law students understand basic legal analysis skills.[24] This work, including substantial contributions from Charles Calleros,[25] a forerunner in the field,[26] has given us some useful tools for helping students develop such skills as case synthesis, legislative drafting, and statutory interpretation.[27]

In one Calleros exercise, students begin to understand basic concepts of the legal method—including the ambiguous nature of the law—through a skit in which a grocery store employee must decide whether to display a newly arrived shipment of tomatoes near the apples in the store window or near the carrots that were stacked inside the store.[28] Students learn that the

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Calleros, *Introducing Students to Legislative Process and Statutory Analysis Through Experiential Learning in a Familiar Context*, 38 GONZ. L. REV. 33, 34 (2002-2003) [hereinafter Calleros, *Introducing*].

[21] Timothy W. Floyd et al., *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 OHIO N.U. L. REV. 257, 267 (2011).

[22] *See* Campbell, *supra* note 16, at 281.

[23] Calleros, *Introducing*, *supra* note 20, at 34. "[A]n occasional diversion to nonlegal cases can be justified if they teach something about the law and legal method through metaphor or analogy." Charles Calleros, *Rules for Monica*, 9 THE L. TEACHER 11, 11 (2001), *available at* http://www.lawteaching.org/lawteacher/2001fall/lawteacher2001fall.pdf [hereinafter Calleros, *Rules*].

[24] "Legal writing professors commonly use non-legal examples to introduce fundamental legal writing principles. A cursory examination of the existing scholarship reveals that the analytical skills most commonly introduced with non-legal examples fall into three broad categories: curing linguistic ambiguity, demonstrating the structural intricacies of predictive writing, and explaining rule synthesis." Campbell, *supra* note 16, at 276 (citations omitted).

[25] Professor of Law, Arizona State University, Sandra Day O'Connor College of Law. *See Faculty Profile, Charles Calleros*, ARIZONA STATE UNIVERSITY, SANDRA DAY O'CONNOR COLLEGE OF LAW, http://apps.law.asu.edu/Apps/Faculty/Faculty.aspx?individual_id=138 (last visited Nov. 24, 2013).

[26] *See* Campbell, *supra* note 16, at 277.

[27] *See, e.g.*, Calleros, *Using*, *supra* note 19; Calleros, *Introducing*, *supra* note 20; Charles R. Calleros, *Reading, Writing, and Rhythm: A Whimsical, Musical Way of Thinking about Teaching Legal Method and Writing*, 5 LEGAL WRITING: J. LEGAL WRITING INST. 2 (1999) [hereinafter Calleros, *Reading*].

[28] *See* Calleros, *Using*, *supra* note 19, at 42-43. Calleros adapted his skit from a simpler exercise about fruit in a basket developed by Elisabeth Keller and described in Jane Kent

grocery store owner likes to display apples in the store window to attract shoppers inside,[29] but that carrots are unlikely to draw anyone in and so they should be displayed in the produce section.[30] Students are then asked to speculate as to the reasoning behind the owner's preferences[31] and to apply that reasoning in deciding where to locate the tomatoes.[32] In so doing, students begin to understand why case law does not always present a single "right answer" and how to develop arguments for both sides of a dispute.[33]

In a similar manner, Professor Nancy Soonpaa[34] has developed a nonlegal exercise about paintings designed to expose students to the case synthesis process.[35] In Soonpaa's exercise, students evaluate two paintings owned by a collector, synthesize a "rule" about what kind of art the collector likes, and predict whether the collector would like to purchase a specific painting.[36] Students thereby become familiar with the process of synthesizing rules from several cases and applying those rules to a new set of facts.[37]

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Gionfriddo, *Using Fruit to Teach Analogy*, 12 THE SECOND DRAFT: BULL. OF THE LEGAL WRITING INST. 4 (1997), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1016&context=jane_gionfriddo. In turn, others have developed their own variations of the Grocer's problem, adding complexities to Calleros's skit. *See, e.g*, Suzanne Rowe & Jessica Enciso Varn, *From Grocery Store to Courthouse: Teaching Analytical Skills to First-Year Law Students*, 14 THE SECOND DRAFT: BULL. OF THE LEGAL WRITING INST. 14 (2000), *available at* http://www.lwionline.org/publications/seconddraft/may 00.pdf.

[29] Calleros, *Using*, *supra* note 19, at 42-43.

[30] *Id.* at 43.

[31] Most commonly, Calleros notes, students propose either that the grocery store owner was concerned with visually appealing food, like shiny red apples, in the front window to catch the eye of people outside, or that the grocer wished to have "snackable" food in the window, something like an easy-to-eat apple to remind a passerby that he is hungry and may wish to drop in for a convenient snack. *Id.* at 44-45.

[32] *Id.* at 43-44.

[33] *Id.* at 46.

[34] Professor of Law, Texas Tech University School of Law. *See* Biography of Professor Nancy Soonpaa, TEXAS TECH UNIVERSITY SCHOOL OF LAW, http://www.law.ttu.edu/faculty/bios/soonpaa/ (last visited Nov. 30, 2013).

[35] Nancy Soonpaa, *Art of Legal Analysis in the Legal Writing Classroom*, 14 THE SECOND DRAFT: BULL. OF THE LEGAL WRITING INST. 10 (2000), *available at* http://www.lwionline.org/publications/seconddraft/may00.pdf.

[36] *Id.*

[37] *Id.* Relatedly, Karen Gross, currently the president of Southern Vermont College, but previously a law professor at New York Law School, describes an exercise where students are asked to describe paintings as a preview for their later work comparing and contrasting cases. *See* Karen Gross, *Visual Imagery and Law Teaching*, 7 L. TCHR. 8 (1999), *available at* http://lawteaching.org/lawteacher/1999fall/visualimagery.php. For Ms. Gross's biography, see *Biography of President Karen Gross*, SOUTHERN VERMONT COLLEGE,

Similarly, nonlegal examples can be used to allow students to practice combining several authorities to generate an overarching statement of the legal rule.[38] An exercise entitled Rules for Lina[39] consists of skits, either acted out in person or shown on video,[40] involving a high school girl's social activity. Each short scene shows Lina, the teenage protagonist of the series, returning home after an evening with friends and eliciting some kind of response from her mother.[41] After each scene, students are asked to interpret the mother's statements "in an attempt to identify the parent's holding in each case and the apparent policies supporting the holding . . . ."[42] Thus, after four or five scenarios, the students are able to develop a synthesized rule statement from the incremental parental decision-making and the parental policies behind the rule.[43] This process mimics the analysis a student undertakes in working with the common law as it develops over several court decisions.[44] "Once they gain confidence in addressing ambiguities in the holdings of cases in a nonlegal context and understand what it means to synthesize those holdings," then "students can apply their newly formed conceptual frameworks to more complicated and unfamiliar cases dealing with elusive legal concepts such as consideration and causation."[45] In this way, using a familiar, nonlegal context "allows students to focus their attention entirely on the new concepts of legal method."[46]

Using an exercise called "Decoding the Dress Code," Professor Camille Lamar[47] introduces students to "fundamental legal concepts such as stare

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http://www.svc.edu/about/presidentbio.html (last visited Nov. 30, 2013).

[38] Calleros, *Using*, *supra* note 19, at 49-62; *see generally* CHARLES R. CALLEROS, LEGAL METHOD & WRITING (6th ed. 2011).

[39] Lina's previous incarnation was as Monica. Calleros, *Rules*, *supra* note 23. Students seem unconcerned about what happened to Monica, though the authors still wonder.

[40] *See* Charles Calleros, *Rules for Lina: An Introduction to Common Law Legal Method*, ARIZONA STATE UNIVERSITY, SANDRA DAY O'CONNOR COLLEGE OF LAW, http://www.law.asu.edu/files/faculty/RulesforLina/index.html (last visited Nov. 30, 2013).

[41] "It's past 11. . . . [N]ext time, after the game, don't *hang out* at the pizza parlor. You need your sleep, and you've got plenty of homework to do." Calleros, *Using*, *supra* note 19, at 50. "No [you cannot go to the movies tonight]. You went to the school volleyball game on Tuesday night, and you went to the school musical last night, and that's enough for one week. . . . [Y]ou need to catch up on your homework." *Id.* at 52.

[42] *Id.* at 50.

[43] *See id.* at 54.

[44] Calleros, *Introducing*, *supra* note 20, at 35-36.

[45] Calleros, *Rules*, *supra* note 23, at 11.

[46] Calleros, *Reading*, *supra* note 27, at 8.

[47] Associate Professor of Law, Nova Southeastern University Shepard Broad Law Center. *See Camille Lamar*, SHEPARD BROAD LAW CENTER, NOVA SOUTHEASTERN UNIVERSITY, http://www.nsulaw.nova.edu/faculty/profiles.cfm?pageid=190 (last visited

decisis, the common law process, and the process of predictive legal analysis . . . ."[48] She does so by asking the students to help Sheila, a hypothetical seventeen-year-old foreign exchange student ready to begin her first job at a local clothing store.[49] Sheila is uncertain about appropriate attire for the workplace, and students initially begin by offering advice based on their prior work experience.[50] The exercise forces students to clarify ambiguities in their advice by considering whether certain outfits, as depicted in photos, would be acceptable.[51] Finally, students must synthesize rules governing workplace attire after getting more information concerning the clothing store's prior disciplinary actions for dress code violations.[52] This nonlegal exercise highlights for students the predictive process that lawyers must undergo in advising clients and answering legal questions.

Students can also become more comfortable with the legislative process and with statutory interpretation with various extensions and modifications of the Rules for Lina exercise.[53] In the legislative process version, students are asked to play the roles of parents (legislators) of a friend to "propos[e] and debat[e] rules governing the evening activities of their children in high school, rules that could codify, clarify, modify, or replace the 'common law' rules" developed in the original Lina exercise.[54] For the statutory interpretation exercise, students must resolve ambiguities that arise in the application of the rules created by the legislative process, discussing, for example, what is a "social" activity versus an "academic" one.[55]

Each of these exercises relies on a familiar, nonlegal situation to expose students to some aspect of legal thinking or analysis.[56] They allow professors to draw on the students' existing foundation of knowledge and experience to make a particular concept or thought process more accessible

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Nov. 30, 2013).

[48] Campbell, *supra* note 16, at 276.

[49] *Id.* at 301.

[50] *Id.* at 301-03.

[51] *Id.* at 304.

[52] *Id.* at 305-06.

[53] *See* Calleros, *Introducing*, *supra* note 20, at 46.

[54] *Id.* at 47.

[55] *Id.* at 51.

[56] This approach recognizes that the learning process is a cycle of "becom[ing] acquainted with new ideas and skills[,] . . . [a]ppl[ying] these ideas and skills in real life settings or simulations, reflect[ing] on the experience with these new skills and concepts, redefin[ing] how they might apply in other settings, and then reappl[ying] them in other settings." Hess, *supra* note 15, at 943. Thus, "[w]hen . . . introduc[ing] students to techniques of legal method and analysis, it pays to start with legal questions set in very familiar, concrete contexts." Calleros, *Reading*, *supra* note 27, at 7.

and less abstract.[57] "If students can comfortably navigate the familiar waters of . . . nonlegal settings, . . . they may more easily survive and even thrive in the stormier seas of their legal studies."[58]

In contrast to the pedagogical methods literature, which introduces students to the basic skills necessary to understand and use the law (e.g., reading and processing cases), the leading transactional drafting texts are designed to give students practice drafting real-world documents such as a promissory note, an aircraft purchase agreement, and a letter of intent.[59] The texts focus, appropriately, on how to create the document that the client wants—how to generate the various provisions of a contract or a will or a lease agreement. The texts teach the task;[60] they provide specific and thorough instruction to show students how to create a legal document.

Beyond just teaching the nuts and bolts of transactional drafting, however, much can be done to connect what happens in the classroom to what students will need to do in practice.[61] In the transactional drafting

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[57] *See* Hess, *supra* note 15, at 942-43; Calleros, *Reading*, *supra* note 27, at 7.

[58] Calleros, *Using*, *supra* note 19, at 62.

[59] *See generally* TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007); MARGARET TEMPLE-SMITH & DEBORAH E. CUPPLES, LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS (2013); CYNTHIA M. ADAMS & PETER K. CRAMER, DRAFTING CONTRACTS IN LEGAL ENGLISH: CROSS BORDER AGREEMENTS GOVERNED BY U.S. LAW (2013).

[60] In a similar vein, legal research and writing texts were traditionally focused on the "product" approach, see Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 250 (2012), which concentrated solely on the final written product including format, organization, clarity, and accuracy; Cheri Wryon Levin, *The Doctor is in: Prescriptions for Teaching Writing in a Live-Client In-House Clinic*, 15 CLINICAL L. REV. 157, 178 (2008). This method proved problematic as the exclusive focus of legal writing instruction. Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719, 719-20 (1997). Beginning in the mid-1980s, the discipline saw a shift to the "process" approach of teaching legal writing, focusing less on the final outcome and more on the legal analysis needed to create the final product. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 52-53 (1994); *see generally* Miriam E. Felsenburg & Laura P. Graham, *A Better Beginning: Why and How to Help Novice Legal Writers Build A Solid Foundation by Shifting Their Focus from Product to Process*, 24 REGENT U. L. REV. 83 (2012); Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building A Better LRW Program*, 46 SANTA CLARA L. REV. 93 (2005). The exercise described in this article continues the shift toward process-based instruction, specifically in transactional drafting classes, by isolating the analytical and problem-solving skills that students will need when they become practicing attorneys, rather than focusing solely on the final product they will need to create.

[61] Many law schools are doing just that by offering skills training, clinical programs, and practicum courses. Illig, *supra* note 8, at 226 ("[T]he academy has in recent years taken serious steps toward addressing the needs of transactional students by offering them an ever-expanding variety of skills courses."); *see also id.* at 234-236 (describing the University of

context in particular, students must be exposed to the legal doctrines implicated in the document as well as the practical analytical and drafting skills that they will need to actually create the contract or deed.[62] The ability to solve problems that may arise in the execution of a particular legal document must be tied to the substantive area of law that the document incorporates.[63]

This article attempts to marry the work of the pedagogical scholars and the transactional drafting textbook authors, keeping in mind the call for law schools to develop practice-ready graduates, by giving an analogical context for some of the basic drafting tasks. This article focuses in particular on the contingency planning involved in even the most seemingly routine drafting tasks, and it does so by using a nonlegal exercise to teach students how to approach a drafting task and how to think about the contingencies involved. In this way, this article supplements the existing approaches to teaching transactional drafting and offers a way to introduce and reinforce the thought process that a lawyer must undergo while drafting a legal document.

## III. THE EXERCISE

In a transactional drafting class, students must learn how to create documents, keeping in mind the legal issues implicated in the deal. But they also need to recognize the problem-solving skills that are a key component of a lawyer's professional expertise.[64]

To that end, lawyers must be comfortable thinking through the legal issues—the black letter law that they learn in class. But they must also be able to anticipate contingencies that may arise in the execution of any particular business deal.[65] A party might not be able to give the amount of

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Oregon's Transactional Practice Labs); *see generally* Busharis & Rowe, *supra* note 4, at 305-06 (describing practicum courses taught in conjunction with doctrinal courses at Florida State University); *see generally* Christine A. Corcos et al., *Teaching a MegaCourse: Adventures in Environmental Policy, Team Teaching, and Group Grading*, 47 J. LEGAL EDUC. 224 (1997); John Sonsteng et al., *Learning by Doing: Preparing Law Students for the Practice of Law*, 21 WM. MITCHELL L. REV. 111 (1995); Elizabeth Fajans, *Learning from Experience: Adding a Practicum to a Doctrinal Course*, 12 J. OF THE LEGAL WRITING INST. 215 (2006); Martyn & Salem, *supra* note 10; Mekel, *supra* note 4.

[62] *See* Illig, *supra* note 8, at 226.

[63] Busharis & Rowe, *supra* note 4, at 303.

[64] "Drafting contracts is more than translating the business deal into contract concepts and writing clear, unambiguous contract provisions." STARK, *supra* note 59, at 303.

[65] "Rather than apply [the individual skills of planning, negotiation, and drafting] in a mechanistic fashion—as individual tasks that proceed in a linear or even more or less predictable manner—[an attorney] must creatively utilize whatever means are then at hand

money or type of services expected or might not be able to close at the anticipated time for any number of reasons—financing contingencies, shareholder problems, weather shutting down airports, or computer viruses. Effectively drafted contracts should address those contingencies so that a client's goals are not thwarted, and to do that lawyers have to understand essentially what can go wrong in any particular transaction.[66] Doing so requires "'legal imagination'—the ability, based on experience and intuition, to imagine multiple possible futures and to utilize legal and other tools to direct behavior and solve client problems."[67]

The following exercise helps students get comfortable using their "legal imagination" and adding contingency planning value to documents they draft for clients. It encourages them to think like lawyers and anticipate real world issues and contingencies on the front end of any given transaction.[68] At the same time, the exercise also hones the students' understanding of the effect of and connection among different contract provisions.

The exercise can be effectively used at any point during the semester. Early in the course, the exercise can introduce students to the general themes that will arise and can get them comfortable with the tasks involved in transactional drafting. One hundred page stock purchase agreements are intimidating; a dinner party is not. And if executed with some panache, many students will not recognize that they are developing the components of an agreement until at least midway through the exercise.[69] Moreover, if introduced early enough in the semester, the professor can return to the hypothetical to illustrate different learning points throughout the semester.

The exercise could also be used midpoint in the semester to reinvigorate class discussion and review concepts learned thus far. Also, if introduced at the end of the course, the exercise can serve as a nice capstone to the semester. The students, now equipped with a semester's worth of

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to prepare her client for a future that does not yet exist." Illig, *supra* note 8, at 222.

[66] "Sophisticated drafting requires a lawyer to understand the transaction from a client's business perspective and to add value to the deal. Looking at a contract from the client's perspective means understanding what the client wants to achieve and the risks it wants to avoid." STARK, *supra* note 59, at 303.

[67] *See* Illig, *supra* note 8, at 223.

[68] "Adding value to the deal is a euphemism for finding and resolving business issues. These skills are problem-solving skills and are an integral component of a deal lawyer's professional expertise. They require an understanding not only of contracts, but of business, the client's business, and the transaction at hand." STARK, *supra* note 59, at 303.

[69] Obviously, law students in a transactional drafting course will know that they are not planning a dinner party just for fun. But if they get into the party planning mode without thinking about it from the start as a contractual drafting exercise, they may be more creative (or perhaps more practical) in their suggestions or problem-solving ideas.

transactional terms and drafting techniques, can often use a prod at the end of the course to force them to apply what they have learned throughout the semester in a completely different context. It can be the elusive "ah-ha" moment for many students.

### *A. Dinner Party Dialogue*

The basic premise of the exercise is to walk the students through planning a social event—in this case, a dinner party. In the course of extracting the information necessary to prudently and thoroughly coordinate the gathering, students will naturally address a wide variety of contingencies that could threaten to ruin the experience. Students will quickly identify many of the fundamental issues to be addressed at the outset (e.g., location, date, and participants) and will move on to the finer points (e.g., arrival time, cuisine, and service particulars) in short order.

When enough details have been fleshed out to establish a coherent vision of the party, the students are instructed to turn their attention to a handout, which contains provisions of a standard form contract (in this case, a stock purchase agreement) in a tabular format.[70] The handout directs the students to review the typical contract provisions listed in the sample agreement and provide analogical provisions related to the dinner party scenario. For example, in the exchange section of a stock purchase transaction, the seller may agree to transfer duly executed stock certificates in transferable form. An analogous obligation of a dinner party guest may be to deliver thirty-two ounces of coleslaw.[71]

What follows is a series of questions designed to elicit details and decisions relevant to the event and to force students to consider possible problems that may arise. With enough time allotted for the exercise, one can allow the participants to delve into the minutiae of several individual obligations and logistical challenges,[72] but it is helpful to pull back occasionally and re-focus the students on the most significant "deal killer" issues, like suitability of the location for event purposes and the safety of guests. The questions are drafted to be somewhat casual and playful, which is consistent with the tone of the authors' classrooms generally. One could easily adopt a more formal approach to soliciting the relevant information. There is nothing especially technical about the questions as drafted, but

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[70] *See infra* Appendix A.

[71] One may initially scoff at the relative triviality of a coleslaw delivery obligation, but in certain parts of the South, a barbecue sandwich is considered inedible *sans* "slaw."

[72] And after all, don't many client meetings devolve into a hand-wringing session over unlikely and irrelevant matters?

some thought has been given to ensuring that they draw out a fair amount of detail and address certain essential points of the ultimate agreement.

*"Ok, who wants to have a little get-together for dinner[73] this semester?"*

Here, it's helpful to get at least three volunteers to agree to be "on the spot" to host the party. These volunteers do not necessarily have to be the only attendees.

*"Whom should we invite?"*

This question narrows the field of participants and gives an idea of the scope of the affair. While it may be easier to limit the guest list to those in the room, the stakes are raised when the students plan to entertain others (friends from outside the law school, significant others, volunteers at local charitable organizations, etc.).

*"What date works for everyone?"*

This question is deceptively difficult. Law students are busy folks, socially speaking.[74] This item alone could take an entire class period if a more outgoing lot of participants is chosen. One item to consider here is making sure that there is enough time between the planning (i.e., execution of the agreement) and the party (i.e., the closing) in order to facilitate creating a number of pre-closing covenants later on. Two weeks should be sufficient.

*"Where should we have the dinner?"*

Consider physical space constraints, food preparation requirements, and outdoor/indoor options. One attractive option is for the professor to offer to host the party at her house. A private residence works well for this conversation because it allows the class to contemplate many odd contingencies that might be less problematic at a restaurant or banquet hall such as functioning appliances, basic cleanliness, household pets, accessibility, etc. Using the professor's residence as the defined location also works well because the professor will have a concrete idea of what is available on site and the limitations of the space (e.g., "I have double ovens, but one only goes to 235 degrees, and dining space for eight."). The previously determined date may dictate the location options in large part. For example, if the party is in Topeka, Kansas during February, outdoor space, while abundant, will be far less attractive.

*"Are we cooking or ordering in?"*

The authors push for cooking on-site because it introduces a nice variety and complexity of obligations of the participants. Other options include a

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[73] Substitute "supper" where geographically appropriate.

[74] *See, e.g.*, Hayley Penan, *Diary of a UCI Law Student: Time Management*, THE NOTICE (Sep. 9, 2013, 11:00 AM), http://thenoticeca.com/2013/09/09/diary-of-a-uci-law-student-time-management/.

catered meal, takeout, or a potluck where everyone brings food prepared off-site.

*"What are we serving?"*

You can suggest a specific cuisine (e.g., Italian, Mexican, Asian, Soul food) or simply ask the hosts what they're comfortable preparing for (and serving to) the guests (a group of perhaps twenty students or more). Within this discussion, the hosts can specify what each is contributing to the event, which will be the heart of the ultimate contract. Some may bring groceries or pantry items to use on-site; some may contribute prepackaged courses; others may only need to provide services or expertise (e.g., cleaning or event coordination) or make available their property (e.g., cookware, kitchen supplies, apartment space, vehicle for carpooling).

One way to structure this conversation is to have the students allocate responsibility among the participants by the progression of the courses to be served (e.g., appetizers, main dish, side dishes, dessert, and beverages). Time constraints may prohibit a detailed explication of each item or even developing a full menu, but having the meal sequence in everyone's mind gives the discussion some guideposts.

*"Let's talk a bit about money, because these dishes probably range in cost. How should we address the expenses?"*

This line of questioning allows the students to develop creative solutions to the potentially disproportionate financial burden imposed by the hosts' various contributions. Common solutions include having everyone bear their own costs for their particular contribution, or a cost-sharing arrangement in which each person documents their own expenditures and one host is assigned to ensure an even split after the event.

This item can provoke an especially contentious discussion. It is easy to see where the host tasked with providing beverages would object to bearing alone the cost of beer, wine, and soft drinks for a large gathering. On the other hand, everyone is going to be concerned with keeping all expenses down when the group as a whole will evenly split the costs. The logistics of cost splitting can themselves get intricate. To the extent the students delve into this territory, you might have them address receipt collection and timing of reimbursement among other issues.

If students fail to raise the potential for one participant to get carried away with costs, you may ask, "what if Sally insists on using black truffle-infused olive oil to braise her grass fed chicken from the northern provinces of Canada?" Students can address these concerns effectively in a variety of ways, including agreeing to shop at a specific grocery store, developing a budget for each course or item, or inserting a flexible but overarching

reasonableness clause.[75] At this point it might be appropriate to briefly address potential remedies in the event one host does in fact get carried away.

*"I think we need to know some more information about the physical space."*

The direction of this conversation will vary depending upon the location chosen for the party and who has the information about the space. There are several crucial issues to be addressed with respect to the location including availability of utensils, serving dishes, and cookware; suitability of appliances; and layout of the space including accessibility, parking, and seating options. The previous decisions as to food preparation and menu will dictate what needs to be addressed. For example, depending on kitchen supplies available at the venue, hosts may need to provide extra dinnerware or a chafing dish to keep food warm, or they may need to coordinate carpooling if there is inadequate parking space. The key, however, is to have the students think through the details of what they will need in order to prepare and serve each dish and for general convenience of the guests.

*"So, we've decided to have this party at location X, what are your expectations of what the place will be like when you get there?"*

To prompt the students even further, you may ask, "Have you ever been to someone's place for a social gathering and been unpleasantly surprised? If so, what was it about the space that you didn't anticipate?" Inevitably, students quickly identify pet-related items like prevalent fur or unfriendly or intrusive animals. Many assumptions are less obvious though and it is important to draw those out of students. Beyond having a place to sit and a plate for their food, what other issues could interfere with the comfort of the guests? Will the apartment be adequately air conditioned or heated, relatively clean, and generally rodent-free?[76]

This is also a good point in the conversation to throw the students a curveball:

*"What if Jenny is really excited about the party and repaints her living room in anticipation of hosting the dinner that evening?"*

Although Jenny's intentions are good, the students should see that fresh paint fumes could easily rise to a noxious level and ruin the dinner. Whether Jenny should be held liable is another issue altogether. The point of this conversation is that everyone has assumptions of how an event will unfold. Part of the planning process is to articulate those assumptions to

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[75] This is commonly referred to as the "don't get carried away" clause in our class discussions.

[76] Fortunately, we have found that students are particularly adept at identifying unpleasant domestic scenarios.

ensure that all participants have compatible expectations as to core aspects of the event.

There is no possible way to identify, ex ante, all of the contingencies that could mar the evening. The line of questioning should usher students toward the realization that they cannot plan for every possible scenario and to begin the process of thinking through dealing with unpredictability.

*"We're serving food to a bunch of soon-to-be lawyers. Any concerns?"*

Here, we not-so-subtly direct students to some fundamental health and safety issues involved in preparing food for other people. Again, students will quickly identify the possibilities of food allergies, religious prohibitions, or other dietary restrictions of the guests. However, notions of safe food-handling, which many students may assume they share, can vary widely from person to person. Some will be appalled by the reuse of a cutting board while others wouldn't think twice about working around the spoiled parts of the meat. This question raises issues involved in both food storage prior to use as well as actual preparation. Beyond the obvious concerns like preventing someone from serving raw chicken, thoughtful students will want to ensure that all ingredients were stored at safe temperatures and in an appropriate manner at all times.[77]

Safety and dietary restrictions aside, students may identify items that are more accurately considered mere preferences. Perhaps someone doesn't like onions or enjoys only charred meat. Students should treat these concerns differently than the previously mentioned health and safety issues. Making that distinction is critical to helping students distinguish significant issues, i.e. the deal killers, from negotiable details.

*"What if . . . someone is sick?*
*. . . the weather is bad?*
*. . . the president makes a surprise visit to campus that night?*
*. . . there's a gas leak in the host's apartment building?*
*. . . the store is out of salmon?"*

One of the final items to address is the possibility that something arises that interferes with the dinner party. If someone is sick or otherwise detained at the last minute, should we cancel the event or proceed as planned? Does it matter who is unable to attend—whether it be one of the hosts or a guest? If there is particularly bad weather, will the dinner be rescheduled or cancelled? Who makes these calls? How much notice should they give? What are the repercussions of cancellation? Who bears the cost of wasted food or the stockpiles of paper plate and napkins? Is a host allowed to substitute tilapia for salmon? The possibilities are endless.

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[77] Those who keep up with published local restaurant inspection reports will be especially helpful here.

The crux of the discussion should focus on responsibility—when is it fair to hold someone individually accountable for extra expense, delay, or inconvenience, and when is the failure to follow through excusable?

### *B. Pulling It Together*

After developing enough of the logistics through class discussion to establish a relatively comprehensive concept of the dinner party, the students can turn their attention to drafting the obligations and expectations of the parties in contract form. Appendix A of this Article gives an example of a handout that can be used to guide students through the relevant provisions of a sample contract, which can serve as a model for an agreement to host the dinner party. With sample language of the major contract provisions isolated in tabular format, students can begin to understand not only the individual components of a sophisticated agreement, but also the relationship among the various provisions. The accessibility and familiarity of the dinner party hypothetical, however, prevent the complexity of the task from overwhelming the students.

The tabular contract in Appendix A includes the primary sections of a typical stock purchase agreement, including the definitions, exchange/closing terms, representations and warranties, covenants, closing conditions, indemnification provisions, termination clauses, and miscellaneous terms. Depending on whether this exercise is introduced at the beginning of the course to preview the material to come, at the end of the course as a capstone tool, or somewhere in the middle, the professor may need to spend some time explaining the function of the relevant provisions.

Once students begin examining their drafting options, they initially must determine who will be a party to the agreement. Should only the hosts sign the contract or should the intended beneficiaries, i.e., the guests, also be included? In the stock purchase example, a common question is whether the corporation should be a party to the agreement, or simply the buyer and seller.[78]

After the parties have been identified, you may want to skip down to the exchange provisions, leaving the definitions to be fleshed out as the need arises in the other areas of the document. In the stock purchase agreement, the seller is to deliver the stock certificates in transferable form, free and clear of encumbrances, and the buyer is to deliver the cash or other consideration. This section is the heart of the transaction. In the dinner

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[78] *See* 1 ABA MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY 11 (Robert T. Harper et al. eds., 2d ed. 2010) [hereinafter ABA MODEL STOCK PURCHASE AGREEMENT].

party agreement, this exchange provision will detail who is contributing what to the dinner (grocery items, cookware, dishwashing services) and will likely describe how the costs will be accounted for and shared. As with the stock purchase agreement, the exchange section will also set forth the date and time of closing (i.e., the party) and the schedule of deliveries. Given that this exercise develops an agreement that will be executed at least a couple of weeks in advance of closing, students should be able to develop more robust pre-closing obligations of the parties.

As in practice, considerable attention should be spent refining the representations and warranties of the parties. Representations and warranties are statements of past or presently existing facts combined with a promise that they are and will be true.[79] They are tied to due diligence, i.e., the investigation of the company or real estate or whatever is being purchased, and can be a primary source of liability for the parties.[80] For example, the representations and warranties put the seller "on the hook" for its portrayal of the company in the stock purchase agreement to the extent that portrayal manifests itself in this section (e.g., the statement "The company is not presently a party to any lawsuit.").

In the case of the dinner party, there is less historical background to navigate than would be involved in purchasing an ongoing business. But at the point of execution of the contract, the representations can ensure that everyone is on the same page with respect to certain obligations and assumptions. For example, if the students have developed a list of allergens that the hosts are prohibited from using in the preparation of the food, each party to the agreement can represent and warrant that they have received, read, and understood the list. Further, if the party will be held at someone's apartment, then the host could represent and warrant that the space is suitable for the party or that she has maintained a pest control policy for the past three months.

Representations and warranties are critical to uncovering any surprises before closing. They are the primary sections in which the parties spell out their assumptions and expectations with respect to the form and condition of the items to be delivered and anything else that may interfere with their receipt of the bargained-for benefit.[81] Many representations and warranties are often untouched from deal to deal, an approach that may fail to address

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[79] BURNHAM, *supra* note 12 at 239.

[80] *See, e.g.*, JoEllen Mitchell-Lockyear, *Common Law Misrepresentation in Sales Cases—an Argument for Code Dominance*, 19 FORUM 361, 374 (1984) ("[T]he seller's representations are the primary source of performance obligations under the contract. . . .").

[81] *See* WILLIAM K. SJOSTROM JR., AN INTRODUCTION TO CONTRACT DRAFTING 7 (2d. ed. 2013). *Cf.* CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU 51-52 (2d. ed. 2008).

crucial transaction-specific items.[82] One of the goals of this exercise is developing the students' acumen for anticipating unique problems in the transaction and drafting deal-specific provisions; spending ample time in the representations and warranties is one of the most effective ways of furthering that objective.

The covenants are essentially promises to do something or to refrain from doing something.[83] As opposed to representations, which are primarily statements of past or existing facts, covenants relate to things that have yet to happen as of the date of the contract execution.[84] The covenants and representations and warranties do, however, address many similar items. Well-drafted covenants can refine the parties' mutual understanding of what must happen (or not happen) in order to close the deal, as well as what needs to occur post-closing in order to protect the value of the transaction for all parties.[85] In the case of a stock purchase, the buyer may require the seller to agree to operate the business in the ordinary course between signing and closing, and to refrain from entering into any long-term contracts with third party vendors or customers until the deal is finalized.[86] In the dinner party example, the hosts could covenant to shop only at a certain store for ingredients (to keep costs predictable) and to prepare all food in accordance with "safe food handling procedures," which could be a defined term.

The covenants naturally flow into the closing conditions section. The closing conditions set forth what must happen or not happen in order for all parties to be obligated to perform.[87] If a closing condition is not met, the performance of some or all parties may be excused. One party's failure to abide by a covenant would likely excuse the other party's obligation to go

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[82] *See* Phillip Wm. Lear, *Representations, Warranties, Covenants, Conditions, and Indemnities: Stitching Them Together in the Purchase Agreement*, 37 ROCKY MTN. MIN. L. INST. § 3.01 (1991) ("All too often the industry resorts to stock forms containing boilerplate language without fully understanding the relationship of each provision to the other until deals unravel.").

[83] SJOSTROM, *supra* note 81, at 18-19.

[84] *Id.*

[85] *See* Alan S. Gutterman, *A Legal Due Diligence Framework for Inbound Transfers of Foreign Technology Rights*, 24 INT'L LAW 976, 1003 (1990) ("Representations, warranties, and covenants are of value in any commercial transaction . . . . Properly drafted, they can provide a basis for a common understanding between the parties as to the due diligence that has been undertaken in structuring the transaction and the ongoing expectations that have been created relating to activities following the original execution of the agreement.").

[86] *See generally* ABA Committee on Negotiated Acquisitions, Model Stock Purchase Agreement, WASHINGTON UNIVERSITY LAW, *available at* http://law.wustl.edu/courses/lehrer/spring2010/10CourseMaterials/ModelStockPurchaseAgreement.pdf.

[87] *See* FOX, *supra* note 81, at 20-21.

through with the deal pursuant to the closing conditions.[88] Closing conditions are also tied to the representations and warranties. A typical closing condition will be the continuing accuracy of all representations and warranties.[89] In the stock purchase scenario, a buyer's obligation to purchase stock may be conditioned upon something specific like the continued employment of several key officers of the company, or something general like the absence of any material adverse event occurring in the seller's corporation or in the seller's industry as a whole.[90]

The all-encompassing "material adverse effect" language is common in commercial transactions[91] and serves as a model for students looking to address the unlimited contingencies in nearly any legal, business, or personal situation. For the dinner party, the hosts may provide that if certain critical ingredients are unavailable at a reasonable cost (e.g., the shipment of live crawfish is lost on its way to the Midwest), then their performance is excused and the party can either be delayed, rescheduled, or cancelled. Further, if one student is hosting the meal at her apartment and covenants to have the apartment in "party ready condition" (another potential defined term), but has failed to pay her bills and had her electricity shut off the day of the party, then the closing conditions should be drafted to allow the other hosts and guests to either cancel or relocate the party.[92]

The host's failure to ensure proper heating or cooling then leads into the indemnification provisions. Should the responsible host be liable to the rest of the partygoers for the cost of relocating the event? If so, where do you draw the line for culpability? Surely there should be a difference between a power outage caused by an electrical storm and one resulting from a failure to pay the bills or to appropriately maintain the apartment. The

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[88] *Id.*

[89] ADAMS, *supra* note 59, at 190-91.

[90] *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981) (defining "condition" in contract law).

[91] FOX, *supra* note 81, at 86-88.

[92] A relevant discussion at this point is whether there should be some equivalent of due diligence investigation on the part of the hosts. Initially, the hosts might want to ensure the availability of ingredients in the area ("Ground bison is $8.00 a pound at Kroger. Check.") and the cost and accessibility of alternative locations. Keen students may also push for an inspection of the premises near the time of the event. Some will have experience purchasing real estate and be familiar with the inspection process and the potential solutions to problems identified during that process (including walk rights and price offsets). One of the most valuable provisions in a real estate purchase agreement is the closing condition of the buyer's complete satisfaction with the inspection of the property, which could be a helpful model in the dinner party example. *See, e.g.*, HAWAI'I ASSOCIATION OF REALTORS, PURCHASE CONTRACT STANDARD FORM ¶J-1 (2012), *available at* http://www.hawaii realtors.com/download/rr201-5-12%20for%20education%202-22-12.pdf.

indemnification provision should specify what acts or omissions of each party will give rise to an obligation to compensate the other parties to the agreement.[93]

Finally, the termination section and miscellaneous provisions may be rather similar in the stock purchase agreement and the dinner party contract. The hosts would likely want the ability to end their obligations under the agreement by mutual assent or upon a minimum number of days notice by certain parties. The dinner party may actually have more non-actionable termination options because things like inclement weather (for an outdoor event) or even minor illness (particularly of one of the hosts) could reasonably delay or cancel the dinner where they would not typically excuse a stock purchaser's obligation to close. Many of the miscellaneous provisions likewise are useful in a variety of circumstances and may require little adaptation to the dinner party. For example, the hosts could include a fairly standard provision for the modification of the agreement.[94]

This exercise is particularly valuable because, in addition to teaching students the function of each provision of a contract and the contingencies that come into play in drafting even a simple transaction, it demonstrates the interrelatedness of the contract provisions. Even the seemingly straightforward offer to bring food for a dinner party can implicate all of the various parts of a contract.

Initially, the obligation to prepare and bring a certain dish would be addressed in the exchange provision of the contract—that particular host has agreed to contribute ingredients and cooking services to the event. Students recognizing the dangers of cooking for potential lawyers will want to specify that the handling and preparation of the food is done in a safe manner. Because this notion of safe food handling will likely be used in several places throughout the document, drafters will want to identify a shorthand way of consistently incorporating that concept, which would logically be in the definitions section of the contract. Students will have to be resourceful in developing a workable definition. They may, for example, research the U.S. Department of Agriculture's website for guidelines on safe food handling and agree to abide by those recommended procedures.[95]

The notion of safe food handling touches on representations and warranties with the hosts all acknowledging that they have read and understand the defined procedures (as laid out in the definitions). The

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[93] *See* FOX, *supra* note 81, at 254-55.

[94] *See generally* W. MICHAEL GARNER, 2 FRANCH. & DISTR. LAW & PRAC. § 8:19 (2013) (discussing standard contract modification provisions).

[95] *See Food Safety*, U.S. DEP'T OF AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?navid=FOOD_SAFETY (last visited Nov. 30, 2013).

concept implicates covenants as well, which would require that hosts abide by the safe food handling procedures at all relevant times between the date of the contract and the dinner party itself.

Compliance with the covenant to handle food in a safe manner would be a closing condition such that a failure by a host to abide by the covenant would possibly excuse the performance of other hosts. Depending on the type and timing, a breach of a covenant might, in some cases, trigger the indemnification or even the termination provisions.

Students may spend some time fleshing out the severity of breaches of covenants and representations and warranties, identifying which breaches trigger walk rights, indemnification, or other remedies. What if it comes to light, for example, that one of the hosts has stored the foie gras in her car trunk for eight hours? Is that host liable to replace it with the closest thing she can find during a last-minute run to the grocery store? Are other hosts excused from their cooking obligations? Is the breach severe enough to warrant canceling the party? And if so, is the breaching host responsible for reimbursing the other hosts for the time and money they expended? Is there a difference in relative culpability between the host who neglects the foie gras in her car and a host who serves an undercooked chicken dish? Should there be a different remedy given the danger of potential illness?

By completing the handout with details from the dinner party planning session—Appendix B offers some suggestions for dinner party provisions that may fit into each section of the contract—students will see the interrelatedness of the various contract provisions. This relationship among the provisions demonstrates the importance of treating any one item thoroughly and consistently throughout the document.

One common pitfall of new attorneys is the careless, mechanical overreliance on form documents in creating a contract. Illustrating for students the interrelatedness of contract provisions highlights the dangers of this practice. Instead, students should realize that, even if borrowing provisions from separate agreements, they must be cautious to ensure that the provisions make sense when combined into a single document. For example, a seller's obligation to deliver stock certificates unencumbered may be addressed in one stock purchase agreement in the exchange provision ("seller shall deliver unencumbered stock certificates . . ."). Another agreement may address that obligation differently in the covenants ("seller shall refrain from encumbering . . .") or the representations and warranties ("stock certificates are free from encumbrances . . ."). Another may use the definition section to specify that "stock certificates" means unencumbered certificates. Creating a piecemeal contract by cutting and pasting paragraphs from separate documents can be an efficient way to customize a contract for a client, but it runs the risk that the provisions will

not cover all necessary information, or worse, that they will directly contradict each other. Without careful drafting, a contract that incorporates provisions from each different agreement may be repetitive, inconsistent, or incomplete. Thus, lawyers must take care to be consistent and thorough throughout the document, particularly if borrowing provisions from other forms.

This exercise, then, gets students more comfortable not only with the standard layout of the document and the effect of each clause, but also with the interrelationship of the provisions. Grasping this drafting concept, as well as the need to write specifically for each client's goals, emphasizes the importance of careful and accurate drafting.

### *C. Possible Work Products*

The dinner party exercise can be used in a number of different ways to produce various outcomes. The sequence contemplated in this article involves talking through the exercise in class with little or no preparation on the part of the students, and then inserting basic skeletal concepts or language into a worksheet keyed to an analogous stock purchase agreement. The students could simply take notes on the form and complete it themselves. The intermediary product could be something similar to Appendix B, which is a sample of a completed tabular contract that includes a number of items that would be addressed in both agreements.

To promote a deeper understanding of the function and interrelationship of the contractual provisions, the assignment could incorporate drafting an actual contract with each relevant provision articulated in final form that would be legally enforceable and effective at accomplishing the client's goals. The students could either be individually assigned separate provisions, which could later be assembled into a master class document, or they could work in teams to produce several versions of the agreement. Either approach works well, particularly if shared with the entire class so that students can see how others resolved tricky language and structural issues involved in the drafting. A sample student-drafted contract is included in Appendix C. The example is by no means exhaustive or flawless, but merely demonstrates some of the ways a particular student chose to solve the drafting challenges presented in the exercise.

Requiring the students to draft the contract language also fosters their resourcefulness. They will need to contemplate what kind of legal language to use for the various dinner party provisions and perhaps even seek out other sources to find sample wording. They might, as noted above, refer to the USDA website for food handling procedures, or perhaps turn to

habitability language from a lease agreement to help define "party ready condition."

This kind of resourcefulness is a skill that often separates successful new attorneys (those who thrive on solving challenging tasks in a creative manner) from those who can only perform limited or isolated tasks. Much like the construction-worker-turned-computer-technician who was unable to apply industry common sense to solve a client's problem,[96] attorneys who fail to appreciate the larger business or legal context and lack ingenuity or creativity will often fail to effectively serve their clients. By promoting creative problem-solving and drafting flexibility in the transaction setting through these and similar exercises, law schools can better equip students to practice in a way that adds significant value to their clients' deals from day one.

Finally, the dinner party hypothetical can serve as a handy reference point throughout the semester in a transactional drafting course. If introduced early, the instructor can refer back to the numerous variables, contingencies, planning paths, and alternative solutions presented by the party scenario in a consistent and accessible manner.[97] For instance, when discussing the benefits and downsides to incorporating an alternative dispute resolution mechanism, the students can recall hosts who might be suddenly adverse to each other after one of them flakes on the meal and the others are left with forty pounds of fresh-caught Atlantic salmon. This tangible and manageable example can be used to frame many, if not most, of the substantive discussions throughout the semester.[98]

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[96] *See supra* Part I.

[97] In Professor William Foster's Mergers & Acquisitions class, he walks the students through the purchase of a local restaurant in the first class meeting. The students initially identify what it is they actually want to purchase (e.g., the equipment, location, name, recipes, or employee contracts, if any), and then think through the relative benefits and costs of stock purchases and assets acquisitions. The hypothetical continues to develop throughout the semester as the details of the restaurant's (surprisingly complex) corporate structure and intricate contractual obligations with vendors and major customers unfold.

[98] It might be helpful, however, at the conclusion of the exercise to remind students of the pedagogical purposes underlying it. Many students tend to alienate their friends or family during law school by bringing legal lingo and sensibilities to social occasions that ought to be kept simple. *See, e.g.*, Tanina Rostain et al., *Thinking Like a Lawyer, Designing Like an Architect: Preparing Students for the 21st Century Practice*, 88 CHI.-KENT L. REV. 743, 752 (2013) (noting that law students' family and friends sometimes complain about the students' tendency to "lapse into legal jargon"). For example, we do not want them lunching at someone's home and asking "Are you warranting that this food is fresh and has been prepared in a hygienic fashion?" Instead, the exercise is designed to develop ways of thinking and negotiating that students can later apply to legal problems; we certainly are not suggesting that every dinner party must be reduced to a set of carefully negotiated written obligations. In real life, sometimes "I'll bring a salad and dessert to add to your main dish,"

## IV. OTHER POSSIBILITIES

Beyond the stock purchase agreement and dinner party conversation, there are nearly endless possibilities for developing similar exercises. One option is to use a partnership agreement format to set out the obligations and expectations of roommates sharing an apartment for the first time. In addition to being a particularly familiar circumstance for most students, the roommate/partnership example is a great option because it highlights the uniqueness of individual business partners' various contributions and concerns.[99] In this sense, variations on the roommate hypothetical advance the attorney's understanding of his role as a dynamic problem-solver and also encourage the view of the client as someone with dynamic needs.

There is a tendency among practitioners to draft partnership and LLC agreements in a one-size-fits-all manner, which can miss more obvious and straightforward approaches to things like valuation of contributions, liquidating distributions, cash flow allocations, and so forth.[100] A roommate agreement would consist of more than merely detailing how the bills get paid. Similarly, a partnership agreement must also include things beyond the obvious contributions of money, property, and services. Just like a roommate who shows up with a dog, a saxophone, and a heavy metal music collection, a client's potential partner brings to the table his own individual personalities, strengths, and weaknesses. Thus, the roommate scenario highlights for students the multiple variables of the arrangement, variables that might not be that obvious to new lawyers in an analogous legal situation where, at first blush, it seems that the only significant terms are the financial details.

Consider also the parallels between a contingent scholarship grant and an earn-out agreement.[101] Many students are familiar with contingent

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really is all that is needed or appropriate.

[99] It is, after all, occasionally ok to anthropomorphize your clients.

[100] "[E]very transactional matter is unique, and each one requires lawyers to draft new language that both is precise and does not expose their clients to liability or excessive risk." Todres, *supra* note 5, at 377. As a result, "attorneys who 'draft' contracts by relying on [form books] may fail to competently represent their clients." Jacob M. Carpenter, *Unique Problems and Creative Solutions to Assessing Learning Outcomes in Transactional Drafting Courses: Overcoming the "Form Book Problem"*, 38 U. DAYTON L. REV. 195, 196 (2012). Drafting problems arising from reliance on forms extend to the format and style of the document as well. "[T]oo often lawyers and law students use forms to replace [the organization, sentence structure, and grammar] part of the process of legal drafting, blindly copying forms or combining several of them, without thinking about their language or structure. Often, the results can be disastrous." SUSAN L. BRODY ET AL., LEGAL DRAFTING 10 (1994).

[101] *See* DALE A. OESTERLE, THE LAW OF MERGERS AND ACQUISITIONS, 24 (4th ed. 2012)

scholarships, where the monetary award varies based on the earned GPA in a given year. In a similar way, contingent compensation in the acquisition of a business is sometimes represented in an earn-out agreement, which specifies a schedule of payments to be made upon the selling company hitting certain, typically financial, milestones.

Although most schools tie contingent scholarships solely to GPA, students tasked with structuring the arrangement may find themselves advocating for more creative measures of contribution to the school. Students may, for example, recommend that the scholarship award consider things beyond just GPA, including participating in moot court competitions, serving as a student bar association representative, or volunteering for certain community-oriented externships. Similarly, the attorney advocating for a seller of a business might want to look for more innovative measures of performance to trigger a higher payout from the buyer. A seller's attorney might advocate for the company's performance potential to be evaluated on things beyond just the financial bottom line, including the receipt of new patent rights, recognition from a community organization for the company's contribution to hiring minority workers, or an award for outstanding safety performance in the industry.

Again, this analogy encourages students to be creative and dynamic in their representation of clients, and it gets them comfortable drafting language from scratch to solve specific client goals. In the context of a company acquisition, this approach adds value to both sides of the transaction and to the industry and community at large.

Other course-oriented drafting tasks include a will (particularly one that establishes a testamentary trust that ties distributions to certain events related to age or education), an advanced directive, a healthcare power of attorney, a real estate purchase agreement, a promissory note, a mortgage, or even a patent license. The nonlegal settings could involve a family wedding, a storyline from television show,[102] the logistics of traveling abroad with a group, or a shared labor project where someone exchanges legal services for yard work and home maintenance. Bearing in mind the students' experiences and frames of reference, a nonlegal analogy to a drafting task can challenge the students to think about the task in a nontraditional way.

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("In an earnout, the purchaser pays part of the purchase price (in additional cash or purchaser securities) as a percentage of post-closing profits earned periodically by the newly purchased operations."); Richmond v. Peters, No. 97-3647, 1999 WL 96736 (6th Cir., Feb. 3, 1999) (demonstrating a real-world example of an earn-out agreement).

[102] Jerry and Elaine's intricate agreement to rekindle aspects of their friendship in *Seinfeld: The Deal* (NBC television broadcast May 2, 1991), is a particularly saucy example.

## V. CONCLUSION

The dinner party scenario uses a common event in the lives of students to show them that they have the ability to plan for contingencies. We ask specific questions—What if there's bad weather? What if someone is sick? What if an ingredient is more expensive that we thought?—and then ask them to work through how to achieve the desired outcome. The handout closes the loop by giving the contingencies names and a place in an actual contract. So in addition to being more comfortable anticipating problems, students learn some substance of the drafting task, namely what kinds of terms belong in various parts of a contract.

In using an exercise that draws on students' everyday experiences and then connecting them specifically to tasks they will face as attorneys, we can communicate to students that they have the ability to think critically and anticipate problems—people problems, logistical problems, business problems, and not just legal ones. Although it may seem like using a nonlegal discussion represents a step backward from practice-readiness, the exercise addresses a deficit in the problem solving skills of new attorneys.[103] The nonlegal context allows professors to illustrate the need for a multi-faceted view of an attorney's role as issue spotter and anticipator. By using a familiar nonlegal context, the exercise focuses students' attention solely on the challenges of anticipating contingencies and addressing them with creative solutions. If students started out with a drafting assignment only in a legal context, they might devote so much attention to technical facets of that field or industry that they would forget to see the bigger picture. Thus, the exercise encourages students to be thorough but non-mechanical in their drafting tasks, and it gives them confidence as they approach a drafting situation, rather than starting with a mindset of worry or dread.

The utility of this exercise extends to students all across the performance spectrum. Even top performing students are often paralyzed by the overwhelming number of legal issues that may be implicated in a given

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[103] *See* Neil J. Dilloff, *Law School Training: Bridging the Gap Between Legal Education and the Practice of Law*, 24 STAN. L. & POL'Y REV. 425, 438 (2013) (stating that "good lawyers trained in creative thinking can devise solutions that are within both legal and ethical bounds"); David Segal, *After Law School, Associates Learn to Be Lawyers*, N.Y. TIMES (Nov. 19, 2011), http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0 ("What [students] did not get, for all that time and money, was much practical training. Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions . . . ."); *supra* Part I (discussing the lack of real-world problem solving skills in new attorneys).

document. Actually, it is often the better students that are aware of the potential implications of the document that they are drafting. The tendency is for those students to either "over-lawyer" each provision (e.g., write too specifically to include each possible variation on each contingency, etc.), or to stick with the standard form document and make no alterations besides the names of the parties.[104] Neither approach effectively serves the client.

We can help students find a more positive and eager approach to their drafting tasks by demonstrating that creating transactional documents is easier and more effective with a flexible mindset. The exercise described above illustrates that there is nothing mystical about many of the contingencies attorneys deal with; they can be anticipated and handled as easily as those issues students address without hesitation in their everyday lives.

[104] *See* BRODY, *supra* note 100, at 10; *Lear*, *supra* note 82, at § 3.01.

## APPENDIX A: STUDENT HANDOUT

*Agreement for* _____

*1. Defined Terms*

| |
|---|
| The Defined Terms section provides agreed-upon definitions of terms that are either frequently used in the document or the explanation of which elsewhere in the document would detract from the readability of the contract. |
| *Example:*[105]<br>For purposes of this Agreement, the term "Business Day" shall mean any day other than (a) Saturday or Sunday or (b) any other day on which national banks in the State of Kansas are generally permitted or required to be closed.[106] |
| *Dinner Party:* |

*2. Exchange/Transaction/Closing*

| |
|---|
| The Exchange section explains the form and economic terms of the transaction, including the details (time/date/location) of the closing of the transaction and the parties' respective deliveries due at closing. |

[105] All examples are adapted from the ABA's Model stock Purchase Agreement. *See* 1 ABA MODEL STOCK PURCHASE AGREEMENT, *supra* note 78.

[106] *Id.* at 15.

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| *Examples:*<br>Subject to the terms and conditions of this Agreement, at the Closing, Buyer shall purchase the Shares from Seller, and Seller shall sell and transfer the Shares to Buyer, free and clear of any Encumbrance.[107]<br><br>At the Closing, Buyer shall deliver to Seller $100,000.00, which shall be paid by wire transfer to Seller.<br><br>At the Closing, Seller shall deliver to Buyer certificates representing the Shares, endorsed in blank and otherwise in proper form for transfer.[108] |
| *Dinner Party:* |

*3. Representations and Warranties*

| |
|---|
| Representations are statements as to past or present facts, made as of a moment in time to induce a party to act. Warranties are promises that existing or future facts are or will be true. Among other things, these provisions describe what is being sold and give assurances as to the authority of the parties to enter into the transaction.[109] |
| *Examples:*<br>Seller represents and warrants to Buyer that the Company is duly organized, validly existing, and in good standing under the laws of its jurisdiction of organization.[110]<br><br>Since January 1, 2013, the Company has not suffered any Material Adverse Change and no event has occurred, and no circumstance exists, that can reasonably be expected to result in a Material Adverse Change.[111] |

[107] *Id.* at 45.
[108] *Id.* at 58-59.
[109] *Id.* at 77.
[110] *See id.* at 82.
[111] *Id.* at 124.

| *Dinner Party:* |
| --- |

*4. Covenants*

| Covenants are commitments by each of the parties to the contract to perform (or to refrain from performing) certain obligations prior to closing and after closing.[112] |
| --- |
| *Examples:*<br>Prior to Closing, Seller will provide Buyer with full and free access, during regular business hours, to the Company's personnel, assets, contracts, records, and furnish Buyer with such contracts and records as Buyer may reasonably request.[113]<br><br>After Closing, Seller shall take no action, either directly or indirectly, that could diminish the value of the Company or interfere with the business of the Company.[114] |
| *Dinner Party:* |

*5. Conditions*

| Conditions specify what must happen (or not happen) prior to closing in order for the parties to be obligated to close. If a condition is not satisfied, the other party may refuse to close without being liable for damages.[115] |
| --- |

[112] *See id.* at 197.
[113] *Id.* at 198.
[114] *Id.* at 243.
[115] *See id.* at 245.

| |
|---|
| *Examples:*<br>Buyer's obligation to purchase the Shares is subject to Buyer's receipt, at or prior to Closing, of each of the Consents identified here in a form and substance satisfactory to Buyer.[116]<br><br>Seller's obligation to sell the Shares is subject to Buyer's representations and warranties being accurate in all material respects as of the date of this Agreement and of Closing.[117] |
| *Dinner Party:* |

*6. Termination*

| |
|---|
| The Termination provision specifies which events will terminate the parties' obligations under the agreement and upon which terms each of the parties may terminate the contract (either with or without liability).[118] |
| *Examples:*<br>This Agreement may be terminated as follows:<br>by mutual consent of Buyer and Seller;<br>by Buyer upon a material Breach of any provision of this Agreement by Seller; or<br>by Seller upon a material Breach by Buyer.[119]<br>A termination will not relieve any party from any liability for any Breach of this Agreement occurring prior to termination.[120] |
| *Dinner Party:* |

[116] *See id.* at 255.
[117] *See id.* at 270.
[118] *See id.* at 275.
[119] *Id.* at 276.
[120] *Id.* at 280.

*7. Indemnification/Remedies*

| |
|---|
| The Indemnification provision backs up the representations and warranties and other agreements contained in the contract by providing that the breaching party will pay for damages caused by its breach. This section may provide for equitable remedies or set termination fees as well as money damages.[121] |
| *Examples:*<br>Seller shall indemnify and hold harmless Buyer from any loss that Buyer may suffer, sustain, or become subject to, as a result of any Breach of any representation or warranty made by Seller in this Agreement.[122]<br><br>Buyer shall indemnify and hold harmless Seller from any loss that Seller may suffer as a result of any Breach of any representation or warranty made by Buyer.[123] |
| *Dinner Party:* |

*8. Miscellaneous*

| |
|---|
| The Miscellaneous provisions are the standard boilerplate, which are common in most contracts and which specify how expenses will be shared and which state's laws govern, and where notices should go, among other things.[124] |
| *Example:*<br>This Agreement may only be amended, supplemented, or otherwise modified by a writing executed by the Buyer and the Seller.[125] |

[121] *See id.* at 285-86.
[122] *See id.* at 305.
[123] *See id.* at 323.
[124] *See id.* at 351.
[125] *Id.* at 361.

*Dinner Party:*

## APPENDIX B: COMPLETED EXERCISE

*Agreement to Host a Dinner Party*

*Recitals: identify the parties to and purposes of the transaction/event*

*1. Defined Terms*

| |
|---|
| The Defined Terms section provides agreed-upon definitions of terms that are either frequently used in the document or the explanation of which elsewhere in the document would detract from the readability of the contract. |
| *Example:*[126]<br>For purposes of this Agreement, the term "Business Day" shall mean any day other than (a) Saturday or Sunday or (b) any other day on which national banks in the State of Kansas are generally permitted or required to be closed. |
| *Dinner Party:*<br>"Protein/Starch"<br>"Side Dish"<br>"Dessert" (includes cheese? Fruit?)<br>"Identified Allergens?"<br>"Safe Food Handling Procedures"<br>"Party Ready Condition" |

*2. Exchange/Transaction/Closing*

| |
|---|
| The Exchange section explains the form and economic terms of the transaction, including the details (time/date/location) of the closing of the transaction and the parties' respective deliveries due at closing. |

[126] All examples are adapted from the ABA's Model Stock Purchase Agreement. *See supra* notes 105-125.

*Examples:*
Subject to the terms and conditions of this Agreement, at the Closing, Buyer shall purchase the Shares from Seller, and Seller shall sell and transfer the Shares to Buyer, free and clear of any Encumbrance.

At the Closing, Buyer shall deliver to Seller $100,000.00, which shall be paid by wire transfer to Seller.

At the Closing, Seller shall deliver to Buyer certificates representing the Shares, endorsed in blank and otherwise in proper form for transfer.

*Dinner Party:*
On June 15, between 6:00 and 6:30 PM, Steve will bring X, and Megan will bring Y to the apartment at _____.

X will be delivered hot/cold or ready to eat/ready to be cooked, etc.

Z will tally all receipts submitted by June 17 and allocated the costs evenly among the Hosts.

Hosts with a deficit will deliver a check or cash in the amount of the deficit to Z on or before June 24 at 5:00 PM

W will provide disposable dishware, utensils and napkins by ___.

Q will make available the Apartment from 5:00 until midnight on the night of the event in Party-Ready Condition.

*3. Representations and Warranties*

Representations are statements as to past or present facts, made as of a moment in time to induce a party to act. Warranties are promises that existing or future facts are or will be true. Among other things, these provisions describe what is being sold and give assurances as to the authority of the parties to enter into the transaction.

*Examples:*
Seller represents and warrants to Buyer that the Company is duly organized, validly existing, and in good standing under the laws of its jurisdiction of organization.

| |
|---|
| Since January 1, 2013, the Company has not suffered any Material Adverse Change and no event has occurred, and no circumstance exists, that can reasonably be expected to result in a Material Adverse Change. |
| *Dinner Party:*<br>X, Y, and Z represent and warrant they have read and understand the list of Identified Allergens set forth in Exhibit __.<br><br>Q represents and warrants that the Apartment is suitable for purposes of hosting the Party. |

*4. Covenants*

| |
|---|
| Covenants are commitments by each of the parties to the contract to perform (or to refrain from performing) certain obligations prior to closing and after closing. |
| *Examples:*<br>Prior to Closing, Seller will provide Buyer with full and free access, during regular business hours, to the Company's personnel, assets, contracts, records, and furnish Buyer with such contracts and records as Buyer may reasonably request.<br><br>After Closing, Seller shall take no action, either directly or indirectly, that could diminish the value of the Company or interfere with the business of the Company. |
| *Dinner Party:*<br>All Hosts will obtain and distribute to Z by June 17th copies of receipts for all expenses incurred with respect to the Party.<br><br>Hosts will use reasonable best efforts to keep costs reasonable by shopping for ingredients only at Walmart.<br><br>At all times from the execution of this Agreement to the Party, Q will maintain a policy for regular pest control for the Apartment.<br><br>Hosts will acquire, store, transport, handle, and prepare all ingredients in accordance with Safe Food Handling Procedures. |

Each of the Hosts will take reasonable/ordinary care to ensure the safety of themselves and others (no running with knives or sloshing hot oil around), and to maintain the kitchen in reasonably good and serviceable condition at all times (including cleaning spills on floors, in the oven, or on the countertops) in a timely manner and storing all equipment in a safe manner (no baking sheets on the floor).

*5. Conditions*

Conditions specify what must happen (or not happen) prior to closing in order for the parties to be obligated to close. If a condition is not satisfied, the other party may refuse to close without being liable for damages.

*Examples:*
Buyer's obligation to purchase the Shares is subject to Buyer's receipt, at or prior to Closing, of each of the Consents identified here in a form and substance satisfactory to Buyer.

Seller's obligation to sell the Shares is subject to Buyer's representations and warranties being accurate in all material respects as of the date of this Agreement and of Closing.

*Dinner Party:*
The Hosts' obligations to perform (including showing up, bringing ingredients/dishes, and sharing costs) are subject to the satisfaction of Q's covenant to keep the Apartment in Party Ready Condition.

The Hosts' obligations to reimburse (under paragraph __) are subject to the performance of the receipt/accounting procedures (under paragraph __).

All Hosts' obligations to perform are excused if Shawnee County is subject to a tornado warning issued by the National Weather Service at any time between 5:00 PM and 6:00 PM on the night of the Dinner.

*6. Termination*

| |
|---|
| The Termination provision specifies which events will terminate the parties' obligations under the agreement and upon which terms each of the parties may terminate the contract (either with or without liability). |
| *Examples:*<br>This Agreement may be terminated as follows:<br>by mutual consent of Buyer and Seller;<br>by Buyer upon a material Breach of any provision of this Agreement by Seller; or<br>by Seller upon a material Breach by Buyer.<br><br>A termination will not relieve any party from any liability for any Breach of this Agreement occurring prior to termination. |
| *Dinner Party:*<br>The Party can be cancelled by the Guests (as communicated by Guest representative _____). If cancelled within 5 days of the Party, all Host obligations will be terminated. |

*7. Indemnification/Remedies*

| |
|---|
| The Indemnification provision backs up the representations and warranties and other agreements contained in the contract by providing that the breaching party will pay for damages caused by its breach. This section may provide for equitable remedies or set termination fees as well as money damages. |
| *Examples:*<br>Seller shall indemnify and hold harmless Buyer from any loss that Buyer may suffer, sustain, or become subject to, as a result of any Breach of any representation or warranty made by Seller in this Agreement.<br><br>Buyer shall indemnify and hold harmless Seller from any loss that Seller may suffer as a result of any Breach of any representation or warranty made by Buyer. |

| |
|---|
| *Dinner Party:*<br>A Host who breaches a covenant or representation and warranty regarding Safe Food Handling or Identified Allergens must indemnify ___ for any damage or injury or loss suffered as a result of such breach.<br><br>A Host who goes over budget is liable for the excess expenditure. |

*8. Miscellaneous*

| |
|---|
| The Miscellaneous provisions are the standard boilerplate, which are common in most contracts and which specify how expenses will be shared and which state's laws govern, and where notices should go, among other things. |
| *Example:*<br>This Agreement may only be amended, supplemented, or otherwise modified by a writing executed by the Buyer and the Seller. |
| *Dinner Party:*<br>Can modify the date/time/food, by majority vote of Hosts. |

## APPENDIX C: SAMPLE COMPLETED CONTRACT

### DINNER PARTY AGREEMENT

This DINNER PARTY AGREEMENT (the "Agreement") is entered into effective as of February 1, 2013, by and among Abigail, an individual ("A"), Benjamin, an individual ("B"), and Charles, an individual ("C," and collectively with A and B, the "Hosts," or individually, a "Host").

### BACKGROUND

(a) The Hosts are students enrolled in Professor Grant's Spring 2013 Transactional Drafting class (the "Class").
(b) The Hosts desire to host a dinner party (the "Dinner Party") for all students currently enrolled in the Class (the "Guests").
(c) This Agreement sets forth the Hosts' obligations and rights with respect to the Dinner Party.

Accordingly, the Hosts agree as follows:

1. *Definitions.* Terms defined in the preamble have their assigned meanings and each of the following terms has the meaning assigned to it:

   (a) *"Allergen"* means any food allergen identified by any of the Guests by written notice to the Hosts no later than ten (10) days prior to the Table Date.

   (b) *"Appetizer"* means Caesar salad to be prepared substantially in compliance with the recipe attached as Exhibit A.

   (c) *"Beverages"* means water, coffee, Coke, Diet Coke, and red wine.

   (d) *"Dessert"* means tiramisu and vanilla ice cream to be prepared substantially in compliance with the recipe attached as Exhibit E.

(e) *"Main Course"* means chicken parmesan served on spaghetti noodles with marinara sauce to be prepared substantially in compliance with the recipes attached as Exhibit B.

(f) *"Meal"* means the combination of the following: Appetizer, Beverages, Dessert, and Main Course to be served successively on the Table Date.

(g) *"Party Ready Condition"* means accessible, habitable, air conditioned, properly lighted, and reasonably clean such that the premises are suitable for food preparation by the Hosts and occupancy by the Guests.

(h) *"Proper Cooking Temperature"* means the correct temperature at which particular food items should be cooked as set forth by the U.S. Food and Drug Administration on the following webpage: http://www.fda.gov/Food/FoodborneIllnessContaminants/PeopleAtRisk/ucm083057.htm.

(i) *"Protein"* means chicken parmesan served on spaghetti noodles with red sauce, prepared at the Proper Cooking Temperature.

(j) *"Safe Food Handling Procedures"* means compliance with the four steps to food safety, as further defined by the U.S. Food and Drug Administration: Clean, Separate, Cook, and Chill, as set forth on the following webpage: http://www.fda.gov/Food/ResourcesForYou/HealthEducators/ucm083000.htm.

(k) *"Servingware"* means plates, napkins, forks, knives, spoons, and glasses.

(l) *"Side Dishes"* means corn prepared substantially in compliance with the recipe attached as Exhibit C, and garlic bread to be prepared substantially in compliance with the recipe attached as Exhibit D.

(m) *"Table Date"* means February 22, 2013, between the hours of 6:00 PM and 10:00 PM.

(n) *"Venue"* means A's residence, located at 555 N. Main Street, Topeka, Kansas.

(o) *"Weather Cancellation"* means a cancellation of the Dinner Party, which will occur if Washburn University School of Law has cancelled its afternoon classes due to inclement weather on the Table Date.

2. *Hosting the Dinner Party.* By signing this Agreement, the Hosts agree to combine their efforts to prepare a Meal and host a Dinner Party for the Guests, pursuant to the following:

(a) A shall by 5:00 PM on the Table Date:
  (1) make available the Venue in Party Ready Condition;
  (2) make available Servingware for all Hosts and Guests; and
  (3) provide Beverages for all Hosts and Guests.

(b) B shall provide:
  (1) Protein for all Hosts and Guests by 6:30 PM on the Table Date; and
  (2) Dessert for all Hosts and Guests by 8:30 PM on the Table Date.

(c) C shall provide:
  (1) Appetizer for all Hosts and Guests by 6:00 PM on the Table Date; and
  (2) Side Dishes for all Hosts and Guests by 6:30 PM.

(d) *Reasonable Care.* Each Host individually shall take reasonable care to ensure the safety of themselves and others, and to maintain the Venue in good and serviceable conditions at all times during the Dinner Party. The Hosts collectively shall ensure that all floors, countertops, and appliances will be cleaned in a timely manner, and shall ensure that all cooking equipment, utensils, and cutlery will used and stored in a safe manner.

(e) *Expenses.* Each Host shall pay a proportionate share of the reasonable expenses incurred in the Dinner Party, subject to the terms and conditions outlined in section 3 below.

3. *Cost and Payment.*

   (a) *Estimated Cost and Cap.* The Hosts estimate that the cost of preparing and hosting the Dinner Party will be Five Hundred Dollars ($500).

   (b) *Receipts.* Each Host shall provide A with all receipts of items purchased in preparation of hosting the Dinner Party. Each Host shall deliver a copy of his or her receipts to A by 5:00 PM three (3) days following the Dinner Party.

   (c) *Reasonableness of Expenses.* Each Host shall use care to keep costs reasonable in preparation for the Dinner Party. If, after reviewing the receipts, A believes an expenditure is unreasonable, A shall bring it to the attention of the Hosts, who will decide by a majority vote what portion of the particular expense is unreasonable. Each Host shall be responsible for paying any portion of his or her incurred expenses that are determined unreasonable.

   (d) *Allocation of Costs.* Excluding any portion of any expense deemed unreasonable in part 3(c) above, A shall divide the total costs among the Hosts and will calculate who needs to pay whom in order to equalize the expenditures. A shall promptly notify the Hosts of the amounts due to each other.

   (e) *Form and Timing of Payment.* Each Host shall pay his or her proportionate share of the total cost by check or cash no later than seven days after notification by A pursuant to part 3(d) above.

4. *Representations and Warranties of A.* A represents and warrants to B and C as follows:

   (a) *Meal Preparation.* A has read and understands the Safe Food Handling Procedures.

   (b) *Proper Cooking Temperature.* A has read and understands the requirements for Proper Cooking Temperature.

(c) *The Venue.* The appliances in the Venue are currently in working condition, and the Venue can accommodate the Hosts and the Guests.

5. *Representations and Warranties of B.* B represents and warrants to A and C as follows:

(a) *Meal Preparation.* B has read and understands the Safe Food Handling Procedures.

(b) *Proper Cooking Temperature.* B has read and understands the requirements for Proper Cooking Temperature.

(c) *Recipes.* B has read and understands the recipes attached to this Agreement for the Protein and Dessert and is or will be competent to prepare both dishes on the Table Date.

6. *Representations and Warranties of C.* C represents and warrants to A and B as follows:

(a) *Meal Preparation.* C has read and understands the Safe Food Handling Procedures.

(b) *Proper Cooking Temperature.* C has read and understands the requirements for Proper Cooking Temperature.

(c) *Recipes.* C has read and understands the recipes attached to this Agreement for the Appetizer and Side Dishes and is or will be competent to prepare both dishes on the Table Date.

7. *Covenants.*

(a) *Meal Preparation.* The Hosts individually will abide by Safe Food Handling Procedures and Proper Cooking Temperature requirements. The Hosts individually will refrain from using any identified Allergen in the preparation of the food.

(b) *The Venue.* Between the date of this Agreement and the Table Date, A will notify the Hosts of anything that could impact the Venue's Party Ready Condition on the Table Date.

8. *Termination of the Parties' Obligations and Rights.*

   (a) The Dinner Party may be cancelled by a two-thirds (2/3rds) majority vote of all the students of the Class, so long as the Dinner Party is cancelled at least five (5) days prior to the Table Date. A two-thirds (2/3rds) majority vote to cancel the Dinner Party shall terminate the parties' rights and obligations under this Agreement.

   (b) All parties' rights and obligations to perform shall terminate in the event of a Weather Cancellation.

   (c) If the Venue is not in Party Ready Condition by 5:00 PM on the Table Date, two-thirds (2/3rds) of the Hosts may elect to cancel the Dinner Party or to relocate it to an alternate location, capable of accommodating The Guests and furnished with all necessary appliances and equipment.

9. *Indemnification.*

   (a) *Indemnification by A.* A shall indemnify and hold B and C harmless from and against any liability, claim, damage, obligation, cost, or expense incurred by or asserted against B or C by reason of the breach by A of any representation, warranty or covenant of A contained in this Agreement.

   (b) *Indemnification by B.* B shall indemnify and hold A and C harmless from and against any liability, claim, damage, obligation, cost, or expense incurred by or asserted against A or C by reason of the breach by B of any representation, warranty or covenant of B contained in this Agreement.

   (c) *Indemnification by C.* C shall indemnify and hold A and B harmless from and against any liability, claim, damage, obligation, cost, or expense incurred by or asserted against A or B by reason of the breach by C of any representation, warranty or covenant of C contained in this Agreement.

10. *General Provisions.*

   (a) *Assignment.* Neither this Agreement, nor any of the rights, obligations, and duties hereunder, may be assigned or

otherwise transferred by any party without the prior written consent of all other parties to the Agreement.

(b) *Amendment.* This Agreement shall not be modified or amended except pursuant to the written consent of two-thirds (2/3rds) the Hosts.

(c) *Governing Law.* This Agreement shall be governed by the laws of the States of Kansas.

(d) *Survival.* The covenants, agreements, representations, warranties, and obligations of the parties hereto shall survive the Table Date.

(e) *Entire Agreement.* This Agreement is the full agreement among the parties.

(f) *Binding Effect and Benefit.* This Agreement shall be binding upon and inure to the benefit of the parties hereto. Otherwise, this Agreement is not intended to create any rights for the benefit of any third party.

(g) *Notice.* All notices, requests, and other communications required or permitted hereunder shall be in writing and sent by e-mail as follows:

(1) If to A, e-mailed to Abigail@hotmail.com, with copy to B at Benjamin@gmail.com and C at Charles@yahoo.com.

(2) If to B, e-mailed to Benjamin@gmail.com, with copy to A at Abigail@hotmail.com and C at Charles@yahoo.com.

(3) If to C, e-mailed to Charles@yahoo.com, with copy to A at Abigail@hotmail.com and B at Benjamin@gmail.com.

(4) Any party may designate an alternate address with notice to the other parties.

(5) Any notice, if properly made, shall be deemed to have been made at the time actually sent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the day and year aforesaid.

The Hosts

_____

Abigail

_____

Benjamin

_____

Charles

# Economic Substantive Due Process: Considered Dead Is Being Revived by a Series of Supreme Court Land-use Cases

William L. Want*

The Supreme Court handed property-rights advocates a significant victory on June 25, 2013, in *Koontz v. St. Johns River Water Management District*,[1] and in so doing took a major step in resurrecting economic substantive due process, a doctrine which had prevailed from the late Nineteenth Century until rebuffed in 1937[2] and since, was presumed dead.[3] The case expands a takings law precedent the Court established in *Nollan v. California Coastal Commission*[4] and *Dolan v. City of Tigard*,[5] despite the fact that those decisions were severely undermined by the Court's decision in *Lingle v. Chevron U.S.A. Inc.*[6] Whereas *Nollan* and *Dolan* themselves expanded takings law to include the situation where a property interest required for mitigation is not sufficiently connected to the impacts of the

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[1] 133 S. Ct. 2586 (2013).

[2] Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post-Lochner Era*, 102 DICK. L. REV. 327, 332 (1998) ("[T]he doctrine [of substantive due process] was discredited for blocking social legislation needed to relieve the economic and social distress of the Great Depression."); DAVID E. BERNSTEIN, REHABILITATING LOCHNER 1 (2011) ("*Lochner* is likely the most disreputable case in modern constitutional discourse.").

[3] *See, e.g.*, Frank Easterbrook, *The Constitution of Business*, 11 GEO. MASON U. L. REV. 53, 53 (1988) ("Substantive due process is dead."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980) (describing Lochner and its progeny as "now universally acknowledged to have been constitutionally improper"). *But see* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM L. REV. 873 (1987) ("[T]he case [*Lochner*] should be taken to symbolize not merely an aggressive judicial role, but an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law."); BERNSTEIN, *supra* note 2, 126-28 (stating that the *Lochner* era Supreme Court was not as activist as is the conventional wisdom, and the laws it overturned were not limited to economic regulation protective of corporate interests, but also included laws that restricted personal liberties).

[4] 483 U.S. 825 (1987).

[5] 512 U.S. 374 (1994).

[6] 544 U.S. 528 (2005).

permitted activity,[7] *Koontz* makes it a taking for the government agency to require the expenditure of money to mitigate the project's impacts.[8] Judicial review of economic regulation is normally done under the rational basis standard[9] which almost invariably results in the regulation being upheld.[10] By changing that standard to the heightened level of takings analysis for the vast amount of local, state, and federal permitting requiring the expenditure of funds for mitigation, *Koontz* dramatically increases the universe of actions subject to what amounts to substantive due process. To paraphrase the dissent, under *Koontz*, federal courts will be charged with deciding on constitutional grounds disputes about sewage and water charges and fees for liquor licenses.[11]

Demonstrating this proposition requires a detailed historical review of the development of takings law, including a description of its close association with due process, as well as a discussion of the doctrines of substantive due process and unconstitutional conditions. This article concludes by suggesting alternatives to the *Koontz* approach of resurrecting economic substantive due process that provide more than rubber-stamp "rational basis" review for government permit decisions.

## I. THE *KOONTZ* DECISION

Mr. Koontz claimed that the Water Management District's alleged requirement that he fund an offsite wetlands mitigation project as a condition for a land-use permit amounted to a taking.[12] His application sought permission to fill some wetlands as part of a proposal to develop 3.7 acres of his property.[13] Koontz offered, as mitigation for the wetlands loss, to place a conservation easement on approximately eleven acres of his property.[14] The Water Management District considered this inadequate, and informed him of two mitigation alternatives it would accept as well as inviting him to submit other mitigation proposals.[15]

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[7] *Dolan*, 512 U.S. at 386; *Nollan*, 483 U.S. at 830.

[8] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013).

[9] *See, e.g.*, TCF Nat. Bank v. Bernanke, 643 F.3d 1158, 1163 (8th Cir. 2011) ("Parties making substantive-due-process claims concerning economic regulations generally "face a highly deferential rational basis test . . . .").

[10] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 6.5, at 553 (4th ed. 2011) ("The rational basis test is enormously deferential to the government, and only rarely has the Supreme Court invalidated laws as failing rational basis review.").

[11] *See Koontz*, 133 S. Ct. at 2607.

[12] *See id.* at 2593.

[13] *Id.* at 2592.

[14] *Id.* at 2592-93.

[15] *Id.* at 2593.

Justice Alito, writing for the 5-4 majority, began his opinion by describing the *Nollan* and *Dolan* decisions and stating that they involved a "special application" of the unconstitutional condition doctrine.[16] He noted two important realities with respect to the government's power to require permit conditions—first, that this power afforded the government the opportunity to pressure applicants for concessions that the takings provision would prohibit; and second, that permit conditions could appropriately require applicants to pay for the burdens imposed by the activities permitted.[17] "*Nollan* and *Dolan* accommodate both realities," Justice Alito stated, "by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' [the *Nollan* requirement] and 'rough proportionality' [the *Dolan* requirement] between the property that the government demands and the social costs of the applicant's proposal."[18]

Addressing the question of how the requirement to expend money as a permit condition, rather than the requirement of a property interest, could be a taking, Justice Alito stated, "We note as an initial matter that if we accepted this argument [that requiring the payment of money was not a taking] it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*."[19] Further, Justice Alito stated, "[T]he demand for money at issue here did operate upon . . . an identified property interest by directing the owner of a particular piece of property to make a monetary payment."[20] He cited Supreme Court cases where the Court treated confiscations of money and seizures of liens as takings.[21] While acknowledging that taxes and user fees cannot constitute takings, Justice Alito noted that "teasing out the difference between taxes and takings is more difficult in theory than in practice."[22] He also supported his takings ruling on the basis of the unconstitutional condition doctrine.[23]

Justice Kagan, dissenting on behalf of herself and three other Justices, would have rejected the takings claim before reaching the *Nollan/Dolan* issue of money versus property on the basis that the Water Management District never demanded anything in particular in exchange for a permit, but rather made suggestions as to appropriate mitigation.[24] Additionally, she

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[16] *Id.* at 2594 (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005)).

[17] *Id.* at 2594-95.

[18] *Id.* at 2595.

[19] *Id.* at 2599.

[20] *Id.* (ellipses in original) (quotations and citations omitted).

[21] *Id.* at 2599-2600.

[22] *Id.* at 2601.

[23] *See id.* at 2595.

[24] *Id.* at 2604 (Kagan, J., dissenting).

noted that Koontz never acceded to a demand, even if there had been one.[25] Addressing the *Nollan/Dolan* question, Justice Kagan stated that the takings tests established by those cases only apply "when the appropriation of that *property*, outside the permitting process, would constitute a taking."[26] She rejected the comparison between requiring the payment of money for wetlands and the government seizing a bank account or dissolving a lien because in those situations "the government indeed takes a 'specific' and 'identified property interest.'"[27]

Summarizing the basis of her dissent, Justice Kagan stated:

> [T]he heightened standard of *Nollan* and *Dolan* is not a freestanding protection for land-use permit applicants; rather, it is "a special application of the doctrine of unconstitutional conditions, which provides that the government may not require a person to give up a constitutional right—here the right to receive just compensation when *property* is taken"—in exchange for a land-use permit.[28]

Justice Kagan went on to describe the "significant practical harm" the Court's decision could cause, stating, "By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments . . . the majority extends the Takings Clause, with its notoriously difficult and perplexing standards, into the very heart of local land-use regulation and service delivery."[29] She warned that the *Nollan* and *Dolan* essential nexus and proportionality tests would apply to routine decisions by localities throughout the country on such things as sewage and water charges and fees for liquor licenses.[30] Additionally, she noted, "If a local government risked a lawsuit every time it made a suggestion to an applicant about how to meet permitting criteria, it would cease to do so; indeed, the government might desist altogether from communicating with applicants."[31]

## II. THE DEVELOPMENT OF TAKINGS LAW

A "taking" refers to the requirement that government pay compensation for property whose ownership it takes or whose value it destroys.[32] The

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[25] *Id.*

[26] *Id.* at 2605 (emphasis added).

[27] *Id.* at 2606 (citing E. Enters v. Apfel, 524 U.S. 498, 540-41 (1998)).

[28] *Id.* at 2606-07 (emphasis added).

[29] *Id.* at 2607 (quotations and citation omitted).

[30] *Id.*

[31] *Id.* at 2610

[32] *See* BLACK'S LAW DICTIONARY 1591 (9th ed. 2009) ("The government's actual or effective acquisition of private property either by ousting the owner or by destroying the property or severely impairing its utility."); *see also* CHEMERINSKY, *supra* note 10, § 8.4.5, at

requirement stems from the provision of the Fifth Amendment of the United States Constitution that "private property [not] be taken for public use, without just compensation."[33] The provision most obviously requires the government to pay for property when it takes title from an unwilling seller.[34] The government accomplishes such transfer of ownership through exercising its eminent domain powers in a condemnation proceeding.[35] The Supreme Court determined in 1872 that this constitutional provision also requires payment when the government physically destroys the value of property by flooding.[36] This is called an inverse condemnation and requires a lawsuit by the property owner against the government.[37]

The Fifth Amendment requirement that the government pay compensation for taking property is commonly traced back to the Magna Carta, which required that no freeman be acted upon "unless . . . by the law of the land."[38] The provision was developed to protect English noblemen from the King's increasingly burdensome seizure of land for debts.[39] Exactly when the additional requirement of compensation was developed is the subject of debate.[40] Various states required just compensation in their constitutions, including Vermont in 1777 followed by Massachusetts in 1780.[41] There was a conflict in state court rulings as to whether a regulation could constitute a taking.[42]

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681 ("The Constitution clearly envisions that the government will take private property for public use, but it requires that the government pay for it.").

[33] U.S. CONST. amend. V. The rights created by the first ten amendments to the Constitution, referred to as the Bill of Rights, apply to the federal government, not the states. *See* 16A AM. JUR. 2D *Constitutional Law* § 418 (1964). The Supreme Court has construed the due process clause of the Fourteenth Amendment, which does apply to the states, as incorporating the compensation provision of the Fifth Amendment. *Cf. id.* § 421.

[34] *See* CHEMERINSKY, *supra* note 10, § 8.4.5, at 681 ("The Constitution clearly envisions that the government will take private property for public use, but it requires that the government pay for it.").

[35] *See id.*

[36] Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1871) ("[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution . . . .").

[37] *See* CHEMERINSKY, *supra* note 10, § 8.4.5, at 681-82.

[38] Catherine R. Connors, *Back to the Future: The "Nuisance Exception" to the Just Compensation Clause*, 19 CAP. U. L. REV. 139, 148 (1990).

[39] FRED BOSSELMAN ET AL., THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 54-56 (1973).

[40] Connors, *supra* note 38, at 149.

[41] *Id.*

[42] *Id.* at 151-53.

Prior to 1922, the U.S. Supreme Court did not recognize that the compensation provision of the Fifth Amendment applied to regulations.[43] The leading case regarding the constitutionality of regulations that reduced the value of property had been *Mugler v. Kansas*.[44] In that case, the plaintiff challenged a Kansas law prohibiting the operation of a brewery on his property as a violation of the due process provision of the Fourteenth Amendment,[45] which states, "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."[46] The Court, in rejecting the due process challenge, addressed the takings question as well, stating, "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[47] A taking, the Court declared, required a direct encroachment such as a "permanent flooding of private property, a physical invasion of the real estate of the private owner, and a practical ouster of his possession."[48] This reference by the Court to "taking" in a due process case was the start of a long history of comingling the takings and due process concepts.[49]

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[43] *See* Robert S. Mangiaratti, *Regulatory Taking Claims in Massachusetts Following the* Lingle *and* Gove *Decisions*, 90 MASS. L. REV. 54, 54 (2006) ("In 1922, the United States Supreme Court first recognized that a governmental regulation could be the equivalent of an uncompensated taking of private property in violation of the Fifth Amendment.").

[44] 123 U.S. 623 (1887).

[45] *Id.* at 654.

[46] U.S. CONST. amend. XIV. The challenge also alleged a violation of the provision of the Fourteenth Amendment prohibiting a state from abridging the privileges or immunities of citizens of the United States. *Mugler*, 123 U.S. at 657.

[47] *Id.* at 668-69.

[48] *Id.* at 668 (internal quotations omitted).

[49] Professor Robert Dreher notes that while *Mugler* and other early land-use cases were brought under due process, in effect they argued that the regulations at issue "took private property for public use without just compensation." Robert G. Dreher, Lingle*'s Legacy: Untangling Substantive Due Process From Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 374 (2006). Describing the comingling of the concepts, Justice Stevens stated that the Court in the early years of the twentieth century had "fused the two express constitutional restrictions on any state interference with private property that property shall not be taken without due process nor for a public purpose without just compensation into a single standard . . . ." Moore v. City of E. Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring). Professors Julian Juergensmeyer and Thomas Roberts state, "The relationship between substantive due process and regulatory takings has been confusing. . . . This first area of confusion is understandable since the formulations of the two constraints, except for remedy, has at times been almost identical." JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW, § 10:12(C), at 430 (3d ed. 2013). Professor Thomas W. Merrill states that large swaths of takings law "rest[] on a mixture of takings and due process traditions." Thomas W. Merrill, *Why* Lingle *is Half*

*Hadacheck v. Sebastian*[50] is another early case frequently cited in the history of takings law.[51] Plaintiff alleged that a Los Angeles ordinance prohibiting the operation of brickyards within the city limits violated due process.[52] The Court, following *Mugler*, upheld the regulation as being within governmental police powers, noting however that the police power would not be valid if it were "arbitrarily exercised."[53]

As states "increasingly used their police powers to do more than suppress common law nuisances, discontent with the *Mugler* test grew."[54] A new approach to takings was forged by Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*.[55] There, plaintiff coal company challenged a Pennsylvania law preventing it from removing coal from a subsurface estate if it would cause surface subsidence.[56] Justice Louis Brandeis, dissenting, followed the *Mugler* approach that government action was valid and could not be a taking if it came within the government's police power, which was determined by a consideration of whether the law served a public purpose and whether it arbitrarily sought to achieve that purpose.[57] By contrast, Justice Holmes focused on the extent of the economic impact on the landowner.[58] According to him, "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation."[59] While acknowledging that "government hardly could go on if to some extent values incident to property could not be diminished," there were limits, he stated.[60] When the diminution reaches a certain magnitude, Justice Holmes declared, "[I]n most if not in all cases there must be an exercise of eminent domain and compensation to sustain the

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*Right*, 11 VT. J. ENVTL. L. 421, 432 (2010). Professor McUsic contends that by 1920 takings and due process analysis had been fused. Molly S. McUsic, *The Ghost of* Lochner*: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U.L. REV. 605, 613-14 (1996).

[50] 239 U.S. 394 (1915).

[51] *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 105 (1978); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022 (1992).

[52] *Hadacheck*, 239 U.S. at 404.

[53] *Id.* at 409-10.

[54] Connors, *supra* note 38, at 166.

[55] 260 U.S. 393 (1922).

[56] *Id.* at 412-13.

[57] *See id.* at 417-18 (Brandeis, J., dissenting).

[58] *See id.* at 415 (majority opinion).

[59] *Id.*

[60] *Id.* at 413.

act."[61] The general rule was that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[62]

The Supreme Court decided subsequent land-use cases in the 1920s based on the police powers/due process doctrine of *Mugler* rather than the takings doctrine of *Mahon*.[63] *Mahon* "was apparently not recognized by the Court . . . as establishing a new doctrine of [regulatory] takings"[64] different from the police power doctrine of *Mugler*.[65] In *Village of Euclid, Ohio v. Ambler Realty Co.*,[66] a case frequently cited in modern takings cases,[67] plaintiff made a facial challenge to zoning requirements as violating due process.[68] The Court considered the reasons argued to justify the limitation of property use through zoning and addressed them in due process, rather than takings, terms, stating:

> If these reasons [for zoning], thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[69]

Two years after holding that zoning did not on its face violate substantive due process, in *Nectow v. City of Cambridge*,[70] the Court ruled that zoning as applied to a particular tract did in fact violate due process.[71] Also in

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[61] *Id.*

[62] *Id.* at 415.

[63] *See* Dreher, *supra* note 49, at 377-78.

[64] *Id.* at 377.

[65] *Id. See also* Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 666 (1996).

[66] 272 U.S. 365 (1926).

[67] *See, e.g.*, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013); MHC Fin. Ltd. P'ship v. City of San Rafael, 714 F.3d 1118, 1127 (9th Cir. 2013).

[68] *See Euclid*, 272 U.S. at 384. The confusion of the takings and due process clause claims and the comingling of the two concepts (*see supra* note 49) is shown by the fact that despite the clear allegation of a due process violation in *Euclid*, a takings violation was indicated to some extent as well. *Id.* ("It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land, so as to *confiscate and destroy a great part of its value*[.]" (emphasis added)). Plaintiff also challenged zoning in *Euclid* based on equal protection and the Ohio Constitution. *Id.*

[69] *Id.* at 395.

[70] 277 U.S. 183 (1928).

[71] JUERGENSMEYER & ROBERTS, *supra* note 49, §10:4(A), at 397; *see also Nectow*, 277 U.S. at 188-89.

1928, the Supreme Court decided *Miller v. Schoene*,[72] a case that sounded more in the nature of taking than due process,[73] but was nonetheless brought as a due process challenge.[74] There, the State had ordered plaintiffs to cut down a large number of diseased ornamental red cedar trees growing on their property as a means of preventing the spread of the plant disease to apple orchards in the vicinity.[75] The statute did not allow for compensation.[76] Citing *Mugler*, *Hadacheck*, and *Euclid*, the Court stated, "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."[77] Thus, the Court continued to rely principally on the due process approach of *Mugler* rather than a separate takings approach of *Mahon*.

In *Goldblatt v. Town of Hempstead*,[78] decided in 1962, plaintiffs alleged that an ordinance preventing excavation below a certain depth and requiring refilling of excavations below that depth was a taking that denied due process,[79] thereby essentially merging the takings and due process claims into one.[80] Ruling on the basis of *Mugler*, the Court stated that as long as the prohibition is for a purpose "declared, by valid legislation, to be injurious to the health, morals, or safety of the community, [it] cannot . . . be deemed a taking . . . ."[81] The Court, however, made reference to Holmes's approach in *Mahon* and preserved it for possible future use with the statement: "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation."[82]

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[72] 276 U.S. 272 (1928).

[73] The statute in question required diseased trees to be cut down to prevent the spread of the disease. *See id.* at 277.

[74] *Id.* at 277.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 279-80.

[78] 369 U.S. 590 (1962).

[79] *Id.* at 591-92.

[80] Professor Robert Dreher considers *Goldblatt* a due process, rather than a takings, case. Dreher, *supra* note 49, at 390. While he is correct that the cause of action was due process, the description of that claim incorporates or at least suggests takings without just compensation as well. *See Goldblatt*, 369 U.S. at 591. Professor Dreher does note that early land-use cases like *Goldblatt*, though brought under due process, in effect argued that the regulations at issue were a taking. Dreher, *supra* note 49, at 374.

[81] *Goldblatt*, 369 U.S. at 593 (quoting Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)).

[82] *Id.* at 594 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

The reason the Supreme Court decided land-use cases with takings related issues on the basis of due process rather than the diminution in value taking approach of *Mahon* is probably that regulation, particularly federal regulation, had not become so restrictive as to potentially amount to a sufficient diminution of value to be a taking under *Mahon*.[83] Justice Holmes's statement in *Mahon* that government hardly could go on without diminishing property values[84] shows that the diminution would have to be severe to amount to a taking. Also, with respect to *Euclid* and *Nectow*, zoning was so new and such a radical departure from previous practice to be questionable as to whether it came within police powers,[85] thereby making due process a plausible claim. Federal environmental regulation arose like a phoenix in the 1970s[86] and it is not surprising that property rights advocates would turn more directly to the takings doctrine created by *Mahon* many years earlier. Additionally, the due process approach to challenging land-use regulations had proven unsuccessful,[87] and it was clear by this time that land use and environmental protection were well within the police powers of the state.[88]

## III. TAKINGS RULINGS WITH REGARD TO EMERGING ENVIRONMENTAL REGULATION

One of the most intrusive federal regulatory programs with regard to property is the federal wetlands program,[89] which requires a permit to fill

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[83] *See, e.g.*, Alfred P. Levitt, *Taking on a New Direction: The Rehnquist Scalia Approach to Regulatory Takings*, 66 TEMP. L. REV. 197, 197 (1993) ("With an ever increasing volume of legislation substantially emasculating property rights, private property owners now look to the Takings Clause as a defense against governmental encroachment.").

[84] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[85] *Cf.* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926) ("Building zone laws are of modern origin. They began in this country about 25 years ago.").

[86] *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 67 (2004) ("The 1970s were an extraordinary decade for environmental law."); *see also id.* at 67-97 (discussing the environmental law in the 1970s in a chapter entitled "Building a Road: The 1970s").

[87] *Cf.* Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 DENV. U. L. REV. 453, 489 (1998) (describing unsuccessful due process challenges).

[88] *See* 22 FLA. JUR 2D *Environmental Rights and Remedies* § 18 (WL current through 2013) ("[T]he state has the right to use its police power to establish land-use regulations addressing environmental concerns.").

[89] *Cf.* Sheila Deely & Mark Latham, *The Federal Wetlands Program: A Regulatory Program Run Amuck*, ANALYSIS & PERSPECTIVE (DrinkerBiddle, New York, N.Y.), Nov. 10, 2003, at 1, *available at* http://www.drinkerbiddle.com/resources/publications/2003/the-federal-wetlands-program-a-regulatory-program-run-amuck ("One of the most controversial federal environmental programs in existence today, the federal wetlands regulatory program

wetlands[90] and thereby develop lands containing them. With the dormancy of regulatory takings law at the Supreme Court level since 1922, the lower courts were not receptive to the takings claims as to federal wetlands regulation, which began in the late 1960s. In *Zabel v. Tabb*, the first major wetlands case to reach a court of appeals, the Fifth Circuit rejected the claim outright, stating: "Our discussion of this contention begins and ends with the idea that there is no taking."[91]

Takings claims did not fare well in state courts either. In 1972, the Wisconsin Supreme Court in *Just v. Marinette County* rejected the takings claim, stating:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.[92]

The year *Zabel v. Tabb* was decided—1970—marked the beginning of what has been called the "environmental decade."[93] On January 1, 1970, President Nixon signed the National Environmental Protection Act into law,[94] and in subsequent years of the decade, Congress enacted numerous environmental laws by lopsided margins.[95] The federal courts were receptive to this new era of environmental regulation[96] and it was in this atmosphere that the Supreme Court handed down its landmark takings case in 1978 in *Penn Central Transportation Co. v. City New York*.[97]

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under the Clean Water Act has been characterized as a land grab by the United States government.").

[90] Clean Water Act § 404, 33 U.S.C. § 1344 (2006).

[91] 430 F.2d 199, 215 (5th Cir. 1970).

[92] 201 N.W.2d 761, 768 (1972). It is noteworthy that this state case, like the federal cases subsequent to *Mahon*, adhered to the *Mugler* due process approach, rather than the *Mahon* diminution in value approach to decide the takings question. *See id.* at 767-69.

[93] *See* Kenneth A. Manaster, *Justice Stevens, Judicial Power, and the Varieties of Environmental Litigation*, 74 FORDHAM L. REV. 1963, 1963 (2006) ("1970, as is often said, began the 'Environmental Decade' . . . .").

[94] *See* National Environmental Protection Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4370f (2006)).

[95] LAZARUS, *supra* note 86, at 69 ("The average vote in favor of major federal environmental legislation during the 1970s was 76 to 5 in the Senate and 331 to 30 in the House . . . .").

[96] *Id.* at 66 ("[J]udges in the early 1970s began to perceive the relationship between humankind and the natural environment differently and to incorporate those new perceptions into their legal reasoning, with potentially radical implications.").

[97] 438 U.S. 104 (1978).

The Penn Central Transportation Company wanted to lease the air space above Grand Central Station to a developer who was planning to build an office building on top of the station.[98] The City of New York had designated the station a historic landmark and refused permission to alter its appearance.[99] Penn Central sued the city claiming that its historic preservation ordinance was a regulatory taking.[100] The Court rejected the claim[101] in an opinion in which it, for the first time, set forth in some detail the criteria for a taking. In particular, the Court named the following three factors that were to be deferentially balanced in favor of upholding the regulation: (1) the character of the government action, (2) its economic impact, and (3) the interference with the landowner's reasonable investment-backed expectations.[102] This first factor, though ambiguous, appears to be in the nature of the *Mugler* approach of examining whether the regulation came within the government's police power. Supporting this view is the Court's statement that if a state reasonably concludes that "the health, safety, morals, or general welfare" are promoted by prohibiting a particular contemplated use of land, then the prohibition does not constitute a taking.[103] Similarly, consistent with *Mugler*, the Court noted that its decisions rejected the proposition that "diminution in property value, standing alone, can establish a 'taking,'" so long as the government is acting in furtherance of the general welfare.[104]

The second factor named in *Penn Central* for determining a taking, the economic impact of the regulation, was derived from the *Mahon* approach, the extent of the economic impact on the landowners. To some extent, the third factor, reasonable investment-backed expectations, was based on economic impact as well. So the *Penn Central* case merged the due process approach of *Mugler* and the reduction in value approach of *Mahon* into the test for a taking. That test made it unlikely that land-use regulations would be ruled a taking. Even total elimination of value was not alone enough because this factor would be deferentially balanced against the government's broad police powers and the landowner's reasonable expectations.

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[98] *Id.* at 116.
[99] *Id.* at 116-17.
[100] *Id.* at 119.
[101] *Id.* at 122.
[102] *Id.* at 124.
[103] *Id.* at 125.
[104] *Id.* at 131.

Two years later, in *Agins v. City of Tiburon*,[105] the Court restated the takings formula in a way that was subsequently rejected by the Court in *Lingle*,[106] but which, in the meantime, spawned the new takings test of *Nollan*[107] and *Dolan*.[108] In particular, the Court in *Agins* described the takings test as follows: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land . . . ."[109] The first test of substantially advancing legitimate state interests is a version of the *Mugler* due process approach[110] and the second test of denying economically viable use is a version of the *Mahon* diminution in value approach.[111]

## IV. THE *NOLLAN* AND *DOLAN* NEW TAKINGS TEST

*Nollan v. California Coastal Commission*,[112] along with *Dolan v. City of Tigard*,[113] created a new type of takings quite different from the takings law doctrine that had developed in previous Supreme Court decisions. The theory of takings cryptically set forth in *Mahon* was that a government regulation that severely reduced the value of property could be a taking.[114] Later Supreme Court decisions merged a police power, due process factor into the takings doctrine originated in *Mahon*.[115]

*Nollan* and *Dolan* did not conform to these concepts of takings law. They were instead, based on the government's requirement that a property

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[105] 447 U.S. 255 (1980) (upholding the municipal zoning ordinance against takings challenge).

[106] 544 U.S. 528, 540-42 (2005).

[107] 483 U.S. 825, 834-35 (1987).

[108] 512 U.S. 374, 385 (1994).

[109] *Agins*, 447 U.S. at 260 (citations omitted).

[110] *See* Eric Pearson, *Some Thoughts on the Role of Substantive Due Process in the Federal Constitutional Law of Property Rights Protection*, 25 PACE ENVTL. L. REV. 1, 33 (2008) (stating that the Supreme Court "treat[ed] the character factor and the substantially advances test as kindred spirits"); Dreher, *supra* note 49, at 392 ("[T]he *first* prong of *Agins* elevated the means-end inquiry into the validity of governmental action under the police power that the Court had employed in reviewing land-use regulations under the Due Process Clause into an explicit, and apparently self-sufficient, test for a taking of property without just compensation . . . ." (emphasis in original)).

[111] Pennsylvania Coal. Co. v. Mahon, 260 U.S. 393, 413 (1922).

[112] 483 U.S. 825 (1987).

[113] 512 U.S. 374 (1994).

[114] *Mahon*, 260 U.S. at 413 ("One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.").

[115] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022 (1992).

interest be dedicated for a public purpose as a condition for receiving a land-use permit.[116] In both cases, the property required to be dedicated was a small portion of the property for which the permit was sought.[117] As such, there was no possibility that it would meet the takings criterion established by substantially reducing the value of the property as a whole.[118] The only question in both cases was whether the dedication of land as a condition for a land-use permit came within the government's police powers.[119] Thus, in declaring in *Nollan* and *Dolan* that the requirement of a dedication of property interest to be a taking, the Supreme Court created a new takings test that was in addition to the previous one. This new takings test is explored in more depth in a description of the two cases below.

The *Nollan* case arose as a result of the Nollans' permit application in early 1982 to the California Coastal Commission ("Commission") to demolish a small bungalow on a beachfront lot in Ventura County, California and replace it with a modern three-bedroom house.[120] The Commission agreed to grant the permit, but only on the condition that the Nollans allow the public an easement across the beachfront portion of their property.[121] The Commission considered the easement to be mitigation for the proposed larger house's impact of limiting the public's view of the beach from the street, thereby creating a "psychological barrier" to the public's use of the beach.[122] The Commission believed that building the house closer to the beach contributed to this barrier as well.[123] There was no contention that the permit condition diminished the value of the property as a whole enough to be a taking or that it violated the classic due process criterion of failing to serve a public purpose. The Court invalidated the land-use regulation nonetheless as a taking by employing the due process criteria in a new fashion and calling it a taking.[124] Instead of the land-use regulation being required to serve a public purpose and do so by non-arbitrary means, the Court created the new takings criterion that the permit condition must be reasonably related to the specific burden imposed by the

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[116] *Nollan*, 483 U.S. at 853-54; *Dolan*, 512 U.S. at 374.

[117] *Nollan*, 483 U.S. at 853-54; *Dolan*, 512 U.S. at 379-80.

[118] *Penn Central* made the denominator in determining the percentage reduction in value the value of the property as a whole. *Penn Central*, 438 U.S. at 130-31.

[119] *Nollan*, 483 U.S. at 836; *Dolan*, 512 U.S. at 389-90.

[120] *Nollan*, 483 U.S. at 828.

[121] *Id.*

[122] *Id.* at 838.

[123] *Id.* at 835.

[124] *Id.* at 838-39.

permitted activity, which the Court characterized as having an essential nexus.[125]

Justice Scalia, the author of the 5-4 majority opinion in *Nollan*, acknowledged that the Court had never previously called this circumstance a taking, but said this was perhaps because the proposition was so obvious.[126] He noted that some state courts and lower federal courts had determined it to be a taking.[127] It was doctrinally supported, he said, by the "substantially advance[s] legitimate state interests" test of *Agins*.[128] "Whatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, this is not one of them."[129] Further illustrating the new takings test, he stated that while it would have been legal for the Commission to have required the Nollans to cede an easement at the back of their property for the public to view the beach, it was a taking to require forfeiture of this property interest for an unconnected purpose.[130] The existence of the *Agins* "substantially advance legitimate state interest" test was thus the doctrinal link to takings law for the creation of the new takings test in *Nollan*.[131]

In his dissent on behalf of four Justices, Justice Brennan first argued against the new takings test, then argued it was satisfied because there was a sufficient connection between the burden of the Nollans' activity and the permit condition imposed.[132] Certainly, Justice Brennan was right that there was a connection between the burden on public beach access and the

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[125] *Id.* at 837.

[126] *Id.* at 831 ("Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion.").

[127] *Id.* at 832.

[128] *Id.* at 834 (alteration in original).

[129] *Id.* at 837.

[130] *Id.* at 836.

[131] Justice Scalia also supported his ruling by noting that it would clearly be a taking for the government to require an easement across the Nollans' property if no permit were sought. *Id.* at 831. However, this is quite different from the situation where a property interest is required to mitigate the impacts of a project proposal that, even Scalia concedes the government can reject outright if it does not constitute a takings under the *Penn Central* tests and may require mitigation to compensate for the burden the permitted activity imposes. *Id.* at 835-36. Justice Alito also notes in *Koontz* that the government can require permit conditions that mitigate project impacts. Koontz v. St. Johns River Mgmt. Dist., 133 S. Ct. 2586, 2594-95 (2013). Thus, the fact that it would be a taking to require a property interest absent a permit application does not support a ruling of a taking when a property interest is required as a permit condition.

[132] *Nollan*, 483 U.S. at 849 (Brennan, J., dissenting).

condition of a public walkway along the beach.[133] To find otherwise was to require a rather precise connection, which the Court's new taking standard did indeed impose.[134]

The Supreme Court expanded the *Nollan* takings concept in *Dolan*[135] in a 5-4 majority opinion authored by Chief Justice Rehnquist. Mrs. Dolan had applied to the City Planning Commission of the City of Tigard for permission to redevelop a 1.67-acre parcel of land, comprised of a plumbing and electrical supply store and a gravel parking lot.[136] She intended to double the size of her electrical supply store, to pave the existing parking lot, and then to continue development of the lot with an additional structure and additional parking.[137] The Planning Commission granted Mrs. Dolan's permit application subject to a condition that she donate an easement on her property lying within an old floodplain to accommodate periodic flooding and that the easement allow for public recreation as well.[138] The Commission also required that she dedicate an additional fifteen-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.[139]

Mrs. Dolan challenged the condition on the ground that the city's dedication requirements were not related to the impacts of the proposed development and amounted to an uncompensated taking under the Fifth Amendment.[140] The Court ruled in her favor, expanding the "essential nexus" standard from *Nollan* by requiring the city to demonstrate a "rough proportionality" between the permit condition and the impact of the development.[141] So while the bigger store and parking lot would result in more traffic and the pedestrian/bicycle pathway would be an alternative way of handling some of that traffic, the Court found it to be a taking because the Commission had not demonstrated a more precise proportionality.[142] The Court also based its takings decision on the fact

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[133] *Id.* at 849-53. For further discussion of the direct connection between the requirement of a public walkway across the beach side of the property and the burden imposed by the permitted activity, see Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of* Nollan v. California Coastal Comm'n, 12 HARV. ENVTL. L. REV. 231, 243-44 (1988).

[134] *Nollan*, 483 U.S. at 842-43 (Brennan, J., dissenting).

[135] 512 U.S. 374 (1994).

[136] *Id.* at 379.

[137] *Id.*

[138] *Id.* at 380.

[139] *Id.*

[140] *Id.* at 382.

[141] *Id.* at 391.

[142] *Id.* ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

that the city was requiring that a portion of the floodway needed to deal with flooding be made open to the public for recreation.[143] The Commission had argued that this was ancillary to the flood control use.[144] Finally, the Court in *Dolan* expanded the doctrinal basis of its decision from the *Agins* "substantially advance" takings test to also include the unconstitutional condition doctrine.[145]

## V. *LINGLE V. CHEVRON*: ELIMINATING DUE PROCESS AS A TAKINGS FACTOR

The Supreme Court's decision in *Lingle v. Chevron U.S.A., Inc.*[146] in 2006 resolved the tricky relationship between the due process and diminution in value factors of the takings doctrine. The Supreme Court concluded that due process and takings were separate doctrines, and their prior merger had been a mistake.[147] Plaintiff, Chevron U.S.A., Inc., alleged in *Lingle* that a Hawai'i statute controlling rents for gasoline stations was a taking because it would not achieve the state's objective of protecting consumers from high gasoline prices, and thus did not "substantially advance" the state interests.[148] Because Chevron U.S.A., Inc., made no claim that it had suffered significant economic injury, its takings claim relied exclusively on the "substantially advancing legitimate state interest" test.[149] Justice O'Connor, summing up the case at the beginning of her opinion, stated: "This case requires us to decide whether the 'substantially advances' formula announced in Agins*Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not."[150]

According to Justice O'Connor, "There is no question that the 'substantially advances' formula was derived from due process, not takings, precedents."[151] Although Justice O'Connor noted that *Agins'* reliance on due process precedents was "understandable" when viewed in historic context, she called its language "regrettably imprecise."[152] The "substantially advances" formula, she observed, suggests a means-ends test

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[143] *Id.* at 393.
[144] *Id.*
[145] *Id.* at 385.
[146] 544 U.S. 528 (2005).
[147] *Id.* at 547-48.
[148] *Id.* at 533-34.
[149] *Id.* at 543-44.
[150] *Id.* at 532.
[151] *Id.* at 540.
[152] *Id.* at 542.

as to the effectiveness of a regulation.[153] Such an inquiry "has some logic in the context of a due process challenge," because the due process clause is intended, in part, to protect against arbitrary government conduct, but it "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights."[154]

Justice O'Connor named several factors that had mistakenly led to the inclusion of the due process test in *Agins*, first, noting: "*Agins* was the Court's first case involving a challenge to zoning regulations in many decades, so it was natural to turn to these seminal zoning precedents for guidance."[155] Next, she stated: "*Agins*' apparent commingling of due process and takings inquiries had some precedent in the Court's then-recent decision in *Penn Central*."[156] Additionally, she noted that "when *Agins* was decided, there had been some history of referring to deprivations of property without due process of law as 'takings' . . . ."[157]

Justice O'Connor proceeded to explain the differences between the due process and takings doctrines. Failure to serve any legitimate governmental objective, she stated, "may be so arbitrary or irrational that it runs afoul of the Due Process Clause. . . . But such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment."[158] Takings law, she said, "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[159] Hence, it "focuses directly upon the severity of the burden that government imposes upon private property rights."[160] As a consequence, she concluded that the "substantially advances" test "does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property . . . ."[161]

Justice O'Connor's explanation of the "substantially advances" inquiry becoming a takings test as a mistake or inadvertence is only partially true or an over simplification. There was a struggle from the beginning of the regulatory takings law doctrine in *Mahon* with whether such a taking

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153 *Id.*

154 *Id.* (emphasis in original).

155 *Id.* at 541.

156 *Id.* The Court noted in a parenthetical that *Penn Central* stated in dicta that "[i]t is implicit in *Goldberg v. Hempstead* . . . that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . ." *Id.* (alteration in original) (citations omitted).

157 *Id.*

158 *Id.* at 542 (citation omitted).

159 *Id.* at 539.

160 *Id.*

161 *Id.* at 542.

existed when a governmental action exceeded police powers or rather when governmental regulatory action eliminated most value.[162] More specifically, this struggle was between whether there should be a separate takings doctrine regarding elimination of value or whether a taking should simply be a governmental action that took property without due process. In *Mahon*, Justice Holmes took the former view[163] and Justice Brandeis took the latter.[164] Although Justice Holmes's opinion was the majority opinion, that did not settle the matter. *Miller v. Schoene*,[165] decided in 1928, held that the government could destroy timber without paying compensation as long as the public purpose was sufficient.[166] *Goldblatt v. Town of Hempstead*,[167] decided in 1962, also employed the due process approach.[168] *Penn Central* named the "character of the governmental action," a due process criterion, as one factor in the takings determination, but included two other factors that were in the nature of *Mahon's* diminution in value approach and called for a balancing of all these factors in deciding the takings question.[169]

Due process was not even eliminated from the takings determination by the 1992 landmark takings case of *Lucas v. South Carolina Coastal*

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[162] Professor Robert Dreher argues that *Lingle* is far from a correction of the Court's mistaken inclusion of due process cases in takings analysis. Dreher, *supra* note 49, at 371-72. Dreher stated:

> In fact, *Lingle* marks the culmination of one of the more prolonged and difficult debates in the history of the Court's constitutional jurisprudence. For more than a century, the Court has struggled to define the relationship between the Fifth Amendment's protection against deprivation of property without due process and its command that property not be taken for public use without just compensation. By finally separating the long-entangled strands of substantive due process from takings doctrine, *Lingle* brings a remarkable coherence to the Court's confused regulatory takings doctrine.

*Id.* at 372. Similarly, Professor Dreher states: "*Lingle* confronted the Court with the legacy of confusion resulting from the Court's historic intermingling of concepts of substantive due process and takings." *Id.* Justice Stevens also noted the commingling of takings and due process, stating that the Supreme Court in Euclid had "fused" the constitutional protections of property against being taken without due process and against being taken for public purpose without just compensation into a "single standard." Moore v. City of E. Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring).

[163] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[164] *See id.* at 417-18 (Brandeis, J., dissenting).

[165] 276 U.S. 272 (1928).

[166] *Id.* at 280.

[167] 369 U.S. 590 (1962).

[168] *Id.* at 596.

[169] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

*Council*,[170] where the Court ruled that reduction in value alone is sufficient to create a taking if the reduction is total.[171] Due process could still play a role where there was less than a loss of all value because the Court would continue to employ the *Penn Central* factors that incorporate due process. In his dissent in *Lucas*, Justice Blackmun contended that the due process component of the takings test should trump even a total elimination of value.[172]

Thus, this author concludes that while Justice O'Connor's unanimous opinion in *Lingle* has clearly eliminated the "substantially advances" due process test from the takings determination, it was not simply correcting a mistake, but rather resolving a long-standing struggle. Further, the author contends that the resolution of this long-standing struggle should have resulted in an acknowledgment by the Court that the basis of the takings test created in *Nollan* and *Dolan* had been eliminated. Instead, the Court concluded that the *Nollan/Dolan* takings test was still valid based on the alternative doctrine of unconstitutional condition.

## VI. UNCONSTITUTIONAL CONDITION DOCTRINE

While the unconstitutional condition doctrine was not mentioned in *Nollan* as a basis of the new takings test, Chief Justice Rehnquist named it in *Dolan* along with the "substantially advances" test that was named in *Nollan*.[173] "The unconstitutional condition doctrine is the principle that the government cannot condition a benefit on the requirement that a person forgo a constitutional right."[174] "Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference."[175]

The Supreme Court created the unconstitutional condition doctrine in the first few decades of the twentieth century when it ruled in several decisions that "while states could constitutionally exclude foreign corporations from

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[170] 505 U.S. 1003 (1992).

[171] *Id.* at 1029.

[172] *Id.* at 1047 (Blackmun, J., dissenting). In support of this position, Justice Blackmun approvingly quoted the following statement from *Mugler*: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property." *Id.*

[173] Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

[174] CHEMERINSKY, supra note 10, § 11.2.4.4, at 1009.

[175] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421-22 (1989).

local business or private carriers from public highways altogether, they could not condition such corporate privileges on surrender of constitutional rights that corporations were understood to enjoy under then-prevailing notions of substantive due process."[176] The chief proponent of the doctrine at the time was Chief Justice Sutherland,[177] a leading conservative Supreme Court Justice.[178] While substantive due process for economic regulation fell under pressure to uphold President Franklin Roosevelt's Depression-fighting legislation,[179] "the doctrine of unconstitutional conditions reemerged under the Warren Court to protect personal liberties of speech, association, religion, and privacy just as it once had protected the economic liberties of foreign corporations and private truckers."[180] This time, one of the Court's most liberal Justices, Justice Brennan, was its chief proponent.[181]

Legal commentators have noted that in modern times the doctrine only applies to privileged or preferred constitutional rights.[182] Chief Justice Rehnquist refused to apply the doctrine to a tax matter in *Regan v. Taxation with Representation of Washington*,[183] noting that the concept applied to fundamental rights and that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax [matters]."[184] Chief Justice Rehnquist nevertheless employed the unconstitutional condition doctrine in *Nollan* as a basis of support for the new takings test.[185] Justice Stevens objected to its application in his *Dolan* dissent on the basis that the case involved a business regulation as opposed to a fundamental right.[186] Chief Justice Rehnquist responded to this criticism by observing that the Fifth Amendment is as much a part of the Constitution as the First Amendment or any other amendment.[187] Although Professors Donald Guy and James

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[176] *Id.* at 1415 (footnote omitted).

[177] *Id.* at 1416.

[178] Ford G. Lacy, *Mr. Justice Sutherland*, 28 IND. L.J. 118, 120 (1952).

[179] *Cf.* Guy & Holloway, *supra* note 2, at 331-32.

[180] Sullivan, *supra* note 175, at 1416.

[181] *Cf. id.*

[182] *E.g.*, *id.* at 1427 ("[T]he constitutional interest at issue must rise to the level of a recognized right—indeed a *preferred* right normally protected by strict judicial review."). *See also* Guy & Holloway, *supra* note 2, at 332.

[183] 461 U.S. 540, 547 (1983). Chief Justice Rehnquist, writing for the Court's majority, upheld federal income tax laws barring nonprofit organizations from using tax-deductible contributions for lobbying activities noting, "Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race." *Id.*

[184] *Id.*

[185] *Id.* at 545.

[186] Dolan v. City of Tigard, 512 U.S. 374, 407-08 (1994) (Stevens, J., dissenting).

[187] *Id.* at 392 (majority opinion).

Holloway call Rehnquist's observation dicta, they indicate an increased concern by the Court for the protection of private property rights.[188]

Because the unconstitutional condition doctrine, as noted, applies to preferred or fundamental rights such as freedom of speech, it would appear inappropriate for use in connection with property rights. Even if it is considered applicable to property rights, it should apply in a much different way than it does for personal liberties. Denials of personal, noneconomic liberties are subject to heightened scrutiny,[189] whereas economic regulation is subject to just rational basis review with the burden of persuasion placed on the challenger.[190]

Also, even if the unconstitutional condition doctrine can supply a rationale for ruling the proposed conditions in *Nollan* and *Dolan* unconstitutional, it does not provide a basis for ruling them to be takings. The unconstitutional condition doctrine is a quite different doctrine from takings, which, as shown in *Lingle*, has evolved into an emphasis on the severity of the reduction in value of the property at issue as a whole.

## VII. SUBSTANTIVE DUE PROCESS

"'Substantive due process' is the common name for the principle of federal constitutional law by which courts claim the right to examine legislation for its content and to invalidate that legislation if the content is deemed on some basis to be unsatisfactory."[191] The provisions of the Federal Constitution relied upon to authorize substantive due process review are the Fifth and Fourteenth Amendments,[192] which prohibit the government from depriving someone of "life, liberty, or property, without due process of law . . . ."[193] While the phrase itself suggests a process or

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[188] Guy & Holloway, *supra* note 2, at 349.

[189] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 170 (1973) (holding that the right of a woman to choose to terminate her pregnancy was a personal liberty subject to "particularly careful scrutiny"); *see also* CHEMERINSKY, *supra* note 10, § 10.1.1, at 882 ("The Supreme Court has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe upon them unless strict scrutiny is met.").

[190] *See* TCF Nat. Bank v. Bernanke, 643 F.3d 1158, 1163 (8th Cir. 2011) ("Parties making substantive-due-process claims concerning economic regulations generally 'face a highly deferential rational basis test,' whereby 'the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.'" (citation omitted)).

[191] Pearson, *supra* note 110, at 1.

[192] *Id.* at 2-3.

[193] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

procedural right, the Supreme Court has not limited the clause to just procedure.[194]

The doctrine of substantive due process was employed as far back as 1856 in the infamous decision of *Dred Scott v. Sandford.*[195] In 1887, the Supreme Court handed down a substantive due process case in which it considered the question in terms of whether a statute adequately pursued its announced purposes.[196] Seven years later, the Court declared its broad authority to examine state statutes on content grounds.[197] In 1905, in the famous case of *Lochner v. New York*, the Court employed substantive due process to invalidate legislation simply because it deemed the legislation to be unsound.[198] The Court continued to utilize the doctrine into the 1930s and held that early "New Deal" legislation violated substantive due process.[199] The Court rejected the doctrine in 1937 in *West Coast Hotel Co. v. Parrish*, where the Court announced that it would defer to legislative determinations.[200] A year later in *U.S. v. Carolene Products Co.*, the Court resurrected substantive due process to protect fundamental rights such as

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[194] Pearson, *supra* note 110, at 2-3.

[195] 60 U.S. 393 (1856) (declaring the Missouri Compromise to be unconstitutional). The Supreme Court stated:

> Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without *due process* of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of *due process* of law.

*Id.* at 450 (emphasis added).

[196] Mugler v. Kansas, 123 U.S. 623, 661 (1887) (upholding as a valid exercise of the police power legislation that prohibited the sale and manufacture of liquors without a permit: "[Courts] are at liberty, indeed, are under a solemn duty, to look at the substance of things").

[197] Lawton v. Steele, 152 U.S. 137 (1894).

[198] 198 U.S. 45 (1905) (holding that a New York statute limiting the number of hours one could work in a bakery was unconstitutional because it violated substantive due process). *See also* Guy & Holloway, *supra* note 2, at 351 ("To pass constitutional muster under Lochner's economic due process analysis, courts had to find the statute to be within the scope of the police powers and then find that the statute was directly related to the evil it is designed to combat.").

[199] Guy & Holloway, *supra* note 2, at 331-332.

[200] 300 U.S. 379, 398-400 (1937). The Court declared due process was satisfied if legislation under review had "a reasonable relation to a proper legislative purpose, and [was] neither arbitrary nor discriminatory . . . ." *Id.* at 398 (quotations and citation omitted). The Court further noted, "[T]he Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power. *Id.* (quotations and citation omitted).

freedom of speech, freedom of religion, and equal protection for minorities, but not for commercial rights.[201]

Thus, the combined effect of *West Coast Hotel* and *Carolene Products* was to reverse strict substantive due process from applying to economic regulation and not personal rights to just the opposite. The general rule now is that personal liberties are protected by strict scrutiny with the burden of persuasion being on the government to support the law[202]—and economic legislation is subject to just a rational basis review standard with the burden of persuasion being on the entity challenging the legislation.[203] The "rational basis" standard is considered violated if the government action is deemed arbitrary and capricious.[204] The "rational basis" standard thus provides enormous deference to the government[205] and is rarely determined to be violated.

While the application of substantive due process to economic regulation has generally remained a discredited theory,[206] some commentators began criticizing the distinction between economic and individual rights,

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[201] 304 U.S. 144, 152-53 (1938). In his famous footnote four in *Carolene Products*, Justice Stone described the rights for which a higher level of scrutiny might apply as those for which there is a specific prohibition in the Constitution, which would include takings. *Id.* at 152 n.4. However, he went on in the footnote to describe the rights warranting a higher level of scrutiny as those affecting the political processes, such as voting and peaceable assembly, religious rights, and minority rights, noting 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 . . . ." *Id. See also* JUERGENSMEYER & ROBERTS, *supra* note 49, § 10:12(A), at 429 (substantive due process said to apply to land-use "only when a fundamental right or suspect class is affected . . . .").

[202] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 170 (1973) (holding that the right of a woman to choose to terminate her pregnancy was a personal liberty subject to "particularly careful scrutiny"); *see also* CHEMERINSKY, *supra* note 10, § 10.1.1, at 812 ("The Supreme Court has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe upon them unless strict scrutiny is met.").

[203] *See* TCF Nat. Bank v. Bernanke, 643 F.3d 1158, 1163 (8th Cir. 2011) ("Parties making substantive-due-process claims concerning economic regulations generally 'face a highly deferential rational basis test,' whereby 'the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.'" (citation omitted)).

[204] JUERGENSMEYER & ROBERTS, *supra* note 49, § 10:12(D), at 432-33.

[205] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 212 (Harvard Univ. Press 1985) (noting that "broadly speaking, a suspect classification such as race or national origin is subject to a high degree of means-ends scrutiny, while classifications which involve mere economic relationships are subject to a very deferential standard of review . . . ."). *See also* CHEMERINSKY, *supra* note 10, § 6.5, at 553 ("The rational basis test is enormously deferential to the government . . . .").

[206] *See supra* note 3.

particularly beginning in the 1980s.[207] Judge Richard Posner of the Seventh Circuit noted in a 1985 publication, "[T]here is a movement afoot (among scholars, not as yet among judges) to make the majority opinion in *Lochner* the centerpiece of a new activist jurisprudence."[208]

## VIII. THE *KOONTZ* DECISION IS A BIG STEP IN RESURRECTING ECONOMIC SUBSTANTIVE DUE PROCESS

The *Koontz* decision is a big step in resurrecting substantive due process for economic regulation because it expands the steps previously taken by *Nollan* and *Dolan* to apply to situations where no property interests are involved. Prior to *Nollan* and *Dolan*, Supreme Court precedent held that property rights, like other economic rights, were to be examined by courts under the rational basis standard.[209] *Nollan* and *Dolan* created a heightened scrutiny for the situation where the government required, as a condition for a land-use permit, the dedication of a property interest for public purposes.[210] Justice Stevens, in his *Dolan* dissent, contended that this raised the specter of Lochnerism, stating,

> The so-called "regulatory takings" doctrine . . . has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of

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[207] Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 265 (1987) ("The doctrine of economic substantive due process has recently enjoyed an increased popularity among certain commentators. These advocates propose that the doctrine be revitalized as the centerpiece of a new economics-focused activist jurisprudence.").

[208] RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 209 n.25 (1985).

[209] *See* David Schultz, *Scalia, Property, and* Dolan v. Tigard: *The Emergence of a Post-*Carolene Products *Jurisprudence*, 29 AKRON L. REV. 1, 29-30 (1995) ("Rehnquist's call in *Dolan* for an intermediate level of scrutiny to ascertain the nexus between regulation and state interests, as well as Scalia's use of some type of heightened scrutiny in *Nollan* and *Lucas*, similarly seem to break with the use of rational basis tests to review economic and land-use regulation in the *Carolene Products* Era.").

[210] Lawrence, *supra* note 133, at 242 ("[T]he majority opinion was fraught with indications that heightened scrutiny is appropriate for some class of takings claims . . . ."); David L. Callies & Christopher T. Goodin, *The Status of* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard *after* Lingle v. Chevron U.S.A., Inc., 40 J. MARSHALL L. REV. 539, 559-62 (2007) (discussing why "[b]ecause the *Nollan* and *Dolan* [t]est is [n]ot a [d]ue [p]rocess [t]est, [b]ecause it is a [s]pecial [a]pplication of the [u]nconstitutional [c]onditions [d]octrine, [h]eightened [s]crutiny is [a]ppropriate"). Professors Donald Guy and James Holloway take the position that the Supreme Court in *Nollan* and *Dolan* "did not resurrect the substantive due process analysis of Lochner v. New York. However, it slightly eroded the distinction between fundamental rights and property rights . . . ." Guy & Holloway, *supra* note 2, at 351.

> judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.[211]

Professor Edward Sullivan agrees with Justice Stevens, stating that *Nollan* and *Dolan* "resurrect a form of substantive due process that most thought had been consigned to the dustbin of history . . . ."[212]

## IX. THE SUPREME COURT SHOULD RECOGNIZE *NOLLAN*, *DOLAN* AND *KOONTZ* AS PROPERLY SUBJECT TO DUE PROCESS, RATHER THAN TAKINGS, ANALYSIS

*Lingle*'s clarification of the distinction between due process and takings analysis should have logically led to revisiting the takings test established in *Nollan* and *Dolan*. Those two cases were based on the concept that a taking occurs when a government action does not substantially advance a legitimate state interest.[213] Because due process is no longer a takings criterion and its previous inclusion as such was determined by *Lingle* to be error, the *Nollan/Dolan* takings test should be eliminated and its analysis correctly converted to a due process analysis. The Court recognized the problem *Lingle* created for the *Nollan/Dolan* takings test and addressed it by stating that the test remained valid because it was based on the unconstitutional condition doctrine.[214] That doctrine was not mentioned in *Nollan*. While it was mentioned in *Dolan*,[215] it does not support the takings test created by *Nollan* and *Dolan*. The unconstitutional condition doctrine is not a takings concept. It has never been analyzed in terms of diminution in value or investment-backed expectations and it has never been subject to a compensation remedy. Therefore, while the unconstitutional condition doctrine could be employed as a doctrine to analyze a permit condition, it does not invoke a takings analysis. Rather the question under the unconstitutional condition doctrine is whether a constitutional provision is

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[211] Dolan v. City of Tigard, 512 U.S. 374, 406-07 (1994) (Stevens, J., dissenting). Similarly, Justice Stevens stated, "One can only hope that the Court's reliance today on First Amendment cases . . . and its candid disavowal of the term 'rational basis' to describe its new standard of review . . . do not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era." *Id.* at 409 (Stevens, J., dissenting).

[212] Edward J. Sullivan, *Return of the Platonic Guardians:* Nollan *and* Dolan *and the First Prong of* Agins, 34 URB. LAW 39, 41 (2002).

[213] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834; Dolan v. City of Tigard, 512 U.S. 374,395 (1994).

[214] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005). *See also* Koontz v. St. Johns River Mgmt. Dist., 133 S. Ct. 2586, 2594-95 (2013).

[215] *Dolan*, 512 U.S. at 385.

violated, and for economic regulation, the standard of review is rational basis.

## X. ALTERNATIVES TO SUBSTANTIVE DUE PROCESS FOR JUDICIAL REVIEW OF LAND-USE AND OTHER GOVERNMENTAL PERMIT DECISIONS

The author is not unsympathetic to the view of a number of commentators that property rights warrant more than rational basis review given how much more extensive and stringent land-use regulation has become since substantive due process for economic regulation was abandoned in 1937. These commentators stress the importance of property rights and their fundamental nature to our system of government. Professor David Callies, for example, states, "Property rights, and in particular rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States."[216] Professor Richard Epstein insists that "property is the guardian of every other right."[217] He further argues:

> [T]he current constitutional doctrines, by yielding too much power to state regulation, will decrease social wealth and social welfare by increasing the scope for factional politics that produce short-term advantages for some at the cost of long-term dislocations for society as a whole.[218]

Professor Alfred P. Levitt ascribes as one of the functions of property rights to be protection of individual free will within a society dominated by centralized governmental power.[219]

The significant functions of property rights, combined with their more stringent regulation in general, and of land-use in particular, warrant more than rubber-stamp judicial review. They do not, however, warrant a resurrection of substantive due process, which has been the direction of the Supreme Court with *Nollan*, *Dolan*, and *Koontz*. The same arguments

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[216] David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 STETSON L. REV. 523, 526 (1999).

[217] RICHARD A. EPSTEIN, SUPREME NEGLECT 1 (2008).

[218] *Id.* at xvii. Similarly, Professor Charles Siemon notes the Supreme Court's limited review of economic regulations and states that the impotency of judicial review of exactions exaggerates the potential for the government's abuse of them. Charles Siemon, *Who Bears the Cost?*, 50 LAW & CONTEMP. PROBS. 115, 125-26 (1987).

[219] Levitt, *supra* note 83, at 199. The other two functions he ascribes to property rights are maintaining property's marketplace value and helping government maintain efficient legislative practices. *Id.* at 199-200.

against such review that existed in the past are still valid today.[220] While legislatures and regulatory agencies may err in their economic decision-making, they are the preferred institutions for such policy determinations. Judge Posner notes: "The concept [of substantive due process] invests judges with an uncanalized discretion to invalidate federal and state legislation. . . . It also . . . invites the federal courts to sit in judgment on almost all state action[—]including . . . all zoning decisions."[221]

In contrast with economic rights, substantive due process is warranted to protect rights fundamental to the operation of the democratic system and to protect minorities whose rights can be threatened by majorities. Professor Eric Pearson, arguing against a return of substantive due process, states:

> First is the problem of complexity. Simply put, the addition of substantive due process theory in these constitutional arenas complicates the judicial task by obliging judges to evaluate the worthiness of legislation—an onerous task in and of itself—and additionally to balance that worthiness with and against the other ambiguous criteria. The result is a jurisprudence of both uncertain content and unpredictable future effect.[222]

Without a return to substantive due process for economic regulation, how can courts provide some meaningful protection for property rights, particularly the situation in *Nollan*, *Dolan*, and *Koontz*, where agencies attach conditions to permit approval? The most obvious method is through review of agency action under the federal or state administrative procedures acts. Most state administrative procedure acts are modeled on the federal one,[223] which is discussed here. Agency actions, including those related to permit conditions, are generally accomplished through informal rulemaking[224] for which the federal Administrative Procedures Act ("APA")[225] provides for an "arbitrary and capricious" standard of review.[226] One of the hallmarks of modern administrative law is how searching and

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[220] As the unanimous Supreme Court stated in *Lingle*, "The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 545 (2005).

[221] Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 465 (7th Cir. 1988) (citations omitted).

[222] Pearson, *supra* note 110, at 24-25.

[223] *Cf.* Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 297 (1986) (stating that similarities between the federal APA and state APAs arose because both systems relied upon the Model State Administrative Procedure Act).

[224] *See* Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 256-259 (1986); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 114 (11th ed. 2011).

[225] 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (2012).

[226] 5 U.S.C. § 706(2)(A) (2012).

detailed review has become under this standard.[227] Some courts and commentators call it the equivalent of the substantial evidence standard employed by the APA for formal rulemaking.[228] The Supreme Court has specifically noted that the "arbitrary and capricious" standard does not contemplate rubber-stamp review of agency action by the courts.[229]

Another method for obtaining more substantial review for agency action affecting property rights is through state legislation. A key reason more substantial review has been sought, and an impetus for the property rights movement,[230] has been the increasing use by city and counties of impact fees to pay the costs of development. While development once paid for itself through increased tax revenues, for a variety of reasons including the suburbanization form of development,[231] development costs outstripped the revenues they provided with the result that increased taxes were necessary.[232] To offset development costs and the need for new taxes, communities increasingly shifted the burdens to real estate developers through the use of exactions in the form of land dedication requirements or impact fees.[233]

Development exactions have been defined as "a form of land-use regulation in which a municipality requires a developer to give something to the community as a condition to receiving permission to develop."[234]

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[227] STRAUSS, *supra* note 224, at 1003 (noting that the "hard look" required under 5 U.S.C. § 706(2)(A) has "evolved to connote the rigorous standard of judicial review applied to increasingly utilized informal rulemaking"); Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 15 (2009) (stating that the hard look review "is now commonly understood to require courts to take a hard look at agency rationality"); Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 NEV. L.J. 151, 156 (stating that the hard look standard requires "that the agency's ultimate policy choice be reasonable, not just minimally rational").

[228] *E.g.*, Ass'n of Data Processing Serv. Org. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 683-84 (D.C. Cir. 1984); Pac. Legal Found. v. Dep't of Transp., 593 F.2d 1338, 1343 n.35 (D.C. Cir. 1979); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 533-34 (1985); Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 935 n.138 (1973).

[229] Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 746 (1973).

[230] Guy & Holloway, *supra* note 2, at 329.

[231] Jeremy R. Meredith, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV 447, 453-55 (2003).

[232] *See id.* at 455-57.

[233] Guy & Holloway, *supra* note 2, at 329.

[234] Nicholas V. Morosoff, *"Take My Beach, Please!":* Nollan v. California Coastal Commission *and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV 823, 823 (1989).

The *Nollan*, *Dolan*, and *Koontz* decisions all involved development exactions.[235] In addition to review of these decisions being available through administrative procedures acts, state legislatures have imposed requirements, often similar to that of a rather precise equivalency between the impacts of the permitted activity and the condition required of *Nollan* and *Dolan*. For instance, the South Carolina Development Impact Fee Act requires that developments not be charged more than the costs necessitated by the development with the Act setting forth detailed requirements to assure this.[236]

The Supreme Court decision in *Koontz* is a substantial, unwarranted step towards the resurrection of substantive due process for economic regulation. The *Nollan* and *Dolan* decisions at least were cases involving a requirement that property interests be dedicated for permit approval.[237] In *Koontz*, however, the requirement was for the expenditure of money, an interest that, as Justice Kagan discussed in her dissent, is not a proper subject of takings analysis.[238] By holding to the contrary in *Koontz*, the Supreme Court has extended a takings test discredited in *Lingle* and in so doing mandated a heightened level of judicial scrutiny to a much broader range of governmental actions. The Due Process Clause of the Constitution is typically included as a count in challenges to land-use decisions of the innumerable municipalities and counties throughout the country.[239] Courts have pointed out the danger that substantive due process poses in making these challenges constitutional cases for the federal courts.[240] Courts are not the right institutions for making these policy determinations under the broad standard of constitutional due process, and alternatives are available to make court review more than a rubber-stamp exercise under the rational basis standard. Perhaps the Supreme Court will correct its error in takings law interpretation as it did in *Lingle* in a later decision overturning the 5-4 decision in *Koontz*. At a minimum, hopefully the problems with the case and with substantive due process for economic regulation will stop the

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[235] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987); Dolan v. City of Tigard, 512 U.S. 374, 379 (1994); Koontz v. St. Johns River Mgmt. Dist., 133 S. Ct. 2586, 2592-93 (2013).

[236] S.C. CODE ANN. §§ 6-1-910 to 6-1-2010 (2013).

[237] *See Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379.

[238] *See Koontz*, 133 S. Ct. at 2605 (Kagan, J., dissenting).

[239] *See* BRIAN W. BLAESSER, DISCRETIONARY LAND-USE CONTROLS: AVOIDING INVITATIONS TO ABUSE DISCRETION, § 1:45 (14th ed. 2007); JUERGENSMEYER & ROBERTS, *supra* note 49, § 10:12, at 428 ("Usually unsuccessful and still controversial, substantive due process continues to be a basis of complaint in many land use cases . . . .").

[240] *See supra* notes 161-62 and accompanying text.

Court from taking another step in using takings law to resurrect substantive due process beyond *Koontz*.

# Translation v. Tradition: Fighting for Equal Standardized Testing ma ka ʻŌlelo Hawaiʻi

L. Kaipoleimanu Kaʻawaloa*

## I. INTRODUCTION

ʻŌlelo ʻia, "[i] ka ʻōlelo nō ke ola, i ka ʻōlelo nō ka make."[1] He mea koʻikoʻi loa ka ʻōlelo Hawaiʻi i ka poʻe Hawaiʻi, no ka mea ma ka ʻōlelo nō ka mana a me ka mauli. No laila, pono nō kākou e ʻākoakoa no ka mālama ʻana i kā mākou ʻōlelo makuahine. Inā ʻae kākou i ka Moku ʻĀina ʻo Hawaiʻi i ka hoʻopaʻa i nā leo o kā kākou poʻe keiki ma ke kākoʻo ʻole ʻana i ka ʻōlelo Hawaiʻi ma nā kula, e lilo loa ana ka ʻōlelo Hawaiʻi a me ka moʻomeheu Hawaiʻi i ka nalo loa. E ala mai! E ʻōnipaʻa pū kākou no ka hoʻomau ʻana i ka ʻōlelo makuahine no nā kau a kau.[2]

*It is said, "[t]hrough language there is life, through language there is death."*[3] *The Hawaiian language is very important to the Native Hawaiian*[4] *people because the life forces that carry significant physical and spiritual powers exist in the language.*[5] *As such, we must gather together to*

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My sincerest thanks and mahalo to my ʻohana (family) for everything. Mahalo nui to Ryan Kanakaʻole for his patience, understanding, and support. Mahalo to my professors and sources for sharing their knowledge. Mahalo to Sterling Wong for guiding me to this important issue. Finally, mahalo to Pūnana Leo ʻo Honolulu, Ke Kula Kaiapuni ʻo Ānuenue, and the Kamehameha Schools for both providing me with the tools to succeed and instilling in me my cultural identity as a Native Hawaiian.

[1] MARY KAWENA PUKUI, ʻŌLELO NOʻEAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 129 (2004).

[2] For the purposes of this paper, ʻōlelo Hawaiʻi will not be italicized because it is not a foreign language in Hawaiʻi, unless italicization is required to preserve the integrity of cited material. HAW. REV. STAT. § 1-13 (West 2013) ("English and Hawaiian are the official languages of Hawai[ʻ]i."). *See also* Breann Nu'uhiwa, *Government of the People, By the People, for the People: Cultural Sovereignty, Civil Rights, and Good Native Hawaiian Governance*, 14 ASIAN-PAC. L. & POL'Y J. 57, 66 n.38 (2013).

[3] PUKUI, *supra* note 1.

[4] The term "Native Hawaiian" will be used to describe people of Hawaiian ancestry, and will not be defined as stated in the Hawaiian Homes Commission Act. The Hawaiian Homes Commission Act defines "Native Hawaiian" as a person with fifty percent or more blood Hawaiian blood, but all federal statutes enacted since 1970 define "Native Hawaiian" as a person with any Hawaiian ancestry. JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAIʻI? 1 n.1 (2008).

[5] Paul F. Nahoa Lucas, *E Ola Mau Kākou I Ka ʻŌlelo Makuahine: Hawaiian Language Policy and the Courts*, 34 HAW. J. HIST. 1, 2 (2000), *available at* http://evols.

*preserve our mother tongue. If we allow the State of Hawai'i to silence the voices of our children by not supporting the Hawaiian language in schools, then the Hawaiian language and, ultimately, its culture will be lost forever. So, awaken! Let us move together steadfast to ensure the preservation of the mother tongue forever.*[6]

If we teach keiki (children)[7] their Hawaiian language and culture, but only assess their knowledge of a foreign language, the keiki have no choice but to fail. Out of necessity grew the revitalization of the Hawaiian language through the birth of Papahana Kula Kaiapuni (public Hawaiian language immersion schools, also known as the Hawaiian Language Immersion Program ("HLIP")). Due to nearly 100 years of suppressing the Hawaiian language[8] and the resilience of Native Hawaiians as a people, a revolution of language emerged. Ka Papahana Kula Kaiapuni ("Kaiapuni"), established in the late 1980s,[9] attempts to revive ka 'ōlelo Hawai'i (the Native Hawaiian language).[10] Hawaiian immersion schools are also part of the public school system. Although Hawaiian immersion haumāna (students)[11] learn all subjects ma ka 'ōlelo Hawai'i, they must take the same standardized assessments under the No Child Left Behind Act ("NCLB") as their non-Hawaiian speaking counterparts.[12] These assessments fail to consider the manner in which Hawaiian keiki learn and creates a system designed for failure.

This article explores NCLB's requirements forced upon Kaiapuni haumāna and how such requirements fail these haumāna. In the past, Kaiapuni haumāna took variations of assessments from 2003 to the present day, including exams translated and created ma ka 'ōlelo Hawai'i.[13] The proposal to continue translating the English version of the Hawai'i Standardized Assessments into Hawaiian by ill-equipped Hawaiian

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library.manoa.hawaii.edu/bitstream/handle/10524/431/?sequence=2.

[6] Translation of above paragraph by author.

[7] MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 142 (1986 ed. 1986).

[8] *See* Lucas, *supra* note 5, at 7.

[9] *Id.* at 10.

[10] PUKUI & ELBERT, *supra* note 7, at 284. The term "ka 'ōlelo Hawai'i" will be used interchangeably with the term "the Hawaiian language" to reference the native language of the Hawaiian people. Variations also include "ma ka 'ōlelo Hawai'i" which means "in the Hawaiian language."

[11] PUKUI & ELBERT, *supra* note 7, at 61. The term "haumāna" will be used interchangeably with the word "student" to describe students attending Kaiapuni schools.

[12] 20 U.S.C. § 6311(b)(3)(C)(vii) (2006).

[13] *Student Assessments Sections (SAS), History of the Hawaiian Aligned Portfolio Assessment (HAPA)*, HAW. STATE DEP'T OF EDUC., http://sao.k12.hi.us/assessment/hapa/about.htm (last visited Apr. 10, 2014) [hereinafter *History of HAPA*].

language translators only serves to cripple the possible success of Kaiapuni haumāna on these assessments. This form of testing cannot continue. A change must be made. House Bill 2875 ("H.B. 2875"), a bill that would require the State of Hawaii's Department of Education ("DOE") to develop a separate test in the Hawaiian language for Papahana Kula Kaiapuni haumāna in grades three through six,[14] seeks to correct the failed attempts by the DOE with the goal of ensuring equality for keiki in the Hawaiian language immersion program.[15]

In order to understand the importance of Papahana Kula Kaiapuni and the perpetuation of ka ʻōlelo Hawaiʻi, Part II will introduce the history of ka ʻōlelo Hawaiʻi, the suppression of the language, and the revitalization of the language. Next, Part III will discuss NCLB in terms of the Act's purpose and imposition on native languages. Part IV will discuss the effects of NCLB on Hawaiian immersion schools and students as well as a history of standardized assessments administered to Hawaiian immersion students to date. Then, Part V will discuss H.B. 2875 and how this legislation hopes to amend the disparity between Hawaiian medium schools and English medium schools. Part VI will provide additional solutions to enable Kaiapuni schools and haumāna to reach equality in the realm of education and NCLB testing. Finally, Part VII will conclude with lessons and solutions that can be drawn from this paper.

## II. THE REVITALIZATION ʻO KA ʻŌLELO HAWAIʻI

### *A. A Brief History of the Hawaiian Language*

ʻŌlelo Hawaiʻi is the native language of Hawaiʻi.[16] Long before Captain James Cook "discovered" Hawaiʻi in 1778, ʻōlelo (or spoken Hawaiian) was the prime medium of communication.[17] In 1820, missionaries arrived in Hawaiʻi and sought to educate Hawaiians about Christianity through ka

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[14] H.B. 2875, 26th Leg., Reg. Sess. (Haw. 2012). Since this comment was written, H.B. 2875 died in the legislature without being passed. However, a new bill, H.B. 224 was introduced in the legislature in 2013 and carried over to the 2014 session. HB224 HD3 SD2, HAWAIʻI STATE LEGISLATURE, http://www.capitol.hawaii.gov/measureindiv.aspx?billtype=HB&billnumber=224&year=2014 (last visited Apr. 3, 2014). In its current version after House and Senate amendments, H.B. 224 is virtually identical to H.B. 2875, with only non-substantive changes. The arguments made in this comment in favor of passing of H.B. 2875, and its criticisms, therefore apply equally to H.B. 224. *See* H.B. 224 SD2, 27th Leg., Reg. Sess. (Haw. 2014).

[15] *See* H. Stand. Comm. Rep. No. 250-12, 26th Leg., Reg. Sess. (Haw. 2012).

[16] Lucas, *supra* note 5, at 1.

[17] *Id.*

'ōlelo Hawai'i.[18] At the time, 'ōlelo Hawai'i was primarily an oral language.[19] In order to teach Christianity to as many Native Hawaiians as possible, the missionaries reduced the oral Hawaiian language into writing, ultimately leading to the creation of the Hawaiian Pī'āpā (alphabet).[20] Native Hawaiians quickly embraced the written medium, and by 1853, nearly three-fourths of the Native Hawaiian population over the age of sixteen years was literate in the Hawaiian language.[21]

Although 'ōlelo Hawai'i evolved into a thriving written language, the growth of business prompted the government to "promote English while publicly scorning the Hawaiian language."[22] After the 1893 overthrow of the Hawaiian monarchy, English-only advocates accelerated their efforts to exterminate the Hawaiian language, specifically targeting education.[23] In 1896, the newly created Republic of Hawai'i enacted a law requiring English to be the sole medium of instruction in all public and private schools.[24] The law provided:

> The English language shall be the medium and basis of instruction in all public and private schools, provided that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the Department, either by its rules, the curriculum of the schools, or by direct order in any particular instance. Any schools that shall not conform to the provisions of this section shall not be recognized by the Department.[25]

Due to the 1896 law, the number of Hawaiian medium schools dropped drastically from 150 in 1880 to zero in 1902.[26] The 1896 law discouraged speaking and teaching the Hawaiian language to the extent that, by 1917, "no child under 15 years of age . . . [could] converse correctly in the mother tongue of this land."[27] The increase in the number of laws and regulations oppressing the use of the Hawaiian language caused the language to go "underground."[28]

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[18] *Id.* at 2.
[19] *Id.* at 1.
[20] *Id.* at 2.
[21] *Id.*
[22] *Id.* at 7.
[23] *Id.*
[24] *Id.*
[25] Act of June 8, 1896, ch. 57, § 30, 1897 Haw. Comp. Laws § 123.
[26] ALBERT J. SCHUTZ, THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES 352 (1994).
[27] *Id.* at 356.
[28] Lucas, *supra* note 5, at 9.

### *B. Revitalization of ka 'Ōlelo Hawai'i*

After the passage of the 1896 law, 'ōlelo Hawai'i teetered on the brink of becoming a dead language—until efforts for a rebirth sprung forth in the 1970s and 1980s.[29] The push to create Hawaiian language schools gained momentum with the 1978 amendment to the Hawai'i Constitution in Article XV, section 4, which provides that "English and Hawaiian shall be the official languages of Hawai'i."[30] In addition, the second amendment to Article X, section 4 of Hawaii's Constitution mandates that "[t]he State shall promote the study of Hawaiian culture, history and language."[31] Initiatives to establish Hawaiian language schools began in the early 1980s with the creation of the Pūnana Leo preschools, administered by 'Aha Pūnana Leo, a private non-profit organization.[32] The passage of various pro-Hawaiian language laws by the state assured 'ōlelo Hawai'i advocates that the time to revitalize the Hawaiian language was at hand.

In 1987, after repeated requests by parents and Hawaiian language advocates, the State of Hawaii's Board of Education ("BOE") approved the Hawaiian Language Immersion Program,[33] long informally known as Ka Papahana Kula Kaiapuni, a name taken from a boycott kindergarten of the 'Aha Pūnana Leo.[34] Kaiapuni began as a pilot program at two schools in the DOE in 1987.[35] Kaiapuni provides a complete educational program to students in the medium of the Hawaiian language with curriculum based on native cultural perspectives and the "Hawaii Content and Performance Standards."[36] In 1992, the BOE approved extending Ka Papahana Kula Kaiapuni to grade twelve.[37] Today Papahana Kaiapuni has grown to

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[29] *Id.* at 10.

[30] HAW. CONST. art. XV, § 4.

[31] HAW. CONST. art. X, § 4.

[32] Lucas, *supra* note 5, at 10.

[33] Minutes of Hawai'i Board of Educ. Meeting 9-10 (July 23, 1987), *available at* https://lilinote.k12.hi.us/STATE/BOE/Minutes.nsf/a15fa9df11029fd70a2565cb0065b6b7/d3cc992bfae3eb0a0a2573a000077b2d/$FILE/7-23-87.pdf.

[34] *See* William H. Wilson & Kauanoe Kamanā, *'Mai Loko Mai O Ka 'I'ini: Proceeding from a Dream' The 'Aha Pūnana Leo Connection in Hawaiian Language Revitalization*, *in* THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE 147, 150 (Leanne Hinton & Ken Hale, eds., 2001).

[35] OFFICE OF CURRICULUM, INSTRUCTION AND STUDENT SUPPORT/INSTRUCTIONAL SERV. BRANCH, HAW. DEP'T OF EDUC., PROGRAM GUIDE FOR THE PAPAHANA KAIAPUNI HAWAI'I HAWAIIAN LANGUAGE IMMERSION PROGRAM 1 (2004), *available at* http://www.k12.hi.us/~kaiapuni/HLIP/HLIPGuide.pdf [hereinafter KAIAPUNI PROGRAM GUIDE].

[36] *Id.*

[37] Minutes of Hawai'i Board of Education Meeting 3-4 (Feb. 6, 1992), *available at* https://lilinote.k12.hi.us/STATE/BOE/Minutes.nsf/a15fa9df11029fd70a2565cb0065b6b7/f28d9bea194c78e70a25738d008065fa/$FILE/2-6-92.pdf.

include twenty-one immersion schools, with approximately 2,000 students enrolled from kindergarten through the twelfth grade.[38]

Although Kaiapuni teaches students through the medium of the Hawaiian language with an emphasis on Hawaiian culture, it also incorporates the English language. Because one of the main goals of Kaiapuni includes providing students opportunities to achieve a high level of proficiency in the Hawaiian language, Hawaiian immersion schools do not introduce English into the curriculum until the fifth grade.[39] Many Kaiapuni elementary schools are self-contained immersion programs where Kaiapuni students do not take classes with English medium students.[40] All areas of instruction in Kaiapuni, including mathematics, social studies, and science, are taught in the Hawaiian language with an emphasis on Native Hawaiian cultural perspectives.[41] To promote the Hawaiian language and culture, Kaiapuni stresses the importance of the Hawaiian language and culture while also providing English language classes in the fifth grade; however, the English language is not used as the medium of education.

## III. THE NO CHILD LEFT BEHIND ACT OF 2001

In January 2002, President George W. Bush signed NCLB into law.[42] Title I of NCLB is now the main source of federal legislation funding for public schools.[43] Title I amends federal educational programs under the Elementary and Secondary Education Act of 1965 ("ESEA") by shifting the purpose of the ESEA from improving the educational needs of disadvantaged children[44] to ensuring that all children have a fair and equal opportunity to achieve a high-quality education.[45] NCLB also brings accountability measures and increased budgets to states and local

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[38] Katherine Poythress, *Hawaiian Language Students Getting Lost in Translation, Advocates Say*, HONOLULU CIVIL BEAT (Feb. 10, 2012), http://www.civilbeat.com/articles/2012/02/10/14837-hawaiian-language-students-getting-lost-in-translation-advocates-say/. Although this article focuses on H.B. 2875, it will be used to reference the same struggles and criticisms of H.B. 1986 because both H.B. 1986 and H.B. 2875 aimed to create NCLB assessments in the Hawaiian language.

[39] KAIAPUNI PROGRAM GUIDE, *supra* note 35, at 11.

[40] *Id.* at 10.

[41] *Id.* at 15.

[42] No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1439 (2002) (codified at 20 U.S.C. § 6301 et seq. (2006)).

[43] *Federal Education Budget Project*, NEW AMERICA FOUNDATION, http://febp.newamerica.net/background-analysis/no-child-left-behind-overview (last visited Sept. 15, 2013).

[44] Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C. § 6301 (2006)).

[45] *Id.*

educational agencies ("LEAs"), creating an expansion of federal influence over educational policy.[46]

NCLB strives to increase the academic achievement of students across the United States and to ensure that all students have the opportunity to receive a high quality of education.[47] In order to reach these goals, NCLB requires states to develop both "academic standards for all public elementary school and secondary school children"[48] and yearly student academic assessments.[49] While the positive underlying basis of NCLB is to ensure that all students have an equal opportunity to obtain a high quality of education,[50] NCLB fails to consider the effects of its annual assessments on students educated in the Hawaiian Language Immersion Program.

### *A. NCLB and Accountability*

Fueled by federal funding, the creation of the No Child Left Behind Act of 2001 ushered in a new era of accountability. Under NCLB, Title I funding is contingent on annual state math, reading, and science testing of students.[51] States, however, can opt-out of the rigorous requirements of NCLB by declining the federal funds, but no states have done so.[52]

#### *1. Standards and assessments*

A state seeking to receive federal funds under NCLB must submit a plan to the Secretary of the United States Department of Education ("USDE") demonstrating the state's adoption of challenging academic content and achievement standards.[53] Such standards must include academic content standards in subjects that: "specify what children are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills."[54] The academic standards established by a state need to be the "same academic standards that the State applies to all

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[46] Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 780 (2006).

[47] 20 U.S.C. § 6301.

[48] *Id.* § 6311(b)(1)(C).

[49] *Id.* § 6311(b)(3)(A).

[50] *Id.* § 6301.

[51] *Id.* § 6311(b)(3)(C)(vii).

[52] Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, *in* NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 23, 23 (Paul E. Peterson & Martin R. West eds., 2003).

[53] 20 U.S.C. § 6311(a)(1), (b)(1)(A).

[54] *Id.* § 6311(b)(1)(D)(i).

schools and children in the State."[55] The achievement of a student is qualified as basic, proficient, or advanced, and, to gauge progress, annual testing is conducted.[56] Annual assessments are administered in reading and math from the third through the eighth grades and once more between the tenth and twelfth grades.[57] Beginning in the 2007-2008 school year, students began taking assessments in science, which must be performed a minimum of three times between the third and twelfth grades.[58]

### *2. Adequate yearly progress and sanctions*

Test scores from each school determine whether schools meet the state's adequate yearly progress ("AYP"). Each state is required to define its AYP as a means of measuring the progress and proficiency of its students on these assessments.[59] Each state must also establish a timeline and gradually increase its AYP to ensure that by 2014 all students meet or exceed the individual state's proficiency level of academic achievement.[60]

The AYP specifications for each state may differ. States maintain the flexibility to: determine their own standards, create their own tests, and decide the scores that individual students must achieve in order to be deemed proficient.[61] Therefore, if a state creates more challenging tests or increases the proficiency score, schools in that state will have a harder time meeting the definition of AYP.[62]

Adequate yearly progress aids in assessing proficiency, but also sanctions schools that fail to meet it. Schools that receive Title I funding and have too few students meeting or exceeding the state's proficiency level of academic achievement could face sanctions.[63] After two consecutive years of missing AYP, these underperforming schools begin to face sanctions.[64] Sanctions include re-categorization of the school.[65] In the first category, schools identified as requiring improvement must develop or amend a school plan addressing weaknesses and improvements on core academic

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[55] *Id.* § 6311(b)(1)(B).

[56] *Id.* § 6311(b)(1)(D)(ii).

[57] *Id.* § 6311(b)(3)(C)(vii), (b)(3)(C)(v)(I).

[58] *Id.* § 6311(b)(3)(C)(v)(II).

[59] *Id.* § 6311(b)(2)(C)(iv).

[60] *Id.* § 6311(b)(2)(F).

[61] James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 941-42 (2004).

[62] *Id.* at 942.

[63] 20 U.S.C. § 6316(b) (2006).

[64] *Id.* §§ 6316(b)(1)(A), 6311(b)(2)(A).

[65] *Id.* § 6316(b).

areas.[66] If a school continues noncompliance, punishments become progressively harsher, and may require: tutoring from an outside provider for low-income students;[67] replacing the staff and amending the curriculum under the term "corrective action;"[68] and converting the school into a public charter school, contracting out management to a private company, or surrendering governance to the state department of education.[69] Because of the severity of sanctions, schools receiving funding under Title I have a strong incentive to strive to achieve AYP.

### *B. Flexibility Under NCLB*

NCLB also provides schools with accommodations, exceptions, and waivers to comply with the Act. NCLB sets rigorous standards, but the Act also provides various accommodations for certain classified groups. Such accommodations may aid in addressing the problems faced by Ka Papahana Kula Kaiapuni.

#### *1. Waivers*

NCLB provides a state with the opportunity to apply for waivers to regulatory requirements under the Act.[70] NCLB permits the Secretary of Education to "waive any statutory or regulatory requirement . . . for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency" that both receives funds under NCLB and requests a waiver.[71] Although the Secretary maintains broad discretionary power under NCLB, there are also limitations to his power.[72] Limitations to the discretionary power of the Secretary include the fact that the Secretary must not waive statutory or regulatory requirements relating to: the allocation or distribution of funds to states, LEAs, or other recipients of funds under NCLB; use of federal funds to supplement; parental participation and involvement; or equitable participation of private school students and teachers.[73]

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[66] *Id.* § 6316(b)(3)(A).
[67] *Id.* § 6316(b)(5)(B).
[68] *Id.* § 6316(b)(7)(C)(iv)(I)-(II).
[69] *Id.* § 6316(b)(8)(B)(i)-(iv).
[70] *Id.* § 7861.
[71] *Id.* § 7861(a).
[72] *Id.* § 7861(c).
[73] *Id.*

In order to apply for a waiver, states and local educational agencies must submit a proposal to the Secretary.[74] The proposal must explain how the waiver will increase the quality of instruction and improve students' academic achievement.[75] States must also incorporate "specific, measurable educational goals . . . and the methods to be used to measure annually such progress for meeting such goals and outcomes[.]"[76] Finally, the proposal needs to describe how the waiver will assist the state educational agency and each affected local education agency or school in reaching those goals.[77] Even if a state fulfills all of the minimum elements required, NCLB does not require the Secretary to grant the waiver.[78]

If the Secretary approves a waiver, the waiver cannot exceed four years.[79] The Secretary also has discretion to extend the four-year period if the waiver proves effective in allowing the state to perform the activities requested[80] and if the extension is in the public interest.[81] Conversely, the Secretary may also terminate a waiver due to poor performance by the state or if the waiver no longer achieves its original purposes.[82]

### 2. *Testing in a language other than English*

Because submitting a proposal to the Secretary does not guarantee a waiver, states can also explore additional accommodations under NCLB. NCLB requires annual assessments to provide "reasonable accommodations on assessments" to limited English proficient ("LEP") students.[83] Such accommodations may include administering "assessments in the language and form most likely to yield accurate data on what [LEP] students know and can do in academic content areas . . . ."[84] LEP students are defined as individuals aged 3 to 21, who are enrolled in elementary or secondary education, who were born outside of the United States or whose native language is a language other than English, and whose mastery of English is not sufficient to meet state standards and succeed in an English language classroom.[85] Providing assessments in languages other than English,

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[74] *Id.* § 7861(b)(1).
[75] *Id.* § 7861(b)(1)(B)(i)-(ii).
[76] *Id.* § 7861(b)(1)(C).
[77] *Id.* § 7861(b)(1)(D).
[78] Connecticut v. Spellings, 453 F. Supp. 2d 459, 496 (D. Conn. 2006).
[79] 20 U.S.C. § 7861(d)(1) (2006).
[80] *Id.* § 7861(d)(2)(A).
[81] *Id.* § 7861(d)(2)(B).
[82] *Id.* § 7861(f).
[83] *Id.* § 6311(b)(3)(B)(ix)(III).
[84] *Id.*
[85] *Id.* § 7801(25).

however, are narrow because such assessments end when limited English proficient students achieve English language proficiency.[86] In order to assess English language proficiency, each state must provide an annual assessment of English proficiency (testing students' oral language, reading, and writing skills in English).[87] Although native language assessments may be provided, if a student has been in U.S. schools for three consecutive years, then the student must be tested in English in the areas of reading and language arts.[88]

Each state plan must also identify languages other than English that exist in the participating student population as well as indicate which languages do not have yearly student academic assessments and are thus needed.[89] Furthermore, states must make every effort to create such assessments.[90] States may request assistance from the Secretary of Education if "linguistically accessible academic assessment measures are needed."[91]

To increase accountability, NCLB provides funding to states and participating schools upon the contingency that schools set and meet AYP.[92] But if schools fail to meet AYP, then schools run the risk of being sanctioned.[93] The Act however offers various accommodations, including waivers and the option to take NCLB assessments in a language other than English.[94] Therefore, although NCLB places strict constraints on participating states, schools, and students, it also provides options to assist students and states achieve the goals required under NCLB.

## IV. HAWAIIAN IS NOT ENGLISH AND ENGLISH IS NOT HAWAIIAN: THE EFFECTS OF NCLB IN HAWAI'I

In 2002, the State of Hawai'i DOE adopted NCLB.[95] The DOE continues to implement NCLB through standards-based testing as a means of achieving five performance goals.[96] Such goals include that all students reach high standards and at least attain proficiency or better in

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[86] *Id.* § 6311(b)(3)(C)(ix)(III).
[87] *Id.* § 6311(b)(7).
[88] *Id.* § 6311(b)(3)(C)(x).
[89] *Id.* § 6311(b)(6).
[90] *Id.*
[91] *Id.*
[92] *Id.* § 6311(a)(1), (b)(2)(C).
[93] *Id.* § 6316(b).
[94] *Id.* § 6311(b)(3)(C)(ix)(III).
[95] *Biennium Operating Budget Request,* HAW. DEP'T OF EDUC., at iii, http://doeweb2.k12.hi.us/reports/budget/BienniumOperatingBudgetRequest_1113.pdf (last visited Apr. 10, 2014).
[96] *Id.* at ii.

reading/language arts and mathematics by school year ("SY") 2013-14.[97] In order to meet or exceed the requirements of NCLB, DOE administers the Hawai'i State Assessment ("HSA") as part of its standards-based testing.[98]

The HSA, written in English, measures the proficiency of English-speaking students in public schools.[99] Because NCLB requires testing of all students in a state in reading, mathematics, and science,[100] all students in Hawai'i must take the assessments. Students enrolled in Kaiapuni, however, do not learn English until the fifth grade,[101] and are thus ill-equipped to take an assessment written in the English language. Despite their limited exposure to formal English at the time of testing, NCLB policy requires fifth and sixth grade Kaiapuni haumāna to take the assessments in English.[102] In order to assess the proficiency levels of Papahana Kula Kaiapuni keiki pursuant to NCLB, various tests in the Hawaiian language were created for third and fourth grade haumāna.[103] Because fifth and sixth grade Kaiapuni haumāna could only take the HSA due to their short exposure to English, they did not receive any alternative NCLB testing ma ka 'ōlelo Hawai'i like their third and fourth grade schoolmates.[104]

### *A. Translation of the Hawai'i State Assessment*

The first manifestation of a translated version of the HSA started in SY 2003-2004.[105] The HSA, based on the Hawai'i Content and Performance Standards ("HCPS") for both reading and mathematics, was translated into ka 'ōlelo Hawai'i with the intention of administering both exams to Kaiapuni keiki in the third and fourth grades.[106] The exam consisted of a booklet with bubble-in response items.[107] A University of Hawai'i Hawaiian language instructor and a former Kaiapuni teacher, along with

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[97] *Id.*

[98] *History of HAPA*, *supra* note 13.

[99] *Id.*

[100] 20 U.S.C. § 6311(b)(3)(C)(vii) (2006).

[101] KAIAPUNI PROGRAM GUIDE, *supra* note 35, at 22.

[102] *A Bill for an Act Relating to the Hawaiian Language Immersion Program: Hearing on H.B. 2875 Before the S. Comm. on Hawaiian Affairs and Educ.*, 26th Leg., Reg. Sess. (Haw. 2012) (Testimony of Office of Hawaiian Affairs), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/HB2875_TESTIMONY_HWN-EDU_03-21-12.pdf [hereinafter OHA Testimony].

[103] *History of HAPA*, *supra* note 13.

[104] OHA Testimony, *supra* note 102.

[105] *History of HAPA*, *supra* note 13.

[106] *Id.*

[107] Interview with Kalae Akioka, Kaiapuni Teacher, Ke Kula Kaiapuni 'o Pū'ōhala, in Kāne'ohe, Haw. (Feb. 8, 2012) [hereinafter Akioka Interview].

another colleague,[108] translated the reading and mathematics tests for Papahana Kula Kaiapuni keiki in the third and fourth grades.[109] Although DOE planned on administering both the reading and mathematics translated assessments to Kaiapuni students, it soon became evident that the translation process for the reading assessment would require more time.[110] In response, the USDE allowed DOE additional time to complete the translation process for the reading assessment for third and fourth graders and the mathematics assessment for fourth graders.[111] In spite of the difficulties in translating the HSA into the Hawaiian language, Papahana Kula Kaiapuni keiki took the translated HSA in SY 2003-2004.[112]

Although the newly translated exam appeared to fix the dilemma of testing Kaiapuni students, members of the Technical Advisory Committee ("TAC") for the State of Hawai'i did not agree.[113] In February 2005, members of TAC, which included individuals fluent in the Hawaiian language, analyzed the translated version of the HSA.[114] These members determined that the Hawaiian language version of the HSA was not satisfactory.[115] TAC members discovered that comparing the results of a norm-referenced assessment translated into Hawaiian for Kaiapuni students with an assessment designed for English program students proved too difficult, as "Hawaiian is not English and English is not Hawaiian."[116] Additionally, some Kaiapuni teachers expressed concerns regarding the translated HSA. Concerns included: (1) the fact that the assessment was written by a university level instructor equipped to teach college-level Hawaiian language students and not third and fourth graders; (2) the author was under the incorrect impression that Kaiapuni teachers would understand the definition of certain words that he created, as many English math terms do not have existing words in the Hawaiian language; and (3) the fact that the mere translation of the HSA did not accurately measure what Kaiapuni haumāna were learning in school.[117] The confusion and

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[108] Makana Garma, Senior Culture Specialist at Kamehameha Schools. *See* Email from Makana Garma, Senior Culture Specialist, Kamehameha Schools, to author (Mar. 7, 2012, 09:57 HST) (on file with author).

[109] *History of HAPA*, *supra* note 13.

[110] Email from Cara Tanimura, Director, Systems Accountability Office, Haw. Dep't of Educ., to author (Mar. 2, 2012, 18:08 HST) (on file with author) [hereinafter Tanimura Email, Mar. 2, 2012].

[111] *Id.*

[112] *History of HAPA*, *supra* note 13.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] Akioka Interview, *supra* note 107.

complications associated with the translated HSA became much more apparent with the publication of the Kaiapuni scores, which showed Kaiapuni haumāna in the third grade scoring far below proficiency in SY 2003-2004 and SY 2004-2005.[118]

Ultimately, members of TAC recommended that Hawai'i develop a structured portfolio assessment to assess students enrolled in Kaiapuni schools properly.[119] A structured portfolio would address several major issues that emerged during the previous administration of the translated HSA:

> (1) The language used in the assessment would match the language of instruction, (2) a structured portfolio would allow the use of the various dialects of Hawaiian, and (3) the portfolio assessment would not require translating English items into Hawaiian words that may not always precisely match the meaning of the English words.[120]

DOE supported the TAC suggestions and commissioned the development of the Hawaiian Aligned Portfolio Assessment ("HAPA").[121]

### *B. Hawaiian Aligned Portfolio Assessment*

Because HAPA gained much needed support from DOE, Papahana Kula Kaiapuni haumāna saw a positive shift in testing. DOE commissioned the development of HAPA through various partnerships with the Hawai'i Department of Education Student Assessment Section, Kaiapuni teachers and administrators, community members, and the Pacific Resources for Education and Learning ("PREL").[122] HAPA thus fulfilled NCLB requirements for testing Kaiapuni students in the third and fourth grades.[123] Heeding the recommendations of the TAC, DOE created HAPA as a structured portfolio aligned with the new reading and mathematics HCPS III.[124] Hawai'i Board of Education approved HAPA in the spring of 2005.[125]

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[118] *Accountability Data Center*, ACCOUNTABILITY RESOURCE CENTER HAWAI'I, http://arch.k12.hi.us/datacenter/adc.html (select "Proficiency" from "Panel" drop-down menu; then select "2003-2004" or "2004-2005" from "School Year" drop-down menu; then check the "School" box and select "Anuenue" from drop-down menu) (last visited Apr. 10, 2014).

[119] *History of HAPA*, *supra* note 13.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

### *1. The Kaiapuni community embraces HAPA*

Many differences exist between the originally translated HSA and HAPA. The primary difference is that questions in HAPA are written in the Hawaiian language.[126] Responses to the questions are also expected to be in Hawaiian.[127] An additional benefit of HAPA is that the restrictive bubble-in responses were replaced by open, constructed response items.[128] For reading standards outlined in HCPS III, HAPA covers three strands: reading convention and skills; reading comprehension; and literary response.[129] The mathematics standards for HAPA cover five strands: numbers and operations; measurement; geometry and spatial sense; patterns, functions, and algebra; and data analysis, statistics, and probability.[130]

Various individuals fluent in the Hawaiian language, including kumu (teachers),[131] mākua (parents)[132] of Kaiapuni haumāna, university instructors, educational administrators, and other educators, score HAPA.[133] The schools of participating HAPA students receive a summary of results in August.[134] Papahana Kula Kaiapuni keiki took HAPA for six school years, from SY 2005-2006 to SY 2010-2011.[135] The radical changes offered by HAPA, particularly testing Kaiapuni students in the Hawaiian language—the language in which they are taught—proved to be a positive shift toward accountability and proficiency.[136] For the first time since Hawaii's adoption of NCLB, Kaiapuni students tested at and beyond levels of proficiency.[137] Of the Kaiapuni fourth graders who took HAPA in 2007, for example, 100 percent were proficient in reading and seventy-one percent were proficient in math.[138]

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] PUKUI & ELBERT, *supra* note 7, at 182.
[132] *Id.* at 230.
[133] *History of HAPA*, *supra* note 13.
[134] *Id.*
[135] *Id.*
[136] *See Accountability Data Center*, ACCOUNTABILITY RESOURCE CENTER HAWAI'I, http://arch.k12.hi.us/datacenter/adc.html (select "Proficiency" from "Panel" drop-down menu; then select "2007-08" from "School Year" drop-down menu; then check the "School" box and select "Anuenue" from drop-down menu) (last visited Apr. 10, 2014).
[137] *Id.*
[138] *Id.*

### 2. *HAPA failed to meet USDE standards*

HAPA appeared to resolve the issue of testing Kaiapuni students pursuant to NCLB; however, the USDE disagreed.[139] The Hawai'i DOE, the USDE, and its respective external peer reviewers met to discuss how HAPA was developed and administered as the state's accountability assessment for Kaiapuni students in the third and fourth grades.[140] USDE determined that HAPA did not meet the expected technical quality required for assessments at the federal level.[141] The USDE concluded that Hawai'i needed to submit additional documents in order to gain a fully approved standards and assessment system.[142]

USDE provided a summary of additional evidence that Hawai'i needed to submit to meet the Elementary and Secondary Education Act of 1965 requirements for the HSA system.[143] The list of required evidence included technical quality issues for both the HSA and HAPA.[144] Specifically, USDE wanted evidence: indicating Hawaii's scoring for oral fluency is valid and consistent in the same way across scorers; showing that all students are included in the assessment program; and documenting the comparison between the oral fluency tasks for the HAPA and the items from the HSA.[145] This technical quality list indicated six major points that DOE needed to address regarding the HSA, while listing only four points regarding HAPA,[146] which may indicate the greater need to first amend the HSA before attacking HAPA. USDE determined that HAPA failed to meet NCLB standards, and changes to HAPA needed to be made.[147] Because USDE declared that HAPA needed changes, HAPA was ultimately discontinued.[148]

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[139] Email from Cara Tanimura, Director, Systems Accountability Office, Haw. Dep't of Educ., to author (Feb. 29, 2012, 15:12 HST) [hereinafter Tanimura Email, Feb. 29, 2012].

[140] *Id.*

[141] *Id.*

[142] Letter from Kerri L. Briggs, Ph.D., to Patricia Hamamoto, Superintendent of Educ., Haw. Dep't of Educ. (Oct. 30, 2007), *available at* http://www2.ed.gov/admins/lead/account/nclbfinalassess/hi5.html.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] Minutes of Hawai'i Board of Education Committee on Curriculum, Instruction & Student Support Meeting (Feb. 16, 2011), *available at* https://lilinote.k12.hi.us/STATE/BOE/Minutes.nsf/a15fa9df11029fd70a2565cb0065b6b7/c13a7e217cce8ce50a25785700022ed6?OpenDocument [hereinafter Curriculum Committee Minutes].

### *2. Race To The Top and HAPA*

Although USDE and Hawai'i DOE maintain various reasons for discounting the validity of HAPA, some Kaiapuni kumu maintain that a non-standards related reason, namely monetary, is the source of the upheaval.[149] Some of the speculation raised by Kaiapuni teachers points to the adoption of the Race To The Top ("RTTT") program.[150] Under the American Recovery and Reinvestment Act of 2009,[151] the USDE received $4.35 billion to establish a competitive grant program, commonly known as "Race To The Top."[152] RTTT encourages and rewards states that among other things improve high school graduation rates, close achievement gaps, and implement ambitious plans to turn around the lowest-achieving schools in the U.S.[153]

On August 24, 2010, Hawai'i became one of ten RTTT Phase Two winners.[154] The RTTT award granted Hawai'i seventy-five million dollars[155] "over a four-year period for systematic, bold education reform."[156] Hawai'i set clear educational goals and high expectations to win the RTTT grant.[157] According to the state's plan, the increased goals and standards include: raising overall K-12 student achievement by 2014; ensuring college and career readiness by 2018; increasing higher education enrollment by 2018; ensuring equity and effectiveness by closing achievement gaps by 2014; and increasing science, technology, engineering, and mathematics ("STEM") proficiency statewide and highly effective STEM instruction in Title I schools.[158]

Some Kaiapuni kumu believe that the increased funding and increased requirements to obtain funding under RTTT place a priority on the money,

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[149] Akioka Interview, *supra* note 107.

[150] *Id.*

[151] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (codified as amended in various titles of U.S.C.).

[152] Katherine Poythress, *Race to the Top*, HONOLULU CIVIL BEAT, http://www.civilbeat.com/topics/race-to-the-top/ (last visited Aug. 31, 2013).

[153] *Id.*

[154] Press Release, U.S. Dep't of Educ., Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), *available at* http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants.

[155] Official State of Hawai'i American Recovery and Reinvestment Act (ARRA) website, HAW. DEP'T OF EDUC., http://hawaii.gov/recovery/doe (last visited Apr. 10, 2014).

[156] HAWAII'S RACE TO THE TOP, EXECUTIVE SUMMARY, HAW. DEP'T OF EDUC. (2010), *available at* https://lilinote.k12.hi.us/STATE/COMM/DOEPRESS.NSF/a1d7af052e94dd120a2561f7000a037c/c8994103050d7c680a25776d0064bf00/$FILE/HI%20RTTT%20Executive%20Summary%20July%2027%202010%20FINAL-HI.pdf.

[157] *Id.*

[158] *Id.*

and thus ignore how such standards affect Kaiapuni schools and students.[159] The DOE maintains that RTTT was not a factor in steering away from HAPA.[160] Regardless of the speculated reasons for the sudden termination of HAPA, DOE moved forward with plans to shift back to translation and also change to online testing. Therefore, for SY 2010-2011, DOE scheduled Kaiapuni students to take the Online HSA, which was translated into the Hawaiian language.[161]

### *C. Online Hawai'i State Assessment Translated into ka 'Ōlelo Hawai'i*

The USDE officials stated that HAPA failed to meet standards outlined in NCLB.[162] DOE therefore decided to make a change as a means of complying with the requirements for the development, administration, scoring, and reporting of results for all assessments. DOE determined that it would implement new statewide reading, mathematics, and science assessments for Kaiapuni students in the third and fourth grades in addition to all other students in third through eighth grades, and the tenth grade.[163] In order to comply with the requirements listed above, DOE designed a system in which Kaiapuni third and fourth graders would take the Online HSA translated into the Hawaiian language in various subjects throughout the end of 2010 and beginning of 2011.[164]

#### *1. Shifting from HAPA to translation*

The Hawai'i DOE rationalized that the new Online Assessment would correct various issues associated with HAPA.[165] According to DOE, the Online Assessment addresses these issues by: (1) providing detailed test specifications (such as acceptable item types, depth of knowledge, sample item stems, types of reading passages, etc.), which were not included in the original development of HAPA; (2) giving students the ability to answer a different set of test items each time they take an online assessment, contrary to HAPA where students answered the same set of test items with

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[159] Akioka Interview, *supra* note 107.

[160] Tanimura Email, Mar. 2, 2012, *supra* note 110.

[161] *See* Curriculum Committee Minutes, *supra* note 148.

[162] Poythress, *supra* note 38.

[163] Memorandum from Kathryn S. Matayoshi, Superintendent, Haw. Dep't of Educ., to Complex Area Superintendents, Charter School Admin. Office Exec. Dir., & Hawaiian Language Immersion Program Principals (Jan. 22, 2010) (on file with author) [hereinafter Matayoshi Memorandum, Jan. 22, 2010].

[164] *Id.*

[165] Tanimura Email, Mar. 2, 2012, *supra* note 110.

rewording; (3) prohibiting teachers' access to the test items before, during, or after students tested online, contrary to teachers having copies of HAPA test items prior to administration of the items to the students; and (4) using machine-scoring capability to validate rubrics immediately after an online assessment is completed, contrary to HAPA scores being hand-scored by Kaiapuni educators and community members.[166] DOE asserted that its online assessment would yield better results and improve efficiency and fairness.[167]

Additionally, in order to translate the Online HSA in the English language into the Hawaiian language, DOE solicited help from Kaiapuni and resource teachers, as well as non-DOE individuals.[168] These individuals assisted in tasks designed to increase the accuracy of the translated Online HSA.[169] Such tasks included: translating current third and fourth grade online reading, mathematics, and science test items from English to Hawaiian;[170] creating items originally drafted in the Hawaiian language and translated into English for possible inclusion in future assessments;[171] and to back-translate (Hawaiian to English) to determine the accuracy of the initial Hawaiian translations.[172] DOE hoped that combining the expertise of the Office of Curriculum, Instruction, and Student Support and Systems Accountability Office as well as individuals fluent in the Hawaiian language would provide "appropriate online reading, mathematics, and science assessments for all students."[173] Unfortunately, this system of translation and the creation of the new Online HSA did not work as planned. Review of the Online HSA revealed that it was fraught with problems.[174]

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[166] *Id.*

[167] Katherine Poythress, *Hawaiian Schools Threaten to Boycott State Test*, HONOLULU CIVIL BEAT (Mar. 16, 2011), http://www.civilbeat.com/articles/2011/03/16/9457-hawaiian-schools-threaten-to-boycott-state-test/.

[168] Matayoshi Memorandum, Jan. 22, 2010, *supra* note 163.

[169] *Id.*

[170] *Id.*

[171] Memorandum from Kathryn S. Matayoshi, Superintendent, Haw. Dep't of Educ., to Complex Area Superintendents, Charter School Admin. Office, & Hawaiian Language Immersion Program Principals (July 16, 2010) (on file with author) [hereinafter Matayoshi Memorandum, July 16, 2010].

[172] Matayoshi Memorandum, Jan. 22, 2010, *supra* note 163.

[173] *Id.*

[174] Poythress, *supra* note 38.

### *2. Problems with the online translated HSA*

By November 2010, a few Kaiapuni schools had begun administering the Online HSA in the Hawaiian language to students in the third and fourth grades.[175] The Online HSA, however, maintained many problems, including various technical issues with the assessment delivery system,[176] in addition to "mistranslations to inaccuracies" and test items that were displayed improperly on the students' computer screens.[177] Because the Systems Accountability Office and the American Institutes for Research ("AIR")[178] could not resolve these problems immediately, DOE advised Kaiapuni schools to stop the administration of the Online HSA in the Hawaiian language for third and fourth grade students.[179]

Because of the problems associated with the Online HSA, many Kaiapuni schools boycotted the new Online HSA and reverted back to earlier versions of HAPA.[180] Meanwhile, DOE and its affiliates tried to amend the technical difficulties of the exam.[181] Many Kaiapuni teachers who administered the Online HSA identified problems with the test. For instance, the Online HSA required third and fourth graders to type answers in essay form, which proved difficult, as the exam did not allow students to save their answers.[182] Moreover, the test applied the incorrect usage of certain words in the Hawaiian language and used different Hawaiian words to describe the same thing, ultimately confusing many Kaiapuni haumāna.[183] In developing the Online HSA, Kaiapuni teachers could not participate in editing the test, but those with little to no immersion classroom experience, such as college students, were allowed to develop

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[175] *See* Memorandum from Kathryn S. Matayoshi, Superintendent, Haw. Dep't of Educ., to Hawaiian Language Immersion Program Principals, Test Coordinators, & Hawaiian Language Program Schools (Nov. 17, 2010) (on file with author) [hereinafter Matayoshi Memorandum, Nov. 17, 2010].

[176] *Id.*

[177] Poythress, *supra* note 38.

[178] AM. INST. FOR RESEARCH, http://www.air.org/ (last visited Apr. 18, 2012). American Institutes for Research is a third party research company that DOE hired to create and score HSA in the Hawaiian language. *See* Matayoshi Memorandum, July 16, 2010, *supra* note 171.

[179] Matayoshi Memorandum, Nov. 17, 2010, *supra* note 175.

[180] Poythress, *supra* note 38.

[181] *Id.*

[182] *See* Wendy "Kalaekea" Akioka, Kaiapuni Teacher, Testimony in Opposition to Online Translated HSA, Attachment A to Minutes of Hawai'i Board of Educ. Meeting (Feb. 16, 2011), *available at* https://lilinote.k12.hi.us/STATE/BOE/Minutes.nsf/7d59b00aff8d3cf50a2565cb00663e82/c13a7e217cce8ce50a25785700022ed6/$FILE/Minutes%2002-16-11%20(ATTACHMENT).pdf.

[183] *Id.*

translations in isolation.[184] Finally, many Kaiapuni educators believed that the Online HSA failed to accurately measure the educational achievements of Kaiapuni haumāna.[185]

DOE explicitly stated that the SY 2009-2010 HAPA should not be used for SY 2010-2011.[186] According to a March 10, 2011 meeting with various representatives from the Kaiapuni community, however, DOE decided to administer the 2009-2010 HAPA in reading and mathematics to Kaiapuni students in the third and fourth grades for SY 2010-2011.[187] But, DOE would administer the Online HSA Assessment in the Hawaiian language to fourth grade Kaiapuni students for the same school year.[188]

For school years 2011-2012 and 2012-2013, fourteen Kaiapuni principals and other stakeholders agreed to identify at least one representative from each of the schools to work with DOE from April to May 2011 to create items in Hawaiian that were aligned to the HCPS III.[189] DOE and stakeholders believed that collaborating with Kaiapuni representatives would benefit Kaiapuni students;[190] specifically that Kaiapuni students in the third and fourth grades could benefit from the computer adaptive assessment system, gain immediate test scores, and, if needed, have up to three opportunities to meet proficiency in the set content areas.[191] Writ with good intentions, the passage writing and item writing projects for the Online HSA in the Hawaiian language were cancelled due to DOE's inability to secure the needed number of individuals to commit to both projects.[192] Kaiapuni teachers did not participate primarily because working on the HSA project would require them to be gone from the classroom for an extended time period.[193] Because of a lack of adequate personnel, or teachers capable of substituting for Kaiapuni kumu, many

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[184] *Id.*

[185] Poythress, *supra* note 38.

[186] Memorandum from Kathryn S. Matayoshi, Superintendent, Haw. Dep't of Educ., to Garret Toguchi, Chairperson, Hawai'i Bd. of Educ. (Mar. 2, 2011) (on file with author).

[187] Memorandum from Kathryn S. Matayoshi, Superintendent, Haw. Dep't of Educ., to Complex Area Superintendents, Charter School Admin. Office, & Hawaiian Language Immersion School Principals (Mar. 15, 2011) (on file with author).

[188] Memorandum from Kathryn S. Matayoshi, Superintendent, Haw. Dep't of Educ., to Complex Area Superintendents, Charter School Admin. Office, & Hawaiian Language Immersion School Principals (Apr. 7, 2011) (on file with author) [hereinafter Matayoshi Memorandum, Apr. 7, 2011].

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

kumu could not commit to a project requiring that they be away from their haumāna for such an extensive period of time.[194]

Although the Online HSA translated into the Hawaiian language continues to exhibit technical errors and elicits concerns of validity and accuracy,[195] DOE decided that it would, once again, administer the translated assessment.[196] Therefore, for SY 2011-2012 and SY 2012-2013, all third and fourth grade Kaiapuni students took the Online HSA reading, mathematics, and science assessments in the Hawaiian language.[197] Outrage over the reversion to the faulty translated exam caused many community members and organizations, such as the Office of Hawaiian Affairs ("OHA") to spring into action to aid Kaiapuni keiki in perpetuating their education in the Hawaiian language and culture.[198]

## V. RESOLVING NCLB DISPARITY FOR KAIAPUNI HAUMĀNA THROUGH LEGISLATION

In an attempt to assist the more than 2,000 Kaiapuni haumāna enrolled at twenty-one public Kaiapuni schools[199] gain equal testing under NCLB, OHA proposed a bill before the state House of Representatives[200] and a bill before the state Senate.[201] The bills, H.B. 1986 and S.B. 2177, propose that DOE develop a separate test in the Hawaiian language for Kaiapuni students in the third and fourth grades.[202] These bills did not survive crossover, but another similar bill, H.B. 2875, did.[203] H.B. 2875 and its companion bill S.B. 3009 also propose that DOE develop a separate test in the Hawaiian language for Kaiapuni students but increase the range of students to encompass grades three through six.[204] Because only H.B. 2875

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[194] Akioka Interview, *supra* note 107.

[195] Poythress, *supra* note 38.

[196] *Id.*

[197] *See* Matayoshi Memorandum, Apr. 7, 2011, *supra* note 188.

[198] Poythress, *supra* note 38; *see infra* Part V.

[199] H.B. 1986, 26th Leg., Reg. Sess. (Haw. 2012).

[200] *Id.*

[201] S.B. 2177, 26th Leg., Reg. Sess. (Haw. 2012).

[202] H.B. 1986, 26th Leg., Reg. Sess. (Haw. 2012); S.B. 2177, 26th Leg., Reg. Sess. (Haw. 2012).

[203] HB1986, HAWAI'I STATE LEGISLATURE, http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=1986&year=2012 (last visited Apr. 10, 2014); SB2177, HAWAI'I STATE LEGISLATURE, http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=2177&year=2012 (last visited Apr. 10, 2014); HB2875 SD2, HAWAI'I STATE LEGISLATURE, http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=2875&year=2012 (last visited Apr. 10, 2014).

[204] H.B. 2875, 26th Leg., Reg. Sess. (Haw. 2012); S.B. 3009, 26th Leg., Reg. Sess. (Haw.

managed to survive crossover in the legislature, it will be the main bill discussed.[205]

### *A. House Bill 2875*

House Bill 2875 addresses the reading, math, science, and other assessments administered to third through sixth grade haumāna enrolled in Kaiapuni schools.[206]

#### *1. The purpose of H.B. 2875*

The primary purpose of H.B. 2875 is to address the many problems associated with the current Online HSA translated into the Hawaiian language and to expand Hawaiian language testing to fifth and sixth grade Kaiapuni haumāna.[207] As discussed, many problems arose after DOE declared that Kaiapuni haumāna would no longer take HAPA and would be required to take the Online HSA translated into the Hawaiian language for SY 2011-2012.[208] One main problem in translating the HSA from English to Hawaiian is that the construct changes as a result of the translation.[209] In other words, once an English reading test is translated into Hawaiian, the test no longer measures reading proficiency in either language.[210] House Bill 2875 tried to amend translation problems by proposing "the development of a parallel test written originally in the Hawaiian language."[211]

Because the State of Hawai'i recognizes that the Hawaiian language is an integral part of Hawaii's heritage, the state must fulfill its obligation to perpetuate the Hawaiian language.[212] This bill is a perfect example of exemplifying the Constitutional mandates to perpetuate the Hawaiian language.[213] Kaiapuni haumāna are the vessels to perpetuate the language and to not pass this bill would result in a step backward. If H.B. 2875 does

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2012).

[205] Although this comment discusses H.B. 2875, the arguments made for and against the bill also apply equally to the substantively identical H.B. 224, which was introduced in 2013 after H.B. 2875 was not passed. *See supra* note 14; H.B. 224 SD2, 27th Leg., Reg. Sess. (Haw. 2014).

[206] H.B. 2875, 26th Leg., Reg. Sess. (Haw. 2012).

[207] *Id.*

[208] *See supra* Part IV.C.2.

[209] H.B. 2875, 26th Leg., Reg. Sess. (Haw. 2012).

[210] *Id.*

[211] *Id.*

[212] HAW. CONST. art. X, § 4.

[213] *See id.*; H.B. 2875, 26th Leg., Reg. Sess. (Haw. 2012).

not pass, then not only will our Kaiapuni keiki suffer but the 'ōlelo will also face the risk of extinction, again.

The current version of House Bill 2875 requires DOE to develop language arts and math assessments ma ka 'ōlelo Hawai'i for third through sixth grade Kaiapuni haumāna, and science assessments ma ka 'ōlelo Hawai'i for fourth grade Kaiapuni haumāna.[214] This bill outlines specific requirements that could ameliorate some of the previous assessment problems. H.B. 2875 explicitly states that the assessments must not be mere Hawaiian translations of the general HSA.[215] Rather, H.B. 2875 requires that the assessments be: "(1) [a]ligned with the common core state standards or the Hawai'i content and performance standards III, as appropriate; (2) [v]alid, reliable, and consistent with nationally recognized professional and technical standards; and (3) [c]ompliant with the Elementary and Secondary Education Act of 1964, as amended."[216]

In order to make the administration of all NCLB assessments to all students in Hawai'i equal, H.B. 2875 requires that all "ancillary assessment materials and tools"[217] made available to students taking the general HSA must also be available in the Hawaiian language to Kaiapuni students.[218] Finally, the development of the assessments by DOE must include the consultation and collaboration of the Hawaiian language community, including the Hawaiian education department of the state, the 'Aha Kauleo Kaiapuni Hawai'i, members of Kaiapuni schools, the Hawaiian language programs at the University of Hawai'i at Hilo and the University of Hawai'i at Mānoa, OHA, and other Hawaiian language community organizations.[219] Before the closing of the 2012 Legislative Session, H.B. 2875 passed each house of the legislature, and each house appointed members to a conference committee to discuss the differences of the bill in each house.[220]

### *2. Support for H.B. 2875*

The introduction of H.B. 2875 calls out to the Kaiapuni community, the Native Hawaiian community, and all supporters of the Hawaiian language to rally together as a means of preserving the language and education of

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[214] H.B. 2875 S.D. 2, 26th Leg., Reg. Sess. (Haw. 2012).

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*; *see also* HB2875 SD2, HAWAI'I STATE LEGISLATURE, http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=2875&year=2012 (last visited Apr. 10, 2014).

Kaiapuni haumāna.[221] Many schools, teachers, students, and other Hawaiian language advocates continue to show their support of H.B. 2875 by providing testimony supporting the bill.[222] Individuals and organizations that support the bill understand the importance of ka ʻōlelo Hawaiʻi and the need to support Ka Papahana Kula Kaiapuni as well as its haumāna.

Most supporters of H.B. 2875 testify that the main reason for their support of the bill revolves around the need to preserve the Hawaiian language as well as a need to gain equal treatment for Kaiapuni keiki, similar to that of the general public school students.[223] One specific testimony illustrated the importance of H.B. 2875 to Kaiapuni and its haumāna.[224] This testimony, submitted by a University of Hawaiʻi at Mānoa Professor of Hawaiian language, stated that "[w]hile every point of assessment can be agreed upon for both English and Hawaiian educational settings, the framing of those aspects should be generated within the target language, which will allow these tools to be presented in authentic, culturally appropriate vocabulary and structure."[225] Essentially, translation from one language to another "will continue to be inherently problematic, and it will be the receivers of translated tools who will suffer,"[226] specifically Kaiapuni haumāna.

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[221] *See* H.B. 2875 S.D. 2, 26th Leg., Reg. Sess. (Haw. 2012).

[222] *See, e.g.*, *A Bill for an Act Relating to the Hawaiian Language Immersion Program: Hearing on H.B. 2875 Before the H. Comm. on Hawaiian Affairs*, 26th Leg., Reg. Sess. (Haw. 2012) (Testimony of Kathryn S. Matayoshi, Superintendent, Haw. Dept. of of Educ.), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/HB2875_TESTIMONY_HAW_02-08-12_.PDF [hereinafter Matayoshi Testimony]; *A Bill for an Act Relating to the Hawaiian Language Immersion Program: Hearing on H.B. 2875 Before the H. Comm. on Hawaiian Affairs*, 26th Leg., Reg. Sess. (Haw. 2012) (Testimony of Kale Naumu, Principal of Ke Kula Kaiapuni ʻo Ānuenue), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/HB2875_TESTIMONY_HAW_02-08-12_.PDF [hereinafter Naumu Testimony]; *A Bill for an Act Relating to the Hawaiian Language Immersion Program: Hearing on H.B. 2875 Before the H. Comm. on Hawaiian Affairs*, 26th Leg., Reg. Sess. (Haw. 2012) (Testimony of Kuuipo Kelekolio), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/HB2875_TESTIMONY_HAW_02-08-12_.PDF [hereinafter Kelekolio Testimony].

[223] *See, e.g.*, Matayoshi Testimony, *supra* note 222; Naumu Testimony, *supra* note 222; Kelekolio Testimony, *supra* note 222.

[224] *A Bill for an Act Relating to the Hawaiian Language Immersion Program: Hearing on H.B. 2875 Before the S. Comm. on Hawaiian Affairs and Educ.*, 26th Leg., Reg. Sess. (Haw. 2012) (Testimony of Puakea Nogelmeier, Professor of Hawaiian language, Univ. of Haw. at Mānoa), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/HB2875_TESTIMONY_HWN-EDU_03-21-12.pdf.

[225] *Id.*

[226] *Id.*

House Bill 2875 supporters should also seek assistance from the Board of Education. BOE Chairman Garrett Toguchi believes that implementing the Online HSA in the Hawaiian language places Kaiapuni students at a disadvantage.[227] In a memo to the Department of Education on February 28, 2011, Toguchi stated that "the translated HSA is not a valid and fair test"[228] and if the "Department does not satisfactorily resolve this issue, it could lead to the dismantling of Ka Papahana Kaiapuni Hawai'i or to a federal lawsuit."[229] Furthermore, although the Online HSA test material may be valid, the manner in which it is presented to Kaiapuni students does not equal the one received by English students.[230] Disparity in testing is further evidenced by the assessment tutorial videos, which exist only in the English language.[231] Kaiapuni haumāna and supporters simply seek equality in testing. If H.B. 2875 does not pass, the entire Kaiapuni system could crumble and with it the Hawaiian language. Therefore, the time for change and equality is now. Kaiapuni and Hawaiian language supporters must rally together and seek assistance and guidance from Toguchi in order to assist H.B. 2875 in passing the legislature.

### *B. Criticism of H.B. 2875*

Although H.B. 2875 maintains a strong, supportive following, criticisms of the bill, its goals, and its purpose exist. Much of the criticism revolves around the cost affiliated with the creation of all three assessments in the Hawaiian language, and whether or not the Hawaiian language exams will meet the NCLB standards.[232] Additionally, some question whether or not the proposed law will merely serve as a short-term solution, and that a reorganization of the Kaiapuni program within the BOE should be explored.[233]

#### *1. NCLB standards*

Initially, the Department of Education maintained no position as to H.B. 2875 so long as its "implementation [did] not impact or replace the

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[227] Poythress, *supra* note 167.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *See, e.g.*, Matayoshi Testimony, *supra* note 222.

[233] *See* Email from Dr. William H. Wilson, Professor and Chair of Hawaiian Studies, Univ. of Haw. at Hilo, to author (Feb. 24, 2012, 08:59 HST) (on file with author) [hereinafter Wilson Email].

priorities set forth in the Executive Supplemental Budget of Fiscal Year 2012-2013."[234] DOE, however, highlighted key challenges that could impact the implementation of H.B. 2875, which included issues such as development and personnel.[235] Development of all assessments in the Hawaiian language for grades three and four would require modifications and revisions to the technical standards in various areas.[236] The modifications and revisions associated with test development would also need to go before the Technical Advisory Committee for review, analysis, and guidance.[237] Appropriate and measureable program standards for each content area and grade level need to be developed and assessed, and after development, the standards need to be reviewed for alignment, then adopted by the Hawai'i State BOE.[238] Developing a new assessment that must also follow guidelines established in the Standards for Educational and Psychological Testing takes approximately twenty-four months.[239]

Developing a new assessment also requires the adherence to certain protocols as well as the assistance of various personnel. Creating an assessment in the Hawaiian language would require experts in the development of item type who possess an understanding of the scope of the standards, as well as fluency in reading, writing, and speaking the Hawaiian language.[240] Because of the high level of expertise that the development of an assessment in the Hawaiian language requires, individuals capable of completing such a task may be limited, which would increase the length of the development process.[241] Further adding to the problem is the fact that many of the individuals considered fluent or qualified to develop these assessments may also be instructors of Kaiapuni students.[242] As such, these individuals would probably not be permitted to develop the assessment items due to the need to preserve the confidentiality of the assessment.[243] Based on the key challenges that DOE discussed, advocates for H.B. 2875 should propose ways in which to address such issues.

Most recently, however, DOE stated that it supports the intent of H.B. 2875, but suggests a few amendments.[244] The amendments primarily

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[234] Matayoshi Testimony, *supra* note 222.
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] The five clarifying amendments that DOE proposed are:
(1) Stating that the annual assessments are for the purposes of educational

clarify what H.B. 2875 proposes.[245] One amendment includes "clarifying that the NCLB ancillary assessments materials and tools that are made available to students taking HSA also be made available in the Hawaiian language, to the extent that these materials and tools can be adapted for use in the Hawaiian language."[246] Because DOE now supports the intent of H.B. 2875, which ultimately seeks equal testing for Kaiapuni haumāna, the bill may pass the legislature and achieve its goal of equality.

### *2. Cost to create assessments ma ka 'Ōlelo Hawai'i*

In addition to concerns regarding the development and adequacy of personnel, DOE maintains that cost will greatly impact the advancement of H.B. 2875 and, ultimately, the creation of assessments in the Hawaiian language.[247] Based on costs associated with the creation of previous assessments, such as HSA, DOE calculates that in order to develop assessments written in the Hawaiian language, it would cost approximately $2.8 million.[248] In responding to inquiries on how the $8,000 cost per student was derived, the Director of the Systems and Accounting Office,

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accountability under the Elementary and Secondary Education Act and are aligned to either the Common Core State Standards (English/Language Arts and Mathematics for grades 3 through 6) or the Hawaii Content and Performance Standards III (Science for grade 4 only) commencing in school year 2014-15; (2) Deleting the establishment of a formal Memorandum of Agreement with one entity, but requiring that the Department of Education invite the broader Hawaiian language community stakeholders to participate in the development and scoring of the assessments in the Hawaiian language; (3) Clarifying that the NCLB ancillary assessment materials and tools that are made available to students taking the general assessment are also made available in the Hawaiian language to the extent that these materials and tools can be adapted for use in the Hawaiian language; and (4) Including in the legislative reports the estimated costs and other critical resources or agreements relating to the development of the assessments; and (5) Expanding the Hawaiian community stakeholders to include members of the Hawaiian Language Immersion Program schools, the Hawaiian language programs at the University of Hawaii at Hilo and the University of Hawaii at Manoa, the Office of Hawaiian Affairs, Punana Leo, Kamehameha Schools, Hawaiian civic clubs, and other Hawaiian language community organizations.

*A Bill for an Act Relating to the Hawaiian Language Immersion Program: Hearing on H.B. 2875 Before the S. Comm. on Hawaiian Affairs and Educ.*, 26th Leg., Reg. Sess. (Haw. 2012) (Testimony of Kathryn S. Matayoshi, Superintendent, Haw. Dep't of Educ.), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/HB2875_TESTIMONY_HWN-EDU_03-21-12.pdf.

[245] *Id.*

[246] *Id.*

[247] Matayoshi Testimony, *supra* note 222.

[248] *Id.* DOE explains that multiplying 350 third and fourth grade students by the cost per student, $8,000, the total for one year equates to $2.8 million.

Cara Tanimura, stated that "the price per student is based on the 'estimated' cost for development and implementation of an online adaptive assessment developed originally in the Hawaiian language."[249]

Further, because of the need to develop and implement many tasks, the cost to develop an online assessment tends to be higher in the initial year.[250] With each year, however, the cost would decrease as the initial tasks are completed and put into practice.[251] Because of the high cost of developing and implementing a Hawaiian language assessment pursuant to H.B. 2875, the bill's demand on limited government funds may prove difficult for it to advance any further. But, this should not be the cause of continued unequal treatment of Kaiapuni keiki and the entire Kaiapuni program. Since its inception, the Kaiapuni program has and continues to take a backseat to English medium schools in the DOE system, especially regarding allotment of funding and resources. Cost cannot continue to be the scapegoat of why DOE refuses to provide and treat Kaiapuni schools as equals.

### *3. Structure of Ka Papahana Kula Kaiapuni*

In addition to concerns regarding maintaining NCLB standards as well as the cost of developing and implementing an assessment in the Hawaiian language, supporters of H.B. 2875 reason that the bill may only resolve a minor, short-term problem—testing.[252] Rather than focus on minor problems, such as testing, the focus should be on the whole picture, which would require amending the entire Papahana Kula Kaiapuni program within DOE as a means of improving the foundation of the program.[253] In short, rather than concentrate specifically on amending assessments, DOE should work to define what it means to be a "Hawaiian immersion school"[254] and focus on restructuring Kaiapuni within DOE.

## VI. SOLUTIONS TO REACH EQUALITY

Because of various concerns regarding the viability of H.B. 2875, including maintaining NCLB standards and cost, H.B. 2875 may not pass. Therefore, Kaiapuni supporters need to consider other options to reach equality for Kaiapuni haumāna. Options include looking to the law, including both NCLB and the Native American Language Act of 1990, and

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[249] Tanimura Email, Feb. 29, 2012, *supra* note 139.
[250] Matayoshi Testimony, *supra* note 222.
[251] *Id.*
[252] *See* Wilson Email, *supra* note 233.
[253] *Id.*
[254] *Id.*

persuading DOE that it should not dissuade the creation of assessments written in the Hawaiian language merely due to cost.

### *A. Looking to the Source: NCLB*

Because the root of the assessments forced upon Kaiapuni students stems from NCLB,[255] exploring exceptions provided under the Act may prove beneficial. The No Child Left Behind Act of 2001 provides a couple of exceptions that Kaiapuni supporters should explore. Exceptions include applying for a waiver for any requirement under NCLB[256] or trying to define Papahana Kaiapuni haumāna as limited English proficient ("LEP").[257]

#### *1. Waivers for Kaiapuni*

As discussed, the NCLB provides states with an opportunity to apply for waivers to regulatory requirements under the Act.[258] Under NCLB, the Secretary of Education can "waive any statutory or regulatory requirement . . . for a [s]tate educational agency, local educational agency . . . or school through a local educational agency . . . ."[259] The Secretary maintains broad discretionary power under NCLB,[260] but limitations to his power exist.[261] Therefore, if DOE, in conjunction with Kaiapuni supporters, petition the Secretary of Education for a waiver regarding the requirement mandating that Kaiapuni students take the assessments listed under NCLB, then Kaiapuni haumāna may no longer need to be subjected to these unfair assessments.

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[255] *See* 20 U.S.C. § 6311(b)(3)(C)(vii) (2006).

[256] *Id.* § 7861(a) (2006).

[257] *Id.* § 6311(b)(3)(C)(ix)(III).

[258] *See id.* § 7861.

[259] *Id.* § 7861(a).

[260] *See id.*

[261] The Secretary shall not waive . . . any statutory or regulatory requirements relating to— (1) the allocation or distribution of funds to States, local educational agencies, or other recipients of funds under this chapter; (2) maintenance of effort; (3) comparability of services; (4) use of Federal funds to supplement, not supplant, non-Federal funds; (5) equitable participation of private school students and teachers; (6) parental participation and involvement; (7) applicable civil rights requirements; (8) the requirement for a charter school under subpart 1 of part B of subchapter V of this chapter; [and] (9) the prohibitions regarding— (A) State aid in section 7902 of this title [and] use of funds for religious worship or instruction in section 7885 of this title . . . .

*Id.* § 7861(c).

To apply for a waiver, the State of Hawai'i must first submit a proposal to the Secretary.[262] The proposal must explain how the waiver will increase the quality of instruction and improve the academic achievement of students.[263] For purposes of removing the NCLB requirement that Kaiapuni haumāna take the assessments, Kaiapuni supporters reason that the quality of instruction and the academic achievements of haumāna would improve in Kaiapuni schools if the focus of the assessments shifts from measuring the achievements of the general public school student to the Kaiapuni haumāna.[264] Quality of instruction and academic achievement of haumāna will improve if kumu can teach their normal course of work without wasting instruction time teaching how to best succeed on NCLB assessments that fail to consider the unique curriculum of the Kaiapuni program.

In seeking a waiver, the State of Hawai'i would also need to incorporate "specific, measurable educational goals . . . and the methods to be used to measure annually such progress for meeting such goals and outcomes."[265] The proposal should also describe how the waiver would assist the state educational agency and each affected local education agency or school in reaching those goals.[266] Kaiapuni supporters explain that creating measurable goals that will assist DOE and affected schools—i.e., Kaiapuni schools—can only be achieved through the collaboration of DOE and Kaiapuni programs, parents, and teachers, as well as offices within the DOE geared toward assisting the Hawaiian Language Immersion Program.[267] NCLB, however, does not require the Secretary to grant a waiver,[268] even if the State of Hawai'i fulfills all of the minimum elements required to apply for a waiver.

If the Secretary does approve a waiver, the Secretary can only grant a waiver for not more than four years.[269] The Secretary also exercises discretion as to whether or not he should extend the four-year period if the waiver proves effective in allowing the state to perform the activities requested[270] and if the extension is in the public interest.[271] Conversely, the

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[262] *Id.* § 7861(b)(1).

[263] *Id.* § 7861(b)(1)(B)(i)-(ii).

[264] Interview with D. Kau'i Sang, Acting Educ. Specialist-Hawaiian Language Immersion Program (HLIP), Haw. Dep't of Educ., and HLIP Parent, in Haw. (Feb. 3, 2012) [hereinafter Sang Interview].

[265] 20 U.S.C. § 7861(b)(1)(C) (2006).

[266] *Id.* § 7861(b)(1)(D).

[267] Sang Interview, *supra* note 264.

[268] *See* Connecticut v. Spellings, 453 F. Supp. 2d 459, 496 (D. Conn. 2006).

[269] 20 U.S.C. § 7861(d)(1).

[270] *Id.* § 7861(d)(2)(A).

[271] *Id.* § 7861(d)(2)(B).

Secretary may also terminate a waiver due to poor performance or due to inadequacy of the waiver.[272] Because a waiver cannot last more than four years without an extension, a waiver for Kaiapuni haumāna is only a short-term solution.

As of March 2, 2012, the State of Hawai'i had not yet applied for a waiver with the Secretary.[273] The Director of the Systems Accountability Office of the DOE, Cara Tanimura, explained that the Superintendent, Kathryn S. Matayoshi, requested that the Office of Curriculum, Instruction and Student Support take the lead in working with Kaiapuni staff and the Hawaiian community to complete the application process for submittal to the USDE.[274] Additionally, OHA contacted DOE requesting a possible waiver.[275] In response, DOE stated that representatives from HLIP and the Systems Accountability Office will work with OHA to facilitate the waiver process.[276] Exempting Kaiapuni schools from NCLB assessments would greatly benefit the haumāna and the Kaiapuni program. If Kaiapuni schools continue to score below proficiency, these schools risk sanctions and ultimately a complete reorganization of each under-performing school.

### *2. Classifying Kaiapuni students as Limited English Proficient*

Submitting a proposal to the Secretary does not guarantee the state a waiver;[277] therefore, the State of Hawai'i needs to explore additional accommodations available under NCLB. The No Child Left Behind Act of 2001 requires annual assessments as a means of providing "reasonable accommodations on assessments" to limited English proficient students.[278] Such accommodations may include, to the extent practicable, administering assessments in the language and form most likely to yield accurate data on what limited English proficient (LEP) students know in academic content

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[272] *Id.* § 7861(f).

[273] Tanimura Email, Mar. 2, 2012, *supra* note 110.

[274] *Id.*

[275] Memorandum from Richard Pezzulo, Interim Chief Exec. Officer, Office of Hawaiian Affairs, to Kathryn S. Matayoshi, Superintendent, Haw. Dep't of Educ. (Jan. 5, 2012) (on file with author).

[276] Memorandum from Kathryn S. Matayoshi, Superintendent, Haw. Dep't of Educ., to Richard Pezzulo, Interim Chief Exec. Officer, Office of Hawaiian Affairs (Feb. 2, 2012) (on file with author).

[277] *See* 20 U.S.C. § 7861(a) (2006) ("[T]he Secretary [of Education] *may* waive any statutory or regulatory requirement of this chapter for a State educational agency . . . .") (emphasis added).

[278] *Id.* § 6311(b)(3)(C)(ix)(III).

areas.[279] For example, accommodating Kaiapuni haumāna by administering NCLB assessments in the Hawaiian language.

Offering assessments in languages other than English, however, are narrow because such assessments end when limited English proficient students achieve English language proficiency.[280] As a means of assessing English language proficiency, each state must provide an annual assessment of English proficiency (testing students' oral language, reading, and writing skills in English).[281] Also, although native-language assessments may be provided, if students have been in U.S. schools for three consecutive years, then the students must be tested in English in the areas of reading and language arts.[282]

Each state plan must also identify languages other than English that exist in the participating student population as well as indicate which languages do not have yearly student academic assessments and are needed.[283] States must make every effort to create such assessments.[284] States may request assistance from the Secretary of Education if "linguistically accessible academic assessment measures are needed."[285] Based on various accommodations that NCLB provides to students speaking languages other than English, states, schools, and students maintain several options to best achieve the goals required by NCLB.[286]

NCLB defines the term "limited English proficient" as an individual who is: aged three through twenty-one; enrolled or preparing to enroll in elementary secondary education; often born outside of the United States or speaks a language other than English at home; from an environment where a language other than English has a significant impact on his or her level of English language proficiency; and lacking sufficient mastery of English to meet state standards and excel in an English-classroom.[287] The USDE definition of LEP students includes those "who are recent arrivals to the United States."[288] The State of Hawai'i refers to LEP students as English Language Learners ("ELL").[289] Because most Kaiapuni haumāna are not

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[279] *Id.*

[280] *Id.*

[281] *Id.* § 6311(b)(7).

[282] *Id.* § 6311(b)(3)(C)(x).

[283] *Id.* § 6311(b)(6).

[284] *Id.*

[285] *Id.*

[286] *See generally id.* § 6311.

[287] *Id.* § 7801(25) (2006).

[288] U.S. DEP'T OF EDUC., *New No Child Left Behind Regulations: Flexibility and Accountability for Limited English Proficient Students* 1 (Sep. 11, 2006), http://www2.ed.gov/admins/lead/account/lepfactsheet.pdf.

[289] Tanimura Email, Mar. 2, 2012, *supra* note 110.

new arrivals to the U.S.,[290] it may be difficult to define Kaiapuni haumāna as LEP students as all factors listed must be met. However, because the definition of LEP includes students that "come from an environment where a language other than English has had a significant impact on the [student's] level of English language proficiency"[291] and who lack sufficient mastery of English to meet state standards and excel in an English-classroom,[292] some Kaiapuni haumāna may meet the definition of LEP.

One school in particular may qualify its Kaiapuni students as LEP students. Nāwahī'okalani'ōpu'u, a kindergarten to sixth grade public charter school,[293] administers and operates its school only through the Hawaiian language.[294] The Hawaiian language extends beyond the confines of the classroom and into the school's administration, meaning that staff meetings and parent meetings are also conducted in the Hawaiian language.[295] Additionally, many students and families continue speaking the Hawaiian language outside of school and in their respective homes.[296] This contrasts with other Kaiapuni schools, such as Ke Kula Kaiapuni 'o Ānuenue, which conducts school staff meetings in English because not all of the staff, such as janitors, speak the Hawaiian language.[297] Based on the facts above and assuming arguendo that the English language is not the primary language for Nāwahī'okalani'ōpu'u students, such students may experience difficulties in reading and writing the English language. Such difficulties may cause students to struggle to meet proficiency levels of achievement on the state assessments. Therefore, Nāwahī'okalani'ōpu'u haumāna probably meet all factors required to establish a status as LEP students.[298]

Because states must make every effort to construct assessments in the native languages of LEP[299] students, and because some Kaiapuni students may qualify as LEP or ELL students, the State of Hawai'i should create state assessments in the Hawaiian language. Like most things concerning

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[290] Akioka Interview, *supra* note 107.

[291] 20 U.S.C. § 7801(25)(C)(ii)(II) (2006).

[292] *Id.* § 7801(25)(D).

[293] *Hawaiian Language Immersion Program Sites 2007-08*, HAWAIIAN LANGUAGE IMMERSION PROGRAM, http://www.k12.hi.us/~kaiapuni/HLIP/HLIPsites_07_08.htm (last visited Apr. 10, 2014).

[294] *See* Wilson Email, *supra* note 233.

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *See* 20 U.S.C. § 7801(25) (2006) (the determination of whether an individual is an LEP student must be made on an individual basis).

[299] *Id.* § 6311(b)(6).

ka ʻōlelo Hawaiʻi and the Kaiapuni program, exceptions exist that prevent Kaiapuni haumāna from achieving equality.

Director of the Systems and Accounting Office Cara Tanimura explained that Kaiapuni students could possibly be classified as LEP students, but exceptions to such action exist.[300] Any student who provides a language other than English for any language field on an enrollment form will be flagged as a potential LEP student.[301] In complying with the definition of LEP,[302] DOE administers an English language proficiency assessment[303] to determine the level of English proficiency by a student. If the student's performance on the assessment indicates below proficiency, then the student is placed in the state's ELL Program.[304] While in the ELL Program, the student will receive services and participate in programs and activities that will ensure that the student can meaningfully access the "educational program in order to gain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards"[305] expected of all students.[306]

Additionally, a referral process exists as a means of referring students to the ELL Program if the languages on the enrollment form incorrectly provide all English (meaning that the student checked proficiency in English, but the student is clearly not proficient).[307] For the referral process, a student's teacher(s), staff, parent(s)/guardian(s), or the student him/herself is able to refer the student to the ELL Program for services.[308] Upon referral, the student takes the initial English language proficiency assessment to determine the student's level of proficiency, and then the student enters the ELL Program.[309] With regard to a student that indicates the Hawaiian language in any of the three language fields on the enrollment form, the student will also be flagged as a potential ELL student.[310] Similar to any other possible ELL student, a student fluent in the Hawaiian language will take the initial English proficiency assessment, and if she scores below proficiency then she will enter the ELL Program.[311]

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[300] Tanimura Email, Mar. 2, 2012, *supra* note 110.
[301] *Id.*
[302] 20 U.S.C. § 7801(25).
[303] *Id.* § 6311(b)(7).
[304] Tanimura Email, Mar. 2, 2012, *supra* note 110.
[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *See id.*

Although students that indicate the Hawaiian language on their enrollment form may enter the ELL Program, an exception exists for such students enrolled in the Kaiapuni program.[312] If a student writes the Hawaiian language on the enrollment form and enrolls in a Kaiapuni school, then the student cannot get referred to the initial assessment for ELL Program services while in the Kaiapuni program.[313] Tanimura explained that the goal of the ELL Program is to provide the student access to the primary language of instruction, which is English for non-Hawaiian Language Immersion Programs.[314] Because Hawaiian is the primary language of instruction in Kaiapuni schools and because the ELL Program assists students with English, the ELL Program would probably not be helpful in assisting students fluent in the Hawaiian language enrolled at a Kaiapuni school.[315] Tanimura further noted that once the student transfers out of Kaiapuni and indicates a language other than English on the enrollment form, such as Hawaiian, the student would then be referred for testing for English language proficiency.[316] But under the logic discussed above, how can DOE expect Kaiapuni students, who learn through the Hawaiian language, to take an assessment designed for students getting instruction through the English language, and offer programs to assist English medium students improve English, but not offer the same to Kaiapuni students?

Although LEP is a possible solution to allow Kaiapuni haumāna to take NCLB assessments in the Hawaiian language, it is a weak solution. One requirement of LEP students is that they must speak a language other than English at home.[317] Because the first language of many Kaiapuni haumāna is English and because that is the main language spoken at home, Kaiapuni haumāna may not qualify as an LEP. The only Kaiapuni students that might qualify are those enrolled at Nāwahī'okalani'ōpu'u.[318] Therefore, seeking to classify Kaiapuni haumāna as LEP students may not be the best solution to achieve equality in NCLB testing.

### *B. Native American Languages Act*

In addition to seeking equality through accommodations under NCLB, looking to other federal law such as the Native American Languages Act,

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312 *Id.*
313 *Id.*
314 *Id.*
315 *Id.*
316 *Id.*
317 *See supra* note 290 and accompanying text.
318 *See supra* notes 292-93 and accompanying text.

may also help in achieving equality not only for Kaiapuni students but also for the survival of the Hawaiian language as a whole. The Native American Languages Act of 1990 ("NALA")[319] attempted to amend a history of suppressing the cultures and languages of Native Americans[320] by explicitly stating that the United States has a duty to ensure the survival of the "unique cultures and languages" of Native Americans.[321] NALA recognizes that "the traditional languages of Native Americans are an integral part of their cultures and identities . . . ."[322] Furthermore, "acts of suppression and extermination directed against Native American languages and cultures are in conflict with the U.S. policy of self-determination for Native Americans . . . ."[323] NALA incorporates Native Hawaiians into its definition of "Native American."[324] As such, the Hawaiian language should equally be afforded the rights outlined above regarding the perpetuation of the language and culture.

Because the U.S. should "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages,"[325] including ka ʻōlelo Hawaiʻi, then the U.S. should work with Native Hawaiians to ensure the survival of the culture and language.[326] Ensuring the survival of the Hawaiian language by the U.S. should be an important duty. The USDE, however, has failed to comply with NALA.[327]

Under Title I of NCLB, the USDE infringes on the rights of the State of Hawaiʻi in terms of Hawaii's ability to determine its own official languages for use in its educational system.[328] Although the USDE infringes upon the rights of the State of Hawaiʻi, the right to determine its own official languages for use in its educations system is accorded solely to Puerto Rico.[329] Additionally, on more than one occasion, the USDE was made aware of NALA violations with regard to Native American language-based schools, including Nāwahīokalaniʻōpuʻu in a presentation to USDE lawyers during the National Native American Languages Summit on July 13, 2010

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[319] Native American Languages Act, Pub. L. 101-477, 104 Stat. 1153 (1990) (codified at 25 U.S.C. §§ 2901-2906 (2006)).

[320] William H. Wilson, *USDE Violations of NALA and the Testing Boycott at Nāwahīokalaniʻōpuʻu School*, 51 J. AM. INDIAN EDUC. 30, 30 (2012).

[321] 25 U.S.C. § 2901(1) (2006).

[322] *Id.* § 2901(3).

[323] *Id.* § 2901(8).

[324] *Id.* § 2902(1).

[325] *Id.* § 2903(1).

[326] *See Id.* § 2901(1).

[327] Wilson, *supra* note 320, at 30.

[328] *Id.*

[329] *Id.*

in Washington D.C.[330] The USDE, however, has not made any subsequent changes relating to the use of Hawaiian and other Native American languages in schools that must follow NCLB.[331] Because USDE owes a duty under NALA to preserve the use of the Native Hawaiian language and because it has failed to comply with NALA, supporters of the Hawaiian language should protest the U.S. government and require the USDE to comply with NALA or boycott NCLB assessments until there is compliance.

Although the federal government fails to comply with NALA, Kaiapuni supporters probably cannot sue the government for noncompliance. Unfortunately for Kaiapuni and NALA supporters, no private cause of action exists under NALA.[332] Analyzing the legislative history behind NALA does not weigh in favor of a private remedy.[333] In signing the bill to enact NALA into law, President Bush stated that he construes NALA as a statement of general policy and does not understand it to confer a private right of action on any individual group.[334] Additionally, NALA does not create a new set of regulations that could lend itself to enforcement through suits by private citizens.[335] Rather, NALA speaks merely in terms of general policy goals.[336] NALA consists mainly of statements indicating that "unique Native American languages and cultures have been suppressed in the past and should now be fostered."[337] Therefore, because no private cause of action exists under NALA, it may merely serve as persuasive language. But, native language supporters such as Kaiapuni supporters could lobby Congress to change NALA and insert a private cause of action.

### *C. Exempt Kaiapuni Schools from NCLB*

Although Title I of NCLB purports to support Native American language speaking students, it actually violates NALA by implementing the NCLB mandated testing.[338] NCLB exempts Spanish medium schools in the U.S. territory of Puerto Rico from the Title I mandate of testing in English, and

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[330] *Id.*

[331] *Id.*

[332] Office of Hawaiian Affairs v. Dep't of Educ., 951 F. Supp. 1484, 1493-96 (D. Haw. 1996).

[333] *Id.* at 1494.

[334] Presidential Statement on Signing the Native American Languages Act, 1990 U.S.C.C.A.N. 1849-1 (Oct. 30, 1990).

[335] Office of Hawaiian Affairs v. Dep't of Educ., 951 F. Supp. at 1493-96.

[336] *Id.*

[337] *Id.* at 1494.

[338] Wilson, *supra* note 320, at 35.

allows these schools to be officially assessed through their appropriate medium of instruction.[339] The USDE however continues to deny the same right to schools taught through the medium of Native American languages.[340] Even though the language of Native Hawaiians "shall not be restricted in any public proceeding, including publicly supported education programs"[341] pursuant to NALA, the USDE continues its noncompliance with NALA. The USDE should accord the same courtesy extended to Spanish medium schools in Puerto Rico to Hawaiian language medium schools in Hawai'i, and allow Kaiapuni students to take NCLB assessments ma ka 'ōlelo Hawai'i.

### *D. Justifying the Cost*

In addition to looking for accommodations provided under NCLB and NALA, supporters of the Hawaiian language could also argue that the cost of establishing assessments pursuant to NCLB in the Hawaiian language, as outlined in H.B. 2875, is merely relative. As discussed previously, DOE argues that the cost to establish assessments written in the Hawaiian language would cost approximately $2.8 million.[342] But, the State of Hawai'i spent millions of dollars to develop the HSA exam for all English medium schools.[343]

In 2006-2007, the first year of DOE's contract with AIR, over $12 million was spent.[344] DOE explained that the cost for the English Assessment in SY 2011-2012 cost a total of $7.1 million.[345] Tanimura explained that the first year, 2006-2007, to transition from the paper pencil assessments to the online assessment cost approximately $9.1 million, which included the development of an online test delivery, scoring and reporting system, and converting items from paper and pencil to online.[346] The cost to develop HAPA, an existing assessment written in the Hawaiian language, however, only cost $24,980.[347]

Hawaiian language supporters and H.B. 2875 supporters alike should protest the Online HSA and promote the Hawaiian language assessments

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[339] *Id.*

[340] *Id.*

[341] 25 U.S.C. § 2904 (2006).

[342] Matayoshi Testimony, *supra* note 222.

[343] Tanimura Email, Feb. 29, 2012, *supra* note 139.

[344] *Id.* Approximately 95,000 students took the assessment for a per student cost of $126.00. *Id.*

[345] Poythress, *supra* note 38.

[346] Tanimura Email, Feb. 29, 2012, *supra* note 139.

[347] *Id.*

proposed under H.B. 2875 arguing that cost should not be a factor. As discussed above, DOE spent millions of dollars to develop exams designed for English medium schools, but now claims that expending a mere $2.8 million for Kaiapuni students is too expensive.[348] The State of Hawai'i should show Kaiapuni schools and students the same courtesy afforded to English medium schools, and provide them with the tools needed to succeed in assessments pursuant to NCLB and in education as a whole. If DOE fails to provide Kaiapuni haumāna with assessments written in the Hawaiian language because of cost, then by default DOE is saying that Kaiapuni keiki are not worthy of the State's funds.

## VII. CONCLUSION

Mandates under NCLB coupled with DOE's failure to treat the Hawaiian language as the official language of the State of Hawai'i places keiki enrolled in Kaiapuni schools at a distinct disadvantage. NCLB conditions funding to states upon a state's adoption of math, reading and science standards and assessments. Although the State of Hawai'i set its own standards under NCLB, the state failed to consider how such standards affect Kaiapuni haumāna. Furthermore, the Hawaiian language is an official language of Hawai'i and because the state must promote the perpetuation of the Hawaiian language and culture, the state owes a duty to Kaiapuni haumāna and the Hawaiian language.

The Hawaiian language is an integral part of the Hawaiian culture and people. The preservation and continuation of ka 'ōlelo Hawai'i relies on Kaiapuni haumāna. If Kaiapuni haumāna continue to score poorly on NCLB assessments, which are not written in the language in which these Kaiapuni keiki learn, then Kaiapuni schools risk being sanctioned and ultimately restructured. But, H.B. 2875 offers a solution. House Bill 2875 requires DOE to create Hawaiian language assessments, which would improve Kaiapuni testing and be a positive step toward equal testing for Kaiapuni haumāna.[349] Although the DOE argues that the costs associated with H.B. 2875 are too high, DOE did not hesitate to expend millions on the development of assessments for the state's English medium schools.[350] To achieve equality, the legislature should pass H.B. 2875.

Even if the legislature fails to enact H.B. 2875, Kaiapuni and Hawaiian language supporters should explore other options to achieve equality for Kaiapuni keiki. Such options include: (1) applying for waivers to the

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[348] *See* Poythress, *supra* note 38.

[349] H.B. 2875, 26th Leg., Reg. Sess. (Haw. 2012).

[350] Poythress, *supra* note 38.

mandatory assessments pursuant to NCLB for Kaiapuni haumāna; (2) having individual students apply to be LEP students; (3) requiring the USDE to comply with NALA or amending NALA to provide a private cause of action; (4) gaining exemption for Kaiapuni schools from NCLB testing; and (5) petitioning DOE to expend funds to create equal testing for Kaiapuni haumāna with the H.B. 2875 assessment. Options do exist for Kaiapuni schools, students, and supporters, and these options need to be explored. Hawaiian language supporters must continue to push not only for equality for Kaiapuni keiki but also for the perpetuation of the Hawaiian language. E ola mau ka ʻōlelo Hawaiʻi!

# Drawing the Curtain: Examining the Colorblind Rhetoric of *Ruiz v. Robinson* and Its Implications

Ashley Fukutomi*

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## I. INTRODUCTION

Wendy Ruiz is an American citizen who understands the value of postsecondary education. While attending Miami Dade College ("Miami Dade"), Ruiz worked towards her associate's degree in biology, held a 3.7 grade point average, and hoped to later attend Florida International University to fulfill her dream of becoming a podiatrist.[1] Moreover, she

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[1] Greg Allen, *Students Born to Illegal Immigrants Sue Over Tuition*, NAT'L PUB. RADIO

had drive: during her time at Miami Dade, Ruiz worked multiple jobs to pay for her tuition.[2] She understands that furthering her education means opportunity and security later on in life.[3]

However, Ruiz's dream was put on hold when she encountered the hefty price tag of postsecondary education.[4] Classified as a non-resident, Ruiz had to pay nearly three times the tuition as a resident.[5] To attend Florida International University, where she hoped to transfer, Ruiz would have to spend nearly $18,000 in out-of-state tuition a year.[6] Curiously, although classified as a non-resident for tuition purposes, Ruiz had lived in Florida all her life: she was born in Miami in 1992, raised in Florida, and graduated from a Florida public high school in 2010.[7]

By all accounts, one would assume that Ruiz would have qualified for in-state tuition. Not according to Florida's now defunct state tuition regulations[8]—because Ruiz is the citizen-child of undocumented immigrants[9] and could not prove the legal residency status of her parents, she was forced to pay the much higher non-resident tuition rate.[10] And Ruiz is not alone: Noel Saucedo, Caroline Roa, Kassandra Romero, and Janeth America Perez are all birthright citizens and have lived in Florida all their lives, yet were classified as non-residents for tuition purposes, thereby impeding, or in some cases putting a stop to, their educational pursuits.[11]

Ruiz, Saucedo, Roa, Romero, and Perez's predicament, and undoubtedly the predicament of many others, is indicative of the ways in which the dominant group,[12] maintains itself through "the guise of ideology,

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(Oct. 31, 2011, 4:21 AM), http://www.npr.org/2011/10/31/141847033/students-born-to-illegal-immigrants-sue-over-tuition.

[2] *Id.*

[3] Kristofer Rios, *Students with Undocumented Parents Win Right to In-State Tuition in Florida*, ABC NEWS (Oct. 9, 2012, 3:04 PM), http://fusion.net/abc_univision/news/story/american-children-undocumented-parents-win-pay-state-college-17718.

[4] Allen, *supra* note 1.

[5] *Id.*

[6] *Id.*

[7] Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1323 (S.D. Fla. 2012).

[8] *See* FLA. ADMIN. CODE ANN. r. 72-1.001 (2013), *held unconstitutional by* Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012); FLA. ADMIN. CODE ANN. r. 6A-10.044 (2011), *held unconstitutional by* Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012).

[9] I use the term "undocumented immigrants" to refer to immigrants who have entered and live in the U.S. illegally. *See* BLACK'S LAW DICTIONARY 84 (9th ed. 2009) (defining an "undocumented" or "illegal alien" as one "who enters a country at the wrong time or place, eludes an examination by officials, obtains entry by fraud, or enters into a sham marriage to evade immigration laws").

[10] *Ruiz*, 892 F. Supp. 2d at 1323.

[11] *Id.* at 1323-24.

[12] I use the terms "dominant group," "dominant social group," or "hegemony" to refer to

negotiation, and education."[13] In particular, their situation demonstrates how the Florida Commissioner of Education, the Chancellor of the State University System,[14] and various members and chairs of the Florida State Board of Education ("BOE") and Florida Board of Governors ("BOG")[15] have erected specific barriers to keep a particular group of others, the citizen-children-of-undocumented-immigrants,[16] out of the ivory tower. Although such regulations claim to deter illegal immigration[17] or safeguard states' limited finances,[18] tuition policies like Florida's also work to keep qualified students, whose only "mistake" was to be born to undocumented immigrants, out of the university, thereby limiting their access to education and maintaining the status quo.

Fortunately, such discriminatory measures are being addressed. In *Ruiz v. Robinson*,[19] Ruiz, Saucedo, Roa, Romero, and Perez brought suit against Florida's Commissioner of Education, State University System Chancellor, and chairs and members of the BOE and BOG, claiming that the State's tuition regulations violated the Equal Protection Clause of the Fourteenth Amendment by wrongfully classifying them as "non-residents" based on

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those who have traditionally occupied a position of power and influence over society, generally to the detriment and subordination of minorities. *See generally* BLACK'S LAW DICTIONARY, *supra* note 9, at 791 (defining "hegemony" as having "[i]nfluence, authority, or supremacy over others").

[13] Michelle Jay, *Critical Race Theory, Multicultural Education, and the Hidden Curriculum of Hegemony*, 5 MULTICULTURAL PERSP. 3, 6 (2003).

[14] *Ruiz*, 892 F. Supp. 2d at 1324-25. Plaintiffs brought suit against Gerard Robinson and Frank T. Brogan, the Florida Commissioner of Education and the Chancellor of the State University System respectively, as well as other members and chairs of the Board of Education ("BOE") and Board of Governors ("BOG"). *Id.* As the Commissioner of Education, Robinson is responsible for enforcing compliance with the state's educational system. *Id.* at 1324; *see also* FLA. STAT. ANN. § 1001.10(1) (2013). While the Commissioner's responsibility does not extend to the State University System, it does include all of the State's community colleges. *Ruiz*, 892 F. Supp. 2d at 1324. He is also a member of the BOG. *Id.* The Chancellor, on the other hand, is primarily tasked with assisting the BOG in the execution of its responsibilities. *Id.* at 1325; *see also* FLA. STAT. ANN. § 20.155(3) (2013).

[15] The Florida BOG is a state board responsible for Florida's public universities as well as the operation, regulation, and management of the State University System. *See* § 20.155(4); *Ruiz*, 892 F. Supp. 2d at 1325.

[16] I use this term to differentiate between the birthright citizen children of undocumented immigrants and birthright citizens whose immigrant parents legally reside in the U.S.

[17] Michelle J. Seo, *Uncertainty of Access: U.S. Citizen Children of Undocumented Immigrant Parents and In-State Tuition for Higher Education*, 44 COLUM. J.L. & SOC. PROBS. 311, 311-12 (2011).

[18] *Ruiz*, 892 F. Supp. 2d at 1331-32.

[19] 892 F. Supp. 2d 1321 (S.D. Fla. 2012).

their parents' immigration status.[20] The district court held that the relationship between the students' residency status, their parents' immigration status, and the State's interests were too tenuous to justify the State's tuition regulations and that the regulations violated the Equal Protection Clause.[21]

While it is important to applaud the *Ruiz* court's holding, we cannot stop there. Although legal policies and court holdings attempt to engage in a "colorblind" rhetoric of neutrality and objectivity, this rhetoric "ignores the fact that inequity, inopportunity, and oppression are historical artifacts that will not be easily remedied . . . ."[22] Therefore, rather than simply celebrate *Ruiz* as a civil rights victory, it is important to analyze the ideological consequences the *Ruiz* court's rhetoric may have on this particular minority group's relationship with society. In particular, as a site of cultural performance, how does the *Ruiz* court work against or reify the dominant social order in concluding that Florida's tuition regulations violate the Fourteenth Amendment? This paper finds that while the *Ruiz* court ultimately made the correct determination that Florida's residency tuition regulations discriminated against plaintiffs based on their parents' immigration status, it did so with a colorblind rhetoric that effectively stripped them of both race and history, subsuming them within the dominant narrative and category of "citizen." As a result, the district court's holding leaves unaddressed the hegemonic structures and functions that culminated in Florida's tuition regulations in the first place. To engage with these issues, this paper will rhetorically analyze *Ruiz* to demonstrate how the legal system's use of a colorblind rhetoric actually maintains the social structures that support and perpetuate minority subordination. Specifically, the rhetorical analysis will reveal how the court's rhetoric further silences the voices of plaintiffs and other minority peoples in a way that maintains the dominant status quo.

Part II contextualizes *Ruiz* by briefly discussing the concept of birthright citizenship and examining the statistics of citizen-children-of-undocumented-immigrants to show that the issues the *Ruiz* court faced have the potential to affect a large number of Americans. Additionally, Part II provides an overview of residency tuition policies at the federal and state level. Virginia's residency tuition policy will be used as an example of how other states have used statutory residency guidelines to deny citizen-children-of-undocumented-immigrants the benefit of in-state tuition. Part

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[20] *Id.* at 1326.

[21] *Id.* at 1331-33.

[22] Jessica T. DeCuir & Adrienne D. Dixson, *"So When It Comes Out, They Aren't That Surprised That It Is There": Using Critical Race Theory as a Tool of Analysis of Race and Racism in Education*, 33 EDUC. RESEARCHER 26, 29 (2004).

III provides a legal analysis of *Ruiz*'s holding, looking specifically at the issue of plaintiffs' birthright citizenship, Florida's residency tuition regulations under federal residency guidelines, and how Florida's tuition regulations violated the Equal Protection Clause of the Fourteenth Amendment. In Part IV, this paper conducts a rhetorical analysis of *Ruiz* through the lens of critical race theory and cultural performance theory to examine the broader social message of the *Ruiz* court and how its colorblind rhetoric "fails to take into consideration the persistence and permanence of racism and the construction of people of color as Other."[23] Lastly, Part V considers how courts, lawyers, and scholars can take *Ruiz* as a starting point to question the use of a colorblind rhetoric when engaging with the issues of discrimination and race.

## II. DRAWING THE CURTAIN: CONTEXTUALIZING CITIZEN-CHILDREN-OF-UNDOCUMENTED-IMMIGRANTS WITHIN THE GREATER SOCIAL NARRATIVE

Discrimination is no stranger to society or education. In fact, it has barely been sixty years since *Brown v. Board of Education*[24] rejected the use of the "separate but equal" doctrine and declared educational facilities that segregated on the basis of race unconstitutional.[25] However, as present circumstances illustrate, the issues of prejudice in the educational system were not cured with *Brown*.[26] On the contrary, *Ruiz* is just one example of how the dominant social group works to sustain its authority under the guise of legal jargon and principles. As will be discussed, *Ruiz* shows how discrimination is effectuated through statutory and policy interpretations that work to deny U.S. citizen-children-of-undocumented-immigrants from receiving the same tuition benefits as their U.S.-citizen-children-of-U.S-citizens counterparts.

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[23] *Id.*

[24] 347 U.S. 483 (1954).

[25] *Id.* at 495.

[26] *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 710-11 (2007) (petitioners filed suit against Respondents claiming that the district's student assignment plans, which used racial classifications to determine where certain children may go to school, violated the Equal Protection Clause of the Fourteenth Amendment); Plyler v. Doe, 457 U.S. 202, 205-06 (1982) (undocumented immigrant children sought injunctive and declaratory relief against the defendants due to their exclusion from the benefit of public education); United States v. W. Carroll Parish Sch. Dist., 477 F. Supp. 2d 759, 760 (W.D. La. 2007) (the U.S. government brought suit against the district, claiming that it had not eliminated "the vestiges of discrimination under its prior dual school system to the extent practicable").

### A. Enter Stage Left: U.S. Citizen-Children-of-Undocumented-Immigrants in the United States

In determining the validity of Florida's residency tuition policies, *Ruiz*'s holding revolved around plaintiffs' citizenship status.[27] While the *Ruiz* court does not explicitly go into the circumstances of plaintiffs' citizenship, it does recognize the nature of their citizenship: citizenship by "virtue of birthright."[28] As birthright citizens, plaintiffs, despite their parents' illegal immigration status, are considered U.S. citizens because they were born on U.S. soil.[29]

The Citizenship Clause of the Fourteenth Amendment states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[30] Traditional interpretation of the Citizenship Clause follows the English common law notion of *jus soli*, or "citizenship by right of the soil, which means that citizenship follows birth within a national territory."[31] In other words, the clause is interpreted to mean that any child born on U.S. soil, irrespective of the immigration status of her parents, is automatically conferred U.S. citizenship.[32] Accordingly, birthright citizenship is not only applied to the children of legal immigrants, but also to the children of undocumented immigrants who are in the U.S. illegally.[33]

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[27] Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1329-30 (S.D. Fla. 2012).

[28] *Id.* at 1323-24. In a roundabout manner, the *Ruiz* court exclusively refers to plaintiffs as "citizen[s] by virtue of birthright" and only provides a brief review of birthright citizenship in a footnote. *Id.* at 1323 & n.2.

[29] *See* U.S. CONST. amend. XIV, § 1, cl. 2; *see also* Nicole Newman, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 442 (2008) (articulating the traditional *jus soli* interpretation of the citizenship clause).

Although the concept of birthright citizenship is highly controversial in regards to the kinds of, if any, state benefits should be conferred onto birthright citizens, this paper will not be exploring those issues. This paper will, however, investigate how birthrights citizens are "othered" and subjugated by the dominant American community, construed as outsiders based on their parents' national origins, and how these attitudes are implicitly expressed in *Ruiz*.

[30] U.S. CONST. amend. XIV, § 1, cl. 2.

[31] Newman, *supra* note 29, at 442.

[32] *See* Hiroshi Motomura, *Making Legal: The Dream Act, Birthright Citizenship, and Broad-Scale Legalization*, 16 LEWIS & CLARK L. REV. 1127, 1133 (2012); Mariana E. Ormonde, *Debunking the Myth of the "Anchor Baby": Why Proposed Legislation Limiting Birthright Citizenship Is Not a Means of Controlling Unauthorized Immigration*, 17 ROGER WILLIAMS U. L. REV. 861, 865-66 (2012).

[33] Motomura, *supra* note 32, at 1133.

Finding their roots in the arguments surrounding illegal immigration,[34] many contest the granting of citizenship to the children of undocumented immigrants[35] and would like to see the Citizenship Clause amended and made more stringent.[36] One of the major arguments against birthright citizenship is that it provides the undocumented immigrant families of citizen-children with public benefits for which they would not otherwise qualify.[37] Additionally, opponents of birthright citizenship argue that such birthright citizens are inevitably used as "anchor babies."[38] This term is used to describe those children intentionally born in the U.S. by undocumented immigrant parents so that they may use their birthright citizen child to avoid deportation[39] and, eventually, secure their own citizenship.[40]

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[34] *See* Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 36 (1988) (examining "the validity of . . . sanctions against United States citizen children [of undocumented immigrants] for the purpose of discouraging illegal immigration"); Ormonde, *supra* note 32, at 861-62, 876-86 (arguing that the term "anchor baby," which is "freely used to rile up anti-immigration sentiment," has no factual basis); Patrick J. Charles, *Decoding the Fourteenth Amendment's Citizenship Clause: Unlawful Immigrants, Allegiance, Personal Subjection, and the Law*, 51 WASHBURN L. J. 211, 212 (2012) (asserting that "[o]ne of the most controversial issues in American constitutional law is that of birthright citizenship and its interrelation with unlawful immigrants").

[35] *See* Newman, *supra* note 29, at 471-73 (addressing some of the arguments made by opponents of birthright citizenship); Ormonde, *supra* note 32, at 874-75 (noting legislative attempts to limit or reinterpret the Citizenship Clause to restrict the conferral of *jus soli* citizenship); Paul C. Barton, *Birthright Citizenship Contested on Capitol Hill*, USA TODAY (Mar. 30, 2013, 10:00 AM), http://www.usatoday.com/story/news/politics/2013/03/30/birthright-citizenship-constitution/2036095/ (detailing how certain GOP House members are legislatively seeking to deny birthright citizenship to the U.S.-born children of undocumented immigrants).

[36] *See* Margaret D. Stock, *Is Birthright Citizenship Good for America?*, 32 CATO J. 139, 143-44 (2012). Stock explains that proponents of changing the current Citizenship Clause see a multiplicity of benefits:

> Proponents of a change . . . argue that America will benefit by abandoning its long-standing birthright citizenship rule because a rule allowing citizenship only through one's parents or by naturalization will make U.S. citizenship more valuable, deter unauthorized migration, bring the United States into line with the most common international law rule, and reduce chain migration (which they view unfavorably).

*Id.* Additionally, she notes that such proponents see amending the Citizenship Clause "as a way to punish unauthorized immigrants or certain U.S.-born children of whom they do not approve." *Id.* at 144; *supra* note 35 and accompanying text.

[37] *See* Ormonde, *supra* note 32, at 861-62; Jon Feere, *Birthright Citizenship in the United States: A Global Comparison*, CENTER FOR IMMIGR. STUD. (Aug. 2010), www.cis.org/birthright-citizenship (last visited Feb. 18, 2013).

[38] *See* Ormonde, *supra* note 32, at 861-62; Feere, *supra* note 37.

[39] The term is used to connote the idea that birthright-citizen-children effectively

Although *Ruiz* is not the first case to develop at the intersection of illegal immigration and education,[41] it demonstrates how concerns over birthright citizens and public resources have bled into the postsecondary education and educational access context.[42] Various statistics show that *Ruiz* and similar cases could have a significant impact on a large number of U.S. citizens: a study by the Pew Hispanic Center shows that in 2008 there were 11.9 million undocumented immigrants in the U.S. and that 73% of these undocumented immigrants' children were U.S. citizens.[43] Additionally, the Center for Immigration Studies states that "[b]etween 300,000 and 400,000 children are born to illegal immigrants in the United States every year. Put another way, as many as *one out of 10 births in the United States is to an illegal immigrant mother*."[44] Not surprisingly, the Center for Immigration Studies notes that the population of citizen-children-of-undocumented-immigrants is rapidly expanding.[45] In 2003, the citizen-children-of-undocumented-immigrants population was around 2.3 million and increased to 4 million in 2008.[46]

What the statistics from the Pew Hispanic Center and Center for Immigration studies show is a very disconcerting future: a large number of U.S. citizens are in real danger of being denied affordable access to postsecondary education by policies that, practically, are meant to deter illegal immigration,[47] and, ideologically, work to maintain the hegemonic status quo. While some may argue that the danger was resolved with *Ruiz*'s holding that Florida's tuition policies violate the Equal Protection Clause,[48] the story does not end there.

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"anchor" their undocumented immigrant parents to the U.S. *See* Ormonde, *supra* note 32, at 861-62.

[40] Newman, *supra* note 29, at 440-41.

[41] *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982); Brown v. Board of Education, 347 U.S. 483 (1954).

[42] In particular, defendants in *Ruiz* argued that providing residency tuition to plaintiffs would drain the State's "limited financial means," and thereby harm the quality of Florida's public postsecondary institutions. Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1331 (2012).

[43] Jeffrey Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States,* PEW HISP. CENTER i (2009), http://pewhispanic.org/files/reports/107.pdf.

[44] Feere, *supra* note 37 (emphasis added).

[45] *Id.*

[46] *Id.*

[47] Seo, *supra* note 17, at 311-12.

[48] *Id.* at 342 n.163.

### *B. Enter Stage Right: Residency Tuition Policies*

At the federal level, two immigration statutes limit aliens' eligibility for state and local benefits, thereby impacting states' residency tuition policies.[49] First, the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA")[50] establishes the statutory model "for determining whether aliens are eligible for local, state, or federal public benefits."[51] Under this scheme, aliens eligible for local, state, and federal benefits are divided into three categories, all of which do not include undocumented immigrants who are in the U.S. illegally.[52] Thus, undocumented immigrants are ineligible for state and local benefits, including any "postsecondary education [benefits] . . . for which payments or assistance are provided to an individual . . . by an agency of a State or local government or by appropriated funds of a State . . . ."[53]

Second, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")[54] states the parameters through which an undocumented alien may obtain postsecondary education benefits.[55] Specifically, IIRIRA maintains that undocumented immigrants are ineligible for a state's postsecondary educational benefits unless non-resident citizens are granted the same benefits:[56]

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit *unless a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident.*[57]

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[49] *Id.* at 323.

[50] Professional Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 2, 5, 7, 8, 10, 11, 13, 15, 20, 21, 25, 26, 28, 29, 31, 42 U.S.C.); 8 U.S.C. §§ 611, 1621 (2012).

[51] Seo, *supra* note 17, at 324.

[52] 8 U.S.C. § 1621(a); *see also* Seo, *supra* note 17, at 324 n.76 (summarizing 8 U.S.C. § 1641 (b) (2010): "While the definition of 'qualified alien' covers those that have been lawfully admitted, granted asylum, paroled into the United States, had their deportation withheld, granted conditional entry, and, under specific circumstances, battered, it does not include aliens unlawfully in the United States.").

[53] 8 U.S.C. § 1621(c)(1)(B); *see* Seo, *supra* note 17, at 324.

[54] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 10, 18, 22, 28, 29, 41-43, and 47 U.S.C.; 8 U.S.C. § 1623 (2012)).

[55] 8 U.S.C. § 1623(a); *see* Seo, *supra* note 17, at 324.

[56] 8 U.S.C. § 1623(a); *see* Seo, *supra* note 17, at 324.

[57] 8 U.S.C. §1623(a) (emphasis added).

IIRIRA mandates that if a state provides in-state tuition to undocumented immigrants, who may be domiciled in the state, then that state will be forced to abolish the category of "non-resident" for tuition purposes.[58] Under this statutory scheme, a state's ability to provide postsecondary educational benefits is circumscribed.[59] While birthright citizens are able to avoid this particular regulation due to their citizenship status, as will be discussed and as noted by others,[60] "states still retain the power to set residency qualifications for in-state tuition and to determine who qualifies as an in-state resident."[61]

For many states, "dependent students are classified based on the domicile or residency of the parent."[62] Many tuition policies maintain that residency is determined by a number of factors and no particular factor is dispositive of domicile or a lack thereof.[63] Nonetheless, some states and university systems have interpreted their residency statutes as creating a bar to citizen-children-of-undocumented-immigrants' ability to establish domicile because of their parents' undocumented immigration status.[64]

For example, in 2008, the Virginia Attorney General ("AG") was asked whether a dependent citizen-child of unlawfully present immigrants but who had been born in Virginia and had lived in the state all his life would be able to establish domicile in Virginia and be eligible for in-state tuition.[65] The AG determined that the parents, who are not lawfully present in the U.S., could not be considered domiciled in Virginia.[66] This determination begged the question of whether the dependent student, and all similarly-situated students, would be able to rebut the presumption of non-domicile as based on his parents' status and be eligible for in-state tuition.[67] The AG, relying on Virginia Code section 23-7.4, "[e]ligibility for in-state tuition charges,"[68] maintained that "students are often said to 'stand in the

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[58] *See id.*; *see also* Seo, *supra* note 17, at 324-25.

[59] *See* Seo, *supra* note 17, at 324-25.

[60] *See id.* at 325-331.

[61] *Id.* at 325 (citing 15A AM. JUR. 2D *Colleges & Univ.* § 23 (2010)).

[62] *Id.* For a list of states that classify dependent students by their parents' residency or domiciles, see *id.* at 325 n.82.

[63] *See id.* at 326-27. For a sampling of states that use a number of factors to determine residency requirements, see *id.* at 327 n.84.

[64] *Id.* at 326-328; *see also* Memorandum from Ronald C. Forehand, Senior Assistant Attorney Gen., Commonwealth of Va., to Lee Andes, State Council of Higher Educ. for Va. (Mar. 6, 2008), [hereinafter Virginia Memorandum] *available at* http://acluva.org/wp-content/uploads/2009/12/20080306 AGmemoInStateTuition.pdf.

[65] *See* Virginia Memorandum, *supra* note 64; *see also* Seo, *supra* note 17, at 343.

[66] *See* Virginia Memorandum, *supra* note 64; *see also* Seo, *supra* note 17, at 343-44.

[67] *See* Virginia Memorandum, *supra* note 64; *see also* Seo, *supra* note 17, at 343-44.

[68] VA. CODE ANN. § 23-7.4 (West 2012).

shoes of their parents' with respect to domicile," which would presume that the citizen-child lacks domicile in the state.[69] The AG went on to explain that while the citizen-child could rebut such a presumption through clear and convincing evidence, "[o]vercoming the presumption is a difficult burden to meet, and instances of overcoming it will be rare."[70] The AG's memorandum thus demonstrates the kind of disparate impact that citizen-children-of-undocumented-immigrants may experience.[71] Indeed, "[a]ll else being equal, citizen-children of undocumented parents could be treated differently than their citizen peers[] under the policy interpretation provided by the Virginia Memorandum."[72]

However, efforts were made to combat Virginia's potentially discriminatory policy. In response to the AG's letter, the American Civil Liberties Union of Virginia ("ACLU of Virginia") issued a letter to the presidents of all public universities in Virginia.[73] The letter asserted that the AG's explication of citizen-children-of-undocumented-immigrants' ability to establish domicile for the purposes of in-state tuition "is an incorrect statement of Virginia law, and, moreover, that it is unconstitutional to deny a student in-state tuition based solely on the immigration status of his parents."[74] ACLU of Virginia argued that such conduct would violate the Equal Protection Clause of the Fourteenth Amendment and that the United States Supreme Court itself "has repeatedly recognized that individuals may not be discriminated against *on the basis of who their parents are*."[75] ACLU of Virginia concluded by imploring Virginia's public universities to "treat dependent U.S. citizen children of undocumented immigrants precisely the same way that [they] treat their peers"[76] and added that they are "prepared to take legal action on behalf of

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[69] Virginia Memorandum, *supra* note 64; *see* Seo, *supra* note 17, at 342.

[70] Virginia Memorandum, *supra* note 64.

[71] Seo, *supra* note 17, at 344-45. Seo notes that while the Virginia AG's memorandum explains that *any* dependent student seeking in-state tuition may offer evidence of Virginia domicile, the AG's statutory interpretation places a disparate impact upon citizen-children-of-undocumented-immigrants because these students "face a vastly different eligibility requirement for in-state tuition than that faced by similarly situated citizen children of U.S. citizens." *Id.* Particularly, establishing domicile for a child with an out-of-state parent would be very different from establishing domicile for a child whose parents are living within the state, but are undocumented immigrants. *Id.* at 345.

[72] *Id.* at 345.

[73] *See* Letter from Rebecca K. Glenberg, Legal Director, ACLU of Virginia, to the Presidents of All Public Universities in Virginia (Mar, 25, 2008) [hereinafter ACLU Letter] *available at* http://www.acluva.org/wp-content/uploads/2009/12/20080325ACLULetterto CollegesInStateTuition.pdf..

[74] *Id.*

[75] *Id.* (emphasis added).

[76] *Id.*

any student who is denied in-state tuition based on the legal status of his parents."[77]

ACLU of Virginia's response, much like the outcome of *Ruiz*, is inspiring, as it attempts to combat the racism and prejudice inherent in the hot-topic debate of immigration as well as the policies and legal interpretations used to keep "others" from entering the university.[78] While such acts of resistance should be applauded, they also demonstrate the reality that such prejudice exists and that the legal system is being used to erect barriers to the gates of the ivory tower. Simply arguing that such policies deny citizen-children-of-undocumented-immigrants equal protection of the law works to "insist only on treatment that is the same across the board, [and] can thus remedy only the most blatant forms of discrimination . . . ."[79] Understanding that we only scratch the surface when we use legal principles to address the inherently subjective nature of racism and prejudice, this paper will investigate the *Ruiz* court's colorblind rhetoric and reveal how it strips plaintiffs of their history and culture, subsumes them within the dominant narrative, and leaves untouched the systems of oppression that culminated in Florida's discriminatory tuition policies.

## III. SETTING THE STAGE: A LEGAL ANALYSIS OF *RUIZ V. ROBINSON*

To understand how the *Ruiz* court's legal analysis belies a colorblind rhetoric that marginalizes both plaintiffs and other citizen-children-of-undocumented-immigrants, one needs to understand the basic facts of the case and the legal reasoning that supports the court's holding. In examining and investigating the context of *Ruiz*, this paper hopes to give voice to plaintiffs' experiences as birthright citizens and carve out a space for their stories. Additionally, a rhetorical analysis of the facts and legal reasoning of *Ruiz* will unmask the legal system's objective façade and demonstrate how its colorblindness, while establishing equality, does little to combat the social structures of subordination and discrimination.

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[77] *Id.*

[78] *See ACLU Says Schools Must Provide In-State Tuition to U.S.-Born Virginia Residents Even If Parents Are Undocumented*, AM. CIV. LIBERTIES UNION OF VA. (Mar. 25, 2008, 9:57 AM), https://acluva.org/957/aclu-says-schools-must-provide-in-state-tuition-to-u-s-born-virginia-residents-even-if-parents-are-undocumented/ [hereinafter "ACLU VA Article"]. In the article, ACLU of Virginia Executive Director Kent Willis is quoted as asserting, "[i]t appears that the AG is allowing his bias against immigrants to taint his thinking . . . ." *Id.*

[79] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 8 (2d ed. 2012).

### *A. Lights: The Facts of* Ruiz v. Robinson

As explained, *Ruiz* was initiated by a group of dependent U.S. citizen-children-of-undocumented-immigrants who sought to challenge the residency tuition regulations established by the Florida State BOE and Florida BOG.[80] Plaintiffs Ruiz, Saucedo, Roa, Romero, and Perez are all U.S. citizens by birthright and are Florida residents who had been classified as "non-residents" for tuition purposes.[81] Regarding tuition, Florida law determines the classifications of "resident" and "nonresident."[82] To establish residency for tuition purposes, Florida Statute section 1009.21, "Determination of resident status for tuition purposes,"[83] states:

> A person or, if that person is a dependent child, his or her parent or parents must have established legal residence in this state [Florida] and must have maintained legal residence in this state for at least 12 consecutive months immediately prior to his or her initial enrollment in an institution of higher education.[84]

A "legal resident" is one who has "maintained his or her residence . . . for the preceding year, has purchased a home which is occupied by him or her as his or her residence, or has established a domicile in this state . . . ."[85] For student purposes, a "dependent child" is defined as "any person, whether or not living with his or her parent, who is eligible to be claimed by his or her parent as a dependent under the federal income tax code."[86] For a dependent child to be eligible for residency tuition, his or her parents must have established legal residency at least twelve months prior to the dependent child's enrollment in a postsecondary institution.[87]

Under section 1009.21(13), the BOE and the BOG are authorized to adopt rules to carry out the purpose of the statute.[88] As such, the two boards created additional criteria to determine residency for tuition purposes and with regards to the dependent children of non-citizen

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[80] *See* Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1322-26 (S.D. Fla. 2012).

[81] *Id.* at 1323-26.

[82] FLA. STAT. ANN. § 1009.21 (West, Westlaw through 2013 Reg. Sess.); *Ruiz*, 892 F. Supp. 2d at 1325.

[83] FLA. STAT. ANN. § 1009.21.

[84] *Id.* at § 1009.21(2)(a)(1).

[85] *Id.* at § 1009.21(a)(1)(d) (referring to FLA. STAT. ANN. § 222.17 (West, Westlaw through 2013 Reg. Sess.), "Manifesting and evidencing domicile in Florida").

[86] *Id.* at § 1009.21(1)(a).

[87] *See id.* at § 1009.21(2)(a)(1).

[88] *See id.* at § 1009.21(13); *see also* Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1326 (S.D. Fla. 2012).

parents.[89] For citizen-children-of-undocumented-immigrants, of particular relevance among the additional criteria was the requirement that "[t]he student, and parent if the student is a dependent, must present evidence of legal presence in the United States."[90]

Due to Florida's residency tuition regulations and the requirement that dependent children need to prove the legal residency of their parents, plaintiffs, who are all children of undocumented immigrants, were ineligible for in-state tuition.[91] However, plaintiffs alleged that "[t]hey ha[d] been wrongfully classified as 'non-residents' of the State of Florida, and, inter alia, charged higher tuition rates than individuals who qualify as residents[]"[92] despite their U.S. citizenship and domicile in Florida.[93] As a result of defendants' residency tuition regulations, plaintiffs claimed that they were "denied the preferential treatment that residents receive throughout the admissions process at several of these institutions."[94] Their wrongful classification and consequent denial of in-state tuition, they argued, was "the sole result of their inability to establish their parents' lawful immigration status and [thereby] claim[ed] that this classification violate[d] their rights under the Equal Protection Clause of the Fourteenth Amendment . . . ."[95] In light of plaintiffs' claims, the court conducted an equal protection analysis,[96] which will be discussed in the next section, and granted plaintiffs' motion for summary judgment,[97] finding that "[d]efendants' regulations must fail because they deny to each of these United States citizens the equal protection of the laws as guaranteed under the Fourteenth Amendment . . . ."[98]

### *B. Camera: The* Ruiz *Court's Legal Analysis of Plaintiffs' Equal Protection Claims*

Although *Ruiz*'s holding focused on plaintiffs' wrongful residency classification and the violation of their equal protection rights, the

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[89] *See Ruiz*, 892 F. Supp. 2d at 1326 (citing FLA. ADMIN. CODE r. 72-1.001 (2013), *held unconstitutional by* Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012), FLA. ADMIN. CODE r. 6A-10.044 (2011), *held unconstitutional by* Ruiz v. Robinson, 892 F. Supp. 2d 1321 (S.D. Fla. 2012)).

[90] FLA. ADMIN. CODE r. 72-1.001(5)(a)(3); *see id.* at r. 6A-10.044(1)(a), (4).

[91] *See Ruiz*, 892 F. Supp. 2d at 1322-24.

[92] *Id.* at 1326.

[93] *Id.* at 1323-24.

[94] *Id.* at 1323.

[95] *Id.* at 1326.

[96] *See id.* at 1326-33.

[97] *See id.* at 1333.

[98] *Id.* at 1323.

foundation of plaintiffs' claim revolved around their U.S. citizenship.[99] As the U.S.-born children of undocumented immigrants, plaintiffs are, as the district court put it, "U.S. citizen[s] by virtue of [their] birthright,"[100] or birthright citizens. Although the issue of birthright citizenship is highly charged,[101] the court takes the students' citizenship as a given, thereby laying the foundation for the rest of its equal protection analysis.

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of its laws,"[102] which "reflects a fundamental tenant [sic] that 'all persons similarly circumstanced shall be treated alike.'"[103] Although initially narrow in its inception, the *Ruiz* court explicated that "[t]he Supreme Court has since expanded the reach of the Equal Protection Clause to encompass numerous types of legislative classifications in order to preserve substantive values of equality and liberty."[104] However, because certain "legislative classifications threaten the substantive values of equality and liberty more so than others[,]"[105] the *Ruiz* court was required to determine the level of scrutiny to be applied to plaintiffs' equal protection claim.[106]

In deciding the level of scrutiny, the *Ruiz* court noted that "[p]ublic education is 'not a "right" granted to individuals by the Constitution.'"[107] Although education may not be considered a constitutional right, the *Ruiz* court did state the importance of education.[108] In particular, it cited the U.S. Supreme Court's decision in *Plyler v. Doe*,[109] in which Texas' denial of primary education to undocumented immigrant children was found not to advance a substantial state interest,[110] to assert the fundamental nature of education in maintaining society and providing for an "economically productive" life.[111] The *Ruiz* court also emphasized the increased significance of postsecondary education in obtaining employment.[112]

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[99] *See id.*

[100] *Id.* at 1323-24.

[101] *See supra* Part II.A.

[102] U.S. CONST. amend. XIV, § 1.

[103] *Ruiz*, 892 F. Supp. 2d at 1326 (quoting Plyler v. Doe, 457 U.S. 202, 217 (1982)).

[104] *Id.* at 1327 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1465 (2d ed. 1988)).

[105] *Id.* at 1327.

[106] *Id.* at 1328-31.

[107] *Id.* at 1328 (quoting *Plyler*, 457 U.S. at 221).

[108] *See id.* at 1328-29.

[109] 457 U.S. 202 (1982).

[110] *See id.* at 230.

[111] *Ruiz*, 892 F. Supp. 2d at 1328 (quoting *Plyler*, 457 U.S. at 221).

[112] *Id.* at 1329. The *Ruiz* court specifically looked at the U.S. Department of Labor's

Despite finding that Florida's residency tuition regulations presented obstacles to plaintiffs' educational advancement, the court stated that the regulations did not warrant heightened scrutiny per se because "access to in-state tuition benefits have long been held constitutional so long as they do not unreasonably burden other rights."[113] Thus, the court considered plaintiffs' birthright citizen status and the importance the regulations placed on the immigration status of dependent students' parents.[114] In so doing, the *Ruiz* court determined that the regulations sought to "punish the citizen children [plaintiffs] for the acts of their parents,"[115] thereby warranting heightened scrutiny.[116]

While defendants claimed that heightened scrutiny was unwarranted because the regulations were an attempt to comply with PRWORA,[117] the *Ruiz* court stated that defendants misapplied the act by incorrectly classifying plaintiffs by their parents' immigration status.[118] The court found that because plaintiffs are not aliens, but U.S. citizens by birthright, PRWORA and its denial of public benefits to illegal immigrants did not apply to them.[119] Thus, heightened scrutiny was warranted because defendants' regulations classified plaintiffs as second-class U.S. citizens by allowing them to enjoy only some of the benefits provided for citizens.[120]

In applying heightened scrutiny, the *Ruiz* court found that the State's interest in denying in-state tuition to plaintiffs was far too tenuous to justify

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Bureau of Labor 2011 Statistics and found that the unemployment rate of those twenty-five and older who had obtained only a high school diploma was nearly double (9.4%) that of those who had had obtained a bachelor's degree (4.9%). *Id.* (citing U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., *Education Pays,* TCI C. OF TECH. (Mar. 23, 2012), *available at* http://www.tcicollege.edu/education-pays).

[113] *Id.*at 1329.

[114] *See id.* at 1329-30.

[115] *Id.* at 1330.

[116] *See id.*

[117] *See id.* at 1330-31.

[118] *See id.* at 1330. The court cites 8 U.S.C § 1623, which states:

> Notwithstanding any other provisions of law, *an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State* (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

8 U.S.C. § 1623(a) (2006) (emphasis added).

[119] *See Ruiz,* 892 F. Supp. 2d at 1332.

[120] *See id.* at 1330-31. The court further argued that defendants could not attach plaintiffs' parents' alienage to plaintiffs because postsecondary education benefits attach to the student, who must do the work necessary for a degree and is ultimately responsible for any tuition and obligations. *See id.* at 1331.

its tuition regulations.[121] In fact, defendants gave only one argument for the regulation, asserting that the State's limited finances could not shoulder the extension of its in-state tuition benefits.[122] Defendants claimed that if they provided in-state tuition benefits to plaintiffs, they would be required to do so for all U.S. citizens, which would result in a roughly $200,000,000 loss in tuition revenue.[123] Finding that defendants' justification was premised on their misinterpretation of PRWORA and that the act was not even implicated since plaintiffs were not "aliens," the court concluded that providing in-state tuition to plaintiffs would not disregard the distinction made between residents and non-residents for tuition purposes.[124]

Consequently, the district court concluded that plaintiffs had been categorized within a "second-tier of U.S. citizenship"[125] and that "[t]he relationship between Plaintiffs' residency, their parents' immigration status, and the State's interest in providing quality public post-secondary education [was] far too tenuous to justify the State's regulations and withstand heightened scrutiny."[126] However, as will be demonstrated below, despite *Ruiz*'s holding and the equality it seeks to establish, the *Ruiz* court's

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[121] *See id.* at 1331-33.

[122] *See id.* at 1331.

[123] *See id.*

[124] *See id.* at 1332. The court articulated that defendants' interpretation of PRWORA was premised on the belief that if Florida provided in-state tuition benefits to U.S. citizen-children-of-undocumented-immigrants, then Florida's public postsecondary education institutions would have to offer the same in-state tuition rates to all U.S. citizens. *See id.* at 1331-32. The court asserted, however, that this is "simply incorrect" because PRWORA did not apply to plaintiffs. *Id.* at 1332.

Although not brought up by defendants, whose sole justification was the financial strains and loss of revenue that repealing its residency tuition regulation and providing plaintiffs with in-state tuition would incur, the district court also investigated two other considerations for upholding the state's regulations and found both lacking. *See id.* First, the court found that the traditional state interest of redistributing funds collected through the state income tax had no support in the current case. *Id.* Florida's public education system is not funded through a state income tax, so the benefit of in-state tuition cannot be said to come from such taxes. *Id.* Additionally, since plaintiffs and their parents, like other in-state residents, pay transactional taxes in Florida, the district court concluded that "the State's classification bears no relationship to any State interest in distributing funds to its own citizens from whom a significant portion of the funds originate." *Id.* (internal citation omitted). Second, the argument that in-state tuition benefits should only be for those that demonstrate an intent to stay in the state and will contribute to the state's economy after graduation from a postsecondary institution was found to be without merit. *Id.* at 1332. The court maintained that any assertion that the citizen-children-of-undocumented-immigrants were less likely to remain in the state and contribute to the economy is mere abstraction. *Id.* at 1332-33.

[125] *Id.* at 1331.

[126] *Id.* at 1333.

colorblind rhetoric elides the socio-cultural history and race of plaintiffs and erases them from the dominant social narrative. And, because the court, as a site of cultural performance,[127] helps to structure society's norms and attitudes about issues, the district court's rhetoric implicitly reifies the binaries between the dominant community and minorities, leaving unaddressed the structural mechanisms that led to Florida's discriminatory tuition regulations.[128]

## IV. ACTION: A RHETORICAL ANALYSIS OF *RUIZ V. ROBINSON*

Before a rhetorical analysis of *Ruiz v. Robinson* can begin, it is necessary to explain that this paper does not disagree with the decision reached by the district court. In fact, given the judicial constraints, parameters of the law, and what was at stake for plaintiffs, this paper agrees with the *Ruiz* court's holding that the challenged regulations were in violation of the Equal Protection Clause.[129] Undoubtedly, this is a step toward the destabilization of a hegemonic social order, for, at the very least, these gate-keeping regulations have been done away with, which will hopefully allow more minorities to enjoy the benefits of postsecondary education.

While we must recognize the positive impacts *Ruiz* has and will have on citizen-children-of-undocumented-immigrants, we cannot let sleeping dogs lie. As important as it is to ensure that plaintiffs and other similarly situated people receive equal protection, it is just as important to continually examine the language with which the legal system discusses such people and their issues. In discussing the extent of language's power and influence, languages and linguistics scholar Deborah Cao states:

> Whether one admits or not, or whether one knows or not, language entails power. Linguistic power often works in a subtle and invisible way because language is so natural and innate to all of us that it often works its power and influence without us realizing it. This is particularly the case in the courtroom and the legal process, where language sometimes exerts tremendous power . . . .[130]

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[127] *See infra* Part IV.A.2.

[128] *See* DeCuir & Dixson, *supra* note 22, at 29 (asserting that colorblindness "ignores the fact that inequity, inopportunity, and oppression are historical artifacts that will not easily be remedied by ignoring race . . . [and that] adopting a colorblind ideology does not eliminate the possibility that racism and racist acts will persist").

[129] *Ruiz*, 892 F. Supp. 2d at 1323.

[130] Deborah Cao, *Forward: Power of and to Language in Law* to EXPLORING COURTROOM DISCOURSE: THE LANGUAGE OF POWER AND CONTROL xv (Anne Wagner & Le Cheng, eds., Ashgate Publishing Ltd. 2011).

In *Ruiz*, the power of language is most evident in the court's decree: "Defendants' regulations must fail because they deny to each of these United States citizens the equal protection of the laws as guaranteed under the Fourteenth Amendment to the United States Constitution."[131] Most immediately, because of the court's discursive power, Florida will no longer be able to interpret its residency tuition policies to deny in-state tuition to resident citizen-children-of-undocumented-immigrants.[132] On a broader scale, state university systems enforcing or thinking of enforcing similar policies have been shown the kind of judicial analysis and arguments they may confront.[133]

However, the power of language is not only what we can see at the surface level.[134] Rather, "language is a mechanism of power, and one's relational position in a social space is indicated by the language one uses, and the existing social structures affect or determine who has the right to be listened to, to interrupt, and to pose questions, and to what extent."[135] In other words, language is determinative.[136] The ways in which people are spoken of and the ways their stories are articulated, work to position them within the broader social narrative.[137]

The language of the law is no exception. Indeed, Cao asserts that "[t]he courtroom is a stage for the display of linguistic power at work, with various actors performing largely linguistic acts in the discursive choices in (re)presenting and (re)constructing stories or events in real life."[138] The ways in which judges articulate cases, then, is a matter of discursive choice dictated by the parameters of the applicable law. But the law, despite what

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[131] *Ruiz*, 892 F. Supp. 2d at 1323.

[132] *See id.*

[133] *See supra* Part III.B. Note the similarity between the legal analysis in *Ruiz* and ACLU of Virginia's letter to the Virginia public university presidents, which claimed that withholding in-state tuition benefits from birthright citizens who have, for all other intents and purposes, established residency in the state would violate the students' equal protection rights. *See* ACLU VA Article, *supra* note 78.

[134] *See* Cao, *supra* note 130, at xv (maintaining that "[t]he power of language or linguistic power . . . is . . . subtle and invisible, and most people are unaware of it even though most use that power every day and exert its power to achieve one's ends in different circumstances and contexts . . . .").

[135] *Id.* at xvi.

[136] *See* Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 666 (1993) (asserting that a group's "stories, narratives, conventions, and understandings" articulate what has been decided as "good, valid, worthy, and true").

[137] *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412-13 (1988) (explaining that the ingroup's stories articulate its relationship with the outgroup, and, conversely, that an outgroup's story can subvert those suppositions).

[138] Cao, *supra* note 130, at xvi.

many of us want to believe, is not a neutral and reasoned conclusion of what separates right from wrong.[139] Rather, the law functions both as a form of social control and as an expression of the dominant community, embodying its values, goals, and biases.[140]

The expressed will of the dominant social group is not lost in the articulation of cases, however much it is couched in terms of neutrality and objectivity. The court and its language, in subtle and not so subtle ways, determine how society should think of minority people within the larger social narrative.[141] Using *Ruiz* as a site of analysis, then, this paper seeks to uncover how the colorblind rhetoric of the court reifies the hegemony of the dominant social order and maintains the status quo.

### *A. Act One: critical Race Theory and Cultural Performance Theory*

To examine the colorblind rhetoric used in the *Ruiz* court's discussion of citizen-children-of-undocumented-immigrants, this paper will utilize the tenets of critical race theory as its broad conceptual framework and cultural performance theory as the narrow lens through which to examine the *Ruiz* court's discourse and its impact on citizen-children-of-undocumented-immigrants. Specifically, critical race theory provides the analytical foundation necessary to identify *Ruiz*'s colorblind rhetoric and its underlying discriminatory prerogative.[142] In tandem with critical race theory's recognition of colorblindness, this paper will use cultural performance theory to argue that such rhetoric, while seemingly confined to the courts, constitutes a broader social message that significantly structures society's perspective on minorities and minority issues.[143]

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[139] *See generally*, Paul Kahn, *Legal Performance and the Imagination of Sovereignty*, YALE L. SCH. FACULTY SCHOLARSHIP SERIES, Paper 321 (2006), *available at* http://digitalcommons.law.yale.edu/fss_papers/321 ("[N]o one really believes that law is reason without interest. But everyone sort of believes. We believe it as a background assumption that sustains the rule of law.").

[140] *See* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2184 (1992).

[141] *See* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 842 (1997) ("In terms of constraints on self-definition, law has played a powerful role in imposing identities on racialized minorities as a way of excluding them from full participation in American life.").

[142] *See infra* Part IV.A.1.

[143] *See infra* Part IV.A.2.

### *1. Enter stage left: critical race theory*

First, critical race theory is an apt foundation to investigate the kind of inequities facing citizen-children-of-undocumented-immigrants, as it understands that "racism is endemic in U.S. society, deeply ingrained legally, culturally, and even psychologically."[144] Critical race theory does not see racism as an aberration, but part of "the common, everyday experience of most people of color in this country."[145] Therefore, rather than ask

> whether or how racial discrimination can be eliminated while maintaining the integrity of other interests implicated in the status quo such as federalism, privacy, traditional values, or established property interests[,] . . . [critical race theory asks] how these traditional interests and values serve as vessels of racial subordination.[146]

Since critical race theory already establishes racism as the norm,[147] it is able to move beyond initial knee-jerk reactions to investigate the structures in place that maintain racism and other mechanisms of oppression.

This basic tenet of critical race theory undergirds the reality that many citizen-children-of-undocumented-immigrants face. Indeed, the kind of discrimination that many of these citizen-children will endure is likely two-fold: first, they are likely to encounter traditional racism based on the very color of their skin;[148] and second, they are burdened with the stigma often attached to the subject of illegal immigration and border-crossers.[149] Therefore, by using critical race theory to examine how the *Ruiz* court

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[144] William F. Tate IV, *Critical Race Theory and Education: History, Theory, and Implications*, 22 REV. RES. IN EDUC. 195, 234 (1997); *see also* Charles R. Lawrence III et al., *Introduction* to MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 1, 6 (1992) (articulating the position that critical race theory sees racism as "endemic to American life").

[145] DELGADO & STEFANCIC, *supra* note 79, at 7.

[146] MATSUDA ET AL., *supra* note 144, at 6.

[147] DELGADO & STEFANCIC, *supra* note 79, at 7.

[148] *See* Michael Hoefer et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, U.S. DEP'T OF HOMELAND SECURITY 1, 4 (2012), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf. According to a 2011 report conducted by the U.S. Department of Homeland Security, 59% of the 11.5 million unauthorized immigrants living in the U.S. were from Mexico (6.8 million). *Id.* at 5. The study also showed that approximately 11% of unauthorized immigrants were from Asia (1.3 million) and approximately 7% were from South America (0.8 million). *Id.* Although the U.S. Department of Homeland Security's survey does not identify the specific ethnic group that these unauthorized immigrants belong to, it is likely that a majority of unauthorized immigrants would be considered minorities. *Id.*

[149] *See supra* Part II.A.

positions citizen-children-of-undocumented-immigrants within the broader social narrative, we will be able to move beyond initial feelings of injustice and move forward in investigating how the court's colorblind rhetoric marginalizes plaintiffs and "others" while attempting to establish their equal protection rights.

Second, critical race theory's notion of "colorblindness" is particularly invaluable, as the notion "expresses skepticism toward dominant legal claims of neutrality, objectivity, color blindness, and meritocracy."[150] In discussing the objectivity "inherent" in the law, legal scholar Paul Kahn argues, "[N]o one really believes that law is reason without interest. But everyone sort of believes. We believe it as a background assumption that sustains the rule of law."[151] And the objectivity of colorblindness is not without function, as critical race scholar Neil Gotanda explains that "color-blind constitutionalism is meant to educate the American public by demonstrating the 'proper' attitude towards race. The end of color-blind constitutionalism is a racially assimilated society in which race is irrelevant."[152] Within this framework, race is no longer a social construction, but an "immutable characteristic devoid of social meaning . . . [that] tells an ahistorical, abstracted story of racial inequality as a series of randomly occurring, intentional, and individualized acts."[153] Inherently and within the eyes of the law, everyone is considered equal because race is not seen as connected to "social attributes such as culture, education, wealth or language."[154] The "proper" attitude regarding race is one that sees race as

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[150] MATSUDA ET AL., *supra* note 144, at 6.

[151] Kahn, *supra* note 139.

[152] Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 53 (1991).

[153] MATSUDA ET AL., *supra* note 144, at 6.

[154] Gotanda, *supra* note 152, at 4; *see also* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In *Plessy*, the Supreme Court held that a Louisiana statute that segregated railway passengers by race was constitutional. *Id.* at 549-52. Justice Harlan dissented, arguing against the constitutionality of such segregation:

> In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. . . .
>
> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. *But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes*

just another objective, physical characteristic, like hair and eye color.[155] Consequently, a colorblind notion of equality and neutrality "limits the concept of racism and the label 'racist' to those individuals who maintain irrational personal prejudices against persons who 'happen' to be" in the minority.[156] Within this framework, then, racism is viewed not as an everyday occurrence, but as an egregious social aberration.[157]

However, critical race theory cuts across this background assumption of neutrality and colorblindness, asserting that laws and policies are not created in a social vacuum and that interests[158] are always being served.[159] As a result, critical race theory looks at how laws act "as camouflages for the self-interest of powerful entities of society"[160] to unmask and address the implicit social means of racial oppression.[161] In seeking to uncover the implicit ways the dominant social group maintains the status quo, critical race theorists seek to enter into a "jurisprudential dialogue"[162] that examines the functions and purpose of legal discourse.[163] To engage in such a discussion, "[c]ritical race theorists deconstruct the limitations of traditional liberal legal discourse and the ways in which that discourse tends to exclude

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*among citizens. In respect of civil rights, all citizens are equal before the law.* The humblest is the peer of the most powerful.

*Id.* at 554-59 (emphasis added).

[155] Gotanda, *supra* note 152, at 53, 56; *see* Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 832 (2008) ("Because everyone is the '*same*,' or similarly situated, history can be ignored (or submerged) in the name of colorblindness (history is neutral); race can be decontextualized so that it becomes an *institutional value* rather than a complex social construct . . . ." (emphasis in original) (citations omitted)).

[156] Gotanda, *supra* note 152, at 43.

[157] *See id.* at 43-45; *see also* DELGADO & STEFANCIC, *supra* note 79, at 22 (explaining that "[c]ritical race theorists . . . hold that color blindness will allow us to redress only extremely egregious racial harms, ones that everyone would notice and condemn").

[158] *See* DELGADO & STEFANCIC, *supra* note 79, at 8. The notion of "interest convergence," a major theme of critical race theory not explored in this paper, posits that "[b]ecause racism advances the interests of both white elites (materially) and working-class people (psychically), large segments of society have little incentive to eradicate it." *Id.* As a result, what may seem as civil rights advances or policies are actually engaged in to promote the interests of the dominant social group than minority interest. *See id.*

[159] *See* Tate, *supra* note 144, at 235.

[160] *Id.*

[161] *See id.*; *see* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 439-40 (2000) (noting that the work of critical race scholars has demonstrated "that rules, values, and norms thought of as stable truth are merely accounts driven by the perspective of the group empowered to impose its rules on the larger society").

[162] Yamamoto, *supra* note 141, at 868.

[163] *See id.*

voices on society's margins and to perpetuate structural inequality."[164] Critical race theory is not satisfied with a colorblind legal rhetoric that asserts an objective right/wrong standard, but seeks to uncover the racism left unaddressed and perpetuated in the law's rhetoric:

> [Critical race theory] . . . reveal[s] the law's blindness toward unconscious racism, the ways in which legal discourse inscribes and reproduces subordinating images of racial groups, and the ways in which legal institutions and discourse contribute to the construction and maintenance of racial hierarchies. In short, critical race theory analyzes ways in which law ignores cultural domination within law's own processes and the ways in which those processes contribute to racial oppression.[165]

The scrutiny expressed in critical race theory and its determination to understand the implicit workings of racism and oppression within the rhetoric of the law will be particularly useful in analyzing the *Ruiz* court's holding because it breaks down the law's neutral façade and exposes how even an objective and positive application of the law can work to serve the status quo.

Lastly, critical race theory's emphasis on storytelling will allow this paper to engage with the implicit narrative embedded in *Ruiz* and, indeed, in the similar stories of other citizen-children-of-undocumented-immigrants, as critical race theory seeks out the counterstories presented by the oppressed and contextualizes them against the ahistoric narrative extolled by the dominant social group and the law.[166] As legal scholar Sherrilyn A. Ifill explains, narratives are important social and cultural structures.[167] Within a community, narratives may function as truths, dictate a community's relationship with another community, and symbolize community values.[168] Thus, narratives can become "the cultural equivalent of the schemata, which help us process what we see[] . . . [and even] help us interpret racial stimuli."[169]

As critical race theory establishes, the dominant community composes a master narrative through the use of language, image, and media, and thereby sustains the stratifications between oppressor and oppressed.[170] These master narratives "dominate the public consciousness to such an extent that they assume a kind of super-legitimacy. They are transformed

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[164] *Id.* (citing Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 989-92 (1990)).

[165] Yamamoto, *supra* note 141, at 868 (internal citations omitted).

[166] DELGADO & STEFANCIC, *supra* note 79, at 44-48.

[167] *See* Ifill, *supra* note 161, at 439.

[168] *See id.*

[169] *Id.*

[170] *See* DELGADO & STEFANCIC, *supra* note 79, at 48.

from stories to truth."[171] However, critical race theory looks between the lines of the master narrative to tease out those counter-narratives that provide an alternative view of reality.[172] By examining and providing a space for these counter-narratives, critical race scholars hope to challenge the "super-legitimacy" of the dominant community's grand narrative and call into question the beliefs, preconceptions, and stories that constitute its social structure.[173] Moreover, counter-narratives can provide a space for those whose voices have been traditionally silenced and create a starting point from which to rectify discrimination.[174] In regards to *Ruiz*, then, looking at the grand narrative established and perpetuated by the court allows us to investigate the story being created for citizen-children-of-undocumented-immigrants.

### *2. Enter stage right: cultural performance theory*

Given the implications the law has on the image of minorities and their place within the broader social narrative, this paper seeks to understand how *Ruiz*'s colorblind rhetoric works to maintain the status quo. To do so, this paper will utilize cultural performance theory to rhetorically analyze the social impact of the district court's holding. As scholars Gerald Torres and Kathryn Milun have asserted, and as Professor Eric K. Yamamoto has reiterated, "The telling of stories holds an important role in the work of courts. Within a society, there are specific places where most of the activities making up social life within that society simultaneously are represented, contested, and inverted. Courts are such places."[175] Thus, the activities taking place in courts are starting points for both negative and positive transformative work—courts "not only decide disputes, they also transform particular legal controversies and rights claims into larger public messages."[176]

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[171] Ifill, *supra* note 161, at 440-41.

[172] *Id.* at 440.

[173] *Id.* at 441-42; *see also* DELGADO & STEFANCIC, *supra* note 79, at 49.

[174] *See* DELGADO & STEFANCIC, *supra* note 79, at 49-50 ("Powerfully written stories and narratives may begin a process of correction in our system of beliefs and categories by calling attention to neglected evidence and reminding readers of our common humanity.").

[175] Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 628 (1990); *see also* Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 17-18 (1994) (Professor Yamamoto uses Torres and Milun's framework to examine the use of the courts by indigenous peoples).

[176] Yamamoto et al., *supra* note 175, at 20-21.

However, courts do more than determine and convey the social rights and remedies of disputing parties.[177] In creating larger public messages courts also adjudicate competing cultural narratives, often overseeing the battles between master and counter-narratives.[178] It becomes the role of the courts to "decid[e] which reality to legitimate within the context of a particular dispute."[179] Courts, then, not only play a fundamental role in the legitimization of narratives[180] but also in what constitutes "truth" and reality.[181] As explained previously, a community's narratives function as its schemata: they are a way of understanding the world, why things are, and how to process what we see.[182]

In other words, as sites of cultural performance, courts establish the social narrative through which to understand people's place and rights in society.[183] Given these significant social impacts, legal scholar Danielle Hart explains that minority groups have used and are using courts to "develop and express their own narratives that counter the current understandings of existing rights, duties, and categories that classify events and relationships."[184] In a manner similar to critical race scholars, minority litigants are using courts to provide counter-narratives that speak to and against the beliefs, preconceptions, and narratives of the dominant community, thereby promoting a more complex perspective.[185] Additionally, Hart argues, even if the rights claims of minority groups do not prevail, the assertion of minority rights in court provides a number of positive results: it builds community, instigates and shapes public discourse about minority rights and differences, educates the public, raises public awareness, and "transmits a powerful political message concerning the kind of society we want to live in."[186] Just having the courts as a forum

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[177] *See* Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at* Baehr v. Lewin, 9 GEO. MASON U. C.R. L.J. 1, 109 (1998) (citing Yamamoto et al., *supra* note 175, at 6).

[178] Ifill, *supra* note 161, at 442.

[179] *Id.*

[180] *Id.*

[181] *See id.* at 439.

[182] *Id.*

[183] Ifill asserts that by deciding what narratives to legitimate, the courts also "convey messages to the public that signal which values are worthy of receiving the law's imprimatur." *Id.* at 442. Therefore, the courts and their holdings can have extremely significant social ramifications. *See id.* at 443. Those whose narratives have been determined to be false or illegitimate can find their rights, position, and values in society pushed to the margins. *Id.*

[184] Hart, *supra* note 177, at 109-10.

[185] *Id.* at 110 (quoting Yamamoto et al., *supra* note 175, at 22).

[186] *Id.* at 110-11 (internal quotation marks omitted).

can accomplish positive social work.[187] Thus, according to Hart, courts are sites of cultural performance that can initiate positive change in society.[188]

However, while Hart's view illustrates the positive potential of the courts' social message function, courts can also be used to persistently exclude and de-legitimate a community's narrative.[189] As Ifill explains, the continual exclusion and de-legitimization of a minority's narratives and values in the courts present such communities with a catch-22: the minority community must either reject its narratives, values, history, and experiences or be relegated to the social margins.[190] Either choice, though, entails the continued subordination of the minority community.[191]

Looking at *Ruiz*, one can see that the narrative created by the court is a complex product of both a rights claim and a colorblind rhetoric. To understand the narrative being constructed for plaintiffs and citizen-children-of-undocumented-immigrants, this paper will deconstruct and examine the rhetoric used by the court to elucidate the larger public message being broadcasted. It is only in understanding this public message that we can begin to address and rectify the inequities facing citizen-children-of-undocumented-immigrants.

### *B. Act Two: The* Ruiz *Court's Erasing of Plaintiffs' History*

It is a basic law school principle that when constructing a case, the legally significant facts are those that dictate the ensuing legal analysis—the rest is superfluous to the actual application of the law.[192] For example, in *Legal Writing: Getting it Right and Getting it Written*, a desktop reference manual aimed at "address[ing] many of the questions that professional legal writers face,"[193] the authors distinguish between three sets of facts: "legally significant facts," "background facts," and

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[187] *See id.* at 111-12.

[188] *See id.*

> Repeated assertions of minority rights claims through litigation can help focus issues by compelling formal public statements of justification by those with decision-making power. Rights theory can then be recast in light of practical experience and asserted once again in litigation. Such repeated challenges may transform social concerns into recognized rights, thereby recharging political movements.

*Id.* (internal citations and quotations omitted).

[189] *See* Ifill, *supra* note 161, at 443.

[190] *Id.*

[191] *Id.*

[192] *See* MARY BARNARD RAY & JILL J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 36, 141, 221 (5th ed. 2010) (defining "Background Facts," "Emotional Facts," and "Legally Significant Facts," respectively).

[193] *Id.* at vii.

"emotional facts." In their definitions of these three kinds of facts, there is an obvious hierarchy: "legally significant facts" are the most important because they inform the legal analysis;[194] "background facts" occupy a middle space as facts that "fill in the gaps between legally significant facts" and supplement a reader's understanding of the legally relevant facts;[195] and at the bottom of the hierarchy are "emotional facts" that, while providing a personal context for the parties involved, are posited as rhetorical ploys meant to pull on readers' heartstrings but that are neither legally nor contextually relevant.[196]

However, despite what legal writing may dictate as "relevant," the facts in a case are not isolated happenings, but tied to people and places with histories, cultures, and values that have contributed to the situation being adjudicated and decided by the court. A determination of what is "relevant," then, is a rhetorical choice that considers audience and purpose while also embodying the cultural values of the writer. Additionally, critical race scholars Richard Delgado and Jean Stefancic note that "[s]ociety constructs the social world through a series of tacit agreements mediated by images, pictures, tales, blog postings, and other scripts."[197] Therefore, a case's fact pattern, particularly as the court's discernment of what is important to know, contributes to the construction or maintenance of a particular social narrative.[198]

In *Ruiz,* the factual details regarding plaintiffs' position, history, and context are notably sparse.[199] That is not to say that the *Ruiz* court did not supply the facts and circumstances needed to correctly apply the law, as it explains (1) plaintiffs' position, status, and residency-tuition predicament; (2) Florida's residency-tuition regulations; and (3) how defendants imposed Florida's regulations on plaintiffs.[200] Indeed, according to the definitions of "legally significant facts"[201] and "background facts,"[202] the *Ruiz* court

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[194] *See id.* at 221 (stating that "[l]egally significant facts are facts that, if they were changed or deleted, would affect the outcome of the case.").

[195] *See id.* at 36 (explaining that "background facts" are those that "fill in the gaps between legally significant facts [and] [a]lthough not essential to the issues, . . . are essential to the reader's understanding of the general situation").

[196] *See id.* at 141. The text describes "emotional facts" as facts that have no bearing on legal analysis or the understanding of a case's context, but are used to "play on the reader's emotions." *Id.* As a rhetorical tool and because they are not legally significant, legal writers are cautioned to "avoid inserting them carelessly, *too often, or too obviously* [as] [t]oo much use of emotional facts can impair your credibility." *Id.* at 142.

[197] DELGADO & STEFANCIC, *supra* note 79, at 48.

[198] *See supra* Part IV.A.1 for a discussion on narrative.

[199] *See* Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1322-26 (S.D. Fla. 2012).

[200] *Id.* at 1323-24.

[201] RAY & RAMSFIELD, *supra* note 192, at 221.

supplied all the necessary factual information needed to engage in its equal protection analysis. While this paper is mindful about the rhetorical constraints that limit the court in its recounting of the facts, the lack of background detail in *Ruiz* is made all the more apparent by the court's criticism of how defendants depreciated the historic value of plaintiffs' citizenship.[203] As will be explained more fully below, looking at the way in which plaintiffs are introduced and their backgrounds described, the *Ruiz* court itself engages in a depreciation of plaintiffs' history and citizenship by ignoring the circumstances that have culminated in their birthright citizen statuses. The court's depreciation, though, has more far-reaching consequences: in its terse description of plaintiffs' backgrounds, the court throws away the opportunity to write these citizen-children-of-undocumented-immigrants into the broader social narrative. Instead, the court chooses to erase plaintiffs' ethnic heritage, culture, and history in exchange for assumed citizenship.

In investigating the role of legal language, critical race theorists find that "legal discourse inscribes and reproduces subordinating images of racial groups . . . ."[204] While this productive function can be seen when the dominant community uses legal discourse to articulate the rights of minorities,[205] it can also be seen in the rhetorical act of representation. In *Gender Trouble*,[206] Judith Butler discusses the use of representation and its effect on the represented subject, asserting:

> On the one hand, *representation* serves as the operative term within a political process that seeks to extend visibility and legitimacy to women as political subjects; on the other hand, representation is the normative function of a language which is said either to reveal or to distort what is assumed to be true about the category of women.[207]

Although Butler is speaking from a feminist perspective, her understanding of representation can also be applied to critical race theory and in thinking about the *Ruiz* court's description of plaintiffs. If representation, as Butler posits, is used either to extend visibility and

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[202] *Id.* at 36.

[203] *Ruiz*, 892 F. Supp. 2d at 1331.

[204] Yamamoto, *supra* note 141, at 868.

[205] *See id.* at 841-42 (stating that the law "is an integral part of political-cultural processes that generate 'structures of meaning that radiate throughout social life and serve as part of the material people use to negotiate their understanding of everyday events and relationships.'" (quoting David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW & CONTEMP. PROBS. 111, 124 (1988))).

[206] JUDITH BUTLER, GENDER TROUBLE (2d ed. 1999).

[207] *Id.* at 3-4.

legitimacy, or to reveal or distort the represented subject, then the *Ruiz* court's simple categorization of plaintiffs as "U.S. citizen[s] by virtue of [their] birthright"[208] is a distortion that turns plaintiffs' race and history into apolitical and ahistorical characteristics that have no bearing on their lived experiences.

The court's background description of the parties particularly reveals this distorted colorblind representation of plaintiffs. For example, in articulating the background of Wendy Ruiz, the court chooses to gloss over her citizenship and, instead, focuses primarily on her residency:

> Plaintiff Wendy Ruiz was born in Miami, Florida in 1992 and *is a U.S. citizen by virtue of birthright.* Ruiz's parents have resided continuously in Florida for the past ten years. Ruiz has resided in Florida her entire life and graduated from a Florida public high school in 2010. During her senior year in high school, Ruiz attempted to enroll at Florida International University ("FIU"). FIU requires applicants to disclose their parents' federal immigration status, and after Ruiz was unable to furnish this information, she was unable complete the application process. Ruiz currently attends Miami-Dade College ("MDC") and because she is a dependent student who cannot prove her parents' federal immigration status, she has been classified as an "out-of-state resident," and is required to pay a tuition rate nearly three times higher than the tuition rate for Florida residents. Consequently, Ruiz has been unable to afford a full course load of classes each semester and it will take her more than two years to complete a two-year degree.[209]

The court's description of Ruiz's situation is also representative of the descriptions of plaintiffs Roa, Saucedo, Romero, and Perez.[210] By presuming that plaintiffs' race and history are unnecessary facts, the court imposes a colorblind rhetoric that subsumes them into the dominant narrative and community by virtue of their citizenship. And, as critical race theorist John O. Calmore argues, such incorporation of plaintiffs into the dominant community is part of the function of the law as a hegemonic tool, for the

> [l]aw . . . is not only an instrument of social control but also a symbolic expression of dominant society. An important aspect of cultural analysis[, therefore,] incorporates consideration of how these two characteristics of social control and symbolic expression intersect with symbolic boundaries that separate or integrate diverse peoples and cultures.[211]

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[208] *See Ruiz*, 892 F. Supp. 2d at 1323.

[209] *Id.* (emphasis added).

[210] *Id.* at 1323-24.

[211] Calmore, *supra* note 140, at 2184.

Like Calmore's observation suggests, the erasure of plaintiffs' race and history serve the symbolic interests of the dominant group: to provide a semblance of equality (the adjudication of plaintiffs' equal protection claim) in a way that does not create or endorse counterstories that would disrupt the dominant narrative.[212]

Just as critical race theory attempts to destabilize the hegemony of the dominant community through counter-narratives,[213] conversely, the lack of a counter-narrative in *Ruiz* works to maintain the current status quo. Delgado and Stefancic explain that storytelling and stories can provide a "valid destructive function":[214] by sharing others' experiences, minority narratives and counter-stories can subvert preconceived notions "that marginalize others or conceal their humanity . . . ."[215] Thus, narratives not only provide a voice to minorities, but also create a starting point from which to combat the discrimination they have experienced.[216] In other words, "stories and narratives may begin a process of correction in our system of beliefs and categories by calling attention to neglected evidence and reminding readers of our common humanity."[217]

This kind of story, however, is almost entirely lacking within *Ruiz*—the only history given to readers is that plaintiffs were born in the U.S., lived in Florida long enough to establish residency, and were discriminated against based on their parents' immigration status.[218] Of course, if one were to read between the lines, one may espy a glimmer of plaintiffs' experiences as minority birthright citizens and impress upon them a supposed history of what it must have been like growing up as the child of illegal immigrants. But such an imposed narrative does little to combat the stereotypes and presumptions that work to keep plaintiffs and minorities subjugated in the first place. Rather than providing a "destructive function,"[219] the *Ruiz* court's narrative actually reinforces the dominant narrative: although the

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[212] *See generally* DeCuir & Dixson, *supra* note 22, at 29. DeCuir and Dixson maintain that any social change actually occurs, it "appears to benefit those who are not directly adversely affected by social, economic, and educational inequity that come as a result of racism and racist practices." *Id.* The dominant group remains unaffected by social change because such social change, which happens at a slow pace to accommodate the dominant group, employs only remedies of equality that assume a sameness of experience and opportunity across citizens. *Id.* Consequently, the racist and discriminatory social structures of the dominant group remain unaddressed. *Id.*

[213] *See* DELGADO & STEFANCIC, *supra* note 79, at 48.

[214] *Id.*

[215] *Id.*

[216] *Id.* at 49-50.

[217] *Id.*

[218] *See* Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1323-24 (S.D. Fla. 2012).

[219] DELGADO & STEFANCIC, *supra* note 79, at 48.

court holds that plaintiffs were wrongly discriminated against,[220] its colorblind rhetoric subsumes and whitewashes them into the dominant narrative by only finding them worthy of equal protection by virtue of their citizenship. By ignoring the topic of plaintiffs' race and history, the court implicitly states that such considerations are not important or worthy of attention.

Arguably, this colorblind rhetoric, as one that does not address that plaintiffs' parents are undocumented immigrants, could be said to be a positive rhetorical choice, as it does not characterize plaintiffs as "anchor babies."[221] Critical race theory does recognize that "[c]olor blindness can be admirable, as when a governmental decision maker refuses to give in to local prejudices."[222] In reading *Ruiz* and its ensuing equal protection analysis, one can see that the main crux of the court's holding is that plaintiffs are citizens and deserve equal protection of the law, regardless of who their parents are and how they received their citizenry.[223] In fact, a word search reveals that the *Ruiz* court does not once use the term "birthright citizen" in its articulation of the case, perhaps because the term itself conjures up the contested debates regarding birthright citizenship in the U.S.[224] Arguably, one could interpret the court's rhetoric as demonstrating that plaintiffs' ethnicity or their parents' immigration status should not matter and that is why it receives no representation by the court.

But it does. These subjects matter because they are part of the driving force behind discriminatory regulations.[225] In addressing the Virginia Attorney General's interpretation of Virginia's similar residency tuition policy, ACLU of Virginia Executive Director Kent Willis asserted, "It appears that the AG is allowing his bias against immigrants to taint his thinking."[226] While Director Willis recognizes the kinds of discriminatory motivations that may promote such regulations, the *Ruiz* court chooses to not even address the possibility that any bias colored Florida's residency tuition regulations. The only evidence readers have about plaintiffs' ethnicity or socio-cultural history are their surnames, Ruiz, Saucedo, Roa,

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[220] *Ruiz*, 892 F. Supp. 2d at 1333.

[221] Feere, *supra* note 37 (explaining that children of illegal immigrants born in the U.S. can be used to "cement an immigrant's presence in the United States, [to] provide access to welfare benefits, and ultimately initiate chain migration of the child's extended family and in-laws . . . .").

[222] DELGADO & STEFANCIC, *supra* note 79, at 26.

[223] *See Ruiz*, 892 F. Supp. 2d at 1323.

[224] *See* Seo, *supra* note 17, at 316-19; *see also supra* Part II.A.

[225] *See generally* Seo, *supra* note 17, at 312 (arguing that tuition policies like Florida's place "citizen children . . . in danger of becoming the unsuspecting victims of state and federal policies aimed at addressing illegal immigration").

[226] ACLU VA Article, *supra* note 78 (internal quotation marks omitted).

Romero, and Perez, which serve as ethnic markers, and their place of domicile, Florida, which has a large unauthorized immigrant population.[227] While these linguistic and geographical markers are slight, they do provide some kind of socio-historical context for plaintiffs and for the ulterior purpose of Florida's residency tuition regulation, making the *Ruiz* court's colorblind description of plaintiffs that much more noticeable and suspect.

Thus, in its general narrative (or lack thereof) of plaintiffs' background, the *Ruiz* court, while attempting to make race a non-issue, simultaneously strips plaintiffs of both race and history. Plaintiffs and other birthright-citizens-of-undocumented-immigrants are left without a voice and no counter-narratives are produced, thereby allowing the social structures that contributed to Florida's discriminatory policies to go undisturbed—the result is a momentary solution to the ever-present problem of discrimination and racism.[228] However, this elision of plaintiffs' and other birthright citizens' narrative is not only evident in what the *Ruiz* court does not say, but is also present in the very means by which the *Ruiz* court presents plaintiffs' remedy: its application of the Equal Protection Clause.

### *C. Act Three: The* Ruiz *Court's Colorblind Equal Protection Analysis*

By establishing plaintiffs' citizenship through a colorblind rhetoric, the *Ruiz* court implicitly sets the stage for a colorblind constitutionalism that, as Gotanda argues, "legitimates, and thereby maintains, the social, economic, and political advantages that whites [the dominant hegemony] hold over other Americans."[229] In explaining that Florida's residency tuition regulations seek to "distribute different benefits and create different obstacles between similarly situated individuals,"[230] the *Ruiz* court does not see plaintiffs as minority birthright citizens; rather, the court only sees plaintiffs as citizens or "similarly situated individuals" because that is as far as its equal protection analysis will let it go.[231] Justice, then, is not served wholesale—it is only served to American citizens, thereby further marginalizing birthright citizens and minorities, the very people this case is meant to protect.

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[227] Jeffrey S. Passel et al., *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, PEW HISPANIC CENTER 12 (Sept. 23, 2013), http://www.pewhispanic.org/files/2013/09/Unauthorized-Sept-2013-FINAL.pdf ("Florida had an estimated 950,000 unauthorized immigrants in 2012.").

[228] *See generally* DeCuir & Dixson, *supra* note 22.

[229] Gotanda, *supra* note 152, at 2-3.

[230] Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1329 (S.D. Fla. 2012).

[231] *Id.*

Given that the court provides the legally relevant facts through a colorblind rhetoric, the *Ruiz* court's ensuing equal protection analysis is constrained by the same kind of rhetoric that refuses to put race into the equation, which leads, as Gotanda notes, to very little in the way of actual social change.[232] Gotanda posits that such judicial discounting of race is an act of "nonrecognition" that explicitly turns race into a non-issue.[233] As a technique, nonrecognition is comprised of three parts: "First, there must be something which is cognizable as a racial characteristic or classification. Second, the characteristic must be recognized. Third, the characteristic must not be considered in a decision."[234] While neither a principle of constitutional interpretation nor common law, nonrecognition is a discursive technique used by judicial decision-makers to ignore the socio-cultural history and social impact of race, thereby allowing the court to "describe, to accommodate, and then to ignore issues of subordination."[235] The substantive impacts of nonrecognition, moreover, remain hidden behind the technique's procedural and objective façade.[236] As a result, "the systematic denial of racial subordination and the psychological repression of an individual's recognition of that subordination" are allowed to remain unchecked, "thereby allowing such subordination to continue."[237]

An application of Gotanda's framework shows that nonrecognition is at work in the *Ruiz* court's colorblind equal protection analysis. First, illegal immigration and, consequently, race are involved in *Ruiz* by virtue of Florida's discriminatory regulations.[238] Second, the court recognizes that plaintiffs' predicament is the result of them being the children of undocumented immigrants.[239] Lastly, despite the implicit implications of undocumented immigration and race in *Ruiz*, the court does not even consider how racial or immigrant bias could have been involved in Florida's residency tuition regulations. Instead, the court's equal protection analysis primarily focuses on how defendants' misinterpretation of PRWORA and how any potential financial burdens do not meet the

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[232] *See* Gotanda, *supra* note 152, at 54.

[233] *Id.* at 16-17.

[234] *Id.*

[235] *Id.* at 17 (stating that nonrecognition "addresses the question of race, not by examining the social realities or legal categories of race, but by setting forth an analytical methodology").

[236] *Id.*

[237] *Id.* at 16.

[238] Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1325-26 (S.D. Fla. 2012).

[239] *Id.* at 1322-24.

standard of heightened scrutiny,[240] leaving unaddressed the system of subordination that resulted in defendants' residency tuition regulations.

Moreover, in its equal protection analysis, one can see how the *Ruiz* court uses the façade of equality and "sameness"[241] as a means of both addressing the overt social ill (Florida's discriminatory regulation) and advancing the interests of the dominant community. For example, in laying the foundation for its analysis, the *Ruiz* court, borrowing from *Plyler*, asserts that the "Equal Protection Clause reflects a fundamental tenant [sic] that 'all persons similarly circumstanced shall be treated alike.'"[242] As the court's analysis reveals, plaintiffs should be "treated alike" because they are entitled to the same benefits as their resident counterparts.[243] Accordingly, then, the people that the court assumes plaintiffs are "similarly situated" with are other citizens.[244]

However, as history and current race and immigrant relations reveal, plaintiffs are anything but "similarly situated" and, instead, occupy a volatile space within the U.S.[245] Often, immigrant "others" are characterized as "inferior beings whose inclusion would infest and degrade society."[246] This perception is then projected onto their children who have citizenship by virtue of their birthright.[247] Therefore, because of their race and the circumstances of their citizenship, birthright citizens are inevitably suspect.[248]

As historian Mae M. Ngai explains, birthright citizens are not considered "Americans" "on account of the racialized identity of [their] immigrant ancestry. In this construction, the foreignness of non-European peoples is deemed unalterable, making nationality a kind of racial trait. Alienage, then, becomes a permanent condition, passed from generation to generation, adhering even to the native-born citizen."[249] As Ngai makes clear, despite

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[240] *Id.* at 1330-33.

[241] *See* DeCuir & Dixson, *supra* note 22, at 29 ("Remedies based on equality assume that citizens have the *same* opportunities and experiences."); Gotanda, *supra* note 152, at 4 (stating that formal race sees everyone as the same and that race is just a "neutral, apolitical description[ ], reflecting merely 'skin color' or country of ancestral origin").

[242] *Ruiz*, 892 F. Supp. 2d at 1326 (quoting Plyler v. Doe, 457 U.S. 202, 217 (1982)).

[243] *See id.* at 1326, 1331-32.

[244] *See id.* at 1326-31.

[245] *See supra* Part II.A.

[246] *See* Newman, *supra* note 29, at 438.

[247] *See* Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2521 (2007).

[248] *Id.*

[249] *Id.*; *see also* Newman, *supra* note 29, at 438 (asserting that "[f]requently, those who consider themselves the 'true' Americans do so at the expense of outsiders, deeming them inferior beings whose inclusion would infest and degrade society").

having citizenship, the minority citizen is racially marked as an "other," providing an indelible marker of exclusion from the dominant community.[250] Consequently, any notion of being similarly situated is a grossly overgeneralized characterization of citizenship that ignores birthright-citizen-children-of-undocumented-immigrants' history of discrimination.

This colorblindness is also evident in the court's analysis of Florida's regulation. First, in determining what level of scrutiny to apply, the court asserts that defendants' misinterpretation of PRWORA and subsequent classification of plaintiffs as "aliens" placed plaintiffs in a "second-tier of U.S. citizenship that depreciate[d] the historic values of *Plaintiffs'* [sic] citizenship by affording" them some but not all of the benefits.[251] In this one sentence, the *Ruiz* court opens the door to explore how this second-tier of citizenship operates and in what ways defendants "depreciate[d] the historic values of *Plaintiffs'* [sic] citizenship."[252] However, this door is soon shut by the *Ruiz* court, which quickly concludes that the classification deserves heightened scrutiny.[253] Again, while the court's rhetoric may be constrained by "legal discourse," it also represents how society should look at this particular issue—in this case, what is broadcasted is not how defendants' policies contribute to the continued subordination of minorities, but simply that one cannot classify citizens as aliens without implicating an equal protection violation.[254]

Second, when considering whether the regulation served a compelling government interest, *Ruiz*'s colorblind rhetoric impacts the decision's potential for social change due to its sole focus on the economic impacts of invalidating the regulation.[255] In determining that the regulations lacked a compelling government interest, the *Ruiz* court looked at three arguments: (1) defendants' argument that Florida has only a limited means to provide quality post-secondary education and would not be able to extend residency tuition to all U.S. citizens; (2) that plaintiffs and their families would benefit from residents' tax dollars; and (3) that plaintiffs are less likely to remain in Florida and contribute to the state's economy.[256] Although once

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[250] *See* Ngai, *supra* note 247, at 2521.

[251] Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1331 (S.D. Fla. 2012).

[252] *Id.*

[253] *Id.*

[254] Gotanda's concept of nonrecognition could also be applied to the court's level of scrutiny determination. Like its description of plaintiffs' background and the fact that led to *Ruiz*, the court once again ignores plaintiffs' race or socio-cultural background as a potential site of analysis. *See supra* Part IV.B.

[255] *Ruiz*, 892 F. Supp. 2d at 1331-33.

[256] *Id.*

again presented with the opportunity to examine the structures and mechanisms that culminated in Florida's now defunct regulations, the court chooses to adopt a colorblind rhetoric that focuses on the economics of the regulations. Even ACLU of Virginia noted that the Virginia AG's determination that U.S. citizen-children-of-undocumented-immigrants were ineligible for residency tuition was, in part, colored by some kind of bias.[257] However, within the *Ruiz* court's colorblind analysis and rhetoric, race and biases are irrelevant and unworthy of discussion.

In discussing the function of representation and its impact on a subject, Butler states:

> The domains of political and linguistic "representation" set out in advance the criterion by which subjects themselves are formed, with the result that representation is extended only to what can be acknowledged as a subject. In other words, the qualification for being a subject must first be met before representation can be extended.[258]

Given Butler's description of the relationship between a subject and its representation, the *Ruiz* court's equal protection analysis demonstrates how the court acknowledges neither plaintiffs' race nor history as subjects. The only subject within the court's purview is the economics of the situation.[259] While the court determines that none of the arguments for the residency tuition regulations are compelling enough to survive heightened scrutiny,[260] the fact that economics and money are not only represented but also recognized as more important than race demonstrates how color blindness ultimately ignores race and history to the detriment of minorities.

Rather than address what led to the violation of plaintiffs' equal protection rights, the court, instead, ignores the possibility of racism and immigrant bias, engaging in the "belief that, ultimately, race should have no real significance."[261] Thus, while plaintiffs and others "similarly situated" may receive equality in the form of dollar signs, addressing and dismantling the social structures of discrimination and subordination are still far off.

## V. CUE THE MUSIC: MOVING FROM A PLEA FOR EQUITY TO SOCIAL ACTION

As a rhetorical analysis of *Ruiz* illustrates, the court's use of a colorblind rhetoric to deal with Florida's discriminatory residency tuition regulations

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[257] ACLU VA Article, *supra* note 78.

[258] BUTLER, *supra* note 206, at 4.

[259] *See Ruiz*, 892 F. Supp. 2d at 1331-32.

[260] *Id.*

[261] Gotanda, *supra* note 152, at 59.

belie the issues of race and immigration that lie at their foundation, ultimately foreclosing any attempt to address the inherent issues of discrimination and subordination. But in recognizing the limitations of this kind of rhetoric, we should not reject legal discourse entirely, for, as Butler explains, "the political task is not to refuse representational politics—as if we could. . . . [Instead,] the task is to formulate within this constituted frame a critique of the categories of identity that contemporary juridical structures engender, naturalize, and immobilize."[262] In seeking to legitimate marginalized people's experiences and acknowledge the discrimination that critical race theorists find as part and parcel of everyday life in the U.S.,[263] it is not enough to argue that legal discourse, or at the very least a colorblind rhetoric, erases race and history to maintain the supremacy of the dominant group. Rather, Butler argues, the task is to critique the identities and categories created within the juridical structure.[264] It is only in critiquing the mode of characterization and representation (or lack thereof) can we elucidate how a colorblind rhetoric implicitly reifies social stratification and discrimination.

### *A. Here Comes the Crescendo: The Importance of Legal Scholarship in Combating a Colorblind Rhetoric*

Although critical race scholars and this paper attempt to expose the implicit machinations of racism and discrimination inherent in the law, critics of critical race theory often assert that critical race theorists see the American legal system as "structurally incapable of achieving racial equality because law is essentially politics, and politics is white supremacy."[265] Although some critical race theorists find that civil rights progress through the law is nothing more than an illusion,[266] others reject such a pessimistic view.[267] Instead, as Professor Yamamoto explains, many

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[262] BUTLER, *supra* note 206, at 8.

[263] *See* DELGADO & STEFANCIC, *supra* note 79, at 7-8.

[264] BUTLER, *supra* note 206, at 8.

[265] Jeffery J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promise of Liberalism*, 40 B.C. L. REV. 787, 797 (1999) (internal citations omitted).

[266] Yamamoto, *supra* note 141, at 869. In describing how critical race theorists deconstruct the law to understand its implicit modes of subjugation and domination, Yamamoto explains that this postmodern turn also "undermines both the positive and normative aspects of law . . . . [This] suggest[s] that what has been presented in our social-political and our intellectual traditions, as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power . . . ." *Id.* As consequence of this postmodern condition, any civil rights laws or movements that produce laws "engender little more than illusions of racial progress while reinforcing harmful racial hierarchies." *Id.*

[267] *Id.*

critical race theorists, while understanding that the effects of "rights talk" and civil rights laws may be limited, also "perceive potentially transformative value in law and rights assertion for disempowered groups, and they embrace modernist notions of hope and justice through reconceived ideas of law and political struggle."[268] For example, Professor Yamamoto cites to critical race scholar Angela Harris and her argument that the tension existing within critical race theory, in which critical race scholars attempt to deconstruct and demonstrate the inauthenticity of the law while simultaneously reconstructing it in the hopes of racial justice, is not a source of epistemological crisis, but one of strength.[269] For Harris, "[critical race theory's] ultimate vision is redemptive, not deconstructive."[270] In particular, the tension that exists within critical race theory can provide the opportunity for a reconstructive jurisprudence that allows minorities to "write back" to the dominant group and its institutions, laws, and narratives.[271]

Also working within critical race theory's epistemological tension, Professor Yamamoto posits a critical race praxis to respond to the "disjuncture between progressive race theory and political lawyering practice and to respond in part to the dissociation of law from racial justice."[272] Professor Yamamoto's critical race praxis is a combination of "critical pragmatic socio-legal analysis with political lawyering and community organizing for justice practice by and for racialized communities."[273] Specifically, this praxis instructs lawyers to both analyze the specific legal claim presented *and* "employ theory to interrogate subtext to identify the disabling cultural representations and exercises of group power underlying or exacerbating the specific grievance, and to assess critically the institutional dynamics . . . of the setting in which justice is practiced."[274]

Harris and Professor Yamamoto are not alone. Critical race scholars like Charles R. Lawrence III, Richard Delgado, Mari J. Matsuda, and Cedric Merlin Powell are just some of the critical race scholars who have advanced the reconstructive value of critical race theory and how the law can be used to forward the civil rights of minorities.[275] Thus, like Professor Yamamoto,

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[268] *Id.*

[269] *Id.* (citing Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 744-44 (1994)).

[270] Harris, *supra* note 269, at 743.

[271] *Id.* at 765-66.

[272] Yamamoto, *supra* note 141, at 874.

[273] *Id.* at 875.

[274] *Id.* at 876.

[275] *Id.* at 870-71. Yamamoto provides a brief overview of critical race scholars who are

Harris, and many other critical race scholars, I am not so pessimistic about the impact that critical race scholarship can have on the legal system.

Given both the oppressive and liberatory narrative functions of the court,[276] one can see that if legal rhetoric can write out race and history and project that mentality onto society, it can also provide a space for minorities and their narratives.[277] We must continue the project of critical race theory in carving out a space for such counter-narratives so that they may contend with and contest the dominant narrative.[278] And, one way to achieve this liberatory goal is for the courts to be aware of not only the kind of rhetoric they use, but also to recognize the competing master and counter-narratives that can exist in cases involving minorities.

### *B. No Diminuendo: A Brief Comment on Addressing Race and Bias*

As previously stated, a number of critical race scholars have posited various kinds of political, legal, and judicial reforms to address the implicit discrimination embedded within the law.[279] Although an entire paper could be written on the kind of legal rhetoric the courts should engage in whenever dealing with minority issues, this paper's primary focus is to demonstrate the rhetorical effects the *Ruiz* court's colorblind rhetoric has on plaintiffs and the citizen-children-of-birthright-citizens. However, in light of its project, this paper is compelled to briefly articulate the need to address the impact of race and bias whenever they exist.

As Gotanda points out, when addressing the issues of race and discrimination, recognition is not the problem:

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not only "talking back" to the dominant community and its social structures, but also provide proposals of reform to advance civil rights; *see generally* MARI J. MATSUDA ET AL., WORDS THAT WOUND (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Powell, *supra* note 155.

[276] As explained previously, critical race scholars have demonstrated the importance of legitimizing minority counter-narratives and the impact it can have on minority groups' relationships with the dominant community. *See supra* Part IV.A and notes 177-205; *see also* Yamamoto et al., *supra* note 175, at 21-22. Professor Yamamoto asserts that within the realm of the court, "[t]he shaping and then retelling of stories through [the] court process can help either to reinforce or counter a prevailing cultural narrative in a given community." Yamamoto et al., *supra* note 175, at 21. Depending on the court's cultural performance, the effect of narrative on minorities can either be "repressive, legitimating harsh imbalances of power in existing social relationships[,] . . . be liberatory, opposing or reconfiguring entrenched group images and relationships[,] or . . . reflect some complex, shifting combination of the two." *Id.* at 17-18.

[277] *See generally* Delgado, *supra* note 137 (examining the use of stories in racial reform).

[278] *See* DELGADO & STEFANCIC, *supra* note 79, at 48-49.

[279] *See supra* Part V.A. Indeed, an entire paper could be devoted to a survey on the legal reforms suggested by critical race scholars.

> To use color-blind recognition effectively in the private sphere, we would have to fail to recognize race in our everyday lives. *This is impossible. One cannot literally follow a color-blind standard of conduct in ordinary social life* . . . .
>
> In everyday American life, nonrecognition is self-contradictory because it is impossible to not think about a subject without having first thought about it at least a little. Nonrecognition differs from nonperception. Compare color-blind recognition with medical color-blindness. A medically color-blind person is someone who cannot see what others can. It is a partial nonperception of what is "really" there. *To be racially color-blind, on the other hand, is to ignore what one has already noticed.*[280]

The problem is not that race and its social impacts go unperceived, but that they are consistently ignored in the name of objectivity and equality.[281] What results, then, is indifference. Although speaking about the use of academic scholarship in judicial opinions, Larry Catá Baker's point on the effect of indifference is well taken: "Indifference is an effective gatekeeper, preventing ideas raised in outsider scholarly work from appearing in those institutional arenas in which policy is debated and norms are institutionalized . . . . Silence is a potent weapon to keep newly emerging ideas within the ghetto . . . ."[282] In a similar fashion, colorblindness acts as an effective rhetorical gatekeeper, barring any awareness or development of the issues surrounding racial subordination and discrimination. Consequently, such issues are not broadcasted to society, keeping the dominant narrative unabated and perpetuating the cycle of subordination.

To prevent this kind of gatekeeping, the courts must not remain indifferent or shy away from addressing race. In arguing for a revised constitutional approach to race in the courts, Gotanda posits three factors that should be considered:[283] first, courts must recognize that race is a social construction with a plurality of meanings that cannot be bifurcated from lived experience;[284] thus, an effort to understand racial issues must move beyond legal formalism.[285] Second, courts must allow for considerations of race and its multiple dimensions when engaging in judicial and legislative decision-making.[286] Finally, a revised approach

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[280] Gotanda, *supra* note 152, at 18 (emphasis added) (citations omitted).

[281] *See supra* Part IV.A.

[282] Larry Catá Baker, *Measuring the Penetration of Outsider Scholarship into the Courts: Indifference, Hostility, Engagement*, 33 U.C. DAVIS L. REV. 1173, 1210 (2000).

[283] Gotanda, *supra* note 152, at 63.

[284] *Id.*

[285] *Id.*

[286] *Id.*

must recognize the naturalization of subordination in society.[287] Together, these three factors call for courts' acknowledgment of how race is implicated in an issue, which will work to whittle away the underlying structures of subordination.

Scholars are not the only ones to call for such increased acknowledgement of how race may be implicated in a case. For example, in *State v. Buggs*,[288] the Minnesota Supreme Court was asked whether the state's use of a peremptory strike of a white female juror was based on racial discrimination.[289] Justice Alan C. Page argued in his dissent that the Minnesota Supreme Court's determination that a prima facie case of racial discrimination had not been made because the juror was white and, therefore, not a member of a racial minority, mischaracterized the impact race and our perceptions of race have on the justice system.[290] In his dissent, Justice Page articulates much of what this paper finds lacking in the *Ruiz* decision. He argued that the problem of race "belongs to all of us,"[291] and as such, we must address the issue when it presents itself. Justice Page articulates three steps that courts must engage in to address the issues of race and subordination:

> To achieve resolution, we must first have the ability to recognize issues of race when they come before us. To do so, we must look beyond the limited box of our own experience. . . . Once we recognize that issues of race are before us, we must then determine whether race has played an impermissible role. In doing so, we must be critical in our analysis. Finally, if we conclude that race has played an impermissible role, we must be courageous in acting to eradicate the resulting bias. As a court, our commitment to eradicate racial bias from our judicial system must ground itself in concrete common sense actions whenever and under whatever guise that bias manifests itself.[292]

Justice Page's argument for the recognition of racism and discrimination's impact on the legal system is not wildly revolutionary or antithetical to the system itself. Rather, Justice Page's assertion simply calls for diligence and awareness. It asks readers, scholars, lawyers, and judges to scrutinize a situation and ask the sometimes uncomfortable question, "is race and racism involved?"; and, if it is, as Justice Page asserts, "we must be

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[287] *Id.*

[288] State v. Buggs, 581 N.W. 2d 329 (Minn. 1998). *See also* DELGADO & STEFANCIC, *supra* note 79, at 48 (presenting an excerpt from *Buggs* as an example of how legal narratives can present the existence of alternative experiences (citing *Buggs*, 581 N.W. 2d at 344)).

[289] *Id.* at 339.

[290] *Id.* at 343-45 (Page, J., dissenting).

[291] *Id.* at 344.

[292] *Id.* at 345 (emphasis added).

courageous"[293] and address the resulting bias and the structures that inform and constitute that bias.[294] It is only by asking the hard questions can the structures that promote racism and discrimination be revealed and dealt with, thereby making papers like this less of a plea for equality and more of a call for awareness and action.[295]

## VI. CONCLUSION: KEEPING THE CURTAIN DRAWN

As *Ruiz* demonstrates, Florida's residency tuition regulations were entirely discriminatory, denying plaintiffs their right to the benefits given to others similarly situated and hindering their access to post-secondary education.[296] While the court's holding is a triumph for plaintiffs and does provide justice in the sense that the discrimination is no longer allowed, the *Ruiz* court uses a colorblind rhetoric that refuses to address the issue of plaintiffs' race and history, thereby rendering those issues invisible to the broader audience to which the court's discourse is directed. As a result, the court's social messages, which inform society's norms and attitudes towards minorities and immigrants, are structured through this lack:[297] because the race and history of these minorities are not seen as important by the court, the same issues go ignored by society as a whole, allowing for the maintenance of the dominant community and the continued subjugation of "others." Therefore, it remains the duty of scholars, legal theorists, and lawyers to examine the kind of rhetoric utilized by the justice system and develop a means of exposing the subtle ways in which race and culture are ignored and devalued. It is only through such critiques that we can make ourselves aware of not only how the marginalization of minority peoples are perpetuated through language, but provide a means of then responding to and combating such discrimination.

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[293] *Id.*
[294] *Id.*
[295] *See id.*
[296] Ruiz v. Robinson, 892 F. Supp. 2d 1321, 1332-33 (S.D. Fla. 2012).
[297] Yamamoto et al., *supra* note 175, at 18-19.

# Equity Without Law and Judicial Legislation: Rethinking the Private Attorney General Doctrine in Hawai'i

Brent K. Wilson*

> [L]aw, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law[,] which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.[1]

## I. INTRODUCTION

According to Blackstone, the great eighteenth century English legal scholar, equity "must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge."[2] Without constitutional or statutory guidance, the Private Attorney General Doctrine ("PAGD") fosters the evolution of the very scenario Blackstone cautions against. The PAGD stems from the equitable powers of the court and seeks to compensate private litigants who figuratively assume the role of a private attorney general by vindicating issues of significant public interest during adversarial proceedings.[3] The doctrine "provides for the enforcement of public rights through the use of private lawsuits, as opposed to through public lawsuits brought by the attorney general. The incentive for the private suit is the award of attorneys' fees following successful enforcement of the litigated right."[4]

Recently, the Hawai'i Supreme Court applied the PAGD in the case of *Honolulu Construction & Draying Co., Ltd. v. Department of Land &*

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* J.D. Candidate 2015, William S. Richardson School of Law. I would like to express my deepest, sincerest, heartfelt, down on my knees thanks to my wife Marly. Your love, support, strength, and very presence in my life have made this difficult journey possible. Thank you Miss Wai. Thank you to my family for their faith and prayers. Also, much thanks to Professor Robert Bruce Graham for his invaluable guidance and instruction.

[1] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 62 (Professional Books 1982) (1809).

[2] *Id.*

[3] *See* Honolulu Constr. & Draying Co., Ltd. v. Dep't of Land & Natural Res. (*Honolulu Constr. II*), 130 Haw. 306, 308, 310 P.3d 301, 303 (2013).

[4] Carl Cheng, Comment, *Important Rights and The Private Attorney General Doctrine*, 73 CALIF. L. REV. 1929, 1929 n.1 (1985).

*Natural Resources* ("*Honolulu Construction II*").[5] The court held that Petitioner/Respondent-Cross-Appellee Scenic Hawai'i, Inc. ("Scenic Hawai'i") was entitled to attorneys' fees and costs under the PAGD for "vindicat[ing] the important public policy of preserving public parks and historic sites . . . ."[6] Although Scenic Hawai'i was not the sole litigant contesting the State's and the Aloha Tower Development Corporation's ("ATDC") efforts to rescind the public park status of Irwin Park,[7] the court concluded that Scenic Hawaii's involvement in the suit was necessary and established new precedent "in enforcing the dedication of land for public parks and as historic sites."[8]

The precedential value of this decision provides deeper insight into the court's evolving interpretation and recent application of the PAGD. Specifically, *Honolulu Construction II* broadens the PAGD by: 1) explaining that the public policy vindicated does not need to be the subject of litigation itself;[9] 2) illustrating how a party representing the public interest along with other parties may still be "solely responsible" for advocating the public interest;[10] and 3) determining that "direct challenge[s] to . . . law[s] or polic[ies]" are not required in order to invoke the PAGD.[11] With the current mind of the court focused upon a more liberal interpretation of the PAGD, attorneys must recognize the strategic opportunities and hazards spawned by the doctrine as they prepare to litigate not only public policy issues, but also any issue that may indirectly touch upon the public's interest. This is especially important as many underlying public policy issues may not be facially apparent at the outset of litigation.

In an effort to provide a useful tool for legal practitioners, this note examines the evolution of the PAGD in both the Hawai'i Supreme Court and the United States Supreme Court and analyzes the application of the PAGD in *Honolulu Construction II*. The facts and procedural history of *Honolulu Construction II* are examined in Part II. Part III discusses the evolution of the PAGD leading up to *Honolulu Construction II*. Part IV analyzes the application of the PAGD to the facts in *Honolulu Construction*

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[5] *Honolulu Const. II*, 130 Haw. at 306, 310 P.3d at 301.

[6] *See id.* at 308, 310 P.3d at 303.

[7] *See id.* at 306, 310 P.3d at 301.

[8] *Id.* at 308, 310 P.3d at 303.

[9] *Id.* at 315, 310 P.3d at 310.

[10] *Id.* at 316, 310 P.3d at 311 (citing Sierra Club v. Dep't of Transp., 120 Haw. 181, 220, 202 P.3d 1226, 1263 (2009)).

[11] *Id.* at 318, 310 P.3d at 313 (applying Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 251 P.3d 131 (Mont. 2011)).

*II.* Finally, Part V analyzes the impact of *Honolulu Construction II* on the PAGD in Hawai'i.

## II. FACTS & PROCEDURAL HISTORY

### *A. Background*

Irwin Park,[12] immediately fronting Aloha Tower Marketplace, was dedicated in trust to the Territory of Hawai'i ("Territory") in 1930 by Helene Irwin Fagan ("Fagan") for use as a public park and for the beautification of the entrance to Honolulu Harbor.[13] Four restrictive covenants were appurtenant to Irwin Park and limited the Territory's use of the land to a public park.[14] The property was eventually converted into a public park by executive order in 1931.[15]

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[12] Irwin Park is located on the mountain side of Aloha Tower Marketplace (Aloha Tower Marketplace is located at 1 Aloha Tower Dr. Honolulu, HI 96813) and is bounded by North Nimitz Highway, Fort Street, Bishop Street, and Aloha Tower Drive.

[13] *Honolulu Constr. II*, 130 Haw. at 308, 310 P.3d at 303. Fagan entered into a trilateral agreement with the Territory and Honolulu Construction and Draying, Ltd. on September 3, 1930 whereby Fagan purchased Irwin Park from Honolulu Construction and Draying Ltd. for 2300 shares of common stock in Standard Oil Company of California and then agreed to donate the property to the Territory who subsequently accepted it with the restrictive covenants. Honolulu Constr. & Draying Co., Ltd. v. Dep't of Land & Natural Res. (*Honolulu Constr. I*), 129 Haw. 68, 70, 293 P.3d 141, 143 (App. 2012). The court considered only three of the covenants:

> (1) [t]he [Territory] shall . . . within three (3) years from and after the date hereof have converted all of said land, into a public park to be designated as the "Irwin Memorial Park."
>
> (2) The [Territory] shall, at all times hereafter, suitably maintain all of said real property as a public park under the jurisdiction and control of the . . . Harbor Commissioners, or their successors in office . . . .
>
> (4) In the event that . . . *all of said land shall not be suitably maintained by the [Territory] at any time hereafter as a public park, or if said public park shall at any time cease to be designated as "Irwin Memorial Park[,]" or if at any time hereafter any portion of said land shall be abandoned as a public park, . . . thereupon forthwith all right, title[,] and interest of the [Territory], and its successors and thereof, shall forthwith terminate, and title to all of said real property hereby conveyed shall forthwith immediately and without further act of either party to this agreement, their successors or assigns, revert to [Fagan], and her heirs and assigns, in fee simple absolute.*

*Honolulu Constr. II*, 130 Haw. at 308-309, 310 P.3d at 303-304 (emphasis in original).

[14] *Id.* at 308, 310 P.3d at 303.

[15] *Id.* at 309, 310 P.3d at 304. The executive order was issued by Territorial Governor Lawrence M. Judd and has remained in full force and effect since March 13, 1931. *Id.*

Later, in 1951, the Department of Public Works ("DPW") made plans to widen Nimitz Highway. The work would necessarily encroach upon Irwin Park, therefore, the DPW contacted Fagan and sought approval of the construction and waiver of all "Restrictions and Conditions."[16] A Special Deputy Attorney General with the DPW, Wilford D. Godbold ("Godbold"), also contacted Fagan on January 25, 1952, regarding the Nimitz construction.[17] Godbold's letter detailed a proposed land exchange, approved by the Territorial Attorney General, which offered Fagan a parcel of land near the Hana Maui Airport in exchange for Fagan's waiver of all revisionary provisions associated with the Irwin Park deed.[18] On January 31, 1952, Fagan replied to Goldbold's letter by signing it and adding the following above her signature: "[w]aiver is hereby made of any and all damages resulting from a breach of the conditions contained in that certain deed above referred to. It is hereby agreed that the restrictive conditions contained in such deed will be withdrawn and cancelled."[19] Although the construction on Nimitz Highway was completed, the land exchange never occurred and Fagan's agreement described in her January 31 response to Goldbold was not consummated.[20] Fagan then passed away in California on May 30, 1966 with no further communication on the matter.[21]

Years later, in 1981, the ATDC was created and became an agency of the State under Hawai'i Revised Statutes ("HRS") chapter 206J.[22] Chapter 206J specifically states that "Irwin Memorial Park shall be retained as a public park subject to the reservations and conditions set forth in the deed of Helene Irwin Fagan to the Territory of Hawai['i]."[23] Irwin Park was also included in the Hawai'i Register of Historic Places in 1999.[24]

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[16] *Id.*

[17] *Id.*

[18] *Id.* The proposed construction would encroach upon 24,303 square feet of Fagan's land and the value of the exchange was limited to $5,000. *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] HAW. REV. STAT. § 206J-4(a) (2001).

[23] *Id.* § 206J-6(c). The Legislature also stated, "The legislature finds that the area in downtown Honolulu on the waterfront, including . . . Irwin Memorial Park . . . is one of the most valuable properties in downtown Honolulu . . . . The legislature finds and determines that the purpose of this chapter is in the public interest and constitutes a valid public purpose." *Id.* § 206J-1.

[24] *Honolulu Constr. I*, 129 Haw. 68, 70, 293 P.3d 141, 143 (App. 2012).

### *B. The Land Court Proceedings*

Now the ground lessee of Irwin Park, ATDC filed a Petition with the Land Court to remove the deed restrictions mandating its use as a public park on May 15, 2001.[25] The Petition was also served upon "John W.K. Chang, the attorney for Party–in–Interest State of Hawai'i (the State), and 'Jane Fagan Olds and William Olds, Trustees of the William G. Irwin Charity Foundation.'"[26] On the same day, an ex parte application for an Order to Show Cause was filed by ATDC providing notice of the Petition to the parties.[27] The Order to Show Cause was also issued by the Land Court on the same date.[28]

Nearly a month later, Scenic Hawai'i moved to intervene in order to preserve Irwin Park's public-park status.[29] Scenic Hawai'i quickly moved to shorten time on its Motion to Intervene, arguing that if the motion was not granted, "the only parties who will be present in [c]ourt on [the date of the Order to Show Cause hearing] will be the State of Hawai'i and possibly the [] Foundation."[30] Scenic Hawai'i further asserted that: "(1) the State . . . would not adequately represent the public's interest because ATDC . . . supported the development of Irwin Park[;] and (2) the Fagan Heirs . . . appeared to defend the restrictive covenant[,]" in addition to other "questions of law and fact."[31]

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[25] *Id.* The ICA determined that ATDC wanted to build a multi-level parking structure on the land. *Id.*

[26] *Honolulu Constr. II*, 130 Haw. at 310, 310 P.3d at 305.

[27] *Id.*

[28] *Id.*

[29] *Id.* Scenic Hawai'i was also joined by four other non-profit organizations. The Outdoor Circle, Historic Hawai'i Foundation, Hawaii's Thousand Friends, and Life of the Land, in addition to Scenic Hawai'i, were referred to as the "Preservation Organizations" in the Land Court proceedings. *Id.* n.7.

[30] *Id.* at 310, 310 P.3d at 305.

[31] *Honolulu Constr. I*, 129 Haw. 68, 70-71, 293 P.3d 141, 143-44 (App. 2012). The Fagan Heirs and the Foundation separately responded to the Petition contesting relief under HRS § 206J–6(c) and Executive Order No. 472. *Id.* Scenic Hawai'i contended many questions and law and issues of fact including:

> "Was and is there a legal waiver by Mrs. Fagan of the restrictive covenant"? As to the evidence of a 'waiver' suggested by [ATDC], is it authentic? Is the signature that of Mrs. Fagan? Was the signature witnessed or notarized? Was the purported 'waiver' conditioned upon a land exchange involving Maui land? If so, was the land exchange ever consummated? What were the intentions of Mrs. Fagan with respect to the use, preservation and future reversion of Irwin Memorial Park? Do the living heirs of Mrs. Fagan have any information concerning Mrs. Fagan's intentions? If so, what testimony or evidence might they present?

*Id.*

The City and County of Honolulu also intervened.[32] Arguing its intervention was proper, the City and County asserted that the existing parties would not adequately represent the City and County's interests because it was unlikely that the parties shared the same interests.[33]

The Land Court granted both Scenic Hawai'i and the City and County's motions to intervene.[34] The State[35] was also joined as a "necessary and indispensable party[,]" in addition to the Department of Land and Natural Resources ("DLNR") as the administrator of the State's public lands.[36]

On December 12, 2002, ATDC's Petition was denied by the Land Court in a non-jury trial.[37] The Land Court concluded that "the restrictive covenants and reversionary interests contained in the 1930 deed are still valid and in full force and effect."[38]

Six years later, following the court's decision in *Maui Tomorrow v. State*,[39] Scenic Hawai'i filed a Motion for Attorneys' Fees and Costs under the PAGD.[40] Following multiple hearings on the matter, the Motion for Attorneys' Fees was granted in part and denied in part without prejudice by the Land Court.[41] Scenic Hawai'i renewed their Motion for Attorneys' Fees and was finally awarded $135,637.69 on March 29, 2010.[42]

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[32] *Id.* at 71, 293 P.3d at 144. The City and County of Honolulu intervened because it recognized its duty to "substantially advance legitimate public interests" such as the preservation of open spaces in urban areas and that removing the restrictions would dispose of the City's interest in preserving Irwin Park. *Id.*

[33] *Honolulu Constr. II*, 130 Haw. at 311, 310 P.3d at 306. The City and County felt that since the Heirs lived outside of the state, they would be more amenable to a monetary settlement with ATDC. *Id.* The City and County also stated that its interests were more in line with those of Scenic Hawai'i. *Id.*

[34] *Id.*

[35] Responding to a motion by ATDC, the Land Court filed an Order to Show Cause, ordering the State and the DLNR to appear as parties in interest. The State and DLNR filed their responses to the Order to Show Cause, both supporting ATDC's Petition. *Id.*

[36] *Honolulu Constr. I*, 129 Haw. at 71, 293 P.3d at 144.

[37] *Honolulu Constr. II*, 130 Haw. at 311, 310 P.3d at 306.

[38] *Id.* The Land Court concluded that "Fagan neither waived the restrictive covenants . . . nor gifted her reversionary interest in the Property" and denied the Petition for that reason. *Honolulu Constr. I*, 129 Haw. at 71, 293 P.3d at 144.

[39] 110 Haw. 234, 131 P.3d 517 (2006).

[40] *Honolulu Constr. II*, 130 Haw. at 311, 310 P.3d at 306. Scenic Hawai'i relied on common law principles discussed by the court in *Maui Tomorrow*. *Id.*

[41] *Id.* at 312, 310 P.3d at 307. The Land Court held that although Scenic Hawai'i satisfied all three prongs of the PAGD, the form in which they submitted their billing was incorrect. *Id.*

[42] *Id.*

### *C. The ICA Decision*

Following a timely appeal to the Intermediate Court of Appeals ("ICA") by ATDC and a cross appeal by Scenic Hawai'i, the ICA reversed the Land Court's decision to award attorneys' fees under the PAGD.[43] The ICA's decision considered three prongs that must be evaluated when deciding whether to award attorneys' fees under the PAGD: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision."[44]

As to the first prong, the ICA held that since the public policy interest "had no connection to or impact on the factual dispute[,]" Scenic Hawai'i failed to establish the first prong.[45] The ICA's reasoning was based upon the premise that the vindicated public policy must be connected to or impact the factual dispute before the court.[46] Here, the ICA concluded that the factual dispute before the Land Court was whether "[the] ATDC had demonstrated it was entitled to modify and amend Land Court Transfer Certificate of Title No. 310,513, pursuant to HRS § 501–196, to expunge the deed restrictions on the Property transferred from Fagan to the Territory."[47]

The ICA also held that Scenic Hawai'i failed to establish the second prong.[48] Scenic Hawai'i argued that its intervention was necessary because the Fagan heirs were residents of California and would not likely share the same sense of public interest.[49] Similarly, the State, the ATDC, and the Attorney General all supported ATDC's Petition.[50] In other words, Scenic Hawai'i argued that no one adequately represented the public interest of Hawai'i. Ultimately, this argument failed to convince the ICA. The ICA stated, "We reject any argument that California residents are inherently less interested in preserving their property rights in Hawai'i, particularly in this

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[43] *Honolulu Constr. I*, 129 Haw. at 70, 293 P.3d at 143. The ICA affirmed the Land Court's decision regarding all other issues.

[44] *Id.* at 73, 293 P.3d at 146 (citing Sierra Club v. Dep't of Transp., 120 Haw. 181, 218, 202 P.3d 1226, 1263 (2009)) (emphasis omitted).

[45] *Id.* at 74-75, 203 P.3d at 147-48.

[46] *Id.*

[47] *Id.* at 74, 293 P.3d at 147. The ICA rejected the argument asserted by Scenic Hawai'i that the issue before the Land Court was whether the ATDC was derelict in its statutory duty to preserve Irwin Park for the public good under HRS § 206J-1. *Id.* at 74-75, 293 P.3d at 147-48.

[48] *Id.* at 75, 293 P.3d at 148.

[49] *Id.*

[50] *Id.*

case, where they have appeared and defended those rights."[51] Furthermore, the ICA explained that the City and County's intervention negated any allegations of inadequate representation of the public's interest by the State, the ATDC, or the Attorney General because both the City and County and Scenic Hawai'i shared the same interests.[52] Thus, once the City and County intervened, the need for "private enforcement" by Scenic Hawai'i no longer existed.[53]

With neither the first nor the second prongs satisfied, the ICA found no reason to analyze the third prong.[54] The ICA concluded that the Land Court had abused its discretion and reversed the Land Court's decision to award attorneys' fees under the PAGD.[55] Scenic Hawai'i then filed for a writ of certiorari which was granted by the court.

## III. THE EVOLUTION OF THE PAGD

The Hawai'i Supreme Court stated that *Honolulu Construction II*, as a result of Scenic Hawai'i and its involvement "has general precedential value for enforcing governmental adherence to the dedication of private land for public parks and as historic sites, and for the enforcement of the government's commitments to the preservation of such parks and historic sites."[56] The case also "set precedent that agencies may not easily subvert statutory limitations through indirect actions."[57] Indeed, nearly every Hawai'i Supreme Court decision addressing the PAGD possesses some precedential value as the doctrine is still relatively new to Hawai'i and continues to evolve.[58] In order to provide a better substantive analysis of

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[51] *Id.*

[52] *Id.*

[53] *Id.* The ICA determined that Scenic Hawai'i was not "the *sole representative* of the vindicated public interest" and that in order to prevail, the public interest issue needed to be the "sole" issue of litigation. *Id.* (quoting *In re* Water Use Permit Applications (*Waiāhole II*), 96 Haw. 27, 31, 25 P.3d 802, 806 (2001) (emphasis added)); *see also* Sierra Club v. Dep't of Transp., 120 Haw. 181, 220, 202 P.3d 1226, 1265 (2009).

[54] *Honolulu Constr. I*, 129 Haw. at 75, 293 P.3d at 148 (citing *Waiāhole II*, 96 Haw. at 31, 25 P.3d at 806). The ICA also alludes to the idea that the Land Court's decision went beyond the intended bounds of the PAGD stating that the three-part test acts to prevent "unbridled judicial discretion to depart from the well-established American Rule." *Id.* at 75-76, 293 P.3d at 148-49. As is discussed in more detail *infra*, the ICA appears to be attempting to reign in and set boundaries for what appears to be a constant expansion of the PAGD by the Hawai'i Supreme Court.

[55] *Id.*

[56] *Honolulu Constr. II*, 130 Haw. 306, 319, 310 P.3d 301, 314 (2013).

[57] *Id.* at 318, 310 P.3d at 313.

[58] The PAGD was first discussed by the Hawai'i Supreme Court only twelve years ago in *Waiāhole II*. *Waiāhole II*, 96 Haw. 27, 25 P.3d 802; *Honolulu Constr. II*, 130 Haw. at

the court's application of the PAGD in *Honolulu Construction II*, this section will review the common-law origins of the doctrine and trace its evolution within the court. It will then provide an overview of the adoption and development of the PAGD within the Hawai'i Supreme Court.

### *A. The Common-law Origins of the PAGD*

Intuitively, the PAGD seems inconsistent with American legal practice. "In American litigation, attorney's fees are not ordinarily recoverable without statutory or contractual authorization."[59] Hence, each side pays for its respective legal expenses.[60] The PAGD, on the other hand, is more consistent with the English style of litigation where the losing party pays for the legal expenses of the prevailing party.[61] As an exception to the American rule, the PAGD is the latest development in a line of common-law equitable exceptions.

#### *1. The common-fund doctrine*

The origins of the PAGD begin in the nineteenth century. In *Internal Improvement Fund Trustees v. Greenough* ("*Improvement Fund*"), the State of Florida secured a bond issue of the Florida Railroad Company through conveying over ten million acres of state-owned land to trustees who then collusively sold hundreds of thousands of acres at nominal prices.[62] A "large holder" of the Railroad Company's bonds sued on behalf of himself and other bondholders, successfully convincing the court to set aside the transfers as fraudulent.[63] The bondholder also presented a claim for attorneys' fees and the court held that denying the fees

> would not only be unjust . . . but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. [The large holder] has worked for them as well as for himself; . . . they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.[64]

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308, 310 P.3d at 303. Since then, the Hawai'i Supreme Court has only adjudicated about one case per year dealing with the PAGD.

[59] Ann K. Wooster, Annotation, *Private Attorney General Doctrine—State Cases*, 106 A.L.R. 5th 523 (2003).

[60] *See id.*

[61] *See id.*

[62] Internal Imp. Fund Trustees v. Greenough, 105 U.S. 527, 528-59 (1881).

[63] *Id.* at 528.

[64] *Id.* at 532; *see also* Central Railroad & Banking Co. of Ga. v. Pettus, 113 U.S. 116,

*Improvement Fund* depicts what was discussed almost a century later in *Serrano v. Priest* where the Supreme Court of California commented that:

> [W]hen a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorneys [sic] fees out of the fund.[65]

Hence, the associated costs regarding the litigation efforts of a single plaintiff that result in a common benefit for all class members may be withdrawn from the fund before its proceeds are dispersed.[66] Doing so is consistent with the common-law rationale that beneficiaries of a common fund must equitably share the costs of creating the fund.[67]

### *2. The substantial benefit doctrine*

"Where the litigation efforts of one member of a class do not result in the creation of a common fund but nevertheless confer a substantial benefit on the class, the substantial benefit doctrine allows a court to award attorneys' fees . . . ."[68] Often deemed an offshoot of the common-fund doctrine,[69] the substantial benefit doctrine "permits the award of fees when the litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a 'substantial benefit' of a pecuniary or nonpecuniary nature."[70] Like the common-fund doctrine, the substantial benefit doctrine is similarly rooted in the notion that "members of a group benefiting from litigation should contribute to the costs of bringing the suit."[71]

To better illustrate the substantial benefit doctrine, consider the following example. The common scenario here is the derivative suit, "where the defendant corporation is able to spread plaintiff's costs among the benefiting shareholders . . . ."[72] In *Mills v. Electric Auto-Lite Co.*, plaintiff stockholders were awarded attorneys' fees under the substantial benefit doctrine against defendant corporation for "showing that proxies necessary

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126 (1885) (allowing a direct claim on the "fund" by the attorneys).

[65] Serrano v. Priest, 569 P.2d 1303, 1306 (Cal. 1977).

[66] *See* Cheng, *supra* note 4, at 1931.

[67] *See id.*

[68] *Id.*

[69] *See* Hall v. Cole, 412 U.S. 1, 5 n.7 (1973) (recognizing the substantial benefit doctrine as an "established exception").

[70] *Serrano*, 569 P.2d at 1309.

[71] Karla H. Alderman, Comment, *Making Sense of Oregon's Equitable Exception to the American Rule of Attorney Fees After* Armatta v. Kitzhaber, 35 WILLAMETTE L. REV. 407, 412 (1999).

[72] Cheng, *supra* note 4, at 1931.

to approval of [a] merger were obtained by means of a materially misleading solicitation . . . ."[73] The court held that a substantial service benefitting all shareholders was rendered by the plaintiff and to allow other shareholders to benefit from the expenses incurred by the plaintiff "without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense."[74] The application of the substantial benefit doctrine not only applies to corporate defendant scenarios, but has also been utilized within governmental defendant actions as well.[75]

### *3. The PAGD*

The PAGD is considered an offshoot of both the common-fund and substantial benefit doctrines.[76] Although some similarities between the two doctrines exist, the PAGD differs from the substantial benefit doctrine "in that a party acting as a private attorney general protects public interests or constitutional rights for society in general, while the substantial benefit doctrine establishes or protects rights of a limited group."[77] This difference marks a fundamental distinction between the PAGD and its ancestral doctrines. The PAGD expands the limits of the common-fund and substantial benefit doctrines by granting attorneys' fees to private parties who successfully litigate issues benefiting the general public.[78] The ability to determine whether or not the issues brought before the court are considered to be within the public's interest is a power inherent to the PAGD, even in the absence of legislative guidance or statutory authority.[79] Concerned with this very issue, the absence of statutory authority was the primary reason why the United States Supreme Court decided to expressly reject the PAGD.

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[73] Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 386 (1970).

[74] *Id.* at 392.

[75] *See Serrano*, 569 P.2d at 1309.

[76] *See* Cheng, *supra* note 4, at 1931.

[77] Allison Crist, Note, *Civil Rights—No Private Attorney General Exception to the American Rule in New Mexico:* New Mexico Right To Choose/National Abortion Rights Action League v. Johnson, 31 N.M. L. REV. 585, 589 (2001). Similar to the substantial benefit doctrine, the payment of fees is imposed upon the state who then passes on the cost of the fees to the general public, or those who stand to benefit from the vindicated public interest, by means of increased taxes and fees. *Id.* at 589-90.

[78] *Id.* at 590. Whether a court decides to adopt the PAGD brings with it a choice between encouraging the enforcement of constitutional rights and public policy interests through private enforcement or letting law makers assume their traditional roles of determining what constitutes the public interest and the circumstances under which state funds should be used to finance suits brought against the state. *Id.*

[79] *See* Cheng, *supra* note 4, at 1933.

### *B. The United States Supreme Court Rejects the PAGD*

The PAGD does not exist at federal common law. In 1975, the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society* held that "[c]ourts are not free . . . to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."[80] Doing so "would make major inroads on a policy matter that Congress has reserved for itself."[81] The majority concluded that in general, court-mandated shifting of attorneys' fees was not congruent with statutory authority and that courts were not capable of determining which rights were important under the PAGD.[82] Unless Congress has made a statutory indication that counsel fees should be awarded to help implement public policy, the federal courts are powerless to act.[83]

However, the court's express rejection of the PAGD in the *Alyeska* decision was limited to federal courts only, allowing state courts to retain the doctrine if it so desired.[84] Interestingly, instead of following the court's

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[80] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975). In *Alyeska*, a public interest group challenged construction permits issued by the Department of the Interior for the building of the Trans-Alaska pipeline. *Id.* at 241-42. Generally, it is understood that *Alyeska* was the court's categorical rejection of the PAGD. *See* Cheng, *supra* note 4, at 1933 n.19.

[81] *Alyeska*, 421 U.S. at 269.

[82] *Id.* at 263-64. The majority indicated that Congress possessed the power and ability to exercise judgment in choosing which statutes to allow attorneys' fees, noting that several parts of the U.S. Code contain specific provisions for the awarding of such fees under certain circumstances. *Id.* Without legislative guidance, courts are not equipped to make such determinations. *Id.* Even though those parts of the U.S. code that provide for the award of attorneys' fees under certain circumstances depend upon private enforcement as the primary means of protecting public policy by encouraging private litigation, Justice White stated:

> [C]ongressional utilization of the private–attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

*Id.* at 263. The majority also sought to preclude the judiciary from making its own rules regarding the allowance of attorneys' fees to either the prevailing party or possibly choose among plaintiffs and the statutes under which they bring suit, ultimately awarding some parties in certain cases and not others depending upon the court's evaluation of the importance of the public policy involved. *Id.* at 269.

[83] *See generally id.* at 261-63.

[84] *Id.* at 288 n.31. Although the court does not specifically state that the rejection of the PAGD is limited to federal courts, the court implies that state courts are precluded because federal courts must apply state law regarding the award of attorney fees in diversity cases.

reasoned analysis, which chose to leave a traditionally legislative function to lawmakers,[85] *Alyeska* was met with mixed reactions amongst the states. In fact, most states rejected the PAGD, leaving others to adopt the doctrine on state constitutional grounds or even "for cases protecting public interests in general."[86]

### *C. California Rejects* Alyeska: *The Model for the PAGD in Hawai'i*

Of particular interest here is the State of California's reaction to *Alyeska*. Choosing to reject *Alyeska* and perhaps taking a cue from the majority's dicta,[87] the California Supreme Court adopted the PAGD in its seminal case *Serrano v. Priest*.[88] As the *Serrano* case served in large part as the model the Hawai'i Supreme Court followed when it adopted the PAGD decades later, a brief overview of the facts and an analysis of the court's reasoning will prove beneficial.

Having established the unconstitutionality of the public school financing system,[89] plaintiffs sought attorneys' fees under the PAGD.[90] The *Serrano* court held that contrary to the court's decision in *Alyeska*, the PAGD should be adopted even in the absence of legislative guidance.[91] The *Serrano* court distinguished *Alyeska* by holding that when the litigated right is constitutional as opposed to statutory, "the *Alyeska* court's proscription of judicial interference with legislative enforcement priorities did not apply . . . ."[92] However, the Serrano court was also clear that the distinction

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*Id.*

[85] *See generally id.* at 261-64 (referring to the court's decision to look for statutory guidance as a condition precedent to granting attorney fees).

[86] Crist, *supra* note 77, at 590; *see generally* Wooster, *supra* note 59, at 523. States rejecting the PAGD followed the same path of reasoning as the court in *Alyeska*, essentially that the awarding of attorneys' fees is ultimately a legislative prerogative. Crist, *supra* note 77, at 590 n.46.

[87] *See Alyeska*, 421 U.S. at 259 n.31 (implying that the court's rejection of the PAGD was limited to federal courts, as state law regarding the award of attorney fees would still control in diversity cases).

[88] Serrano v. Priest, 569 P.2d 1303, 1316 (Cal. 1977).

[89] "The trial court held that the California public school financing system for elementary and secondary schools as it stood following the adoption of S.B. 90 and A.B. 1267 . . . was invalid as in violation of former article I, sections 11 and 21, of the California Constitution . . . ." *Id.* at 1304 n.1.

[90] *Id.* at 1306.

[91] *Id.* at 1315. The *Serrano* court acknowledged that even though the holding in *Alyeska* was "foremost in [its] mind[,]" adopting the PAGD was within the equitable powers of the court. *Id.* at 1313-15.

[92] Cheng, *supra* note 4, at 1934 (citing *Serrano*, 569 P.2d at 1315).

between constitutional versus statutory rights was not the determining factor when weighing whether the PAGD applies.[93]

Moving beyond the statutory-constitutional distinction, the *Serrano* court laid out its underlying rationale for adopting the PAGD and developed an elemental test by which to determine whether the PAGD should be applied. First, the court acknowledged the need for encouraging private enforcement of public interests in order to address the insufficiency of resources at the state-enforcement level. The *Serrano* court commented:

> [I]t frequently occurs that citizens in great numbers and across a broad spectrum have interests in common. These, while of enormous significance to the society as a whole, do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts. Although there are within the executive branch of the government offices and institutions (exemplified by the Attorney General) whose function it is to represent the general public in such matters and to ensure proper enforcement, for various reasons the burden of enforcement is not always adequately carried by those offices and institutions, rendering some sort of private action imperative.[94]

Second, part of the urgency the court refers to stems from simple economics. The costliness of litigation and the complexity of the issues often make it difficult to secure adequate representation for public interests as the number of private attorneys willing to work pro bono are limited.[95] Even with the advent of public-interest law firms providing more representation for public-interest litigants, the court seemed to agree that the amount of private and foundational funding was not adequate for such firms.[96] Hence, the court looked to the PAGD as a solution for evening the

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[93] *See Serrano*, 569 P.2d at 1314-15; Cheng, *supra* note 4 at 1934. The decision specifically leaves the question of whether the PAGD applies to statutory rights that have no provision for attorneys' fees open. *Id.* However, the California legislature answered the question left open by the *Serrano* court. Only days after the *Serrano* decision, the legislature drafted and passed section 1021.5 of the California Code of Civil Procedure, which authorizes the award of attorneys' fees for private enforcement of any "important right affecting the public interest." CAL. CIV. PROC. CODE § 1021.5 (West, Westlaw through 2014 Ch. 3). The California Supreme Court subsequently interpreted this provision as confirming that the PAGD applied to both constitutional and statutory rights. *See* Woodland Hills Residents Ass'n, Inc. v. City Council, 593 P.2d 200, 206 (Cal. 1979); Cheng, *supra* note 4, at 1934-35.

[94] *Serrano*, 569 P.2d at 1313.

[95] *Id.*

[96] *Id.* at 1313-14. The court recognized the disparity between private and public interests with regards to financial resources and implied that under its equitable powers, the court could bridge the financial gap between private and public interests by awarding substantial attorneys' fees and thereby provide parity of representation for public interest

playing field by providing a potential source financial stimulus for public interest litigation.

The *Serrano* court then looked to previous decisions granting attorneys' fees under the PAGD and identified three general elements to be considered when determining whether the doctrine applies.[97] The court recognized the following as factors to be considered: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision."[98]

As to the first factor, the *Serrano* court acknowledged the ambiguous language calling for a subjective assessment by the judge.[99] The court conceded that the lack of "specific objective standards" within the first factor could cause a judge to assume more of a legislative role by having to determine "the relative strength or weakness of public policies . . . ."[100] Also, such an assessment impliedly determines which public policies should be encouraged by awarding attorneys' fees, a duty belonging to the legislature.[101] Although the *Serrano* court concluded as a matter of law that the PAGD applied in this case because the right at issue was constitutional as opposed to statutory, the court readily admitted that "[a] judicial evaluation . . . of the strength or importance of [a] statutorily based policy presents difficult and sensitive problems whose resolution by the courts may be of questionable propriety."[102] The *Serrano* court did not comment further on either of the two remaining factors.

### *D. Hawai'i Rejects* Alyeska: *The Development and Adoption of the PAGD*

Over three decades later, the Hawai'i Supreme Court joined the California Supreme Court in rejecting *Alyeska* and formally adopting the PAGD in *Sierra Club v. Department of Transportation of State of Hawai'i* (*Sierra Club II*).[103] Prior to the Hawai'i Supreme Court's formal adoption

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causes. *Id.*

[97] *Id.* at 1314.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* The *Serrano* court also discussed the relationship between public policy and statutory law. The court stated that the enactment of a statute is in essence a declaration of public policy and if the statute contained no provisions for the awarding of attorneys' fees then a judge could logically conclude that "the public policy involved did not warrant such encouragement." *Id.* at 1314-15.

[102] *Id.* at 1315.

[103] Sierra Club v. Dep't of Transp. of State of Hawai'i (*Sierra Club II*), 120 Haw. 181,

of the doctrine in 2009, the court adjudicated two cases that argued for the recognition of the doctrine under the court's equitable powers. In re *Water Use Permit Applications* ("*Waiāhole II*")[104] and *Maui Tomorrow v. State Board of Land and Natural Resources of the State of Hawai'i*[105] mark the beginning of the doctrine's development in Hawai'i.

### *1.* Waiāhole II: *An introduction to the PAGD*

*Waiāhole II* was the Hawai'i Supreme Court's first opportunity to consider the PAGD. The case involved multiple public-interest appellees seeking attorneys' fees against both private and governmental appellants following the partial reversal of an agency decision.[106] Ultimately, the court denied the motion for attorneys' fees stating that the second prong of the *Serrano* factors, "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff," was not met.[107] In order to reach this decision, the *Waiāhole II* court relied heavily upon *Serrano*. A brief overview of the court's reasoning in *Waiāhole II* reveals significant parallels to the *Serrano* court and begins to establish a baseline from which to compare the court's current position on the PAGD.

Arriving at its decision, the Hawai'i Supreme Court stated that the purpose of the private attorney general doctrine was "to promote vindication of important public rights."[108] The court based its rationale for this statement upon the same arguments in favor of the PAGD cited in *Serrano*.[109]

Applying this rationale to the *Serrano* factors, the court ruled that the first and third prongs were met as *Waiāhole II* "involved constitutional rights of profound significance, and all of the citizens of the state, present

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221, 202 P.3d 1226, 1266 (2009).

[104] *In re* Water Use Permit Applications (*Waiāhole II*), 96 Haw. 27, 25 P.3d 802 (2001).

[105] Maui Tomorrow v. State Bd. of Land & Natural Res., 110 Haw. 234, 131 P.3d 517 (2006).

[106] *Waiāhole II*, 96 Haw. at 28, 25 P.3d at 803.

[107] *Id.* at 31-32, 25 P.3d at 806-07.

[108] *Id.* at 30, 25 P.3d at 805 (citations omitted).

[109] *Id.* at 30, 25 P.3d at 805; *Sierra Club II*, 120 Haw. 181, 219, 202 P.3d 1226, 1264 (2009) (commenting on *Waiāhole II*'s adoption of the PAGD as articulated in Serrano). The *Waiāhole II* court specifically focused upon the same arguments articulated in *Serrano* such as the inadequacy of enforcement by public officers and institutions thus heightening the need for some sort of private enforcement, the limited availability of private attorneys to represent public interests, and the lack of adequate funding for private-interest law firms. *Waiāhole II*, 96 Haw. at 30, 25 P.3d at 805. For a more in-depth discussion, see *supra* Part III.C.

and future, stood to benefit from the decision."[110] Here, the court seemed to avoid the "potential problem of encroaching on the legislature's domain by applying the doctrine . . . to litigation grounded in constitutional . . . rights and duties,"[111] likely following the *Serrano* court's lead. Unlike the *Serrano* court,[112] the Hawai'i Supreme Court makes no mention of whether the PAGD would apply to rights arising under statutory law.

Returning to the second prong, the *Waiāhole II* court's ruling lends some insight into the court's interpretation of the PAGD. The "*necessity* for private enforcement and the magnitude of the resultant burden on the plaintiff"[113] was weighed by two factors. First, the court noted that, "In other cases, the plaintiffs served as the *sole representative* of the vindicated public interest."[114] In *Waiāhole II*, the court thus seemed to gauge the degree of necessity for private enforcement with the number of litigants representing the public interest. Indeed, the court's decision in this case makes it clear that the more litigants representing the public interest, the less likely one is to prevail as the necessity for private enforcement by the one litigant decreases as the number of litigants representing the public interest increases.

Second, the court also noted that in other cases the government either "completely abandoned, or actively opposed, the plaintiff's cause."[115] Here, the court draws an important distinction between what constitutes an actionable government offense and what does not. In order to satisfy the second *Serrano* prong, the public interest at issue must arise from a "previously established *government* law or policy."[116] The distinction is that public interest issues arising from the adversarial proceedings of a government *tribunal* or *agency*, such as the Commission on Water Resources Management in this case, that do not take issue with an actual law or policy do not satisfy the second *Serrano* prong.[117]

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[110] *Waiāhole II*, 96 Haw. at 31, 25 P.3d at 806. At issue was the apportionment of water rights, which is governed under the Hawai'i State Constitution and the public trust doctrine. HAW. CONST. art. XI, § 7; *see also In re* Water Use Permit Applications (*Waiāhole I*), 94 Haw. 97, 198, 9 P.3d 409, 510 (2000).

[111] *Waiāhole II*, 96 Haw. at 31, 25 P.3d at 806.

[112] *See* Serrano v. Priest, 569 P.2d 1303, 1315 (Cal. 1977).

[113] *Id.* at 1314 (emphasis added).

[114] *Waiāhole II*, 96 Haw. at 31, 25 P.3d at 806 (emphasis added).

[115] *Id.*

[116] *Id.* at 32, 25 P.3d at 807 (emphasis added).

[117] *Id.* To clarify, the contested issue was the apportionment of water rights between various public and private interests, not any policy of the government. *See* Maui Tomorrow v. State Bd. Of Land & Natural Res., 110 Haw. 234, 245, 131 P.3d 517, 538 (2006) (explaining the contested issue in *Waiāhole II*).

Taken together, the reasons and rationale for the court's denial of attorneys' fees in *Waiāhole II* were derived from "the conventional application of the private attorney general doctrine."[118] Combined with the holdings in *Maui Tomorrow* and *Sierra Club* discussed in the next two subsections, *Waiāhole II* provides the first glimpse into the mind of the Hawai'i Supreme Court regarding the PAGD and establishes the beginning of a comparative baseline. The baseline will be a useful tool from which to compare and contrast the court's decision in *Honolulu Construction II* and draw conclusions regarding the impact of the PAGD on future litigation.

### 2. Maui Tomorrow: *The second prong refined*

*Maui Tomorrow* adds to the baseline, further refining the second prong of the *Serrano* test. At issue in *Maui Tomorrow* was a long-term water lease granted by the State Board of Land and Natural Resources ("BLNR") allowing a private party continued use of water sourced in streams on state-owned land and then delivered via a private irrigation system to agriculture and domestic uses throughout Maui.[119] Appellant argued that the BLNR failed to complete the required analysis of how the lease would impact native Hawaiian rights.[120]

BLNR's failure to perform the analysis is actually an aspect of the case that helps distinguish it from *Waiāhole II*. Here, the public interest issue arises from a "*policy* of the BLNR to lease water rights without performing the required analysis."[121] However, even though the public interest at issue arises from a governmental policy, the court still denied appellant's attorneys' fees under the PAGD because the government did not actively oppose or abandon appellant's cause.[122]

Active opposition to or abandonment of the appellant's cause requires more than mere omission of duty. In *Maui Tomorrow*, "the BLNR recognized the State's 'duty to protect the reasonable exercise of

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[118] *Waiāhole II*, 96 Haw. at 32, 25 P.3d at 807.

[119] *Maui Tomorrow*, 110 Haw. at 236, 131 P.3d at 519.

[120] *See id.* at 239, 131 P.3d at 522. Appellant argued that under Article XII § 7 of the Hawai'i Constitution and the Hawai'i Supreme Court's decisions in *Public Access Shoreline Hawai'i v. Cnty. of Hawai'i*, 79 Haw. 425, 437, 903 P.2d 1246, 1250 (1995), and *Ka Pa'akai v. Land Use Commission*, 94 Haw. 31, 45, 7 P.3d 1068, 1082 (2000), the State had an affirmative duty to protect both traditional and customary Native Hawaiian rights, including the completion of a cultural impact analysis prior to granting such a lease. *Maui Tomorrow*, 110 Haw. at 239, 131 P.3d at 522.

[121] *Id.* at 245, 131 P.3d at 528 (emphasis added). The issue in *Waiāhole II* arose from the apportionment of water rights between various public and private interests, not any policy of the government. *See id.*

[122] *Id.*

customarily and traditionally exercised rights of Hawaiians to the extent feasible[,]' . . . but stated that the [Commission on Water Rights Management], rather than itself, was the appropriate agency to fulfill the State's duty."[123] The Hawai'i Supreme Court concluded that just because the BLNR didn't perform its duty as mandated under Article XII, Section 7 of the Hawai'i Constitution, did not mean that it had abandoned appellant's cause.[124] Rather, the court held that "the BLNR was under the impression, although erroneous, that the duty was to be carried out by another agency" and therefore did not "actively oppose" or abandon appellant's cause, which precluded appellant from collecting attorneys' fees under the PAGD.[125] Hence, in order to prevail under the second prong of the *Serrano* test, merely showing that the government failed to perform its constitutional or statutory duty is not sufficient.

### *3.* Sierra Club II: *Formal adoption of the PAGD*

Armed with the *Serrano* test and two prior decisions, the Hawai'i Supreme Court formally adopted the PAGD and awarded appellants attorneys' fees in *Sierra Club II*.[126] The issue in *Sierra Club II* was whether the State of Hawai'i Department of Transportation's ("DOT") determination that improvements to the Kahului Harbor in preparation for the new Superferry inter-island service were exempt from an environmental assessment ("EA") prior to commencing the harbor improvements.[127] After

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Sierra Club II*, 120 Haw. 181, 221, 202 P.3d 1226, 1266 (2009).

[127] *Id.* at 186-87, 202 P.3d at 1231-32. The Hawai'i Superferry project involved an inter-island ferry service between the islands of O'ahu, Maui, Kaua'i, and Hawai'i, requiring the use of harbor facilities on each island. *Id.* The DOT determined that improvements to Kahului Harbor, such as the construction of a removable barge to Pier Two of the harbor and other improvements to assist in operations, were needed to accommodate the Superferry. The DOT determined that the improvements were exempt from the environmental assessment requirements of Hawai'i Revised Statutes chapter 343. *Id.*

The Hawai'i Supreme Court's first review of this case was in 2007. Sierra Club v. Dep't. of Transp. of State of Hawai'i (*Sierra Club I*), 115 Haw. 299, 167 P.3d 292 (2007). In *Sierra Club I*, the court vacated the circuit court's decision upholding the DOT's determination that the Kahului Harbor improvements were exempt from the environmental assessment [hereinafter EA] report required under Hawai'i Revised Statutes chapter 343. *Sierra Club II*, 120 Haw. at 187, 202 P.3d at 1232. The circuit court entered summary judgment in favor of Sierra Club on its claim requesting an EA. *Id.* Sierra Club then moved ex parte to enjoin and was granted a temporary restraining order against the DOT and Superferry enjoining them from use of the harbor until the completion of the EA. *Id.* Eventually, the DOT and Superferry were permanently enjoined from implementing the

lengthy litigation, *Sierra Club II* was declared the prevailing party in the suit and subsequently sought attorneys' fees under the PAGD.[128] The court's reasoning for its decision in this case is very instructive, providing the final baseline segment.

In addition to applying and further clarifying the *Serrano* test, the court first explained how to determine which party is the prevailing party for purposes of the PAGD. The analysis of the *Sierra Club II* decision will begin with the threshold issue of whether a party is the prevailing party and then conclude with a review of the court's application of the *Serrano* test.

In order to invoke the PAGD, the movant must be the prevailing party in an adversarial proceeding.[129] Here, the court concluded that Sierra Club was the prevailing party under the approach adopted from *Food Pantry, Ltd. v. Waikiki Business Plaza, Inc.*[130] "In *Food Pantry*, this court concluded that 'where a party prevails on the disputed main issue, even though not to the extent of his original contention, he will be deemed to be the successful party for the purpose of taxing costs and attorneys' fees.'"[131] Under this approach, the prevailing party is determined by the main issues.[132] To determine the main issues, the Hawai'i Supreme Court looked

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Superferry project until the completion of the EA. *Id.* at 189, 202 P.3d at 1234. In response to the permanent injunction, Governor Linda Lingle convened a special legislative session where the legislature passed Act 2, "A Bill for An Act Relating to Transportation" for the purpose of circumventing the court's injunction by removing the EA as a condition precedent to the commencement of the Maui Harbor improvements. *Id.* at 190, 202 P.3d at 1235 (citing Act of Nov. 2, 2007, No. 2, §§ 1-18, 2d. Spec. Sess. 2007 Haw. Sess. Laws 5–21 (*invalidated by Sierra Club II*, 120 Haw. at 185, 202 P.3d at 1230)). In response to Act 2, the circuit court dissolved the permanent injunction. *Sierra Club II*, 120 Haw. at 192-93, 202 P.3d at 1237-38. Sierra Club then moved for reimbursement of reasonable attorneys' fees, for voluntary dismissal of its remaining claims, and for entry of final judgment. *Id.* Sierra club was granted their motion for attorneys' fees because the circuit court had not given weight to fifteen exhibits submitted by Sierra Club challenging Superferry's claim of reliance in good faith on DOT's exemption determination. *Id.* Both the DOT and Superferry appealed, Sierra Club cross-appealed. *Id.*

[128] *Sierra Club II*, 120 Haw. at 231, 202 P.3d at 1276.

[129] *See generally* Wooster, *supra* note 59.

[130] 58 Haw. 606, 620, 575 P.2d 869, 879 (1978) (holding that a lessor that prevailed on the basic issues of the suit, could be awarded damages, but was prevented from canceling the lease).

[131] *Sierra Club II*, 120 Haw. at 216, 202 P.3d at 1261 (citing *Food Pantry*, 58 Haw. at 620, 575 P.2d at 879).

[132] *Id.* The court also identified other approaches that are impliedly valid under the PAGD because they did not fit the facts of this case as well. *Id.* at 217, 202 P.3d at 1262. The approach from *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Haw. 92, 176 P.3d 91 (2008), determines the prevailing party by the final judgment:

> [I]n general, a party in whose favor judgment is rendered . . . is the prevailing party . . . plaintiff or defendant, as the case may be. Although a plaintiff may not

to the Intermediate Court of Appeals ("ICA"). The ICA held that "[t]he trial court is required to first identify the principle issues raised by the pleadings and proof in a particular case, and then determine, on balance, which party prevailed on the issues."[133] Applying the ICA test, the principle issue here was whether the EA was mandatory under HRS chapter 343 to which the circuit court said yes and thus determined that Sierra Club prevailed on the merits.[134]

Having established Sierra Club as the prevailing party, the court applied the *Serrano* test to the facts. The court held that Sierra Club prevailed on the first prong because contrary to the DOT's and Superferry's arguments, "this litigation *[was] responsible for establishing the principle of procedural standing in environmental law in Hawai'i and clarifying the importance of addressing the secondary impacts of a project in the environmental review process pursuant to HRS chapter 343.*"[135]

The court's rationale under the first prong is instructive for two reasons. First, it echoes the *Serrano* court's discussion[136] by implying that important public policies may originate from statutory in addition to constitutional law.[137] Second, in weighing the "strength or societal importance of the

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sustain his entire claim, *if judgment is rendered for him, he is the prevailing party for purposes of costs and [attorneys'] fees.*

*Sierra Club* II, 120 Haw. at 215, 202 P.3d at 1260 (quoting *Kamaka*, 117 Haw. at 126, 176 P.3d at 125).

[133] *Sierra Club II*, 120 Haw. at 216, 202 P.3d at 1261 (citing MFD Partners v. Murphy, 9 Haw. App. 509, 515, 850 P.2d 713, 716 (1992)).

[134] *Id.* at 217-18, 202 P.3d at 1262-63. The court also considered that the circuit court held four weeks of evidentiary hearings before issuing a permanent injunction in favor of Sierra Club and recognizing Sierra Club as the prevailing party. *Id.* Sierra Club was also allowed to file a request for attorneys' fees because the circuit court considered it the prevailing party. *Id.* at 217, 202 P.3d at 1262. The fact that Act 2 changed the underlying law while the case was being litigated did not affect the court's analysis. *Id.* at 218, 202 P.3d at 1263.

[135] *Id.* at 220, 202 P.3d at 1265 (emphasis added). DOT and Superferry argued that the first prong was not satisfied because no public policy was vindicated and the underlying policy of chapter 343 was not at risk. *Id.* Rather, instead of abandoning or actively opposing Sierra Club's cause, the DOT and Superferry contended that the issue here was an erroneous determination of the law, and therefore, not actionable under the PAGD. *Id.*

[136] *See* Serrano v. Priest, 569 P.2d 1303, 1314-15 (Cal. 1977) (discussing the relationship between public policy and statutory law and stating that the enactment of a statute is in essence a declaration of public policy and if the statute contained no provisions for the awarding of attorneys' fees then a judge could logically conclude that "the public policy involved did not warrant such encouragement").

[137] The public policies at issue in both *Waiāhole II* and *Maui Tomorrow* stemmed from rights under the Hawai'i Constitution. This was the court's first opportunity to decide whether it would also find actionable public interest rights under statutory law. However, at this point, the court could not be deemed as having assumed a legislative role by determining

public policy vindicated by the litigation,"[138] it is not necessary for the underlying policy itself to be "at risk" in order to satisfy the first prong.[139] Instead, the court's ruling implies that the DOT's erroneous determination under the statute was sufficient to constitute an actionable violation of the public interest, thereby giving standing for the suit. DOT's actions must have "abandon[ed] or actively oppos[ed] the plaintiffs' cause" in some way because to hold otherwise would make the DOT's actions more analogous to those of the Commission on Water Rights Management ("CWRM") in *Waiāhole II* and therefore not actionable under the PAGD.[140]

The court's weighing of the second prong, "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff,"[141] is confusing. As discussed *supra* in Part III.D.1., the court remains consistent with its reasoning of associating the necessity for private enforcement with the number of litigants representing the public interest. The number of parties representing the public interest in *Sierra Club* was three as opposed to well over three in *Waiāhole II*.[142] The court concluded that "[t]hese groups were *solely* responsible for challenging DOT's erroneous application of its responsibilities under HRS chapter 343."[143] The decision supports the previous implication in *Waiāhole II* that fewer parties representing the public interest raises the necessity for private enforcement. However, considering more than one litigant as congruent with the meaning of the word *sole* is not consistent with the common understanding of the word.[144] Nevertheless, the Hawai'i Supreme Court appears to favor a more liberal meaning of the word and will recognize multiple litigants representing the public interest as *sole* litigants.

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the importance of chapter 343 via its award of attorneys' fees. HRS § 607–25, entitled "Actions based on failure to obtain government permit or approvals; attorneys' fees and costs," allowed for attorneys' fees in this case.

[138] *Serrano*, 569 P.2d at 1314.

[139] *Sierra Club II*, 120 Haw. at 220, 202 P.3d at 1265.

[140] *Id.* If the DOT's actions were not abandoning or actively opposing plaintiff's cause, then they would not be actionable under the PAGD because like the CWRM's apportionment of water rights, Sierra Club would be attacking the decision of the DOT and not the underlying "established government policy." *See id.*

[141] *Id.*

[142] *See supra* Part III.D.1.

[143] *Sierra Club II*, 120 Haw. at 220, 202 P.3d at 1265 (emphasis added).

[144] The common meaning of the word "sole" when used as an adjective is "belonging exclusively or otherwise limited to one . . . ." MERRIAM-WEBSTER'S DICTIONARY OF LAW 460 (1996). Although the court's review of cases from other jurisdictions in *Waiāhole II* seemed to focus on the singular nature of the public interest litigant with reference to the court's use of the word "sole," *Sierra Club II* appears to underscore the fact that the Hawai'i Supreme Court will not limit the meaning of the word to its common definition. *See Waiāhole II*, 96 Haw. 27, 31, 25 P.3d 802, 806.

As for the third prong, "the number of people standing to benefit from the decision," the court agreed with Sierra Club's argument that *Sierra Club I*:

> provided a public benefit, because it is generally applicable law that established procedural standing in environmental law and clarified the need to address secondary impacts in environmental review pursuant to HRS chapter 343 and will "benefit large numbers of people over long periods of time."[145]

The court further commented that the vision of the legislature was to involve all parties, both those directly involved in the EA process and the general public.[146]

Of the three *Serrano* prongs, the third remains the most subjective. Looking for criteria by which to weigh the facts under the third prong, the court provided no specific guidance in *Sierra Club II* or either of the previous two cases. The only insight the court gave regarding the appraisal of the third prong was that cases involving "constitutional rights of profound significance" will benefit "all of the citizens of the state, present and future."[147] After *Sierra Club II*, it could also be assumed that the court is willing to recognize and encourage the private enforcement of statutory rights of profound significance via the PAGD.

## IV. *HONOLULU CONSTRUCTION II*: CONTEMPORARY APPLICATION OF THE PAGD

In less than ten years, the Hawai'i Supreme Court's application of the PAGD to *Honolulu Construction II* shows notable changes from its decision in *Sierra Club II*.

### *A. Prong One: The Strength or Societal Importance Vindicated by the Litigation*

The Hawai'i Supreme Court began by breaking the first prong into two separate parts, analyzing each individually. First, the court considered "the 'strength or societal importance of the public policy' advocated by Scenic Hawai'i."[148] Here, the court ruled that Scenic Hawai'i satisfied the first prong because "[t]he preservation of public parks and historic sites in the

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[145] *Sierra Club II*, 120 Haw. at 221, 202 P.3d at 1266.

[146] *Id.*

[147] *Id.* at 219, 22 P.3d at 1264; Waiāhole *II*, 96 Haw. at 31, 25 P.3d at 806.

[148] *Honolulu Constr. II*, 130 Haw. 306, 314, 310 P.3d 301, 309 (2013) (citing *Sierra Club II*, 120 Haw. at 218, 202 P.3d at 1263) (citations omitted).

State represents a significant public concern."[149] The court went on to justify its decision by citing its prior decision in *Waiāhole II*, "that the first prong of the doctrine was satisfied because the case 'involved constitutional rights of profound significance.'"[150] It also cited to *Serrano*, stating "[T]he goal of the doctrine is to award attorneys' fees to deserving interests to the end that support may be provided for the representation of interests of similar character in future litigation."[151] The court concluded its reasoning under the first prong by explaining that simply because this suit related to a single discrete piece of property does not preclude it from being an important public policy.[152] Rather, the fact that the legal implications flowing from this case would create "support . . . for the representation of interests of similar character in future litigation" further underscores the vindication of an important public policy and satisfies the first prong.[153]

Second, the court determined whether the underlying litigation actually vindicated this important public policy. Previously, the ICA held that because the public policy advocated by Scenic Hawai'i bore no connection to the factual issue in dispute, Scenic Hawai'i could not prevail under the first prong.[154] The court ruled that this interpretation of the first prong of the PAGD was too restrictive.[155] Specifically, the court explained that the

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[149] *Id.* The Hawai'i Supreme Court relied on HAW. REV. STAT. § 6E–1 (2009), which states, "The Constitution of the State of Hawai[']i recognizes the value of conserving and developing the historic and cultural property within the state for the public good." *Id.* The court also looked to HAW. REV. STAT. § 184–2(3), which provides for new parks and parkways to be established. *Id.* Notably, none of these sources were argued by Scenic Hawai'i.

[150] *Honolulu Const. II*, 130 Haw. at 314, 310 P.3d at 309 (citing *Waiāhole II*, 96 Haw. at 31, 25 P.3d at 806).

[151] *Id.* (citing *Waiāhole II*, 96 Haw. at 30, 25 P.3d at 805; *Serrano*, 569 P.2d 1303, 1313–14 (1977)) (internal quotation marks omitted).

[152] *See id.*

[153] *Id.* (citing *Waiāhole II*, 96 Haw. at 30, 25 P.3d at 805) (internal quotations and citations omitted).

[154] *Id.* (citing *Honolulu Constr. I*, 129 Haw. 68, 74, 293 P.3d 141, 147 (App. 2012)). The factual issue in dispute was whether Fagan had waived the deed restrictions or gifted the revisionary interest. *See Honolulu Constr. I*, 129 Haw. at 74, 293 P.3d at 147. The ICA reasoned that even if the Land Court agreed with Scenic Hawai'i that the State had abandoned its public trust duty, "that position would not have been dispositive of the factual issue of whether Fagan waived the deed restrictions or gifted her reversionary interest to the Territory." *Id.* The ICA also held that "the Land Court's ruling . . . did not include any determination as to whether ATDC's intended use was a violation of HRS § 206J–6 or in contravention of Hawai'i Historic Preservation Law, HRS chapter 6E." *Id.* at 74–75, 293 P.3d at 147–48." *Id.* On its face, the ICA appears to be applying the court's analysis in *Waiāhole II* regarding whether the government had "abandoned, or actively opposed, the plaintiff's cause." *See Waiāhole II*, 96 Haw. at 31, 25 P.3d at 806 (citations omitted).

[155] *Honolulu Constr. II*, 130 Haw. at 315, 310 P.3d at 310.

litigation must vindicate a public policy, but the public policy does not need to be the subject of the litigation.[156]

In light of past decisions, the court's interpretation of the first prong is indeed precedential. However the significance of the court's decision as to the first prong is not in its reasoning, but in its intent. Although the court's reasoning appears somewhat consistent with its prior holdings, there seems to be a concerted effort by the court to adhere to a very liberal interpretation of the "societal importance of the public policy."[157]

### *B. Prong Two: The Necessity for Private Enforcement and the Magnitude of the Resultant Burden on the Plaintiff*

The Hawai'i Supreme Court concluded that "[b]ut for the efforts of Scenic Hawai'i, the private parties may not have thus participated in this litigation" and thereby prevailed under the second prong.[158] The court began its analysis with determining whether Scenic Hawai'i was responsible for "single-handedly challeng[ing] a previously established government law or policy," or "was [] the sole representative challenging" the State and ATDC.[159] The ICA had held that Scenic Hawai'i failed to satisfy the second prong because "there were 'actual respondents [Olds, Bogart and the Foundation] who vigorously litigated their private interests.'"[160] Even though multiple parties representing both private and public interests existed, the court held that vindication of the important public policy would not have occurred if Scenic Hawai'i had not intervened when it did.[161] The fact that Scenic Hawai'i did not "single-handedly

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[156] *Id.* at 314-15, 310 P.3d at 309-10. The Hawai'i Supreme Court went on to explain the vindication of public interests may be accomplished on discrete, as opposed to the main, issues of the litigation as long as the "resolution of the litigation in favor of the organization vindicates a public policy goal, and that policy satisfies the first prong of the test." *Id.* at 315, 310 P.3d at 310 It is noteworthy that the court offers no authority or precedent for this interpretation.

[157] *Id.* at 314, 310 P.3d at 309 (citing *Sierra Club II*, 120 Haw. 181, 218, 202 P.3d 1226, 1263 (2009)).

[158] *Id.* at 317, 310 P.3d at 312 (internal quotations omitted).

[159] *Id.* at 310, 310 P.3d at 315.

[160] *Id.* at 311, 310 P.3d at 316. The ICA also pointed out that when the City of Honolulu intervened, the public interest was adequately represented thus there was no longer a need for private enforcement. *Id.*

[161] *Id.* The Hawai'i Supreme Court reasoned:

> Scenic Hawai'i moved swiftly to intervene before Olds and Bogart answered the Petition. There was only a brief time between when the ATDC filed its Petition on May 15, 2001, and the date of the Order to Show Cause hearing, on June 18th, 2001, as noted by Scenic Hawai'i. Accordingly, had Scenic Hawai'i not moved to intervene, ATDC might very well have prevailed in the face of a lack of opposition, abrogating

challenge[] a previously established government law or policy" is irrelevant according to the court, which stated that "a party representing the public interest along with other parties may still be 'solely responsible' for advocating the public interest despite the fact that private parties are named in the litigation."[162]

The court's analysis of the second prong solidifies the court's movement toward not excluding parties on the basis of being one of multiple private or public interest litigants. Being the sole litigant as originally expressed in the *Serrano* court and echoed in *Waiāhole II*, as a means of gauging the necessity of private enforcement, seems immaterial to the court at this point. Here, the City of Honolulu in addition to another public interest litigants such as The Outdoor Circle, Historic Hawai'i Foundation, Hawaii's Thousand Friends, and Life of the Land accompanied Scenic Hawai'i in this suit and yet Scenic Hawai'i was still found "solely responsible."[163] The court reiterated statements from the *Serrano* court supporting its implied commitment to encouraging private enforcement important public policies:

> In the complex society in which we live it frequently occurs that citizens in great numbers and across a broad spectrum have interests in common. These, while of enormous significance to the society as a whole, *do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts.*[164]

### *C. Prong Three: The Number of People Standing to Benefit from the Decision*

Perhaps the greatest precedential value in this case comes from the Hawai'i Supreme Court's analysis of the third prong. Finding that Scenic Hawai'i prevailed under the third prong, the court held that "[t]he number of people standing to benefit by the litigation [was] significant in terms of

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not only the legislative mandate that Irwin Park remain a park, *see* HRS § 206J–6(c), but also demolishing the park as a historic site.

*Id.* at 317, 310 P.3d at 312.

[162] *Id.* at 316, 310 P.3d at 311 (citing *Sierra Club II*, 120 Haw. 181, 220, 202 P.3d 1226, 1265 (2009)) (internal citation omitted).

[163] *See Honolulu Constr. II*, 130 Haw. at 316, 310 P.3d at 311. Admittedly, the fact that Scenic Hawai'i provided signed declarations from Olds and Bogart stating, "But for the efforts of Scenic Hawai'i," the private parties "may not have thus participated in this litigation[]" weighed heavily in the courts assessment of prong two. *Id.* However, the court's gradual and continuous movement to not exclude litigants by virtue of the fact that they are one of multiple public interest parties is unmistakable given this decision.

[164] *Id.* at 310, 310 P.3d at 315 (quoting *Waiāhole II*, 96 Haw. 27, 30, 25 P.3d 802, 806 (2001)) (emphasis in the original).

both the use of the park itself and the preservation of the park's historical significance."[165] Because the litigation "concerned a specific property, but the result vindicated the dedication of public parks and historic sites across the state[,]" this case provides "general precedential value for enforcing governmental adherence to the dedication of private land for public parks and as historic sites, and for the enforcement of the government's commitments to the preservation of such parks and historic sites."[166]

Having never decided whether the PAGD applies to a "situation where the public policy involves a discrete property or historic site open to the general public[,]"[167] the court turned to a Montana case dealing with the very same issue, *Bitterroot River Protective Ass'n v. Bitterroot Conservation District*.[168] Similar to *Honolulu Construction II*, *Bitterroot* involved a discrete determination, as opposed to a direct challenge to a law or policy.[169] The issue in *Bitterroot* was also similar. The Montana court had to decide whether the PAGD applied to a group seeking a declaratory judgment that the state's Natural Streambed and Land Preservation Act and Stream Access Law applied to a certain waterway.[170] In the holding, "[t]he Montana court reiterated the district court's statement that the case was of 'statewide importance to all Montanans,' because 'the decision clarified the status of other public waters in the state apart from the [public water at issue].'"[171] Restating the precedential value of the case, the court commented that "[t]hese are the types of causes that have value to society as a whole, but which would not necessarily be vindicated by a single individual."[172]

## V. THE IMPACT OF *HONOLULU CONSTRUCTION II* ON LITIGATION IN HAWAI'I

Certainly, the Hawai'i Supreme Court's reasoning in *Honolulu Construction II* breaks new legal ground in many ways. We now know that the public policy vindicated does not need to be the subject of litigation

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[165] *Id.* at 318, 310 P.3d at 313.

[166] *Id.* at 318-19, 310 P.3d at 313-14.

[167] *Id.* at 318, 310 P.3d at 313.

[168] *Id.* at 318, 310 P.3d at 313 (citing Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 251 P.3d 131 (Mont. 2011)).

[169] *Id.* (citing *Bitterroot*, 251 P.3d at 140).

[170] *Id. See also Bitterroot*, 251 P.3d at 134-35).

[171] *Honolulu Constr. II*, 130 Haw. at 318, 310 P.3d at 313 (quoting *Bitterroot*, 251 P.3d at 140).

[172] *Id.* at 319, 310 P.3d at 314.

itself.[173] Instead, litigating discrete issues is allowed as long as "the resolution of the litigation in favor of the organization vindicates a public policy goal, and that policy satisfies the first prong of the test."[174] Direct challenges to laws or policies are no longer mandatory if an attack on a discrete issue can be made.[175] Also, a litigant representing the public interest need not be the only party advocating for the public in order to be considered "solely responsible."[176] Now, "a party representing the public interest along with other parties may still be 'solely responsible' for advocating the public interest . . . despite the fact that [other] private [and public] parties are named in the litigation."[177]

With the Hawai'i Supreme Court leaning toward a liberal interpretation of the PAGD, the need for statutory guidance regarding the award of attorneys' fees is critical. The *Serrano* court voiced its concern about this matter that is worth re-stating:

> Since generally speaking the enactment of a statute entails in a sense the declaration of a public policy, it is arguable that, where it contains no provision for the awarding of attorney fees, the Legislature was of the view that the public policy involved did not warrant such encouragement. A judicial evaluation, then, of the strength or importance of such statutorily based policy presents difficult and sensitive problems whose resolution by the courts may be of questionable propriety.[178]

The United States Supreme Court also warned of the tendency for courts to make their own new rules in the absence of statutory guidance cautioning that courts would be left free to "pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."[179] These types of activities are generally within the duties of the legislative and not the judicial branch of government. Allowing them to continue wears away at the separation of powers and promotes judicial legislation.

Unfortunately, absent legislation to the contrary, the PAGD will continue to increase in popularity as virtually any law can be argued as having an underlying public interest policy. The truthfulness of this statement is underscored by the dozens of circumstances that the PAGD has been

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[173] *Id.* at 314-15, 310 P.3d at 309-10.

[174] *Id.* at 315, 310 P.3d at 310.

[175] *See id.*

[176] *Id.* at 316, 310 P.3d at 311.

[177] *Id.* (citing *Sierra Club II*, 120 Haw. 181, 220, 202 P.3d 1226 1265 (2009)) (internal citation omitted).

[178] Serrano v. Priest, 569 P.2d 1303, 1314-15 (Cal. 1977).

[179] Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975).

applied.[180] With each new application of the PAGD will come new rules and interpretations. Therefore, litigators must adjust their legal strategies to consider the ramifications of this new doctrine. This is especially important as many underlying public policy issues may not be facially apparent at the outset of litigation.

[180] *See generally* Wooster, *supra* note 59. The PAGD has been applied in over 138 different circumstances including adult book stores, ballots and elections, child support litigation, demolition of structures, education litigation, health care litigation, insurance litigation, landfills, motorcycle races, obscenity, prisons and prisoners, to name just a few. *Id.*

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