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

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

Translation by Pauahi Ho‘okano

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ARTICLES

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Five Easy Pieces: Recurrent Themes in American Property Law

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The title of my article, "Five Easy Pieces," may not resonate with those of you who are too young to remember Jack Nicholson as a budding young movie star cut out of the James Dean mold. For those who do remember, it is, of course, the title of one of Nicholson's early (and, to my mind, greatest) movies.[1] Jack's five easy pieces were piano pieces, easy for him to perform, less so for others.[2] There was a certain irony about the word "easy" in the title. The irony lay not only in the fact that just about everyone else consider those pieces difficult, but, more deeply, because those piano pieces were the only pieces of the life of Bobby Dupea, the character whom Jack portrayed, that *were* easy for him. Life as a whole, the big picture, was one great, almost impossible challenge for him.

My five easy pieces have their own ironic twist. They are rather different but equally challenging in their own ways that first-year law students here will readily recognize. My pieces, this piece, is really aimed at them. The pieces I will discuss are five recurrent themes in American property law, *leit motifs*, to continue the metaphor from the Nicholson movie, that run throughout American legal doctrines. These themes provide a way of structuring all of property law, adding coherence to what so often appears to law students as an unintelligible rag-tag collection of rules and doctrines that defy any attempt to construct an overarching framework for analysis. I have given five simple labels to these recurrent topics: "*conceptualizing property*," "*categorizing property*," "*historicizing property*," "*enforcing property*," and "*de-marginalizing property*." We begin with how we conceptualize property.

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* A. Robert Noll Professor of Law, Cornell University. This article is a somewhat expanded version of the Gifford Lecture, delivered at the University of Hawai'i Richardson School of Law. I wish to thank Dean Avi Soifer for his typically warm and gracious hospitality during my visit at the Richardson School of Law. I am deeply grateful to him. I am also grateful to Joe Singer, who graciously and helpfully commented on an earlier draft.

[1] FIVE EASY PIECES (Columbia Pictures 1970).

[2] *See generally* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

I. CONCEPTUALIZING PROPERTY

At least three different ways of conceptualizing ownership of property exist in American legal thought and legal discourse. Introducing them in chronological order, the first might be called the *classical* conception. This is the understanding of ownership that is customarily attributed to Sir William Blackstone, the great eighteenth-century English jurist, academic, and scholar whose treatise, *Commentaries on the Laws of England*,[3] was enormously influential on American lawyers into the twentieth century. The classical view was captured by Blackstone's memorable definition of ownership as "that sole and despotic dominion which one man claims and exercises over the things of the world, in total exclusion of the right of any other individual in the universe."[4] As Jane Baron notes, "The Blackstonian view posits nearly limitless rights consolidated in a single owner, who can exclude all others."[5] Blackstone himself did not hold that view of ownership.[6] What we call the Blackstonian conception is really a trope, a construct that we have come to attribute to Blackstone. This is why it is better to refer to this conception as the "classical" conception of ownership.

The classical conception has three defining features. First, it conceives of ownership as unified, rather than fragmented, a very important point, as we will soon see. Second, it constructs ownership in terms of the simple relationship between a person and a "thing." Third, the person in that relationship is considered to have exclusive dominion over the thing, to be the master of it, to the exclusion of everyone else in the world.

Now, this way of looking at ownership arguably captures the ordinary non-lawyer's understanding of what it means to own property. Professor Bruce Ackerman made that contention a number of years ago in his book *Private Property and the Constitution*.[7] Ackerman argued that the classical conception reflects just the way in which a hypothetical ordinary lay person, whom he dubbed "Layman," thought, or at least talked about property and ownership. Ackerman asserted that lay people think of

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[3] 1-4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (elec. reproduction, Farmington Hills, Mich., Cengage Gale 2009) (1773).

[4] 2 BLACKSTONE, *supra* note 3, at 2.

[5] Jane B. Baron, *Rescuing the Bundle-of Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 58 (2013).

[6] GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 (1997). Blackstone himself held a rather more complex conception of ownership. *See* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601 (1998); David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103 (2009).

[7] BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

ownership pretty much in accordance with the classical conception: as unitary, as a person-thing relationship, and as exclusive dominion.

Whether or not lay people think of ownership that way, it is no longer the way in which most American lawyers think or talk about ownership. The American Legal Realist movement of the 1920s and 30s replaced the classical conception with a second conception, commonly called the "bundles-of-rights" conception. The attraction of the bundles-of-rights metaphor to the Legal Realists and subsequent generations of American lawyers is its flexibility. The bundle-of-rights theory has three significant insights that contribute to its flexibility. First, as its name indicates, it rejected the old idea that ownership is unitary, in favor of a fragmented understanding of ownership. What this means is that ownership is comprised of a number of claim-rights, such as the rights to use, possess, exclude, manage, give, sell, and so on, and that no single one of these claim-rights is essential to ownership.

Second, and closely related to the first, the bundles idea relaxed the view of ownership as absolute, or nearly so, dominion by focusing attention on the fact that ownership is a matter of one person's claim being relatively better than another's, leaving open the possibility that such a claim might yet be relatively weaker than a third person's claim. "Title," as we say, "is relative."

Third, the bundle-of-rights conception shifts the focus from the relationship between a person and a thing to the relationship between persons. Ownership is a person-to-person relationship with respect to things (not even really things, but assets). This aspect of the bundle-of-rights conception was important to the Legal Realists because they wanted to emphasize the social character of ownership, that is, the fact that private ownership of property is a matter of human relationships.

Although the bundle-of-rights conception has dominated American legal discourse about ownership for nearly a century, today it is under attack. It has been attacked by scholars who wish to concentrate attention on the ends of property, including those who argue that a regime of private property should aim at producing outcomes that are conducive of a "free and democratic society."[8] The primary source of attack, however, comes from scholars who view property as the "law of things."[9] These scholars object to the bundle-of-rights conception not only because it does not focus attention on things as the subject matter of property law but also, and perhaps more importantly, because it tends to treat all of the twigs in the

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[8] Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009).

[9] Henry Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

bundle as of a piece. According to these scholars, not all the twigs are equally important or expendable. In particular, to them, the right to exclude is the core of ownership, indeed the very *sine qua non* of ownership, and the bundle metaphor obscures this central point.[10]

The leading exponents of this view, which we can call the exclusion theory, are Professors Thomas Merrill, of Columbia Law School, and Henry Smith, of Harvard. Writing both separately and together, Merrill and Smith argue, "[t]he most basic principle is that property at its core entails the right to exclude others from some discrete thing. This right gives rise to a general duty on the part of others to abstain from interfering with the thing." They go on to assert:

> The materials [in our Property casebook] are designed to challenge each student to decide for him or herself whether property is defined by common principles such as the right to exclude others, or whether any such principle is so riddled with exceptions that property can only be regarded as an ad hoc 'bundle of rights.'[11]

Several aspects of this claim need to be noticed. The most important of these is the claimed centrality of the right to exclude to ownership. Professors Merrill and Smith argue that the right to exclude is the core of ownership of property. One of them, Professor Merrill, goes so far as to assert that this right is the very essence of ownership itself; take that right away and you no longer have ownership.[12] However true that claim may be under American law and American society, it is not true of all legal systems or societies, even in the western world. At best, the claim is only culturally true; it is culturally contingent. Scotland, for example, has enacted a so-called "right to roam" law, which permits any person to be upon anyone else's land, subject to certain limitations (such as not coming within a few yards of a person's home).[13] One might distinguish the Scottish example from American law in certain respects. For example, Scotland is not a common-law country. Instead, it has a mixed legal system, combining the common law with the civil law. Moreover, the ancient system of feudal

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[10] Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004); Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. OF LEG. STUD. 453 (2002).

[11] THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES at v (2007).

[12] *See* Merrill, *Right to Exclude*, *supra* note 10.

[13] For an excellent discussion of the act and its background, see John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 741 (2011).

estates was not abolished in Scotland until as late as 2000.[14] England, however, is a common law country par excellence, and it too now has a right to roam statute.[15] The English statute differs from its Scottish predecessor in certain notable respects, the most important of which is that its coverage is more limited. Under the English Act, the public has the right to wander only over registered "common land" and lands classified as "open country," defined as mountain, moorland, heath and downland.[16] Qualified land covers approximately twelve percent of England and Wales, in contrast with the nearly one hundred percent covered by the Scottish statutory right.[17]

Professors Merrill and Smith claim that this exclusion theory captures the ordinary person's morality of property.[18] The "traditional everyday view," they assert, is that property just is a "right to a thing good against the world."[19] But just which ordinary person's morality is this? Apparently not the ordinary Scot's morality, for the statute recognizing the right to roam had strong popular support.[20] Nor, apparently, does it reflect the ordinary English person's morality of property.[21] So, the morality, if it be a morality at all, is neither timeless nor universal. It is, at best, culturally-based; it is contingent.

Moreover, there is reason to be skeptical that it is the ordinary American's morality. Perhaps ordinary Americans talk about ownership of property in these simplistic ways,[22] but they surely don't think about ownership that way, at least not when faced with a situation in which it makes a difference.[23] In analyzing the ways in which ordinary people understand ownership of property, the relevant social judgments are not simply the judgments as to which specific interests people apply the words "ownership" or "property" in ordinary language usage. Rather, the relevant

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[14] *See* Abolition of Feudal Tenure (Scotland) Act 2000(ASP 5) §§ 1-3. It, together with other Scottish legislation, is available at http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/about.htm.

[15] For a good discussion on the English act, see Jerry L. Anderson, *Britain's Right to Roam: Redefining the Bundle of Sticks*, 19 GEO. INT'L ENVTL. L. Rev. 375 (2007).

[16] Countryside and Rights of Way Act 2000, c. 37, § 1 (Eng.).

[17] *See* Anderson, *supra* note 15, at 407.

[18] *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1894 (2007).

[19] Merrill & SMITH, *supra* note 11, at 1.

[20] *See* Lovett, *supra* note 13; Gregory S. Alexander, *The Sporting Life: The Historical Origins of the Scottish Right to Roam*, 2016 U. Ill. L. Rev. __ (2016) (forthcoming).

[21] *See* Lovett, *supra* note 13, at 301-02.

[22] *See* ACKERMAN, *supra* note 7.

[23] For some empirical evidence indicating the greater complexity of ordinary people's thinking regarding ownership and boundaries, *see* Nicholas Blomley, *The Boundaries of Property*, 48 CANADIAN GEOGRAPHER 91 (2004).

considerations are the shared impressions about the circumstances in which given interests would be entitled, prima facie, to legal protection against non-consensual encroachments. Such expectations are not always expressed in ordinary speech in terms of "ownership" or "property." Those terms are perhaps most commonly used in connection with the forms of wealth that are dominant in the given speaker's social spheres. People may nevertheless consider other interests, less commonly encountered within their particular group, prima facie legally protectable whenever they are threatened or challenged. The boundary between legally protectable and non-protectable interests in the expectations of well-socialized lay persons does not always track speech habits concerning the terms "ownership" and "property."[24] Moreover, why should we suppose that most ordinary folk regard the right to exclude as the maximal right, the essence of ownership, as it were? Apparently some people consider the right to use, which might be seen as the opposite side of the coin from the right to exclude, as equally important.[25] Others consider the power to transfer as essential to ownership.[26]

To the extent that it is possible to identify an ordinary American's morality concerning property at all, that morality seems closer to the morality that lay behind James Madison's vision for the Fifth Amendment's property clause that he drafted. As various scholars have observed,[27] Madison's aim in proposing that clause was protecting a sphere of individual autonomy against depredations by the state. It was state action that was the source of Madison's anxiety, for Madison understood that individuals are social creatures, embedded in multiple social networks. Consequently, property itself is social. Abusive behavior by one's neighbors is one thing; abusive behavior by the state, armed as it is with vast power, is another. Disputes between neighbors were to be left to the private arena, negotiation and, hopefully, eventual cooperation, but in disputes between individuals and the state the status of the individual property owner had to be raised to a different level in order to enable property to do its autonomy-protecting work.[28] It is this connection

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[24] *See* Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1560-61 (1982).

[25] *See* Stephen R. Munzer, *A Bundle Theorist Holds On to His Collection of Sticks*, 8 ECON. J. WATCH 265, 270 (2011).

[26] *See id.*

[27] *See, e.g.*, JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990); William T. Fischer, *Making Sense of Madison*, 18 L. & SOC. INQ. 547 (1993).

[28] *See* Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988).

between property and individual autonomy that lies at the heart of any ostensible ordinary conception of property.

Where, then, does this leave us with regard to the debate over conceptualizing property? My sense is that it leaves us with no single, universally-applicable or correct conception of property. We need multiple conceptions of property ownership.[29] The reason is that no single conception of property, or ownership, adequately captures all of the diverse social contexts in which people own property. Property is not solely a creature of market; it is also an institution of marriage and the family, of neighborhoods, of community groups, and other social contexts. In some of these contexts the exclusion conception of ownership fits well, while in others, some version of the bundles-of-rights conception works much better. As Hanoch Dagan has argued, with respect to the exclusion conception:

> numerous [property] rules prescribe the rights and obligations of members of local communities, neighbors, co-owners, partners, and family members, including . . . the governance of these property institutions. These property rules cannot fairly be analyzed in terms of exclusion or exclusivity: . . . the whole point of these elaborate property governance doctrines is to provide structures for cooperative rather than competitive or hierarchical relationships.[30]

At the same time, Dagan points out, the bundles-of-rights conception, while capturing part of the picture, is somewhat misleading.[31] As Dagan puts it, ownership is not "a mere laundry list of rights with limitless permutations."[32] For one thing, under the so-called *numerus clausus* doctrine, property law itself imposes limits on the forms that ownership can take. The bundles-of-rights is not open-ended. Better to think of ownership as tending to be structured by different assemblages of rights and obligations according to different contexts. These different assemblages are not purely ad hoc but tend to be patterned according to certain repeated domains of social life. Thus, ownership of property in the strictly commercial sphere usually carries with it a particular bundle of rights and obligations, whereas ownership within the marital realm has a rather different configuration of rights and duties. So, for example, both the classical and exclusion conceptions have greater traction if we are dealing

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[29] *See* HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 40-43 (2011).

[30] *Id.* at 41. On the importance of doctrines providing for the internal governance of property institutions, see also Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853 (2012).

[31] DAGAN, *supra* note 29, at 41-42.

[32] *Id.* at 42.

with my status as the owner of my laptop computer than they do my status as owner of a condominium in a residential community. One size does not fit all.

II. CATEGORIZING PROPERTY

The next theme is categorizing property. Here again, I am going to examine this theme in a somewhat unconventional fashion. In referring to categories, one might suppose that my topic will be property law's internal categorical structure of estates, servitudes, and other such interests. Instead, I am going to address the familiar public/private categorical distinction, but not in the way that the distinction is usually discussed. Rather than addressing the question of which aspects of property law are a matter of private law and which are public law, I am going to talk about the more fundamental question of property law's basic values, the values that support property law, and whether those values properly belong to the private or the public realm.

We commonly associate property with certain private law values. Those values include individual autonomy, personal security/privacy, self-determination, self-expression, and responsibility (along with other virtues). These values, the values that theorists take to be among the intended ends of private property, are not in conflict or incompatible with fundamental public values, values such as equality, inclusiveness, community, and participation. Quite the contrary, the private law values at times require recognition of public values for property's own values to be realized. That is, they are internal to private law and are constitutive of its ends. The relationship between private property and public values should be seen as symbiotic rather than antagonistic.

Just what does it mean to say that fulfillment of a traditional private law end requires one or more conventional public values? Consider first the private law value of individual autonomy. Every major liberal theory of property gives special place to autonomy as a justification for private property rights. Two theories--Kantianism and libertarianism--identify it as property's foundational end. Even utilitarianism and its modern variant, welfarism, indirectly recognize the special contribution of personal autonomy to overall social well-being, whether defined in terms of utility or wealth. No one would dispute that autonomy is at least a component of property's ends. But autonomy is not self-realizing. We are not born as autonomous agents. We depend upon others to help us develop those capabilities that enable us to function as independent practical reasoners. As Alasdair MacIntyre states, "To become an effective independent practical reasoner is an achievement, but it is always one to which others

have made essential contributions."[33] We enter the world utterly dependent on others for our physical survival, but our dependence on others doesn't end with infancy or even with childhood. Even upon reaching adulthood, we continue to place at least partial physical dependence (and even emotional or psychological dependence) on others as we move through a dangerous world. Often, little more than dumb luck separates the independent adult from the dependent one. And, as we reach the final years of our lives, the possibility of physical dependence once again looms ever larger.

Our dependence on others to develop autonomy goes beyond sheer physical dependence. MacIntyre observes:

> What we need from others, if we are . . . to develop the capacities of independent practical reasoners, are those relationships necessary for fostering the ability to evaluate, modify, or reject our own practical judgments, to ask, that is, whether what we take to be good reasons for action really are sufficiently good reasons, and the ability to imagine realistically alternative possible futures, so as to be able to make rational choices between them, and the ability to stand back from our desires, so as to be able to enquire rationally what the pursuit of our good here and now requires and how our desires must be directed and, if necessary, reeducated, if we are to attain it.[34]

This kind of nurturing and this sort of capability development is carried out through communities, through networks of family members, friends, teachers, and others who constitute the multiple social spheres of our lives. Individual autonomy can be acquired only within a vital matrix of social structures and practices. Its continued existence and exercise depends upon a richly social, cultural, and institutional context, and the free and autonomous individual must rely upon others to provide this context.

The interdependence between private and public values in the context of property law can be illustrated by several cases. Consider the well-known right-to-exclude case, *Jacque v. Steenberg Homes, Inc.*[35] In that case, home owners, Lois and Harvey Jacque, sued Steenberg Homes for damages for intentional trespass to the Jacques' land.[36] Steenberg delivered a mobile home by plowing a path across the Jacques' snow-covered field despite strenuous protests from the Jacques.[37] Although other means of accessing the delivery location were available, Steenberg used the path across the

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[33] ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 82 (1999).

[34] *Id.* at 83 (emphasis omitted).

[35] 563 N.W.2d 154 (Wis. 1997).

[36] *Id.* at 156.

[37] *Id.*

Jacques' land because that was the easiest route for it. The jury awarded the Jacques one dollar in nominal damages and $100,000 in punitive damages. On appeal, the Wisconsin Supreme Court held that if a jury awards nominal damages for intentional trespass, the jury may also award punitive damages. The Jacques had good autonomy-based reasons for excluding Steenberg Homes. If home-dwellers are to feel secure in their own homes and to be uncoerced in making decisions regarding what uses of their land will make their lives go best for them, they must be free of intentional trespass. There are exceptional situations, of course, such as the need for police or fire fighters to access a person's home in case of emergency, but the owner is not likely to object to entrance upon her property under such circumstances.

Contrast *Jacque* with the famous Civil Rights Era "Lunch Counter" cases.[38] In those cases, young African Americans were arrested for and convicted of criminal trespass when they refused to leave restaurants after being requested to do so solely because of their race. The alleged trespassers, who were protesting "whites-only" practices at lunch counters in Southern retail stores, had asked to be served lunch but were refused and were asked to leave. The defendants appealed their convictions arguing that the convictions violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The cases raised the question whether state action was involved or whether the discrimination was strictly private. In each case the Court found state action.

Would such cases be decided differently under the common law? Would they be viewed the same as *Jacque*, with the restaurant owner having the right to exclude anyone for whatever reason? Although there certainly are older decisions that indicate otherwise,[39] I suggest that it would be possible for a court to hold that a restaurant owner does not have the right to exclude for racially discriminatory reasons (or other reasons based on grounds of invidious discrimination) under the private law of property. The public values that nurture property's private values push against the freedom of owners of restaurants that are otherwise open to the public to exclude members of the owners' communities because of their race. Because the owners have otherwise opened their restaurants to the general public, the owner's personal security is not at stake in this situation. Admitting African American patrons in no way adds to the risk of the owners' security beyond the level of risk that the owners have already voluntarily accepted.

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[38] *See* Bell v. Maryland, 378 U.S. 226 (1964); Robinson v. Florida, 378 U.S. 153 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, S.C., 373 U.S. 244 (1963).

[39] *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1351-52 (1996).

More fundamentally, the public value of self-constitution, which is necessary for personal autonomy, resists recognition of the owners' right to exclude under these circumstances. I said earlier that self-constitution -- the process of interpreting oneself within a social context -- is always dialogical in character. I also said that self-constitution's social dimension poses a risk of undermining rather than promoting personal autonomy and that the purpose of the right to exclude is to mitigate that risk. Where the interaction between the owner and others is already in a social and public setting, one that the owner has created, the owner has already assumed that risk by creating the setting. In that situation, the right to exclude cannot perform its risk-mitigation function. Requiring that the owner admit to his restaurant patrons who he would otherwise admit but for their race does not undermine his personal autonomy in any meaningful sense. He has already made choices about his goals with respect to the use of his property, choices that are immediately relevant to his right to exclude in this circumstance. Hence, it is quite arguable that the public accommodation cases such as these could have been decided the same way as they were on private law grounds as by relying on constitutional or statutory provisions.[40]

Consider another example. Most, perhaps all, of us are familiar with common interest communities, also known as homeowner association. The relations between common interest communities, called CICs for short, and their members often are friendly and cooperative, but sometimes enforcement of restrictive covenants create bad blood between CICs, which are created to enforce these rules, and the owners who are subject to them. Consider the case of Donald Lamp. He was the father-in-law of U.S. Supreme Court Justice Clarence Thomas. He got into a dispute with the governing board of his condo association several years back when he hung an American flag from the balcony of his Omaha, Nebraska apartment on a particular July 4th morning, a ritual he had observed every year. Citing a violation of one of the covenants in the master plan that governs the development, the condo association board told him to remove the flag, but Mr. Lamp, a World War II veteran, would have none of it.

Lamp's case got national attention, much of it unfavorable for the homeowner association. A typical reaction was this posting on a blog site: "Donald Lamp fought for our right and his right to display our nation's flag anywhere and anytime."[41]

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[40] Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values,* 99 IOWA L. REV. 1257, 1291 (2014); *Cf.* Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993 (1989).

[41] Yoe, *Comment to Nebraska Retiree Fights to Hang American Flag*, FOX NEWS (May 28, 2004, 5:00 PM), http://www.freerepublic.com/focus/f-news/1144102/posts.

> The question, of course, is, does Mr. Lamp have such a right? On one view, a view informed by the private law values of property law, the answer, quite clearly, is no. The covenant restricting the display of flags within the development was included in Mr. Lamp's deed. He had legal notice, either actual or record notice, of it at the time he entered into the purchase of his unit, and he agreed to be bound to it. The matter is strictly one of consent. So long as he had notice of the restrictive covenant at the time he entered into the agreement with the association, he is bound by it. Donald Lamp and his supporters did not see the matter this way. To them, some values cannot be contracted away. These are fundamental values--public values--and among them is the right to display the American flag. So the argument goes.[42]

What private and public values are at stake in this dispute? At one level, disputes such as Donald Lamp's seem easily resolved by looking at the matter through the lens of personal responsibility with its concomitant legal principle of contractual obligation. Lamp signed an agreement expressly restricting his freedom to display flags publicly, and he is responsible for that contractual commitment. Yet if we examine the matter a bit more deeply, it becomes apparent that personal responsibility does not exhaust the list of private law values that are at stake in Lamp's dispute. For personal autonomy seems just as obviously involved in the controversy. Personal autonomy means being the creator of one's own ideas and preferences. To be sure, it does not mean being immune from all involvement by others in one's affairs; that is an impossible situation. But it does mean that one's plans, ideas, beliefs, and so on, are one's own, and not coerced by others.

One can certainly point out that, by signing the deed that included the restrictive covenant, Mr. Lamp freely chose to restrict his own autonomy with respect to displaying flags outside his apartment. From that perspective, personal responsibility trumps any view of personal autonomy that suggests tension between the two values in this case. Yet closely related to personal autonomy in this situation is yet another value--self-expression. Sometimes it is not enough simply to hold views that are the creations of one's own making; one feels compelled to express those views. On these occasions self-expression supports, and even extends, personal autonomy. Lamp held deeply personal beliefs and chose to use his position as homeowner to express those beliefs publicly. The American flag symbolized beliefs that Lamp considered expressive of his identity, and he wished to communicate those beliefs with his neighbors in a particularly prominent and effective way. Self-expression is an important value that does not merely augment autonomy, but also enables the exercise of

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[42] *Id.*

autonomy. From that perspective, autonomy alone cannot justify Lamp's waiver of self-expression.

One possible basis for justifying waiver is freedom of association. Homeowner associations, like other voluntary associations, rely on freedom of association for their integrity and, ultimately, their existence. If we lack the freedom not only to choose the persons with whom we associate, but also the ground rules by which our association abides, we cannot truly realize our social character.

The connection between freedom of association and human sociability suggests that freedom of association implicates a deeper value--community. Conceptually, community is relevant here as a value, a regulative ideal, and as a sociological phenomenon.[43] As a regulative ideal, community operates as a norm by which relationships may be regulated and something that we experience in our actual lives. Community is also a sociological concept. In this sense it describes a group mode of living and social interaction with others with whom we share particular interests and values. Homeowner associations are frequently identified as communities in this latter, sociological sense. Common interest developments often stress the club-like quality of their living experience, explicitly emphasizing their group-like character.[44]

Community has both private and public aspects. It is private in the sense that it is constitutive of the self. Community's public side regulates the external relations of communities as institutions, that is, their relations with each other, especially the larger communities of which it is a part. The most important of these larger communities is the state, for the state facilitates these smaller communities through its rules of private ordering and fundamental norms respecting rights of association, assembly, and the like.

The general point is that the categories of public and private are unhelpful with respect to community. The line between them is as porous as it is with respect to all of the values underlying property. Both institutionally and normatively, community operates in a Janus-faced fashion, always looking inward to itself and yet outward to the increasingly larger spheres of social life with which it is inextricably enmeshed.

This double life of community is essential to a proper understanding of community's role as a value, or end, of property. It means that community's normative valence is not always clear. When other

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[43] *See* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, INTRODUCTION TO PROPERTY AND COMMUNITY, at xxviii, xxix (Gregory S. Alexander and Eduardo M. Peñalver eds., 2010).

[44] Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 9-12 (1989).

substantive values of small institutional communities conflict with those of one or more of the larger institutional communities within which the smaller communities are nested, the normative implication of community does not unambiguously favor one substantive value or the other. There is no trumping effect of community as a value. What matters in these situations of nested communities with conflicting substantive values is the nature of the relationship between the institutional communities.

The private side of community poses a risk of undermining rather than promoting personal autonomy. The core of community's private side is autonomy, the value that supports the power of communities, as institutions, to exclude those who do not share the constituent values and interests of particular communities. That value --autonomy-- confers upon communities power to set the terms and conditions of membership in voluntary communities, requiring members to subordinate their own personal autonomy for the good of the larger institution's values.

The public side of community, as a private law value, places a limit on this subordination of personal autonomy and supports autonomy as one of property's ends by striking a balance between personal and institutional autonomy. The basis for this limit is the fact that the state, as the community that enables the creation of voluntary communities through its private legal rules of contract and constitutional rights of assembly and free association, and facilitates the operation of those communities through its legal system, is literally constitutive of them. As the foundational community that makes the existence of smaller, nested communities possible, the state sets the basic parameters for their membership within the foundational, constitutive community. Those parameters are set by the state's own foundational values, the values of which it is normatively constituted. Among these foundational values is personal autonomy, augmented by its ancillary value of self-expression. These values are constitutive of the state as a political community. Self-expression, which is manifested, among other ways, in the right of freedom of speech, is essential to the existence of a particular kind of political community, and for that reason the state treats it as fundamental. Because self-expression is so existential, it cannot be subordinated to conflicting values of smaller voluntary communities. This is not a matter of state action or public law. The priority of the state's fundamental values, values such as personal autonomy and self-expression, over the values of nested voluntary communities, is established by private law, through its values.

In cases such as Mr. Lamp's, the public side of community as a private law value resists recognition of the right of voluntary groups, including those created by private agreement, to subordinate values that are existential to the particular kind of political community that the state

represents to the group's own conflicting values. Hence, the question whether Lamp waived his right to display the American flag in front of his condominium unit is moot because, properly understood, the private law of property makes the value of self-expression non-waivable as applied to such forms of self-expression as political speech.[45]

Of course, there are limits to this principle of subordination. It applies only to those values that are truly existential to the particular kind of political community that the state represents. Hence, in the case of homeowner associations, not all instances of self-expression or other acts of personal autonomy are or should be beyond the group's power to regulate. So, for example, a homeowner association covenant prohibiting outdoor displays of plastic pink flamingoes is valid. Such an aesthetic regulation, although restricting self-expression, in no way implicates values that are existential to the substantive character of the larger political community. The same will be true of the vast majority of homeowner association rules. Group autonomy, which promotes the integrally related values of free association and sociability, should normally prevail because it is supported by community's private aspect and does not interfere with its public dimension.

The relationship between the public and private often turns out to be supportive rather than in conflict. The values that are part of property's public dimension in many instances are necessary to support, facilitate, and enable property's private ends. Hence, any account of public and private values that depicts them as categorically separate is seriously misleading.

III. HISTORICIZING PROPERTY

The third theme is historicizing property. More than all of the other first-year law school courses, perhaps, Property is strongly influenced by history. As the preface to an old Property casebook states, "[M]uch of the modern law of Property is understandable only in light of its origins and development and . . . only through a knowledge of the historical factors can law students get an intelligent understanding of the evolution of the institution."[46]

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[45] This is essentially the position adopted in the Restatement (Third) of Property. *See* Restatement (Third) of Property: Servitudes § 3.1 (2000). As to the specific issue of the American flag, the primacy of the individual's autonomy is now codified by federal statute. *See* 4 U.S.C. § 5 (2012) ("A condominium association . . . may not adopt or enforce any policy . . . that would restrict or prevent a member of the association from displaying the flag of the United States on residential property").

[46] 1 RALPH AIGLER, ALLEN SMITH & SHELDON TEFFT, CASES AND MATERIALS ON THE LAW OF PROPERTY, at vii (2d ed. 1951).

Virtually all of the Property casebooks, including my own, depict property's evolution as linear. This view of property law's history is entirely unsurprising, for it squares neatly with a larger view of the historical development of property. With only a few exceptions, historians and political theorists, along with legal scholars, have tended to accept uncritically the claim that there is a single tradition of property that runs throughout American history and American historical thought. According to this view, property has served one core purpose and has had a single constant meaning throughout American history: to define in material terms the legal and political sphere within which individuals are free to pursue their own private agendas and satisfy their own preferences, free from governmental coercion or other forms of external interference. Property, according to this line of thought, is the foundation for the categorical separation between the public and private spheres of life, the individual and the collective, the market and the polity.

The economic expression of this individual preference-satisfying conception of property is market commodity. Property satisfies individual preferences most effectively through the process of market exchange, or what lawyers call market-alienability. The exchange function of property is so important in American society property is often thought to be synonymous with the idea of market commodity.

This commodity view of property is only half right. Property-as-commodity is one-half of a dialectic that American legal thought and legal writing has continuously expressed from the nation's very beginning to the present. The other half of the dialectic is a view that I call property as propriety.[47] According to the propriety view, property is the material foundation for creating and maintaining the proper social order, the private basis for the public good. This proprietarian tradition, whose roots are very old indeed, has always understood the individual as an inherently social being, inevitably dependent upon others not only to thrive but just to survive. The irreducible interdependency means that individuals owe one another obligations, not by virtue of consent alone but as an inherent incident of the human condition. This view of human nature provides the basis for the political-legal principle in proprietarian thought that when individuals fail to meet their precontractual social obligations, the state may legitimately compel them to act for the good of the entire community.

The concept of the common weal, moreover, was understood to have substantive meaning. The common law maxim *salus populi suprema est*

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[47] *Id.* (citing Carol M. Rose, *Property as Wealth, Property as Propriety*, 33 J. OF THE AM. SOC'Y FOR LEGAL AND POL. PHIL. 223, 223-47(1991)).

lex (the welfare of the people is the supreme law) had real content.[48] The public good was not understood as simply whatever the market produces, for the market was viewed as a realm in which individuals were too vulnerable to the temptation to act out of narrow self-interest rather than, as proprietarian principles required, for the purpose of maintaining the properly ordered society.

Just what the proper social order is has been an enormously controversial issue throughout American history. The existence of different substantive conceptions of the properly ordered society means that there have been multiple versions of the proprietarian conception of property in American legal history. To illustrate, let me quickly sketch three such conceptions of property that fit within the proprietarian definition but whose substantive terms differ greatly from each other.

The first example is the civic republican conception of property, most eloquently and forcefully championed by Thomas Jefferson. Contrary to some popular misconceptions, Jefferson's understanding of property was not grounded on individual liberty, at least not for its own sake. Jefferson was no Lockean. Unlike Locke, Jefferson thought that law creates property rights and that law ought continually to control them.

Jefferson believed that every citizen–remember that citizenship was confined to white males–ought to own land and own it in fee simple. The republic was constituted by nothing less than the "fee simple empire." Citizens were men who cultivated–they owned freely; so positioned, they were beholden to no one and were independent in the most literal sense. This form of independence was necessary for them to act virtuously, free of corruption, strictly in the interest of the common good.

The form of property that Jefferson opposed, the form of property that he found threatening to the virtuous republic, was not just commercial property, but industrial property. The opposition, then, was between agricultural property and industrial property, i.e., cultivation of the land and manufacturing. "Those who labor in the earth," he stated, were the "chosen people of God."[49] They held this exalted status insofar as they were not exposed to the corrupting influence of manufacturing. "As '[d]ependence begets subservience,' he continued, manufacturing begets dependence."

Jefferson's concern with dependence led him to oppose aspects of the English system of inheritance that perpetuated hierarchy and dependence. Notable among these aspects were primogeniture and the fee tail. Under

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[48] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH—CENTURY AMERICA 42 (1996).

[49] *Id.* (citing Thomas Jefferson, Notes on the State of Virginia (1781), http://www.masshist.org/thomasjeffersonpapers/notes/nsvviewer.php?page=99&nav=query&q=19&results=0page).

the doctrine of primogeniture, when a man died intestate (without a legally valid will) his lands descended to his eldest son. Primogeniture could be avoided by devising one's land by will, as most wealthy eighteenth-century American landowners did. But the symbolic significance of primogeniture alone was enough to draw republican opposition.

Republicans similarly opposed entailments of land, which involved keeping land within the family by restricting the power of the person to whom a testator might devise land to transfer it outside the line of lineal descendants. Through this arrangement land would pass through a series of descendants, one generation to the next, possibly for hundreds of years. Such an arrangement sapped citizens of their independence, republicans believed. Under Jefferson's leadership, Virginia enacted legislation abolishing both primogeniture and the fee tail. Virginia's example was quickly followed in other colonies, pursuing the same vision of republican property.

The next example of property-as-propriety comes from the antebellum South. Southern slavery theory was primarily a social theory.[50] The major theorists, including legal theorists, who defended slavery did so did so on the basis of a coherent, albeit utterly immoral, theory of the ideal society whose core institution was chattel slavery. That ideal society was in many ways pre-modern and in many ways the antithesis of the modern society they saw developing in the North. Pro-slavery theorists identified the modern society by three characteristics that were anathema to them: (1) social leveling, that is, the decline of a natural social hierarchy; (2) the decline of internal, that is, nonconsensual social obligations; and (3) the alienation of labor from capital. Modern society was characterized by fluidity in all aspects of social life.

Pro-slavery legal theory, particularly after 1840, was in many respects hostile to the classical economic teachings of Adam Smith and David Ricardo. These Southern slavery theorists constructed a world order that was an alternative to social modernity, as they understood it. What made modernity unacceptable for them was that it seemingly meant the market's total domination over all social relations.[51]

"The Southern theorists' ideal society was certainly a market society in the sense that the market allocated economic resources." What set their ideal society apart from modern society was the fact that the market's influence on social life was strictly limited. Above all, these Southern defenders of slavery insisted, the market could not be permitted to

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[50] *Id.* at 214.

[51] *Id.* at 213.

destabilize the South's rigid social hierarchy, which they considered to be organic, moral, and proper. [52]

The foundation for the new social order that the Southern theorists imagined was, of course, the South's "peculiar institution."[53] More precisely, the foundation was the conception of slaves as a unique form of property. Though they could be used as a commodity, slaves were not primarily valued for that function. Their core function, rather, was to anchor and maintain the stability of the proper social hierarchy. It was the preservation of that hierarchy, not the production of wealth, that was the vital interest of the slaves-as-property system.

Within this social vision the commodity conception of property was highly problematic. The commodity conception was the product of a modern commercial social order that was in many ways the antithesis of what proslavery theorists valued. Slave property, used primarily as an item of commerce, threatened to transform the Southern social order into the fluid sort of society that existed in the bourgeois communities of the North.[54]

The South's order required stability at all costs, the slavery theorists thought, so that the hierarchy that was the very heart of the proper social order could be preserved.

The key to maintaining that hierarchy was keeping a strict distinction between property that was fungible, that is, market property, and property that is not fungible because its primary function is civic, not economic. In the center of this non-fungible property stood the slave. The slave was to mid-nineteenth century Southern theorists what land was to eighteenth-century century civic republicans, the anchor of virtuous citizenship. Although land was clearly superior to intangible forms of property (such as credit) in the Southern hierarchy of property, it was nevertheless inferior in importance to slaves.

Still, land and slaves were different in respects that were relevant to the Southern theorists. Primarily, the difference for their purposes is that land is immobile but slaves are not.

The shift from immobile land to mobile slaves as the primary form of economic attachment . . . threatened to transform the South from a traditional society in which property owners are civically, as well as physically, unconnected. In this latter sort of society citizens are less citizens than they are autonomous, preference-maximizing agents, precisely the sort of *homo economicus* that political economists . . . in the

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[52] *Id.*

[53] *Id.* at 215.

[54] *Id.*

North . . . described with admiration but that [Southern theorists] viewed with anxiety. As [one Southern writer] put it, "It is useless to seek to excite patriotic emotion in behalf of the land of birth, when self-interest speaks so loudly."[55]

The pro-slavery theorists' unwillingness to abolish the market left them with a dilemma of which they were aware. Their writings frequently reflected a sense of uncertainty about the future of slavery. The only way in which they could cover up their unease was to pull out the old wretched racist rhetoric on which time and again they relied. In the end their so-called republic was doomed.

The final example of property-as-propriety comes from the rise of the modern welfare state, especially during the post-War period. "Welfarism as a state policy fundamentally changed private property, both as a social institution and as a legal concept. As an institution, property in the welfare state was more obviously public than it had been throughout the nineteenth century."[56]

Housing is a particularly striking example of how the regulatory state became more involved in seemingly private relations. The relationship between landlords and their tenants, which traditionally was subject to minimal legal regulation, underwent a massive legal change during the 1960s. Federal legislation like the Fair Housing Act of 1968 prohibited discrimination in the private housing market on the basis of race, religion, gender, and national origin. At the state level, many states, prompted by court decisions, enacted statutes creating a "warranty of habitability" that guaranteed tenants the right to live in safe and habitable conditions. These statutes reversed the traditional legal rule that allocated to tenants the responsibility for care and condition of rental housing. The most important aspect of this new warranty was that it was non-waivable; landlords and tenants could not bargain around the new warranty even if they were so inclined. The overall effect of these and other changes was substantially to remove landlord-tenant relations, especially in the residential context, from the realm of private ordering to the domain of public regulation.[57]

The welfare state changed ideas about property as much as it did the institution of property. The most important effect of social welfare programs on legal thought about property was that they undermined the commodity conception in some areas of social life.

Various types of property [that] traditionally were regarded as market assets came to be seen as serving other, non-market functions. On those

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[55] ALEXANDER, COMMODITY & PROPRIETY, *supra* note 6, at 239 n.42.

[56] *Id.* at 359.

[57] *Id.* at 360.

occasions when free market transferability seemed to threaten these functions, the law changed to protect the non-commodified aspects of property arrangements.

Landlord-tenant law again provides a clear example. The "revolution," as it has been called, in the law regulating landlord-tenant relations was based on the implicit premise that residential housing should not be treated solely as a market asset, subject to being bought and sold on whatever terms the parties wanted. At least as important as the economic function is a political-moral function: residential housing is one of the crucial material conditions that determine whether and how people will flourish personally and as citizens. Courts and legal scholars explained the legal changes creating new rights for tenants as based on a shift from antiquated feudal property law to contract law, but that account was very misleading. The new rules establishing tenants' rights were not entirely consistent with contract law and certainly not contractarian in the sense of reflecting a commitment to private ordering. The real basis for the overall doctrinal shift was a change in how the legal culture perceived the character of residential housing.

> While the landlord's interest . . . is (usually) strictly financial——a commodity——the tenant's interest is primarily personal and only secondarily financial. Tenants enter into a lease primarily to have a home, a place in which to belong, not as an investment. Protecting that personal interest means treating it as at least somewhat outside the domain of market ordering, in which the rights and duties of the two sides are set through the process of bargaining. The new landlord-tenant rule replaced bargaining with legally-imposed terms regulating the relationship precisely to protect the tenant's non-commodity interest from the possibly corrosive effects of the market.[58]

As this quick survey hopefully reveals, the market conception – the commodity conception – although it remains the dominant conception, is not the only available way of thinking about property. The propriety conception remains alive and well, perhaps even thriving, at least in some areas of law and social life. In this respect, historically, then, nothing has changed. American legal thought is and has always been characterized by a dualism in ways of conceiving property.

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[58] *Id.* at 361-62; *see* Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667, 688 (2014).

IV. ENFORCING PROPERTY

The fourth theme should be familiar to all law students. I call this theme "enforcing property," and it has to do with the distinction between rules and standards. Rules and standards are legal norms through which law enforces property duties and protect property rights. As we all know, the distinction between them is that rules are hard-edged, clear, predictable, and easily understood and applied. Standards, on the other hand, are more open-ended, vaguer or opaque, less predictable. The conventional wisdom is that property law is and ought to be by and large the domain of rules, or "crystals," as one scholar calls them,[59] with only the occasion use of standards, or "mud."[60] Property law, more than tort law and even more than contract, the argument goes, requires predictability, and predictability is possible only in a regime of clear-cut rules.[61] I want to suggest that this wisdom is quite misleading, that, as a descriptive matter, property law has shifted substantially toward the use of standards over the past quarter of a century and that standards and predictability are not necessarily incompatible.

Professor Joseph Singer has recently written an article showing that property law seems to be moving away from clear rules and toward flexible rules.[62] Over the past few decades, Singer shows, both courts and legislatures have increasingly discarded traditional hard-edged rules and adopted in their place standards of various sorts. As Singer puts it, "Reasonableness tests now abound in property law."[63]

One area of property law that illustrates this trend is servitude law, the province of easements and covenants. Traditionally, this was an area that was governed by rules. For real covenants to run with the land, as we lawyers say, horizontal privity of estate had to exist between the original parties to the covenant,[64] and the covenant could be enforced against someone who was not the original promisor only if vertical privity existed between that party and the defendant.[65] The list of technical rules such as these has bewildered law students for generations.

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[59] *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

[60] *See* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C.D. L. REV. 1369, 1372 (2013).

[61] *See, e.g.*, Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1753-91 (2004).

[62] *See* Singer, *supra* note 60, at 1372-73.

[63] *See id.* at 1373.

[64] *See* RESTATEMENT OF PROPERTY § 2.4 cmt. a.

[65] *See id.* § 5.2 cmt. b.

Another traditional rule of servitude law is the requirement that a real covenant or an equitable servitude must "touch and concern" the land.[66] This rule illustrates one of the problems with rules. Some legal norms that are nominally rules turn out to be standards in practice. That is, they exhibit the same characteristics that we commonly attribute to standards; they are opaque, open-ended, and unpredictable. Precisely in reaction to this problem with the touch-and-concern requirement, modern servitude law has shifted from a nominal rule approach to an explicitly standard-based approach. The Restatement (Third) of Servitudes has abandoned the touch-and-concern requirement and substituted in its place a policy-focus standard. Under the new Restatement a covenant is invalid if it is "illegal or unconstitutional or [against] public policy."[67] It is the last ground of invalidity–of course, against public policy–that is the standard. The Restatement does provide some guidelines regarding what factors might lead to offenses of public policy, among them servitudes burdening a "fundamental constitutional right" and servitudes that are spiteful or capricious, but the boundaries of these factors are hardly hard-edged.

Another example is the case of the "improving trespasser."[68] This case occurs when someone constructs an improvement, say, a garage, on what she thinks is her own land but because of some error (maybe by the surveyor) it really is on her neighbor's land. Traditionally, property law treated this as a trespass, pure and simple. The trespasser's only remedy was to try to reach an agreement with her neighbor to allow her to leave her improvement as is in return, say, for some payment. If the neighbor refused, the neighbor had a clear right to force the trespasser to remove the improvement, regardless of the cost and regardless of its importance to the trespasser. Even if the intrusion was minimal, the victim could compel removal at the trespasser's expense. The trespasser's innocence and good faith were entirely irrelevant. Most courts today have abandoned this clear rule in favor or a murkier "relative hardship" standard.[69] Under this standard the court, rather than summarily ordering removal of the improvement, will order a forced sale of the land on which the improvement sits to the improving trespasser if several conditions are met: (1) the improvement was constructed in a good faith belief that the trespasser is constructing on her own land; (2) the encroachment is small, or relatively so; and (3) the cost of removing the improvement is large. However, if the encroachment was constructed in bad faith, that is, with the

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[66] *See id.* § 3.2.

[67] *See id.* § 3.1.

[68] *See* JESSE DUKEMINIER, ET AL., PROPERTY, 8th ed.

[69] *E.g.,* Somerville v. Jacobs, 170 S.E.2d 805, 812 (W.Va. 1969).

knowledge that it was on the neighbor's land, the court will revert to the old rule and order removal.

The pattern of shifting from traditional hard-and-fast rules toward more open-ended standards seems clear enough. This pattern raises the question whether the trend is wise. Are the values that are commonly associated with rules, i.e., predictability and ease of application, being sacrificed for some other values? To consider this question let us return to the right to exclude, which we discussed earlier. In recent years courts have weakened the right to exclude through various standards that transform acts that would otherwise have constituted trespass into permissible encroachments upon private property. A famous example is *State v. Shack*.[70] In that case the defendants entered upon the plaintiff's land for the purpose of providing aid, specifically, health care and legal advice, to migrant farm workers who worked for the plaintiff and lived on his farm. The plaintiff-owner ordered them to leave, and after they refused, the plaintiff executed a complaint against them, charging trespass. The defendants were convicted of criminal trespass. On appeal, the New Jersey Supreme Court reversed the conviction, finding that no trespass had occurred. "Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premise," the Court stated.[71] "It is unthinkable," the Court continued, "that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being."[72] Hence, "the migrant worker must be allowed to receive visitors [upon the employer's farm] of his own choice, so long as there is no behavior hurtful to others. . . ."[73] The question for my purposes is whether the case, creating an exception to the owner's right to exclude through the use of a standard, renders trespass law in New Jersey unpredictable. The answer, I think, is no.

Viewed in the context of New Jersey right-to-exclude case law, *Shack* fits within an identifiable pattern that provides a degree of regularity, if not a strict rule, to New Jersey's right-to-exclude decisions. In *State v. Schmid*,[74] the New Jersey Supreme Court held that under the state's constitution, individuals have a free speech right to distribute political leaflets on the Princeton University campus by virtue of the fact that the university, though private, invited numerous public uses of its resources in order to fulfill its broader educational ideals and goals. In *Uston v. Resorts*

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[70] 277 A.2d 369 (N.J. 1971).
[71] *Id.* at 372.
[72] *Id.* at 374.
[73] *Id.*
[74] 423 A.2d 615 (N.J. 1980).

International Hotel, Inc.,[75] the court restricted a casino owner's right to exclude a patron, a notorious card-counter in blackjack, stressing the same factor, namely, "the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property."[76] Although this norm is certainly a standard, rather than a binary, on-off rule, it is certainly not at the open-ended, ad hoc end of the scale where Smith put it. Under *Shack* and its cognate New Jersey right-to-exclude decisions, an owner's right to exclude is very much alive and well, and the limits on that right are reasonably predictable. Finally, in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,[77] the same court held that this free speech right extended to protestors against the first Gulf War who were distributing leaflets in the "public" areas of shopping malls. The case involved a group that opposed military intervention in the Persian Gulf. They sought permission to enter a shopping mall for the purpose of distributing leaflets and were denied entry. The shopping mall permitted and encouraged non-shopping activities on its premises, including access for community groups, speech, politics and community issues. The Court stated that the shopping mall had impliedly made an invitation to leaflet under these circumstances. Shopping malls intentionally draw people in and encourage public use of their space. This diminishes their private property interest.[78]

What the New Jersey Supreme Court has done in these cases is to create a kind of sliding scale approach to the right to exclude. The right to exclude does not operate in a binary, on/off fashion, but rather is a matter of degree. Its strength depends upon several factors, including how private the owner's property is. The more the owner opens her property to the general public for their own private interests, the less they are able to exclude people for whatever reason they wish.

This sliding scale approach is precisely the sort of seemingly ad hoc and indeterminate approach that advocates of rules deplore. In their view it sacrifices all predictability. But a close look at the New Jersey approach reveals that this is not so. Elsewhere,[79] Dean Eduardo Peñalver and I have created a graph that plots the outcomes of various New Jersey exclusion cases along two axes.[80] "The horizontal axis reflects the degree to which

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[75] 445 A.2d 370 (N.J. 1982).

[76] *Id.* at 376 (quoting *Schmid*, 423 A.2d at 629).

[77] 650 A.2d 757 (N.J. 1994).

[78] *Id.* at 780.

[79] *See* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 142 (2012).

[80] *See* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, PROPERTY AND COMMUNITY

the owner has invited the owner onto her property."[81] Using the New Jersey approach we can view this variable as inversely related to the objective weight of the owner's interest in being able to exclude those seeking entry to the owner's property without her permission. The vertical axis represents the importance of the values (which is not the same as the intensity of the preferences) that would be vindicated by granting the entrant access to the property. Plotting the cases out on the basis of these two axes, a rather clear pattern emerges. Although not based on a mechanical application of any single rule, the New Jersey Court's approach comes to be seen as a mix of rules and standards interacting in an intelligible way that avoids the high degree of uncertainty that rule advocates predict will result from just this sort of approach to enforcing property. Standards do not, at least not always, give rise to unpredictability.

Moreover, the converse is also the case; that is, clear rules do not always promote predictability. Joseph Singer points out how the subprime housing crisis illustrates this.[82]

The securitization of subprime mortgages occurred within the context of a regime of fairly clear rules. Property law requires that parties to real estate transactions reduce their agreement to a signed writing and further that the paperwork be recorded in the local deed registration office. Banks as lending institutions did not always follow these rules, however. Many bypassed the public recording office, thus keeping mortgage information private, and many also failed to formalize all their mortgage transactions in the securitization process.[83] The result, as Singer observes, is clouded titles and insecure property rights.[84]

The two points that emerge from this discussion are that, first, property law is no longer solely, even mainly, the domain of rules; standards now proliferate the doctrinal landscape. Second, there is no necessary reason to believe that this movement from rules to standards has led to a loss of predictability or stability in property law. Rules are not always as crystal-clear as they are sometimes claimed to be, and standards, in practice, often lead to predictable patterns.

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142 (2010).

[81] *Id.*

[82] *See* Singer, *supra* note 60, at 1372.

[83] *See id.*

[84] *See id.*

V. DE-MARGINALIZING PROPERTY

The final theme is a development that I call "de-marginalizing property."[85] As that neologism may suggest, the development concerns the status of socially and economically marginalized groups. Within the past several decades property law has changed in ways designed to improve the lives of members of these groups to "de-marginalize" them, as it were. De-marginalizing property is a form of property designed to create a robustly democratic society, in which democracy is defined not simply by political rights but by social and economic rights as well. Another term for it might be "inclusionary property." Although de-marginalizing property has had some successes, it has a long way to go. There are multiple reasons for the shortfalls in this effort to improve the status of members of marginalized groups as fully sharing members of American society through property law. In this last part of my talk I want to briefly touch on its successes but also focus on its shortcomings. I will conclude with some remarks about de-marginalizing property's deepest challenge.

De-marginalizing property represents a signal break from property law's roots in private ordering. Its most common and obvious forms have been legislative interventions that have the effect, if not the purpose, of cutting back, to one degree or another, on individual freedom to use, possess, or transfer property. A clear and, for the most part, successful example is the federal Fair Housing Act of 1968, since amended several times to broaden its coverage.[86] The Act bans various acts of discrimination in the sale or rental of housing on the basis of race, religion, sex, familial status, national origin, or handicap.[87] It is difficult, for obvious reasons, to get an accurate read on the actual prevalence of housing discrimination today.[88] Few individuals who engage in acts of discrimination are likely to acknowledge their conduct. Moreover, discrimination sometimes comes in subtler forms, such as individuals who are protected by the Act being steered away from certain neighborhoods or not shown certain units that are otherwise available. The current method of measuring discrimination today is through the use of testers. Two testers are sent out to housing providers, agents, and lenders with identical fictitious backgrounds, with one

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[85] For an incomparable analysis of property law, primarily, but not exclusively, South Africa's, from a marginal perspective, see A.J. VAN DER WALT, PROPERTY IN THE MARGINS (2009). Professor van der Walt defines marginal persons and groups as "those suffered under the injustices of [a] discredited regime or whose position must be taken seriously because of political changes . . . " *Id.* at 21.

[86] *See* 42 U.S.C. §§ 3601-19, 3631.

[87] *See id.* § 3604.

[88] This discussion draws on DUKEMINIER, *supra* note 68, at 460-61.

exception–membership in a protected group. If the two testers experience differential treatment, discrimination may be inferred. The results of the most recent large-scale study using testers were released in 2013. Although they showed that most blatant forms of discrimination have declined sharply over the past four decades, African Americans, Hispanics, and Asians still experience subtle forms of discrimination. For example, African American renters who contact real estate agents learn about 11.4 percent fewer available housing units compared with equally qualified white renters. The disparities for Hispanics and Asians are 12.5 percent and 9.8 percent, respectively.[89] Based on such figures, one can say that the Fair Housing Act is been an attempt at de-marginalizing property that has achieved mixed success.

Another example of de-marginalizing property is the warranty of habitability, which applies to all residential leases in nearly all states.[90] As I noted earlier,[91] this doctrine was first introduced into property law as part of the tenants' rights movement of the late 1960s and earlier 1970s. Viewed narrowly, its purpose was to require landlords to repair blighted housing.[92] Viewed broadly, it was an effort to de-marginalize poor urban tenants, many of whom were people of color, by redistributing wealth from wealthier landlords to poor tenants[93] or by creating conditions for better lives for the urban poor.[94] The results that the warranty of habitability doctrine actually achieved, however, have fallen far short of either goal.[95]

There are several markers of the doctrine's failure. A very large percentage of eviction cases never reach open court.[96] Landlord-tenant courts, which would hear these disputes, have extremely high default rates.[97] In the few cases that do reach court, the vast majority are decided with no reference made to the condition of the premises.[98] Finally, data

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[89] *See* U.S. Dept. of HUD, Housing Discrimination Against Racial and Ethnic Minorities 2012 xv (2013).

[90] *See* DUKEMINIER, *supra* note 68, at 522.

[91] *See* note 144 *supra*.

[92] *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 394 (2011).

[93] *See* Duncan Kennedy, *The Effect of the Warranty of Habitability on Low-Income Housing: "Milking" and Class Violence*, 15 Fla. St. U. L. Rev. 485, 512 (1987),

[94] *See* Carl Schier, *Draftsman: Formulation of Policy*, 2 PROSPECTUS 227 (1968).

[95] *See* Super, *supra* note 92, at 394 and *passim*. This extraordinary article is well worth reading in its entirety. The following discussion draws upon Professor Super's piece.

[96] *See id.* at 434.

[97] *See id.*

[98] *See id.* at 435.

indicate that landlords win in a large percentage of cases brought for non-payment of rent.[99]

The habitability doctrine's failure has a number of reasons. For one, low-income tenants are often unaware of the doctrine's existence. Even if they are aware of its existence, tenants often lack incentives assert the doctrine. As Professor David Super explains:

> inducing tenants in tight housing markets to assert the warranty requires highly favorable values for the other elements in the calculation, including the tenant's chances of winning in the initial action and in avoiding retaliation, the damages (or rent abatement) awarded, and the likelihood that the landlord will repair. [T]his combination of circumstances is quite unlikely.[100]

Moreover, as Super further points out, moving costs skew the warranty's impact in favor of better-off tenants.[101] These moving costs include a deposit, which must be paid up-front before the tenant has received any money she may eventually receive as damages in a successful warranty action. For poor tenants with severely limited available cash, this effectively means that they must remain in substandard housing. Yet another factor contributing to the warranty's failure are landlords' protective orders (LPOs), which are court orders or statutory requirements that tenants deposit rent with the court during the pendency of these actions as a condition to being heard on their defenses.[102] In Professor Super's words, for poor tenants, "these orders may effectively keep the implied warranty out of court."[103]

More recently, we have witnessed the appearance of other novel forms of de-marginalizing property. Some of these forms really do not aim at de-marginalizing groups as much as simply housing individuals, getting them off the streets. An example is urban homesteading. Cities like New York have policies that encourage squatters in abandoned buildings to improve the properties in which they live.[104] In New York, the phenomenon began during the 1980s, when squatters took over many old tenement building in Manhattan's Lower East Side that owners had simply abandoned. In 2002, the City of New York granted ownership of eleven of these squats to the Urban Homesteading Assistance Board (UHAB), a private not-for-profit organization.[105] UHAB provides loans for essential renovations to bring the

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[99] *See id.* at 437.

[100] *Id.* at 409.

[101] *Id.*

[102] *See, e.g.*, Uniform Residential Landlord-Tenant Act § 4.105.

[103] Super, *supra* note 92, at 426.

[104] *See* Entry for Urban Homestead Program, *Directory of New York City Affordable Housing Programs*, N.Y.U. SCHOOL OF LAW - Furman Center, Mar. 3, 2014.

[105] *See* Sarah Ferguson, *Better Homes and Squatters*, THE VILLAGE VOICE (Aug. 27,

buildings up to city code regulations, after which the city will turn over title to the occupants for one dollar. Ownership will be organized in the form of a limited-equity cooperative.[106]

In response to the home foreclosure crisis, a growing number of cities have exercised their power of eminent domain in a remarkably new way—to acquire underwater mortgages. Despite rising home values, there are still some 9.8 million households underwater, representing 19.4 percent of all mortgaged homes—nearly one out of every five such homes.[107] The problem disproportionately affects communities of color. In seventy-one of the one-hundred hardest-hit cities, African Americans and Latinos account for at least forty percent of the population.[108] In 146 of the 395 hardest-hit ZIP codes, African Americans and Latinos account for at least seventy-five percent of the population.[109] Between 2005 and 2009, African Americans and Latinos have experienced a decline in household wealth, of fifty-two and sixty-six percent, respectively, compared to sixteen percent for whites.[110] The new plan to use eminent domain aims to substantially alleviate this injustice.

First developed by my colleague Robert Hockett, the plan basically partners cities with private investors to purchase troubled mortgages at their fair market value, refinance the mortgage by writing down the principal owed, and thereby recoup value for all. In the process, the strategy mitigates urban blight and keeps borrowers, many of whom are people of color, in their homes. It is a kind of "inverse *Kelo*" action in which the eminent domain power is used to keep people in their homes rather than throw them out.[111] The city, after purchasing possession, works with each willing mortgagor to accept discounted repayment of the mortgagor's obligation. Repayment is set at a level that corresponds to the level at which the mortgagor can obtain new financing in the current mortgage market. The mortgagor then conveys the new mortgage to trusts that are created to collect private investor funds. The city receives discounted repayment in the form of proceeds from the new mortgage loan. The city then conveys these proceeds to the trusts, which in turn convey them to the

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2002).

[106] *See id.*

[107] *See*, Peter Dreier, et al., *Underwater America*, HAAS INSTITUTE FOR A FAIR AND INCLUSIVE SOCIETY, UC-BERKELEY, at 5.

[108] *See id.* at 4.

[109] *See id.*

[110] *See id.*

[111] *See* Robert C. Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN. J.L BUS. & FIN. 121 (2012).

private investors as repayment in kind for the moneys that the investors lent the city upfront to finance the initial condemnation award.[112]

This innovative strategy has already been adopted or being considered by several municipalities around the country.[113] Recently, a report from the Haas Institute for a Fair and Inclusive Society at UC-Berkeley, specifically endorsed the reverse eminent domain strategy.[114] Obviously, this is a bold and unprecedented form of property, but underwater mortgages remain a deeply entrenched problem for many Americans, especially people of color, and problems of this magnitude require novel solutions.

A more familiar form of de-marginalizing property is housing subsidies. A major housing problem today throughout the nation is the high level of rent, high rent costs have crowded out other financial obligations, and this has exacerbated the gap between the large majority of low-income people receiving no major housing subsidies and the minority that do.[115] Yet, as David Super has pointed out, "direct subsidies have far more potential than regulatory action to improve low-income tenants' housing conditions."[116] Yet the supply of vouchers comes nowhere close to meeting demand. Only one in five eligible families receives a voucher today.[117] Housing subsidies are a form of de-marginalizing property that badly needs revival.

Housing subsidies are not the only form of direct subsidy that needs resuscitation these days. Food stamps are another. Contrary to some news reports,[118] the Supplemental Nutrition Assistance Program ("SNAP"), formerly known as the Food Stamp program, will not come to an end March 15, 2015.[119] Nevertheless, Congress recently cut the food stamp program by $8.6 billion over ten years.[120] The importance of food stamps

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[112] *See id.* at 150-151.

[113] *See, e.g.*, Alejandro Lazo, *Richmond Adopts Eminent Domain Mortgage Plan*, L.A. TIMES, July 30, 2013, http://articles.latimes.com/2013/jul/30/business/la-fi-mo-richmond-eminent-domain-20130730; James Queally, ACLU, NJ Leaders Join Fight to Protect Cities Using Eminent Domain to Fight Foreclosure Crisis, Newark (NJ) STAR-LEDGER, Apr. 7, 2014, http://www.nj.com/essex/index.ssf/2014/04/aclu_nj_leaders_join_fight_to_protect_cities_using_eminent_domain_to_fight_foreclosure_crisis.htm.

[114] *See* Dreier, *supra* note 107, at 6.

[115] *See* Super, *supra* note 92, at 457.

[116] *See id.* at 461.

[117] *See id.*

[118] *See Government Food Stamp Program To Be Discontinued Effective March 2015*, EMPIRE NEWS, Aug. 8, 2014, http://empirenews.net/government-food-stamp-program-to-be-discontinued-effective-2015.

[119] *See Stamping Out*, SNOPES.COM, Aug. 12, 2014, http://www.snopes.com/media/notnews/foodstamps.asp#w5GVOj27CXiQLo5x.99.

[120] *See* Alan Bjerga, *Congress Passes Farm Bill to End Fight Over Food Stamps*, BLOOMBERG, Feb. 4, 2014, http://www.bloomberg.com/news/2014-02-04/congress-passes-farm-bill-to-end-fight-over-food-stamps.html.

to people who live at, near, or below the federal poverty line can hardly be underestimated. A Department of Agriculture report released this September stated that fourteen percent of American households remain food-insecure, that is, had difficulty at some time during the year in providing enough food for all their members.[121] Food stamps disproportionately benefit people of color and women. As of 2012, women were about twice as likely as men (twenty-three percent versus twelve percent) to have received food stamps at some point in their lives. African Americans are roughly twice as likely as whites to have received them during their lives (thirty-one percent versus fifteen percent). Among Latinos, about twenty-two percent said they have received food stamps.[122]

It is difficult to measure the success of SNAP with, in terms of reducing food insecurity, with any precision. Households that do and do not receive SNAP benefits can differ in systematic ways, complicating the task of measuring SNAP's success rate. A study that uses instrumental variable models to control for the endogeneity of SNAP receipt shows that the receipt of SNAP benefits reduces the likelihood of being food insecure food insecure.[123] The study provides evidence that SNAP is meeting its key goal of reducing food-related hardship. Hence, a robust food stamp program would be an effective form of de-marginalizing property.

A tension exists between extant property interests and the interests of members of marginalized groups, for the real legal, political, and social changes that are necessary to fundamentally improve the lives of these individuals–require redistribution of wealth. These changes involve not simply making the pie bigger, but changing how the pieces of the pie are distributed. De-marginalization is a matter of relative position, i.e., how the worst-off members of society are economically situated, not in absolute terms, but relative to the rest of society. Even if my thin wedge of the new, bigger pie is larger than its former counterpart, making me better-off in absolute terms, I remain marginalized if the wedges of everyone else also have grown proportionately larger.

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[121] *See New Data from USDA Shows 49m People (16m Children) are Food Insecure in the US*, FEEDING AMERICA, Sept. 3, 2014, http://www.feedingamerica.org/hunger-in-america/news-and-updates/press-room/press-releases/new-data-from-usda-shows-49m-are-food-insecure.html.

[122] *See* Rich Morin, *The Politics and Demographics of Food Stamp Recipients*, PEW RESEARCH CENTER, July 12, 2013, http://www.pewresearch.org/fact-tank/2013/07/12/the-politics-and-demographics-of-food-stamp-recipients/

[123] Caroline Ratcliffe and Signe-Mary McKernan, *How Much Does SNAP Reduce Food Insecurity?*, THE URBAN INSTITUTE REP. NO. 60, Mar. 2010, http://www.urban.org/UploadedPDF/412065_reduce_food_insecurity.pdf

In today's political environmental the prospects of effecting such redistribution through legislation are not good, to say the least. Alternative methods must be sought. One is through changes in property doctrines that have the potential to use property law in a way that goes beyond its traditional role in promoting order and stability and instead to fulfill its potential to shift entitlements. Some property doctrines do this already. What I am talking about is a matter of exploiting the potential of these and other doctrines to effect further change. This is what Eduardo Peñalver and Sonia Katyal have in mind in their wonderful article, *Property Outlaws*.[124] By that term, Peñalver and Katyal refer to individuals who have deliberately encroached upon the settled property rights of others. The term includes situations such as adverse possessors, persons who trespass for reasons of necessity, and persons who trespass as an express of political protest. Peñalver and Katyal argue that "the apparent order and stability that property law provides owe much to the destabilizing role of the lawbreaker, who occasionally forces shifts of entitlements and laws."[125] They argue in favor of an expansion of doctrines like the necessity defense to allow redistribution of entitlements in ways that track the de-marginalizing role of property I have described here.[126]

This proposal will likely strike most of us as an extreme, even outrageous, method of addressing the problem of social and economic marginalization. Perhaps it is. However, in a society that is unwilling to take substantial measures in an open and frontal way at alleviating the property (or non-property) conditions of marginalized groups, it is hardly surprising that legal scholars propose highly novel means of redistributing entitlements. Legal doctrine is pliable, at least to a degree, and in the absence of legislative action progressive legal theorists have no alternative but doctrine as the means of advancing the project of de-marginalizing property.

VI. CONCLUSION

It is time to wrap things up. Perhaps my five pieces–the recurrent themes I have noted–are not so easy after all. Still, I hope enough has been said here to indicate their fundamental importance to an understanding of American property law. The pieces–conceptualizing property, categorizing property, historicizing property, enforcing property, de-marginalizing property–do not appear in Gilbert's or other commercial outlines, but

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[124] Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

[125] *Id.* at 1098.

[126] *Id.* at 1172-77.

students will gain a much firmer grasp of the property doctrines covered in those outlines if they understand property law's recurrent themes. Finally, the doctrines will become easy for them like Bobby Dupea's piano pieces through the same method he used–practice, practice, and more practice.

Helping Hawaii's Diverse Community of English Language Learners: Does the Hawai'i Department of Education Meet Federal Standards for English Language Learner Programs?

By Kelsey Inouye*

I. INTRODUCTION

The State of Hawai'i has a rich but complex history of language and English language instruction that is tied to many cultural and political issues central to Hawaii's people. Today, the Hawai'i Department of Education ("HIDOE") approaches English language education by teaching English as a Second Language ("ESL"), pulling students designated English Language Learner ("ELL")[1] out from their regular classes for about an hour

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of instruction per day.[2] In Hawai'i the curricula for ELL students has changed constantly, techniques and tests influenced by national trends and government funding, and current State ELL policies lack cohesiveness.

Following the landmark Supreme Court case *Lau v. Nichols*,[3] the right to language education was codified under the Equal Educational Opportunities Act of 1974 ("EEOA"),[4] which required school districts to take "appropriate action" to help students learn English so they may meaningfully participate in educational programs.[5] In this paper, I argue that Hawaii's current ELL practices fall short of the federal requirements set out in the EEOA, necessitating policy revisions that would provide adequate English language education for all ELL students in Hawai'i. Access to adequate English language instruction has been heavily affected by the politics of immigration and nationalism, meaning that ELL programs not only represent a contested area of education policy, but also reflect important civil rights issues. I also suggest that the State should consider bilingual education as a long-term goal in order to maximize ELL student proficiency while maintaining ties to native languages and customs.

In Part II of this article, I will discuss English and education in the social and historical contexts of Hawai'i, focusing on the 1919 Federal Survey of Education and establishment of English Standard Schools. Part II will also explore how language is tied to race, culture, and politics, tracing English's evolution from a minority language in the early 1900s to the State's majority language just decades later. Part III will turn to the law, discussing the federal standard for English Language Learner assistance, beginning with *Lau v. Nichols* and *Castaneda v. Pickard*,[6] then tracing subsequent cases in the federal circuits and how those courts have interpreted the three-step test set forth in *Castaneda*. Part IV will describe the current ELL programs and policies currently employed in the State of

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[1] English Language Learners ("ELL") is the term used to refer to immigrant and/or non-native English speaking students. Another term for this population is "minority language students." Limited English Proficiency ("LEP") refers to the level of students' language, and English as a Second Language ("ESL") refers to the English language course that most ELL students are enrolled in.

[2] Andreas Wiegand, State Specialist for the English Language Learner Program, Address at the Impact of Immigration and ELL Learners in Hawai'i Conference (Jan. 18, 2014).

[3] 414 U.S. 563 (1974).

[4] 20 U.S.C.A. § 1703(f) (Westlaw 2014) ("No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.").

[5] *See id.*

[6] 648 F.2d 989 (5th Cir. 1981).

Hawai'i, and analyze how Hawaii's program measures against the federal standard. This will be done by identifying factors other states and federal circuits have used in their determinations of whether language programs are acceptable, and comparing those factors to Hawaii's program. Ultimately, this section will argue that Hawai'i likely does not meet the federal standard, largely because of the State's failure to meet the second prong of the *Castaneda* test. Finally, Part V will suggest ways in which the Hawai'i Department of Education can revise its current English language program in order to comply with federal law, drawing on programs in other states and educational research, and appealing to the original policies and purposes underlying ELL programs.

II. SOCIAL AND HISTORICAL CONTEXTS: LANGUAGE AND EDUCATION IN HAWAI'I

Home to Native Hawaiians and the Hawaiian language, Hawaii's social, political, and linguistic system started to change when Europeans and Americans arrived in the islands during the late 18th and early 19th centuries. Following Captain James Cook's landing in 1778,[7] foreign disease on trading and missionary ships decimated the Native Hawaiian population.[8] Western influence resulted in a growing demand for imported goods, transforming Hawaiian culture into a "monetary economy" and disrupting communities and social structure.[9] Many Hawaiians began questioning their religious beliefs as foreigners failed to respect *kapu*,[10] and the Protestant missionaries opened schools,[11] translated Hawaiian into written forms,[12] and produced Hawaiian versions of the Bible.[13] Some missionaries also pointed to the dwindling Hawaiian population as evidence that their systems of spirituality had failed,[14] persuading more and more Hawaiian people to convert to Christianity and consequently engage in English as the key to further learning.

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[7] Dorothy Brown Aspinwall, *Languages in Hawaii*, 75 PUB. MODERN LANG. ASS. 7, 7 (1960).

[8] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 19 (2008).

[9] *Id.* at 21.

[10] *Id.* at 21-22.

[11] *Id.* at 23.

[12] Paul F. Lucas, *E Ola Mau Kakou I Ka Olelo Makuahine: Hawaiian Language Policy and the Courts*, 34 HAW. J. OF HIST. 1, 2 (2000) (in 1820, the missionaries printed the Pi-a-pa, a Hawaiian language primer, which marked the transition of Hawaiian from oral tradition to written language).

[13] VAN DYKE, *supra* note 8, at 22-23.

[14] *Id.* at 23.

English was solidified as the most widely spoken language in Hawai'i during the first half of the twentieth century. From 1924 to 1960, Hawai'i had a system of select public schools that were designated "English Standard."[15] These English Standard Schools provided accelerated instruction to students with better English skills, and served as a proxy for segregation based on race and class as this meant nearly all English Standard students were white and of the upper or middle classes.[16] Among the numerous historical and social events that contributed to the rise of English Standard Schools, the plantation-driven immigration from Asia and the 1919 Federal Survey of Education in Hawai'i were most important, shedding light on the linguistic imperialism and classism underlying the English Standard Schools.

The sugar and pineapple plantations that sprouted in the islands during the nineteenth and early twentieth centuries drew immigrants from all over the world, particularly Asia.[17] This sudden upsurge in immigration and the close-quarter plantation lifestyle resulted in both a diversity of language and the creation of Hawai'i Creole English ("HCE"), which is known in the islands as "Pidgin."[18] Hawaiian, the language native to Hawai'i, had already dwindled due to Western presence,[19] and the large numbers of Asian immigrants not only overtook the number of English speakers, but also minoritized the Hawaiian language even further.[20]

Although English was the medium of instruction in public schools,[21] the vast majority of Hawai'i residents did not speak Standard English up until

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[15] Morris Young, *Standard English and Student Bodies: Institutionalizing Race and Literacy in Hawai'i*, 64 C. ENGLISH 405, 410-20 (2002).

[16] Eileen H. Tamura, *Power, Status, and Hawaii Creole English: An Example of Linguistic Intolerance and History*, 65 PAC. HIST. REV. 431, 436-37 ("Arthur L. Dean, former president of the University of [Hawai'i] and then vice-president of the sugar company Alexander and Baldwin and chairman of the Territorial Board of Education, admitted in 1936 that the establishment of Standard schools was a way to separate children of different cultural and economic groups . . . the Department of Public Instruction created these schools in response to pressure from Caucasians . . . ."); *see also* Young, *supra* note 15, at 411.

[17] Young, *supra* note 15, at 408.

[18] *Id.* at 409.

[19] *See* VAN DYKE, *supra* note 8, at 19-23.

[20] Young, *supra* note 15, at 409 ("[T]he development of Pidgin in addition to the 'official' standing of English acted to further displace the Native Hawaiian language. English became the language of instruction and government; Pidgin became the language of the (nonwhite) community; and Hawaiian was actively discouraged, even forbidden, to the point where Native Hawaiian children who spoke Hawaiian faced corporal punishment and laws were established making the use of Hawaiian in school illegal . . . .").

[21] Judith R. Hughes, *The Demise of the English Standard School System in Hawai'i*, 27 HAW. J. OF HIST. 65, 66 (1993).

the second half of the twentieth century.[22] During the early 1900s, many Hawai'i children entered school speaking either Pidgin or the languages of their parents: Portuguese, Hawaiian, and Japanese, among others.[23] In 1920, it is estimated that only "three percent of all six and seven-year-olds entering Hawaii's public schools spoke Standard English."[24]

Fearing anti-American sentiment in Hawai'i due to the large population of immigrants—notably the Japanese[25]—the federal government conducted the Federal Survey of Education in Hawai'i in 1919, primarily to investigate the numerous Japanese language schools operating in the Territory.[26] Racial tensions in Hawai'i were already high during the early 1900s, as large populations of immigrants continued to enter the islands, and the Japanese and other ethnic groups started to open their own language schools so that their children would learn their native languages in addition to the English being taught in public schools.[27] The 1920 Sugar Strike, supported by Japanese teachers and the Japanese press, increased tension between Japanese and English-speaking groups,[28] and the State later attempted to ban foreign language schools.[29]

While conducting a federal survey had been discussed in previous years, Vaughan MacCaughey's appointment as Hawai'i Superintendent of Public Instruction catalyzed the start of the 1919 survey.[30] MacCaughey believed that immigrants, particularly the Japanese, were at the root of Hawaii's educational issues, writing that "[t]he bulk of [Hawaii's] school population

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[22] Tamura, *supra* note 16, at 433.

[23] *Id.* at 434.

[24] *Id.*

[25] *See* Noriko Asato, *Mandating Americanization: Japanese Language Schools and the Federal Survey of Education in Hawai'i, 1916-1920*, 43 HIST. OF EDUC. Q. 10, 12-13 (2003). At the time of the survey, Japanese made up almost half of Hawaii's population, settling in the islands after plantation work, and composing the largest "voting block [sic] in the territory's electorate." *Id.*

[26] *Id.* at 12 ("[T]he territorial legislature requested the survey to investigate was the 163 Japanese language schools accused of instilling 'anti-Americanism' in over 20,000 Japanese American students in [Hawai'i]."). The federal survey also provided the basis for English Standard Schools. *See* Hughes, *supra* note 21, at 68-69.

[27] Hughes, *supra* note 21, at 65-66.

[28] Tamura, *supra* note 16, at 440-41 ("[The strike] ignited latent hostilities and served as a catalyst for discriminatory actions against the Japanese. This effort against the foreign-language press was part of a nationwide movement against non-English-language publications resulting from the antiforeignism that erupted on the mainland during World War I.").

[29] This ban was unsuccessful. In Farrington v. Tokushige, 273 U.S. 284 (1927), the U.S. Supreme Court found that Hawai'i law banning foreign language schools in the State unconstitutional. *Tokushige*, 273 U.S. at 298.

[30] Young, *supra* note 15, at 410.

attends Japanese language schools six days per week, throughout practically the entire year. The teachers . . . are all aliens and are imported from Japan. They have little or no knowledge of American institutions or ideals."[31]

The Federal Survey, led by Frank F. Bunker, found that "teacher supply and the Japanese language schools" were the two main problems with Hawaii's education system,[32] and that Buddhist and Shinto religions were the underlying problems fostering anti-Americanism.[33] Another surveyor, Trent, recommended that Japanese children should go to public schools or "privately funded Japanese schools," not both.[34] The survey also recommended that "the pupils who speak English fluently be separated from the others and that the latter be given a different type of English study."[35] This recommendation served as the basis for English Standard Schools, which began opening in 1924 and were codified in Act 103 of 1927.[36]

English Standard Schools operated from 1924 to 1960,[37] and were the product of the racism reflected in the 1919 Federal Survey and complaints by predominantly American parents.[38] The schools were meant to provide places where children of English-speaking parents could learn Western values amongst other native speakers, free from children with limited English skills who might impede native-speakers' learning.[39] While the

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[31] Asato, *supra* note 25, at 21 (quoting MacCaughey to Claxton, July 25, 1919, HSF) (internal quotations omitted).

[32] *Id.* at 24 ("[P]rivate schools dominate the entire situation, while public schools were considered merely a means to satisfy the 'foreigners.'").

[33] *Id.* at 26.

[34] *Id.* at 24.

[35] Young, *supra* note 15, at 410.

[36] *Id.*

[37] *See id.* at 436-37.

[38] *Id.* at 410 ("Vaughan MacCaughey, received a petition signed by parents of four hundred children from English-speaking homes in Honolulu requesting the establishment of a public school exclusively for those who spoke Standard English. These families were part of the growing white middle class that began to migrate to Hawai'i after it had been annexed but who could not afford to send their children to the private schools attended by the children of wealthy plantation owners, industrialists, and [Hawaii's] elite.") (internal citations omitted).

[39] *See* Hughes, *supra* note 21, at 70 ("Proponents of the plan argued that separation was the only way native speakers of English could progress at a normal rate of learning both in language and in other subjects. Their basic argument was that (1) children from English-speaking homes were held back by the large numbers of children who had trouble with the language; (2) in almost all schools there were not enough American-ancestry children so that they could exercise the socializing influence, generally called "Americanizing," that supporters of integrated classes wanted, and, in fact, the opposite was true, that is, the "foreign" influence would predominate; and (3) English-speaking parents, who were taxpayers, had a right to an appropriate public education for their children.").

Standard Schools did not officially segregate by race, "*de facto* segregation was the reality."[40] Missionary-established private schools like Punahou already served similar purposes, but the English Standard Schools offered further alternatives within the public school system for children of middle-class parents.[41] Students were admitted to Standard English schools via an oral examination, meaning that predictably, most of the Standard Schools initially filled with Caucasian students up until the start of World War II.[42] The schools remained open until 1960.[43]

Today, English is by far the most widely spoken language in Hawai'i,[44] a result that comes in part from the Standard Schools, statehood, and continued Western presence. The English Standard Schools and the sentiments reflected in the 1919 Survey of Education demonstrate how nationalism and racism are closely tied to language. While English Standard Schools no longer exist in Hawai'i, stigma remains attached to Pidgin, and the new linguistic minority, non-English speakers, struggles to access services in the islands.

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[40] Young, *supra* note 15, at 411 ("For example, when a group of Japanese immigrant families organized a kindergarten that emphasized Standard English so that their children could pass the oral examination to attend Central Grammar School, American parents (i.e., white parents) were upset because the Japanese children (though usually American-born) 'easily passed the tests for entrance into the school which it had hoped would, by an exclusion of little Orientals, meet the demand for an 'American school.'"') (internal citations omitted).

[41] Hughes, *supra* note 21, at 65 ("In the 1820s the missionaries in Hawai'i sent their children on a six-month trip to New England at an early age because of the lack of Western educational opportunities and their unwillingness to have their children come into contact with Hawaiian children. Later, in 1842, they established Punahou School, initially so that their children could remain in Hawai'i but be separated from the Hawaiians.").

[42] *Id.* at 434.

[43] Tamura, *supra* note 16, at 437 ("Standard schools continued to exist within the public school system for the next several decades, but after World War II, their presence became controversial again. By this time, the proportion of nonwhites in Standard schools had increased, and class had become the dominant issue .... The small proportion (two to nine percent) of public school students accepted in the schools encouraged such elitism. In 1949, the territorial legislature passed a measure that slowly phased out the schools ... and the last class of Standard students graduated from high school in 1960.") (internal citations omitted).

[44] *See* Hawaii Educational Policy Center, Summary Report on: "Immigration and English Language Learners in Public Schools" 1 (2014), http://manoa.hawaii.edu/hepc/wp-content/uploads/Summary-of-the-forum.pdf.

III. FEDERAL LAW: REQUIREMENTS FOR ENGLISH LANGUAGE EDUCATION UNDER THE EEOA, LAU, AND CASTANEDA

Lau v. Nichols,[45] decided by the U.S. Supreme Court in 1974, was the first major case defining non-native English speakers' rights to English language education. Before *Lau,* the rights of linguistic minorities were not clearly outlined, and were often tied to immigration and social reform movements of the 1960s, embedded in the Title VI Civil Rights Act of 1964[46] and the Fourteenth Amendment's Equal Protection Clause.[47] In *Lau*, non-English speaking students of Chinese ancestry brought a class action lawsuit against the officials of the San Francisco Unified School District, alleging that poor educational opportunities for non-English speakers violated Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment Equal Protection Clause.[48] The Court found in favor of the plaintiffs, basing its holding on the Civil Rights Act,[49] noting that about 1,800 of 2,856 Chinese students in the district did not receive any English language instruction, and asserting that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[50] The Court stated that since the school district received federal funding, it was also bound by the regulations set out by the Department of Health, Education, and Welfare ("HEW").[51] HEW's 1970 guidelines required that "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[52] Thus, the Court held that by not providing Chinese-

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[45] 414 U.S. 563 (1974).

[46] Further, courts have found that there is no constitutional right to education. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[47] Under the Fourteenth Amendment, linguistic minorities are not considered a suspect classification. *See* Plyler v. Doe, 457 U.S. 202 (1982).

[48] Lau, 414 U.S. at 564.

[49] The *Lau* Court did not reach the Fourteenth Amendment analysis and relied instead on the Civil Rights Act of 1964. *Id.* at 566.

[50] *Id.*

[51] *Id.* at 568-69. The school district agreed to "comply with title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the regulation of HEW." *Id.* (quoting 45 C.F.R. §§ 80.1-80.13).

[52] *Id.* at 568 (quoting 35 Fed. Reg. 11,595 (July 18, 1970)) (internal quotation marks omitted) (emphasis added).

speaking students with English language education, the district was violating the Civil Rights Act and HEW regulations.[53]

Following *Lau,* the non-native English speakers' rights to English language education was codified in the Equal Educational Opportunities Act of 1974 ("EEOA"), which states:

> The Congress declares it to be the policy of the United States that (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and (2) the neighborhood is the appropriate basis for determining public school assignments . . . .[54] No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take *appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs.[55]

Today, the EEOA remains the statutory basis for providing English Language instruction and assessing state ELL policies. In 1978, the United States Court of Appeals for the Fifth Circuit's decision *Castaneda v. Pickard*,[56] clarified what it means for school districts to take "appropriate action to overcome language barriers"[57] under the EEOA by producing a three-prong analysis.[58] This three-prong test has been widely adopted by courts across the federal circuits to determine the adequacy of state-administered English language programs, and would likely be the governing law if Hawaii's ELL program is challenged.

In *Castaneda*, Mexican-American parents and children alleged that the Raymondsville, Texas Independent School District ("RISD") was guilty of racial discrimination by engaging in a program of ability grouping that resulted in classroom segregation, discriminatory faculty hiring, and lack of sufficient bilingual education programs that constituted a violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the EEOA.[59] While ability grouping is in itself not illegal,[60] "a practice which actually groups children on the basis of their language ability and then identifies these groups not by a description of their language ability but with a general ability label is . . . highly suspect."[61]

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[53] *See id.* at 568-70.
[54] 20 U.S.C.A. § 1701(a) (West 2014) (formatting adjusted for space).
[55] 20 U.S.C.A. § 1703(f) (West 2014) (formatting adjusted for space).
[56] 648 F.2d 989 (5th Cir. 1981).
[57] 20 U.S.C.A. § 1703(f) (West 2014).
[58] *See* Castaneda, 648 F.2d at 1009-10.
[59] *Id.* at 992.
[60] *Id.* at 996.
[61] *Id.* at 998.

Among their claims, plaintiffs asserted that RISD's bilingual education program was inadequate due to lapses in teacher credentials and resources, arguing that ELL students have the right to an effective bilingual program.[62] This claim was based in part on the "Lau Guidelines" developed by the Department of Health, Education and Welfare in 1975, which caution against "overempha[sis] [of] the development of English language skills to the detriment of the child's overall cognitive development."[63] However, the Fifth Circuit questioned the legitimacy of the Lau Guidelines, which "were the result of a policy conference organized by HEW [and] were never published in the Federal Register," and therefore do not warrant the same deference as statutes.[64] The Court also questioned the "vitality" of *Lau*,[65] which based its holding in Title VI of the Civil Rights Act; later cases including *Washington v. Davis*[66] and *Regents of the University of California v. Bakke*[67] found that violations of Title VI and the Equal Protection Clause require "discriminatory purpose, and not simply a disparate impact,"[68] thus calling into question the legal basis for the *Lau* decision. Nevertheless, while the reasoning underlying *Lau* may now be questionable, plaintiffs in *Castaneda* also relied on the EEOA, which does not have an intent requirement,[69] making the EEOA the current source of authority for claims against school districts' ELL policies.

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[62] *Id.* at 1006.

[63] *Id.*

[64] *Id.* at 1007.

[65] *Id.*

[66] 426 U.S. 229 (1976).

[67] 438 U.S. 265 (1978).

[68] Castaneda, 648 F.2d at 1007.

[69] *Id.* at 1007-08 ("Unlike subsections (a) and (e) of [§] 1703, [§] 1703(f) does not contain language that explicitly incorporates an intent requirement nor, like [§] 1703(d) which we construed above, does this subsection employ words such as "discrimination" whose legal definition has been understood to incorporate an intent requirement. Although we have not previously explicitly considered this question, in Morales v. Shannon, [516 F.2d 411 (5th Cir. 1975)], we assumed that the failure of an educational agency to undertake appropriate efforts to remedy the language deficiencies of its students, regardless of whether such a failure is motivated by an intent to discriminate against those students, would violate [§] 1703(f) and we think that such a construction of that subsection is most consistent with the plain meaning of the language employed in [§] 1703(f). Thus, although serious doubts exist about the continuing vitality of Lau v. Nichols as a judicial interpretation of the requirements of Title VI or the fourteenth amendment, the essential holding of Lau, i.e., that schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district, has now been legislated by Congress, acting pursuant to its power to enforce the fourteenth amendment, in [§] 1703(f).").

Because Congress did not specify how to gauge whether a school's language program is sufficient,[70] the *Castaneda* court came up with a three-part test to guide assessment:

1. [T]he court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based.[71]

2. The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.[72]

3. Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions.[73]

In other words, in order for school districts' ELL programs to satisfy federal requirements, they must be 1) based in educational theory; 2) have the resources necessary to implement the program; and 3) demonstrate that

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[70] *Id.* at 1008 (citations omitted) ("We do not believe that Congress, at the time it adopted the EEOA, intended to require local educational authorities to adopt any particular type of language remediation program. At the same time Congress enacted the EEOA, it passed the Bilingual Education Act of 1974, 20 U.S.C. [§] 880b et seq. (1976). The Bilingual Educational Act established a program of federal financial assistance intended to encourage local educational authorities to develop and implement bilingual education programs. The Bilingual Education Act implicitly embodied a recognition that bilingual education programs were still in experimental stages and that a variety of programs and techniques would have to be tried before it could be determined which were most efficacious. Thus, although the Act empowered the U.S. Office of Education to develop model programs, Congress expressly directed that the state and local agencies receiving funds under the Act were not required to adopt one of these model programs but were free to develop their own. We note that although Congress enacted both the Biligual [sic] Education Act and the EEOA as part of the 1974 amendments to the Elementary and Secondary Education Act, Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of "bilingual education" to all limited English speaking students. We think Congress' use of the less specific term, "appropriate action," rather than "biligual [sic] education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.").

[71] *Id.* at 1009.

[72] *Id.* at 1010.

[73] *Id.*

the program is working, or if it is not working, make good faith efforts to remedy it. This test remains the governing method of assessment of ELL policy in federal courts.[74]

A. Part I: "Soundness of the Educational Theory"

Following *Castaneda*, subsequent federal cases raised the bar for plaintiffs attempting to prove that an ELL program is not based in sound educational theory, making it virtually impossible to find an ELL program insufficient under the first prong of *Castaneda*. At the time *Castaneda* was decided, bilingual education was becoming controversial.[75] Despite the 1968 Bilingual Education Act, which encouraged state bilingual education programs, school districts were unhappy with the bilingual mandate.[76] Lower court decisions failed to enforce those programs, and in 1978, the Bilingual Education Act was amended to focus on English competence.[77] When *Castaneda* was decided in 1981, the court made clear that the EEOA does not mandate any particular type of language education program.[78] The court reasoned that "Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA,"[79] thereby providing leeway for state school districts to implement the language programs of their choice.

Early applications of *Castaneda* required convincing expert testimony to support soundness of "educational theory."[80] For example, in *United States v. Texas*, the court held that Texas San Antonio School District did not meet the requirements of the first *Castaneda* prong, as the State's single expert witness was not enough when compared with plaintiffs' multiple expert witnesses who testified to the education program's flaws and

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[74] *See, e.g.*, Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1041 (7th Cir. 1987).

[75] *See* Jennifer Bonilla Moreno, *Only English? How Bilingual Education Can Mitigate the Damage of English-Only*, 20 DUKE J. GENDER L. & POL'Y 197, 214-16 (2012).

[76] *Id.* at 214.

[77] *Id.* at 215 ("Three years after Keys, in 1978, Congress amended the BEA to focus on the goal of English competence, which translated to restricting funding to transitional support programs only, and providing no funds for heritage language maintenance programs.").

[78] Castaneda, 648 F.2d at 1009 ("We note that although Congress enacted both the Bilingual Education Act and the EEOA as part of the 1974 amendments to the Elementary and Secondary Education Act, Congress, in describing the remedial obligation it sought to impose on the states in the EEOA, did not specify that a state must provide a program of "bilingual education" to all limited English speaking students.").

[79] *Id.*

[80] United States v. Texas, 523 F.Supp. 703, 735 (D. Tex. 1981).

inadequacies.[81] Later cases in other federal circuits heightened the standard for disproving sound educational theory, finding first that plaintiffs have the burden of proving educational programs inappropriate,[82] and second, that an ELL program is considered based in sound educational theory so long as it is recognized as sound by *some* expert in the field.[83] Thus, if the state can produce at least one expert witness who will testify to the legitimacy of the ELL program, the program will survive the first prong of *Castaneda*.

B. Part II: Implementation and Resources

The second prong of the *Castaneda* test requires that school districts implement the chosen ELL program with enough resources so that the program can actually be executed.[84] Over the past few decades, several key cases have identified factors that courts may look to in deciding whether a school district meets this part of *Castaneda*. These factors include teacher training and credentials,[85] strength of curriculum,[86] funding,[87] and standardized testing and exit program assessment.[88] Of these areas, teacher training and credentials are particularly important, and in school districts that do have bilingual programs, teachers' second language abilities are essential. For example, in *Keyes*, the court noted that teachers in the school district's bilingual program had not taken standardized tests to assess their language skills, and received little training in ELL.[89] Further, some ELL teachers had "no second language capability," and while several

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[81] *See id.*

[82] *See* Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 713 (D. Cal. 1989).

[83] *See* Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1020 (D. Cal. 1998); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987).

[84] *Castaneda*, 648 F.2d at 1010.

[85] *See* Keyes v. Sch. Dist. No. 1, 576 F. Supp. 1503, 1512 (D. Colo. 1983); *Teresa P.*, 724 F. Supp. at 714.

[86] *See Keyes*, 576 F. Supp. at 1512.

[87] *See Teresa P.*, 724 F. Supp. at 715; Flores v. Arizona, 172 F. Supp. 2d 1774, 1238-39 (D. Ariz. 2000). In *Flores*, the Defendant school district failed to pass Castaneda test for taking "appropriate action" in overcoming language barriers based on the following findings: 1) State funding determined a minimum amount per ELL student, but has not updated this amount since 1991/1992 to account for inflation, and the cost study is likely inaccurate to begin with; and 2) Due to the inadequate funding, the language program now has too many students per classroom, not enough or qualified teachers/teacher aids, inadequate tutoring and teaching materials. *Id. See also Keyes*, 576 F. Supp. at 1231 ("Teachers are qualified LEP instructors if they have a bilingual endorsement. This endorsement requires a teacher to know Spanish.").

[88] *See Keyes*, 576 F. Supp. at 1513-14; *Teresa P.*, 724 F. Supp. At 715; McFadden v. Bd. of Educ. for Illinois Sch. Dist. U-46, 984 F. Supp. 2d 882, 900 (N.D. Ill. 2013).

[89] *See Keyes*, 576 F. Supp. at 1513-15.

paraprofessional tutors could speak a second language, they had minimal training in education and were not required to have content knowledge.[90] The ELL program's emphasis on oral English skills was found insufficient to allow students full participation in their academic classes as reading and writing skills are just as necessary as oral skills when it comes to school learning.[91]

Courts also note that while well-qualified teachers are critical to ELL program implementation, what ultimately matters is whether school districts are making efforts to attain teachers with sufficient training, not necessarily whether school districts actually have qualified teachers.[92] Instead, courts look to the reality of circumstances, acknowledging that poor economies and teacher shortages sometimes mean that having enough ELL-trained teachers is an impossibility.[93] In these cases, so long as the school district is trying to recruit qualified teachers then there is no EEOA violation and the second prong of *Castaneda* is met.[94] In fact, the court in *Teresa P.* found that "good teachers are good teachers no matter what the educational challenge may be. There is in fact evidence in the record showing that there is no difference in achievement success of [Limited English Proficiency ("LEP")] students in the [Berkeley Unified School District] between students with credentialed teachers and students who do not have credentialed teachers."[95] That said, in determining what efforts to recruit and train teachers are sufficient, it may also be important to note whether the school district is making other efforts to ensure the teachers it does have are prepared to work with ELL students, such as providing training sessions and supplementary workshops for continuing education.[96]

Strength of the ELL curriculum, funding, and testing are other factors considered by some courts in assessing the second prong of *Castaneda*. For example, in *Keyes*, the ELL program's emphasis on oral English skills was found insufficient to allow students full participation in their academic classes, because reading and writing skills are just as necessary as oral

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[90] *See id.*

[91] *See id.* at 1517-18.

[92] *See id.* at 1520-21.

[93] *Teresa P.*, 724 F. Supp. at 713-14 ("[T]he question of whether a school district has in good faith attempted to implement such a program must be tested against reality . . . . The threshold question is, of course, whether or not the credentialed teachers contemplated by plaintiffs are in fact available to a school district who seeks them out.").

[94] *See id.*

[95] *Id.* at 714-15.

[96] *See id.* at 714 ("Those [teachers] without credentials were assessed as to relevant bilingual skills, required to participate in district level training sessions, and to make substantial progress toward completion of requirements for credentials as a condition of employment.").

skills when it comes to learning.[97] Funding is another important consideration, as funds are needed to pay ELL teachers and acquire necessary class materials, and lack of funds may lead to classroom overcrowding.[98] In *Flores v. Arizona*, decided in 2000, the district court found that the State's allocation of $150 per ELL student was "arbitrary and capricious," as the State failed to adjust the budget for inflation since 1992 and did not make efforts to come up with a more reliable means of calculating funds.[99] Finally, some courts note that necessary ELL program resources include "adequate tests to measure the results of what the district is doing"[100] to assess student progress and allow for program exit.

C. Part III: Effectiveness

The final prong of *Castaneda* focuses on the effectiveness of the program, and in the event the program is *not* working, whether the school district has taken steps towards reformation.[101] While courts were initially reluctant to assess program effectiveness,[102] over time several elements have been identified that may indicate the quality of a program's results, and with the era of No Child Left Behind ("NCLB") and standardized testing, standardized measures are becoming a natural source of evidence of ELL program performance.[103] Other indicia of effectiveness include

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[97] *Keyes*, 576 F. Supp. at 1518.

[98] *Flores*, 172 F. Supp. 2d at 1238.

[99] *Id.* at 1238-39 ("The State has established a 'minimum' base level amount for the LAU program of approximately $150.00 per LEP student .... Since 1991–1992, the State legislature has failed to account for inflation in its base level allocation for LEP students. The State's LAU program funding formula was derived from, but is less than the 1987-1988 estimate .... The State admits that the LAU program costs in the 1987-1988 study are unreliable, but the State has failed to update its 1987-1988 cost study ....").

[100] *Keyes*, 576 F. Supp. at 1518.

[101] Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981).

[102] *Keyes*, 576 F. Supp. at 1518 ("[B]ecause it implies the establishment of a substantive standard of quality in education benefits .... [I]t is beyond the competence of the courts to determine appropriate measurements of academic achievement ....").

[103] For example, in *Teresa P.*, the court used standardized tests—California Achievement Profile ("CAP") and Comprehensive Test of Basic Skills ("CTBS")—as evidence of the district's ELL program success. *See Teresa P.*, 724 F. Supp. at 715-16 ("In this case, the CAP and CTBS standardized achievement scores, used by California schools, relative to English and to academic subject matter, as well as the classroom grades of the [Berkeley Unified School District's] LEP students, all point to the effectiveness of the program in teaching English to LEP students and in contributing to their academic achievement. These scores show that the BUSDs LEP students are learning at rates equal to or higher than their counterparts in California. LEP students in the BUSD have a record of achievement which is the same or better than the record of LEP students in schools identified by plaintiffs' experts as having effective language remediation programs.").

student attendance rates[104] and drop-out rates,[105] as well as the quality of ELL class materials.[106]

Although NCLB is no longer used to keep track of public education,[107] the idea of using standardized testing as a means of keeping students and teachers accountable for academic progress has not died. Common Core, which replaced NCLB in 2010, also relies on standardized testing.[108] Further, many ELL programs, including English as a Second Language and Bilingual Education use standardized tests to assess and identify ELL students and determine when they are ready to exit ELL programs. Thus, it seems more than likely that standardized testing will emerge as a major factor in assessing the third prong of *Castaneda* in future cases challenging ELL programs.

IV. DOES THE CURRENT ENGLISH LANGUAGE PROGRAM IN HAWAI'I MEET FEDERAL STANDARDS?

Today, there are over fifty-three languages spoken in Hawai'i, and more than 296,000 residents speak languages other than English.[109] The most commonly spoken languages include (1000 people or more): Ilokano, Tagalog, Japanese, Mandarin/Cantonese, Korean, Spanish, Vietnamese, Chuukese/Marshallese, Samoan, Cebuano/Bisaya, and Hawaiian.[110] Currently, the school complexes with the highest percentages of ELL students are Farrington (28%), Kaimuki (24%), and McKinley (26%),[111] and overall, ELL students make up 13.5% of Hawaii's public school population.[112] In Hawai'i there are 255 regular public schools and 31 charter schools with a total enrollment of 178,189 students and

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[104] *See id.* at 716.

[105] *Keyes*, 576 F. Supp. at 1519 (finding that a high number of Hispanic drop-outs that peaked in tenth grade and had a suspicious correlation with the "sharp decline" in ELL "C category" students from 7th to 9th grades and 10th to 12th grades).

[106] *See id.* The school district used "leveled English" handouts that the ELL secondary students use, and they are "not comparable to the English language textbooks, "an acknowledgement by the school district that the LEP students have failed to attain a reasonable parity of participation with the other students in the educational process at the secondary level. *See id.*

[107] *See* Andrea L. Bell & Katie A. Meinelt, *A Past, Present, and Future Look at No Child Left Behind,* 38 HUM. RTS. 11 (2011).

[108] *See id.*

[109] HAWAII EDUCATIONAL POLICY CENTER, SUMMARY REPORT ON: "IMMIGRATION AND ENGLISH LANGUAGE LEARNERS IN PUBLIC SCHOOLS" 1, 4 (2014), http://manoa.hawaii.edu/hepc/wp-content/uploads/Summary-of-the-forum.pdf.

[110] *Id.* at 1.

[111] Wiegand, *supra* note 2.

[112] *Id.*

approximately 12,250 teachers in the Department of Education.[113] The enrollment of ELL students is expected to grow in coming years.[114]

The Hawai'i Department of Education's ELL mission statement is as follows: "English Language Learners (ELLs) will meet state standards and develop English language proficiency in an environment where language and cultural assets are recognized as valuable resources to learning."[115] The program's goals are for ELL students to:

1. Acquire a level of English proficiency that will provide them with equal opportunities to succeed in the general education program.

2. Achieve the HIDOE content standards and English language proficiency standards at levels to be able to exit the program.

3. Possess the language, knowledge and skills to graduate and pursue post-secondary education and/or careers.

4. Develop an understanding of and appreciation for diverse cultures.[116]

ELL students are initially identified using the SIS-10 registration form[117] that locates potential ELL students based on first language, most used language, and language spoken at home.[118] Following this initial identification, the HIDOE uses a screening/placement system called the World-Class Instructional Design and Assessment Access Placement Test, also known as W-APT.[119] In addition, all ELL students are assessed every February via another test called Assessing Comprehension and Communication in English State to State for English Language Learners ("ACCESS").[120]

The WIDA/ACCESS exams consist of four main areas: social and instructional language, language of math, language of science, and language of social studies.[121] There is also a Native Language Proficiency Test.[122]

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[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* SIS-10 is the initial standard public school registration form. *See id.*

[118] *Id.*

[119] *Id.* The placement test itself is developed by World-Class Instructional Design and Assessment ("WIDA"), and is administered within fourteen days of the student's referral or arrival at the school. Students who need ELL training are typically identified through a referral by either their parents or a teacher. *See id.*

[120] *Id.*

[121] ACCESS for ELLs Summative Assessment, WORLD-CLASS INSTRUCTIONAL DESIGN AND ASSESSMENT, http://www.wida.us/FAQs/general.aspx#faqA1 (last visited Nov. 17, 2014); *see also* Wiegand, *supra* note 2 at 11, 21.

[122] Wiegand, *supra* note 2 at 8.

ELL students generally have one class period of ELL instruction per day, though some students in upper grades who are classified as Non-English proficient may receive an additional class period of instruction if necessary.[123] However, because there is little standardization of the ELL program in Hawai'i, the implementation of ELL programs appears to vary from school complex to complex, or sometimes even from school to school.[124]

Within the Hawai'i ELL program, student language proficiency is also assessed. Schools measure language proficiency on a six-level scale: 1 (entering), 2 (beginning), 3 (developing), 4 (expanding), 5 (bridging), and 6 (reaching).[125] In order to exit the ELL program, students must attain a proficiency level of 4.7 in language and 4.2 in literacy.[126]

The Denver School District, like Hawai'i, has students from a variety of language backgrounds, cultures, and socioeconomic statuses who rotate through public schools at all grade levels, making planning and execution of English language programs particularly challenging.[127] This makes "[i]t . . . unreasonable to expect that the school district could provide a full bilingual education to every single LEP student . . . ."[128] Regardless, the *Keyes* court found that the defendant nevertheless has "the duty to take appropriate action to eliminate language barriers which currently prevent a great number of students from participating equally in the educational programs offered by the district."[129] Thus, even though Hawai'i presents a challenging landscape in which to execute effective English language education, the Department of Education must still take "appropriate action" to aid students in overcoming language barriers that keep from success in school.

In Hawai'i, there is not a great deal of available information on the Department of Education's ELL policies and practices. But what data is accessible suggests that Hawai'i likely does not meet the federal

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[123] *Id.* at 14.

[124] *See id.* at 9; Diane Murakami, Address at the Impact of Immigration and ELL Learners in Hawai'i Conference (Jan. 18, 2014).

[125] Wiegand, *supra* note 2.

[126] *Id.* Each proficiency level has three dimensions: discourse (linguistic complexity), sentence (language forms and conventions), and word/phrase (vocabulary usage). In order to reach level 5 (bridging), and be guaranteed exit from the ELL program, students must be able to make complex sentences that express "cohesive and organized related ideas," use "compound, complex grammatical constructions [and] a broad range of sentence patterns characteristic of particular content areas," and have "[t]echnical and abstract content-area language . . . [w]ords and expressions with shades of meaning across content areas." *Id.*

[127] *Keyes*, 576 F. Supp. at 1519.

[128] *Id.*

[129] *Id.* at 1519-20.

requirements outlined by the three-part *Castaneda* test due to apparent deficiencies in part two—adequate resources—and part three—effectiveness.

A. Castaneda Part I: Sound Educational Theory

First, part one of the *Castaneda* test states that the ELL program must be grounded in solid educational theory.[130] A 2008-09 report by the National Center for Education Statistics states that Hawai'i lacks standards for ELL instruction.[131] However, Hawai'i does use the WIDA/ACCESS/WAP-T system for placing and assessing ELL students.[132] The program was designed by the Center for Applied Linguistics and the WIDA Consortium.[133]

Although this system is for assessment and not instruction, courts will likely find Hawai'i meets the *Castaneda* requirement that the ELL program is based in educational theory because of the ACCESS testing component. The testing program provides goals for ELL achievement and measures "English language proficiency ("ELP") in academic content areas—not the academic content knowledge itself."[134] However, at secondary levels, where academic content becomes more critical, the Department of Education offers Sheltered Instruction content classes that focus on academic material.[135] These classes supplement ELL/ESL language classes.[136] Because previous case law heightened the standard that plaintiffs must meet to show that an ELL program is not based in educational theory,[137] it is extremely unlikely that the Hawai'i Department of Education will fail under this first part of *Castaneda*; as demonstrated, the WIDA/ACCESS placement and evaluation tests are developed by a national research center and are used in thirty-one states.[138]

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[130] *Castaneda*, 648 F.2d at 1007.

[131] Institute for Education Sciences, *Table 3.6. State Policies Regarding Teaching of English Language Learner (ELL) Students, by State: (2008-2009)*, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, http://nces.ed.gov/programs/statereform/tab3_6.asp (last visited Nov. 20, 2014).

[132] Wiegand, *supra* note 2.

[133] FAQs: ACCESS for ELLs, WORLD-CLASS INSTRUCTIONAL DESIGN AND ASSESSMENT, http://www.wida.us/FAQs/general.aspx#faqA1 (last visited Nov. 17, 2014).

[134] Wiegand, *supra* note 2 ("[F]or example, what "greater than[>]" and "less than[<]" mean, not the math/computation itself (e.g., 6 [>/<] 5).").

[135] *Id.*

[136] *Id.*

[137] *See, e.g.*, Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Ca. 1998).

[138] Wiegand, *supra* note 2.

B. Castaneda Part II: Adequate Resources

The second part of the *Castaneda* test requires that the ELL programs have sufficient resources to be effectively implemented.[139] In *Keyes,* the court looked to inadequate teacher training and lack of proper assessments to gauge student progress as evidence of the school district's failure to meet the second prong of *Castaneda.*[140] Based on the information gathered over the past five years, Hawai'i probably would not meet the *Castaneda* requirements for several of these same reasons.

First, while Hawai'i does have adequate assessment exams in place, ELL teacher standards and availability appear lacking. As of 2012, there was a student-teacher ratio of about 100 ELL students per teacher, and less than 100 full-time ESL/ELL certified teachers in the Department of Education.[141] In *Flores v. Arizona*, one of the inadequacies the court pointed to was that one-fifth to one-third of ELL elementary students do not have ESL endorsed teachers.[142] If it is true that there are only 100 full-time ELL/ESL teachers in the Department of Education, then it is very likely that many of Hawaii's over 17,000 ELL students are being underserved.

In Hawai'i, ELL teacher applicants must have 12 credits in bilingual or multi-education, a Bachelor's degree, and be qualified in the content area by a state approved teacher education program.[143] The State does not require a degree or certification in ELL education, and Hawai'i currently has no ELL teacher-licensing program.[144] In *Teresa P.*, the U.S. District Court in California found that ELL teachers do not necessarily need to be certified or licensed, and that the issue in *Castaneda* is whether the "school district has in good faith attempted to implement such a program [which] must be tested against reality."[145] Further, the court states "[t]he threshold question is, of course, whether or not the credentialed teachers

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[139] Resources may include teacher qualifications, instructional materials, and funding. *See Keyes*, 576 F. Supp. at 1516-19.

[140] *See id.* at 1516-18.

[141] Working Group on ELL Policy, Policy Brief, Improving Educational Outcomes for English Language Learners: Recommendations for ESEA Reauthorization (Mar. 25, 2011) [ELL MEMO].

[142] *Flores*, 172 F. Supp. 2d at 1232 ("Ideally, all LEP students not in ESL classes are supposed to be taught in the mainstream classrooms by LEP endorsed teachers, with half the teachers being bilingual and the other half being ESL endorsed. Between 500 to 1,000 of the 2,700 elementary students are not with endorsed teachers . . . .").

[143] ELL Memo, *supra* note 141.

[144] Hawai'i Pacific University and the University of Hawai'i at Mānoa offer masters degrees focusing on second language education and theory, but no teacher licensing program in English Language Learner education currently exists.

[145] *Teresa P.*, 724 F. Supp. at 714.

contemplated by plaintiffs are in fact available to a school district who seeks them out."[146] Using this reasoning the *Teresa P.* court held that the Berkeley Unified School District satisfied the second the prong of *Castaneda* as the district could not reasonably have supplied all the necessary certified teachers, and the district provided additional required training to all uncertified teachers and tutors.[147] Further, as a condition of employment, non-certified teachers must "make substantial progress toward completion of requirements for credentials."[148] In Hawai'i, it may be unrealistic to expect the Department of Education to hire the necessary number of ELL teachers if ESL or ELL certification is a requirement, given the fact that Hawai'i has no licensing program in the state. However, unlike Berkeley Unified School District, Hawai'i does not require additional ELL training for its uncertified teachers, nor does it provide incentives for "substantial progress."[149] This lack of subsequent training and incentive for progress may call into question whether the Hawai'i Department of Education is making a "good faith attempt" to provide adequate resources needed to implement its ELL program, as there appear to be few policies in place to improve or monitor the quality of ELL teachers whether certified or not. Thus, it seems possible that Hawai'i does not meet the adequate resources prong of *Castaneda.*

C. Castaneda Part III: Effectiveness

The third prong of *Castaneda*, evidence of effectiveness, is closely related to the second prong, and based on current data it is likely the Hawai'i Department of Education will fail on this standard. Several cases that analyzed school districts under *Castaneda* noted the problematic nature of this last piece of the test, that to determine the effectiveness of an educational program is outside the scope of the court's expertise.[150] The

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[146] *Id.* ("The evidence at trial did not fully resolve this issue but did suggest that it is highly unlikely that the BUSD could fill all necessary positions with fully credentialed teachers in the basic language groups and that it is impossible to cover all languages represented in the BUSD school population. The record in this case established that the mix of teachers newly hired or reassigned to language remediation responsibilities by the BUSD, included both credentialed and non-credentialed teachers. Those without credentials were assessed as to relevant bilingual skills, required to participate in district level training sessions, and to make substantial progress toward completion of requirements for credentials as a condition of employment.").

[147] *Id.* The district also had additional requirements for non-credentialed teachers that included bilingual skills. *Id.*

[148] *Id.*

[149] ELL Memo, *supra* note 141.

[150] *See Keyes*, 576 F. Supp. at 1506.

court in *Keyes* did however point to several facts that indicated a lack of progress and success in the Denver School District's ELL program, pointing to the spike in ELL dropout rates and the ELL class materials that were far below in English language and content what was expected in mainstream classrooms.[151]

In Hawai'i, there is little data that shows problems in dropout rates and lower-level ELL class material, but there is information on ELL performance on standardized tests and ELL graduation rates. Data for 2014 show that on the state assessment tests only 43% of ELL/LEP students in Hawai'i met proficiency for reading, 41% met proficiency in Math, and 20% met proficiency in science, meaning that overall ELL students did not make proficiency goals in any category.[152] ELL students had the lowest proficiency rates in all categories except for special education and Pacific Islander students who scored slightly lower in math and science.[153] On a positive note, many students who recently exited ELL programs have achieved "Meets" or "Exceeds" on recent Hawai'i State Assessment ("HSA") math and reading exams.[154] However, this data also does not specify how long ago these students left ELL—"recently exited" could potentially mean months or years, making it difficult to assess precisely how effective the ELL programs are.

In terms of language proficiency, data indicates that overall Hawai'i ELL students have been making progress in language proficiency tests over the past five years, and the number of students exiting ELL programs has also increased to 20.91% during the 2012-13 school year.[155] While this progress is positive the 20.91% exit rate remains quite low. Further, as of spring 2014 ELL students have the lowest rate of graduation at 57%, significantly below other specialized student groupings except for special education.[156] The second lowest groups had a graduation rate of 61% (special education), and 62% (Native American).[157] The low ELL graduation rate indicates a lack of support for second language students, and questions the

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[151] *Id.* at 1519.

[152] ACCOUNTABILITY RESOURCE CENTER HAWAII, STRIVE HI: STUDENT GROUP PERFORMANCE REPORT STATE OF HAWAI'I 1, 1 (2014), http://arch.k12.hi.us/PDFs/strivehi/2014/studentgroupperformance/999-Student%20Group%20Performance%20Report.pdf.

[153] *Id.*

[154] Accountability Data Center, *Math Meeting Standard by Subgroup & Year for FSY State of Hawaii*, ARCH ADC, https://adc.hidoe.us/#/proficiency (last visited Feb. 14, 2016) (59.9% "Recently Exited ELL" students achieved "Meets" or Exceeds on the 2014 HSA Math exam (41.9% in 2015), while 67.6% achieved "Meets" or "Exceeds" on the HSA Reading portion (46.6% in 2015)).

[155] Wiegand, *supra* note 2.

[156] ACCOUNTABILITY RESOURCE CENTER HAWAII, *supra* note 152.

[157] *Id.*

effectiveness of the current ELL program. If the purpose of an ELL program is to teach non-native English speakers literacy in English so they may succeed in other content areas and fully access the education system, a low rate of high school graduation surely indicates program failures in at least some areas.

The second aspect of the effectiveness prong of *Castaneda* is that if an ELL program has proven ineffective after a reasonable amount of time, the court should look to whether the school district is engaging in measures to improve or correct the faulty program.[158] According to recent data, it appears that Hawaii's ELL students are falling behind in HSA testing and graduation rates, and while the percentage of ELL students exiting ELL programs has increased over the past eight years, that number remains low. Further, the Department of Education does not seem to have made any significant changes to its ELL programs despite its obvious difficulties. Based on this information, Hawai'i probably would not pass the effectiveness of *Castaneda* in court.

D. Final Thoughts on Castaneda and Hawai'i Compliance

Although Hawai'i would likely meet the first requirement of the *Castaneda* test, there is a good chance the State would fall short on the second and third parts of the test, meaning that Hawaii's ELL program is likely not in compliance with the federal standards for English Language Education described in the Equal Educational Opportunities Act and *Castaneda*. However, there is still a great deal of information that would be needed before bringing the Hawai'i Department of Education to court, specifically data on teacher education, class size, and ELL classroom instruction. Yet, Hawaii's lack of explicit ELL program criteria and instruction plan makes gathering this information challenging.

V. MEETING AND EXCEEDING *CASTANEDA*: POLICY SUGGESTIONS AND THOUGHTS ON BILINGUAL EDUCATION

At its most basic level, Hawai'i needs a clear ELL policy, a set of written guidelines to regulate program implementation and monitor progress.[159] This is the starting point from which further policy revisions like funding, continuing education, and testing systems can grow. Further, ELL programs across the country could benefit from increased federal oversight. It appears that although ELL instruction is required by federal statute, there

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[158] *Castaneda*, 648 F.2d at 1010.

[159] The Hawai'i Board of Education discussed a proposed ELL policy on May 5, 2015.

is no way of regulating state compliance through annual reports or other means. Instead, failing programs receive federal attention only when parents or students bring lawsuits.[160]

Teacher education is also critical to reforming the State's ELL program, as lack of teacher credentials is a weak spot in Hawaii's *Castaneda* analysis. Hawai'i needs an ELL teacher certification program. Given the State's large population of immigrant students, an in-state certification program would be one of the most important ways to ensure that the State has an adequate supply of licensed ELL teachers. Research indicates that teacher training in ELL should extend even beyond certification and continue into the teaching process,[161] suggesting that continuing education classes and workshops are needed for optimal teacher performance. A policy brief prepared by The Working Group on ELL Policy[162] suggests that states be required to show that "their credential requirements and alternative routes to certification of teachers of core content include components that are effective in preparing these teachers to address both the content and academic language needs of English language learners" in order to receive federal funding.[163] The Group also recommends adding English as a Second Language as a core academic subject and require regular "core content area" teachers also undergo ELL/ESL training.[164] Further, assessment of ELL student progress should be included in the measures for teacher effectiveness in all academic subjects.[165] Because language proficiency includes both language and content skills, having ELL-trained core content area teachers would aid ELL students in acquiring academic literacy knowledge by making the content accessible.[166]

Another long-term option for ELL program reform is to implement a system of bilingual education. Today, the Hawai'i Department of

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[160] *See, e.g.*, John Fensterwald, *Feds Back English Learner Lawsuit Against State*, EDSOURCE, (July 24, 2014), http://edsource.org/2014/feds-back-english-learner-lawsuit-against-state/65759.

[161] *See* Jennifer D. Zinth, *English Language Learners*, THE PROGRESS OF EDUCATION REFORM (Dec. 2013), 1, 4, http://schoolturnaroundsupport.org/sites/default/files/resources/http___cl.exct_.pdf.

[162] *See* Kenji Hakuta & Robert Linquanti, *Improving Educational Outcomes for English Language Learners: Recommendations for ESEA Reauthorization*, WORKING GROUP ON ELL POLICY, 1 (Mar. 2011), http://ellpolicy.org/wp-content/uploads/PolicyBrief.pdf.

[163] *Id.* at 7.

[164] *Id.* ("Define English as a Second Language (ESL) as an additional core academic subject for ELLs within ESEA, and apply the same requirements to ESL/ELD teachers as to other teachers of core academic content areas.").

[165] *Id.*

[166] *Id.* ("Mainstream teachers, as academic content instruction experts, have the obligation to help ELLs learn academic content. By providing meaningful and accessible instruction, they also make a key contribution to ELLs' English language development.").

Education has a policy guiding implementation of bilingual education for Hawaiian and English. [167] This Hawaiian-English program, called Hawaiian Language Immersion, is meant to "revitalize[e] the Hawaiian language and [assist] people to regain and maintain their language."[168] English is not introduced into the curriculum until the fifth grade,[169] allowing Hawaiian to remain the dominant language of instruction from elementary through high school.[170] Despite the influx of immigrants and their children, and number of languages spoken in Hawai'i public schools, there is no bilingual education program beyond what exists exclusively for Hawaiian languages at select schools. Instead, Hawai'i public schools use the "pull-out" method, which involves pulling ELL students from classes once per day to attend an hour or so of English language instruction.[171] Yet, as discussed previously, this method has not been very effective.

For nearly thirty years, best practices research on second language education has said that bilingual education is the most effective way to teach another language.[172] Bilingual education involves simultaneous teaching in both the student's original language(s) and the target language, which in this case is English.[173] There are different models for bilingual instruction including transitional, development, and two-way.[174] The type of model implemented depends on the students' needs and the program's goals.[175]

Implementing a state-wide bilingual education program in Hawai'i would be challenging, especially given the number of languages spoken in schools; unlike certain states on the mainland U.S. where there is a predominant non-English language, Hawai'i has great linguistic diversity.[176] Thus, it could prove difficult to locate ELL teachers able to

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[167] *History of the Hawaiian Language Immersion Program*, HAWAI'I DEPARTMENT OF EDUCATION, http://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/History-of-the-Hawaiian-Education-program.aspx (last visited Nov. 22, 2014).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *See* Wiegand, *supra* note 2.

[172] Eric Haas & Mileidis Gort, *Demanding More: Legal Standards and Best Practices for English Language Learners*, 32 BILINGUAL RES. J. 115, 116 (2009).

[173] Stephen Krashen, *What is Bilingual Education?*, NATIONAL ASSOCIATION FOR BILINGUAL EDUCATION (2014), http://www.nabe.org/BilingualEducation.

[174] *Id.* Transitional programs aim to achieve quick exit for ELL students. In contrast developmental programs focus on gradual English language acquisition. Two-way immersion involves English-speaking students learning another language while non-English-speaking students learn English. *Id.*

[175] *Id.*

[176] *See* Kathryn A. Davis, et al., *"It's Our Kuleana": A Critical Participatory Approach*

speak the students' native languages, and every school would need a team of ELL and bilingual teachers to cover the variety of languages spoken on each school campus. Funding, training, and program planning are other key considerations that would require a great deal of time and effort on the part of the DOE.

It is important to remember that federal law does not require bilingual education. In fact, over the years, the term "bilingual education" has been erased from statutes and replaced with a focus on English language proficiency alone, reinforcing the English-only movement and its aversion to bilingual education.[177] Nevertheless, such programs remain worth working toward, backed by the research demonstrating that bilingual education programs, when executed well, can be very effective, shortening the time required to teach minority language students English skills while also keeping ELL students on track in academic content.[178]

VI. CONCLUSION

One of the problems with assessing the Hawai'i Department of Education's ELL program is the lack of available data. Most data on teacher qualification, funding, graduation rates, and ELL student achievement is either distributed amongst many sources or not publicly reported, making it difficult to conduct a thorough appraisal of the program. Further, this data is spread out over ten or so years of reports and pamphlets, not all of which are up to date, indicating that the Hawai'i DOE lacks a comprehensive and cohesive means of tracking and reporting ELL student data in a way that is accessible to the public and other stakeholders including students, parents, and teachers.

While it would be difficult to take HIDOE to court and litigate based solely on the statistics discussed above, analysis of the available ELL program information under the three-part *Castaneda* test suggests that the Hawai'i Department of Education would have difficulty meeting all three prongs of *Castaneda*, particularly prongs two and three, which demand

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to Language-Minority Education in LEARNING, TEACHING, AND COMMUNITY: CONTRIBUTIONS OF SITUATED AND PARTICIPATORY APPROACHES TO EDUCATIONAL INNOVATION 3-4 (Lucinda Pease-Alvarez & Sandra R. Schecter eds., 2005).

[177] Kellie Rolstad, et al., *The Big Picture: A Meta-Analysis of Program Effectiveness Research on English Language Learners*, 19 EDUC. POL'Y 572, 573 (2005), http://www.educationjustice.org/assets/files/pdf/Resources/Policy/Programs%20That%20Work/The%20big%20picture.pdf ("At the federal level, the Bilingual Education Act of 1968, which had been repeatedly reauthorized, was repealed concurrently with the passage of the No Child Left Behind Act and replaced with the English Acquisition Act.").

[178] Hass & Gort, *supra* note 172, at 116.

adequate resources and proof of efficacy.[179] There are a number of ways that the Hawai'i DOE could improve its ELL program to not only meet the needs of *Castaneda*, but to exceed them and effectively educate a currently underserved population of students. Funding, politics, and practical implementation will prove challenging should the DOE choose to reform its program, and drastic changes in ELL—like transitioning to bilingual education—would undoubtedly require years of planning and training.

[179] *See Castaneda*, 648 F.2d at 1010.

State Search and Seizure: The Original Meaning

Jeremy M. Christiansen*

Every state in the Union has a state constitutional provision purporting to guarantee a right against unreasonable searches and seizures. And every state supreme court in the country frequently invokes originalism as a basic method of state constitutional interpretation, and has been doing so for a very long time. Yet almost no state adheres to the original meaning of its search and seizure provision. Rather, state supreme courts assume that the remedy for unreasonable searches or seizures is exclusion of evidence. The problem with this arrangement, as other scholars have noted with regard to the Fourth Amendment, is that there is an unjustifiable remedial gap—innocent people have no constitutional recourse. And what that really means is that innocent people actually do not have a right to be free from unreasonable searches and seizures. This should not be the case.

To date, no scholar has addressed this problem with regard to state constitutional law. This article breaks new ground in the field of state constitutional law and originalism by analyzing the original meaning of the

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search and seizure provisions of all fifty states. This is accomplished by examining the texts of all fifty search and seizure provisions, case law from the nineteenth and early twentieth centuries, and state constitutional conventions. Based on these sources, this article concludes that nearly every state shares a common original meaning when it comes to search and seizure provisions. And that original meaning fixes the remedial problem described above by providing to every citizen, guilty or innocent, a self-executing, constitutional tort that protects interests of privacy, property, dignity, and reputation via compensatory and punitive damages. Courts should return to this original meaning so as to ensure that all citizens actually have the right to be free from unreasonable searches and seizures.

I. INTRODUCTION

All fifty state constitutions protect against unreasonable searches and seizures.[1] Textually, most of these provisions resemble the Fourth Amendment.[2] A typical state search and seizure provision declares that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated."[3] Yet in spite of the lofty language of this and similar state constitutional provisions, it is not the case that all "the people" enjoy this right at the state level.[4] Practically speaking, only a narrow subset of people—those who have been arrested with illicit contraband—enjoy this right.[5] The reason is

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[1] ALA. CONST. art. I, § 5; ALASKA. CONST. art. I, § 14; ARIZ. CONST. art. II, § 8; ARK. CONST. art. II, § 15; CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 7; CONN. CONST. art. I, § 7; DEL. CONST. art. I, § 6; FLA. CONST. art. I, § 12; GA. CONST. art. I, § 1, para. XIII; HAW. CONST. art I, § 7; IDAHO CONST. art. I, § 17; ILL. CONST. art. I, § 6; IND. CONST. art. I, § 11; IOWA CONST. art. I, § 8; KAN. CONST. Bill of Rights § 15; KY. CONST. Bill of Rights § 10; LA. CONST. art. I, § 5; ME. CONST. art. I, § 5; MD. CONST. Declaration of Rights, art. XXVI; MASS. CONST. art. XIV; MICH. CONST. art. I, § 11; MINN. CONST. art. I, § 10; MISS. CONST. art. III, § 23; MO. CONST. art. I, § 15; MONT. CONST. art. II, § 11; NEB. CONST. art. I, § 7; NEV. CONST. art. I, § 18; N.H. CONST. pt. 1, art. XIX; N.J. CONST. art. I, para. 7; N.M. CONST. art. II, § 10; N.Y. CONST. art. I, § 12; N.C. CONST. art. I, § 20; N.D. CONST. art. I, § 8; OHIO CONST. art. I, § 14; OKLA. CONST. art. II, § 30; OR. CONST. art I, § 9; PENN. CONST. art. I, § 8; R.I. CONST. art. I, § 6; S.C. CONST. art. I, § 10; S.D. CONST. art. VI, § 11; TENN. CONST. art. I, § 7; TEX. CONST. art. I, § 9; UTAH CONST. art. I, § 14; VT. CONST. art. XI; VA. CONST. art. I, § 10; WASH. CONST. art. I, § 7; W. VA. CONST. art. III, § 6; WIS. CONST. art. I, § 11; WYO. CONST. art. I, § 4.

[2] *See supra* note 1.

[3] IOWA CONST. art. I, § 8.

[4] *See* Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 3 (2013) ("[T]he court never considers the situations of the countless other innocent individuals searched, rather only the one who has acted illegally.").

[5] *See id.*

simple: State courts have blindly followed the U.S. Supreme Court down the road of the exclusionary rule.[6] For there to be a right, there must be a remedy.[7] Yet the current order of state constitutional law specifically excludes the law-abiding from its protective auspices by adopting exclusion as the pertinent remedy. Only where there is something to exclude is there a remedy.

In line with the near-universal scholarly consensus that the Supreme Court's Fourth Amendment jurisprudence is—well—some iteration of the word *bad*,[8] criticisms of the remedial scheme of the Fourth Amendment

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[6] *See* Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 383–88 (2013) (describing state constitutional search and seizure provisions wholly in terms of whether those states adhere to U.S. Supreme Court's exclusionary rule jurisprudence); Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417, 418–63 (2007); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 323–28 (1996) (collecting cases and noting that the vast majority of states have interpreted their state search and seizure provisions to contain an exclusionary rule). Some states have taken this notion as far as expressly constitutionalizing it. *See* FLA. CONST. art. I, § 12 ("This right [against unreasonable searches and seizures] shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.").

[7] *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury .... Blackstone states [that] . . . 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'"); *see also* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 1 (4th ed. 2010) ("Remedies give meaning to obligations imposed by the rest of the substantive law.").

[8] *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (calling Fourth Amendment jurisprudence "a doctrinal mess"); Baradaran, *supra* note 4, at 12 ("Fourth Amendment balancing tests . . . have led to some troubling results."); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) ("The fourth amendment is the Supreme Court's tarbaby."); Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 329 (1973) ("The fourth amendment cases are a mess!"); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011) (noting that "Fourth Amendment rules can appear to be selected almost at random," that they are "patchwork," "theoretical[ly] embarrass[ing] to scholars and judges alike," and "cobbled together"); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 821 (2013) ("[T]he Court's [Fourth Amendment] case law . . . is a mess."); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787–88 (1999) (calling developments in Fourth Amendment jurisprudence "more duct tape on the Amendment's frame and a step closer to the junkyard"); David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 47

abound.[9] Scholars such as Akhil Amar have famously described this constitutional arrangement as "embarrass[ing]," and a "perverse" system in which "[c]riminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy."[10] It does not take much imagination to see the problem with a remedial scheme that focuses on exclusion alone.

Consider a young college student, perhaps a racial minority, traveling back to school after a long weekend at home. An officer, with no legitimate reason to do so, stops the young man and conducts a blatantly unreasonable search for drugs. Or perhaps the initial stop was justified by a missed traffic signal but the ensuing stop was unreasonable in scope and resulted in an unconstitutional search. The officer finds no evidence of a crime, and the young man is free to go. Under the conventional wisdom of state constitutional law, this young man has no recourse *because there is no evidence to exclude.*[11] The same goes for an eighth grader detained by

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(2005) ("Fourth Amendment doctrine is a mess. Supreme Court decisions are arbitrary, unpredictable, and often border on incoherent."); Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1769 (1994) (criticizing Fourth Amendment "reasonableness" inquiries); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 29 (1988) (criticizing standards for determining a "search" as "a series of inconsistent and bizarre results" which the Court has "left entirely undefended").

[9] *See, e.g.*, Amar, *supra* note 8, at 785–86 (criticizing the exclusionary rule and advocating for tort remedies under the Fourth Amendment); Baradaran, *supra* note 4, at 1–2, 12–14 (noting the lack of a remedy for minorities unreasonably accosted by police officers when no evidence is found as a result of the search); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 723–34 (1970) (criticizing the exclusionary rule as a deterrent on empirical grounds for its lack of deterrence); Richard A. Posner, *Rethinking the Fourth Amendment,* 1981 SUP. CT. REV. 49, 53–57 (criticizing the exclusionary rule on grounds of economic efficiency and advocating for tort remedies in place of exclusion); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 363 (arguing for the abandonment of the exclusionary rule in favor of tort or administrative remedies).

[10] Amar, *supra* note 8, at 757–58.

[11] Though the frequency with which a scenario like this happens could be disputed, it would be naïve to contend that such occurrences are so out of the norm as to not deserve scrutiny. *See, e.g.*, CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 1 (2011), http://bjs.gov/content/pub/pdf/cpp08.pdf (noting that police stopped male drivers more frequently than female drivers, that black drivers were three times as likely as whites and two times as likely as Hispanics to be searched during a traffic stop, and that only about 20% of drivers who had their vehicle searched believed the police had a legitimate reason for doing so); UTAH COMMISSION ON CRIMINAL & JUVENILE JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: A SURVEY OF CONTACTS IN 2006 AND 2007, at 14 (2008), http://www.justice.utah.gov/Documents/Research/Race/RacialProfilingStudy2007.pdf (noting that of the sixty-eight respondents who reported having been searched by the police,

police with seemingly no basis for the stop other than his race, or for another young man arrested, physically assaulted by police and called a racial epithet when he had done no wrong.[12] Neither of these young men has any state constitutional right to be free from this behavior because they had no contraband.[13]

Or try this example. A young woman is pulled over for having only one working headlight. The officer, in violation of department policy, turns off his dash-cam audio component, and approaches the vehicle. Suspecting that she possessed drugs for some unarticulated reason, the officer threatens to take her to the station to X-ray her because she was driving on a suspended license. And then, in a culmination of events, the officer forces the woman to shake her bra out in front of the dash cam. The officer finds nothing. Investigators and high-level state law enforcement officials later deem the incident "egregious," "demeaning," and "high-questionable," noting that the officer was "on a power trip."[14] Again, under the current norm of state constitutional law, this woman has no constitutional right because the officer did not find anything that could later be used in a case against her. Outcomes like this are perverse indeed.

Many scholars have proposed solutions to this problem in the context of the Fourth Amendment. Professor Shima Baradaran has argued that judges must use more empirical data when conducting balancing tests under the Fourth Amendment in order to take into account the interests of innocent society.[15] Others have contended for a more administrative-based remedy to deter police misconduct.[16] Originalists like Professor Amar have advocated for a return to the original meaning of the Fourth Amendment and its tort-based remedies.[17] Yet existing scholarship on *state* search and seizure provisions has no apparent answer to this critique, probably because it has bought in to the same faulty assumptions as have state supreme

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only about fifteen of those searches led to the discovery of incriminating evidence); *see also Case Resolutions*, ACLU OF UTAH (Feb. 11, 2013), http://www.acluutah.org/resolutions.htm [https://web.archive.org/web/20130310021838/http://www.acluutah.org/MSC_v_BrighamCity.html] (noting favorable settlement in case of ethnic minority who was allegedly profiled and searched in southern Utah).

[12] Baradaran, *supra* note 4, at 2–3.

[13] *Id.* at 3.

[14] *Dustin Fetz, Police Officer, Makes Zoe Brugger Shake Her Bra in Search for 'Drugs,'* HUFFINGTON POST (June 21, 2013, 11:32 AM), http://www.huffingtonpost.com/2013/06/21/dustin-fetz-zoe-brugger-shake-bra_n_3478690.html.

[15] *See generally* Baradaran, *supra* note 4 (arguing that judges need to stop engaging in "blind" balancing of interests and engage in "informed" balancing, considering the privacy and racial equality interests of the innocent in society).

[16] Slobogin, *supra* note 9; Steinberg, *supra* note 8, at 74–76.

[17] *See generally* Amar, *supra* note 8.

courts—that these provisions mean the same thing, roughly speaking, as does the Fourth Amendment as interpreted by the U.S. Supreme Court. To date, scholars who have analyzed state search and seizure provisions have done so only in ways that support (directly or indirectly) the remedial status quo. For example, many commentators have either discussed how state courts of last resort have or have not adopted or should or should not have adopted various features of Fourth Amendment doctrine, such as the good faith exception to the exclusionary rule.[18] Other literature is more descriptive in nature, but only further supports the idea that state supreme courts view these search and seizure provisions as mere addenda to the Supreme Court's Fourth Amendment jurisprudence.[19] Some scholars have floated around the edges of the original meaning of specific state search and seizure provisions but have kept the focus of their inquiry limited to a single state.[20]

To date, no article has done what this article attempts—to provide an originalist analysis of the state search and seizure provisions of every state in the country. This article picks up where Professor Amar has left off and demonstrates that a return to the original meaning of *state* constitutional prohibitions on unreasonable searches and seizures would provide a remedy for criminal defendants and the innocent alike—a constitutional tort. A few states have already re-recognized this important constitutional right. But there are strong grounds for most, if not nearly *all*, states to adopt this same approach. The conclusions of this article also highlight the relevance of

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[18] Andrea Lynn Bistline, *The State Constitution as a Source of Individual Liberties: Declining to Apply the "Good-Faith" Exception to the Exclusionary Rule in* Commonwealth v. Edmunds, 96 DICK. L. REV. 573 *passim* (1992); Clancy, *supra note* 6, at 383–88; Bruce R. Lockwood, Note, *Connecticut Search & Seizure Law: The Connecticut Supreme Court Should Adopt a Good Faith Exception to the Exclusionary Rule to Article First, Section 7, of the Connecticut Constitution*, 13 BRIDGEPORT L. REV. 387 *passim* (1993); Matthew A. Nelson, Note, *An Appeal in Good Faith: Does the Leon Good Faith Exception to the Exclusionary Rule Apply in West Virginia?*, 105 W. VA. L. REV. 719 *passim* (2003); Daniel P. O'Brien, *Criminal Procedure—Pennsylvania Refuses to Take the* Leon *Leap of Good Faith*—Commonwealth v. Edmunds, *586 A.2D 887 (Pa. 1991)*, 65 TEMP. L. REV. 733 *passim* (1992); Michael K. Schneider, Comment, *An Exclusionary Rule Colorado Can Call Its Own*, 63 U. COLO. L. REV. 207 *passim* (1992); Jeremy S. Simon, *Privacy vs. Practicality: Should Alaska Adopt the Leon Good Faith Exception?*, 10 ALASKA L. REV. 143 *passim* (1993); Aminie Woolworth, Note, *The Good Faith Exception: "What Is It Good For?" The Michigan Supreme Court Overturns Twenty Years of Precedent Holding It Was Worth "Absolutely Nothing!"*, 83 U. DET. MERCY L. REV. 441 (2006).

[19] *See generally* Gorman, *supra* note 6, at 417 (noting, among other things, the analytical approach of each state as to its search and seizure provision and generally describing how those courts do or do not protect more broadly than the Fourth Amendment).

[20] Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 OR. L. REV. 819 (2008); Pitler, *supra* note 6, at 262–65.

state constitutional law, an area often considered to be hardly, if at all, relevant in today's discussions about American constitutionalism. The Fourth Amendment's exclusionary rule is likely here to stay, which means that the remedial problem identified above is also likely here to stay. But under the model advocated for in this article, state constitutional law becomes very relevant in supplementing the rights of citizens to be free from unreasonable searches and seizures. It makes state constitutional law matter because it can have bite free from the stranglehold of federal constitutional law.

Part I sets the stage by demonstrating that originalism is a pervasive and mainstream method of state constitutional interpretation. Indeed, it appears to be a dominant method of constitutional interpretation, at least if viewed in broad temporal terms. Nearly every state regularly invokes some iteration of originalism currently and has done so for a very long time. Yet in the realm of search and seizure law, state courts have clearly deviated from the original meaning. This overarching doctrinal inconsistency should serve as a partial catalyst for courts to return to the original meaning of their search and seizure provisions.

From there, Part II seeks to uncover the original meaning of state search and seizure provisions. First, Part II.A presents a textual and structural analysis of all fifty state constitutions with regard to search and seizure provisions, concluding that this evidence weighs heavily against the current order—exclusion. The text of these provisions universally indicate that the right protected belongs to all people and does not suggest that the right is limited only to those who possess illicit contraband. Next, Part II.B examines relevant case law from the nineteenth and early twentieth century to conclude that state search and seizure provisions represented a self-executing, constitutional tort that protected interests of property, privacy, dignity, and reputation via compensatory and punitive damage awards. Part II.C then samples state constitutional convention debates, concluding that framers were almost universally silent on their meaning. However, in light of the text of these provisions, the well-established constitutional tort regime in place throughout American history, and state constitutional law's unique feature of borrowing provisions from other jurisdictions, it is fair to conclude that states were simply adopting the same regime from state to state. The silence speaks loudly. Thus, the original meaning, at least at the broad level of the remedy and general interests protected, is the same in most, thought probably not all, states in the country.

Part III addresses various critiques of the outcomes described in this article and provides brief responses.

The article then concludes with some brief observations.

II. ORIGINALISM IN STATE CONSTITUTIONAL ANALYSIS

Originalism as a theory has evoked a significant amount of scholarship.[21] According to the most predominate version of this interpretive theory, the original public meaning of constitutional language at the time it was ratified governs present-day application.[22] In the area of state constitutional law, originalism has certainly left an indelible footprint. Courts today frequently invoke originalism—in some iteration[23]—as a staple of state constitutional

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[21] For an introduction to the modern rise of the theory of originalism, see Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377–78 (2013); and Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875 *passim* (2008). For various arguments in favor of originalism, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW *passim* (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW *passim* (Amy Gutmann ed., 1997); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW *passim* (1999); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917 *passim* (2008); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 *passim* (1989). For seminal critiques of originalism, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 *passim* (1980), and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 *passim* (1985).

[22] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78–92 (2012) (describing basics tenets of original-meaning originalism); Whittington, *supra* note 21, at 377 ("At its most basic, originalism argues that the discoverable public meaning of the Constitution at the time of its initial adoption should be regarded as authoritative for purposes of later constitutional interpretation.").

[23] It is worth noting that there are several versions of originalism: original intent, original public meaning, and now, original methods originalism. *See generally* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 116–38 (2013). For those versed in originalism, the string of cases cited *infra* notes 23–41, and accompanying text, demonstrating state courts' propensity for using originalism might indicate that I am advocating original intent originalism; many courts past and present use the phrase "intent of the framers" when engaging in that particular type of constitutional interpretation. It is important to note, however, that whatever these courts *said* about "intent," in practice many of these same courts appear to be doing something much more akin to original meaning originalism. *See, e.g.*, Steinhart v. Cty. of Los Angeles, 223 P.3d 57, 71 (Cal. 2010) ("[O]ur task is to effectuate the voters' intent in adopting article XIII A . . . . The words used in a [constitutional provision] must be taken in the ordinary and common acceptation, because they are presumed to have been so understood by the framers and by the people who adopted the provision.") (second alteration in original) (internal quotation marks omitted); Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516, 519 (Ind. 2009) ("Interpreting our Constitution involves a search for the common understanding of both those who framed it and those who ratified it." (internal quotation marks omitted)); State *ex rel.* Spire v. Pub. Emps. Ret. Bd., 410 N.W.2d 463, 467 (Neb. 1987) ("[T]his jurisdiction is committed to the rule that the intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself,

interpretation. In fact, this practice seems particularly well entrenched. All fifty states invoke this methodology of state constitutional interpretation currently, and have been doing so since the founding of each state, or for at least the last one hundred years.[24] In most states, originalism appears to be a principal maxim of state constitutional interpretation.

As a first example, take Colorado. Early on in Colorado's history, the Colorado Supreme Court declared: "[I]t [is] the duty of every member of the court to give effect to [a constitutional provision] in accordance with the intent of its framers, as far as it can be done consistent with the language in which that intent has been manifested."[25] One hundred years later, the court has continued to reiterate, "In construing our constitution, our primary task is to give effect to the framers' intent."[26] Utah has similarly engaged in originalist methodologies since its founding as a state,[27] and continues to hold that, "[i]n interpreting our constitution, [the] goal is to ascertain the drafters' intent."[28] The North Dakota Supreme Court held, only a decade after the state's founding, that its "duty [was] . . . to ascertain . . . the understanding of the framers of the Constitution, and the people who adopted it . . . ."[29] Nearly a century afterwards, the court continued to declare: "When interpreting the [North Dakota] Constitution, it is our overriding objective to give effect to the intent and purpose of the people adopting the constitutional statement."[30] New Mexico's Supreme Court has often held that, "[i]n construing the New Mexico Constitution, this Court must ascertain the intent and objectives of the framers."[31] Only two years after New Mexico joined the Union, the court addressed its right to a jury trial under the state constitution and declared, "[o]ur duty in this case is

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because there is no meaningful way to determine the motivations for submitting the initiative to the electorate or to determine the intent of those voting for its enactment."); Taylor v. State, 109 P.2d 879, 880 (Idaho 1941) ("The presumption is that words used in a constitution are to be given the natural and popular meaning in which they are usually understood by the people who adopted them.").

[24] Obviously, Alaska and Hawai'i are exceptions to this point on account that they have not existed for one hundred years as states. But they too have significant ties to originalism dating from their founding period as states onward. *See* Appendix A.

[25] People *ex rel.* Parish v. Adams, 73 P. 866, 868 (Colo. 1903).

[26] People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1238 (Colo. 2003) (en banc).

[27] *See* Jeremy M. Christiansen, *Some Thoughts on Utah Originalism: A Response*, 2014 UTAH L. REV. ONLAW 1, 9 n.60, 10 n.61–67, 11 n.68 (collecting cases from Utah's founding era which endorsed originalism and rejected alternative, policy-based approaches to interpreting specific constitutional provisions).

[28] State v. Hernandez, 268 P.3d 822, 824.

[29] Barry v. Truax, 99 N.W. 769, 771 (N.D. 1904).

[30] City of Bismarck v. Fettig, 601 N.W.2d 247, 250 (N.D. 1999).

[31] *In re* Generic Investigation into Cable Television Servs. in State of New Mexico, 707 P.2d 1155, 1158 (N.M. 1985).

therefore to ascertain whether it was the understanding of the framers of the Constitution, and the people who adopted it, that the right of trial by jury included, as one of its substantial elements, an absolute right to a trial by a jury of the county where the offense was committed."[32] In Ohio, "the intent of the framers [of the state constitution] is controlling" today,[33] as it was over one hundred years ago.[34] In Florida, "[t]he fundamental object to be sought in construing a constitutional provision is to *ascertain the intent of the framers* and the provision must be construed or interpreted in such manner as to *fulfill the intent of the people* . . . ."[35] And that same interpretive methodology appears frequently going back over a century.[36] In 1856, Rhode Island's Supreme Court noted that it would not approach the interpretation of the Rhode Island Constitution "as a novel question" because its words "had a settled constitutional meaning" that "the people of this state adopted."[37] Fast forward to 2008, and that same court has held that "[i]n construing provisions of the Rhode Island Constitution, our 'chief purpose is to give effect to the intent of the framers.'"[38] In Connecticut, contemporary courts look to "Connecticut precedents and any historical insight into the intent of our constitutional forebears."[39] And in the early nineteenth century, the court relied on the understanding of the words "complaint," "indictment," and "information" found in contemporaneous dictionaries, commentaries, and "common parlance" "all of which must have been well known to those who framed [the] constitution" to hold that crimes brought by complaint before magistrates did not have to be tried in front of a jury.[40] The list goes on to include every state in the Union.[41]

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[32] State v. Holloway, 146 P. 1066, 1071 (N.M. 1914).

[33] State v. Jackson, 811 N.E.2d 68, 71 (Ohio 2004).

[34] State v. Hipp, 38 Ohio St. 199, 224–25 (1882) ("The constitution . . . must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of the government and individual citizens, accord-to [sic] the spirit and intent of its framers, as indicated by its terms.") (internal quotation marks omitted).

[35] Zingale v. Powell, 885 So. 2d 277, 282 (Fla. 2004) (emphasis in original) (quoting Gray v. Bryant, 125 So. 2d 846, 852 (Fla. 1960)).

[36] *See, e.g.*, State *ex rel.* Ferdinand Bayer v. Gardner, 22 Fla. 14, 21 (1886) ("Had the framers of this amendment intended to put such a limitation upon the Legislature, they would have defined it. We see no evidence of any such purpose having been in their minds.").

[37] Taylor v. Place, 4 R.I. 324, 355 (1856).

[38] Riley v. R.I. Dep't of Envtl. Mgmt., 941 A.2d 198, 205 (R.I. 2008) (quoting *In re* Advisory Opinion of Governor, 612 A.2d 1, 7 (R.I. 1992)).

[39] State v. Colon, 864 A.2d 666, 796 (Conn. 2004).

[40] Goddard v. State, 12 Conn. 448, 453–55 (1838).

[41] *See* Appendix A.

To be sure, this is not a claim that these courts' decisions are always (or always have been) consistent with original meaning. Nor is it a claim that many of these courts do not invoke (or never have invoked) anything besides originalist methodologies in interpreting their constitutions. Far from it. The very premise of this article is that most state courts have gone astray from original meaning with regard to their search and seizure provisions. The greater point here is this: the dissonance created by having such a substantial body of case law, stretching over such a lengthy period of time, which is squarely contradicted by some more modern practices should raise concerns. As a general rule, state courts profess an allegiance to the original meaning of their state constitutions and have been doing so for a very long time. Yet the state of search and seizure law in state constitutions has wandered extremely far from its original moorings. This inconsistency should concern courts for its own sake.[42] And when combined with the remedial gap described in the beginning of this article, and other reasons for adopting originalism, this body of case law should serve as a partial[43] catalyst for courts to return to what is described in the remaining sections below—the original meaning of state constitutional search and seizure provisions.

III. A CONSTITUTIONAL TORT: THE ORIGINAL REMEDY

Applying an originalist approach to state search and seizure provisions leads to a tort-focused regime, one in which offending officers are liable for civil damage awards when they engage in unreasonable searches or seizures. It is a fundamental premise of the Anglo-American legal tradition that a right without a remedy is no right at all.[44] Thus, when state constitutions guarantee a "right" to be secure in one's person, house, papers, and effects, it is only natural to assume that this implies some sort of remedy. The question then becomes, what remedy did these provisions contemplate? The sections below offer an answer to this question by surveying the text and structure of these provisions, relevant case law, and constitutional conventions.

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[42] *Cf.* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1866–67 (2008) (noting how "[t]he lack of consistency and predictability in statutory interpretation methodology has raised alarm bells because of its negative effects" among scholars and jurists).

[43] I say partial because an additional piece to the puzzle is the normative justification for originalism. *See* sources cited *supra* note 21.

[44] *See, e.g.*, Marbury, 5 U.S. at 163.

A. Text and Structure of State Search and Seizure Provisions

The first place to look in discerning the meaning of these provisions is, of course, their text. And the conclusion that emerges is two-fold: first, the right created by these provisions extends to *all* people of the state, whether they possess evidence of a crime or not; and second, the remedy therefore cannot be exclusionary in nature. This becomes apparent from dissecting the four broad textual categories of search and seizure provisions.

The first group provides that "the right of the people to be secure" in their persons, houses, papers, and effects "shall not" or "may not" be violated.[45] Note, it is the right of *the people* rather than a right reserved only for one subset of the people (e.g., criminal defendants). While slightly different, we could add West Virginia's "the right of *the citizens* to be secure[,]"[46] and Vermont's "[t]hat *the people have a right* to hold themselves . . . free from search or seizure"[47] into this first group, to bring the count to twenty-seven that follow this general iteration—Alaska, Arkansas, California, Florida, Georgia, Hawai'i, Idaho, Indiana, Iowa, Kansas, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.[48] This group says, then, that the right is for all *the people* or *the citizens*.

The second group of states—Alabama, Colorado, Connecticut, Delaware, Kentucky, Maine, Mississippi, Missouri, Montana, New Mexico, Pennsylvania, Texas, and Tennessee—adheres to the following formulation: "[T]he people shall be secure in their persons, houses, papers, and effects," the only variation being the order of persons, houses, papers, and effects.[49] Again, we can add to that group Illinois ("The people shall have the right to be secure"),[50] Louisiana ("Every person shall be secure"),[51] Massachusetts ("Every subject has a right to be secure"),[52] Michigan ("The person, houses, papers and possessions of every person

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[45] *See* Appendix B.

[46] W. VA. CONST. art. III, § 6. While the word "citizens" here suggests that this right might not apply to all people, it does not support any distinction based on whether a person has illicit contraband—a distinction upon which the exclusionary paradigm necessarily depends.

[47] VT. CONST. art. XI. Vermont's formulation seems like a hybrid between the first and second group, and could rationally be placed in either.

[48] *See* Appendix B.

[49] *Id.*

[50] ILL. CONST. art. I, § 6.

[51] LA. CONST. art. I, § 5.

[52] MASS. CONST. art. XIV.

shall be secure"),[53] and New Hampshire ("Every subject hath a right to be secure").[54] This brings the second category to eighteen. And this group's formulation makes the point even clearer—*every* person (or subject or citizen) *shall* have the right to be secure from unreasonable searches and seizures.

The third group's language focuses on the prohibition of general warrants: Maryland,[55] North Carolina,[56] and Virginia.[57] On their face, this small group does not tell us much about any enforcement mechanism of the right against a general warrant. But the phrase "general warrant" clearly harkens back to the founding-era of our nation and the initial impetus behind the Fourth Amendment. There is little debate that at the time of the founding, the fight against general warrants was fought and won through private tort claims against the offending searchers.[58] Maryland, North Carolina, and Virginia were all original colonies and their invocation of the "general warrant" language is a clear homage to the tort-enforced regime of the time period.[59] So while this group does not tell us as clearly to whom the right belongs, the context of the language certainly tells us that exclusion was not the envisioned remedy.

The final group, the smallest by far, has a privacy-oriented provision. Washington first adopted this formulation at its founding, and Arizona later copied it verbatim. It provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[60] However textually different this formulation is, in practice it has always been the source of Fourth-Amendment-like protections in these two states. And this formulation is quite clear that "*no person*" is to have his rights violated, regardless of whether he has committed or been accused of a crime or whether he is completely innocent.

Together, these texts suggest a uniform proposition: that from state to state, the right to be free from unreasonable searches and seizures extends to everyone. There are no qualifiers.

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[53] MICH. CONST. art. I, § 11.

[54] N.H. CONST. pt. 1, art. XIX.

[55] MD. CONST. Declaration of Rights, art. XXVI.

[56] N.C. CONST. art. I, § 20.

[57] VA. CONST. art. I, § 10.

[58] *See* Widgeon v. E. Shore Hosp. Ctr., 479 A.2d 921, 924–27 (Md. 1984); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 65 (1998); Amar, *supra* note 8, at 786 (noting that tort remedies are "clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions").

[59] *See* Gardner v. Neil, 4 N.C. 104, 104 (1814) (holding that trespass was the proper remedy against one who searched the plaintiffs house with a warrant claiming to be looking for a runaway slave).

[60] WASH. CONST. art. I, § 7.

But there is more of relevance here than just the text of these particular provisions. The structure of state bills of rights suggests a remedy for unreasonable searches that extends outside the context of criminal procedure and does little to support an exclusionary rule paradigm. Just as every single state has a search and seizure provision, every state also has some provision expressly providing for specific rights of "the accused" in a criminal case.[61] One might expect search and seizure clauses to show up as one of the rights of the accused if those provisions were understood when they were adopted as being enforced through the exclusion of evidence.[62] After all, states seemed to have freely departed from the U.S. Constitution's structure by collapsing various criminal procedure rights into a single section providing for the rights of criminal defendants.[63] But no state collapsed search and seizure provisions into another provision containing criminal procedure rights. They are all separate and apart from those rights. Often, rights-of-the-accused provisions are not even next to search and seizure provisions in state bills of rights. Rather, search and seizure provisions are frequently placed in such a way as to leave little to no implication that they are exclusively or even remotely concerned with criminal procedure.[64] Structurally, state constitutions tend to suggest that

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[61] ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. II, § 24; ARK. CONST. art. II, § 10; CAL. CONST. art. I, § 15; COLO. CONST. art. II, § 16; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 16; GA. CONST. art. I, § 1, para. XIV; HAW. CONST. art. I, § 14; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 8; IND. CONST. art. I, § 13; IOWA CONST. art. I, § 10; KAN. CONST. Bill of Rights § 10; KY. CONST. Bill of Rights § 11; LA. CONST. art, I, § 13; ME. CONST. art. I, § 6; MD. CONST. Declaration of Rights, art. XXI; MASS. CONST. art. XII; MICH. CONST. art. I, § 20; MINN. CONST. art. I, § 6; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 11; NEB. CONST. art. I, § 11; NEV. CONST. art. I, § 18; N.H. CONST. pt. 1, art. XV; N.J. CONST. art. I, para. 10; N.M. CONST. art. II, § 14; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 23; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 20; OR. CONST. art. I, § 11; PENN. CONST. art. I, § 9; R.I. CONST. art. I, § 10; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. art. X; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 9; W. VA. CONST. art. III, § 14; WISC. CONST. art. I, § 7; WYO. CONST. art. I, § 10.

[62] *See* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under States Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 798–99 (noting that Utah's constitution likely did not include an exclusionary rule, in part, on the basis that the search and seizure provision was separate from Utah's rights of the accused provision).

[63] *See, e.g.*, IDAHO CONST. art. I, § 13 (combining rights of the "accused," such as right to a speedy and public trial, due process, confrontation, and the right against double jeopardy); N.M. CONST. art. II, § 14 (combining speedy trial, number of jurors, right to indictment, details of grand juries, confrontation, right to counsel).

[64] *See, e.g.*, IDAHO CONST. art. I, § 17 (search and seizure provision sandwiched between a prohibition on bills of attainder and ex post facto laws and the state open courts clause);

the rights protected by search and seizure provisions were not thought of as purely or even principally rights connected with criminal procedure. The structure suggests that the rights these provisions provide extend more broadly. And that is the unifying theme here. Overall, nothing in these texts suggests that the right is limited to a subset of people, and therefore nothing in the text suggests that the remedy ought to be so limited.

This is not to say that the text and structure of every state constitution forecloses an exclusionary remedy. Florida and Michigan, for instance, appear to have amended their search and seizure provisions in ways that expressly reflect an exclusionary-rule paradigm.[65] Other states, like Alaska and Hawai'i, joined the Union at a time where the exclusionary rule was making significant headway. Hence, citizens' understanding of what their constitution required in the event of an illegal search or seizure may have been exclusionary-rule-oriented. And finally, some states, early on in their histories, adopted an exclusionary rule via case law, which creates at least a fair presumption that this interpretation comports with original meaning in that state.[66]

That said, even these situations could still fit the paradigm outlined in this article. For example, the Hawai'i Supreme Court, prior to statehood, clearly contemplated that the search and seizure provision applicable to the Kingdom of Hawai'i under its constitution contained a constitutional tort remedy.[67] And while the Oklahoma Supreme Court did adopt an exclusionary rule early on in its history,[68] the court expressly recognized that it was overruling earlier case law that had disavowed the exclusionary rule.[69] The point is, there are a cluster of states whose early history or

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MINN. CONST. art. I, § 10 (same, sandwiched between treason definition and prohibition on *ex post facto* laws); OKLA. CONST. art. II, § 30 (same, sandwiched between an extradition provision and a provision guaranteeing the right to engage in one's occupation).

[65] FLA. CONST. art. I, § 12 ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated . . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.")§ ; *see also* MICH. CONST. art. I, § 11 ("The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.").

[66] *See* Gore v. State, 218 P. 545, 549 (Okla. Crim. App. 1923); State v. Bonolo, 270 P. 1065, 1068 (Wyo. 1928).

[67] *See infra* Part II.B.1.

[68] *Gore*, 218 P. at 549.

[69] *Id.* at 547 ("This court has held in a number of cases, supported by the decisions of

constitutional text *might* not fit the model set out in this article, but broad brushstrokes still seem justifiable. The large majority of states adopted constitutions that fit a model—textually and structurally speaking—that counsels against an exclusionary rule. Considering these textual and structural indicators noted above, it is no surprise that, as some commentators have noted, it is almost impossible to find a judicial opinion in this country, before *Weeks v. United States*,[70] in which a state court adopted an exclusionary rule as a part of its state constitutional regime.[71]

Examining the text of state search and seizure provisions as a whole strongly suggests that the rights they provide extend to all, and therefore cannot be limited by an exclusionary remedy. But while the text alone tells us a good deal about what these provisions *don't* do, it does not tell us exactly what these provisions *do*. For that, it is necessary to look beyond the bare text to case law from the nineteenth and twentieth centuries which will help define the contours of the right to be free from an unreasonable search or seizure under state constitutions.

B. Nineteenth and Twentieth Century Case Law

Examining relevant case law does three things. First, it enforces the textual and structural point made above—that the right in a search and seizure provision belongs to everyone, not just to criminal defendants. Second, it shows that adherence to original meaning here establishes a constitutional tort. And third, it helps define, at least roughly, exactly what this constitutional tort looked like and protected. Each of these points is discussed below. As an initial caveat, there is not reported case law in every single state indicating the original meaning of search and seizure provisions. Nevertheless, the case law that is available is strikingly uniform across time and geography, such that broader conclusions about the original meaning of state provisions still seem possible.

1. A universal right

As discussed above, the text of state constitutions quite clearly suggests a universal right—meaning one not necessarily limited to those who possess

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many other appellate courts of high standing, that evidence obtained by means of an illegal search and seizure is admissible . . . .").

[70] 232 U.S. 383 (1914).

[71] *See* Cassell, *supra* note 62, at 801–05; Lester J. Mazor, *Note on a Bill of Rights in a State Constitution,* 1966 UTAH L. REV. 326, 346 (1966) ("It is difficult to locate a state court decision . . . not before *Mapp*, but before *Weeks*, adopting the exclusionary rule.") (citations omitted).

criminal contraband and who are in the criminal justice system. But it is worth noting how case law from the nineteenth and early twentieth century reinforces that point. It is not hard to find state supreme courts emphasizing, often with great rhetorical flourish, the universality of the right to be free from an unreasonable search or seizure.

During the 1920s when state supreme courts were first being presented with, and rejecting almost universally, the notion of an exclusionary rule under their state constitutions, many courts quoted and cited from *People v. Mayen*.[72] In *Mayen*, the California Supreme Court rejected the exclusionary rule and declared that the right against unreasonable searches and seizures was "sacred," belonged to "*every citizen*," and "should be zealously enforced in behalf of *every citizen*."[73] *Mayen* was quoted at length or cited favorably in Colorado,[74] Connecticut,[75] Delaware,[76] Idaho,[77] Illinois,[78] Indiana,[79] Iowa,[80] Kansas,[81] Kentucky,[82] Maryland,[83] Nevada,[84] North Dakota,[85] Ohio,[86] Texas,[87] Utah,[88] and Virginia,[89] just to name a few. This sentiment accords with nineteenth century case law that made clear that the prohibition against unreasonable searches and seizures "protect[s]

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[72] 205 P. 435 (Cal. 1922).

[73] *Id.* at 440 (emphasis added).

[74] Massantonio v. People, 236 P. 1019, 1021 (Colo. 1925) (noting that "[e]very officer making an unconstitutional search, and every officer advising or conniving at such conduct, is a law violator . . . and should be held to accountability.").

[75] State v. Reynolds, 125 A. 636, 639 (Conn. 1924).

[76] State v. Chuchola, 120 A. 212, 214 (Del. 1922) (noting that "[t]he violation of the constitutional provision would seem to be complete when the seizure is made, and in that case the only remedy or redress the wronged party has *is an action against the wrongdoer*—the person who made the seizure.") (emphasis added).

[77] State v. Myers, 211 P. 440, 442–43 (Idaho 1922).

[78] People v. Castree, 143 N.E. 112, 120 (Ill. 1924).

[79] McSwain v. State, 167 N.E. 568, 570 (Ind. App. Ct. 1929).

[80] State v. Tonn, 191 N.W. 530, 535 (Iowa 1923) ("A trespassing officer is liable for all wrong done in an illegal search or seizure.").

[81] State v. Johnson, 226 P. 245, 249 (Kan. 1924) (also expressly noting that the remedy is an "[a]ction for damages against the trespasser").

[82] Morse v. Commonwealth, 265 S.W. 37, 40 (Ky. 1924).

[83] Meisinger v. State, 141 A. 536, 537 (Md. 1928).

[84] State v. Chin Gim, 224 P. 798, 801–02 (Nev. 1924).

[85] State v. Fahn, 205 N.W. 67, 69–70 (N.D. 1925).

[86] State v. Lindway, 2 N.E.2d 490, 496–97 (Ohio 1936) ("If [the requirements to search or seize an individual or his papers, house, or effects] are not observed the injured party has his action in trespass.").

[87] Welchek v. State, 247 S.W. 524, 530 (Tex. Crim. App. 1922).

[88] State v. Aime, 220 P. 704, 706–07 (Utah 1923).

[89] Hall v. Town of South Boston, 121 S.E. 154, 156 (Va. 1924).

every citizen of this government in the enjoyment of his personal liberty, his home, and his property . . . ."[90]

To be sure, some of this case law is fairly modern. And perhaps one criticism would be that it is a bit too modern to use for purposes of establishing original meaning. And that criticism is fair enough at some level, but is still insufficient to justify casting aside reliance on these judicial pronouncements. Notice that some of these states entered the Union late in the game, relatively speaking. Idaho and Utah, for example, became states in the 1890s: so case law from the 1920s is still rightfully characterized as being within the founding era. Connecticut, on the other hand, was one of the thirteen original colonies, yet its supreme court still found *Mayen* to be an accurate summary of how the Connecticut Constitution had long been understood. Notwithstanding the temporal range involved in the ratification of these states' constitutions, the fact remains that at a time when courts were asked to reconsider the very foundations of what it meant to be free from an unreasonable search and seizure, they spoke with the same voice. And that voice communicated a right that was universal and did not use exclusion as a remedy.[91]

2. Existence of a cause of action

The next conclusion is that there was a broad recognition in state courts of the right to be free from unreasonable searches and seizures as being enforced via a tort action. English common law in the late eighteenth century, of course, allowed for a private cause of action against government officers who illegally searched citizens.[92] And this notion inspired early state constitutions and eventually the Fourth Amendment to the U.S. Constitution. Some scholars have criticized the idea of the Fourth Amendment representing a constitutional tort. According to this account, "the Framers would not have believed that the government could be liable for a 'constitutional tort' committed by an officer—a term that would have

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[90] *Ex parte* Hurn, 9 So. 515, 519 (Ala. 1891) (emphasis added).

[91] Mazor, *supra* note 71, at 346 ("It is difficult to locate a state court decision . . . not before *Mapp*, but before *Weeks*, adopting the exclusionary rule.") (internal citations omitted).

[92] *See, e.g.*, Wilkes v. Wood, 19 Howell's State Trials 1153, 1170 (1763) (upholding verdict for "a large sum of money as a compensation for the damage" the plaintiff suffered as the result of an unlawful search and arrest under a general warrant); Wolf v. Colorado, 338 U.S. 25, 30 n.1 (1949) ("The common law provide[d] actions for damages against [those who engage in unreasonable searches]."); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 20–21 (1997) (arguing that at the time of the founding of the United States, the Fourth Amendment was understood to be enforceable through tort claims).

been a virtual oxymoron in 1789."[93] "The flaw in . . . [the] claim that the Fourth Amendment 'sounds . . . in constitutional tort law,'" Professor Davies argues, "is that there was no such doctrine until the twentieth century."[94] Whatever merit Professor Davies' critique has as to the Fourth Amendment, his assertion that there was no doctrine of a constitutional tort until the twentieth century is incorrect. As discussed below, state constitutional law from the nineteenth and early twentieth century clearly endorsed a tort against offending officers arising under the state constitutional prohibition on unreasonable searches and seizures.

In 1821, for instance, in a case styled *Anonymous*,[95] the Alabama Supreme Court upheld a plaintiff's suit for damages against the defendant who "with force and arms broke and entered into plaintiff's dwelling-house, under pretence [sic] of searching for money stolen, and unlawfully, unreasonably, and maliciously searched said house without a warrant."[96] Seventy years later (but still in the nineteenth century, mind you) in *Ex Parte Hurn*, that same court held that "consistent with the personal liberty" secured to citizens by "the Constitution of the State," if an officer arrested an individual and searched them, he was permitted to search for and seize "any dangerous weapon found on his person," and "any money, or anything connected with the offense, or which may be used as evidence against him on the prosecution . . . ."[97] And that so long as the officer was "proceeding upon probable grounds for believing that the money or thing [was] connected with the offense charged, or may be used as evidence on the trial" he would "not be liable in damages for a trespass" to the individual for having searched and taken his personal belongings.[98]

In 1878, the Connecticut Supreme Court dealt with a suit against a private individual who had performed a night-time search under a valid warrant.[99] The issue was whether the searching individual had been duly deputized and whether the night-time search was justifiable.[100] The court dismissed the case on a procedural technicality, but the court clearly assumed the general propriety of a suit against an officer for an unreasonable search.[101]

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[93] Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 664 (1999).

[94] *Id.* at 666 n.322.

[95] 12 Am. Dec. 31, 52 (Ala. 1821).

[96] *Id.*

[97] 9 So. at 519 (citing ALA. CONST. art. I, § 6).

[98] *Id.*

[99] Soudant v. Wadhams, 46 Conn. 218, 220 (1878).

[100] *Id.* at 223.

[101] *See id.* at 220.

In Delaware in 1915, a reported trial notes the jury instructions in a case "brought by Robert J. Fennemore against Frank Armstrong to recover damages for injuries . . . occasioned by an alleged illegal search of his dwelling house and premises."[102] Among those instructions were statements such as:

> If a constable enters the dwelling house in the occupancy of another against the latter's will for the purpose of searching for stolen property without a warrant therefor, he is a trespasser and liable in damages to the person injured. So too is the person procuring such search and accompanying the officer in making the same, a trespasser and liable in damages; for under such circumstances the acts of each are illegal.[103]

Thus, at the beginning of the twentieth century in Delaware, the settled state of the law, such that it would constitute a jury instruction, was that police officers were liable in damages for unreasonable searches and seizures.

The Supreme Court of the Kingdom of Hawai'i, in 1875, noted in *Rex v. Eser*,[104] that a criminal defendant who raised questions "as to the proper method of taking out and executing a warrant to search for goods suspected of having been smuggled" brought those issues to the wrong suit.[105] Those questions "c[ould] be decided in an action for damages by the prisoner against the officer [having] serv[ed] [the warrant], but not in the case before the Court."[106] A few years later in *Hang Lung Kee & Co. v. Bickerton*,[107] that same court addressed the claims of plaintiffs who alleged that they and their "sleeping apartments, were searched, and the plaintiffs disturbed, insulted, ill-treated, and assaulted" by police officers, "in contravention of the plaintiffs' private rights under the law, to their damage $200."[108] The court awarded damages to the plaintiffs holding that "[t]he 12th article of the Constitution in declaring that 'every person has the right to be secured from all unreasonable searches and seizures of his person, his house, his papers and effects,' secures to the citizen a highly valued and important civil right."[109] And that such "[a]n unlawful search and seizure" warranted "corresponding damages," though they were reduced because "as shown by

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[102] Fennemore v. Armstrong, 96 A. 204, 204 (Del. Super. Ct. 1915).
[103] *Id.* at 205.
[104] 3 Haw. 607 (1875).
[105] *Id.* at 608.
[106] *Id.*
[107] 4 Haw. 584 (1883).
[108] *Id.* at 585.
[109] *Id.* at 592.

the evidence, [the search] was not conducted with any acts of violence or special indignity."[110]

In the early nineteen hundreds, the Iowa Supreme Court in *Krehbiel v. Henkle*,[111] held that it was "*thoroughly well settled*" that "a violation of [the constitutional provision prohibiting unreasonable searches and seizures] without reasonable ground therefor gives the injured party a right of action."[112]

In the mid-nineteenth century, the Louisiana Supreme Court upheld a $500 jury award against the defendant, who had "br[oken] into and search[ed] . . . the plaintiff's shop and dwelling" though "not authorised [to do so] by the warrant" he possessed.[113] Twenty-five years later, that same court reversed a verdict in favor of a sheriff, thereby awarding $1,000 and costs to the plaintiff, holding "the declaration in the constitution, that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated,' would be a mockery if courts should sanction such a latitude of construction, as is invoked by the defendant . . . ."[114]

In *Sandford v. Nichols*,[115] in 1816, the Massachusetts Supreme Judicial Court reversed a verdict for the defendants in a suit alleging trespass and ordered a new trial because the warrant which had been introduced into evidence, and upon which the officers relied and which would otherwise serve as a shield to liability, was not sufficiently particular.[116] The court noted that "it [was] probable that very small damages will be recovered upon another trial" because there had been no "violence or injury" and it was quite certain that the property was "liable to forfeiture."[117]

In 1814 in *Gardner v. Neil*,[118] the North Carolina Supreme Court held that a trespass action was the proper remedy against a defendant who entered "into the dwelling-house of [the plaintiff], against [his] will" to search for a runaway slave, who was not found in the plaintiff's house.[119] The court reversed, ordered a new trial, but did not reach the question of whether the warrant was valid and whether it would have shielded the defendant from liability.[120]

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[110] *Id.*
[111] 121 N.W. 378, 380 (Iowa 1909).
[112] *Id.* (emphasis added).
[113] Larthet v. Forgay, 2 La. Ann. 524, 525 (1847).
[114] Frazier v. Parsons, 24 La. Ann. 339, 341 (1872) (emphasis omitted).
[115] 13 Mass. 286 (1816).
[116] *Id.* at 289–90.
[117] *Id.*
[118] 4 N.C. 104, 104 (1814).
[119] *Id.*
[120] *Id.*

The list goes on to include New York,[121] Ohio,[122] Texas,[123] Utah,[124] Vermont,[125] and Wisconsin.[126] Between the years 1814 and 1923 all of the above states recognized this tort cause of action against offending officers, and recognized its connection to the state's prohibition on unreasonable searches and seizures. So, to say that the notion of a constitutional tort is somehow a creature only of the twentieth century is incorrect. There is strong evidence to support the conclusion that the right against unreasonable searches and seizures at the state level was enforced via a constitutional cause of action.

3. *Nature and contours of the cause of action*

The next thing we can learn from looking at relevant case law concerns the nature and contours of the right to an unreasonable search and seizure. First, search and seizure provisions were seen as self-executing—meaning that the cause of action arose directly from the constitution itself with no need for implementing legislation. Second, these provisions protected rights of property, privacy, dignity, and reputation. Third, these interests were vindicated via compensatory and sometimes punitive damage awards.

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[121] Doane v. Anderson, 15 N.Y.S. 459, 460 (Gen. Term 1891) (recognizing private cause of action against affiant and magistrate that maliciously issued search warrant and resulted in an officer "invad[ing] the privacy of plaintiff's apartments, to grossly humiliate her, to compel her to undress before him, and even to suffer him to put his fingers through her hair in searching for diamonds which it was falsely alleged had been stolen . . . . [T]his verdict was none too large; for this plaintiff could not have been subjected to a coarser indignity . . . ."); Wallace v. Williams, 14 N.Y.S. 180, 182 (Sup. Ct. 1891).

[122] Simpson v. McCaffrey, 13 Ohio 508, 522–23 (1844) (en banc) (remanding case for lower court to consider "all the facts and circumstances which tend to explain or disclose the motives and the design of the party [who unlawfully searched the plaintiff]" in order to decide whether "smart money, or damages beyond compensation, to punish the party guilty of the wrongful act").

[123] Collins v. Clark, 72 S.W. 97, 98 (Tex. 1902); Regan v. Harkey, 87 S.W. 1164, 1165 (Tex. 1905); Weyer v. Wegner, 58 Tex. 539, 545 (1883); *Welchek*, 247 S.W. at 528.

[124] *Aime*, 220 P. at 706.

[125] Lawton v. Cardell, 22 Vt. 524, 525 (1850).

[126] Shall v. Minneapolis, St. Paul & Sault Ste. Marie Ry., 145 N.W. 649, 651–52 (Wis. 1914) (rejecting the position that there must be some physical harm in order to recover for dignitary harms and mental suffering caused by an illegal search); Bailey v. Ragatz, 7 N.W. 564, 566 (Wis. 1880) ("We do not think that the law gives either an implied or express license to a policeman to demand an entrance, or to enter into the house of a respectable citizen at night, by way of the kitchen door, after the family have retired, for the purpose of making insulting inquiries as to the character of the house or its inmates . . . .").

i. State search and seizure provisions as self-executing

State search and seizure provisions represent a self-executing, constitutional tort. A self-executing constitutional provision is one that is in no need of further legislative enactments in order to be enforced in the courts.[127] In other words, one can bring a lawsuit merely by invoking the constitutional provision itself. There is no need for any statute like in § 1983 cases in federal court.[128] And it appears that courts had a near-uniform view that state search and seizure provisions were the source of a tort cause of action against the offending officer, though there are some caveats to that.

Again, we can look to the era in which state courts were roundly rejecting the exclusionary rule and learn a good deal about how they understood these provisions. The *Mayen* case is, again, particularly instructive. In rejecting the exclusionary rule, the California Supreme Court emphasized that, "[w]hether the trespasser converts [the evidence] to his own use, destroys [it], or uses [it] as evidence [at trial], or voluntarily returns [it] to the possession of the owner, he has already completed the offense *against the Constitution when he makes the search and seizure* . . . ."[129]

This language—that the offense "against the Constitution" is "already completed" at the moment of the unreasonable search—tends to suggest that this is a right that accrues *at that moment*, like a tort; not a right in the abstract that only really becomes a right when the legislature provides for a remedy. Thus, rather than being a mere common law tort, *Mayen* suggests a picture of right to a cause of action enshrined in, and protected by, the state constitution. *Mayen*'s conception of this constitutional tort seems to sum up the common sentiments of the time, having, again, been either cited or quoted in numerous state courts decision at that time.[130]

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[127] *E.g.,* Spackman *ex rel.* Spackman v. Bd. of Educ. of Box Elder County School Dist., 16 P.3d 533, 535–37; *see* BLACK'S LAW DICTIONARY 1482 (9th ed. 2009).

[128] *See* 42 U.S.C. § 1983 (2012).

[129] *Mayen*, 205 P. at 440 (emphasis added).

[130] *Massantonio*, 236 P. at 1021 (noting that "[e]very officer making an unconstitutional search, and every officer advising or conniving at such conduct, is a law violator . . . and should be held to accountability"); *Reynolds*, 125 A. at 639; *Chuchola*, 120 A. at 214 (also noting that "[t]he violation of the constitutional provision would seem to be complete when the seizure is made, and in that case the only remedy or redress the wronged party has *is an action against the wrongdoer*—the person who made the seizure") (emphasis added); *Myers*, 211 P. at 442–43; *Castree*, 143 N.E. at 120; *McSwain*, 167 N.E. at 570; *Tonn*, 191 N.W. at 535 ("A trespassing officer is liable for all wrong done in an illegal search or seizure."); *Johnson*, 226 P. at 249 (noting that the remedy is an "[a]ction for damages against the trespasser"); *Morse*, 265 S.W. at 40; *Meisinger*, 141 A. at 537; *Chin Gim*, 224 P. at 801–02;

The Iowa Supreme Court's decision in *State v. Tonn*[131]—a case that relied heavily on *Mayen*—further elucidates how people had long conceived of the right to be free from unreasonable searches and seizures. In *Tonn*, the Iowa Supreme Court held that rejecting an exclusionary rule "would not detract one iota from the full protection *vouchsafed to the citizen by the constitutional provisions*."[132] The court went on to note that the right against unreasonable searches and seizures was "a sacred right and one which *the courts will rigidly enforce*."[133] The words "the courts will rigidly enforce" and "vouchsafed . . . by the constitutional provision" strongly suggest these state-law provisions existed to guarantee that "[a] trespassing officer is liable for all wrong done in an illegal search."[134] Moreover, they tend to confirm the notion that the tort was self-executing, or at least that the state constitution protected the existence of the common law cause of action against encroachment. Another way of saying a "vouchsafed" cause of action is a cause of action "guaranteed as safe," "grant[ed]," or "bestowed."[135]

Cases from other states tend to confirm the idea that a "vouchsafed" cause of action arose directly under state search and seizure provisions. For example, in *Allen v. Holbrook*,[136] the plaintiff argued before the Utah Supreme Court that his cause of action against several law enforcement officers was well-pleaded against a general demurrer.[137] He argued that because of his repeated assertions in his affidavit that "[the] search and seizure warrant [was] illegal and void . . . for the reasons that it directed an unreasonable search and seizure against the plaintiff in violation of Section 14, Article 1 of the Constitution of the State of Utah[,]" his cause of action was valid.[138] He emphasized that because he had "alleged in general terms that [the search and seizure were illegal] and in violation of the plaintiff's right under the Constitution of the State of Utah, it was a sufficient allegation *to allege a cause of action* in general terms[.]"[139] Although the opinion itself makes no explicit mention of the self-executing nature of the

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Fahn, 205 N.W. at 69, 70; *Lindway*, 2 N.E.2d at 496–97 ("If [the requirements to search or seize an individual or his papers, house, or effects] are not observed the injured party has his action in trespass."); *Welchek*, 247 S.W. at 528; *Aime*, 220 P. 704; *Hall*, 121 S.E. at 156.

131 191 N.W. 530 (Iowa 1923).

132 *Id.* at 535 (emphasis added).

133 *Id.* (emphasis added).

134 *Id.*

135 WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 2860 (1934).

136 135 P.2d 242 (Utah 1943).

137 Reply Br. of Appellant 4, No. 6564, Jan. 13, 1943 (filed in advance of the decision rendered in *Allen*, 135 P.2d 242).

138 *Id.* (formatting adjusted).

139 *Id.* at 5 (emphasis added).

search and seizure provision, the Utah Supreme Court upheld his complaint as properly pled.[140]

In *Welchek v. State*,[141] and in *Weyer v. Wegner*,[142] Texas appellate courts assumed that one could bring this cause of action directly under the state constitution. In *Weyer*, the Texas Supreme Court upheld a punitive damages award against an offending magistrate and made an express connection to the state prohibition on unreasonable searches in seizures in doing so.[143] Decades later in *Welchek*, the Texas Court of Criminal Appeals observed that "it is going as far as the provision of said Constitution *demands* to admit that one whose property is wrongfully obtained in any manner *is entitled* to his day in some court of competent jurisdiction and to a hearing of his claim for the restoration of such property, *and for the punishment of the trespasser* . . . ."[144]

Taken together, these cases, from *Mayen* to *Tonn* to *Allen* to *Weyer* to *Welchek*, suggest that there was a cause of action arising directly from the state constitutional provision. As the Iowa Supreme Court put it in *Krehbiel v. Henkle*,[145] it was "thoroughly well settled" that "*a violation* of this right without reasonable ground therefor *gives the injured party a right of action*."[146] Thus, there appears to have been a common sentiment that one could sue a police officer directly under the state constitution, or at least that a common law cause of action for trespass was constitutionally guaranteed and protected.

ii. Rights of property, privacy, dignity, and reputation

Examining the relevant case law suggests that there were at least four related interests protected by state search and seizure provisions—rights of property, privacy, dignity, and reputation.

First: property. It really should come as no surprise that these provisions would protect property rights considering their textual references to the people being secure in their "houses, papers, and effects."[147] Moreover, considering the venerable history of Anglo-American conceptions of the importance of property, it is entirely expected that a person could sue for

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[140] *Allen*, 135 P.2d at 249.
[141] 247 S.W. 524, 528 (Tex. Crim. App. 1922).
[142] 58 Tex. at 543.
[143] *Weyer*, 58 Tex. at 543.
[144] *Welchek*, 247 S.W. at 528 (emphasis added).
[145] 121 N.W. 378 (Iowa 1909).
[146] *Id.* at 380 (emphasis added).
[147] *E.g.*, MINN. CONST. art. I, § 10.

pecuniary losses sustained as a result of an unlawful search.[148] The constable destroying a citizen's property in the wake of an unreasonable search would, no doubt, be compensable in damages.[149]

Second: privacy, dignity, and reputation. This category might be a little more surprising. But it seems clear that state supreme courts directly connected the right to be free from an unreasonable search or seizure to protecting the rights of privacy, dignity, and reputation of the citizens.

Consider the Alabama Supreme Court's observations in 1821 in *Anonymous*.[150] There, the plaintiff alleged that the defendant "broke and entered into plaintiff's dwelling house, under pretence [sic] of searching for money stolen, and unlawfully [and] unreasonably . . . searched [the] house without a warrant . . . ."[151] The defendant argued a pleading technicality (not uncommon in those days) that the plaintiff's allegations of damages for exposing his "private papers . . . to the eye of curiosity" and injury to "his good name, fame, and credit" could not be sustained in the then-current form of Trespass *vi et armis*.[152] The court rejected the defendant's argument and astutely retorted: "Can we conceive of any act better adapted to *wound sensibility and destroy reputation*?"[153] The court continued:

> It is the natural and immediate consequence of the unlawful and malicious entry and search of the plaintiff's dwelling. He may have sustained no pecuniary loss; but the injury fixes on him the *eye of public suspicion, inflicts a rankling wound on his feelings, and tends to prostrate his character*.[154]

Thus, the Alabama Supreme Court expressly contemplated damages *beyond* physical property damage, extending injury to one's privacy concerns and reputation.

In Delaware in the beginning of the twentieth century, a jury instruction in a case against a sheriff "to recover damages for injuries to his property, reputation and feelings, occasioned by an alleged illegal search of his dwelling house and premises[,]" stated that "[t]he measure of compensatory damages" for "unlawfully entering and searching the dwelling and premises

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[148] *See generally* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Univ. of Chicago Press, facsimile ed. 1979) ("There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.").

[149] *See* Goodman v. Condo, 12 Pa. Super. 456, 466–67 (1899) (holding sheriff liable for burning down a citizen's home in attempting to smoke out a dangerous felon).

[150] 12 Am. Dec. at 52.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 53 (emphasis added).

[154] *Id.* (emphasis added).

of another is such a sum as will reasonably compensate the injured party for injuries to his property, if any, *and for injuries to his reputation and feelings, and for any disturbance of his family*."[155]

During roughly the same time period in Iowa, the Iowa Supreme Court held first, in 1909, that "[t]he essence of the wrong done to [a plaintiff] was the *unreasonable invasion of his home*, which wrong was *aggravated by the charge* that stolen goods were there secreted—thus at the very least *casting upon him the suspicion of complicity in larceny*."[156] Then, when the verdict was returned for the defendant and the plaintiff appealed again in 1911, the court reversed the verdict. The lower court had given the following jury instruction on damages:

> If you find from the evidence that there was a wrongful invasion of the privacy of plaintiff's home, under the writ, and if the evidence fails to show any actual damages resulting therefrom, then the plaintiff would be entitled to recover nominal damages, which are damages of a small amount, such as one cent or one dollar. If only nominal damages are found, no amount can be allowed as exemplary damages.[157]

The Iowa Supreme Court reversed holding it "th[ought] the instruction erroneous."[158] "If there was a wrongful invasion of the plaintiff's home," the court reasoned, "it was a willful wrong *to his reputation* and *an insult, for which the law gives a remedy*. It is a familiar rule that the law implies injury to the feelings, where there is serious personal injury or *insult*, and *for such injury compensatory damages may be recovered*."[159]

The Louisiana Supreme Court affirmed a jury award for damages against the offending law enforcement searcher in 1847 that "exceeded the injury done in searching and putting into disorder the plaintiff's goods[,]" because "the jury undoubtedly assessed them with reference also to the injury to *the plaintiff's feelings, and the disturbance of his family*."[160]

The New York Supreme Court[161] in 1891 upheld a jury verdict awarding damages against an affiant and the magistrate who issued the warrant.[162] In so doing, the court noted that the search "invade[d] *the privacy* of plaintiff's apartments . . . *grossly humiliat*[*ing*] her, to compel her to undress before

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[155] *Fennemore*, 96 A. at 205.

[156] Krehbiel v. Henkle, 121 N.W. 378, 380 (Iowa 1909) (emphasis added).

[157] Krehbiel v. Henkle, 129 N.W. 945, 945 (Iowa 1911) [hereinafter Krehbiel II].

[158] *Id.*

[159] *Id.* (emphasis added).

[160] *Larthet*, 2 La. Ann. at 526 (emphasis added).

[161] The author recognizes that this was not New York's court of last resort.

[162] *Doane*, 15 N.Y.S. at 460.

him, and even to suffer him to put his fingers through her hair in searching for diamonds which it was falsely alleged had been stolen . . . . [T]his verdict was none too large; for this plaintiff could not have been subjected *to a coarser indignity* . . . ."[163]

In 1883, the Texas Supreme Court commented on the same privacy and dignitary interests at stake when it sustained a verdict for punitive damages against law enforcement illegally searching two men's home:

> There is perhaps no man, unless it be one wanting in all honorable feeling, who would not feel that such an entry upon his premises, for such a purpose, was *an insult most grievous in its character*, and, in the absence of cause therefor, most vexatious and wanton. *No greater indignity* could be heaped upon a man *than to enter his premises with a charge that thereon was property acquired by crime*, and that the presence of the intruder was for the purpose of keeping guard over the owner of the premises to prevent him from concealing it; thus *bearing the accusation that the owner was the criminal, or ready to assist some other person who was.*[164]

Later cases in the Texas Court of Civil Appeals confirm the propriety of seeking damages for injuries less tangible than property damage. In *Collins v. Clark*, for example, although the court upheld a verdict in favor of the defendants on sufficiency of the evidence grounds, the court seemed to accept as a matter of course that plaintiffs could seek "special damages for the *deep humiliation and disgrace and for the great mental suffering* and anguish" that a family allegedly suffered as a result of an allegedly unlawful search.[165] The plaintiff had alleged that his family, as a result of the search, had been "brought into *disgrace* among their neighbors and acquaintances" and that "the children of the neighbors pointed *the finger of scorn* at his poor little girl, and refused to associate with her . . . ."[166] The court noted that this testimony was proper. But under a sufficiency of the evidence standard of review, the court would not disturb the jury's verdict in favor of the defendants.[167] Three years later in *Regan v. Harkey*, however, that same court upheld a $200 damage award because the search in that case "was absolutely unwarranted," noting that "[s]uch a proceeding must be *humiliating* to any one."[168]

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[163] *Id.* (emphasis added).
[164] *Weyer*, 58 Tex. at 545 (1883) (emphasis added).
[165] 72 S.W. 97, 98 (Tex. Ct. App. 1902).
[166] *Id.* (emphasis added).
[167] *Id.*
[168] 87 S.W. 1164, 1165–66 (Tex. Ct. App. 1905).

In 1880, the Supreme Court of Wisconsin reversed a lower court's decision to grant a motion to dismiss against a police officer in a suit for unreasonable search.[169] The court held:

> We do not think that the law gives either an implied or express license to a policeman to demand an entrance, or to enter into the house of a respectable citizen at night, by way of the kitchen door, after the family have retired, for the purpose of making *insulting inquiries as to the character of the house or its inmates* . . . .[170]

Thirty-four years later, that same court dealt with a case where the "defendant, without warrant or authority of law, at midnight, when the plaintiff was alone in her dwelling house, without her consent, entered and searched it for the avowed purpose of obtaining information or evidence to be used in an effort to convict the plaintiff's son of burglary."[171] The offending searchers later "discovered that [the plaintiff's] son had nothing to do with the burglary."[172] After citing article I, § 11 of the Wisconsin Constitution,[173] the court reversed the lower court's determination "that compensation *for mental anguish* could not be recovered," thereby excluding "all evidence tending to show injury to *feelings, humiliation, and disgrace* caused" by the illegal search.[174] The court held that "[n]othing could be better calculated to wound *the feelings* of the plaintiff and *humiliate her* than such acts."[175] The court emphasized that the injury "if not [to] her liberty[,]" was to her "*personal security* . . . [,] *character, reputation*, and *domestic relations*."[176] The court held it was "clear that the plaintiff is entitled to damage for *mental suffering* caused by the [search]."[177]

The Utah Supreme Court unanimously seems to have had these types of interest in mind when it rejected the exclusionary rule in the early 1920s—

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[169] *Bailey*, 7 N.W. at 564–66.

[170] *Id.* at 565 (emphasis added).

[171] *Shall*, 145 N.W. at 651–52.

[172] *Id.* at 650.

[173] WISC. CONST. art. I, § 11 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.").

[174] *Shall*, 145 N.W. at 651 (emphasis added).

[175] *Id.* at 652 (emphasis added).

[176] *Id.* (emphasis added)

[177] *Id.* (emphasis added).

less than thirty years after the state's founding, with sitting Justices in the case who were active participants in the constitutional convention[178]:

> Whether the trespasser converts [the illegally seized items] to his own use, destroys them, or uses them as evidence, or voluntarily returns them to the possession of the owner, he has already completed the offense against the Constitution when he makes the search and seizure, *and it is this invasion of the rights of privacy and the sacredness of a man's domicile with which the Constitution is concerned.*[179]

The list can go on, but this suffices. Protections under state search and seizure provisions go far beyond pecuniary harm to property damaged in the wake of an unlawful search. Rather, these provisions protect interests in property, privacy, dignity, and reputation. This feature of search and seizure provisions has direct application to the types of problems alluded to at the beginning of this article. Applying this framework today, an unreasonable search that resulted only in property damage would no doubt be compensable. But an unreasonable search where the only harm was an invasion against privacy or a dignitary or character injury would similarly be sustainable, even in the absence of more concrete damages to property. So, the unreasonable, racially-motivated search on the side of the road would give rise to a cause of action, based on the dignitary harms inflicted by the search itself, the invasion of privacy interests, and the reputational harms inflicted by being detained and searched by law enforcement. And the same goes for the woman forced to shake out her bra in front of a dash cam with no probable cause.

iii. Compensatory and punitive damages

The relevant case law demonstrates that the rights described above were enforced via damage awards that were compensatory and, under certain conditions, punitive in nature. Compensatory damage awards for injuries to property, privacy, dignity, and/or reputation were awarded for $733 in Virginia in 1821,[180] $2,000 and $1,000 in Louisiana in 1847 and 1872,

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[178] *See* John R. Alley, Jr., *Utah State Supreme Court Justice Samuel R. Thurman*, 61 Utah Hist. Q. 233, 233 (1993).

[179] *See Aime*, 220 P. at 706 (quoting *Mayen*, 205 P. at 440).

[180] Faulkner v. Alderson, 21 Va. (Gilmer) 221, 222 (1821).

respectively,[181] $400 and $200 in Texas in 1883 and 1905, respectively,[182] and $2,500 in New York in 1891,[183] as examples.

Punitive damages were also available, and seen as an important component of the right against unreasonable searches and seizures. The Louisiana Supreme Court, for example, noted that "'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures,[']... would be a mockery if courts failed to inflict exemplary damages for the wanton abuse of the personal liberty and private rights of property ...."[184] Of course, while states permitted the use of punitive damages,[185] they were not available in every case. Rather, there appears to be some agreement that some showing of recklessness or malice would first be in order. For instance, a Delaware jury instruction stated that:

> Exemplary damages may be recovered in an action of this kind where it is shown that the defendant in making a search for stolen property, without a warrant, and without the consent of the owner, acted with malice. Whether any malice has been shown such as to warrant punitive damages, if you should find for the plaintiff, you are to determine from all the facts and circumstances of this case. To warrant such damages it should appear that the conduct of the defendant was wanton, gross, or malicious.[186]

In similar fashion, the Iowa Supreme Court held that punitive damages were available if "the defendant's act was wanton and reckless, and in disregard of the plaintiff's rights."[187] And again, Louisiana noted the propriety of "exemplary damages" where there had been "[a] *wanton* abuse of the personal liberty and private rights of property."[188]

Surveying the available nineteenth and twentieth century case law tends to confirm what the text and structure of state search and seizure provisions

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[181] *Larthet*, 2 La. Ann. at 526; *Frazier*, 24 La. Ann. at 341.

[182] *Weyer*, 58 Tex. at 545 (1883); *Regan*, 87 S.W. at 1165.

[183] *Doane*, 15 N.Y.S. at 460.

[184] *Frazier*, 24 La. Ann. at 341 (emphasis omitted).

[185] *See, e.g.*, *id.*; *Simpson*, 13 Ohio at 522–23 (en banc) (remanding case for lower court to consider "all the facts and circumstances which tend to explain or disclose the motives and the design of the party [who unlawfully searched the plaintiff]" in order to decide whether "smart money, or damages beyond compensation, to punish the party guilty of the wrongful act ...."); *Weyer*, 58 Tex. at 544 (sustaining jury instruction on punitive damages for illicit entry without a warrant to search for stolen articles).

[186] *Fennemore*, 96 A. at 205–06.

[187] *Krehbiel II*, 129 N.W. t 945.

[188] *Frazier*, 24 La. Ann. at 341 (emphasis added).

suggests—that these provisions provided a universal right to anyone who was the subject of an unreasonable search by law enforcement and that exclusion was not the pertinent remedy for such violations. Moreover, this case law suggests a self-executing, constitutional tort, which protected rights of property, privacy, dignity, and reputation through damage awards that were both compensatory and punitive in nature.

C. Constitutional Convention Records

So what of the framers? What did they have to say? Not much. The first thing to be learned from the drafting and ratification history of the states' search and seizure provisions is that the history is sparse. Many states engaged only in brief, seemingly trivial discussion about the grammar of the provision.

Alabama's most recent constitutional convention, held in 1901, for example, simply readopted the provision adopted in the original 1819 constitution. This is the full extent of the discussion during the 1819 convention:

> Section Six was then read as follows:
>
> Sec. 6. - That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrant shall issue to search any place or to seize any person or thing without probable cause, support by oath or affirmation.
>
> MR. LOMAX - I move the adoption of that section.
>
> MR. DUKE - I would like to ask the chairman a question. What was the object of changing the word home to house?
>
> MR. LOMAX - To correct a misprint in that copy you have in your hand. The word in the Constitution was house, and in printing that particular copy it was printed home.
>
> Upon a vote being taken the section was adopted.[189]

Similarly, the Nevada Convention engaged only in minor semantic debates over Nevada's search and seizure clause.[190] There was no debate over the substance of the provision. The only discussion of Minnesota's search and seizure provision consisted of a brief report from the "Committee on Phraseology and Revision" to the effect that "the letter 's'

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[189] ALABAMA TERRITORIAL CONVENTION, 1819, JOURNAL OF THE CONVENTION OF THE ALABAMA TERRITORY 1644 (Washington D.C., Statute Law Book Co. 1909).

[190] *See* ANDREW J. MARSH, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 783–84 (F. Eastman 1866).

was stricken off the words 'oaths' and 'affirmations.'"[191] From there, no other debate or discussion occurred as to that provision, and it was adopted by the convention.[192] In Montana, the only debate involved the addition and removal of superfluous language.[193] In Idaho, only minimal discussion occurred. There was a motion to insert probable cause language,[194] a failed motion to change the word "unreasonable" to "unlawful,"[195] and the vote to adopt the finalized provision.[196] In Iowa, there was only an amendment to strike out an apparently erroneous use of the word "papers" and to insert the word "person" in the portion referring to particularity of warrants.[197]

But these discussions seem like treasure troves compared to conventions like Utah's, where "[article I,] section 14 was read and passed without amendment."[198] The same goes for Colorado,[199] Florida,[200] Georgia,[201] Kansas,[202] Michigan,[203] North and South Dakota,[204] New York,[205] and

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[191] FRANCIS H. SMITH, DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION 574 (E.S. Goodrich, Territorial Printer 1857).

[192] *Id.* at 623, 628.

[193] PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION 99 (State Publishing Co. 1921).

[194] *See* 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO OF 1889, at 371–72 (I.W. Hart ed., Caxton Printers Ltd. 1912).

[195] *See id.* at 327.

[196] *See* 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO OF 1889, at 1635–36 (I.W. Hart ed., Caxton Printers Ltd. 1912).

[197] *See* W. BLAIR LORD, 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 118–19 (Luse, Lane & Co. 1857).

[198] 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION 319 (Star Printing Co. 1898) [hereinafter UTAH CONVENTION].

[199] *See* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875, at 523 (Smith-Brooks Press 1907).

[200] *See* JOURNAL OF PROCEEDINGS OF THE CONVENTION OF FLORIDA 28, 29, 134 (Dyke & Carlisle 1865) (only mentioning the search and seizure provisions as proposed and later adopted, with no other discussion).

[201] *See* A STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN ATLANTA GEORGIA, 1877, at 85 (Constitution Publishing Co. 1877) ("The section was agreed to as read.").

[202] *See* KANSAS CONSTITUTIONAL CONVENTION OF 1859, at 289 (Harry G. Larimer ed., Kansas State Printing Plant 1920) (noting that "Section 15 [the search and seizure provision] was read and passed").

[203] *See* JOSEPH H. BREWER, ET AL., PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 212 (Wynkoop Hallenbeck Crawford Co. 1907) ("THE CHAIRMAN: Are there any amendments to the first clause of Section 10? If not, it will be passed. (After a pause.) It is passed.").

[204] *See* OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA, at iv (1889) (only mentioning the search and seizure provision in the final version of the constitution); 1 DAKOTA CONSTITUTIONAL CONVENTION 11, 132, (Doane Robinson ed., Huronite Printing Co. 1907) (only making

Wyoming.[206] The fact is, it appears that state search and seizures provisions, by and large, were adopted and passed around the country with little to no discussion whatsoever regarding their meaning.[207] There are some exceptions, of course. Alaska is one state, for example, that had a significant amount of debate over its search and seizure provision, largely because of McCarthy-era concerns about wire-tapping and privacy issues.[208] But the overall trend is one of silence on the issue of what these provisions meant at all, let alone what the remedy would be for their violation.

Rather than being a source of historical disappointment, the scant discussion about these provisions actually tends to show a good deal of how the people saw this constitutional guarantee when we consider a couple factors. First, it is a well documented facet of state constitution making that "[s]tate constitutions borrow heavily from each other"[209] and often adhered to established constitutional norms. Commentators on one state constitution noted the common desire amongst framers to stick with the "ancient landmarks" already established at the time,[210] and that "[t]he constant appeal to the authority of other states is one of the most striking impressions one gains from reading the [convention] debates."[211] State

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mention of the search and seizure provision in reading the entire proposed Bill of Rights); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF SOUTH DAKOTA 132–33 (Brown & Saenger 1889) (same).

[205] *See* NATHANIEL H. CARTER, ET AL., PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, at 495 (E. & E. Hosford 1821) ("The fifth section, relative to unreasonable searches and seizures, was read and passed without amendment.").

[206] *See* JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING 718–28, 849 (The Daily Sun 1893).

[207] This is, of course, not a comprehensive list of state constitutional conventions. Many states have had more than one convention. And thus, while it is possible some states did discuss search and seizure provisions in more depth, the trend is one of silence.

[208] *See Alaska Constitutional Convention, January 6, 1956, Forty-Fifth Day*, STATE OF ALASKA, DEP'T OF LAW, http://www.law.state.ak.us/doclibrary/conconv/45.html (last visited Jan. 20, 2014); *Alaska Constitutional Convention, January 7, 1956, Forty-Sixth Day*, STATE OF ALASKA, DEP'T OF LAW, http://www.law.state.ak.us/doclibrary/conconv/46.html (last visited Jan. 20, 2014); *Alaska Constitutional Convention, January 9, 1956, Forty-Eighth Day*, STATE OF ALASKA, DEP'T OF LAW, http://www.law.state.ak.us/doclibrary/conconv/48.html (last visited Jan 20, 2014).

[209] Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 313 (2005).

[210] *See* Paul G. Cassell, *Search and Seizure and the Utah Constitution: The Irrelevance of the Antipolygamy Raids*, 1995 B.Y.U. L. REV. 1, 6–8 (1995).

[211] Martin B. Hickman, Utah Constitutional Law 72 (1954) (unpublished Ph.D. dissertation, University of Utah) (on file with author); *see also* Cassell, *supra* note 210, at 9 (quoting John J. Flynn, *Federalism and Viable State Government—The History of Utah's Constitution*, 1966 UTAH L. REV. 311, 324 (1966)).

constitutions often reflected "agreed-upon axioms of fundamental rights" and thereby "stimulated little debate,"[212] particularly in the area of "Fourth . . . Amendment freedoms."[213]

It is hard to find a state constitutional convention in which the constitutional practices of other states are not invoked. At times, it seems that the use of a provision by another jurisdiction was almost a prerequisite for adopting the provision in each state. For example, in Minnesota, delegates argued for corporate law provisions in their state constitution because they "ha[d] been tried [successfully] in the State of Michigan."[214] Minnesota framers also argued for a separation of powers provision in their constitution by invoking the wisdom of other states that have "insert[ed] such a provision as this into their Constitutions."[215] In Kansas delegates argued for a provision governing the electoral process for establishing new counties on the grounds that "such a provision [is in] the Constitution of other States."[216] When adopting its search and seizure provision, Nevada invoked the fact that California's constitution contained one.[217] Indiana delegates contended for various constitutional provisions found in the California and Kentucky constitutions, as well as those of "a half dozen other States."[218] In Utah, delegates noted "the experience and the work of constitution makers of all the other states" as being the source of constitutional inspiration and blueprint.[219] Some noted the desire "that the people of [Utah] have all the rights and all the privileges enjoyed by the people of the other states of this Union."[220] This same delegate fully expected that the Utah Constitution "[might] be looked to by those states which may follow [Utah] into the union as a model for them to pattern after."[221] These are common themes of state constitution making. A

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[212] GORDON MORRIS BAKKEN, ROCKY MOUNTAIN CONSTITUTION MAKING, 1850–1912, at 23 (Greenwood Press 1987).

[213] *Id.*

[214] SMITH, *supra* note 191, at 135 (arguing for corporate law provisions in the Minnesota constitution because "[i]t has been tried [successfully] in the State of Michigan. By the Constitution of that State, adopted in 1850, it is provided that 'Corporations may be formed under general laws but shall not be created by special act except for municipal purposes . . . .' Now that is the form which I would prefer to see adopted.").

[215] *Id.* at 197.

[216] KANSAS CONSTITUTIONAL CONVENTION OF 1859, *supra* note 202, at 139.

[217] MARSH, *supra* note 190, at 783 (citing California's search and seizure provision as a model).

[218] H. FOWLER, 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, 1850, at 1118 (WM. B. BURFORD PRINTING CO. 1933).

[219] 1 UTAH CONVENTION, *supra* note 198, at 11.

[220] *Id.* at 200.

[221] *Id.*

provision might be well accepted in other states and adopted with little or no discussion, at times the only discussion being that it had been adopted in another state.

But the likely reasons for the silence on search and seizure provisions become more apparent in light of the case law discussed in Part II.B. There was a substantial body of search and seizure, tort-driven case law being used all across the country from the early 1800s through the early 1900s. And there seems to have been little or no controversy about this regime being the way in which the right against unreasonable searches and seizures was enforced. It was "thoroughly well settled" that "a violation of [the constitutional provision prohibiting unreasonable searches and seizures] without reasonable ground therefor gives the injured party a right of action."[222] It stands to reason that this regime was so well known, and so accepted that it would have been seen simply as a staple of state constitutional law. So framers gave little attention to these provisions in their state constitutions and adopted the regime—one that was strikingly uniform—existent in the rest of the states. In this way, the original meaning of state search and seizure provisions is, with some possible exceptions as noted throughout this article, the same, despite the significant temporal distances between the ratifications of the several states' constitutions.

Looking at state search and seizure provisions through the lens of originalism suggests that these provisions did not provide for an exclusionary remedy, but a tort remedy. And this remedy was available to all the people of the state. Violations of one's property, privacy, dignitary, or reputation interests during an unreasonable search resulted in the accrual of a constitutional cause of action "vouchsafed" to each citizen. That citizen could then seek damages, compensatory and potentially punitive, for the harm caused to ensure that she is compensated and the constable deterred.

Importantly, a small minority of states has already re-recognized this important constitutional right under their own state constitutions. Courts in Connecticut,[223] Illinois,[224] Louisiana,[225] Maryland,[226] Mississippi,[227]

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[222] *Id.* at 380 (emphasis added).

[223] *See* Binette v. Sabo, 710 A.2d 688, 715 (Conn. 1998).

[224] *See* Newell v. City of Elgin, 340 N.E.2d 344, 349 (Ill. App. Ct. 1976).

[225] *See* Moresi v. State *ex rel.* Dep't of Wildlife & Fisheries, 567 So. 2d 1081, 1091–92 (La. 1990).

[226] *See Widgeon*, 479 A.2d at 930.

[227] *See* Mayes v. Till, 266 So. 2d 578, 580 (Miss. 1972) (recognizing right to at least nominal damages for unlawful entry and search by police).

Montana,[228] New York[229] and Oklahoma[230] have all found a private tort cause of action under their respective search and seizure provisions. While many of these courts leaned heavily on the U.S. Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[231] to justify their holdings, historical analysis played a significant basis in at least some of these decisions. For example, the Connecticut Supreme Court noted the "common-law antecedents to [its] state constitutional prohibitions against unreasonable searches and seizures," citing cases awarding damages in unreasonable search and seizure cases in Connecticut as far back as 1786.[232] Similarly, the Louisiana Supreme Court noted that

> [u]nder the common law of England, where individual rights, such as those protected by [Louisiana's search and seizure provision], were preserved by a fundamental document[,] . . . a violation of those rights generally could be remedied by a traditional action for damages. The violation of the constitutional right was viewed as a trespass, giving rise to a trespass action.[233]

The court then went on to hold,

> [c]onsidering the expression of the framers in the textual formula of [Louisiana's search and seizure provision], the history of the provision as recorded in the convention proceedings, and the strong resemblance between our state guaranty and that of the Fourth Amendment and its English constitutional law antecedents, we conclude that damages may be obtained by an individual for injuries or loss caused by a violation of [the search and seizure provision].[234]

The Maryland Court of Appeals similarly took an extensive look at history in concluding that Maryland's search and seizure provision provided a constitutional tort to vindicate its violation.[235] These decisions are justifiable on originalist grounds. And hopefully they represent the beginning of a welcome trend in state constitutional law.

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[228] *See* Dorwart v. Caraway, 58 P.3d 128, 137 (Mont. 2002).

[229] *See* Brown v. State, 652 N.Y.S.2d 223, 232–33 (recognizing that a constitutional tort has existed in New York since before the time of Judge Cardozo who explicitly contemplated that remedy in People v. Defore, 242 N.Y. 13, 19 (1938)).

[230] *See* Bosh v. Cherokee Cty. Bldg. Auth., 305 P.3d 994, 1001 (Okla. 2013) (recognizing private action for excessive force claims under state search and seizure provision).

[231] 403 U.S. 388 (1971).

[232] *Binette*, 710 A.2d at 715.

[233] *Moresi*, 567 So. 2d at 1091–92 (citing *Widgeon*, 479 A.2d 921).

[234] *Id.* at 1092–93.

[235] *Widgeon*, 479 A.2d at 924–27.

IV. CRITICISMS AND RESPONSES

There are, of course, some criticisms that could be leveled at the outcome described in this article. The most salient ones are likely to come from opposite ends of the criminal justice spectrum. On the one hand, the regime advocated for here might be cast as unfair to criminal defendants. It could be seen as undermining an important right of exclusion upon which defendants rely by replacing it with an ineffective deterrent—tort law. On the other side of the spectrum, the results of this article could be critiqued as being overly harsh on police officers who do not have the resources to answer in tort for even modest damages awards. This would, in turn, potentially deter police officers from doing their jobs and, perhaps, even from becoming police officers in the first place. I will address these two principal critiques.

A. Critiques from the Criminal Defendant Perspective

As to criminal defendants, the approach described in this article would undermine the exclusionary rule in state constitutions. It is highly unlikely that many, if any, state search and seizure provisions contemplated exclusion as an original matter. And adherence to original meaning would replace any current use of the exclusionary rule under a state constitution with a constitutional tort remedy instead. One criticism, then, is that this approach would strip criminal defendants of an important constitutional remedy—and therefore an important constitutional right.

There are several responses to this criticism. First, it is important to recognize that the approach advocated for in this article does *not* mean that criminal defendants would be losing the exclusionary rule. The Fourth Amendment, at least for now, still provides for an exclusionary remedy. In other words, at worst, criminal defendants would only be losing a marginal right to exclusion in those cases in which a state supreme court would decide that its state constitution protects more broadly than does the Fourth Amendment as interpreted by the U.S. Supreme Court.[236] Thus the impact of adopting the original meaning of state search and seizure provisions is not monumental in terms of what it takes away from criminal defendants because they can resort to the Fourth Amendment when needed. The second response concerns fairness. So long as fairness is up for discussion, the fact remains that the choice to read an exclusionary remedy into state

[236] *See, e.g.*, State v. Alston, 440 A.2d 1311, 1318–19 (N.J. 1981) (holding it is "beyond question" that the court may "afford the citizens of this State greater protection against unreasonable searches and seizure than may be required by the Supreme Court's interpretation of the Fourth Amendment").

search and seizure provisions makes a textually and historically unjustifiable decision to exclude all those who are unreasonably searched but who have nothing to hide in the first place. *This* is unfair. Those who have highly probative evidence of having committed a crime benefit *at the expense* of those who have done no wrong. This truly is a perverse arrangement and one which ought to be remedied and can be remedied by adopting the conclusions of this article.

Another critique from the criminal defendant's perspective is that tort remedies are actually ineffective as a deterrent. Thus, from this point of view the approach mapped out in this article would replace the exclusionary rule with a "cure" that is "worse than the disease."[237] The response here is two-fold. First, torts deter. Maybe not to the extent claimed by some law-and-economics theorists, but there is little reason to question that "sector-by-sector, tort law provides something significant by way of deterrence."[238] Courts have long recognized, as a driving policy of tort law, that torts deter the tortfeasor and potentially other potential tortfeasors.[239] Moreover, empirical research suggests that lawsuits against police officers, and

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[237] Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 61–62 (1994).

[238] Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 443 (1994); *see also* Adam D.K. Abelkop, *Tort Law as an Environmental Policy Instrument*, 92 OR. L. REV. 381, 452–53 (2013) (noting that in several areas related to environmental quality, "tort law can be an effective and often necessary policy instrument" because of its deterrent effect); Jason Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 35 (2007) (concluding that common law tort remedies "can effectively promote both restoration and deterrence" in the environmental quality arena); Thomas O. McGarity, *Regulation and Litigation: Complementary Tools for Environmental Protection*, 30 COLUM. J. ENVTL. L. 401, 402 (2005) (concluding that tort law and its deterrent effect is "critically necessary" for modern environmental protection); Bart S. Wilhoit, *Spoliation of Evidence: The Viability Of Four Emerging Torts,* 46 UCLA L. REV. 631, 662 (1998) ("It is generally accepted that the three fundamentals of tort law are morality, compensation, and deterrence.").

[239] *See, e.g.*, Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1173 (Conn. 2006) ("[T]he fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct . . . ."); Jones v. Reagan, 696 F.2d 551, 554 (7th Cir. 1983) ("Now it is true that tort law, including the law of constitutional torts, has a deterrent as well as a compensatory function. Indeed, it has long been one view that deterrence, accomplished through the setting of standards of conduct and the punishment by means of damage awards, compensatory and punitive, of those who deviate from them, is the main function of tort law."); Hannah v. Heeter, 584 S.E.2d 560, 566 (W. Va. 2003) (recognizing that the "foundations of tort law are" compensation, "morality and deterrence").

payouts as a result of those lawsuits, do have some positive impact on police department policies and therefore line officer behavior.[240]

The same cannot be said of the exclusionary rule. The literature criticizing the notion that the exclusionary rule deters is vast and has been around about as long as *Mapp v. Ohio*.[241] At very best, the scholarship on the deterrent effect of the exclusionary rule is at a stalemate. Some have concluded that there is a deterrent effect to the exclusionary rule.[242] Other studies, however, using the same techniques and larger sample sizes have concluded that "the exclusionary rule does not effectively deter police misconduct."[243] The Supreme Court has openly acknowledged that it is simply assuming the exclusionary rule deters.[244] The point is that it is far from clear that the exclusionary rule actually deters at all. Yet it seems thoroughly settled that torts do deter in a significant, if still imperfect, way. And if it is a question about whether tort law or exclusion is a better deterrent, it is telling that when asked about tort remedies, police officers rank them as the least preferable solution to illicit searches and seizures.[245] So it seems that at present tort law has the winning side of the deterrence argument, at least in the abstract.

And that is where a related critique comes in. This criticism is about the effectiveness of a tort remedy *practically* rather than theoretically speaking. After all, there are some significant differences between suing a private person in tort and suing a police officer. Critics of the tort method of search and seizure remedies have zeroed-in on these differences, concluding that tort suits against officers do not currently succeed and that using tort remedies is probably a fruitless endeavor.[246] For instance, Professor Wells notes that the "tort model falls short."[247] One of the principal reasons for this criticism is that the cluster of immunity doctrines surrounding constitutional tort litigation provides a "substantive shield against liability" and also procedural barriers that present a "formidable hurdle for the

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[240] *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 860–61 (2012).

[241] *See* 367 U.S. 643, 657; Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585 (2011); *see generally* OAKS, *supra* note 9.

[242] *See* Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987).

[243] L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 736 (1998).

[244] *See* Clancy, *supra* note 6, at 370 n.61.

[245] *See* Orfield, *supra* note 242, at 1053.

[246] *See, e.g.*, Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 114–15 (2003); Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 860 (1996); Maclin, *supra* note 237, at 61–62.

[247] Wells, *supra* note 246, at 860.

plaintiff."[248] Other scholars, such as Judge Calabresi and Professor Maclin have made similar critiques regarding the practical effectiveness of constitutional torts. All rely on § 1983 or *Bivens* suits to make the point.[249] This criticism of the tort model, that suits are ineffective practically because of immunity, fall short when applied to the constitutional tort described in this article.

The constitutional tort described in this article is self-executing and is therefore not likely subject to sovereign immunity in the first place.[250] Moreover, the doctrine of qualified immunity likely has no application either. Qualified immunity in § 1983 or *Bivens* actions means that an officer will be immune from suit unless the officer's "conduct violated a clearly established constitutional right."[251] In other words, only the clearest violations will be eligible for the compensatory and deterrence benefits deriving from a suit against the officer.[252] And scholarship on the subject "suggests that when introduced as a defense [qualified immunity] is highly successful."[253] Thus, the criticisms of the tort model described above are

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[248] *Id.*

[249] *See* Calbresi, *supra* note 246, at 114; Wells, *supra* note 246, at 860; Maclin, *supra* note 237, at 62.

[250] *See, e.g.*, Gray v. Va. Sec'y of Transp., 662 S.E.2d 66, 73 (Va. 2008) ("We hold that Article I, Section 5; Article III, Section 1; and Article IV, Section 1 [of the Virginia Constitution] are self-executing constitutional provisions and thereby waive the Commonwealth's sovereign immunity."); *Spackman*, 16 P.3d at 537 n.7 (noting that there is "no governmental immunity even in the absence of a legislative waiver" for takings claims, because those claims are self-executing (citing *Colman*, 795 P.2d at 630–35)); Jacobs v. City of Bunkie, 737 So. 2d 14, 19 (La. 1999) ("[C]onstitutional provisions that are not self-executing allocate power to the legislature requiring the legislature to enact supplemental legislation to carry the rule into effect."); *but see* Figueroa v. State, 604 P.2d 1198, 1206 (Haw. 1979) (holding that constitutional provision "which provides that all its provisions are 'self-executing to the fullest extent that their respective natures permit' does not constitute a waiver of sovereign immunity for money damages for constitutional deprivations").

[251] Pearson v. Callahan, 555 U.S. 223, 232 (2009).

[252] James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1615–17 (2011) ("Bivens claimants have been largely unsuccessful in securing a constitutional test of the legality of such controversial post-9/11 government policies as extraordinary rendition, military detention, and harsh interrogation practices at Guantanamo Bay .... The difficulty that alleged victims face in securing a resolution of their constitutional challenge to novel or unprecedented government action may be exacerbated by the immunity standard .... Thus, while the Constitution forbids the use of excessive force, for example, such claims may go to the jury only if previous decisional law put the officer on notice that the force in question would be regarded as excessive.") (citations omitted).

[253] Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 831 (2010); Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999) (concluding that when qualified immunity is raised at summary judgment, it is successful

probably quite valid in the context of *Bivens* of § 1983 suits. But, "[t]here was no such thing as 'good faith' immunity for offending officers at the time of the Founding."[254] Though one state court in the nineteenth century expressed a general notion that "[s]uits in damages against sheriffs, whose duties are delicate, are cautiously entertained, lest the efficiency of the law be impaired,"[255] that same court nonetheless upheld compensatory and punitive damages against the officer in that case.[256] And the available case law, so far as I can discern, never mentions anything about violations needing to be "clearly established" or that the good faith of the officer could shield him from liability. Just the opposite is true. For example, the Ohio Supreme Court held in *Simpson v. McCaffery*,[257] that "[a] trespass may be committed from a *mistaken* notion of power, and from an *honest motive* to accomplish some good end. *But the law tolerates no such abuse of power, nor excuses such act.*"[258] Thus, criticisms of the tort model using *Bivens* and § 1983 suits as an example fall short because the constitutional tort described in this article is not subject to the immunity doctrines that are likely the biggest drawback to federal lawsuits.

This frees constitutional torts under state search and seizure provisions from the modern-day barriers that have been judicially created and imposed. And it ensures that there will be deterrence. Thus, it is not the case that abandoning state exclusionary rules would mean no deterrence of police misconduct. A regime, like the one in place in most states now, that uses exclusion does *nothing* to deter in those cases in which police find no evidence. Adopting the conclusions of this article would fill that gap.

B. Critiques from the Law Enforcement Perspective and Responses

From the other side of the criminal justice spectrum—the law enforcement side—comes a critique about harshness to police officers.

80% of the time, and the other 20% of the time summary judgment could not be granted because of material issues of fact); *but see* Reinert, *supra* note 253, at 841 (concluding that success rates of *Bivens* actions are higher than previously assumed, finding a success rate of "about 30%").

[254] AMAR, *supra* note 58, at 69; *see also* Pfander, *supra* note 252, at 1614 (noting "the absence of qualified immunity at common law").

[255] *Frazier*, 24 La. Ann. at 341.

[256] *Id.*

[257] 13 Ohio 508, 522 (1844) (En Banc).

[258] *Id.* (emphasis added); *cf.* Goodman v. Condo, 12 Pa. Super. 456, 467 (Pa. Super. Ct. 1899) ("Where [the sheriff] . . . inflicts damage [to property] for the purpose of aiding him in [arresting a fleeing felon] he is liable personally unless the law has provided otherwise."); *see also* Pfander, *supra* note 252, at 1615 ("The officer's good faith . . . [was] no defense to a claim for compensatory damages [at common law].").

Under the approach advocated for in this article, law enforcement would probably not have any immunity protections. And that leads directly to a critique that personal liability will deter police officers from effectively doing their jobs (or even becoming law enforcement officers in the first place).[259] After all, individual officers are unlikely able to withstand even a single significant lawsuit.[260]

Currently, however, the ubiquitous practice of officer indemnification probably provides an answer to this critique. Since the time of the Founding, there has been a prevalent practice of indemnification of police officers. That was certainly the case for officers who, in good faith, unreasonably searched or seized someone and were later held liable.[261] And that practice holds true today. Recent scholarly research demonstrates that in practice, police officers nationwide "are virtually always indemnified" in § 1983 lawsuits.[262] Thus, as a practical reality, the fear of over-deterrence of law enforcement is probably not warranted. An officer would be found liable in tort. The state would then reimburse him. And the state could then conduct its own internal review and impose discipline measures as it saw fit. This would place the burdens on the party in the best position to avoid the injuries in the future—the state government.[263]

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[259] Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 640–41 (1982).

[260] *See, e.g.*, Pfander, *supra* note 252, at 1612 ("[P]ersonal liability can also threaten the financial security of well-meaning public officials.").

[261] *See, e.g.*, Amar, *supra* note 8, at 812 (noting that at the founding, the government "would typically be forced to indemnify officials who were merely carrying out government policy"); Pfander, *supra* note 252, at 1614 ("[T]he absence of qualified immunity at common law may reflect the widespread view that the government was obligated to indemnify its officers against any personal liability they incurred in the course and scope of their official duties.").

[262] *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 960–61 (2014) (conducting large-scale empirical study and concluding that "[l]aw enforcement officers employed by the forty-four largest jurisdiction . . . were personally responsible for just 0.02% of the over $730 million paid to plaintiffs in police misconduct suits between 2006 and 2011. Law enforcement officers employed by the thirty-seven small and mid-sized departments in my study paid nothing towards settlements and judgments entered against them during this period. Officers did not contribute to settlements and judgments even when they were disciplined, terminated, or criminally prosecuted for their misconduct.").

[263] *See* Pfander, *supra* note 252, at 1614 ("The existence of a relatively routine practice of indemnity has profound consequences for the incidence or burden of a finding of government liability. A practice of routine indemnity protects the official from personal liability, ensures victim compensation, and allocates the cost of constitutional torts to the government."); Schwartz, *supra* note 240, at 860–61.

V. CONCLUSION

Most state prohibitions on unreasonable searches and seizures represent—as a matter of original meaning—a self-executing, constitutional tort. They protect rights of property, privacy, reputation, and dignity. They allow for damages when those rights are violated, even punitive damages when necessary to deter. There are several relevant observations going forward.

First, more research into the original meaning of state search and seizure provisions is needed. This article has attempted to sketch the large generalities: that a tort right exists, that it exists in probably most of the states, and that it protects certain interests and provides for damages when they are violated. But there are clearly questions that each state's history and unique historical backdrop would answer, such as the question of what is or is not reasonable police conduct or whether there is a general warrant requirement.

Second, in addition to academic scholarship, *lawyers* should be engaging in this type of analysis in advocating for their clients. State constitutional law is generally considered second-tier to federal constitutional law because the former is under a stranglehold of the latter. State constitutional law is an under-researched, under-developed, under-theorized,[264] and over-ignored aspect of our Nation's constitutional tradition. One reason is the fact that lawyers often forget to brief state constitutional claims altogether or do so with a vision of the state constitution as an addendum to the Federal Constitution.[265] This need not be the case and should not be the case. An

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[264] James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992) ("[S]tate constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.").

[265] *See, e.g.*, State v. Santiago, 619 A.2d 1132, 1132 n. 1 (Conn. 1993) (noting that a defendant "claims a violation of the federal constitution only, abandoning any argument pertaining to the Connecticut constitution" which he had raised in the appellate court below); Leydon v. Town of Greenwich, No. CV 95 0143373 S, 1998 WL 395197, at *6 (Conn. Super. Ct. July 8, 1998) ("The plaintiff's state constitutional analysis, in his memoranda, involves only quoting article first, § 1, of the Connecticut constitution."); State v. Worwood, 164 P.3d 397, 405 (Utah 2007) ("[C]ursory references to the state constitution within arguments otherwise dedicated to a federal constitutional claim are inadequate. When parties fail to direct their argument to the state constitutional issue, our ability to formulate an independent body of state constitutional law is compromised. Inadequate briefing denies our fledgling state constitutional analysis the full benefit of the interested parties' thoughts on these important issues."); Trudell v. State, 71 A.3d 1235, 1245–46 (Vt. 2013) ("[P]laintiffs assert that the alteration in deadlines for independent candidates violates their rights under Articles 7 and 8 of the Vermont Constitution . . . . Because plaintiffs fail to present any substantive analysis or articulation as to why Article 7 should accord a different read on the constitutionality of the statute, we decline to address the claim."); State v.

important mechanism for making the original meaning of state search and seizure provisions the current and accepted meaning of state search and seizure provisions is litigation. Lawyers should raise these claims in the future.

Third, courts should recognize these rights. This article has endeavored to show that nearly all the states profess adherence to original meaning in state constitutional interpretation at least some of the time. Originalism appears to be a fundamental maxim in nearly all states. It is the most basic point of analysis in interpreting a state constitution. Courts should stay true to this model in interpreting their search and seizure provisions. They should recognize that the right of the people "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" is a right that belongs to all the people. An exclusionary paradigm unjustifiably rips this right away from the majority of the population. Courts have more than ample historical and legal support to recognize and begin enforcing these important rights. Some states have already done so. The rest should follow.

Fourth, originalism is not simply a smoke-screen for conservative policy outcomes.[266] Granted, the position taken in this article weakens a state-based exclusionary rule (thus being arguably more pro-police). But, at the same time, this article advocates for a much broader right to sue police officers for unreasonable behavior. There is no qualified immunity. Thus, the conclusions of this article help show how originalism can lead to nuanced outcomes. Faithfully applied, sometimes originalism will lead to results that align with conservative policy stances, and sometimes it will not.[267] That is as it should be.

Finally, the approach taken by this article shows why and how state constitutional law is still relevant. In the field of Fourth Amendment law, the exclusionary rule is likely here to stay. There are significant reliance interests that have been built up around the country since *Mapp* was

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Lafountain, 499 A.2d 796, 796 (Vt. 1985) ("Defendant has squarely raised a question of first impression: Is a 'jailhouse interrogation' presumptively custodial under the provisions of the Vermont Constitution, ch. 1, art. X, thereby requiring prophylactic '*Miranda* warnings' by police officials? Neither party, however, has presented any substantive analysis or argument on this question. This constitutes inadequate briefing, and we decline to address the state constitutional question presented in this case.").

[266] *See generally* Keith E. Whittington, *Is Originalism Too Conservative?* 34 HARV. J.L. & PUB. POL'Y 29 (2011).

[267] *Compare Hernandez*, 268 P.3d at 824–25 (expressly relying on the original meaning of the Utah Constitution to extend rights to a preliminary hearing to certain classes of criminal defendants), *with* Am. Bush v. City of South Salt Lake, 140 P.3d 1235, 1240 (Utah 2006) (expressly relying on the original meaning of the Utah Constitution to hold that nude dancing was not a protected form of expression).

decided. Even if the Supreme Court were willing to consider overruling it,[268] the reliance interests involved would likely persuade the Court to stay with the status quo. Examples of similar behavior abound, from the Commerce Clause,[269] to the Privileges or Immunities Clause,[270] to the *Miranda* context.[271] What this means, then, is that we are not only stuck with the exclusionary rule under the Fourth Amendment, but we are also stuck with its perverse remedial gap.[272] That is where state constitutional law comes into play, or at least can and should come into play. Returning to the original meaning of state search and seizure provisions can fill that gap. It can ensure more comprehensive attention to the rights of property, privacy, dignity, and reputation that, at present, have no satisfactory enforcement mechanism. The federal exclusionary rule will be there for criminal defendants to rely on, but state provisions can provide an important supplement in protecting the rights of everyone, not just criminal defendants.

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[268] *See* Clancy, *supra* note 6, at 370 n.61.

[269] Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 702 (2000) ("[A]lthough the Court was willing to breathe some new life into the Commerce Clause's restriction on federal legislative power in *United States v. Lopez*, at least two Justices suggested that the reliance interests advanced by the doctrine of stare decisis prevented them from going further and unraveling the bulk of the Court's expansive Commerce Clause precedents.") (citation omitted).

[270] Kermit Roosevelt III, *What if* Slaughter-House *Had Been Decided Differently?* 45 IND. L. REV. 61, 62 (2011) (noting Justice Scalia's skepticism about, and ultimate refusal to overrule in, the *Slaughter-House Cases* in *McDonald v. City of Chicago*).

[271] *See* Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in* Dickerson, 99 MICH. L. REV. 898, 898 (2001).

[272] *See* Amar, *supra* note 8, at 812.

APPENDIX A

ALABAMA: *See, e.g.*, Parker v. Amerson, 519 So. 2d 442, 443 (Ala. 1987) ("When construing the Constitution of Alabama, the primary purpose of this court is to ascertain and then effectuate the framers' intent."); Ellsberry v. Seay, 3 So. 804, 805 (Ala. 1888) ("The primary object of inquiry is the meaning and intent of the framers of the constitution, and of the people in adopting it, as manifested by the terms employed, when considered in connection with the prior and existing state of things."); Nugent v. State, 18 Ala. 521, 523–24 (Ala. 1850) (expressly interpreting the Alabama Constitution, article V's term "inferior court" according to the "sense that the framers of our constitution used the words inferior courts" rather than other potential definitions of the time).

ALASKA: *See, e.g.*, Alaska Pub. Interest Research Grp. v. State, 167 P.3d 27, 34 (Alaska 2007) ("In interpreting the [Alaska] constitution, 'we adopt a reasonable and practical interpretation in accordance with common sense based upon the plain meaning and purpose of the provision and the intent of the framers.'") (internal quotation marks omitted); Brooks v. Wright, 971 P.2d 1025, 1028 (Alaska 1999) (looking "to the meaning that the voters would have placed on [the] provision" and "the intent of the framers for guidance in interpreting [article XII, § 11 of the Alaska Constitution]"); Wade v. Nolan, 414 P.2d 689, 694–96, 698–701 (Alaska 1966) (relying on convention notes and debates to determine the meaning of article VI and article XIV, § 2 of the Alaska Constitution).

ARIZONA: *See, e.g.*, Cain v. Horne, 202 P.3d 1178, 1181 (Ariz. 2009) ("In interpreting a[n Arizona] constitutional provision, our primary purpose is to effectuate the intent of those who framed the provision.") (internal quotation marks omitted); Jett v. City of Tucson, 882 P.2d 426, 430 (Ariz. 1994) ("When interpreting the scope and meaning of a constitutional provision, we are guided by fundamental principles of constitutional construction. Our primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it."); *cf.* State v. Osborne, 125 P. 884, 892 (Ariz. 1912) (noting that rule of constitutional construction that each clause of a constitution should be given meaning exists "so that intent of the framers may be ascertained and carried out").

ARKANSAS: *See, e.g.*, Foster v. Jefferson Cty. Quorum Court, 901 S.W.2d 809, 816 (Ark. 1995) ("Our primary goal in construing and interpreting a constitutional provision is to ascertain and give effect to the

intent of the Arkansas people."); Berry v. Gordon, 376 S.W.2d 279, 287 (Ark. 1964) ("[I]n construing . . . Constitutional provisions, it is the duty of the courts to ascertain and give effect to the intent of the framers and to the people who adopted it . . . ."); State v. Scott, 9 Ark. 270, 271 (1849) (Walker, J., concurring) ("In determining the intention of the framers of the amendment [to the Arkansas Constitution], we must keep in view the constitution as it stood at the time the amendment was made.").

CALIFORNIA: *See, e.g.*, Steinhart v. Cty. of Los Angeles, 223 P.3d 57, 71 (Cal. 2010) ("[O]ur task is to effectuate the voters' intent in adopting article XIII A . . . . The words used in a [constitutional provision] must be taken in the ordinary and common acceptation, because they are presumed to have been so understood by the framers and by the people who adopted the provision.") (second alteration in original) (internal quotation marks omitted); State v. San Luis Obispo Sportsman's Assn., 584 P.2d 1088, 1091 (Cal. 1978) ("The words 'public lands' must be interpreted to give effect to the intent of the voters in adopting this constitutional amendment."); Cohen v. Barrett, 5 Cal. 195, 203 (1855) ("[T]he Constitution should be construed with reference to its general scope and intent, and the design of its framers . . . .").

COLORADO: *See, e.g.*, People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1238 (Colo. 2003) (en banc) ("In construing our constitution, our primary task is to give effect to the framers' intent."); People ex rel. Parish v. Adams, 73 P. 866, 868 (Colo. 1903) ("[I]t [is] the duty of every member of the court to give effect to [a constitutional provision] in accordance with the intent of its framers, as far as it can be done consistent with the language in which that intent has been manifested.").

CONNECTICUT: *See, e.g.*, State v. Colon, 864 A.2d 666, 796 (Conn. 2004) (looking to "Connecticut precedents and any historical insight into the intent of our constitutional forebears"); Dudley v. Deming, 34 Conn. 169, 174 (1867) (referencing "the intention of the framers of the [Connecticut] constitution" in determining court's appellate jurisdiction); Goddard v. State, 12 Conn. 448, 453–455 (1838) (relying on the understanding of the words "complaint," "indictment," and "information" found in contemporaneous dictionaries, commentaries, and "common parlance" "all of which must have been well known to those who framed [the] constitution" to hold that crimes brought by complaint before magistrates were not entitled to the right of jury trial).

DELAWARE: *See, e.g.*, Claudio v. State, 585 A.2d 1278, 1290–1301 (Del. 1991) (engaging in lengthy historical analysis of Delaware's right to trial by jury); Forbes v. State, 43 A. 626, 628 (Del. 1899) (referencing the intentions of "the framers of [article IV, section 1 of the Delaware Constitution]" in determining the continuing jurisdiction of a lower court after the ratification of Delaware's 1887 Constitution).

FLORIDA: *See, e.g.*, Crist v. Florida Ass'n of Criminal Def. Lawyers, Inc., 978 So. 2d 134, 140 (Fla. 2008) ("[T]his Court endeavors to construe a constitutional provision consistent with the intent of the framers and the voters.") (internal quotation marks omitted); Zingale v. Powell, 885 So. 2d 277, 282 (Fla. 2004) (quoting Gray v. Bryant, 125 So. 2d 846, 852 (Fla. 1960)) ("The fundamental object to be sought in construing a constitutional provision is to *ascertain the intent of the framers* and the provision must be construed or interpreted in such manner as to *fulfill the intent of the people,* never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied."); State *ex rel.* Bayer v. Gardner, 22 Fla. 14, 21 (1886) ("Had the framers of this amendment intended to put such a limitation upon the Legislature, they would have defined it. We see no evidence of any such purpose having been in their minds."); State *ex rel.* Weeks v. Gamble, 13 Fla. 9, 14-15 (1869) ("[A]ny construction of the [Florida] Constitution which restricts by implication the right to exercise the elective franchise in the selection of [the Lieutenant Governor by the people], and extends executive power in that direction, is inconsistent with the intent and purpose of the framers of the Constitution in creating [the office of the Lieutenant Governor].").

GEORGIA: *See, e.g.*, Neal v. State, 722 S.E.2d 765, 772 (Ga. 2012) (holding that "the constitutional history of the 1983 Constitution makes clear that the framers intended for the division of jurisdiction between the two appellate courts to remain unchanged . . . ."); Turman v. Cargill, 54 Ga. 663, 667 (1875) (invoking the "intent of the framers" of the Georgia Constitution in holding constitutional a law that gave appellate jurisdiction to superior courts to hear cases from justice courts for claims of more than $50.00); Gilbert v. Thomas, 3 Ga. 575, 579 (1847) (holding that "if the term '*civil cases*,' as used in [the Georgia Constitution], embraced equity cases, it follows that *equity jurisdiction* was vested in the Inferior, to the exclusion of the Superior Courts, an absurdity that no one will impute to the authors of the constitution").

HAWAI'I: *See, e.g.*, State *ex rel.* Louie v. Hawai'i Gov't Emps. Ass'n, AFSCME Local No. 152, AFL-CIO, 328 P.3d 394, 422 (Haw. 2014) (quoting State ex rel. Amemiya v. Anderson, 545 P.2d 1175, 1181 (Haw. 1976)) ("[W]hen faced with a constitutional question, 'it is the duty of the court to ascertain and declare the intent of the framers of the Constitution . . . .'"); Cty. of Hawai'i v. Ala Loop Homeowners, 235 P.3d 1103, 1116 (Haw. 2010) (quoting Hirono v. Peabody, 915 P.2d 704, 706 (Haw. 1996)) ("[W]e have long recognized that the Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent."); Hawai'i Gov't Employees' Ass'n, Am. Fed'n of State, Cty. & Mun. Emps., Local 152, AFL-CIO v. Maui, 576 P.2d 1029, 1039 (Haw. 1978) ("We must recognize that the fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and the people adopting it.").

IDAHO: *See, e.g.*, Idaho Press Club, Inc. v. State Legislature, 132 P.3d 397, 399 (Idaho 2006) (quoting Williams v. State Legislature, 722 P.2d 465, 467-68 (Idaho 1986)) ("In construing the constitution, the primary object is to determine the intent of the framers."); Taylor v. State, 109 P.2d 879, 880 (Idaho 1941) ("The presumption is that words used in a constitution are to be given the natural and popular meaning in which they are usually understood by the people who adopted them."); Fletcher v. Gifford, 115 P. 824, 826 (Idaho 1911) (interpreting a constitutional amendment that contained a scrivener's error by relying on the "intention" and "understanding" of the people of Idaho who were presented with a version not containing the error).

ILLINOIS: *See, e.g.*, People v. Fitzpatrick, 986 N.E.2d 1163, 1169 (Ill. 2013) ("[W]e look only to the intent of the drafters, the delegates, and the voters in adopting the Illinois Constitution . . . ."); Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 931 (Ill. 2010) ("[I]n the end, it is the intent of the framers of the Illinois Constitution of 1970 and those who adopted it which controls our interpretation of its provisions, including whether those provisions are to be interpreted more expansively than federal law."); Hills v. City of Chicago, 60 Ill. 86, 89-90 (1871) ("The first and cardinal rule [in interpreting the Illinois Constitution] is, that we must so construe it as to give effect to the intent of the people in adopting it. This rule nobody will question.").

INDIANA: *See, e.g.*, Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516, 519 (Ind. 2009) ("Interpreting our Constitution involves a search for the

common understanding of both those who framed it and those who ratified it."); Ajabu v. State, 693 N.E.2d 921, 929 (Ind. 1998) (quoting Boehm v. Town of St. John, 675 N.E.2d 318, 321 (Ind. 1996)) (noting that in interpreting the Indiana Constitution, the court will look to "the language of the text in the context of the history surrounding its drafting and ratification . . . ."); Cory v. Carter, 48 Ind. 327, 342 (1874) ("One of the cardinal rules of construction is, that courts shall give effect to the intent of the framers of the [constitution], and of the people in adopting it.").

IOWA: *See, e.g.*, Homan v. Branstad, 812 N.W.2d 623, 629 (Iowa 2012) ("In construing the item-veto provision [of the state constitution], our mission is to ascertain the intent of the framers."); Rants v. Vilsack, 684 N.W.2d 193, 199 (Iowa 2004) ("Our purpose in this process is to ascertain the intent of the framers of our constitution."); Dist. Twp. of City of Dubuque v. City of Dubuque, 7 Iowa 262, 275 (1858) ("We remark first, that the great object and office of all rules or maxims of interpretation is to discover the true intention of the law or constitution. This once certainly and clearly ascertained, courts are bound to obey it, however much they may doubt its wisdom or policy.").

KANSAS: *See, e.g.*, State *ex rel.* Stephan v. Parrish, 887 P.2d 127, 133 (Kan. 1994) (quoting State v. Nelson, 502 P.2d 841, 846 (Kan. 1972)) ("The constitution must be interpreted and given effect as the paramount law of the state, according to the spirit and intent of its framers."); Hunt v. Eddy, 90 P.2d 747, 750 (Kan. 1939) ("The fundamental principle of constitutional construction is to give effect to the intent of the *framers* of the organic law and *of the people adopting it.*") (emphasis added); *cf.* Locknane v. Martin, McCahon 60, 64, 67 (Kan. Terr. 1858) (noting that the territory's organic act has "the force and effect of a constitution" and noting that the "proper legal rules of construction" were to ascertain "the intent of the framers of the organic act").

KENTUCKY: *See, e.g.*, Legislative Research Comm'n v. Fischer, 366 S.W.3d 905, 913 (Ky. 2012) (quoting Grantz v. Grauman, 30 S.W.2d 364, 367 (Ky. 1957)) ("Another rule of constitutional construction is to give effect to the intent of the framers of the instrument and of the people adopting it."); Fletcher v. Graham, 192 S.W.3d 350, 358 (Ky. 2006) (addressing "the debates of the constitutional convention [of Kentucky]" to show that the court's conclusion "gives effect to the intent of the framers of Kentucky's constitution" even though it was not entirely "necessary because the language of Section 77 is clear . . . .").

LOUISIANA: *See, e.g.*, Retired State Emps. Ass'n v. State, 119 So. 3d 568, 575 (La. 2013) ("[T]he function of a court in construing constitutional provisions is to ascertain and give effect to the intent of the people who adopted it."); *In re* Office of Chief Justice, Louisiana Supreme Court, 101 So. 3d 9, 15 (La. 2012) (same); Maxent v. Maxent, 1 La. 438, 446 (1830) ("[M]y aim has been, in common I am sure with the other members of the court, to seek for the true intent and meaning of the framers of the constitution.").

MAINE: *See, e.g.*, League of Women Voters v. Sec'y of State, 683 A.2d 769, 772–73 nn.7-8 (1996) (Me. 1996) ("We find nothing in the constitutional debates in Maine to suggest an intent on the part of the framers to make constitutional amendment the soles means of enacting qualifications for legislative office . . . . In the absence of any evidence of intent by the framers to render these qualifications exclusive, we decline to find the chosen phraseology of the amendment determinative."); Morrison v. McDonald, 21 Me. 550, 555 (1842) ("[W]e cannot bring our minds to the conclusion that a Recorder is, in the sense contemplated in the Constitution, a judicial officer. It seems evident, that the framers of that instrument had in view those, who to a general intent and purpose were such, and not those who were incidentally and casually entrusted with the exercise of some attribute of a judicial character.").

MARYLAND: *See, e.g.*, State Bd. of Elections v. Snyder *ex rel.* Snyder, 76 A.3d 1110, 1123 (Md. 2013) ("Our task in matters requiring constitutional interpretation is to discern and then give effect to the intent of the instrument's drafters and the public that adopted it."); Bernstein v. State, 29 A.3d 267, 279 (Md. 2011) (ruling against a party, in part, because his "construction of the [constitution] conflicts with the clearly expressed intent of its framers"); Thomas v. Owens, 4 Md. 189, 225 (1853) ("In the construction of [the constitution] the whole paper ought to be considered, that the will of its framers may be truly and accurately ascertained; the objects contemplated and the purposes to be subserved should be constantly kept in view, and the language used interpreted in reference to the manifest intent.").

MASSACHUSETTS: *See, e.g.*, Miller v. Sec'y of Commonwealth, 697 N.E.2d 123, 125–28 (Mass. 1998) (relying heavily on the convention debates from the 1917–18 Massachusetts constitutional convention in interpreting the referendum power under the state constitution); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 547-48 (Mass. 1993) ("We have reviewed at great length the history of public education in

Massachusetts so that we might glean an understanding of the meaning of C. 5, § 2. In doing so, we have considered the history of the colony, the province, the condition and concepts relating to education underlying the drafting of the Constitution of the Commonwealth and, in particular, C. 5, § 2. We have examined the intention of the framers, the language and the structure of the Constitution, the ratification process by the towns and also the words, acts, and deeds of contemporaries of that time, and, especially the views, addresses, and statutes of early Governors (magistrates) and the Legislatures."); Commonwealth v. Harriman, 134 Mass. 314, 314–29 (1883) (interpreting Massachusetts constitution provision that provides for methods of judicial removal and relying on convention debates from 1780 and 1820).

MICHIGAN: *See, e.g.*, *In re* Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 806 N.W.2d 683, 693 (Mich. 2011) ("When reviewing constitutional provisions, the objective of such review is to effectuate the intent of the people who adopted the constitution. The lodestar principle is that of 'common understanding,'" the sense of the words used that would have been most obvious to those who voted to adopt the constitution."); Michigan Dep't of Transp. v. Tomkins, 749 N.W.2d 716, 721 (Mich. 2008) ("When interpreting our state constitution, this Court seeks the original meaning of the text to the ratifiers, the people, at the time of ratification."); Green v. Graves, 1 Doug. 351, 352–372 (Mich. 1844) (interpreting MICH. CONST. art. XII, § 2 by consistent reference to the understanding of "the framers of the constitution").

MINNESOTA: *See, e.g.*, State v. Lessley, 779 N.W.2d 825, 834 (Minn. 2010) ("We strive to ascertain and give effect to the intent of the constitution as indicated by the framers and the people who ratified it. When doing so, we look to the history and circumstances of the times and the state of things existing when the constitutional provisions were framed and ratified in order to ascertain the mischief addressed and the remedy sought by the particular provision."); Lyons v. Spaeth, 20 N.W.2d 481, 484 (Minn. 1945) ("The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it."); Minnesota & Pac. R.R. Co. v. Sibley, 2 Minn. 13, 20, 26 (1858) ("In construing a statute or constitutional provision, the great object is to ascertain and interpret so as to carry out the intention of the lawgiver .... In construing this provision of the constitution, we may also look to the reason which existed for it, the motives which led to its passage, the object contemplated by it,

and the circumstances surrounding its inception, as channels through which we are to arrive at the intention of its framers.").

MISSISSIPPI: *See, e.g.*, Chevron U.S.A., Inc. v. State, 578 So. 2d 644, 649 (Miss. 1991) (quoting State v. Hall, 187 So. 861, 863 (Miss. 1966)) ("[The Constitution] should not be changed, expanded or extended beyond its settled intent and meaning by any court to meet daily changes in the mores, manners, habits, or thinking of the people. The power to alter is the power to erase. Such changes should be made by those authorized so to do by the instrument itself-the people."); Moore v. Gen. Motors Acceptance Corp., 125 So. 411, 412 (Miss. 1930) ("It is a familiar rule that the fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of those who adopted it . . . ."); Hawkins v. Bd. Of Supervisors of Carroll Cty., 50 Miss. 735, 759 (1874) ("The object of construction applied to the constitution is to give effect to the intent of its framers, and the people in adopting it. This intent is to be found in the instrument itself."); Green v. Weller, 32 Miss. 650, 678 (High Ct. Err. & App. 1856) ("[W]e have to ascertain the sense in which these words were intended to be used by the framers of the [state constitution.]").

MISSOURI: *See, e.g.*, Sch. Dist. of Kansas City v. State, 317 S.W.3d 599, 605 (Mo. 2010) (en banc) ("The fundamental purpose of constitutional construction is to give effect to the intent of the voters who adopted the Amendment."); Keller v. Marion Cty. Ambulance Dist., 820 S.W.2d 301, 302 (Mo. 1991) (en banc) (same); State *ex rel.* Jackson v. Emerson, 39 Mo. 80, 89 (1866) ("In construing [the constitution], the true intention of the framers must be arrived at if possible . . . .").

MONTANA: *See, e.g.*, Inquiry Concerning Complaint of Judicial Standards Comm'n v. Not Afraid, 245 P.3d 1116, 1121 (Mont. 2010) (quoting Keller v. Smith, 553 P.2d 1002, 1006 (Mont. 1976)) ("In determining the meaning of a given [constitutional] provision, the intent of the framers is controlling."); Woirhaye v. Montana Fourth Judicial Dist. Court, 972 P.2d 800, 802 (Mont. 1998) ("In interpreting a constitutional provision, the intent of the framers of the constitutional provision controls its meaning."); Lloyd v. Silver Bow County, 28 P. 453, 455–56 (Mont. 1891) (invoking "the intent of the framers of the constitution . . . .").

NEBRASKA: *See, e.g.*, State *ex rel.* Johnson v. Gale, 734 N.W.2d 290, 303 (Neb. 2007) ("It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto."); Nebraska Coal. for Educ. Equity & Adequacy v.

Heineman, 731 N.W.2d 164, 180 (Neb. 2007) (analyzing drafting history of state constitutional provision and invoking the "framers' intent"); *In re* Applications A-16027, 495 N.W.2d 23, 32 (Neb. 1993) ("[E]ffect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions."), *opinion modified on denial of reh'g sub nom*; *In re* Applications A-16027, 499 N.W.2d 548 (Neb. 1993); Schaller v. City of Omaha, 36 N.W. 533, 535 (Neb. 1888) ("It is the duty of this court to give [the state constitution] such a construction as will carry out the intent of the framers, and the people who adopted it . . . .").

NEVADA: *See, e.g.*, Halverson v. Miller, 186 P.3d 893, 896 (Nev. 2008) (invoking "[t]he intent of the framers of the [Nevada] constitution"); Guinn v. Legislature of State of Nev., 76 P.3d 22, 29 (Nev. 2003) ("In construing the Constitution, our primary objective is to discern the intent of those who enacted the provisions at issue, and to fashion an interpretation consistent with that objective."); State v. Gorin, 6 Nev. 276, 276–80 (1871) (invoking the framers' intent); Brown v. Davis, 1 Nev. 409, 413 (1865) ("The language employed in the Constitution is clear and explicit, and whatever may have been the intention of its framers, we cannot look beyond that language when it is free from all ambiguity.").

NEW HAMPSHIRE: *See, e.g.*, Bd. of Trs. of New Hampshire Judicial Ret. Plan v. Sec'y of State, 7 A.3d 1166, 1171 (N.H. 2010) (quoting Lake Cty. v. Rollins, 130 U.S. 662, 671 (1889)) ("When our inquiry requires us to interpret a provision of the constitution, we must look to its purpose and intent. The first resort is the natural significance of the words used by the framers. 'The simplest and most obvious interpretation of a constitution, if in itself sensible, is most likely to be that meant by the people in its adoption.'") (citation omitted); Op. of the Justices, 712 A.2d 1080, 1086 (N.H. 1998) ("The court's duty is to safeguard constitutional mandates by interpreting the plain and common meaning of the constitution in light of the framers' purpose and intent.") (citation omitted); Rich v. Flanders, 39 N.H. 304, 356 (1859) (construing words of state constitutional provision "in the sense in which they must have been understood and employed by the framers of the constitution" as well as holding that article 23 of the state constitution's bill of rights incorporated the "long established and universally recognized principle of the common law" because that was the principle "which the framers of our constitution intended to declare and enforce" through that language).

NEW JERSEY: *See, e.g.*, DePascale v. State, 47 A.3d 690, 698 (N.J. 2012) (relying on the "intent and purpose" of the framers of the New Jersey Constitution of 1947 and examining the proceedings of the constitutional convention in determining the meaning of New Jersey's "No-Diminution Clause"); Cambria v. Soaries, 776 A.2d 754, 761 (N.J. 2001) (invoking the "framers' intent" and relying on debates from the 1844 New Jersey Constitutional convention in interpreting N.J. CONST. art. IX, para. 5); *In re* Forsythe, 450 A.2d 499, 502 (N.J. 1982) ("An inquiry into the intent of the framers, as illuminated by historical commentary, is particularly relevant [in state constitutional analysis]."); State v. De Lorenzo, 79 A. 839, 842 (N.J. Ct. Err. 1911) ("[T]he existence of a constitutional limitation upon the legislative power is to be established and defined by words that are found written in that instrument, and not by reference to some spirit that is supposed to pervade it or to underlie it, or to overshadow the purposes and provisions expressed in its written language.").

NEW MEXICO: *See, e.g.*, State v. Lynch, 74 P.3d 73, 80 (N.M. 2003) ("The most important consideration for us is that we interpret the constitution in a way that reflects the drafters' intent."); *In re* Generic Investigation into Cable Tel. Serv. in State of N.M., 707 P.2d 1155, 1158 (N.M. 1985) ("In construing the New Mexico Constitution, this Court must ascertain the intent and objectives of the framers."); Flaska v. State, 177 P.2d 174, 185 (N.M. 1946) ("The intent of the framers of the amendment to the Constitution in question, and the people who adopted it, of course must control."); State *ex rel.* Ward v. Romero, 125 P. 617, 620-21 (N.M. 1912) ("We do not desire to be understood as holding that the constitutional convention intended to include within the designation of 'state officers' all the peace officers of the state, or even judges of probate courts and justices of the peace, because by common understanding of the people, and in a popular sense, and by reason of prior legislative enactments and classification, many of these officials were evidently considered and dealt with as purely local officers, and, where it is evident that the Constitution, in dealing with these officials, did so in the popular sense, we should give effect to the intention.").

NEW YORK: *See, e.g.*, SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1121, 1213 n.6 (N.Y. 1985) (noting that "[t]he Reports of the Proceedings and Debates at the 1821 Convention plainly indicate that the New York Bill of Rights, like its Federal counterpart, was intended by its drafters to serve as a check on governmental, not private, conduct," and thus concluding that New York's free speech provision included a state action component); Newell v. People *ex rel.* Phelps, 7 N.Y. 9, 119 (1852) ("It is the plain

language of the constitution which brings me to this result, and here, as throughout, I am governed by the rule laid down by the supreme court of the United States, in *Gibbons v. Ogden* (9 *Wheat.* 184), that as men whose intentions require no concealment generally employ the words which most aptly and directly express the ideas they intend to convey, the framers of the constitution must be understood to have employed words in their natural sense, and to have intended what they have said.").

NORTH CAROLINA: *See, e.g.*, Maready v. City of Winston-Salem, 467 S.E.2d 615, 620 (N.C. 1996) ("It is the duty of this Court to ascertain and declare the intent of the framers of the Constitution and to reject any act in conflict therewith."); Trs. of Univ. of N.C. v. Foy, 5 N.C. 58, 81–89 (N.C. Ct. of Conf. 1805) (making multiple references to the understanding of the "framers of the [North Carolina] constitution" in interpreting the application of the North Carolina Bill of Rights § 10 to the University of North Carolina).

NORTH DAKOTA: *See, e.g.*, City of Bismarck v. Fettig, 601 N.W.2d 247, 250 (N.D. 1999) ("When interpreting the [North Dakota] Constitution, it is our overriding objective to give effect to the intent and purpose of the people adopting the constitutional statement."); Barry v. Truax, 99 N.W. 769, 771 (N.D. 1904) ("Our duty in this case is therefore to ascertain whether it was the understanding of the framers of the Constitution, and the people who adopted it, that the right of trial by jury included, as one of its substantial elements, an absolute right to a trial by a jury of the county where the offense was committed.").

OHIO: *See, e.g.*, State v. Carsell, 871 N.E.2d 547, 551 (Ohio 2007) (quoting State v. Jackson, 811 N.E.2d 86, ¶ 14) ("When we construe constitutional provisions, the intent of the framers is controlling."); State v. Jackson, 811 N.E.2d 68, 71 (Ohio 2004) ("[I]n construing the Constitution . . . the intent of the framers is controlling."); Fitzgerald v. City of Cleveland, 103 N.E. 512, 525 (Ohio 1913) (quoting Ogden v. Saunders, 25 U.S. 213, 332 (1827) (opinion of Marshall, C.J.)) (noting, while construing the state constitution that "the intention of the instrument must prevail . . . its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers."); State v. Hipp, 38 Ohio St. 199, 224–25 (1882) (quoting *In re* Assignment of Judges, 34 Ohio St. 431, 440 (Ohio 1878)) ("The constitution . . . must be interpreted and effect give to it as the paramount law of the land, equally

obligatory upon the legislature as upon other departments of the government and individual citizens, accord[ing] to the spirit and intent of its framers, as indicated by its terms.").

OKLAHOMA: *See, e.g.*, Coffee v. Henry, 240 P.3d 1056, 1066 (Okla. 2010) ("The general rules of construction governing the interpretation of our constitution require us to ascertain the intent and purpose of the provision at the times of its adoption."); Latting v. Cordell, 172 P.2d 397, 401 (Okla. 1946) ("[T]he object of construction applied to a constitution is to give effect to the intent of its framers, and of the people adopting it. This intent is to be found in the instrument itself . . . ."); *Ex parte* Cain, 93 P. 974, 975 (Okla. 1908) ("The rules of construction should be so applied to written Constitutions as to give effect, if possible, to the intent of the framers and of the people who have adopted it, and to promote the objects for which the same was framed and adopted.").

OREGON: *See, e.g.*, Stranahan v. Fred Meyer, Inc., 11 P.3d 228, 237 (Or. 2000) ("[W]hen construing provision of the Oregon Constitution, it long has been the practice of this court to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it."); Jones v. Hoss, 285 P. 205, 206 (Or. 1930) ("In construing a constitutional provision we seek to ascertain and give effect to the intent of the framers and of the people who adopted it . . . . A Constitution is dependent upon ratification by the people. Its language should, therefore, be considered in the sense most obvious to the common understanding of the people at the time of its adoption . . . . What did those . . . pioneer citizens have in mind . . . [?]"); Acme Dairy Co. v. City of Astoria, 90 P. 153, 154 (Or. 1907) ("In construing a provision of a written Constitution, the primary inquiry is to ascertain the intent of the framers and of the people who adopted the clause under consideration . . . .").

PENNSYLVANIA: *See, e.g.*, Commonwealth v. Rose, 81 A.3d 123, 127 (Pa. 2013) ("Simply put, under long standing and established principles, we are required to examine the original public meaning of the text at issue, giving due regard to both its spirit and the intent of the framers of the clause."); Driscoll v. Corbett, 69 A.3d 197, 212 (Pa. 2013) ("[W]e bear in mind that the object of all constitutional interpretation is to give effect to the intent of the provision's framers, and of the people who adopted it."); White v. Commonwealth, 6 Binn. 179, 181 (Pa. 1813) ("It is now thirty-seven years since the formation of the constitution of 1776, and during all that time the precepts for Courts of Oyer and Terminer have been in the same form as this. Courts of Oyer and Terminer were held soon after the

making of that constitution, so that the construction first put upon it was contemporaneous with the constitution itself, and no doubt adopted by some of those who were framers of it. *A construction thus commenced and thus continued is entitled to the highest respect.*") (emphasis added).

RHODE ISLAND: *See, e.g.*, Riley v. R.I. Dep't of Envtl. Mgmt., 941 A.2d 198, 205 (R.I. 2008) ("In construing provisions of the Rhode Island Constitution, our chief purpose is to give effect to the intent of the framers . . . . The historical context is important in determining the scope of constitutional limitations because 'a page of history is worth a volume of logic.' . . . . Therefore, this Court properly consults extrinsic sources including the history of the times and examine[s] the state of affairs as they existed when the constitution was framed and adopted.") (internal quotation marks omitted); *In re* Advisory Opinion to Governor, 612 A.2d 1, 7 (R.I. 1992) ("In construing constitutional amendments, our chief purpose is to give effect to the intent of the framers."); Taylor v. Place, 4 R.I. 324, 355 (1856) ("But the meaning of the clause of the constitution in question is not to be ascertained by this court as a novel question. As already hinted, these very words had a settled constitutional meaning,–and the very meaning which we have attributed to them; not only when the people of this state adopted them as a part of their constitution, but ever since constitutional law itself, in our American sense of the term, had an existence.").

SOUTH CAROLINA: *See, e.g.*, J.K. Const., Inc. v. W. Carolina Reg'l Sewer Auth., 519 S.E.2d 561, 565 (S.C. 1999) ("When construing the constitution, the Court applies rules similar to those relating to the construction of statutes."); Miller v. Farr, 133 S.E.2d 838, 841 (S.C. 1963) ("[W]hen construing constitutional amendments, the Court applies rules similar to those relating to the construction of statutes, in its effort to determine the intent of its framers and of the people who adopted it."); State *ex rel.* S. Ry. Co. v. Tompkins, 25 S.E. 982, 983 (S.C. 1896) (interpreting article IX, § 8 of the South Carolina Constitution and declaring that "the intention of the framers of the constitution" was "to require foreign railroad companies operating or seeking to operate railroads in this state to be placed on the same footing with domestic corporations as to their rights and liabilities under the jurisdiction of the state courts.").

SOUTH DAKOTA: *See, e.g.*, Davis v. State, 804 N.W.2d 618, 624 (S.D. 2011) (noting that interpreting the ordinary meaning of Article VIII, § 1 of the South Dakota Constitution, the court will "check this interpretation against the historical context and intent of the framers"); *In re* Janklow, 598 N.W.2d 624, 626 (S.D. 1999) (quoting Poppen v. Walker, 520 N.W.2d 238,

242 (S.D. 1994)) ("First and foremost, the object of construing a constitution is to give effect to the intent of the framers and of the organic law and of the people adopting it."); State *ex rel.* Holmes v. Finnerud, 64 N.W. 121, 124 (S.D. 1895) ("We find nothing in the provisions of the constitution to indicate an intention on the part of the framers of the constitution to limit the appointment of the governor to fill vacancies until the next session of the legislature, or that the appointees to fill vacancies shall be confirmed by the senate. But, on the contrary, it seems to us the framers of the constitution have clearly expressed their intention that, until otherwise provided by the legislature, the appointment by the governor should be for the unexpired term, and not to be confirmed by the senate.").

TENNESSEE: *See, e.g.*, Barrett v. Tenn. Occupational Safety & Health Review Comm'n, 284 S.W.3d 784, 787 (Tenn. 2009) ("The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent and purpose of those who adopted it."); Gaskin v. Collins, 661 S.W.2d 865, 867 (Tenn. 1983) (quoting Hatcher v. Bell, 521 S.W.2d 799 (Tenn. 1974)) ("We must also 'give effect to the intent of the people' who adopt a constitutional provision, and their intent should be derived from the language as it is found in the [constitution]."); Andrews v. State, 50 Tenn. 165, 175–193 (1871) (interpreting the state constitutional right to keep and bear arms in reference to the public understanding of the right under the 1834 and 1870 constitutions).

TEXAS: *See, e.g.*, *In re* Allcat Claims Serv., L.P., 356 S.W.3d 455, 466 (Tex. 2011) (noting that the purpose of constitutional interpretation is to "ascertain and give effect to the plain intent and language of the framers of a constitutional amendment and of the people who adopted it."); City of Sherman v. Henry, 928 S.W.2d 464, 472 (Tex. 1996) (quoting Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989)) ("In construing [a section of the Texas Constitution], we consider 'the intent of the people who adopted it.' In determining that intent, 'the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished, are proper subjects of the inquiry.' However, because of the difficulties inherent in determining the intent of voters over a century ago, we rely heavily on the literal text."); *Ex parte* Anderson, 81 S.W. 973, 975 (Tex. Crim. App. 1904) ("[W]hatever was the purpose and intent of the people in ordaining the Constitution must be the purpose and intent to be carried out by all the agencies created under it, and clothed with power, authority, or direction in executing any of its commands or behests."); Holley v. State, 14 Tex. App. 505, 513 (Tex. Ct. App. 1883) ("The object of

construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it.").

UTAH: *See, e.g.*, Carter v. Lehi City, 269 P.3d 141 (overruling no less than three cases in order to "develop a legal framework for delineating the people's initiative power that is consistent with the text and original meaning of article VI"); State v. Hernandez, 268 P.3d 822, 824 (Utah 2011) ("[The court's] goal is to ascertain the drafters' intent."); Am. Bush v. City of South Salt Lake, 140 P.3d 1235, 1240 (Utah 2013)("The goal of [Utah constitutional] analysis is to discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect."); Tintic Standard Mining Co. v. Utah Cty., 15 P.2d 633, 637 (Utah 1932) ("[T]erms used in [the Utah] Constitution must be taken to mean what they meant to the minds of the voters of the state when the provision was adopted."); State *ex rel.* LLoyd v. Elliott, 44 P. 248, 250 (Utah 1896) (looking to the intent of "the framers of our constitution" to determine the "the meaning attributed to the term 'writ of quo warranto'" in article VIII, § 4 of the Utah Constitution).

VERMONT: *See, e.g.*, State v. DeLaBruere, 577 A.2d 254, 268 (Vt. 1990) (noting that among the valid approaches to interpreting the Vermont Constitution, is "historical analysis"); State v. Becker, 287 A.2d 580, 582 (Vt. 1972) ("The provisions of the Vermont Constitution of 1793, and the course of legislation in this state before and since that time, leave no doubt that the people have regarded all criminal causes as proper for cognizance of a jury. It is our belief that the framers of the Vermont Constitution intended to secure to an accused, in prosecutions for all 'criminal offenses' the right of trial by jury."); Temple v. Mead, 4 Vt. 535, 538-44 (determining that printed ballot was valid under constitutional provision that required ballots be brought with the names of the selected candidates "fairly written" by reference to the intention of the framers of the constitution).

VIRGINIA: *See, e.g.*, Kopalchick v. Catholic Diocese of Richmond, 645 S.E.2d 439, 442 (Va. 2007) (quoting Dean v. Paolicelli, 72 S.E.2d 506, 510-11 (Va. 1952)) ("The purpose and object sought to be attained by the framers of the constitution is to be looked for, and the will and intent of the people who ratified it is to be made effective."); Virginia & SW. Ry. Co. v. Clower's Adm'x, 47 S.E. 1003, 1004 (Va. 1904) ("The true purpose of construction is, at least, to discover the intention of the framers of the Constitution . . . ."); *In re* Cty. Levy, 9 Va. 139, 142 (1804) (holding that because "the [state constitutional] convention" had not "restrained the

power of laying levies," it was "abundantly" clear that Virginia's bill of rights did not bar the judicial practice of doing so").

WASHINGTON: *See, e.g.*, League of Educ. Voters v. State, 295 P.3d 743, 749 (Wash. 2013) ("The court gives the words 'their common and ordinary meaning, as determined at the time they were drafted.' The court may look to the constitutional history for context if there is ambiguity. In this particular case, the historical context necessarily includes other provisions adopted contemporaneously with article II, section 22."); Wash. Water Jet Workers Ass'n v. Yarbrough, 90 P.3d 42, 49 (Wash. 2004) ("In determining the meaning of a constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered."); Duke v. Johnson, 211 P. 710, 712 (Wash. 1923) ("[T]he intent of the framers of the Constitution in the insertion of this provision must be determined.").

WEST VIRGINIA: *See, e.g.*, State *ex rel.* Rist v. Underwood, 524 S.E.2d 179, 189 (W. Va. 1999) ("The fundamental principle in constitutional construction is that effect must be given to the intent of the Framers of such organic law and of the people who ratified and adopted it."); Chesapeake & Ohio Ry. Co. v. Miller, 19 W. Va. 408, 418 (1882) *aff'd,* 114 U.S. 176 (1885) ("It is a well settled rule, that the meaning of the Constitution is fixed, when it is adopted; and it is not different at any subsequent time, when a court has occasion to pass upon it. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it.").

WISCONSIN: *See, e.g.*, Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408, 421-22 (Wis. 2006) (quoting State *ex rel.* Bare v. Schinz, 216 N.W. 509 (Wis. 1927)) ("The purpose of construing a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it. 'Constitutions should be construed so as to promote the objects for which they were framed and adopted. 'The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time.'" We therefore examine three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption.") (citations omitted); Dickson v. State, 1 Wis. 122, 124 (1853) (referencing the intentions of the "framers of the constitution" in interpreting various appellate jurisdiction

provisions of the Wisconsin Constitution and how they affected the legislatures ability to decide what types of suits could be brought in which state courts).

WYOMING: *See, e.g.*, Cathcart v. Meyer, 88 P.3d 1050, 1065 (Wyo. 2004) ("We have said numerous times that, in construing the state constitution . . . our fundamental purpose is to ascertain the intent of the framers."); Dir. of Office of State Lands & Invs. v. Merbanco, Inc., 70 P.3d 241, 252 (Wyo. 2003) ("We are charged with discerning the intent of the Constitutional Convention, and we look first to the plain and unambiguous language to discern that intent."); Bd. of Comm'rs of Converse Cty. v. Burns, 29 P. 894, 899 (Wyo. 1892) (looking to historical materials "in determining the intent of the framers of [Wyoming's] fundamental law").

APPENDIX B

GENERAL FORMULATION: "The right of the people to be secure" shall not be violated	***	***
	ALASKA. CONST. art. I, § 14	The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated
	ARK. CONST. art. II, § 15	The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated
*Deviation- "may not be violated"	CAL. CONST. art. I, § 13	The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated
	FLA. CONST. art. II, § 12	The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated
	GA. CONST. art. I, § 1, para. XIII	The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated

	HAW. CONST. art. I, § 7	The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated
	IDAHO CONST. art. I, § 17	The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated
	IND. CONST. art. I, § 11	The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated
	IOWA CONST. art. I, § 8	The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated
*Deviation- "shall be inviolate"	KAN. CONST. Bill of Rights § 15	The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate
	MINN. CONST. art. I, § 10	The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated
	NEB. CONST. art. I, § 7	The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be

		violated
	NEV. CONST. art. I, § 18	The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated
	N.J. CONST. art. I, para. 7	The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated
	N.Y. CONST. art. I, § 12	The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated
	N.D. CONST. art. I, § 8	The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated
	OHIO CONST. art. I, § 14	The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated
	OKLA. CONST. art. II, § 30	The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated

*Deviation- "No law shall violate the right of the people to be secure"	OR. CONST. art I, § 9	No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure
	R.I. CONST. art. I, § 6	The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated
	S.C. CONST. art. I, § 10	The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated
	S.D. CONST. art. VI, § 11	The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated
	UTAH CONST. art. I, § 14	The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated
*Deviation-"the people have a right to hold themselves . . . free from"	VT. CONST. art. XI	That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure
*Deviation- "citizens"	W. VA. CONST. art. III, § 6	The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches

		and seizures, shall not be violated
	WIS. CONST. art. I, § 11	The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated
	WYO. CONST. art. I, § 4	The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated
GENERAL FORMULATION: "The people shall be secure . . . ."	***	***
	ALA. CONST. art. I, § 5	That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches
	COLO. CONST. art. II, § 7	The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures
	CONN. CONST. art. I, § 7	The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures
	DEL. CONST. art. I, § 6	The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures

	ILL. CONST. art. I, § 6	The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means
	KY. CONST. Bill of Rights § 10	The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure
*Deviation- "Every person"	LA. CONST. art. I, § 5	Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy
	ME. CONST. art. I, § 5	The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures
*Deviation- "Every subject"	MASS. CONST. art. XIV	Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions
	MICH. CONST. art. I, § 11	The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures

	MISS. CONST. art. III, § 23	The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search
	MO. CONST. art. I, § 15	That the people shall be secure in their persons, papers, homes, effects, and electronic communications and data, from unreasonable searches and seizures
	MONT. CONST. art. II, § 11	The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures
*Deviation- "Every subject"	N.H. CONST. pt. 1, art. XIX	Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions
	N.M. CONST. art. II, § 10	The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures
	PA. CONST. art. I, § 8	The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures
	TENN. CONST. art. I, § 7	That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures

	TEX. CONST. art. I, § 9	The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches
GENERAL FORMULATION: Concern with General Warrants	***	***
	MD. CONST. Declaration of Rights, art. XXVI	That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted
	N.C. CONST. art. I, § 20	General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted
	VA. CONST. art. I, § 10	That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or

		persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted
GENERAL FORMULATION: "No person shall be disturbed in his private affairs . . . "	***	***
	ARIZ. CONST. art. II, § 8	No person shall be disturbed in his private affairs, or his home invaded, without authority of law
	WASH. CONST. art. I, § 7	No person shall be disturbed in his private affairs, or his home invaded, without authority of law

A Tale of Two Solar Installations: How Electricity Regulations Impact Distributed Generation

By Heather Payne*

"Here's a $70,000 system sitting idle . . . That's a lot of power. Just sitting."[1]
-Ed Antonio, Queens, N.Y homeowner with no power after SuperStorm Sandy

"It's frustrating to look at those solar panels on your roof on a sunny day and realize they're doing you no good."[2] *– Ed Seliga, homeowner with no power after Sandy near Princeton*

"Net metering was just sort of all the noise and fury, but it's really not where the story is going to be going." First Solar Inc. CEO James Hughes

I. INTRODUCTION

When Superstorm Sandy cut power to millions in October, 2012, "what should have been beacons of hope–hundreds of solar panels glinting from residential rooftops–became symbols of frustration."[3] What many residential customers did not realize was that most solar panel systems are designed to automatically shut off when the main electric grid goes down.[4]

Those customers' unmet expectations of continued electricity and the general lack of understanding among residential customers regarding solar panels and distributed generation demonstrates a crucial misunderstanding between public utility commissions, utilities, and customers. The general public expects that distributed generation will enhance resiliency and their ability to continue using electricity when storm-related or other outages

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[1] Diane Cardwell, *Solar Companies Seek Ways to Build an Oasis of Electricity*, N.Y. TIMES (Nov. 19, 2012), http://www.nytimes.com/2012/11/20/business/energy-environment/solar-power-as-solution-for-storm-darkened-homes.html.

[2] Carolyn Beeler, *Solar Panels Usually No Help After a Storm Like Sandy*, NEWSWORKS (Nov. 8, 2012), http://www.newsworks.org/index.php/local/healthscience/46765-solar-panels-usually-no-help-after-a-storm-like-sandy-.

[3] Cardwell, *supra* note 1.

[4] *Id.*

occur, but that is not uniformly the case.[5] Utility customers who have installed on-site generation, are considering community solar, or evaluating becoming part of a microgrid, often do so not only to reduce power expenses, but also to ensure supply when the grid has challenges. This is even truer now with the potential for extreme weather from climate change.[6]

Whether solar and other renewable systems will, in fact, enable society to become more resilient and more able to function off grid during emergencies and disasters will be the result of specific state electric regulatory policies. This resiliency could allow residents to not only better survive disaster and climate change on their own, but also provide local and state governments with the ability to better provide for all their citizens in the face of these crises. These electric regulations are, therefore, significant for mass distributed generation and micro-grids going forward, but are especially important because of the societal resiliency benefits they could provide.

This article will assess the overall growth of renewable energy technologies, and then outline the different legal and regulatory frameworks in place, specifically regarding net metering, followed by a discussion of policies regarding interconnection. It will then evaluate the impact these sets of policies will have on solar plus storage and microgrids, which will be necessary to increase resiliency. A brief discussion of how utilities have responded to these technologies and how Germany is an example for grid stability with high renewables penetration will follow. Rather than sitting idly for customers to demand, or for circumstances to require change, states should adopt the best of what has already been adopted in other locations to enable resiliency.

II. THE GROWTH OF RENEWABLES

There is no debate that, while it continues to be small, the renewable energy sector is growing. The International Energy Agency recently predicted that both coal and oil will plateau by 2040, with renewables leading power production.[7] In the last quarter of 2014, generation from

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[5] *Id.*

[6] Jill Rosen, *Power grids in coastal U.S. cities increasingly at risk due to climate change*, HUB (Dec. 15, 2014), http://hub.jhu.edu/2014/12/15/hurricane-power-outages-modeling.

[7] Manuel Quiñones, *ENERGY MARKETS: Coal, oil will plateau by 2040 while renewables soar -- IEA*, GREENWIRE (Nov. 12, 2014), http://www.eenews.net/greenwire/2014/11/12/stories/1060008760.

wind and solar was at parity with coal and natural gas production.[8] Prices for rooftop solar systems continue to decline, with the median price of a residential system at $4.69 per watt, the median price of a large commercial system at $3.89 per watt, and the capacity weighted average of utility-scale systems at $3.00 per watt in 2013.[9] Quotes for systems to be installed in 2014 dropped to $3.29 per watt, $2.54 per watt, and $1.80 per watt, respectively.[10] The National Renewable Energy Laboratory and Lawrence Berkeley National Laboratory have reported that a target price of $1.25 to $1.50 per watt by 2020 is "more and more likely to be realized."[11] The Energy Department's goal is couched in slightly different terms; its goal is six cents per kilowatt-hour for installed solar by 2020.[12] It currently expects the goal to be met in two to three years.[13]

A. Renewables Growth Driven – Or Stifled – By Policy

International negotiations to determine "intended nationally-determined contributions" to limit carbon pollution worldwide may or may not prove fruitful (or internationally binding) in Paris in 2015, but countries are turning to renewables both in expectation of an agreement and for economic reasons.[14] Installed solar capacity worldwide is expected to triple by 2020, pushed by emerging economies in Asia, Central and South America, the Middle East and Africa.[15] By 2020, 500,000 solar panels will

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[8] Diane Cardwell, *Solar and Wind Energy Start to Win on Price vs. Conventional Fuels*, N.Y. TIMES (Nov. 23, 2014), http://www.nytimes.com/2014/11/24/business/energy-environment/solar-and-wind-energy-start-to-win-on-price-vs-conventional-fuels.html?ref=earth. Current cost: coal is at 6.6 cents/kilowatt hour ("kWh"); natural gas, 6.1 cents/kWh; utility-scale solar, 5.6 cents/kWh; and wind, as low as 1.4 cents/kWh. *Id.*

[9] David Feldman et al., *Photovoltaic System Pricing Trends: Historical, Recent, and Near-Term Projections*, U.S. Dep't of Energy 4 (2014), http://www.nrel.gov/docs/fy14osti/62558.pdf.

[10] *Id.*

[11] Katherine Ling, *SOLAR: Rooftop costs plunge, on track for Obama's goal -- DOE*, E&E NEWS PM (Oct. 20, 2014), http://www.eenews.net/eenewspm/2014/10/20/stories/1060007592.

[12] Daniel Bush, *SOLAR: DOE's SunShot initiative to cut installation costs 'ahead of schedule'*, GREENWIRE (Feb. 26, 2015), http://www.eenews.net/greenwire/2015/02/26/stories/1060014110.

[13] *Id.*

[14] Kelly Levin & David Rich, *INDCs: Bridging the Gap Between National and International Climate Action*, WORLD RES. INST. (Feb. 19, 2015), http://www.wri.org/blog/2015/02/indcs-bridging-gap-between-national-and-international-climate-action.

[15] Daniel Cusick, *RENEWABLE ENERGY: Solar power expected to triple by 2020, pushed by developing countries*, CLIMATEWIRE (Dec. 4, 2014), http://www.eenews.net/climatewire/2014/12/04/stories/

be installed across Peru to connect rural residents with the electrical grid, with 65,000 panels installed in 2015, 125,000 installed in 2016, and the remainder by the end of 2018.[16] Meanwhile, Brazil held its first auction for solar power, and developers agreed to build 890 megawatts ("MW") of dispatchable subsidy-free capacity for $87 per megawatt hour ("MWh"), about 5% cheaper than the previously-lowest solar contracts.[17]

The European Union is on track to meet its goal of obtaining 20% of its energy from renewable sources.[18] The European Energy Agency recently reported that renewable energy displaced coal use by 13% and gas use by 7%.[19] Four countries in the EU received more than a third of their power from renewable sources in 2013, and the EU nations have agreed upon a target of 27% renewable power by 2030.[20] Wind accounted for more than a third of national electricity consumption in Denmark alone, and the country has a goal of 50% wind power by 2020.[21] Net metering is being adopted outside the U.S., both in Europe and elsewhere.[22] This, along with the renewable energy goals being met in California,[23] demonstrates that getting a significant percentage of energy from renewable sources is both technologically and economically feasible.

1060009922.

[16] Mitra Taj, *Peru aims to cover rural electrical gap with solar Panels by 2020*, REUTERS (Nov. 12, 2014, 3:10 PM EST), http://www.reuters.com/article/2014/11/12/us-peru-solar-idUSKCN0IW2F320141112.

[17] Daniel Cusick, *RENEWABLE ENERGY: Brazil auction fetches record low price for solar power*, CLIMATEWIRE (Nov. 5, 2014), http://www.eenews.net/climatewire/2014/11/05/stories/1060008386.

[18] Barbara Lewis, *EU on track for green energy goal but UK, Dutch lagging*, REUTERS (Feb. 17, 2015, 6:40 AM EST), http://www.reuters.com/article/2015/02/17/us-eu-renewables-idUSKBN0LL0Y320150217.

[19] *Id.*

[20] *Id.*

[21] Paul Rauber, *Leading Edge*, SIERRA (2015), http://www.sierraclub.org/sierra/2015-1-january-february/feature/
leading-edge.

[22] Mike Munsell, *8 Solar Trends to Follow in 2015*, GREENTECH MEDIA (Jan. 26, 2015), http://www.greentechmedia.com/articles/read/The-Most-Important-Trends-in-Solar-in-8-Charts; *see also* Chart for Net Metering Outside the United States, GREENTECH MEDIA, http://www.greentechmedia.com/content/images/articles/global_nem_chart2.png (last viewed Feb. 17, 2016).

[23] The three major utilities have already come close to meeting their requirement to generate 33% of electricity from renewable resources by 2020, with all over 20% already. Just with contracts already signed, Southern California Edison will be at 21.6% renewable by 2020; PG&E will be at 31.3%; and San Diego Gas & Electric will be at 38.8%. Sammy Roth, *California could boost renewable energy mandate*, THE DESERT SUN (Dec. 5, 2014, 5:21 PM PST), http://www.desertsun.com/story/tech/science/energy/2014/12/05/california-boost-renewable-energy-mandate/19952681/.

B. Policy – Or Lack Thereof – In the United States

The United States lacks a unified energy policy that takes environmental considerations, economics, and climate change into account.[24] However, some federal policies and some state policies are having an impact on solar installations.

1. Interior and tax credits

The Department of the Interior has been attempting to incent solar development on federal lands by creating Solar Energy Zones (SEZs).[25] Locations which are more suited to utility-scale solar development, SEZs have fewer environmental concerns and are analyzed under a programmatic environmental impact statement, which leads to an expedited permitting process and a regional mitigation strategy which sets a firm price per acre for mitigation. For three solar projects in Nevada's Dry Lake SEZ, permits were issued in six months instead of the normal twenty-four month turnaround.[26] In all, fifty-two solar, wind, and geothermal projects have been approved on federal land since 2009.[27]

In addition to encouraging solar installations on federal land, tax policy incents residential and commercial installations. First enacted in 2006, the federal government offers a federal tax credit of 30% for homeowners and businesses who install photovoltaic systems.[28] While the federal tax credit has certainly proven beneficial for solar installations, it is currently scheduled to expire for residential solar projects on December 31, 2016.[29] The credit for commercial projects is set to drop from 30% to 10% on the same date.[30]

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[24] Victor B. Flatt & Heather Payne, *Not One Without the Other: The Challenge of Integrating U.S. Environment, Energy, Climate & Economic Policy*, 44 ENVTL. L. 1079, 1086-88 (2014).

[25] Scott Streater, *SOLAR: Interior announces 'milestone' for commercial projects on public lands*, E&E NEWS PM (Dec. 8, 2014), http://www.eenews.net/eenewspm/2014/12/08/stories/1060010146.

[26] *Id.*

[27] *Id.*

[28] Daniel Cusick, *RENEWABLE ENERGY: IEA estimates solar could dominate energy sources by 2050*, CLIMATEWIRE (Sept. 30, 2014), http://www.eenews.net/climatewire/2014/09/30/stories/1060006596; John Rogers, *The Cost of Installing Solar Panels: Plunging Prices, and What They Mean For You*, UNION OF CONCERNED SCIENTISTS (Aug. 25, 2014, 9:35 AM EST), http://blog.ucsusa.org/cost-of-installing-solar-panels-635.

[29] Daniel Cusick, *RENEWABLE ENERGY: U.S. solar panel sales continue to surge in 3rd quarter*, CLIMATEWIRE (Dec. 10, 2014), http://www.eenews.net/climatewire/2014/12/10/stories/1060010247.

[30] *Id.*

While Department of Interior policies increase the use of renewables, they are, for the most part, utility-scale installations which feed onto the grid generally.[31] While they may increase resiliency in that they are located away from other forms of generation and would continue to operate if a disaster or crisis removed other generation, they are not usually designed to serve specific microgrids or other community-scale installations.[32] Residential and commercial installations, on the other hand, can be designed more easily to enable continued operation when the grid is down and provide resiliency benefits.[33]

2. State policies

In the residential market, prices for rooftop solar installations vary widely between states and, sometimes, within states.[34] Factors which contribute to these differences include "market size and maturity, incentive levels, sales taxes, administrative costs, labor costs and project characteristics," many of which can be influenced by policy.[35]

Additionally, some states are expressly adopting policies to incent solar installations or slow the growth that already existed. Colorado's Public Utilities Commission established a 42 MW solar installation plan for each of the next two years, which incents home and business installations.[36] Idaho, which doesn't have a state renewable energy portfolio standard or goal[37] and already has the nation's lowest energy prices,[38] signed 16 contracts totaling 461 MW of solar.[39] With existing projects, renewables

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[31] Streater, *supra* note 25.

[32] Justin Gerdes, *The Emerging Power of Microgrids*, ENSIA (July 3, 2014), http://ensia.com/features/the-emerging-power-of-microgrids/.

[33] Alex Wilson, *Creating a More Resilient Power Grid*, RESILIENT DESIGN INSTITUTE (Dec. 19, 2013), http://www.resilientdesign.org/creating-a-more-resilient-power-grid/.

[34] Ling, *supra* note 11.

[35] *Id.*

[36] Mark Jaffe, *PUC OKs 2-year plan advocates say puts end to install "solar coaster"*, THE DENVER POST (Nov. 24, 2014, 5:11 PM MST), http://www.denverpost.com/business/ci_27004881/puc-oks-2-year-plan-advocates-say-puts.

[37] Database of State Incentives for Renewables & Efficiency ("DSIRE"), *Renewable Portfolio Standard Policies*, U.S. DEP'T OF ENERGY (Sept. 2014), http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2015/01/RPS_map.pdf [hereinafter *Renewable Portfolio Standard Policies*].

[38] U.S. ENERGY INFORMATION ADMIN., ELECTRIC POWER MONTHLY WITH DATA FOR OCTOBER 2015, 124 (2015), http://www.eia.gov/electricity/monthly/pdf/epm.pdf.

[39] Rocky Barker, *Idaho Power: Ready to Become a Green Giant?*, IDAHO STATESMAN (Nov. 19, 2014), http://www.govtech.com/state/Idaho-Power-Ready-to-Become-a-Green-Giant.html.

would cover more than 40% of 2013 peak demand.[40] Forty-five states plus Washington, D.C., have state tax incentives for homeowners and businesses for rooftop solar.[41] On the other hand, "the Florida Public Service Commission voted to phase out a program offering rebates on solar energy purchases, and several other states are considering repealing or freezing energy efficiency measures."[42] Minnesota is attempting to add 100 MW of solar at twenty sites, but must keep all production away from neighboring states, due to a North Dakota prohibition on utilities from factoring carbon reduction and other environmental benefits into its electricity pricing structure, potentially disallowing any rate recovery on the solar power generated in Minnesota.[43]

One of the main policies states enact to encourage renewables is the state Renewable Energy Portfolio Standards (REPS). Statistical analysis performed by the Department of Energy's National Renewable Energy Laboratory "confirmed that solar-related policy, especially solar set-asides within renewable portfolio standards . . . have a quantifiable effect on installed capacity."[44] Currently, twenty-nine states, Washington, D.C., and two territories have REPS.[45] An additional nine states and two territories have renewable portfolio goals.[46] The states with neither are Alabama, Alaska, Arkansas, Georgia, Florida, Idaho, Kentucky, Louisiana, Mississippi, Nebraska, Tennessee, and Wyoming.[47] The REPS and goals vary widely on three measures: the level of renewable energy required, the time frame within which to achieve that level, and what other provisions are included.

The levels of renewable energy required by the REPS vary greatly: from goals as low as 2% in South Carolina to standards as high as 40% in Hawai'i.[48] While the vast majority of standards or goals are stated as

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[40] *Id.*

[41] Rogers, *supra* note 28.

[42] Scott Detrow, *POLICY: Some states use laws and rules to slow growth of renewable energy*, CLIMATEWIRE (Dec. 19, 2014), http://www.eenews.net/climatewire/2014/12/19/stories/1060010830.

[43] Daniel Cusick, *RENEWABLE ENERGY: Minn. approves sprawling, $250M solar power complex*, CLIMATEWIRE (Dec. 17, 2014), http://www.eenews.net/climatewire/2014/12/17/stories/1060010669.

[44] D. STEWARD & E. DORIS, NAT'L RENEWABLE ENERGY LAB., THE EFFECT OF STATE POLICY SUITES ON THE DEVELOPMENT OF SOLAR MARKETS v (2014), http://www.nrel.gov/docs/fy15osti/62506.pdf.

[45] *Renewable Portfolio Standard Policies*, *supra* note 38.

[46] DSIRE, *RPS Policies Summary Map* (Sept. 2014), http://www.dsireusa.org/resources/detailed-summary-maps/ (download "Renewable Portfolio Standards").

[47] *Id.*

[48] *Id.*

percentages, Iowa requires a flat 105 MW and Texas 5,880 MW.[49] The time frames in which utilities must meet the standards also vary widely, with some standards requiring implementation by 2015 (Michigan, New York, North Dakota, Northern Mariana Islands, Oklahoma, South Dakota, Texas, Wisconsin) and others as late as 2026 (Illinois, Ohio, Delaware), 2030 (Hawai'i) or 2035 (Guam, Puerto Rico).[50]

Some REPS or goals also have minimum solar or customer-sited (rather than utility-scale) requirements. These include Arizona, Colorado, Delaware, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, and Washington, D.C.[51] Others, however, include non-renewable resources, such as Colorado, Indiana, Michigan, Pennsylvania, Utah and West Virginia.[52]

C. Projections for Future Growth

U.S. photovoltaic installations have almost tripled in three years, with 1133 MW coming online in the second quarter of 2014 alone.[53] In the third quarter, another 1354 MW of photovoltaic capacity came online.[54] Cumulatively, installed solar exceeds 17.5 GW,[55] enough to power more than 3.2 million homes.[56] Solar generation could provide the majority of the world's electrical power by 2050 – but, according to the International Energy Agency, only with "clear, credible and consistent signals."[57] If 27% of the world's electricity by the middle of the century was provided by solar, with 16% from concentrated solar and photovoltaics, solar could avoid the emission of more than six billion tons of carbon annually.[58]

Achieving continued growth, however, will only come with continued "smart and effective public policies,"[59] rather than "policy incoherence,

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] Daniel Cusick, *RENEWABLE ENERGY: U.S. solar installations have almost tripled in 3 years -- study*, CLIMATEWIRE (Sept. 8, 2014), http://www.eenews.net/climatewire/2014/09/08/stories/1060005342.

[54] Cusick, *supra* note 29.

[55] Cusick, *supra* note 53.

[56] *Id.*

[57] David Ferris, *ELECTRICITY: IEA says solar could be world's leading power source by 2050 – if policies cooperate*, ENERGYWIRE (Sept. 30, 2014), http://www.eenews.net/energywire/2014/09/30/stories/1060006577.

[58] *Id.*

[59] Cusick, *supra* note 29.

confusing signals or stop-and-go policy cycles," where "investors end up paying more for their investment, consumers pay more for their energy, and some projects that are needed simply will not go ahead."[60] Each of the fifty U.S. states has the potential to produce more solar power than it uses in an average year.[61] One of the policy drivers to determine solar and other renewable energy installation is, and will continue to be, net metering.[62]

III. NET METERING

One of the policies which will most impact the adoption of distributed generation and, therefore, the ability of the public and governments to increase resiliency is net metering.[63] The Public Utility Regulatory Act (PURPA) was passed to encourage "increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers."[64] The act also requires electric utilities to "make available upon request net metering service to any electric customer that the electric utility serves," and defines net metering as "service to an electric consumer under which electric energy generated by that electric consumer . . . and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period."[65]

As was demonstrated with the REPS policies, however, how states have chosen to implement this requirement varies widely.[66] Analysts at the National Renewable Energy Laboratory concluded that "no standard formula for solar implementation exists," and they found that a state's policies on interconnection and net metering are the two factors that can strengthen a state's solar market.[67] Net metering is widely considered to be the one more easily understood by customers, since it is perceived to be

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[60] *Id.*

[61] Edward Klump, *ELECTRICITY: Texas should seek goal of 20% solar power by 2025 – report*, ENERGYWIRE (Nov. 21, 2014), http://www.eenews.net/energywire/2014/11/21/stories/1060009365.

[62] Herman K. Trabish, *CPUC pushed to study solar-storage further after filing pegs value at $0.25/kWh*, UTILITYDIVE (Sept. 15, 2015), http://www.utilitydive.com/news/cpuc-pushed-to-study-solar-storage-further-after-filing-pegs-value-at-025/405512/.

[63] *Id.*

[64] 16 U.S.C. § 2601 (2012).

[65] 16 U.S.C. § 2621(11) (2012).

[66] *See Renewable Portfolio Standard Policies*, *supra* note 38.

[67] Press Release, Nat. Renewable Energy Lab., NREL Compares State Solar Policies to Determine Equation for Solar Market Success (Dec. 11, 2014), http://www.nrel.gov/news/press/2014/15432.

"simple."[68] As the following discussion shows, it is highly variable and likely not easy for residential customers to grasp.

A net metering policy is vitally important; how a state implements net metering will impact adoption rates for distributed generation and accordingly have an impact on whether a state will become more resilient.

A. States with No Net Metering Policy

Despite the PURPA requirement, six states have no net metering policy: Alabama, Idaho, Mississippi, South Dakota, Tennessee, and Texas.[69] This list closely correlates with states that also do not have a REPS or goal: Alabama, Idaho, Mississippi, and Tennessee.[70]

Contrary to what one might assume, this does not mean that customers in these six states cannot participate in net metering programs; Alabama Power, for example, does allow for annual contracts for systems smaller than 100 kW with certain conditions.[71] All three of Idaho's utilities have net metering programs.[72] At the other end of the spectrum, South Dakota and Tennessee are completely silent on the issue. Mississippi Power has simply said they are "not opposed" to residential net metering.[73]

Texas presents another example of what can happen without a state policy. There, it depends on service territory and retail provider.[74] The City of Austin, for example, tracks and bills customers for 100% of

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[68] *Id.*

[69] Net Metering Policies Summary Map – Sept. 2014, DSIRE, http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2015/01/net_metering_map.pdf (Jan. 2015). North Dakota's net metering status is also questionable due to a spat between the North Dakota Legislature and the state PUC. *Net Metering*, DSIRE (Apr. 27, 2015), http://programs.dsireusa.org/system/program/detail/285.

[70] *See Renewable Portfolio Standard Policies*, *supra* note 38.

[71] *Solar Energy Frequently Asked Questions*, ALABAMA POWER (2014), http://www.alabamapower.com/environment/renewable-energy/faqs.asp#q1.

[72] *Generator Interconnection Information*, IDAHO POWER (2015), https://www.idahopower.com/aboutus/businesstobusiness/generationinterconnect/default.cfm; *Customer Generation*, ROCKY MOUNTAIN POWER (2015), https://www.rockymountainpower.net/env/nmcg.html; *Customer Generation*, AVISTA UTILITIES (2015), https://www.avistautilities.com/services/electricity/interconnection/pages/default.aspx.

[73] Ian Clover, *Mississippi Power unopposed to net metering, eyes 100 MW RE procurement*, PV MAGAZINE (Aug. 11, 2014), http://www.pv-magazine.com/news/details/beitrag/mississippi-power-unopposed-to-net-metering--eyes-100-mw-re-procurement_100016057/.

[74] Nick, *Go Solar And Sell Power To Your Utility?*, Green Mountain Blog (Jan. 13, 2015), https://www.greenmountainenergy.com/2014/03/go-solar-and-sell-power-to-your-utility/.

electricity used, including that generated by solar panels.[75] A credit is then provided for all the solar generated, not only the portion that was returned to the grid.[76] In the parts of Texas with a deregulated market, whether or not net metering is an option depends on retail electric providers.[77] Some offer net metering programs, many do not.[78]

B. States with Net Metering Policies – But Also With Exemptions

Even for states with net metering policies, there are often exemptions. In Alaska, utilities with retail sales of less than 5 million kilowatt hours/year or utilities that generate 100% of their electricity from certain approved sources with a low environmental impact need not offer net metering.[79] In Arizona, the Salt River Project and municipal utilities are not required to provide net metering. Likewise, municipal utilities are exempt in Arkansas,[80] Massachusetts,[81] and Virginia.[82] In California, publicly-owned electric utilities with more than 750,000 customers which also provide water are exempt (e.g., the Los Angeles Department of Water and Power).[83] Colorado exempts municipal utilities with fewer than 5,000 customers.[84] Florida's rules exempt cooperatives or municipal utilities,[85] as do Illinois'.[86] Michigan exempts utilities with fewer than a million customers.[87] In Pennsylvania, electric generation suppliers are permitted but not required to offer net metering, so customers who choose a retailer other than their

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] ALASKA ADMIN. CODE tit. 3, § 50.900 (2015).

[80] ARK. PUB. SERV. COMM'N, NET METERING RULES (Sep. 2013), http://www.apscservices.info/rules/net_metering_rules.pdf.

[81] *Net Metering Frequently Asked Questions and Answers*, MASS. OFF. OF ENERGY & ENVTL. AFF. (Aug. 14, 2015), http://www.mass.gov/eea/grants-and-tech-assistance/guidance-technical-assistance/agencies-and-divisions/dpu/net-metering-faqs.html.

[82] 20 VA. ADMIN. CODE § 5-315-10 (2014). The net metering chapter specifically applies to customers of investor-owned electric utilities and electric cooperatives, but not municipal utilities. *Id.*

[83] *Net Energy Metering (NEM)*, CAL. PUB. UTIL. COMM'N (2015), http://www.cpuc.ca.gov/General.aspx?id=3800.

[84] 4 COLO. CODE REGS § 723-3 (2014).

[85] FLA. PUB. SERV. COMM'N NOTICE OF ADOPTION OF RULE (2008), https://www.fpl.com/clean-energy/pdf/net-metering-rule.pdf.

[86] *Net Metering*, ILL. PUB. UTIL. COMM'N (2015), http://www.icc.illinois.gov/Electricity/NetMetering.aspx.

[87] *Net Metering*, DSIRE (2015), http://programs.dsireusa.org/system/program/detail/235.

traditional regulated utility may not have net metering available.[88] Wisconsin exempts electric cooperatives.[89] These exemptions mean that consumers may not have access to net metering even where there is a state-level policy in place.

C. Net Metering Policy Variables

Within state net metering policies, there are significant differences from state-to-state, ranging from: the types of sources net metering applies to; the size of system allowed; the percent of expected electrical consumption allowed; the percent of utility load authorized for net metering; the renewable energy credit ownership; the liability and insurance requirements; the fixed costs or standby rates; and the methods by which excess generation is paid for, if at all. All of these can have a profound impact on the financials of renewable generation. Of course, the financials will impact adoption of these technologies.

1. What sources can use the net metering tariff?

There are significant differences over which sources of energy qualify for net metering, and, unlike commonly assumed, they are not all renewable. Photovoltaics[90] and wind[91] are the most frequently qualified, accepted for net metering in at least 41 states plus the District of Columbia.[92] Biomass[93]

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[88] *Alternative Energy*, PA. PUB. UTIL. COMM'N (2015), http://www.puc.pa.gov/consumer_info/electricity/alternative_energy.aspx.

[89] DSIRE, *supra* note 87.

[90] Search Engine for Which States Allow Net Metering [hereinafter DSIRE Search Engine], DSIRE, http://programs.dsireusa.org/system/program/maps (Select "Net Metering" in "Program Type" tab, then select "Solar Photovoltaic" in the "Technology" tab).

[91] *Id.* (Select "Net Metering" in "Program Type" tab, then select "Wind" in the "Technology" tab).

[92] These include: Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawai'i, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[93] Biomass qualifies in Alaska, Arizona, Arkansas, Connecticut, Florida, Hawai'i, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.* (Select "Net Metering" in "Program Type" tab, then select "Biomass" in the "Technology" tab).

and hydroelectric[94] each qualify in at least thirty-five states plus the District of Columbia. Small hydroelectric is the next most-accepted source, qualified in thirty-four states plus the District of Columbia,[95] followed by fuel cells, accepted in twenty-seven states plus the District of Columbia.[96] Net metering for solar thermal electric generation is available in at least twenty-four states plus the District of Columbia,[97] and for geothermal electric generation in twenty-one states plus the District of Columbia.[98] Combined heat and power ("CHP") and cogeneration units can be net metered in at least sixteen states plus the District of Columbia,[99] and anaerobic digestion are accepted for net metering in at least fourteen states plus the District of Columbia.[100] Landfill gas can be net metered in at least

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[94] Hydroelectric qualifies for net metering in Alaska, Arizona, Arkansas, Delaware, Florida, Hawai'i, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* (Select "Net Metering" in "Program Type" tab, then select "Hydroelectric" in the "Technology" tab).

[95] Alaska, Arkansas, Connecticut, Illinois, Louisiana, Maine, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* (Select "Net Metering" in "Program Type" tab, then select "Hydroelectric (Small)" in the "Technology" tab).

[96] Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, and West Virginia. *Id.* (Select "Net Metering" in "Program Type" tab, then select "Fuel Cells using Renewable Fuels" in the "Technology" tab).

[97] Alaska, Arkansas, Indiana, Maine, Minnesota (adopted but not yet put into PUC rules), Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Id.* (Select "Net Metering" in "Program Type" tab, then select "Solar Thermal Electric" in the "Technology" tab).

[98] Alaska, Arizona, Arkansas, Florida, Louisiana, Maine, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Utah, Virginia, West Virginia, and Wisconsin. *Id.* (Select "Net Metering" in "Program Type" tab, then select "Geothermal Electric" in the "Technology" tab).

[99] Arizona, Connecticut, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, South Carolina, Vermont, Washington, West Virginia, and Wisconsin. *Id.* (Select "Net Metering" in "Program Type" tab, then select "Combined Heat & Power" in the "Technology" tab).

[100] Alaska, Delaware, Illinois, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, and Vermont. *Id.* (Select "Net Metering" in "Program Type" tab, then select "Anaerobic Digestion" in the

fourteen states,[101] and municipal solid waste is accepted for net metering in ten.[102]

Perhaps not surprisingly, tidal energy as an accepted generation form for net metering is focused along the coasts, with Alaska, California, Connecticut, Florida, Maine, Michigan, New Hampshire, New Jersey, North Carolina, Oregon, South Carolina, Texas, Virginia, and the District of Columbia allowing it to qualify.[103] Wave energy is similar, qualifying for net metering in Alaska, Connecticut, Florida, Michigan, New Hampshire, New Jersey, North Carolina, Oregon, South Carolina and Virginia.[104]

Microturbines have not received much support, only qualifying in Arkansas, Illinois, Louisiana, New Mexico, New York, Ohio, Texas, and the District of Columbia.[105] Hydrogen qualifies in Arizona, Florida, Indiana, New Hampshire, North Carolina, South Carolina, and Utah.[106] Ocean thermal energy is supported in Alaska, Connecticut, Florida, and Rhode Island.[107] Likewise, biogas is only supported in three states: Arizona,[108] California,[109] and Kentucky.[110] Biofuel and biodiesel can be net

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"Technology" tab).

[101] Alaska, Connecticut, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, and West Virginia. *Id.* (Select "Net Metering" in "Program Type" tab, then select "Landfill Gas" in the "Technology" tab).

[102] Alaska, Maine, Michigan, Minnesota, New Mexico, North Dakota, Oklahoma, Pennsylvania, Virginia, and Wisconsin. *Id.* (Select "Net Metering" in "Program Type" tab, then select "Municipal Solid Waste" in the "Technology" tab).

[103] *Id.* (Select "Net Metering" in "Program Type" tab, then select "Tidal" in the "Technology" tab).

[104] *Id.* (Select "Net Metering" in "Program Type" tab, then select "Wave" in the "Technology" tab).

[105] *Id.* (Select "Net Metering" in "Program Type" tab, then select "Microturbines" in the "Technology" tab).

[106] *Id.* (Select "Net Metering" in "Program Type" tab, then select "Hydrogen" in the "Technology" tab).

[107] *Id.* (Select "Net Metering" in "Program Type" tab, then select "Ocean Thermal" in the "Technology" tab).

[108] *Arizona - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/3093 (last visited Feb. 19, 2016).

[109] *California - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/276 (last visited Feb. 19, 2016).

[110] *Kentucky - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/1081 (last visited Feb. 19, 2016).

metered in New Hampshire.[111] Waste heat recovery is specifically qualified for net metering in Connecticut[112] and Florida.[113]

The remaining sources of energy are just specifically allowed in one state. Alaska accepts hydrokinetic energy for net metering.[114] Connecticut allows low emission advanced renewable energy conversion technologies.[115] Florida allows for ocean, rather than separating tidal and wave.[116] Illinois allows net metering for wood waste, landscape trimmings, and manure.[117] Kansas specifies methane is acceptable.[118] Maryland allows closed-conduit hydroelectric.[119] Pennsylvania allows net metering for generation provided by waste coal and coal-mine methane.[120] Utah, rather than qualifying CHP, qualifies waste gas and waste heat capture or recovery.[121] Therefore, with the exception of photovoltaics, wind, biomass and hydroelectric, there is little agreement among the states regarding which technologies qualify for net metering.

2. How large of a system is allowed?

There is a myriad of size limitations, everything between 10 kW and 80 MW. Colorado residential systems served by municipal utilities and electric co-ops,[122] Georgia residential systems,[123] Montana systems serviced

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[111] *New Hampshire - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/836 (last visited Feb. 19, 2016).

[112] *Connecticut - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/277 (last visited Feb. 19, 2016).

[113] *Florida - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/2880 (last visited Feb. 19, 2016).

[114] *Net Metering*, MATANUSKA ELECTRIC ASSOCIATION (2015), http://www.mea.coop/member-services/net-metering/ (last visited Feb. 19, 2016).

[115] *Connecticut - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/277 (last visited Feb. 19, 2016).

[116] *Florida - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/2880 (last visited Feb. 19, 2016).

[117] *Illinois - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/2700 (last visited Feb. 19, 2016).

[118] *Kansas - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/3403 (last visited Feb. 19, 2016).

[119] *Maryland - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/363 (last visited Feb. 19, 2016).

[120] *Pennsylvania - Net Metering*, DSIRE, http://programs.dsireusa.org/system/program/detail/65 (last visited Feb. 19, 2016).

[121] *Utah - Interconnectedness Standards*, U.S. DEP'T OF ENERGY (2015), http://www.energy.gov/savings/interconnection-standards-10.

[122] 4 COLO. CODE REGS. § 723-3:3667(g) (2015).

[123] GA. CODE ANN. § 46-3-50 *et seq.* (2015).

by electric co-ops,[124] and New York residential fuel cells and combined heat and power installations[125] are limited to 10 kW. Kansas residential[126] systems are limited to 15 kW. South Carolina residential systems,[127] Vermont combined heat systems with non-renewable fuels,[128] and Virginia residential systems[129] are limited to 20 kW. Limited to 25 kW are systems in Alaska,[130] residential installations in Arkansas,[131] Colorado commercial and industrial systems served by municipal utilities and electric cooperatives,[132] residential consumers in Delaware,[133] Louisiana residential systems,[134] systems in Nebraska,[135] New York residential wind, solar, and hydroelectric installations,[136] systems in Ohio,[137] residential applications in Oregon,[138] Utah residential systems,[139] West Virginia residential systems,[140] and systems in Wyoming.[141]

Systems are limited to 30 kW in Kentucky[142] and for combined heat and power installations in Maryland.[143] Minnesota limits systems to 40 kW.[144] 50 kW is the system limit for Montana non-coop systems,[145] Pennsylvania

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[124] MONT. CODE ANN. § 69-8-601 *et seq.* (2014).

[125] New York - Net Metering, DSIRE, http://programs.dsireusa.org/system/program/detail/453 (August 3, 2015).

[126] KAN. STAT. ANN. §66-1263 *et seq.* (2015).

[127] South Carolina - Net Metering, DSIRE, http://programs.dsireusa.org/system/program/detail/3041 (Apr. 3, 2015).

[128] Net Metering, VT. PUB. SERV. BD., http://psb.vermont.gov/utilityindustries/electric/backgroundinfo/netmetering (last visited Sep. 19, 2015).

[129] 20 VA. ADMIN. CODE § 5-315-20 (2015).

[130] ALASKA ADMIN. CODE tit. 3, § 50.920(2)(A) (2015).

[131] ARK. PUB. SERV. COMM'N, Net Metering Rules (Sep. 2013), http://www.apscservices.info/rules/net_metering_rules.pdf.

[132] 4 COLO. CODE REGS. § 723-3 (2015).

[133] 26-3000-3001 Del. Admin Code § 8.1.1.1 (2015).

[134] Louisiana - Net Metering, DSIRE, http://programs.dsireusa.org/system/program/detail/983 (Jan. 15, 2016).

[135] NEB. REV. STAT. § 70-2001 *et seq.* (2015).

[136] DSIRE, *supra* note 125.

[137] OHIO ADMIN. CODE 4901:1-10-28 (2015).

[138] OKLA. ADMIN. CODE § 165:40-9-1 *et seq.* (2015).

[139] UTAH CODE ANN. § 54-15-101 *et seq.* (2015).

[140] West Virginia - Net Metering, DSIRE, http://programs.dsireusa.org/system/program/detail/2380 (Oct. 24, 2015).

[141] WYO. STAT. ANN. § 37-16-101 *et seq.* (2015).

[142] KY. REV. STAT. ANN. § 278.465 *et seq.* (2015).

[143] MD. CODE REGS. 20.50.10.01 (2015).

[144] MINN. R. 7835.3300 Subpart 1 (2015). In 2013, the Minnesota net metering statute was amended to increase the limit to 1MW, but the PUC has not updated its regulations accordingly. Minn. Stat. § 216B.164 Subdivision 4 (2015).

[145] MONT. CODE ANN. § 69-8-601 *et seq.* (2015).

residential systems,[146] and West Virginia commercial and industrial customers of IOUs with fewer than 30,000 customers, municipal utilities, and electric cooperatives. One hundred kW as a limit has broader acceptance, existing for Delaware farms,[147] Georgia commercial systems,[148] Hawai'i,[149] Kansas non-residential,[150] Maine customers served by an electric coop,[151] Missouri,[152] New York farm-based solar,[153] North Dakota,[154] Oklahoma,[155] and Washington.[156] Kansas schools are limited to 150 kW.[157] Arkansas non-residential systems[158] and Louisiana commercial and agricultural systems[159] are limited to 300 kW. 500 kW is the limit for New York farm-based wind systems,[160] Vermont except non-renewable CHP installations,[161] Virginia non-residential systems,[162] and West Virginia commercial customers of IOUs with 30,000 customers or more.[163] While Iowa does not limit system size either by public utility commission order or legislation, utilities operating in the state have limited individual systems to 500 kW.[164] Maine installations, other than those served by electric coops, are limited to 660 kW.[165]

One MW is another more common limit, existing for systems in California,[166] Indiana,[167] Nevada,[168] New Hampshire,[169] farm-based biogas

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[146] DSIRE, *supra* note 120.

[147] 26-3000-3001 DEL. ADMIN CODE § 8.1.1.3 (2015).

[148] GA. CODE ANN. § 46-3-50 *et seq.* (2015).

[149] HAW. REV. STAT. § 269-101 *et seq.* (2015).

[150] KAN. STAT. ANN. §66-1263 *et seq.* (2015).

[151] Maine - Net Energy Billing, DSIRE, http://programs.dsireusa.org/system/program/detail/280 (Oct. 24, 2015).

[152] MO. CODE REGS. ANN. tit. 4, § 240-20.065 (2015).

[153] DSIRE, *supra* note 125.

[154] N.D. ADMIN. CODE 69-09-07-09 *et seq.* (2015).

[155] OKLA. ADMIN. CODE § 165:40-9-1 *et seq.* (2015).

[156] WASH. REV. CODE ANN. §80-60-005 *et seq.* (2015).

[157] KAN. STAT. ANN. §66-1263 *et seq.* (2015).

[158] ARK. PUB. SERV. COMM'N., *supra* note 131.

[159] General Order No. R-27558, LA. PUB. SERV. COMM'N, Nov. 30, 2005, No. R-31417 (June 22, 2011), http://www.entergy-louisiana.com/content/net_metering/GOR-31417NetMetering.pdf.

[160] DSIRE, *supra* note 125.

[161] VT. PUB. SVC. BD., *supra* note 128.

[162] 20 VA. ADMIN. CODE § 5-315-20 (2015).

[163] DSIRE, *supra* note 140.

[164] IOWA ADMIN. CODE r. 199-15.11 (476) (2015).

[165] DSIRE, *supra* note 151.

[166] CAL. PUB. UTIL. CODE § 2827.8 (2015).

[167] 170 IND. ADMIN. CODE 4-4.2 (2015).

[168] NEV. REV. STAT. § 704.773 (2015).

[169] N.H. REV. STAT. ANN. § 362-A:9 (2015).

in New York,[170] North Carolina,[171] South Carolina for non-residential systems, and systems in the District of Columbia.[172] New York commercial fuel cells are limited to 1.5 MW.[173] Two MW is the limit for Delaware non-residential customers,[174] Illinois,[175] Maryland,[176] Massachusetts private facilities,[177] New York commercial solar, wind and hydroelectric,[178] Oregon non-residential,[179] Utah non-residential,[180] and West Virginia industrial customers of IOUs with 30,000 customers or more.[181] Pennsylvania non-residential systems are limited to 3 MW.[182] Rhode Island limits the size to 5 MW.[183] Massachusetts public entities are limited to 10 MW.[184] At the highest, New Mexico limits systems to 80 MW.[185]

3. Is there a limit based on expected electrical consumption?

While not as many states have placed a limit calculated on expected electrical consumption, they do exist in several different configurations, based on historical usage, distribution rating or connected load. In Arizona, the cap is 125% of a customer's total connected load.[186] In Colorado, it's

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[170] DSIRE, *supra* note 125.

[171] North Carolina - Net Metering, DSIRE, http://programs.dsireusa.org/system/program/detail/1246 (Oct. 24, 2015).

[172] D.C. PUB. SERV. COMM'N, FACT SHEET: NET ENERGY METERING FOR CUSTOMER-OWNED GENERATORS IN THE DISTRICT OF COLUMBIA (Jan. 17, 2013), http://www.dcpsc.org/pdf_files/hottopics/NEM_Factsheet_eng.pdf.

[173] DSIRE, *supra* note 125.

[174] DEL. PUB. SERV. COMM'N, Order No. 7984 (Jun. 7, 2011), http://depsc.delaware.gov/orders/7984.pdf.

[175] 220 ILL. COMP. STAT. 5/16-107.5 (2015).

[176] MD. CODE REGS. 20.50.10 (2015).

[177] MASS. DEP'T OF PUB. UTIL., FACTSHEET: RULES ON NET METERING (Jul. 2013), http://www.mass.gov/eea/docs/dpu/electric/net-metering/2013-7-2-net-metering-fact-sheet.pdf.

[178] DSIRE, *supra* note 125.

[179] OKLA. ADMIN. CODE § 165:40-9-1 *et seq.* (2015).

[180] UTAH CODE ANN. § 54-15-101 (2015).

[181] DSIRE, *supra* note 140.

[182] Pennsylvania - Net Metering, DSIRE, http://programs.dsireusa.org/system/program/detail/65 (Oct. 24, 2015). This can increase to 5 MW for customer-generators who make their systems available to the grid during emergencies or where a microgrid is in place in order to maintain critical infrastructure. *Id.*

[183] R.I. GEN. LAWS § 39-26.4-3(a)(1) (2015).

[184] MASS. DEP'T OF PUB. UTIL., *supra* note 177.

[185] New Mexico - Net Metering, DSIRE, http://programs.dsireusa.org/system/program/detail/284 (Oct. 24, 2015).

[186] ARIZ. ADMIN. CODE § 14-2-2301 (2015).

120% of annual average consumption.[187] Delaware is 110%, calculated using the last two years' worth of usage.[188] Florida, instead, sets the limit as 90% of the customer's utility distribution rating.[189] In Maryland, the limit is 200% of the customer's baseline annual usage.[190] One hundred percent is a common limit, set in Nevada, [191] New Jersey,[192] Rhode Island, [193] and South Carolina. [194] Ohio also effectively limits to 100%, as the system "must be intended to offset part or all of the customer-generator's electricity requirements."[195] Alaska has similar language,[196] as does Kansas,[197] Kentucky,[198] Maine,[199] Missouri,[200] Virginia,[201] and Wyoming. [202] Pennsylvania limits to 110%.[203] Regardless of what limit is set, states that use this measure expect the electricity generated not to supplement the grid, but to offset one account's energy consumption.

4. Is there a cap based on percent of utility load?

A number of states have set a cap on overall net metering enrollment based on a percentage of utility load, with ranges from 0.2% to 20%. Georgia is the lowest, allowing net metering to stop at 0.2% of the utility system's peak demand.[204] Louisiana can cease adding net metering capacity once 0.5% of the retail peak load is met,[205] as can utilities in Michigan.[206] Washington limits to 0.5% of a utility's 1996 peak demand.[207]

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[187] 4 COLO. CODE REGS. § 723-3 *et seq.* (2015).

[188] DEL. PUB. SERV. COMM'N, *supra* note 174.

[189] FLA. ADMIN. CODE r. 25-6.065(4) (2015).

[190] MD. CODE REGS. 20.50.10.01 (2015).

[191] Nevada - Net Metering, DSIRE, http://programs.dsireusa.org/system/program/detail/372 (Oct. 24, 2015).

[192] N.J. ADMIN. CODE § 14:8-4.3 (2015).

[193] R.I. GEN. LAWS § 29-26.4-3 (2015).

[194] DSIRE, *supra* note 87.

[195] OHIO ADMIN. CODE 4901:1-10-28(A)(1)(a)(iv) (2015).

[196] ALASKA ADMIN. CODE tit. 3, § 50.900 *et seq.* (2015).

[197] The system "is intended primarily to offset part or all of the customer-generator's own electrical requirements." KAN. STAT. ANN. § 66-1264(b)(4) (2015).

[198] KY. REV. STAT. ANN. § 278.465(1) (2015).

[199] 65-407-313 ME. CODE. R. § 3(C) (2015).

[200] MO. REV. STAT. § 386.890(3)(e) (2015).

[201] 20 VA. ADMIN. CODE § 5-315-20 (2015).

[202] WYO. STAT. ANN. § 37-16-101 (2015).

[203] PA. PUB. UTIL. COMM'N, *supra* note 88.

[204] GA. CODE ANN. § 46-3-50 *et seq.* (2015).

[205] LA. PUB. SERV. COMM'N, *supra* note 159.

[206] MICH. COMP. LAWS ANN. § 460.1173(2) (2015).

[207] WASH. REV. CODE ANN. § 80.60.020(1)(a) (2015).

Hawaii's utilities are allowed to stop connecting at 1% of total peak capacity,[208] as are Indiana's,[209] those in Kansas,[210] and those in Kentucky.[211] Nebraska puts the limit at 1% of average monthly peak.[212] Virginia's cap is 1% of an electric distribution company's peak forecast, rather than actual, for the previous year.[213] In Alaska, the cap is 1.5% of average retail demand.[214] South Carolina limits to 2% of the average retail peak for the previous five years.[215] In New Jersey, utilities can request to cease offering net metering if statewide enrolled capacity exceeds 1.5% of average retail demand.[216] Nevada is slightly higher, setting the cap at 3% of peak capacity.[217] West Virginia limits net metering to 3% of the previous year's peak demand.[218] Rhode Island sets the cap at 3% for Block Island Power Company and Pascoag Utility District.[219] In California,[220] Illinois,[221] and Massachusetts,[222] the limit is 5% of the utility's customer peak demand. Missouri sets the limit of 5% but with an additional 1% capacity added annually.[223] New York sets the cap for everything combined excluding wind at 6% of 2005 demand, with the wind limit set at 0.3% of 2005 demand.[224] Vermont's cap is 15% of a utility's peak demand during 1996 or the peak demand during the most recent calendar year, whichever is greater.[225] Utah raised the aggregate capacity for Rocky Mountain Power to 20% of the utility's 2007 peak demand.[226]

Rather than setting a percentage cap, some states set a pure limit. New Hampshire sets a cap at 50 MW.[227] Maryland sets a limit of 1,500 MW.[228]

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[208] HAW. REV. STAT. § 269-104 (2015).
[209] 170 IND. ADMIN. CODE 4-4.2-4 (2015).
[210] KAN. STAT. ANN. § 66-1,184(c)(5) (2015).
[211] KY. REV. STAT. ANN. § 278.466(1) (2015).
[212] NEB. REV. STAT. § 70-2003(5) (2015).
[213] 20 VA. ADMIN. CODE § 5-315-40 (2015).
[214] ALASKA ADMIN. CODE tit. 3, § 50.910(b) (2015).
[215] South Carolina - Net Metering, *supra*, note 127.
[216] N.J. ADMIN. CODE § 14:8-4.3 (2015).
[217] NEV. REV. STAT. § 704.766 (2014); NEV. ADMIN. CODE § 704.881 (2014).
[218] W. VA. CODE § 24-2F-8(g) (2015).
[219] R.I. GEN. LAWS § 39-26.4-3(a)(1) (2014).
[220] CA. PUBL. UTIL. COMM'N, *supra* note 85.
[221] 220 ILL. COMP. STAT. ANN. 5/16-107.5 (2015).
[222] ENERGY & ENVTL. AFFAIRS, *supra* note 81.
[223] MO. REV. STAT. § 386.890(3)(1) (2014); MO. CODE REGS. ANN. tit. 4, § 240-20.065(4)(A) (2014).
[224] DSIRE, *supra* note 125.
[225] VT. STAT. ANN. tit. 30, §219a(h)(1)(A) (2015).
[226] UTAH CODE ANN. § 54-15-101 (2014).
[227] N.H. REV. STAT. ANN. § 362-A:9 (2013).
[228] MD. CODE REGS. 20.50.10.01(A) (2015).

Regardless of which cap method is chosen and with the possible exception of Vermont and Utah, these caps are incredibly small and do not seem to demonstrate a commitment to distributed generation.

5. Who owns the renewable energy credits?

Who owns the renewable energy credits is an important consideration because this will impact the financial implications of most distributed generation installations. There are two basic ways one would expect this to work: that either the customer owns the renewable energy credits, or the utility does. States falling into the paradigm where the customer owns the credits include Arkansas,[229] Colorado,[230] Florida,[231] Kentucky,[232] Maryland,[233] Minnesota,[234] New Jersey,[235] Pennsylvania,[236] Virginia,[237] and Washington.[238] In Vermont, the customer retains ownership of the credits, but has the option of voluntarily granting them to the utility.[239] In West Virginia, while the customer owns the credits, the customer must certify their resource with the Public Utility Commission and file an Alternative or Renewable Meter Generation Report to claim the credits.[240]

On the other hand, in New Mexico,[241] the utility owns the renewable energy credits. In North Carolina, if a customer does not accept a time-of-use tariff, all renewable energy credits are owned by the utility.[242] Then there are the hybrids, where the customer retains the renewable energy credits unless the utility compensates the customer for the electricity generated, at which point the credits shift to the utility. California falls into this hybrid system,[243] as does North Dakota,[244] Nevada,[245] and New

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[229] ARK. ADMIN. CODE. 126.03.20-2.04 (2015).

[230] 4 COLO. CODE REGS. § 723-3:3664 (2015).

[231] FLA. ADMIN. CODE ANN. r. 25-6.065(8)(f) (2015).

[232] KY. REV. STAT. ANN. § 141.436 (2015).

[233] MD. CODE REGS., 20.50.10.01(A) (2015).

[234] MINN. STAT. ANN. § 216B.164(2a)(g) (2015).

[235] N.J. ADMIN. CODE § 14:8-7.3 (2015).

[236] 52 PA. CODE § 75.13(H) (2015).

[237] 20 VA. ADMIN. CODE § 5-315-50 (2014).

[238] Net Metering, WASH. UTIL. & TRANSP. COMM'N, http://www.utc.wa.gov/regulatedIndustries/utilities/energy/Pages/netMetering.aspx (last visited Sep. 19, 2015).

[239] Net Metering, *supra* note 128.

[240] W. VA. CODE R. § 150-34-5.3 (2015).

[241] N.M. CODE R. § 17.9.570.14(C)(3) (2015) http://164.64.110.239/nmac/parts/title17/17.009.0570.htm. New Mexico's three IOUs each offer performance-based incentives in exchange for the credits. *Id.*

[242] NCUC Order, Docket No. E-100, Sub 83, http://www.ncuc.commerce.state.nc.us/selorder/rules/sw022908.pdf (last visited Feb. 19, 2016).

[243] CA. PUBL. UTIL. COMM'N, *supra* note 83.

Hampshire.[246] Missouri states that the customer owns the credits unless certain rebates are paid by the utility, in which case the credits are transferred to the utility.[247] Kansas has yet a different system; neither the customer nor the utility may sell renewable energy credits, but the estimated generation capacity of all net metered facilities count toward the utilities' compliance with the state's renewable energy standards at a rate of 1 kW nameplate capacity to 1.10 kW of compliance.[248] Louisiana has opted not to set a rule because the state currently does not have a renewable energy portfolio standard.[249] To incent storage, Michigan actually grants 1/5 of a renewable energy credit to a renewable energy system using "advanced electric storage technology."[250] Of course, even more permutations could exist when taking into account leased systems or those bought on credit; the contracts in those cases may require the renewable credits owned by a customer to be transferred to a third party.

6. Are there additional liability and insurance requirements?

Most state policies are silent on this issue. Florida requires those with systems between 10 kW and 100 kW to sign an indemnification clause to relieve the utility from any liabilities up to $1 million and those with systems between 100 kW and 2 MW to do the same up to $2 million.[251] Indiana requires the customer-generator to hold $100,000 in liability insurance on the net metering infrastructure.[252] New Mexico utilities are allowed to require liability insurance.[253] On the other side, Maryland does not allow utilities to require customers to purchase additional liability insurance,[254] nor does Oklahoma.[255] However, the issue of liability seems like an area that could generate significant controversy in the future. As utilities depend on distributed generation, the question of who is liable

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[244] N.D. ADMIN. CODE 69-09-07-09 (2015).

[245] NEV. REV. STAT. § 704.766 (2015); NEV. ADMIN. CODE § 704.881 (2015).

[246] N.H. REV. STAT. ANN. § 362-A:9 (2015).

[247] MO. REV. STAT. § 386.890 (2015); MO. CODE REGS. ANN. tit. 4, § 240-20.065 (2015).

[248] KAN. ADMIN. REGS. 82-17-5 (2015).

[249] LA PUB. SERV. COMM'N, GENERAL ORDER, DOCKET NO. R-31417, IN RE: RE-EXAMINATION OF THE COMMISSION'S NET ENERGY METERING RULES § 2.05 (Nov. 30, 2005), http://www.entergy-louisiana.com/content/net_metering/GOR-31417NetMetering.pdf.

[250] MICH. COMP. LAWS ANN. § 460.1039(c)(2)(c) (2015).

[251] FLA. ADMIN. CODE ANN. r. 25-6.065(5) (2015).

[252] 170 IND. ADMIN. CODE 4-4.2-8(a) (2015).

[253] N.M. CODE R. § 17.9.570.1 (2015).

[254] MD CODE ANN. § 7-306(g)(4)(iii) (2015).

[255] Oklahoma - Net Metering, DSIRE, http://programs.dsireusa.org/system/program/detail/286 (Oct. 24, 2015).

when the distributed generation resource does not deliver will become an issue.

7. What are the fixed costs or standby changes?

This area seems to be one of the most contentious, with utilities attempting to stabilize revenue by shifting to fixed charges over those based on consumption. In Virginia, residential facilities with a capacity of greater than 10 kW must pay a monthly standby charge.[256] For customers of Dominion with a system of between 10 kW and 20 kW, charges are $2.79 per kW in monthly distribution standby charges and $1.40 per kW in monthly transmission standby charges.[257] Most Arizona utilities have a fixed charge of $0.70 per kW per month. However, those serviced by the Salt River Project who install solar panels after Dec. 8, 2014, will be required to pay around $50 in monthly charges that other customers do not have to pay.[258] In Oklahoma, utilities can apply to the OCC for permission to apply a fixed charge to those who install net-metered distributed generation after Nov. 1, 2014.[259] The Connecticut Public Utilities Regulatory Authority recently approved an increase in monthly fees on all residential customers of Connecticut Light and Power Company,[260] although they left in place the current scheme where excess generation can be used to offset some transmission and distribution charges.[261]

Wisconsin has implemented the largest changes in fixed charges. The fixed charge increased Wisconsin Public Service residential customers to $19 per month, the highest of any investor-owned utility in the Midwest.[262] The Public Utilities Commission then approved fixed charges of $16 per month for all We Energies residential customers, a 75% increase. At the same time, they also approved new tariffs for We Energies customers with

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[256] 20 VA. ADMIN. CODE § 5-315-50 (2015).

[257] Virginia Electric and Power Company, Basic Residential Rate Schedule, Section II.4 (Apr. 29, 2015), https://www.dom.com/library/domcom/pdfs/virginia-power/rates/residential-rates/schedule-1.pdf.

[258] Ellen M. Gilmer, *SolarCity accuses Ariz. Utility of Elbowing Out Competition*, ENERGYWIRE (Mar. 5, 2015).

[259] S.B. 1456, 2014 Leg., Reg. Sess. (Okla. 2014), http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20ENR/SB/SB1456%20ENR.pdf.

[260] Michael Copley, *Rooftop Solar Finds Out Utilities Can Disrupt, Too*, SNL (Jan. 20, 2015) https://www.snl.com/InteractiveX/Article.aspx?cdid=A-30310079-12854.

[261] CONN. GEN. STAT. § 16-243 (2015).

[262] Jeffrey Tomich, *UTILITIES: Wis. PSC Makes Statement With Fixed-Charge Decision*, ENERGYWIRE (Nov. 10, 2014), http://www.eenews.net/energywire/2014/11/10/stories/1060008631.

roof top solar, including sharp reductions in bill credits for generation and the imposition of a monthly demand charge.[263]

Hawai'i, while the changes have not been implemented yet, could have the highest fixed fees if a proposal by the Hawaiian Electric Company (HECO) is adopted. HECO is calling for a new monthly fee for all customers of between $50 and $61, and an additional fee for net metered customers who sell electricity onto the grid of between $12 and $16 per month.[264] Additionally, the utility commission is looking at potentially discontinuing net metering entirely to aid utilities' economic challenges due to rooftop solar installations.[265]

On the other end, some states are declining to approve or increase fixed fees or standby charges to encourage solar development. Georgia pulled any fixed fee[266] and South Carolina has deferred any such fees until at least 2020.[267]

8. How is excess generation put onto the grid paid for?

The excess generation put onto the grid–that which does not offset electricity use by the customer–is handled primarily in two broad ways: the customer gets paid, or not. The common misconception is that net metering always equates to a situation where the utility "pays rooftop solar customers the retail electricity rate."[268] While that is true in Arkansas,[269] California,[270] Colorado,[271] Delaware (except for certain community-owned facilities),[272]

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[263] Jeffry Tomich, *SOLAR: Approval of Utility Proposals Dims Outlook for Net Metering in Wisconsin*, ENERGYWIRE (Nov. 17, 2014), http://www.eenews.net/energywire/2014/11/17/stories/1060009007.

[264] Stephen Lacey, *As Hawaii Prepares for Utility Reform, the State's Solar Industry Sheds 3,000 Workers*, GREENTECH MEDIA (Sept. 25, 2014), http://www.greentechmedia.com/articles/read/as-hawaii-demands-utility-reform-thousands-of-solar-installers-are-laid-off.

[265] Erica Gies, *Is Hawaii's Solar Power Surge Slowing Down?*, THE GUARDIAN (Feb. 16, 2015), http://www.theguardian.com/environment/2015/feb/16/is-hawaiis-solar-power-surge-slowing-down.

[266] GA. CODE ANN. § 46-3-54(4) (2015).

[267] S.C. CODE ANN. § 58-40-20 (2015).

[268] Debra Kahn, *UTILITIES: Solar Groups See 'Radical' Shift in Net-Metering Debate*, ENERGYWIRE (Sept. 19, 2014), http://www.eenews.net/energywire/2014/09/19/stories/1060006144.

[269] ARK. PUB. SERV. COMM'N, NET METERING RULES (Sep. 2013), http://www.apscservices.info/rules/net_metering_rules.pdf.

[270] Net Energy Metering (NEM), CALIFORNIA PUBLIC UTILITIES COMMISSION (July 7, 2015), http://www.cpuc.ca.gov/PUC/energy/DistGen/netmetering.htm [http://web.archive.org/web/20150905064855/http://www.cpuc.ca.gov/PUC/energy/DistGen/netmetering.htm].

[271] 4 COLO. CODE REGS § 723-3:2664(b) (2014), http://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=5738&fileName=4%20CCR%20723-3.

Hawai'i,[273] Illinois,[274] Indiana,[275] Iowa,[276] Kansas (for those systems operating before July 1, 2014),[277] Kentucky (where no time-of-use tariff is in place),[278] Louisiana,[279] Maine,[280] Maryland,[281] Michigan for systems 20 kW or less,[282] Minnesota for systems up to 40 kW,[283] Montana (systems served by non-coops),[284] New Jersey,[285] New York (except micro-CHP and fuel cells),[286] North Carolina,[287] Pennsylvania,[288] South Carolina,[289] Vermont,[290] Virginia,[291] Washington,[292] and the District of Columbia (for systems 100 kW or less),[293] it is not always the case.

Arizona,[294] Connecticut,[295] Iowa,[296] Minnesota at customer request,[297] Nevada,[298] New Hampshire,[299] New Mexico (one option for systems 10 kW

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[272] Del. Code Ann. tit. 26, § 1014(e)(2)-(3), (9) (2015).

[273] HAW. REV. STAT. § 269-101 (2014).

[274] ICC Net Metering: Draft Rule – June 28, 2013, ILLINOIS COMMERCE COMMISSION, http://www.icc.illinois.gov/Electricity/NetMetering.aspx [http://web.archive.org/web/20150509054854/http://www.icc.illinois.gov/electricity/NetMetering.aspx].

[275] 170 IND. ADMIN. CODE 4-4.2 (2014).

[276] IOWA ADMIN. CODE r. 199-15.11 (2014).

[277] KAN. STAT. ANN. § 66-1265(d) (2015).

[278] KY. REV. STAT. ANN. § 278.466(3) (2015).

[279] LA. PUB. SERV. COMM'N, General Order (Jun. 22, 2011), www.entergy-louisiana.com/content/net_metering/GOR-31417NetMetering.pdf.

[280] ME. REV. STAT. tit. 35-A, § 3209-A *et seq.* (2014).

[281] MD. CODE REGS. 20.50.10.05 (2015).

[282] MICH. COMP. LAWS ANN. § 460.1177(4) (2015).

[283] MINN. STAT. § 216B.164 (2014).

[284] MONT. CODE ANN. § 69-8-601 *et seq.* (2014).

[285] N.J. ADMIN. CODE § 14:8-4.3(c) (2015).

[286] N.Y. PUB. SERV. LAW § 66-j(4)(b) (McKinney 2011 & Supp. 2015).

[287] Investigation of Proposed Net Metering Rule, No. E-100, Sub 83 (Oct. 20, 2005), http://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=766d7127-977d-4312-a98c-e2fc6fa09742.

[288] 73 PA. CONS. STAT. ANN. § 1648.5 (2015).

[289] Kristi E. Swartz, *SOLAR: Can S.C.'s Groundbreaking Net Metering Policy Spread in the Southeast?*, ENERGYWIRE (Dec. 16, 2014), http://www.eenews.net/energywire/2014/12/16/stories/1060010601.

[290] 18-1 VT. CODE R. § 17(3) (2014).

[291] 20 VA. ADMIN. CODE § 5-315-50 (2014).

[292] WASH. REV. CODE ANN. § 80.60.030(3)(b) (2015).

[293] D.C. Mun. Regs. tit. 15, § 902 (2015).

[294] ARIZ. ADMIN. CODE § 14-2-2301 (2014).

[295] CONN. GEN. STAT. § 16-243 (2014).

[296] IOWA ADMIN. CODE r. 199-15.11(476)(15.11)(5) (2015).

[297] MINN. STAT. § 216B.164 (2014).

[298] NEV. REV. STAT. § 704.766 (2014); NEV. ADMIN. CODE § 704.881 (2014).

[299] N.H. REV. STAT. ANN. § 362-A:9 (2014).

or less),[300] Oregon,[301] South Carolina,[302] Utah (Rocky Mountain Power residential and small commercial customers),[303] West Virginia,[304] and Wyoming,[305] credit any excess generation to a customer's next bill at the utility's retail rate, but as a kWh credit.

Minnesota for systems greater than 40 kW,[306] Missouri,[307] Montana cooperatives,[308] Nebraska,[309] New Mexico (one option for systems 10 kW or less),[310] New York (for micro-CHP and fuel cells),[311] Rhode Island,[312] and Utah (for all cooperative customers and an option for Rocky Mountain Power large commercial or industrial customers)[313] credit excess generation on the customer's next bill at the utility's avoided cost rate.

And then there are the states that choose to calculate something entirely different. Alaska credits excess generation to customer's next bill at the non-firm power rate.[314] Georgia credits to the customer's next bill at a predetermined rate approved by the PUC.[315] For systems larger than 20 kW in Michigan, any excess is credited to customer's next bill at power supply component of retail rate.[316] In Ohio, excess generation is credited to customers' next bill at the unbundled generation rate.[317] In Utah, larger commercial or industrial customers of Rocky Mountain Power have the option of being credited on their next bill at an alternative rate based on

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[300] N.M. CODE R. § 17.9.570.11 (2014).

[301] OR. ADMIN. R. 860-039-0055(1) (2015).

[302] S.C. CODE ANN. § 58-40-20(D)(4) (2015).

[303] Consideration of Changes to Rocky Mountain Power's Schedule No. 135 - Net Metering Service, No. 08-035-78 (Feb. 12, 2009), http://www.psc.state.ut.us/utilities/electric/09orders/feb/0803578ROdtm.pdf.

[304] W. VA. CODE ANN. § 24-2F-1 (2014).

[305] WYO. STAT. ANN. § 37-16-101 (2014). Wyoming utilities also have the right to treat excess generation as "other compensation," giving utilities the freedom to apply rates other than the retail rate. *Id.*

[306] MINN. STAT. § 216B.164 (2014).

[307] MO. REV. STAT. § 386.890 (2014); MO. CODE REGS. ANN. tit. 4, § 240-20.065 (2014).

[308] MONT. CODE ANN. § 69-8-603(3)(b) (2015).

[309] NEB. REV. STAT. § 70-2002(6) (2015).

[310] N.M. CODE R. § 17.9.570.1 (2014).

[311] DSIRE, *supra* note 125.

[312] R.I. GEN. LAWS § 39-26.4-3(a)(4) (2015) (stating credit granted up to a maximum of 125% of the customer's power consumption for that billing period).

[313] UTAH CODE ANN. § 54-15-101 (2014).

[314] ALASKA ADMIN. CODE tit. 3, § 50.930. This is unless a different rate has been established in a commission-approved contract. *Id.*

[315] GA. CODE ANN. § 46-3-55 (2015).

[316] MICHIGAN PUB. SERV. COMM'N, NET METERING PROGRAM, http://www.michigan.gov/mpsc/0,4639,7-159-16393_48212_58124---,00.html (last visited Oct. 24, 2015).

[317] Ohio - Net Metering, DSIRE, http://programs.dsireusa.org/system/program/detail/36 (last visited Mar. 2, 2015).

utility revenue or sales contained in FERC Form No. 1.[318] The District of Columbia credits to customer's next bill at the generation rate for systems from 100 kW to 1 MW.[319]

For those on time-of-use tariffs, the calculation can be even more complicated. In Arizona, off peak generation is credited against off peak consumption, and on-peak generation credited against on peak consumption.[320] Illinois has a similar scheme, where the utility will calculate credits based on the time energy is created,[321] as does Kentucky, which accounts for the specific time the electricity is generated in accordance with the time-of-day or time-of-use billing agreement currently in place.[322] Michigan carries credits forward at the applicable retail rate for each time-of-use pricing period within a billing cycle,[323] as does Nevada (credit will be carried forward to the same time-of-use period as the time-of-use period in which it was generated),[324] North Carolina (on-peak generation offsets on-peak consumption, off-peak generation offsets off-peak consumption, and then any remaining on-peak generation offsets off-peak consumption),[325] and Virginia.[326]

With any of these measures, however, the question arises over how long a customer can keep rolling an excess credit forward. For utilities, this represents an open obligation on their balance sheets. For customers, the best would be that they can roll over any excess credits indefinitely; and that is the case in Alaska,[327] an option in California,[328] an option for those served by IOUs in Colorado,[329] an option for those in Delaware,[330] Indiana,[331] Kentucky,[332] Louisiana,[333] Massachusetts,[334] Michigan,[335]

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[318] UTAH CODE ANN. § 54-15-101 (2014).

[319] D.C. PUB. SERV. COMM'N, FACT SHEET: NET ENERGY METERING FOR CUSTOMER-OWNED GENERATORS IN THE DISTRICT OF COLUMBIA, http://www.dcpsc.org/pdf_files/hottopics/NEM_Factsheet_eng.pdf.

[320] ARIZ. ADMIN. CODE § 14-2-2301 (2014).

[321] 220 ILL. COMP. STAT. ANN. 5/16-107.5(f) (2015).

[322] KY. REV. STAT. ANN. § 278.466(3) (2015).

[323] MICH. COMP. LAWS ANN. § 460.1177(4) (2015).

[324] NEV. REV. STAT. § 704.766 (2014); NEV. ADMIN. CODE § 704.881 (2014).

[325] STATE OF NORTH CAROLINA, UTIL. COMM'N, DOCKET NO. E-100, SUB 83, ORDER AMENDING NET METERING POLICY (Mar. 31, 2009), http://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=f1b29a03-4445-4930-9dfd-14682ceb368e.

[326] 20 VA. ADMIN. CODE § 5-315-50 (2014).

[327] ALASKA ADMIN. CODE tit. 3, § 50.930 (2015).

[328] CAL. PUB. UTIL. COMM'N, NET ENERGY METERING, http://www.cpuc.ca.gov/PUC/energy/DistGen/netmetering.htm.

[329] 4 COLO. CODE REGS § 723-3 (2015).

[330] DEL. CODE ANN. tit. 26, § 1014(e)(1) (2015).

[331] 170 IND. ADMIN. CODE 4-4.2 (2014).

[332] KY. REV. STAT. ANN. § 278.466(5)(c) (2015).

Nevada,[336] New Hampshire,[337] New Mexico,[338] New York (for micro-hydro, non-residential solar and wind, residential micro-CHP and fuel cells),[339] Ohio (unless customers ask for payment at end of 12-month billing period),[340] Virginia,[341] West Virginia,[342] and the District of Columbia.[343]

However, many state policies require that remaining credits be paid out at some point; the difference then becomes when and at what rate. Remaining credits will be paid to the customer at the utility's avoided cost in Arizona (last bill in calendar year),[344] Connecticut (credit remaining on March 31),[345] Florida (at the end of the calendar year),[346] Louisiana (final month of service only),[347] Minnesota (at the end of the calendar year),[348] Nebraska (annually),[349] New Hampshire (upon customer request at the end of an annual period),[350] New Jersey (at the end of an annualized period),[351] New Mexico (when customer leaves utility),[352] New York (for residential PV, wind, and farm-based biogas, reconciled annually),[353] North Dakota (monthly),[354] Virginia (so long as this is agreed with the utility prior to the beginning of the net metering period to be covered),[355] and Wyoming (at the beginning of each calendar year).[356]

The state-specific payments are numerous. An option for those served by IOUs in Colorado is to have the remaining credit paid at average hourly

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[333] Louisiana - Net Metering, DSIRE, *supra* note 134.

[334] MASS. GEN. LAWS ANN. ch. 164, § 139(a) (2015).

[335] MICH. COMP. LAWS ANN. § 460.1177(2015).

[336] NEV. REV. STAT. § 704.766 (2015); NEV. ADMIN. CODE § 704.881 (2015).

[337] N.H. REV. STAT. ANN. § 362-A:9 (2015).

[338] N.M. CODE R. § 17.9.570.1 (2015).

[339] New York - Net Metering, DSIRE, *supra* note 125.

[340] Ohio - Net Metering, *supra* note 317.

[341] 20 VA. ADMIN. CODE § 5-315-50 (2014). A customer has the option of carrying excess forward to the next 12-month period, provided the credit to be carried forward does not exceed the amount of energy purchased during the previous annual period. *Id.*

[342] W. VA. CODE ANN. § 24-2F-1 (2014).

[343] D.C. PUB. SERV. COMM'N, FACT SHEET, *supra* note 319.

[344] ARIZ. ADMIN. CODE § 14-2-2301 (2014).

[345] CONN. GEN. STAT. § 16-243 (2014).

[346] FLA. ADMIN. CODE ANN. r. 25-6.065(8)(f)(2008).

[347] LA. PUB. SERV. COMM'N, *supra* note 159.

[348] MINN. STAT. § 216B.164 (2014).

[349] NEB. REV. STAT. §§ 70-2002(6)(b)-2003(4) (2014).

[350] N.H. REV. STAT. ANN. § 362-A:9 (2014).

[351] N.J. ADMIN. CODE §14:8-4.3 (2013).

[352] N.M. CODE R. § 17.9.570.14(C)(3)(b) (2008).

[353] DSIRE, *supra* note 125.

[354] N.D. ADMIN. CODE 69-09-07-09 (2014).

[355] 20 VA. ADMIN. CODE § 5-315-50 (2014).

[356] WYO. STAT. ANN. § 37-16-103(b) (2015).

incremental cost.[357] Kansas pays the remaining credit at an average cost rate for systems which begin operating after July 1, 2014, and all power generated after January 1, 2030.[358] Being paid at the energy supply rate is an option for those in Delaware[359] and for systems between 10 kW and 80 MW in New Mexico.[360] In Pennsylvania, remaining credits are paid at "price-to-compare" annually, which includes the generation and transmission components of a utility's retail rate, but not the distribution component.[361] Annual reconciliation at a rate municipal utilities and electric cooperatives deem appropriate is what those in Colorado served by these utilities can expect.[362] In Maryland, an annual reconciliation occurs in April, where excess generation is paid at the commodity energy supply rate.[363] And, in New Mexico, those with systems of between 10 kW and 80 MW have the option of being paid at the utility's applicable time-of-use rate.[364] Wisconsin has not set any rules; there, it depends on the utility.[365] However, the PSC has approved Xcel reconciling credits annually at the avoided cost rate.[366]

Several states have attempted to provide greater market signals in the prices they pay. In California, customers may choose to receive payment for credit at a rate equal to the 12-month average spot market price for the hours of 7 am to 5 pm for the year in which the surplus power was generated.[367] If this price is higher than full retail price, this scheme provides value for the benefits of renewable energy generation. In New Jersey, a customer may choose to be compensated on a real-time basis according to the PJM power pool real-time locational marginal pricing rate, adjusted for losses by the respective zone in PJM.[368]

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[357] 4 COLO. CODE REGS. § 723-3 (2014).

[358] KAN. STAT. ANN. § 66-1266 (2009).

[359] DEL. CODE ANN. tit. 26 §1014(e) (2015).

[360] N.M. CODE R. § 17.9.570.14 (2014).

[361] 52 PA. CODE § 75.13(c)-(d) (2008).

[362] COLO. REV. STAT. ANN. § 40-2-124 (2015).

[363] MD. CODE REGS. 20.5.10.05(E)(1) (2015). The "commodity energy supply rate" is calculated as "[t]he dollar value of the net excess generation shall be equal to the generation or commodity portion of the rate that the eligible customer-generator would have been charged by the electric company for the previous month multiplied by the number of kilowatt-hours of excess generation." *Id.*

[364] N.M. CODE R. § 17.9.570.14(C)(3)(b) (2008).

[365] DSIRE, *supra* note 87.

[366] Application of Northern States Power Company-Wisconsin for Authority to Adjust Electric and Natural Gas Rates, No. 4220-UR-117, at 50 (Dec. 22, 2011), https://www.psc.wi.gov/apps40/dockets/content/detail.aspx?dockt_id=4220-UR-117.

[367] CA. PUB. UTILS. COMM'N, *supra* note 83.

[368] N.J. ADMIN. CODE § 14:8-4.3 (2015).

On the other end of the spectrum are state policies which provide no compensation to the consumer for excess generation. This is perhaps most stringent in Oklahoma, where any excess at the close of monthly billing cycle shall expire with no compensation to the customer.[369] Most states with this scheme implement it on an annual basis, where any excess at the close of annual billing cycle shall expire with no compensation to the customer. This is the case in Arkansas,[370] California if a customer does not make a different affirmative choice,[371] Hawai'i,[372] Illinois,[373] Kansas (on March 31),[374] Maine,[375] Missouri,[376] Montana cooperatives,[377] Montana non-coops (in January, April, July, or October, depending on the customer's choice),[378] North Carolina (at the beginning of summer billing season),[379] Vermont,[380] Virginia (for excess over the amount of energy purchased during the previous annual period),[381] and Washington (on April 30 of each calendar year).[382]

Two states provide no compensation to the customer, but instead grant excess generation credits to customers enrolled in low-income assistance programs. In Oregon, excess generation credits still remaining in March are granted to the low-income assistance program at the utility's avoided cost rate.[383] In Utah, the same occurs for Rocky Mountain Power residential and small commercial customers at the end of a 12-month billing cycle.[384]

As all of these permutations show, net metering is anything but simple. Customers–especially residential ones–buy what they think they understand, and net metering is easy to understand at its most basic level. However, the reality is that, as it is implemented across the states, net metering is not simple. While the variation across the states may enable

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[369] OKLA. ADMIN. CODE § 165:40-9-1 *et seq.* (2014).

[370] ARK. CODE ANN. § 23-18-604(6) (2015).

[371] CAL. PUB. UTILS. COMM'N, *supra* note 83.

[372] HAW. REV. STAT. § 269-101(6)(b) (2015).

[373] 220 ILL. COMP. STAT. ANN. 5/16-107.5 (2015).

[374] KAN. STAT. ANN. §66-1266(a)(5) (2015).

[375] 65-407-313 ME. CODE R. § 3(E)(3) (2015)

[376] MO. REV. STAT. § 386.890(7)(5)(4) (2015); MO. CODE REGS. ANN. tit. 4, § 240-20.065(7)(D) (2015).

[377] MONT. CODE ANN. § 69-8-603(3)(b)-(4) (2015).

[378] *Id.* § 69-8-603(4).

[379] North Carolina, DSIRE, *supra* note 171.

[380] VT. PUB. SERV. BD., *supra* note 128.

[381] 20 VA. ADMIN. CODE § 5-315-50 (2014).

[382] WASH. REV. CODE ANN. § 80.60.030(5).

[383] OR. ADMIN. R. 860-39-55(2) (2012).

[384] UTAH CODE ANN. § 54-15-104(4)(a). (2002). The credit can also go to another purpose approved by the PSC. *Id.*

each state to tailor policies to its particular situation, it also makes it more difficult to implement federal policies which could encourage distributed generation or increased resiliency. Rather than starting from a common point–which most would expect–the complexity of the reality of net metering policies makes that impossible.

IV. INTERCONNECTION

As was noted previously by the National Renewable Energy Laboratory, interconnection policy is the other state-level policy which strengthens distributed generation adoption, especially solar.[385] While net metering determines the rate and payment structure between a customer and a utility, interconnection policy is what determines what needs to be in place to link the customer system to the electric grid and enable the two-way transfer of electricity.[386] There are arguments to be made about the technical considerations which are required for interconnection which would enable microgrids and storage; however, I will leave that detail to others. Basically, a more complicated inverter installed with a separate electrical panel enables the solar panels to run certain circuits even when the main electrical grid is down.[387] This also keeps power being generated from the solar panels or microgrid arrangement from flowing back onto distribution lines, maintaining safety for utility workers attempting to restore power to the main grid.[388]

From a policy perspective, what customers are required to implement (external disconnect switches are common), the process they must go

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[385] NAT. RENEWABLE ENERGY LAB., *supra* note 67.

[386] Interconnection is defined as "the linking of two or more networks for the mutual exchange of traffic." 47 C.F.R. § 51.5.

[387] *See* ENERGY MATTERS, GRID CONNECT SOLAR FAQ'S, http://www.energymatters.com.au/residential-solar/home-solar-faqs/ (last visited Oct. 24, 2015).

[388] The Kansas interconnection agreement exemplifies this: "If the proposed System is designed to provide uninterruptible power to critical loads, either through energy storage or back-up generation, the proposed System includes a parallel blocking scheme for this backup source that prevents any backflow of power to the Company's electrical system when the electrical system is not energized or not operating normally." Net Metering Connection Agreement, KANSAS CITY LIGHT & POWER CO. 34K (Dec. 18, 2012), http://kcpl.com/~/media/Files/Save%20Energy%20and%20Money/Sched34.pdf. Similarly, Michigan requires that "projects interconnecting to a spot network circuit where the project or aggregate of total generation exceeds 5 percent of the spot network's maximum load, a requirement that the project must utilize a protective scheme that will ensure that its current flow will not affect the network protective devices, including reverse power relays or a comparable function." DEP'T ENERGY, LABOR & ECON. GROWTH PUB. SERVICE COMM'N, ELECTRIC INTERCONNECTION AND NET METERING STANDARDS, r. 460.615(4)(a) (2009), http://w3.lara.state.mi.us/orrsearch/107_97_AdminCode.pdf.

through, how much it will cost, and how long it will take has an impact on interconnections. Forty-three states plus the District of Columbia have adopted interconnection policies, guidelines or standards.[389] Unfortunately, "stringent technical requirements, obstructive utility practices, and prohibitive regulatory barriers are common obstacles faced by distributed generation projects."[390]

While these policies do not have as much complexity as net metering, they have similarities in which technologies are eligible, which utilities are exempted, and what insurance is required. The most common limitation is how large a system can be. California, Hawai'i, Illinois, Indiana, Maine, Massachusetts, Michigan, New Jersey, North Carolina, Rhode Island, and Vermont have no limit on size.[391] For those states that do limit interconnections based on size, the range on the limit varies from 10 kW (for Georgia residential systems with net metering) to 80 MW (installations in New Mexico).[392]

Costs are also highly variable, with the general rule that application fees are assessed on a sliding scale. Connecticut's application fees for systems no larger than 10 kW are $100, ranging up to $1,000 for systems 2 MW to 20 MW.[393] Delaware does not allow processing fees for systems up to 10 kW. For systems between 10 kW and 2 MW, fees are limited to $50 plus $1 per kW. For those up to between 2 MW and 10 MW, fees are limited to $100 plus $2 per kW.[394] Indiana has a similar structure: no application fees are allowed for systems up to 10 kW; fees of $50 plus $1 per kW nameplate capacity are allowed for systems between 10 kW and 2 MW; and fees of $100 plus $2 per kW nameplate capacity are allowed for systems above that.[395] New Jersey has the same fee schedule.[396] In Iowa, fees are set at $50 for installations up to 10 kW; $100 plus $1 per kW for systems between 10 kW and 2 MW; $500 plus $2 per kW for systems between 2

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[389] Interconnection Policies – November 2012, DSIRE, http://www.dsireusa.org/documents/summarymaps/interconnection_map.pdf [hereinafter DSIRE Map]. All states have guidelines, while 32, plus the District of Columbia, have standards. *Id.*

[390] ALEXANDRA TWEEDIE & ELIZABETH DORIS, COMPARING GERMANY'S AND CALIFORNIA'S INTERCONNECTION PROCESSES FOR PV SYSTEMS 1 (National Renewable Energy Laboratory 2011), http://www.nrel.gov/docs/fy11osti/51814.pdf.

[391] DSIRE Map, *supra* note 389.

[392] *Id.*

[393] CONN. AGENCIES REGS. 16-262m-2(b)(2) (2015).

[394] DEL. CODE ANN. tit. 26 § 1001. (2009).

[395] 170 IND. ADMIN. CODE 4-4.3-4(a) (2013). Systems above 2 MW may also be required to pay for "charges for actual time spent on any impact or facilities studies required by Indiana's rules. Costs for engineering work done as part of any impact or facilities study shall not exceed $100 per hour." *Id.*

[396] N.J. ADMIN. CODE § 14:8-4.3 (2015).

MW and 10 MW; and $1,000 plus $2 per kW for systems larger than 10 MW.[397] For Maine, it is the same $50 fee for systems 10 kW or less; $50 plus $1 per kW for systems between 10 kW and 2 MW; $100 plus $1.50 per kW for systems between 2 MW and 10 MW; and $100 plus $2 per kW for larger systems.[398] Maryland's policy is the same as Maine's except that the charge is $100 plus $2 per kW for those systems between 2 MW and 10 MW as well as for larger systems.[399] In New Mexico, fees are $50 for systems up to 10 kW; $100 for systems between 10 kW and 100 kW; and $100 plus $1 per kW for systems greater than 100 kW.[400] North Carolina requires a fee of $100 for systems up to 20 kW; $250 for systems between 20 kW and 100 kW; and $500 for systems between 100 kW and 2 MW.[401] Washington sets fees at $100 for systems up to 25 kW, $500 for systems between 25 kW and 500 kW, and $1000 for systems between 500 kW and 20 MW.[402] In West Virginia, systems of less than 25 kW pay an application fee of $30, while installations larger than 25 kW pay $50 plus $1 per kW of capacity.[403]

Oregon allows no interconnection fees for systems up to 25 kW; $50 plus $1 per kW for systems between 25 kW and 2 MW plus the "reasonable cost of any required minor modifications to the electric distribution system or additional review," with engineering costs limited to $100 per hour; and, for all other systems, $100 plus $2 per kW plus required impact and feasibility studies at no more than $100 per hour and the cost of any facilities which a utility must install to accommodate the interconnection.[404] In Pennsylvania, the rate is a set $100 for systems up to 10 kW; $250 plus $1 per kW of nameplate capacity for inverter-based systems between 10 kW and 5 MW; $350 plus $2 per kW of nameplate capacity for other systems between 10 kW and 5 MW and everything above 5 MW.[405] Pennsylvania also approves utilities to charge customers "for the cost of grid upgrades necessary to accommodate the system and costs of up to $100 per hour associated with system impact, feasibility, or facility studies."[406] Rhode Island splits out the fees into those for feasibility studies and impact

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[397] IOWA ADMIN. CODE r. 199-15.10 (2014).

[398] ME. REV. STAT. 65-407-324, ME. CODE R. § 8-11 (2014).

[399] MD. CODE REGS. 20.50.09.05 (2015).

[400] N.M. CODE R. § 17.9.568.1 (2014). Utilities with fewer than 50,000 customers also "may charge reasonable consulting fees for systems greater than 10 kW." *Id.*

[401] NC also adopts the FERC fee structure for systems over 2 MW. N.C. UTILS. COMM'N., *supra* note 171, at 25.

[402] WASH. ADMIN. CODE 480-108-030 (2015).

[403] W. VA. CODE ANN. § 24-2F-1 (2014).

[404] OR. ADMIN. R. 860-39-45 (2012).

[405] PA. PUB. UTILS. COMM'N, *supra* note 88, at 19.

[406] *Id.*

studies.[407] For residential systems of less than 25 kW, there is no fee.[408] For residential systems greater than 25 kW, there is a $50 feasibility study fee and a $100 impact study fee.[409] For non-residential systems, the feasibility study fee ranges from $100 to $2,500, and the impact study fee ranges from $500 to $10,000.[410]

On the other end of the spectrum, in Michigan, the combined total of the net metering application and the interconnection review fee cannot exceed $100.[411] New York also specifies no application fees for those with systems up to 50 kW.[412] In South Carolina, the fee is $100 for residential systems and $250 for non-residential systems, regardless of size.[413] In Vermont, the fee is $300 for everyone.[414]

Timing is, unfortunately, not addressed in many policies, which can lead to problems. In Missouri, utilities must review and respond to the customer "within thirty days of receipt for systems [up to] 10 kW . . . and within ninety days of receipt for all other systems."[415] Kentucky specifies 20 business days for a decision for a Level 1 application and 30 business days for a Level 2 application.[416] Virginia allows a system up to 25 kW to be connected 31 days after an application is submitted, and 61 days after an application is submitted for all other sizes.[417] In New York, "systems up to 50 kW are eligible for a simplified or expedited six-step process."[418] All

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[407] 39 R.I. GEN. LAWS § 39-26.3-4 (2014).

[408] *Id.*

[409] *Id.*

[410] *Id.*

[411] MICH. ADMIN. CODE r. 460.642 (2009).

[412] *New York State Standardized Interconnection Requirements and Application Process for New Distributed Generators 2MW or Less Connected in Parallel with Utility Distribution Systems*, N.Y. STATE PUB. SERV. COMM'N 3 (2014) http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/dcf68efca391ad6085257687006f396b/$FILE/ATTP59JI.pdf/Final%20SIR%202-1-14.pdf [hereinafter *NY State S.I.R.*].

[413] South Carolina Public Serice Comm'n Order, Docket No. 2005-387-E (Jan. 19, 2006), https://dms.psc.sc.gov/attachments/order/e95f9000-cfe0-3dbb-ad2898f8371a0fe8.

[414] STATE OF VERMONT PUB. SERVICE BD. R. 5.50 (Sept. 10, 2006), http://psb.vermont.gov/sites/psb/files/rules/OfficialAdoptedRules/5500_Electric_Generation_Interconnection_Procedures.pdf.

[415] MO. REV. STAT. § 386.890 (2014); MO. CODE REGS. ANN. tit. 4, § 240-20.065 (2014).

[416] Interconnection and Net Metering Guidelines, KY. PUB. SERV. COMM'N 5 (2009), http://www.psc.ky.gov/agencies/psc/Industry/Electric/Final%20Net%20Metering-Interconnection%20Guidelines%201-8-09.pdf.

[417] 20 VA. ADMIN. CODE § 5-315-30(B) (2015).

[418] *Interconnection Standards*, DSIRE, http://programs.dsireusa.org/system/program/detail/799 (last updated Nov. 13, 2015).

others go through an eleven-step process, with no time frame specified.[419] However, any sort of rigid time frame is rare.

And timing has become a problem, especially in Hawai'i and California. In Hawai'i, solar is especially attractive to customers because energy prices are so high due to the "near-total dependence on oil."[420] Thousands of residents are waiting for the Hawaiian Electric Company (HECO) to approve their interconnection agreements,[421] and some have been waiting for over a year.[422] HECO has slowed installations, from 83 MW in 2013 to 65 MW in 2014, and installed capacity is likely to drop below 50 MW in 2015.[423] This has led to 3,000 solar installers losing their jobs.[424] California recently released a guidebook that aims to shorten the permitting process, as it can take months to get a permit.[425]

Distributed generation projects in all states could likely benefit from the adoption of an interconnection policy like that of Germany. There, the Renewable Energy Sources Act ("EEG") requires utilities to prioritize connecting renewable energy projects to the grid.[426] No interconnection connection agreement or contract is required of the customer.[427] Utilities are required to connect renewables to the grid, so even though an application is required, few are rejected.[428] Any interconnection studies or grid upgrades are paid for by the utility.[429] Additionally, the EEG provides priority feed-ins for renewable energy, allowing it to be sold at market rates even when other, more traditional forms of electricity are also available.[430]

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[419] *See NY State S.I.R.*, supra note 412 at 5-11.

[420] Bentham Paulos, *Regulating the Utility of the Future: Implications for the Grid Edge 8*, GREENTECH MEDIA (Jan. 2015), https://www.greentechmedia.com/research/report/regulating-the-utility-of-the-future.

[421] Herman K. Trabish, *Solar installers flee Hawaii as interconnection queue backs up,* UTILITYDIVE (Sept. 29, 2014), http://www.utilitydive.com/news/solar-installers-flee-hawaii-as-interconnection-queue-backs-up/314160/.

[422] Stephen Lacey, *As Hawaii Prepares for Utility Reform, the State's Solar Industry Sheds 3,000 Workers*, GREENTECH MEDIA (Sept. 25, 2014), http://www.greentechmedia.com/articles/read/as-hawaii-demands-utility-reform-thousands-of-solar-installers-are-laid-off.

[423] Trabish, *supra* note 421.

[424] Lacey, *supra* note 422.

[425] Debra Kahn, *RENEWABLES: Calif. releases handbook to speed rooftop solar installations,* CLIMATEWIRE (Dec. 18, 2014), http://www.eenews.net/climatewire/2014/12/18/stories/1060010759.

[426] TWEEDIE & DORIS, *supra* note 390, at 4.

[427] *Id.* at 5.

[428] *Id.*

[429] *Id.*

[430] Dr. Matthias Lang & Annette Lang, *Overview Renewable Energy Sources Act*, GERMAN ENERGY BLOG, http://www.germanenergyblog.de/?page_id=283 (last visited Jan. 5, 2016). The EEG also provides for above-market feed-in tariffs, but the policy

Net metering and interconnection do not alone provide resiliency, but rather, they provide for the possibility of a higher percentage of distributed generation resources and, therefore, the potential for resiliency. In order to shift that potential into reality, microgrids and solar plus storage are necessary.

V. SOLAR PLUS STORAGE AND MICROGRIDS

Both of these technologies–solar plus storage and microgrids–enable resiliency. California is currently the largest market for storage, committing to a state target of 1.325 GW of storage by 2020.[431] Southern California Edison announced contracts for 260 MW of energy storage, more than five times what the California Public Utilities Commission required for its recent solicitation; the projects ranged from 0.5 MW to 135 MW and utilize a variety of technologies including energy efficiency.[432] New York City is also trying to increase storage possibilities, as adding a new substation in the city would cost up to $1 billion and increasing transmission is also challenging with the city's density.[433] However, batteries in basements and parking garages in large buildings could help dampen peak demand, such as the 170 kW of batteries in the Brooklyn Army Terminal, which charge at night and then discharge when the building's electric demand peaks.[434] New Brunswick, Nova Scotia and Prince Edward Island are completing a four-year test to store between 16-18 MW of wind energy in electric hot water heaters.[435]

Some states have started to address storage. Arkansas defines solar as solar or solar plus storage.[436] Both Kansas and Kentucky deal with storage

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considerations of increasing feed-in tariffs above retail is not within the scope of this paper.

[431] Debra Kahn, *CALIFORNIA: New energy storage road map lays out path to commercialization*, ENERGYWIRE (Jan. 13, 2015), http://www.eenews.net/energywire/2015/01/13/stories/1060011559 (referencing Energy--Storage--Use, 2010 Cal. Legis. Serv. Ch. 469 (A.B. 2514) (2010)).

[432] Debra Kahn, *GRID: Calif.'s first major energy storage buy bodes well for global market, backers say*, ENERGYWIRE (Nov. 6, 2014), http://www.eenews.net/energywire/2014/11/06/stories/1060008486; Katherine Ling, *UTILITIES: Distributed energy storage gets big boost in new Calif. Contracts*, E&E NEWS PM (Nov. 12, 2014), http://www.eenews.net/eenewspm/2014/11/05/stories/1060008440.

[433] David Ferris, *TECHNOLOGY: New York City tries to cram in some energy storage*, ENERGYWIRE (Nov. 19, 2014), http://www.eenews.net/energywire/2014/11/19/stories/1060009142.

[434] *Id.*

[435] David Ferris, *TECHNOLOGY: Storing renewable energy in a thousand basements*, ENERGYWIRE (Sept. 15, 2014), http://www.eenews.net/energywire/2014/09/15/stories/1060005747.

[436] 126-03-23 ARK. CODE R. (2015) (defining "solar facility" as "[a] facility in which

in standard interconnection agreements.[437] As noted above, Michigan provides additional renewable energy credits for a system using "advanced electric storage technology."[438] Minnesota is evaluating storage, but has yet to adopt a state policy.[439] On the other hand, North Carolina allows storage, but then expressly prohibits "gaming": charging the battery during off-peak hours and then putting electricity onto the system during peak demand.[440] While locations like California and New York are trying to figure out how to do expressly that,[441] North Carolina views this as an illegal manipulation of a time-of-use tariff.[442]

Whatever the specific technology chosen for a particular application, the market for solar plus storage is growing, and is projected to be worth more than $1 billion by 2018.[443] Just utility-scale storage is predicted to reach $15.6 billion within the next 10 years,[444] led by compressed air energy storage and batteries.[445] The price of lithium-ion batteries fell 20% in 2014 and are expected to fall an additional 15% in 2015.[446] Continued decreases in price will make it increasingly economical to install storage.

Microgrids are similarly poised for significant development. The majority of development so far has been on the scale of hospitals,

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electricity is generated through the *collection, transfer and/or storage* of the sun's heat or light") (emphasis added).

[437] *See* KAN. ADMIN. REGS. § 82-17-2(d) (2015); KY. PUB. SERV. COMM'N, *supra* note 416.

[438] *Supra* text accompanying note 250.

[439] *See, e.g.*, STRATEGEN CONSULTING FOR MINN. DEP'T OF COMMERCE, DIV. OF ENERGY RES., WHITE PAPER ANALYSIS OF UTILITY-MANAGED, ON-SITE ENERGY STORAGE IN MINNESOTA (2013), http://mn.gov/commerce/policy-data-reports/energy-data-reports/index.jsp?id=17-81654#/list/appId//filterType//filterValue//page//sort//order/.

[440] DSIRE, *supra* note 125.

[441] *See* Energy Storage, ENERGY UPGRADE CALIFORNIA, http://www.energyupgradeca.org/en/save-energy/home/make-your-power/energy-storage (last visited Jan. 5, 2016) ("Time Varied Rates allow you to take advantage of off-peak prices by drawing power from your battery instead of the grid. You can then recharge your battery from the grid during off-peak hours.").

[442] DSIRE, *supra* note 125.

[443] Katherine Ling, *ENERGY STORAGE: U.S. rooftop solar with battery market to top $1B in 3 years – report*, GREENWIRE (Dec. 22, 2014), http://www.eenews.net/greenwire/2014/12/22/stories/1060010941.

[444] *Id.*

[445] Daniel Cusick, *TECHNOLOGY: Energy storage business poised to explode – study*, CLIMATEWIRE (Jan. 14, 2015), http://www.eenews.net/climatewire/2015/01/14/stories/1060011643.

[446] *BUSINESS: Solar energy storage market to grow tenfold by 2018 – study*, CLIMATEWIRE (Dec. 23, 2014), http://www.eenews.net/climatewire/2014/12/23/stories/1060010965.

campuses, and military installations. The Borough of Manhattan Community College ("BMCC"), for example, had to rescue servers housed in a first floor data center during Superstorm Sandy when it flooded.[447] Now, BMCC is installing 300 kW of solar on the roof, moving its data center to the penthouse along with 100 kW of storage.[448] The campus has noted that the data center and the power to run it are "critical."[449] The military has also found microgrids important; the Marine Corps' Twentynine Palms Combat Center in California has a microgrid designed to maintain power in the event the facility is cut off from the Southern California grid.[450]

Now, microgrids are starting to gain traction at the local level. Potsdam, New York, is installing an underground microgrid to supply electricity to all of the village's essential services.[451] Planned to be completed in 2017, the generation needed for local police, fire, hospital, and emergency response facilities, plus two college campuses, including Clarkson University, will be powered by local generation.[452] Rather than just serve the campus, Clarkson decided to create "a resilient microgrid that would serve critical loads throughout our community."[453] Rutland, Vermont, is planning a microgrid served only by solar and storage.[454] The site will have a 2 MW solar farm connected to 4 MW of battery storage.[455] Built on a former landfill site, the town hopes the project will "improve community resilience during severe storms" by providing power to the emergency shelter at Rutland High School during major outages.[456]

States are also starting down the path of microgrid policy development. Maryland has released a road map for microgrid deployment, which would use microgrids to power essential community operations plus those necessary for quality of life like grocery stores, pharmacies, and gas stations.[457] Connecticut has several microgrid pilot projects in the

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[447] Ferris, *supra* note 435.

[448] *Id.*

[449] *Id.*

[450] Daniel Cusick, *ELECTRICITY: Potsdam, N.Y., tries to 'island' itself to avoid storm-driven power outages*, CLIMATEWIRE (Jan. 20, 2015), http://www.eenews.net/climatewire/2015/01/20/stories/1060011910.

[451] *Id.*

[452] *Id.*

[453] Cusick, *supra* note 450.

[454] Julia Pyper, *ENERGY STORAGE: Former landfill site becomes microgrid to protect Vt. town*, CLIMATEWIRE (Aug. 13, 2014), http://www.eenews.net/climatewire/2014/08/13/stories/1060004414.

[455] *Id.*

[456] *Id.*

[457] Julia Pyper, *ADAPTATION: Eastern states lead way with new microgrids as a*

development phase, and New York and Massachusetts are looking to invest in them as well.[458]

While necessary for increased resilience, solar plus storage and microgrids inherently threaten the traditional monopoly utility model and will continue to develop in the future.

VI. HOW HAVE UTILITIES RESPONDED?

The adoption of solar and increased interconnections have created pressure for traditional utilities and the model used to compensate them. Utilities have struggled to determine what an acceptable response is, and what one going forward would be. Especially for large investor-owned utilities, companies have needed to balance between consumer sentiment, regulators, investors, and politicians.

A study by the Lawrence Berkeley National Laboratory noted that, as distributed generation grows, it reduces utility revenues more than it reduces cost.[459] This is true for both vertically-integrated utilities which include generation as well as transmission and distribution or just transmission and distribution providers,[460] and advances in energy efficiency and distributed generation could decrease revenues by as much as $48 billion by 2025.[461] Some traditional utilities, to extend their monopoly, are attempting to hold on to the current operating and profit model for as long as possible.[462] These utilities are pushing for increasing fixed and standby charges, and some states are allowing this increased risk-shifting to consumers.[463] For places with significant solar penetration

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strategy to weather severe storms, CLIMATEWIRE (June 27, 2014), http://www.eenews.net/climatewire/2014/06/27/stories/1060002067.

[458] *Id.*

[459] ANDREW SATCHWELL ET AL., FINANCIAL IMPACTS OF NET-METERED PV ON UTILITIES AND RATEPAYERS: A SCOPING STUDY OF TWO PROTOTYPICAL U.S. UTILITIES, at ix (Ernest Orlando Lawrence Berkeley National Laboratory 2014), https://emp.lbl.gov/sites/all/files/lbnl-6913e.pdf. As photovoltaic ("PV") penetration rose to ten percent, declines in shareholder returns decreased by between three and eighteen percent. *Id.* However, rate increases under the same ten percent penetration to consumers would be limited to about 2.6%. *Id.*

[460] *See id.*

[461] Ryan Holeywell, *Report: Energy efficiency could cost U.S. utilities $48 billion*, FUELFIX (Dec. 8, 2014), http://fuelfix.com/blog/2014/12/08/report-energy-efficiency-could-cost-u-s-utilities-48-billion/.

[462] *See* Joby Warrick, *Utilities wage campaign against rooftop solar*, THE WASHINGTON POST (Mar. 7, 2015), https://www.washingtonpost.com/national/health-science/utilities-sensing-threat-put-squeeze-on-booming-solar-roof-industry/2015/03/07/2d916f88-c1c9-11e4-ad5c-3b8ce89f1b89_story.html.

[463] *Id.*

already, it is a push for these policies plus, as noted above, attempting to stifle competition by disallowing or delaying interconnections.[464] However, these strategies not only harm solar and other distributed generation resources, but lessen significantly any price signal for conservation and energy efficiency. But it does make revenues more predictable for the traditional entrenched utility. This is, unfortunately, a bid to eliminate competition, and utilities are lobbying hard in both legislatures and public utility commissions to maintain the status quo.[465]

What utility companies are worried about is the so-called "death spiral," where, with more consumers generating their own energy, generation for the remaining population becomes more expensive, which then leads more consumers to generate their own electricity, and so on.[466] However, multiple reports have found any report of the death spiral–especially at the levels of distributed generation envisioned in current state regulations–are exaggerated.[467]

However, there is a path for utilities, and some are recognizing that providing ancillary services, optimizing the grid, and maintaining stability is a place where there is still a need in the future and profit to be made.[468] Managing power from a range of sources–including demand response–will require expertise, and will require grid upgrades that will need to be paid for. The utilities that see this as a potential path forward are more interested in making sure the transition happens in an orderly fashion, preferably over a relatively extended period of time which maintains profits in the short term.[469]

The economics of renewable energy will continue to evolve. Some utilities are starting to see the potential opportunity of starting rooftop solar businesses themselves. Subsidiaries of both Arizona Public Service Co. and Tucson Electric Power Co. have applied for and been given approval to

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[464] *Id.*

[465] *Id.*

[466] *See, e.g.*, Stephen Lacey, *This Is What the Utility Spiral Looks Like*, GREENTECH MEDIA (Mar. 4, 2014), https://www.greentechmedia.com/articles/read/this-is-what-the-utility-death-spiral-looks-like.

[467] SATCHWELL, *supra* note 461, at 60; *see also* Peter Behr, *UTILITIES: Reports of 'death spiral' are exaggerated, consultant says*, ENERGYWIRE (Oct. 2, 2014), http://www.eenews.net/energywire/stories/1060006777.

[468] Edward Klump, *ELECTRCITY: CEOs see promise in wires as they eye spending priorities*, ENERGYWIRE (Nov. 20, 2014), http://www.eenews.net/energywire/2014/11/20/stories/1060009265.

[469] Edward Klump, *ELECTRICITY: Even as grid persists, EEI speakers say utilities' approach must evolve*, ENERGYWIRE (Nov. 13, 2014), http://www.eenews.net/energywire/2014/11/13/stories/1060008812.

offer limited rooftop solar programs by The Arizona Corporation Commission.[470]

Based on a 2014 survey, 61% of utility company executives believed they would suffer from significant to moderate reductions in revenue by 2030 and 51% believed microgrids would have an impact on revenue reduction in the same time frame.[471] It is clear that the majority of utilities need to adapt to the changing electric system and adopt new customer-centric business practices.

VII. THE INTERESTING CASE OF GERMANY

Skeptics of renewable energy scoff at Germany, saying that "subsidizing" renewable energy has led to high electric rates and grid instability without much benefit.[472] Starting at 6.2% renewable energy in 2000,[473] renewable energy made up nearly 26% of Germany's electrical generation in 2014,[474] marking "the first year renewable energy became the primary source of electricity in Germany."[475] In the states that make up former East Germany, it is over 40%.[476]

While the burden for Germany's energy transformation does fall to rate payers, German households pay an average electrical bill which equates to

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[470] Nichola Groom, *Big utilities pushing into blooming home solar market*, REUTERS (Oct. 22, 2014, 4:02 PM), http://www.reuters.com/article/2014/10/22/us-utilities-solar-idUSKCN0IB16I20141022; Julia Pyper, *Arizona Utilities Get Approval to Own Rooftop Solar*, GREENTECH MEDIA (Dec. 26, 2014), http://www.greentechmedia.com/articles/read/arizona-utilites-get-the-go-ahead-to-own-rooftop-solar.

[471] Jack Azagury et al., *How Can Utilities Survive Energy Demand Disruption?*, ACCENTURE 2 (2014), https://www.accenture.com/t20150523T024232__w__/us-en/_acnmedia/Accenture/Conversion-Assets/DotCom/Documents/Global/PDF/Dualpub_14/Accenture-Digitally-Enabled-Grid-Utilities-Survive-Energy-Demand-Disruption.pdf.

[472] *See, e.g.*, Robert L. Greene, *What has gone wrong with Germany's energy policy* (Dec. 14, 2014, 11:50 PM), THE ECONOMIST EXPLAINS, http://www.economist.com/blogs/economist-explains/2014/12/economist-explains-10.

[473] Madeline Chambers, *Is Merkel's green zeal turning brown?*, REUTERS (Sept. 4, 2014), http://uk.reuters.com/article/2014/09/04/uk-germany-environment-idUKKBN0GZ1G320140904.

[474] Jeevan Vasagar, *Renewables take top spot in Germany power supply stakes*, FINANCIAL TIMES, (Jan 7. 2015), http://www.ft.com/cms/s/0/cc90455a-9654-11e4-a40b-00144feabdc0.html. Lignite coal, the next greatest component, made up 25.6% of electrical generation. *Id.*

[475] *Renewable energy takes the lead in Germany*, GOVERNORS' WIND(Jan. 9, 2015) ENERGY COALITION, http://www.governorswindenergycoalition.org/?p=11363.

[476] Umair Irfan, *ELECTRICITY: The illuminating journey of former East Germany: from dirty power to 40% renewable energy*, CLIMATEWIRE (Nov. 3, 2014), http://www.eenews.net/climatewire/2014/11/03/stories/1060008259.

approximately 2.5% of household income, compared to 2.7% of household income in the U.S.[477] And, in Germany, that includes an €0.0624 per kWh renewable energy surcharge.[478]

As noted, this far exceeds the amount of renewables that many states contemplate allowing onto their grids, and utilities say keeping the percentage down is necessary for reliability. However, "despite the high levels of intermittent renewable energy, the Council of European Energy Regulators found that Germany has the most reliable electric grid on the continent."[479] While there is some skepticism about high renewable penetration being reliable, scientists working with Siemens have determined that "[i]t is possible to provide balancing power using 100 percent renewable resources."[480]

New computer models have demonstrated multiple "economically viable ways to achieve a low-carbon future, using existing technologies."[481] In fact, the models showed that it was economically advantageous to move as quickly as possible to 80% renewables, as the entire energy system would cost the same to run, and that Germany could reach 80% renewables by 2025.[482] The simulations required the switch be made without damaging businesses or living standards, and that Germany could not be hurt economically by the results.[483]

Germany expects to continue this increase in renewable generation, planning to generate 60% of its electricity with renewables by 2035,[484] and 80% by 2050.[485] While this renewable penetration has new challenges–there were worries that a solar eclipse in March, 2015 would impact 30,000 MW of production across Europe–grid operators across the continent are coordinating their response.[486] However, as with stability, reliability and

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[477] Umair Irfan, *NATIONS: Burden of Germany's shift to renewable energy falls on taxpayers, but energy rates are close to U.S. range*, CLIMATEWIRE (Oct. 22, 2014), http://www.eenews.net/climatewire/2014/10/22/stories/1060007702.

[478] *Id.*

[479] Irfan, *supra* note 477.

[480] Evdoxia Tsakiridou, *Pictures of the Future*, SIEMENS, Spring 2014, at 22, http://www.siemens.com/content/dam/internet/siemens-com/innovation/pictures-of-the-future/pof-archive/pof-spring-2014.pdf.

[481] Diana S. Powers, *Plan Outlines Low-Carbon Future for Germany*, N.Y. TIMES (Nov. 30, 2014), http://www.nytimes.com/2014/12/01/business/energy-environment/plan-outlines-low-carbon-future-for-germany-energy.html.

[482] *Id.*

[483] *Id.*

[484] Vasagar, *supra* note 474.

[485] Irfan, *supra* note 477.

[486] Michel Rose, *Solar eclipse in March to challenge European power grids*, REUTERS (Nov. 7, 2014), http://www.reuters.com/article/2014/11/07/us-europe-solar-eclipse-idUSKBN0IR16S20141107.

price, states could learn how to integrate distributed generation from Germany's example, rather than approaching it with trepidation and timidity.

VIII. WHERE DO WE GO FROM HERE?

The question then becomes: what do we do with all this information? Rather than just recognizing the absurdity that exists in the complexity of current net metering and interconnection policies, it is important to recognize that, underneath it all, no state is going to argue with the need to increase resiliency. While federal policy may be the best way to do so, it is unlikely that a federal policy will emerge given the current political climate. However, at the very least, states should focus on a way to improve consistency.

That consistency would enable policies which could effectively shape the grid of the future, deal with climate issues, and provide a framework for necessary infrastructure spending. It will also disable protectionist utility behavior, which will eventually lead to consumer empowerment and choice. Lower cost, higher reliability, lower emissions, and greater resiliency are all possible with technologies that are currently available and economically feasible.

The good news is that there are specific examples emerging in locations today that have been discussed in this paper that provide a blueprint for how these might be implemented. On the interconnection side, Germany's ease of implementation is a model that should be replicated. While there is some discussion that this would encourage renewable energy where it is not directly offsetting required investment in the distribution network, there could be two levels (both easy): one for where the distributed generation would negate the need for distribution capital upgrades, and one for where the distributed generation would only negate the need for generation capacity.[487] Both, however, would be little or no cost to the distributed generation owner and be quick and straightforward.

With net metering, the obvious choice is to make it what everyone already thinks it is–straightforward and easy for customers to understand. An October 2014 report found that "most consumers voice a desire to reduce their energy bills, not be wasteful, and express a belief that they are

[487] For example, distributed generation in Brooklyn would fall into the first category, where the distributed generation would both negate the need for new generation capacity and also negate the need for capital upgrades to the transmission and distribution network. Distributed generation other places in the state, which are not forecasted to have a need for transmission and distribution upgrades, would fall into the second category.

energy conscious."[488] However, the study found it was the "simplicity" of messages "critical" for consumers to try "new and existing energy programs."[489] For this to occur, states should agree on which technologies qualify for net metering and how large systems can be. This will allow for economies of scale around marketing programs and installations as well as around the application and approval process.

To encourage microgrids and, with them, resiliency, any net metering limit based on expected electrical consumption should be removed. Any cap based on a percent of utility load should also be removed. As Germany, California, Hawai'i, and other locales have demonstrated, any cap of this sort is based on utility protectionism, rather than on the need for grid stability or reliability. As these locations have integrated a higher percentage of renewables, they have demonstrated adequately that it can be done elsewhere. Stopping distributed generation connections at a small percentage of peak capacity further entrenches traditional utility interests while stifling the ability to become more resilient.

Financial considerations will almost always be part of the decision of consumers to install distributed generation. Therefore, all states should adopt a policy that all Renewable Energy Certificates ("RECs") are owned by the consumer rather than the utility as long as the consumer initiated the process of installing the generation. This should be the case even where the consumer is paid for some net excess generation. Requiring utilities to meet the RECs with renewable energy which they have either built or contracted for directly will stop them from taking advantage of their customers' initiative and good intentions. Along those same lines, consumers should be paid for their net excess generation; a utility should not receive that electricity for free, and especially not at the end of one billing cycle. The easiest retail rate for customers to understand, either as a dollar or kW credit, should be the rate paid.

With both ease of interconnection and favorable net metering policy, states will have the proper incentives in place to encourage distributed generation. However, as discussed, this distributed generation will not, by itself, increase resiliency. Therefore, states will also have to incent utilities to make investments that are more resilient, rather than less. HECO has already started down this path; due to increased grid reliability concerns, the company is delaying or refusing interconnections of solar generation.[490]

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[488] SMART GRID CONSUMER COLLABORATIVE, MOTIVATIONS AND EMOTIONS OF ENGAGED CONSUMERS 4 (2014), http://smartgridcc.org/wp-content/uploads/2014/10/SGCCs-Motivations-and-Emotions-of-Engaged-Consumers-ExecSummary.pdf.

[489] *Id.* at 6.

[490] *See* Kathryn Mykleseth, *Solar Industry Questions HECO's count of PV approvals*, HONOLULU STAR-ADVERTISER, (last updated Apr. 15, 2015, 10:00 AM),

However, the company has said that they will allow interconnection of "smart" solar–which can help the company actively balance the grid–to a higher percentage of grid penetration, while continuing to deny interconnections of "dumb" solar.[491] While this may cost residents more initially, it will aid in resiliency by allowing microgrids. In some cases, the encouragement to be more resilient may need to be a regulatory requirement because being less resilient could be more fiscally beneficial for the utility. This is the case in Arizona; where the utility is looking at installing inverters which increase grid stability by wasting excess solar generation by sending it to ground.[492] The utility would get a return on all the new transformers as a capital asset, but this would not increase resiliency. Rather, the state should require having smart technology at the house, which would increase resiliency (and, likely, provide another market for storage technology).

In terms of integrating storage into the grid, California's model of requiring storage should be emulated. This will generate a larger market, which will continue to drive innovation and decrease prices with more adoption. As noted, storage has the potential to substantially ease the transition between our current centralized generation system and a mass distributed generation future. California's model of a significant RPS goal–and of increasing that goal regularly–should also be adopted. It is pure hypocrisy for some states to claim that a low RPS goal cannot be met; the issue is political will.

New York, through its Reforming Energy Vision process, is attempting to address many of these challenges in a more comprehensive and encompassing way. While new insights will likely come out of this process, it is likely to take longer than currently envisioned and be more

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http://www.staradvertiser.com/news/breaking/20150414_Solar_industry_questions_HECOs_count_of_PV_approvals.html?id=299779161; Herman K. Trabish, HECO accused of slowing solar interconnects to max out NextEra merger value, UTILITYDIVE (Feb. 27, 2015), http://www.utilitydive.com/news/heco-accused-of-slowing-solar-interconnects-to-max-out-nextera-merger-value/369157/; *Gridlocked by the power grid: why Hawaii's solar energy industry is at a crossroads*, PBS (Apr. 11, 2015, 11:23 AM), http://www.pbs.org/newshour/bb/gridlocked-power-grid-hawaiis-solar-energy-industry-crossroads/.

[491] *See* News Release, Hawaiian Electric, Maui Electric, and Hawai'i Electric Light, Hawaiian Electric companies propose plan to sustainably increase rooftop solar (Jan. 20, 2015), http://www.hawaiianelectric.com/vcmcontent/StaticFiles/pdf/20150120b_Hawaiian_Electric_Companies_Plan_for_Sustainable_Solar_Growth.pdf.

[492] Ryan Randazzo, *Salt River explores how to integrate more rooftop solar*, THE ARIZONA REPUBLIC, Aug. 24, 2015, http://www.azcentral.com/story/money/business/2014/08/25/salt-river-explores-integrate-rooftop-solar/14570153/.

disruptive than some states might be willing to accept. However, rather than waiting–either for customers to demand state policies change, or, if storage technology increases substantially, for customers to leave the grid–states should learn from what has already occurred and proactively change their policies to adopt these best practices. Doing so will be important, not only for adapting to a changing climate generally, but adapting in such a way as to increase resilience. That increased resilience will enable state and local governments to provide services to their constituents as well as enabling those citizens who choose to increase their own resilience.

IX. CONCLUSION

Solar electricity is already cheaper than grid electricity in forty-two of the fifty largest cities in the United States.[493] Every four minutes, another solar system is installed in the United States.[494] However, policy makers realize that, in order for that to continue or even increase, solar companies–manufacturers, financiers, installers–"need to see a much longer-term policy commitment."[495] Rather than "noise and fury," smart policies, with consistency, will enable those installations to translate into resiliency.

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[493] Anastasia Pantsios, *Solar Is Cheaper Than Grid Electricity In 42 Of 50 Largest US Cities*, POPULAR RESISTANCE (Jan. 18, 2015), https://www.popularresistance.org/solar-is-cheaper-than-grid-electricity-in-42-of-50-largest-us-cities/. New York and Boston make the most economical sense for solar, followed by Albuquerque, San Jose, Las Vegas, Washington, D.C., Los Angeles, San Diego, Oakland, and San Francisco. *Id.*

[494] Stephen Lacey, *A Solar System Is Installed in the US Every 4 Minutes*, GREENTECH MEDIA (Aug. 19, 2013), http://www.greentechmedia.com/articles/read/america-installs-a-solar-system-every-four-minutes.

[495] Jeffrey Tomich, *RENEWABLES: Ill. Regulators OK $30M plan to jump-start solar development*, ENERGYWIRE (Jan. 22, 2015), http://www.eenews.net/energywire/2015/01/22/stories/1060012085.

State-Created Immigration Climates and Domestic Migration

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ABSTRACT

With comprehensive immigration reform dead for the foreseeable future, immigration laws enacted at the subfederal level -- cities, counties, and states -- have become even more important. Arizona has dominated media coverage and become the popular representation of the states' response to immigration by enacting SB 1070 and other notoriously anti-immigrant laws. Illinois, by contrast, has received relatively little media coverage for enacting laws that benefit the immigrants within its jurisdiction. The reality on the ground is that subfederal jurisdictions in the United States have taken very divergent paths on the issue of immigration regulation.

Compiling city, county, and state immigration laws from 2005-2011, we created a unique database that enables us to build the Immigrant Climate Index ("ICI"): a measure of the divergent immigration climates created by individual jurisdictions. The reasons for this divergence have received surprisingly little analysis; existing analysis has focused on the presence and effect of immigrants and the political ideology of the subfederal jurisdictions.

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We have had the opportunity to present this paper at the Canadian Law and Economics Association's Annual Meeting (University of Toronto Faculty of Law); the Indiana University Center for Law, Society, and Culture; the American Association of Law Schools Workshop on Poverty, Immigration, and Property; St. John's University School of Law; the University of Newcastle Law School (Newcastle, Australia); Iwate University (Iwate, Japan); and the Vietnamese Economist Annual Meeting (Ho Chi Minh City, Vietnam), and we would like to acknowledge the helpful comments we received. Specifically, we thank Jack Chin, Marc Helbling and the other editors of the Migration and Citizenship Newsletter of the American Political Science Association, Carissa Hessick, Margaret Hu, and Jayanth Krishnan for their thoughtful feedback. The data collection was a labor of love, and so we are indebted to our capable and hard-working team of research assistants: Michael Doyle, Paul Elkins, Diyi Li, Carol McCord, Michael Schneider, Joakim Soederbaum, and Jessica Theriot.

Our study demonstrates that there is another important factor to consider. Instead of looking outward to the foreign immigrants moving into a jurisdiction, we look inward and study the impact of *domestic* migrants (those who moved into a state from another state within the past year). Using panel regressions incorporating our ICI scores and census data, we observe that domestic migrants are affecting the immigration climate of their new home states. Domestic migrants are more likely to be educated and to be politically active, and thus to carry their immigration preferences to their new states. Specifically, domestic migrants coming from states with negative ICI scores have a negative effect on their new states' ICI scores. Moreover, the influence of domestic migrants is magnified, and more negative, when they move from states that are predominantly white, to states with large immigrant populations. Our results support a story of intergroup conflict, in which domestic migrants react negatively to the racial, ethnic, and cultural dislocation they experience in their new home states.

I. INTRODUCTION

Immigration laws enacted at the subfederal level – by cities, counties, and states -- have become an enduring part of the United States ("U.S.") legal landscape. Though subfederal immigration laws are still occasionally the subject of legal challenges, the focus of the national conversation in the U.S. has largely shifted from *whether* to have subfederal immigration regulation, to *what form* that regulation should take.

The significance of this shift is best appreciated through a historical lens. Though state and local governments have always been involved in the integration of immigrants within their jurisdiction, the phenomenon of direct immigration regulation at the subfederal level can be traced to the 9/11 attacks. In June 2002, Attorney General John Ashcroft invited states to enforce civil immigration laws as part of "our narrow anti-terrorism mission."[1] This invitation created considerable controversy because it reversed the longstanding federal position that state enforcement of immigration laws was limited to criminal laws (e.g., human trafficking laws).[2] Using their "inherent authority" as sovereigns, Ashcroft maintained

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[1] Attorney General John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (Jun. 6, 2002), http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm (last visited March 4, 2015)[hereinafter "Ashcroft"].

[2] *See* Memorandum Opinion on Assistance by State and Loc. Police in Apprehending Illegal Aliens, 20 Op. O.L.C. 26, (1996), http://www.justice.gov/sites/default/files/olc/opinions/1996/02/31/op-olc-v020-p0026.pdf (opining that local police may enforce

that states could also enforce civil immigration laws (e.g., laws prohibiting visa overstays).[3]

Civil rights and immigrant groups harshly criticized this invitation, arguing that immigration law enforcement by state and local police would have dire policy results, including increased criminal activity as immigrants would be reluctant to report crimes or to cooperate with criminal investigations and increased civil rights violations as police without immigration law training tried to make determinations about who has legal immigration status.[4] These arguments, as well as legal arguments about the federal government's authority to preempt subfederal immigration regulation, have been made in many different federal lawsuits, challenging the legality of both positive and negative immigration laws.

The legal results have been mixed. The local ordinances requiring that landlords check the immigration status of potential tenants have been mostly struck down.[5] Similarly, state laws that offer in-state tuition to college students regardless of immigration status have been largely upheld.[6] In 2011, the U.S. Supreme Court upheld employer sanction provisions in the Legal Arizona Workers Act, ruling that state suspension of business licenses for employers who hire unauthorized workers were not preempted by federal law.[7] A year later, the Court struck down most provisions of Arizona's SB 1070 but permitted the state to enforce its "show me your papers" law, which requires state police to check the immigration status of those they suspect are in the U.S. illegally.[8] The differences among these cases should be emphasized; they involved different laws, different enacting jurisdictions, and different legal arguments. Yet, the overall message from the federal courts is similar: some forms of subfederal immigration regulation are legally permissible, and states, cities, and counties have to choose carefully from among those forms.

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civil but not criminal provisions of the Immigration & Nationality Act).

[3] Ashcroft, *supra* note 1.

[4] *See* Press Release, American Civil Liberties Union, ACLU Seeks Disclosure of "Secret Law" on Local Police Enforcement of Federal Immigration Laws (Apr. 14, 2003), https://www.aclu.org/news/aclu-seeks-disclosure-secret-law-local-police-enforcement-federal-immigration-laws.

[5] *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 535-36 (5th Cir. 2013) (holding that the city ordinance requiring tenants to show proof of legal status was preempted by federal law) *cert. denied*, 134 S. Ct. 1491 (2014).

[6] *See, e.g.*, Martinez v. Regents of the Univ. of California, 241 P.3d 855, 870 (2010) (holding that California colleges may give in-state tuition rates to students regardless of immigration status).

[7] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1987 (2011).

[8] Arizona v. United States, 132 S. Ct. 2492, 2510 (2012).

Against this backdrop, states, cities, and counties have taken divergent paths. Some subfederal jurisdictions have been very active in enacting immigration regulations, while other jurisdictions have largely remained silent. Initially, cities and counties led the charge with law enforcement regulations (either requiring or prohibiting their law officers from enforcing immigration laws). States moved into the regulation picture later; with authority to regulate in more areas, states have surpassed city and county activity, enacting immigration laws related to education, public services, and employment, as well as law enforcement.[9] The combined activity of states, cities, and counties has resulted in an explosion of subfederal immigration laws.

The jurisdictions that have enacted restrictive laws have received the lion's share of media attention. For example, Arizona, when it enacted SB 1070, received widespread attention and a reputation as "the state most aggressively using its own laws to fight illegal immigration."[10] Thus, Arizona with its highly restrictive laws has become the popular representation of how subfederal jurisdictions regulate immigrants within their jurisdictions. In contrast, other subfederal governments have, more quietly, enacted laws that benefit immigrants within their jurisdictions. For example, the state of Illinois in 2005 enacted a law allowing unexpired matrícula consular cards (issued by the Mexican government) to be used for state identification purposes.[11] Additionally, at the local level, cities and counties have also enacted laws beneficial for immigrants. For example, in 2007 Middlebury, Vermont enacted a law prohibiting its police from asking about immigration status, seeking out unauthorized workers, or engaging in racial profiling.[12]

Because of these divergent paths in immigration regulation, an immigrant living in one state may have a very different experience than an immigrant living in a different state. It is this different regulatory experience that we refer to as "climate." Thus, in order to understand the immigrant experience in the United States, it is crucial to understand the divergence in subfederal immigration regulation. To that end, we created the Immigrant

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[9] This decreased local activity can be explained, in part, by state laws that preempt local activity in a particular regulatory area. For example, in 2007, California enacted AB 976 that prohibits laws requiring landlords to check the immigration status of potential tenants. CAL. CIV. CODE § 1940.3 (West 2010).

[10] Seattle Times News Service, *Ariz. Immigration Law Would Be Among Strictest*, SEATTLE TIMES, (last updated Apr. 15, 2010, 9:29 AM), http://www.seattletimes.com/nation-world/ariz-immigration-law-would-be-among-strictest/.

[11] 5 ILL. COMP. STAT. 230/10 (West 2014).

[12] MIDDLEBURY POLICE DEPT., UNDOCUMENTED FOREIGN NATIONALS GENERAL ORDER 2.48 (2007), http://vtmfsp.org/sites/default/files/Middlebury.pdf.

Climate Index ("ICI"), a unique measure of state-created immigration climate based on hundreds of state, city, and county laws collected from multiple sources over a seven-year period (2005-2011), the most active years of subfederal regulation).[13] By assigning a number, either positive or negative, to each immigration regulation enacted within a state, the purpose of the ICI is to express, in quantitative terms, the regulatory climate that immigrants face, allowing comparisons among states and over multiple years.[14]

The ICI scores confirm and quantify the divergent paths that subfederal governments have taken in immigration regulation. For example, the difference in ICI score between the most positive state (Illinois) and the most negative state (Arizona) is an astonishing 519 points. To give context within the ICI's scale, the 519-point difference is equivalent to Arizona having almost 130 more of the most restrictive immigration laws than Illinois has. The other states' scores fall in a continuum between the scores of Arizona and Illinois.

What accounts for the different paths that cities, counties, and states have taken on immigration issues? Given that immigration is one of the most pressing issues that the U.S. faces, this question has received surprisingly little attention. Media attention has focused on incoming immigrants as the explanation, suggesting that large flows of unauthorized immigrants cause states to enact restrictive laws.[15] Academic studies, using more limited data than our study, point to political ideology as the determining factor, concluding that more politically conservative jurisdictions tend to enact more restrictive immigration laws.[16]

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[13] In previous work, we introduced the ICI and reported some initial ICI scores based on data from 2005-2009. Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, *in* STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 21-39 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014).

[14] States' ICI scores over time can also be viewed in an interactive format at http://business.baylor.edu/van_pham/ICI/.

[15] *See* Trip Gabriel, *New Attitude on Immigration Skips an Old Coal Town*, N.Y. TIMES, (MAR. 31, 2013), http://www.nytimes.com/2013/04/01/us/politics/lessons-for-republicans-in-hazleton-pa.html (suggesting that restrictive laws enacted by Hazleton, Pennsylvania are a reaction to the rapidly growing Hispanic population).

[16] Jorge M. Chavez & Doris Marie Provine, *Race and the Response of State Legislatures to Unauthorized Immigrants*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 90 (2009); *see* S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism,* 44 ARIZ. ST. L. J. 1431, 1484 (2013) (concluding that local political contexts are better predictors of law-based restrictive actions); S. Karthick Ramakrishnan & Tom Wong, *Partisanship, Not Spanish: Explaining Municipal Ordinances Affecting Undocumented Immigrants*, *in* TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES 73, 89 (Monica W. Varsanyi ed., 2010) (arguing that political factors are more important than demographic pressures in explaining restrictionist

While these explanations provide some insight, our analysis points to a third factor that provides a more complete explanation. Our results suggest that domestic migrants (those moving into a state from another state) also influence the ICI of their new state. Using domestic migration variables, which we created from the American Community Surveys of the U.S. Census Bureau, we observe correlations between the climate scores of a domestic migrant's home state and the state she moves to.

By employing panel regressions, we were able to isolate the effect that domestic migrants have on their new home states' ICI scores.[17] Specifically, we observed that domestic migrants moving from more restrictive states tend to have a negative influence on their new home states' climates. The political influence of domestic migrants makes sense in light of separate studies, which conclude that people with higher levels of education are both more geographically mobile and more likely to vote.[18]

Furthermore, the negative effect of domestic migrants is magnified when domestic migrants move from predominantly white states to states with large immigrant populations.[19] Our results support a story of intergroup conflict, in which domestic migrants move from racially homogenous states to racially diverse states and react negatively to the dislocation they experience. This negative reaction, we suggest, manifests itself in support for restrictive immigration laws and politicians who advocate for those laws.

Our results are significant for several reasons. As an initial matter, the results present a more dynamic and thus more accurate explanation for state-created immigration climates. Media attention has focused on looking outward, to the international migrants who are moving into different states, suggesting that a state's reaction to international migration depends solely on the numbers of immigrants moving to its jurisdiction.[20] News articles suggesting that international immigrants "cause" a reaction in the receiving states present a static and inaccurate explanation of immigration climates.

Instead, our analysis highlights the importance of looking inward, to the interaction between a state's international migrants and those already living there. Our results demonstrate that the nature of this interaction can change, depending on the composition of the international migrants *and* the domestic migrants. If, in studying state-created immigration climates, we focus exclusively on international migration, we would need to assume that the domestic population is static. But that assumption is false, as data

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responses of local government).

[17] *See* Figure 2 *infra* at 33.

[18] *See* Section II *infra* at 30.

[19] *Id.*

[20] *See, e.g.*, Gabriel *supra* note 15.

shows that large numbers of people migrate within the United States every year.[21] We account for the presence of this third group, domestic migrants, and demonstrate how they affect a state's immigration climate, thus presenting a more accurate explanation.

Finally, the support in the data for the intergroup conflict explanation raises important questions for future subfederal immigration regulation. If domestic migrants affect a state's immigration climate and domestic migrants are themselves affected by their previous interactions with international immigrants (or lack thereof), then the future implications for ICI scores are intriguing. What happens if international immigrants continue their current pattern of settling in areas beyond the traditional gateway cities?[22] In the short term, there is likely to be more negative ICI scores as increased diversification leads to increased intergroup conflict. In the long term, this migration pattern would expose a broader range of domestic residents, living in different states and cities, to immigrant communities. If these domestic migrants have interpersonal interactions with immigrants in their communities, the contact theory of intergroup dynamics suggests that their attitudes about immigrants and immigration will become more positive.[23] When these domestic residents, in turn, migrate to different states, our findings suggest that they may have a positive influence on their new home state's immigration climate.

Part I of our article explains how the ICI was constructed, including our data collection methods and our weighting system for different types of laws. Part II describes our statistical methods and results, including the correlations we found between states' ICI scores and the domestic migration variables we created from Census Bureau data. Part II also explores the implications of our findings, drawing upon the political science literature.

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[21] David Ihrke, *Reasons for Moving: 2012 to 2014*, U.S. CENSUS BUREAU (Jun. 2014), https://www.census.gov/prod/2014pubs/p20-574.pdf ("Between 2012 and 2013, 35.9 million people 1 year and over living in the United States moved to a different residence. The mover rate for this period was 11.7 percent.").

[22] Jill H. Wilson & Nicole Prchal Svajlenka, *Immigrants Continue to Disperse, with Fastest Growth in the Suburbs*, Brookings Institution Immigration Facts Series 18 (Oct. 29, 2014) http://www.brookings.edu/research/papers/2014/10/29-immigrants-disperse-suburbs-wilson-svajlenka.

[23] *See* Hood, *infra* notes 68-69. Briefly stated, this theory states that an increase in intergroup contact tends to reduce conflict among different groups.

II. THE IMMIGRANT CLIMATE INDEX

A. Defining Climate and its Inputs

In conventional usage, the climate of a jurisdiction can be referenced in different contexts: a politician trying to attract industry may pitch her home state as having a business-friendly climate,[24] or tourist websites may describe certain cities as having climates that are hospitable to gays and lesbians, or families with children.[25] "Climate" then can refer to concepts as diverse as laws, public opinion, or structural conditions.[26]

Here, we use "climate" to refer specifically to the regulatory environment created by enacted immigration laws. We choose laws to measure climate for two reasons. First, we are interested in measuring the day-to-day experience of immigrants living in different states, and enacted laws are a critical part of that experience. Through legal regulation, immigrants experience prohibitions, requirements, and benefits that affect their daily lives. And because the laws in our analysis have a special link to immigrants, we can differentiate the climate experienced by immigrants from that experienced by other groups in the jurisdiction.

Second, our definition has the benefit of clarity. Though a law's enactment does not always guarantee its enforcement, our definition provides a bright line rule for analysis. Tracking enforcement of these laws is not workable as different political subdivisions have different ways of allocating resources and recording government activity. Even if it is not rigorously enforced, the enactment of a law presents a significant possibility that it will be enforced at some later point in time; an immigrant who knows that a law *may* be enforced would rationally account for the law's requirements in planning her actions. In that regard, the act of passing a law affects a jurisdiction's climate for immigrants. For similar

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[24] *See, e.g.*, Jason Whitely, *Texans try to lure Sriracha hot sauce maker from California*, WFAA (May 13, 2014), http://www.wfaa.com/story/news/politics/2014/08/21/14210996/.

[25] *See, e.g.*, *12 Best Kid-Friendly Destinations*, BUDGET TRAVEL (Jan. 25, 2013, 1:22 PM), http://www.budgettravel.com/feature/family-travel-vacation-ideas-12-kid-friendly-destinations,12765/.

[26] *Climate,* DICTIONARY.COM, http://dictionary.reference.com/browse/climate?s=t (last visited Mar. 1, 2015) (stating that climate is "the prevailing attitudes, standards, or environmental conditions of a group, period, or place: a climate of political unrest"); *Climate*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/climate (last visited Mar. 1, 2015) (defining climate as "the prevailing influence or environmental conditions characterizing a group or period.").

reasons, we removed laws that were repealed, either by the legislature or by courts after litigation.[27]

What qualifies as an immigration law for our purposes? As noted earlier, the law must have a special link to immigrants. The link to immigration can be explicit, such as when a law authorizes housing for migrant farm workers.[28] Sometimes, however, the link is implicit: when the law, without mentioning immigration in its text, has a special impact on immigrants. For example, the typical English-only law does not reference immigrants, but its impact will be felt most strongly among immigrants, who are less likely than the native-born to be fluent in English.[29]

Our data set is broader and narrower than those used by other studies. Our dataset is broader than other studies because our database includes laws enacted at all relevant subfederal levels: city, county, and state. Our data also includes positive laws, as well as restrictive laws, over a longer time period, which further distinguishes our study from previous studies and provides a more complete measure of immigration climate. By contrast, the Chavez and Provine study only analyzed restrictive state-level legislation enacted during 2005-2006.[30] Ramakrishnan and Wong reviewed restrictive laws enacted at the municipal level. Ramakrishnan and Gulasekaram analyzed restrictive and beneficial laws from 2005-2007, at both the state and local levels.[31]

Our data is also narrower than some collections of these laws.[32] Because we are interested in measuring climate, we excluded laws that mention immigrants or immigration but have little or no concrete effect. Examples include resolutions calling for comprehensive immigration reform or administrative bills that renamed immigration-related agencies.[33] Finally, we excluded some laws because their net effect would likely be neutral.

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[27] If the law was stayed during litigation but ultimately upheld, we used date restrictions to account for any time period during which the law could not be enforced.

[28] *See* FLA. STAT. ANN. § 420.9075(1)(a) (West 2015).

[29] *See, e.g.*, Gadsden, Ala., Res. R-336-06 (Aug. 8, 2006) (declaring English to be the official language of the city of Gadsden).

[30] *See* Ramakrishnan & Gulasekaram, *supra* note 16.

[31] *Id.*

[32] For example, the National Conference of State Legislatures includes in its database of immigration laws all state bills that mention immigration or immigrants, including resolutions and budgetary allocations. For the reasons stated above, we do not include resolutions or budget bills in our ICI calculations. *See Immigration Enactments Database,* NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/immigration/immigration-laws-database.aspx (last visited Oct. 30, 2015).

[33] *See, e.g.,* S.R. 5081, 2009 Leg. Reg. Sess. (N.Y. 2010); *see also* Arizona's Immigration Enforcement Laws, *Resolutions*, NCSL, http://www.ncsl.org/research/immigration/analysis-of-arizonas-immigration-law.aspx (last visited Sept. 9, 2015).

For example, anti-human trafficking laws would, upon initial analysis, seem to deserve positive scores because they protect immigrants from the abuses of trafficking. But for some immigrants, restrictions on trafficking limit an important channel for them to reach the United States. One study of subfederal immigration regulation concluded that trafficking laws help immigrants, while another study concluded that they hurt immigrants;[34] these opposite conclusions reinforce our decision to exclude trafficking laws from our analysis.

For similar reasons, we exclude laws that provide funding for immigration-related functions. Budget bills, which are often omnibus in nature, are very difficult to disentangle; it is often challenging to know when a particular amount has been allocated for an immigration-related purpose. Even when that identification is possible, it is difficult to know whether to classify a budget law as a positive or restrictive law, without knowing whether the allocated budget is an increase or decrease from the previous year's allocation. For example, a law that allocates funding for subfederal immigration enforcement looks like a restrictive law, but if the allocated amount is actually a substantial decrease from the previous year's budget, then the law might actually be a beneficial law for immigrants. Finally, we want to avoid the problem of double counting: if a law is enacted in one bill and funded in another, we risk double counting if we count the funding bill as a separate law.

B. Collecting Data

The laws used to build the ICI come from many sources, collected through a multiple-year process. The state laws were extracted from the National Conference of State Legislatures, a clearinghouse for state laws.[35] The NCSL collects all state laws related to immigration, including resolutions and administrative laws only tangentially related to

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[34] *See The Anti-Immigrant Movement that Failed: Positive Integration Policies by State Governments Still Far Outweigh Punitive Policies Aimed at New Immigrants*, PROGRESSIVE STATES NETWORK, (2008), http://www.progressivestates.org/files/reports/immigrationSept08.pdf [https://web.archive.org/web/20091029042941/http://www.progressivestates.org/files/reports/immigrationSept08.pdf] (concluding that human trafficking laws benefit immigrants and thus were evidence of a state's integrative policies toward immigrants); Jorge M. Chavez & Doris Marie Provine, *Race and the Response of State Legislatures to Unauthorized Immigrants*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 84 (2009) (characterizing human trafficking laws as restrictionist legislation because they increase penalties for those who assist unauthorized immigrants).

[35] NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org (last visited Oct. 30, 2015).

immigration. As noted previously, we are interested in a law's practical effect on the state's climate; thus, our ICI uses a smaller subset of state laws than is reflected in the NCSL's reports.

Collecting city and county laws was more complicated because there is no central clearinghouse for this type of local legislation. We started with lists of local laws compiled by advocacy organizations like the American Civil Liberties Union and the Federation for American Immigration Reform.[36] We combined these lists with information from federal government websites naming local jurisdictions that have agreed to enforce federal immigration laws (through 287(g) agreements). We also did our own searches of electronic news databases to find local immigration laws. For each law that we found through these methods, we contacted the local governmental entity to confirm that the law had been enacted, the date of enactment, and the substance of the laws. Wherever possible, we obtained a copy of the enacted laws. If our research indicated that the law was rescinded (because of litigation or other reasons), we noted the year of rescission in our database and adjusted our ICI calculations accordingly.

The ICI contains laws that were enacted from 2005-2011. We chose 2005 as the start date for our data collection because that is when subfederal immigration regulation started in earnest. The NCSL only started compiling reports on immigration-related laws in 2005; before that year, state laws related to immigration were few in number and largely limited to the state distribution of social service benefits.[37] Our own tracking of city and county level laws confirms a similar timeline for the growth of local immigration laws.

C. Constructing the ICI

Because laws will vary in their effect on immigrants, it is not an accurate reflection of climate to simply count the laws enacted in states. Rather, our ICI considers both a law's type and its geographic reach when calculating a

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[36] We also used lists from these advocacy organizations: the Mexican American Legal Defense and Education Fund, Latino Justice PRLDEF, the National Day Laborer Organizing Network, and the Ohio Jobs and Justice PAC. MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, http://www.maldef.org (last visited Oct. 30, 2015); LATINO JUSTICE PRLDEF, http://latinojustice.org (last visited Oct. 30, 2015); NATIONAL DAY LABORER ORGANIZING NETWORK, http://www.ndlon.org/en/ (Oct. 30, 2015); OHIO JOBS AND JUSTICE PAC, http://www.ojjpac.org (last visited Oct. 30, 2015).

[37] Most of these pre-2005 state laws were reacting to federal welfare reform, the Illegal Immigration Reform and Immigrant Responsibility Act, which prohibited the distribution of welfare benefits to most immigrants. E-mail from Ann Morse, Program Dir., Immigrant Policy Project, Nat'l Conference of State Legislature, to Huyen Pham, Professor of Law, Texas A&M Univ. Sch. of Law (Aug. 12, 2009, 11:47 EST) (on file with author).

jurisdiction's climate score. Regarding type, which laws have more impact? Abraham Maslow's influential hierarchy of needs model posits that humans are motivated to fulfill basic needs first (physiological needs like food and shelter, and safety needs like security, and freedom from fear) before being capable of fulfilling growth needs (like relationships, esteem, and self-actualization).[38] Research applying Maslow's influential hierarchy to immigrants concludes that immigrants are pushed by the disruption in their life patterns to focus on their basic needs, regardless of the personality development level they reached before immigrating.[39]

Incorporating that research, we considered which types of subfederal laws would have the most impact on immigrants' basic needs. Though there are no laws guaranteeing or prohibiting immigrant access to physiological needs like food or shelter, there are a multitude of laws that expand or restrict subfederal enforcement of immigration laws. Subfederal laws can address direct subfederal enforcement (e.g., 287(g) agreements where local and state police are trained by federal authorities to carry out certain immigration law enforcement tasks) or indirect enforcement (e.g., laws prohibiting participation in the federal Secure Communities program, where local police officers share information about arrestees with federal immigration officials and hold those arrestees for federal pickup and deportation). These laws can have a dramatic effect on immigrants' lives. Subfederal participation in the Secure Communities program alone accounts for a majority of the deportations under the Obama administration.[40] Through these subfederal efforts, an ordinary encounter with local law enforcement, say for a traffic violation, could lead to detention and removal from the United States. Immigrants come to the United States for various reasons -- economic opportunity, family reunification, and political freedom -- but none of that is possible if they are detained or deported. Because deportation (or the fear of deportation) is at the core of an immigrant's safety concerns, we assigned the highest points (either four positive or negative points) to these types of laws.[41]

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[38] Seymore Adler, *Maslow's Need Hierarchy and the Adjustment of Immigrants*, 11 INT'L MIGRATION REV. 444 (1977).

[39] *Id.*

[40] Julia Preston, *Republicans Resist Obama's Move to Dismantle Apparatus of Deportation*, THE NEW YORK TIMES (Jan. 15, 2015), http://www.nytimes.com/2015/01/16/us/secure-communities-immigration-program-battle.html?hp&action=click&pgtype=Homepage&module=photo-spot-region&region=top-news&WT.nav=top-news ("Secure Communities, which connected local and state police departments across the country with federal immigration enforcement . . . generate the majority of the 2.3 million deportations under the Obama administration.").

[41] We also include in Tier 4 laws that change a person's treatment within the law enforcement system based on immigration status (e.g., H.B. 2787, 48th Leg. (Ariz. 2007)

After laws affecting physical security, our next tier includes laws that also affect a basic need in immigrants' lives, a need that is very difficult to replace or avoid. For example, laws that impose local or state penalties on employers who hire these workers make it more difficult for immigrants to find any job of work. Immigrants without work authorization may still be able to find work (by using false identification papers or by working off the books), but these alternatives come with their own problems and high costs. For similar reasons, we include in Tier 3 laws restricting or enhancing access to government identification cards (like driver's licenses) and private housing.[42] In our ICI calculations, these laws are assigned three points (either positive or negative).

Tier 2 laws affect an important but not crucial aspect of immigrants' lives; in many instances, immigrants whose access is restricted under these laws can find alternatives with fewer problems or cost than with Tier 3 restrictions. This tier includes laws that affect an immigrant's access to a specific type of job (like working as an insurance agent or in other jobs requiring licenses); an immigrant who wants to work in one of these licensed jobs clearly faces obstacles, but because there are alternative jobs not affected by these laws, the law's impact is more limited. Similarly, laws that expand or limit immigrant access to government-funded benefits like healthcare or college tuition are obviously important to immigrants, but because there are alternatives, these laws belong in Tier 2 and are assigned two positive or negative points.

Tier 1 laws, worth one point each, are included in our ICI calculations because they affect immigrants' lives but in a less important or less significant way. For example, laws requiring that all government transactions be conducted only in English have a negative impact on immigrants, but because linguistic concerns aren't as important as jobs, housing, and other matters regulated by laws in Tiers 2, 3, and 4, these English-only laws are assigned one negative point. For similar reasons, laws making it easier or harder for immigrants to vote and laws restricting or expanding access to legal services are also categorized as Tier 1 laws.

(denying bail to those without lawful immigration status)).

[42] A handful of jurisdictions have enacted laws that require tenants to prove legal immigration status before they are allowed to rent housing. Most of these laws have been successfully challenged in litigation and thus are not included in our ICI calculations. *See Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 535-36 (5th Cir. 2013). The few housing laws that are in effect are categorized as Tier 3 laws; though they would appear to deny access to a basic need (shelter). Immigrants affected by these laws can still find alternatives (by living with friends or relatives with legal immigration status or by living in a neighboring jurisdiction). Law enforcement, by contrast, is pervasive and unavoidable, such that subfederal laws relating to immigration law enforcement have more impact on immigrants' daily lives.

We also weighted laws differently, depending on their geographic reach. State laws were assigned whole points (from 1-4 points depending on their tier). City and county laws were weighted to represent their more limited jurisdiction, as compared with state laws. A city or county law may be in the same tier as a statewide law (e.g., Tier 2), but its impact on the state's climate will be limited to immigrants who live in that particular city or county. Accordingly, its score is adjusted to reflect that more limited impact.

For example, Las Vegas, Nevada has signed a 287(g) with the Department of Justice, authorizing its police officers to perform specified immigration enforcement functions.[43] The negative four points that the 287(g) agreement would usually receive under the tier system is weighted to reflect the city's smaller population, as compared with the larger population of Nevada. The calculation is as follows:

1,951,269 (population of Las Vegas metropolitan area)
÷ 2,700,551 (population of Nevada)
× -4 tier points
= -2.89 points

When calculating Nevada's ICI, this 287(g) agreement will contribute a negative 2.89 points to the state's score. Under this system, the laws of larger local governments (e.g., the city of Las Vegas) will have a more significant effect on their states' ICI scores than will the laws of smaller subfederal governments (e.g., Reno, Nevada).

D. ICI Results and Patterns

Adding up the positive and negative points of individual laws enacted at the city, county, and state levels, we calculated ICI scores for individual states. Figure 1 shows the geographical distribution of scores; Table A lists ICI scores by state.[44]

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[43] *Memorandum of Agreement*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Sept. 8, 2008), http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/287goldlasvegasmpd.pdf.

[44] Our results in this article reflect cumulative scores for the period 2005-2011; state scores for individual years within this time period can be found on an interactive map available at http://business.baylor.edu/van_pham/ICI/.

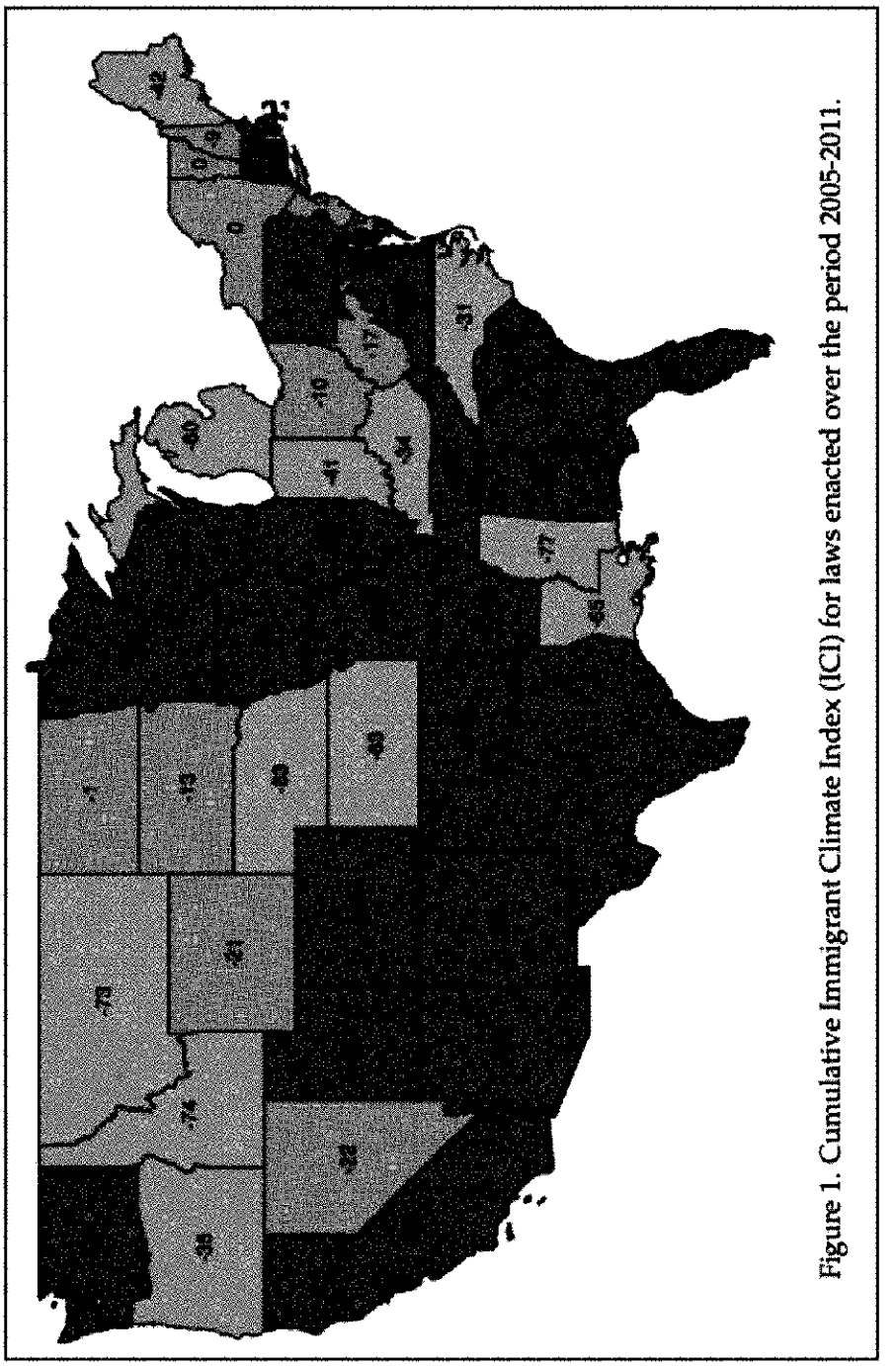

Figure 1. Cumulative Immigrant Climate Index.

Table 1. Immigrant Climate Index (ICI) Scores Based on State and Local Legislation Enacted 2005-2011

	State	ICI Score		State	ICI Score
1	Arizona	-355	37	New York	0
2	South Carolina	-212	38	Vermont	0
3	Oklahoma	-196	39	Wisconsin	3
4	Georgia	-195	40	Pennsylvania	9
5	Virginia	-192	41	Alaska	12
6	Missouri	-176	42	Iowa	12
7	Utah	-161	43	Massachusetts	13
8	Colorado	-151	44	New Mexico	22
9	Tennessee	-123	45	Minnesota	25
10	Arkansas	-115	46	Maryland	43
11	Alabama	-109	47	Washington	45
12	Texas	-94	48	Connecticut	47
13	Florida	-84	49	California	151
14	Nebraska	-83	50	Illinois	164
15	Mississippi	-77			
16	Idaho	-74			
17	Montana	-73			
18	Hawaii	-66			
19	Louisiana	-65			
20	Kansas	-63			
21	Michigan	-60			
22	Maine	-42			
23	Indiana	-41			
24	Oregon	-35			
25	Kentucky	-34			
26	North Carolina	-31			
27	Nevada	-22			
28	Wyoming	-21			
29	West Virginia	-17			
30	Delaware	-15			
31	South Dakota	-13			
32	New Jersey	-12			
33	Rhode Island	-10			
34	Ohio	-10			
35	New Hampshire	-9			
36	North Dakota	-1			

Table 1. Immigrant Climate Index Scores Based On State and Local Legislation 2005-2011.

There are some broad trends about the scores that are worth noting. First, a clear majority of states (36) have negative scores. That Arizona tops the list of negative states is unsurprising, given the slew of highly restrictive laws it has enacted. What may be surprising is that there is a 143-point difference between Arizona and the next most negative state, South Carolina (-212). So not only does Arizona have the most negative immigration climate in the United States, but its climate is substantially more negative than the climate in other negative states. South Carolina, Oklahoma, Georgia, and Virginia cluster as the most negative states, after Arizona.

Second, a sizeable minority (14) states have neutral (net zero) or positive climate scores. The scores of Illinois and California are vastly more positive than other states, the result of proactively enacting laws benefiting immigrants within their jurisdictions. Examples of positive laws include laws granting immigrants access to benefits (like in-state college tuition rates), laws granting driver's licenses or state ID cards without regard to immigration status, and laws restricting local police enforcement of immigration laws. After Illinois and California, there is over a 100-point drop to the scores of Connecticut, Washington, and Maryland.

The most striking trend, however, is the broad divergence among state scores. For example, there is a 519-point difference between the most negative ICI score (Arizona -355) and the most positive score (Illinois 164) -- the equivalent of about 130 law enforcement actions over this seven year period. Other states have ICI scores at all points along the spectrum between Arizona and Illinois. Given the opportunity, states have chosen to take very different paths on the issue of immigration regulation. What accounts for this divergence?

III. EXPLAINING THE DIVERGENCE

In media reports about subfederal immigration regulation, the press has focused on the inflow of immigrants, suggesting that current residents of jurisdictions enact restrictive laws as a reaction to that inflow.[45] Academic analyses have also linked the rise of restrictive laws to growing immigrant populations.[46] Empirical studies of this issue, working with smaller data sets than our study, focus on political ideology. Specifically, these studies

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[45] *See, e.g.*, Gabriel, *supra* note 15.

[46] Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 594 ("Communities are also jumping on the enforcement bandwagon because they seek control over their rapidly changing environments.").

found that Democratic areas were more likely to enact pro-immigrant laws while Republican areas were more likely to enact restrictive laws.[47]

While immigrant inflow and political ideology are important to understanding the divergence in immigration climate, our ICI scores raise questions about the completeness of their explanatory power. The states with the highest shares of immigrants during this time period have ICI scores across the spectrum.[48] Similarly, states with the largest populations of unauthorized immigrants have ICI scores that defy easy categorization.[49] Regarding political ideology, it is possible to discern some pattern in ICI scores along red-blue political lines. However, ICI scores in Figure 1 suggest examples of diverging scores that aren't easily explained by political ideology alone. For example, Arizona and Texas are both reliably conservative states; yet their scores are over 260 points apart (the equivalent of about 65 Tier 4 laws). Similarly, the ICI scores of Oregon and Washington differ by 80 points, though both states generally share liberal politics.

Our analysis points to another significant determinant in understanding the divergence: the flow of domestic migrants among different states. Interstate migration is an important phenomenon in the U.S. but has largely been overlooked by researchers, as well as by policy makers, in analyzing subfederal immigration laws. Informed by the data, our thesis is that domestic migrants carry their immigration preferences across states and influence the climate in destination states.

The first empirical evidence we consider is a scatter plot of the cumulative ICI score of a state from 2005-2011 and the average ICI scores of states that sent domestic migrants to the state (Figure 3 below). The simple correlation between these two variables is positive as represented by the slope of the line fitted to the data points. This pattern is consistent with our thesis: domestic migrants coming from positive ICI states have a positive effect on their new home state's ICI while domestic migrants coming from negative ICI states have a negative effect. As explained

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[47] Chavez & Provine, *supra* note 16, at 83-89; Ramakrishnan & Gulasekaram, *supra* note 16; Ramakrishnan & Wong, *supra* note 16, at 88-89.

[48] Those states are California (151 ICI score), New York (0), New Jersey (-12), Hawai'i (-66), and Florida (-84). Jens Manuel Krogstad & Michael Keegan, *15 States with the Highest Share of Immigrants in Their Population*, PEW RESEARCH CENTER (May 14, 2014), http://www.pewresearch.org/fact-tank/2014/05/14/15-states-with-the-highest-share-of-immigrants-in-their-population/.

[49] Those states are California (151 ICI score), Texas (-94), Florida (-84), New York (0), New Jersey (-12), and Illinois (164). Jens Manuel Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CENTER (Nov. 18, 2014) http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/.

below, the influence of domestic migrants is amplified when domestic migrants move from predominantly white states, to states with large Hispanic or Mexican-born populations.

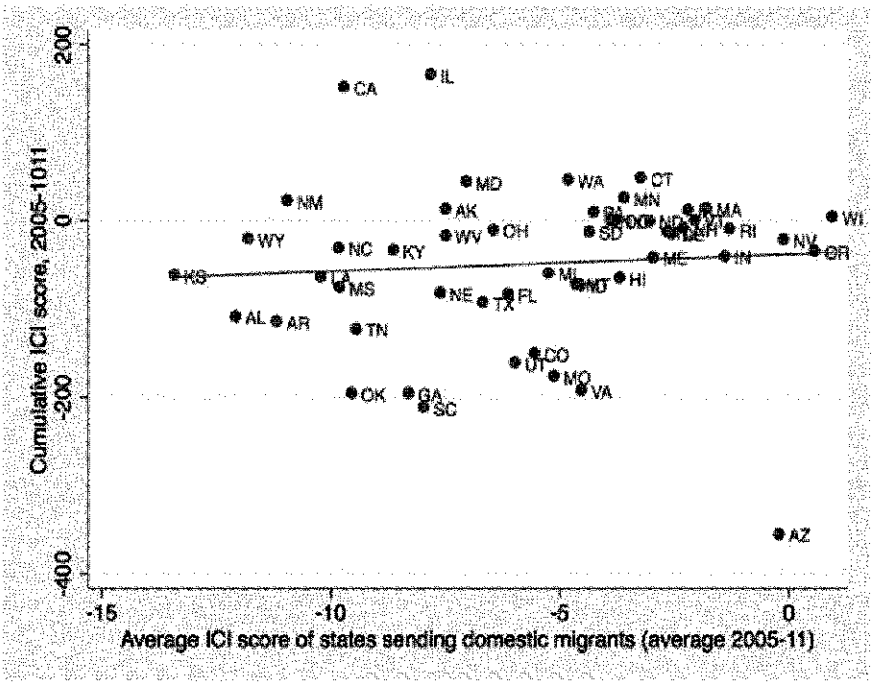

Figure 2. Domestic Migrants Carry Preferences Across Borders

A. Methodology and Statistical Results

The correlation revealed in Figure 2 is consistent with our thesis: domestic migrants carry their immigration preferences across borders to influence the immigration climates in their new home states. As we explain further in Section II.B, domestic migrants are more likely to have higher levels of education, which also makes them more politically active.

The correlation, however, may not necessarily be all due to the relationship proposed in this study. Confounding factors could contribute to this correlation.[50] That is, there may be unrelated factors that simultaneously affect both domestic migration patterns and ICI scores. For example, a state's geographical location may affect both its domestic

[50] ROBERT M. LAWLESS ET AL., EMPIRICAL METHODS IN LAW 406 (2010) (A confounding variable is "a variable omitted from a study but that does affect the phenomenon under investigation thereby potentially leading to a false positive result.").

migration and its ICI score. Southern states have had the highest rates of in-migration for the time period in our analysis; their proximity to Mexico could also affect their residents' views about immigration and immigration enforcement. Similarly, a state's liberal or conservative political orientation may affect its domestic migration patterns (people are either attracted or repelled by the state's political climate); political orientation may also influence views about immigration laws. If either case is true, then the correlation we see between domestic migration patterns and ICI scores would not be due to the direct relationship between the two variables, but rather is explained by the effect of unrelated third variables like a state's geographical location or political orientation.

We are able to address this possible endogeneity problem with our panel data set -- we have ICI and migration scores by state over a number of years. In our regressions, we can include state dummy variables (also known as state fixed effects) that can account for differences in ICI scores due to inherent differences across states that do not change with time. These state fixed effects catch the effects of confounding factors such as geographical location or political ideology mentioned above.[51] After controlling for these state fixed effects, we are effectively looking at the correlation of migration and ICI scores for the same state from one year to the next. As such, we can be more confident that this correlation is coming from the relationship between migration and ICI.

After using state fixed effects to control for possible confounding factors, we must also consider an additional source of endogeneity. It is possible that domestic migrants chose their state of residence because of the immigrant climate. For example, a person who holds restrictive views is attracted to the negative climate in Arizona. In that case, we have a reverse causal relationship -- the ICI scores of states are what is causing the flow of migrants. However, there is evidence that many domestic migrants choose

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[51] We estimate the following fixed-effects regressions:

$$ICI_{st} = a + b * Migration_{st} + StateFixedEffects_s + e_{st}.$$

The left hand side ICI_{st} represents the ICI score of a state (s) in any particular year (t), and the right hand side represents all the variables that could affect a state's ICI score. We are interested in the effect of domestic migration on climate scores (represented as b in the equation above). We include state dummy variables to account for possible confounding factors that do not change with time over our study period (e.g., a state's proximity to Mexico or its political orientation). $Migration_{st}$ are several different migration measures, $StateFixedEffects_s$ are a set of state dummy variables (one for each state to account for the confounding problem), and e_{st} is an error term assumed to be independently, identically distributed normal.

to move for economic reasons unrelated to preferences over immigration.[52] Rodgers and Rodgers find that the wages of domestic migrants increase after the move by as much as twenty percent.[53] Though not conclusive, this result suggests that where domestic migrants choose to move is determined by job prospects, not by preference for immigration climate.[54]

We also test our intergroup conflict thesis: that ICI scores are partly an outcome of domestic migrants encountering inhabitants in their new states who look very different from those in their origin states. As an initial matter, our results show that domestic migrants moving from states with large populations of whites have a negative influence on the ICI scores of their new home states.[55] Using variables that measure foreign and perceived foreign populations in receiving states, we also found that an increase in these populations also has a negative effect on ICI scores.[56] When domestic migrants move from states with large white populations to states with large immigrant populations (or populations that are perceived to be immigrants), the negative effect of domestic migrants on ICI scores is amplified. Those results are also included in Table 3. Our statistical results and more detailed explanations of our methodology are in Appendix A.

B. Influence of Domestic Migrants

Beyond the statistical results, what is the mechanism by which domestic migrants affect immigration climates? Because our ICI measures climate through enacted laws, we are interested in how domestic migrants affect the political process of their new home states. Though domestic migrants are a small group (less than 0.1% of a state's population), we hypothesize that they have a political influence beyond their numbers for several reasons. First, we define a domestic migrant as a person who lived in another state one year ago, but obviously domestic migrants can continue to affect the political process beyond that initial first year.[57] Second, we hypothesize that there is a large overlap between the people most likely to move within the U.S. and those most likely to vote. Specifically, individuals with higher

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[52] Joan Rodgers & John Rodgers, *The Effect of Geographic Mobility on Male Labor-Force Participants in the United States*, 21 J. LABOR RESEARCH 117, 121-26 (Jan. 2000).

[53] *Id.* at 124-126.

[54] *Id.* at 126.

[55] *See* Table 2 *infra* at 50.

[56] Specifically, for each receiving state, we measured the fraction of foreign residents, residents of Asian or Hispanic origin, residents who recently immigrated from Mexico, and the growth in Mexican immigration. Those results are included in Table 3.

[57] We use the one-year definition because the American Community Survey data for the years of our study provides information in that format (i.e., the Survey asks respondents where they lived one year ago).

levels of education are most likely to move within the United States, and also most likely to vote.

Our hypothesis is supported by separate studies of domestic migrants and voting behavior. Studies using census data have concluded that individuals with higher levels of education are more likely to migrate within the United States.[58] Malamud and Wozniak in their 2010 study observe that another year of higher education is closely associated with a large increase in the probability of moving away from one's birth state. Based on this causal link between education and mobility, they conclude that geographic mobility is one of the benefits of higher education. Using Current Population Survey data from 1980 to 2000, Emek Basker also found that education increases geographic mobility, controlling for age, state of origin, and year fixed effects.[59]

Just as education substantially increases mobility, it also increases the likelihood of voting. Why people vote is a question that has long intrigued social scientists. Studies have focused on different determinants of voting, but one empirical regularity in many studies is the connection between education and voter turnout. Numerous studies have concluded that individuals with higher levels of education are more likely to turn out to vote. Studying the effect of social-economic status on voting behavior, Wolfinger and Rosenstone conclude that education has a stronger influence on voter turnout than income.[60] They find that individuals with higher levels of education are more likely to vote than individuals with higher incomes.[61] Using American National Election Studies ("ANES")[62] and CPS data, Milligan, Moretti, and Oreopoulos found that more highly educated individuals in the United States have higher rates of voting *and* higher rates of participation in other political activity, such as: following election campaigns, joining a political group, and working on community issues.[63] This finding of increased political activity is particularly

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[58] Ofer Malamud & Abigail Wozniak, *The Impact of College Education on Geographic Mobility: Evidence from the Vietnam Generation*, 47 J. HUMAN RESOURCES, No. 4, 915-50 (2007).

[59] Emek Basker, *Education, Job Search, and Migration*, (Univ. of Missouri-Columbia, Working Paper No. 02-16, 2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=371120.

[60] RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 23-26 (1980).

[61] *Id.*

[62] A collaboration between Stanford University and the University of Michigan, ANES conducts its own voter surveys and makes the data available to social scientists, teachers, students, journalists, and policy makers. AMERICAN NATIONAL ELECTION STUDIES, http://www.electionstudies.org/ (last visited Mar. 1, 2015).

[63] Kevin Milligan, Enrico Moretti, and Philip Oreopoulos, *Does Education Improve Citizenship? Evidence from the United States and the United Kingdom*. 88 J. PUB. ECON.

significant because it shows that domestic migrants can have political effects beyond just their individual votes. Because they tend to be more politically active generally, domestic migrants can influence the political attitudes of their new neighbors.[64]

As noted above, our results also show that the influence of domestic migrants on ICI scores is magnified and more negative when domestic migrants move from a state with a large white population to a state with a large minority or Hispanic population. Our thesis is that natives' views about immigration are shaped, in part, by exposure to immigrants and immigrant communities. Those who live in communities with large numbers of immigrants (or descendants of immigrants) will have more positive views about immigration. Conversely, those with limited or no exposure to immigrants will have negative views, which translates into political support for restrictive immigration laws.

Our results are consistent with what social scientists have described as the contact theory of intergroup dynamics.[65] According to this theory, an increase in intergroup contact tends to reduce conflict among the groups.[66] Applied to the immigration context, the contact theory suggests that racial and social context do affect immigration attitudes.[67] Using ordered logit and ordered probit methodologies and data from the 1992 American National Election Study and the 1990 Census, Hood and Morris found that Anglos living in heavily Hispanic or Asian areas had more positive views about the potential contributions that these two groups make to society.[68]

In a later study, Hood and Morris suggest that the quality of the interaction that Anglos have with immigrants is important in affecting their attitudes toward immigration.[69] Their study finds that Anglos living in areas with large numbers of authorized immigrants generally have positive attitudes, while Anglos living in areas with large unauthorized populations tend to have more negative attitudes.[70] Because unauthorized immigrants do not have driver's licenses, work permits, social security numbers, and other documents to make them "official" members of the public

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1667 (2004).

[64] *Id.*

[65] *See id.*

[66] *Id.*

[67] *Id.*

[68] M.V. Hood & Irwin L. Morris, *Amigo o Enemigo? Context, Attitudes, and Anglo Public Opinion Toward Immigration*, 78 SOC. SCI. Q. 309 (1997).

[69] M.V. Hood & Irwin L. Morris, *Give Us Your Tired, Your Poor . . . But Make Sure They Have a Green Card: The Effects of Documented and Undocumented Migrant Context on Anglo Opinion Toward Immigration*, 20 POL. BEHAV. 1 (1998).

[70] *Id.* at 7-9.

community, their interaction with outsiders will necessarily be limited.[71] The absence of that interpersonal interaction makes it difficult for unauthorized immigrants to develop the intergroup relations that are the foundation of the contact hypothesis.[72]

Intergroup interaction and the contact hypothesis provide a useful lens for analyzing our results. In our analysis, ICI scores may be viewed as a rough proxy for integration because the subfederal laws regulate access to many benefits necessary for outside interaction: driver's licenses, employment, and even physical freedom (through the policing laws). States with positive ICI scores provide more opportunities for immigrants to develop the kind of intergroup relations that are crucial to improving immigration attitudes among Anglos. On the other hand, states with negative ICI scores limit immigrants' opportunities and interaction by limiting access to benefits. In doing so, the states arguably make all immigrants, even those with authorized status,[73] the "other." Without the opportunity to interact, immigrants in this state cannot develop the intergroup relations that the contact hypothesis suggests is crucial to improving Anglo attitudes about immigrants and immigration.

C. Implications

As we consider the impact that domestic migrants have on ICI scores, we see several new twists to a familiar story. Intergroup conflict that results when different cultures, races, and ethnicities meet is a phenomenon long studied by social scientists. With our focus on domestic migrants, we raise questions about where the relevant borders are and the composition of the insider/outsider groups. As previously explained, subfederal governments can create radically different climates for immigrants within their jurisdiction's borders, so an immigrant's decision to cross one state's border into another state has significant consequences.

In the immigration context, those who immigrate to the United States from another country are natural candidates to be considered outsiders, but what about those who "migrate" from another state? Domestic migrants often have to adjust to different social norms, different racial and ethnic

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[71] *Id.* at 11.

[72] *Id.*

[73] Though many of the restrictive laws appear to apply only to unauthorized immigrants, Hispanics and Asians with authorized status are also often affected. *See* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1486-87 (2006) (arguing that the complexity of immigration law leads untrained police officers who are required to enforce immigration laws to rely on race and ethnicity as proxies for immigration status).

makeups, and different legal regimes. Our data suggests that they may be outsiders in significant ways, carrying their immigration preferences across state borders and affecting climate scores in their new home states. That their influence is amplified and more negative when they move from whiter states to more racially and ethnically diverse states underscores their status as outsiders.

Thus as we consider the determinants of climate scores, we should recognize the importance of looking inward, toward the populations already present in the United States, as well as looking outward to incoming immigrant groups. Instead of a linear "more immigrants leads to a negative immigrant climate" story, our analysis suggests a more dynamic interaction among three groups: international immigrants, long-term state residents, and domestic migrants. Adding complexity to this dynamic is the probable influence of racial and ethnic context, as supported by our data above.

Looking forward, what are the implications for future climate scores? With the caveat that the influence of domestic migrants is only one small piece of the ICI puzzle, we see some possible paths emerging from our analysis. In the short run, as some states grow economically and thus attract migrants (both domestically and internationally), we can expect to see continued active, and likely negative, subfederal immigration regulation. The effect of domestic migrants on the direction of ICI scores (positive or negative) will depend, of course, on specifics: which states are "exporting" their residents, which are "importing," and the nature of the interaction among domestic migrants, international immigrants, and long-term state residents. But in the short run, increased levels of diversification are likely to lead to negative regulation resulting from intergroup conflict.

Over the long run, however, we may see domestic migrants having a net positive effect on subfederal regulation. Domestic migrants who may initially react negatively when they move to a more diverse state may, over time, have more interaction with immigrant communities (both recent immigrants and long-term). The contact hypothesis suggests that this interpersonal interaction is the foundation for the intergroup relations that lead to more positive views about immigrants and immigration, which in turn may translate to more positive ICI scores.

The wildcard in this story, both in the short run and the long run, is the federal government. Subfederal immigration regulation is often justified as a necessary state response in the face of federal inaction. If the federal stalemate on immigration continues, we should expect that states, cities, and counties will continue to be active in subfederal regulation. If the subfederal activity reaches a tipping point in the long run (as we suggest above), the federal government may find enough consensus at the

subfederal level to move forward with immigration reform at the national level.

IV. CONCLUSION

Subfederal immigration regulation -- where cities, counties, and states enact immigration laws affecting immigrants within their jurisdictions -- has become an enduring part of the legal landscape. For immigrants, subfederal laws are centrally important because subfederal governments regulate important aspects of their lives: access to driver's licenses, employment, physical security (through policing laws), and other benefits. Given a limited green light by the courts, subfederal governments have embraced immigration regulation, taking very divergent paths. What explains this divergence?

Using our own database of subfederal laws, we are able to measure the different climates that subfederal governments have created through immigration regulation (Immigrant Climate Index scores). Using panel data techniques, our analysis indicates that domestic migrants (those who move to a state from another state) carry their immigration preferences across state lines to affect their new home state's ICI score. Briefly stated, domestic migrants coming from restrictive states tend to have a negative effect on their new home states' ICI scores; similarly, domestic migrants coming from positive states tend to have a positive effect on their new home states' scores. The effect of domestic migrants is amplified when they move from predominantly white states to states with large immigrant populations. These results provide support for a story of intergroup conflict, between domestic migrants and the diverse immigrant groups they encounter in their new home states.

As we try to understand immigration climates and their determinants, the influence of domestic migrants on ICI scores underscores the importance of looking inward to domestic migration, in addition to looking outward to international migration. This perspective gives us a more accurate understanding of the complex dynamics involved in creating immigration climates.

APPENDIX A

We created these domestic migration variables from the American Community Surveys of the U.S. Census Bureau:

- migplac1: the U.S. state or the foreign country where the respondent lived one year ago
- dommig1: fraction of a state's population that lived in another state one year ago
- scoremig1: for states receiving domestic migrants, the weighted average of sending states' ICI scores[74]
- whitemig1frac: for states receiving domestic migrants, the weighted average of the white fraction (state's white population compared with total population) in sending states, using the same weights as in scoremig1

Table 2 shows results from these regressions.

The positive and statistically significant coefficient on scoremig1 suggests that domestic migrants are importing preferences from their states of origin. A drop of five points in scoremig1 leads to negative contribution of 4.3 points to the ICI, equivalent to one negative statewide Tier 4 law.

[74] Represented mathematically: $scoremig1_{st} = \sum_{i=1}^{I} \frac{m_{st}^{i}}{M_{st}} ICI_{t}^{i}$ where m_{st}^{i} is the number of migrants from state i to state s in year t, M_{st} is the total number of migrants in state s in year t and ICI_{t}^{i} is the ICI score in state i in year t.

VARIABLES	StateFE	StateFE
scoremig1	0.875***	
	[0.139]	
whitemig1frac		-1.974***
		[0.596]
Constant	-1.604*	143.239***
	[0.829]	[45.007]
Observations	306	306
R-squared	0.656	0.618

Dependent variable is ICI for a state in a year.
Standard errors in brackets.
Regressions include state dummies.
*** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$

Table 2. Immigrant Climate and Domestic Migration 2005-2011.

We also ran regressions to test our intergroup conflict thesis: that ICI scores are partly an outcome of domestic migrants encountering inhabitants in their new states who look very different from those in their origin states. To test this thesis, we created these other variables:

- foreignfrac: the fraction of the state population that lived in another country one year ago
- asianhispanicfrac: the fraction of the state population with Asian or Hispanic origin
- mexfrac: the fraction of the state population living in Mexico one year ago
- mexfracgrowth: the year to year growth rate of *mexfrac*.

As an initial matter, we note from Table 2 above that domestic migrants coming from sending states with large populations of whites decrease the ICI scores of their new home states. Specifically, a two percent increase in the whitemig1frac (average share of whites in population of migrants' sending states) leads to a statistically significant -- 4-point contribution to the ICI score -- one negative state-wide Tier 4 law. The coefficient on the dommig1frac variable is positive and statistically significant.

To test our thesis, we ran this regression:

$$ICI_{st} = a + b * Migration_{st} + c * Foreign_{st} + d * Migration_{st}$$

$$* Foreignst \quad + StateFixedEffects_s + e_{st}$$

$Foreign_{st}$ is some measure of the foreign born or Mexican population in state s in year t. We are interested in measuring d, the effect of domestic migration on ICI scores, across states with different foreign population sizes.

Our analysis demonstrates that an increase in *perceived* foreign populations in a state similarly decreases a state's ICI score.

VARIABLES	StateFE	StateFE	StateFE
whitemig1frac	-1.165	-2.317***	-1.439*
	[0.739]	[0.610]	[0.825]
mexfrac	-1.275		
	[7.464]		
mexwhite	-0.03		
	[0.091]		
mexfracgrowth		8.549	
		[36.547]	
mexgrowthwhite		-0.113	
		[0.481]	
foreignfrac			-2.223
			[3.674]
foreignwhite			-0.016
			[0.047]
Constant	102.770*	167.960***	148.675**
	[56.714]	[46.014]	[62.868]
Observations	306	255	306
R-squared	0.64	0.744	0.652

Dependent variable is ICI for a state in a year.
Regressions for years 2005-2011. Standard errors in brackets
*** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$

Table 3. Immigrant Climate as Outcome of Intergroup Conflict

Table 3 shows results from three regressions with the ICI as the left hand side variable and the right hand side variable being asianhispanicfrac (the fraction of the state population of Asian and Hispanic origin), mexfrac (the fraction of the state population of Mexican origin), and mexfracgrowth (the

annual growth rate of mexfrac). The regressions include state fixed effects that control for time-invariant state differences that could be correlated with both ICI scores and state demographics. The estimates of the coefficients for asianhispanicfrac and mexfrac are both negative and statistically significant. Controlling for state fixed effects, a two percent increase in the fraction of Asians and Hispanics in the population makes ICI more negative by 7 points -- the equivalent of enacting one negative statewide tier 3 law and one negative statewide tier 4 law. The presence of Mexican descendants in the population has a bigger effect on the ICI scores. A two percent increase in mexfrac makes the ICI more negative by 8.6 points, the equivalent of more than two negative statewide laws. Faster growth in mexfrac from year to year does not have a statistically significant effect on ICI.

What happens when domestic migrants move from states with large white populations to states with large immigrant populations (or populations that are perceived to be immigrants?) Under those circumstances, we find that the effect of domestic migrants on ICI in these situations is amplified and more negative. Those results are also included in Table 3.

In the first specification, we include as regressors whitemig1frac, mexfrac, and the interaction of the two; in the second, whitemig1frac, asianhispanicfrac, and their interaction; and in the third specification, whitemig1frac, mexfracgrowth, and their interaction. The results are similar across the three specifications: point estimates for the coefficients on whitemig1frac, mexfrac and whitemig1frac, asianhispanicfrac remain negative as in the previous regressions when the variables were considered separately. The estimate for the coefficient on mexfracgrowth remains insignificant. Though not statistically significant, estimates for the interaction terms are all negative, lending some support for the culture shock hypothesis for the determination of ICI.

Note from the Editors

The editors would like to acknowledge the sensitive nature of the subject matter contained in the following article, "The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?" by Chief Judge James S. Burns. Chief Judge Burns' article is what we hope to be the first engagement in a scholarly discussion involving the Native Hawaiian legal community with regards to Crown Lands and Native Hawaiian rights. Volume 39 of the University of Hawai'i Law Review will contain a response article penned by Professors Melody Mackenzie and D. Kapua'ala Sproat, and former Governor John D. Waihe'e.

The editors would further like to express their deep respect and great admiration for the legacy of the late Professor Jon Van Dyke. The views and opinions expressed in this article are those of the author and do not reflect those of the University of Hawai'i Law Review or the William S. Richardson School of Law.

The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?

By James S. Burns*

I. INTRODUCTION

In his 2008 book "Who Owns the Crown Lands of Hawai'i?", Professor Jon M. Van Dyke asked: "What was the trust status of the Crown Lands before the [1893] overthrow?"[1]

Assuming Professor Van Dyke intended to use the word "Monarchs" rather than "Monarchy," this paper agrees with Professor Van Dyke's answer that a law enacted in 1865 "took away the power of alienation and required that the Crown Lands be managed exclusively for the benefit of the Monarchy and the people."[2] The phrase "the people" includes all of the people of Hawai'i, not only Hawaiians.

This paper critically examines three conclusions that Professor Van Dyke reached in his book:

(1) "[These] Crown Lands were not truly 'public' but were an entitlement of the Native Hawaiian People as the beneficiaries of a trust maintained by their Monarch."[3]

Response: As a consequence of the law enacted in 1865, what had been the King's lands became the "Crown Lands" and the Crown Lands trust began. The beneficiaries of that trust were the King and his successors and all of the people of Hawai'i.

(2) "Those who now claim that the Native Hawaiians had lost control of the Kingdom prior to the 1893 overthrow are wrong;"[4] in 1893, prior to the

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* Chief Judge James S. Burns has practiced law in Hawai'i since 1962. Chief Judge Burns is the son of former Hawai'i Governor John A. Burns, under whom William S. Richardson served as Lieutenant Governor and who appointed Richardson as Chief Justice. Chief Judge Burns served as a judge since 1976, including serving as Chief Judge of the Hawai'i Intermediate Court of Appeals from 1982 until his retirement in 2007. Chief Judge Burns continues to be part of the Hawai'i legal community in many capacities, including serving as an adjunct professor at the William S. Richardson School of Law at the University of Hawai'i at Mānoa.

[1] JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 379 (2008).

[2] *Id.* at 378.

[3] *Id.* at 380 (Professor Van Dyke used "[t]he term 'Native Hawaiian' . . . to refer to all persons descended from the Polynesians who lived in the Hawaiian Islands when Captain James Cook arrived in 1778.").

[4] *Id.* at 150.

overthrow, "Native Hawaiians continued to play the dominant role in decision making."[5]

Response: In 1893, prior to the overthrow, Hawaiians did not have "control of the Kingdom". They did not "play the dominant role in decision making." They did not have sovereignty over Hawai'i. It was not the overthrow that caused Hawaiians to lose their sovereignty. Their loss was caused by the decisions and indecisions and actions and inactions of their ali'i during the period from 1778 to pre-overthrow.

> (3) In Section 5(f) of the Admission Act, Congress stated explicitly that these transferred lands are to be held as a "public trust" by the State and that the revenues generated by these lands are to be used for the following five specific purposes:
>
> .... for the support of the public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended*, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use.
>
> These carefully crafted provisions were based on the clear recognition that Native Hawaiians had continuing claims to these lands and that they must be held in trust until those claims are finally resolved.[6]

Response: Pursuant to The Admission Act of 1959, the Crown Lands are held by the State of Hawai'i as a public trust "for one or more" of the five purposes.[7]

II. DEFINITION OF (1) "HAWAIIAN" AND (2) "NATIVE HAWAIIAN"

Lili'uokalani differentiated between "native and part native."[8] Article XII, section 6 of the Hawai'i State Constitution differentiates between "native Hawaiians" and "Hawaiians".[9]

There is general consensus regarding who is a "Hawaiian." There is disagreement regarding who is a "Native Hawaiian." When the phrase "Native Hawaiian" is used, it must be accompanied by a definition. Professor Van Dyke used the same definition for both "Hawaiian" and

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[5] *Id.* at 149.

[6] *Id.* at 257-58 (quoting An Act to Provide for the Admission of the State of Hawai'i into the Union, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959) [hereinafter Admission Act]).

[7] Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6.

[8] Protest to William McKinley (June 17, 1897), *reprinted in* LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 354-56 (1898).

[9] *See* VAN DYKE, *supra* note 1, at 29.

"Native Hawaiian" even when citing a source using a different definition for "Native Hawaiian."[10]

"Native Hawaiians" are recognized: (1) in the Hawaiian Homes Commission Act, 1920, as amended;[11] (2) in Section 5(f) of the 1959 Admission Act;[12] (3) in Article XII, Section 5, of the Hawai'i State Constitution;[13] (4) in the Native American Housing Assistance and Self-Determination Act's programs which are available to the State of Hawaii's Department of Hawaiian Home Lands;[14] and (5) in Hawai'i Revised Statutes ("HRS") Chapter 10, entitled "Office of Hawaiian Affairs."[15] Three of these five define a "Native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[16]

HRS Chapter 10 applies to the Office of Hawaiian Affairs ("OHA"). HRS § 10-2 states the following definitions:

> "Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawai'i.
>
> "Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal

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[10] *See* VAN DYKE, *supra* note 1, at 1 n.1.

[11] Hawaiian Homes Commission Act, 42 Stat. 108 § 201(a)(7) (1921).

[12] Admission Act, Pub. L. No. 86-3, 73 Stat. 4, § 5(f).

[13] Haw. Const. Art. XII, § 5 (1978).

[14] Native American Housing Assistance and Self-Determination Act, 110 Stat. 4016 (1996); *see, e.g.*, Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-569 § 512, 114 Stat. 2944, 2966 (2000) (codified at 42 U.S.C. § 4101(9) (2012)).

[15] HAW. REV. STAT. § 10-1 (2015).

[16] Article V, Section 5, of the Hawai'i State Constitution distinguishes between "native Hawaiians and Hawaiians" but the Constitution does not provide definitions. HAW. CONST. art. V, § 5. The Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016, was amended by the Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-569 § 513, 114 Stat. 2969 (codified at 42 U.S.C. § 4221(9) (2012)). The latter act defined "Native Hawaiian" as follows: "any individual who is—(A) a citizen of the United States; and (B) a descendant of the aboriginal people, who, prior to 1778, occupied and exercised sovereignty in the area that currently constitutes the State of [Hawai'i], as evidenced by—(i) genealogical records; (ii) verification by kupuna (elders) or [kama'aina] (long-term community residents); or (iii) birth records of the State of [Hawai'i]." Pub. L. No. 106-569 § 513, 114 Stat. 2969, 2970-71.

> peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in [Hawai'i].[17]

In contrast, the Apology Resolution defines a "Native Hawaiian" as an individual "who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i."[18] In other words, all Hawaiians are Native Hawaiians.

Section 10H—3 of the HRS defines a "qualified Native Hawaiian." It states in part:

> Native Hawaiian roll commission. (a) There is established a five—member Native Hawaiian roll commission within the office of Hawaiian affairs for administrative purposes only. The Native Hawaiian roll commission shall be responsible for:
>
> (1) Preparing and maintaining a roll of qualified Native Hawaiians;
>
> (2) Certifying that the individuals on the roll of qualified Native Hawaiians meet the definition of qualified Native Hawaiians. For purposes of establishing the roll, a "qualified Native Hawaiian" means an individual whom the commission determines has satisfied the following criteria and who makes a written statement certifying that the individual:
>
> (A) Is:
>
> (i) An individual who is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of [Hawai'i];
>
> (ii) An individual who is one of the indigenous, native people of [Hawai'i] and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that individual; or
>
> (iii) An individual who meets the ancestry requirements of Kamehameha Schools or of any Hawaiian registry program of the office of Hawaiian affairs;

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[17] HAW. REV. STAT. § 10-2 (2015).

[18] Overthrow of Hawai'i § 2, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter Apology Resolution].

(B) Has maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity; and

(C) Is eighteen years of age or older[.][19]

Professor Van Dyke wrote: "The term 'Native Hawaiian' is used in this book to refer to all persons descended from the Polynesians who lived in the Hawaiian Islands when Captain James Cook arrived in 1778."[20] In other words, Professor Van Dyke used the Apology Resolution's definition instead of the Hawaiian Homes Commission Act's definition and the HRS § 10-2 definition. In this document, except when quoting a source, I use the definition from section 10-2 of the HRS.

III. IN BRIEF, THE RELEVANT HISTORY

According to HawaiiHistory.org:

> The concept of private property was unknown to ancient Hawaiians, but they did follow a complex system of land division. All land was controlled ultimately by the highest chief or king who held it in trust for the whole population. Who supervised these lands was designated by the king based on rank and standing . . . .[21]

Diane Lee Rhodes and Linda Wedel Greene wrote:

> 3. Changes in Land Tenure, Government, and Hierarchal Structure
>
> (a) Land Tenure
>
> Upon unification of the Hawaiian kingdom in 1810, Kamehameha set about to consolidate his power base and instituted a number of changes in government, land tenure, and the hierarchal structure of society. This new government served Kamehameha's political needs and accommodated the economic demands of Western traders. According to one author, Kamehameha's government drew upon the best of the old ways while "incorporating novelty without letting it become heresy or anarchy . . . ."
>
> Political unification of the islands allowed Kamehameha to reorganize landholdings and paved the way for later changes in land tenure. Recognizing

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[19] HAW. REV. STAT. § 10H-3 (2015).

[20] VAN DYKE, *supra* note 1, at 1 n.1.

[21] *Ahupua'a*, HAWAIIHISTORY.ORG, http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&CategoryID=299 (last visited Dec. 2, 2015); *see* NATIVE HAWAIIAN LAW: A TREATISE 9 (Melody K. MacKenzie et al. eds., 2015) ("The concept of private ownership of land had no place in early Hawaiian thought.").

that control over resources was a major source of power, he began to make fundamental changes in the land redistribution patterns. Levin notes, "prior to Kamehameha's unification, the pattern of redistribution was to give sections of contiguous lands to relatives and retainers in traditionally held family lands." However Kamehameha broke this pattern. Retaining the choicest parcels of land for himself and his children, he then reapportioned the "smaller tracts of land in different *mokus* and on different islands to his kinsmen and followers in accordance to their rank and service." In return, they

> were to render public service in war or peace, and in raising a revenue. These let out large portions of their divisions to their favorites or dependents, who were in like manner to render their service, and bring the rent; and these employed cultivators on shares, who lived on the products which they divided, or shared with their landlord, rendering service when required, so long as they chose to occupy the land.

Often this re-distribution of lands was "carried out with great severity." As Kamehameha's enemies were dispossessed of their lands, they lost the cadre of commoners who had provided their economic support and their political power. The ali'i who had formerly held tenure and administrative rights over large sections of land now found themselves without any responsibility for administration. Thus "this new pattern of land redistribution entailed a differentiation between land tenure and administrative duties and a concomitant change in the administrative organization."[22]

The Kings could "convey away" land, and they did. For example, Kamehameha gave Scotsman Alexander Napunako Adams, the person he appointed as head of Hawaii's Navy, 2,400 acres of what is now known as Niu Beach, Niuki Circle, Hawai'i Loa Ridge, and Niu Valley. Queen Ka'ahumanu gave Adams over 290 acres of land in Kalihi.[23]

In 1840, Kamehameha III promulgated a Declaration of Rights that stated in part:

> EXPOSITION OF THE PRINCIPLES ON WHICH THE PRESENT DYNASTY IS FOUNDED.

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[22] LINDA W. GREENE & DIANE L. RHODES, A CULTURAL HISTORY OF THREE TRADITIONAL HAWAIIAN SITES ON THE WEST COAST OF HAWAI'I ISLAND (1993) (footnotes omitted) (quoting WILLIAM R. BROUGHTON, A VOYAGE OF DISCOVERY TO THE NORTH PACIFIC OCEAN 37 (Forgotten Books 2013) (formatting adjusted for space). *See* Stephanie Seto Levin, *The Overthrow of the* Kapu *System in Hawai'i*, 77 J. POLYNESIAN SOC'Y 402, 420 (1968) (explaining the consequences of land redistribution during the rule of Kamehameha).

[23] Harold Nedd, *Son Sues Father, Uncle in Fight over Lucas Estate*, PACIFIC BUSINESS NEWS http://www.bizjournals.com/pacific/stories/2007/03/19/story3.html (last updated Mar. 15, 2007); *See* Niu, PAPAKILO DATABASE, http://www.papakilodatabase.com/main/documentdisplay.php?id=155390&history=q (last visited Dec. 2, 2015).

> The origin of the present government, and system of polity, is as follows: Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom . . . .[24]

In 1840, Kamehameha III created a Constitution that changed the government of the Nation of Hawai'i from an Absolute Monarchy to a Constitutional Monarchy allocating some of the powers of government to (a) a Privy Council, (b) a legislative branch and (c) a judicial branch.[25] This 1840 Constitution stated in part:

> PREROGATIVES OF THE KING.
>
> The prerogatives of the King are as follows: He is the sovereign of all the people and all the chiefs. The kingdom is his. He shall have the direction of the army and all the implements of war of the kingdom. He also shall have the direction of the government property--the poll tax--the land tax--the three days monthly labor, though in conformity to the laws. He also shall retain his own private lands, and lands forfeited for the non-payment of taxes shall revert to him.[26]

In *State v. Zimring*, in an opinion authored by Chief Justice William S. Richardson, the Hawai'i Supreme Court explained the Great Māhele:

> It was long ago acknowledged that the people of [Hawai'i] are the original owners of all Hawaiian land. The Constitution of 1840, promulgated by King Kamehameha III, states:
>
> > KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. *It belonged to the chiefs and the people in common*, of whom Kamehameha I was the head, and had the management of the landed property.
>
> Responding to pressure exerted by foreign residents who sought fee title to land, and goaded by the recognition that the traditional system could not long endure, King Kamehameha III undertook a reformation of the traditional system of land tenure by instituting a regime of private title in the 1840's . . . .

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[24] KING. HAW. CONST. OF 1840, *reprinted in* TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III 10-12 (1842).

[25] *Id.*

[26] *Id.*

A Board of Commissioners to Quiet Land Title, commonly known as the Land Commission, was created in 1846 for the "investigation and final ascertainment or rejection of all claims of private individuals," and was empowered to make Land Commission Awards . . . .

In 1847, the King together with the Privy Council determined that a land māhele, or division, was necessary for the prosperity of the Kingdom. The rules adopted to guide such division were, in part, (1) that the King shall retain all his private lands as individual property and (2) that of the remaining lands, one-third was to be set aside for the Government, one-third to the chiefs and konohiki [agents of the chiefs], and one-third for the tenants. The Great [Māhele] was started in 1848, with the chiefs and konohiki first coming forward to settle their interests by agreement with the King. The [Māhele] agreements were essentially reciprocal quitclaims and did not convey title. Detailed claims had to be presented to the Land Commission for formal Land Commission Awards.

Once the [Māhele] agreements with the chiefs and the konohiki had been completed, there was to be a division of the remaining lands between the King and the Government. The King's motives in undertaking such a division were indicated by this court in *Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 722 (1864):

> The records of the discussion in Council show plainly his Majesty's anxious desire to free his lands from the burden of being considered public domain, and as such, subjected to the danger of confiscation in the event of his islands being seized by any foreign power, and also his wish to enjoy complete control over his own property. Moved by these considerations and by a desire to promote the interest of his Kingdom, he proceeded with an exalted liberality to set apart for the use of the government the larger portion of his royal domain, reserving to himself what he deemed a reasonable amount of land as his own estate.

To effect this, the King signed and sealed two instruments. By one instrument, the King, having "set apart forever to the chiefs and people the larger part of my royal land, for the use and benefit of the Hawaiian Government," retained for himself and his heirs certain designated lands, thereafter referred to as Crown Lands. By the second instrument, the King "set apart forever to the chiefs and people of my Kingdom" the remaining designated lands. Until 1865, when Crown Lands were made inalienable, Kamehameha III and his successors acted like private owners respecting such lands. The deeds executed by the King upon sale of any portion of the Crown Lands are known as Kamehameha Deeds.

The public domain, which previous to the [Māhele] had been all-inclusive, was diminished by withdrawals of the Crown Lands and the lands successfully claimed by chiefs, konohiki and tenants. It included, inter alia, the lands surrendered to the Government by the King, the lands ceded by the

> chiefs in lieu of commutation, the lands purchased by the government, and all lands forfeited by the neglect of claimants to present their claims to the Land Commission within the period fixed by law. In 1893, following the overthrow of the monarchy, the Republic declared that Crown Lands were Government property and part of the public domain.
>
> As to lands that were overlooked in the [Māhele] and thus unassigned, the question arose whether they were Crown or Government Lands. This court in *Thurston v. Bishop*, 7 Haw. 421 (1888), adopted the position that such unassigned lands remained part of the public domain.
>
> Following the [Māhele], portions of the public domain were sold from time to time in order to provide landless citizens with land and to obtain revenues for public expenditures. Purchasers of these lands were issued documents called Grants or *Royal Patent Grants*.[27]

The Act of June 7th, 1848, stated that the King's Lands were "the private lands of his Majesty Kamehameha III, to have and to hold to himself, his heirs and successors forever; and said lands shall be regulated and disposed of according to his royal will and pleasure, subject only to the rights of tenants."[28]

Kamehameha III approved the Resident Alien Land Ownership Act of 1850 which permitted "resident aliens" to acquire and own Hawai'i land in fee.[29]

On March 11, 1893, James H. Blount was appointed by President Cleveland as a special commissioner to the Hawaiian Islands.[30] In his July 17, 1893 report ("Blount Report") to President Cleveland, Blount wrote that after the Great Māhele "[t]he foreigners soon traded the chiefs out of a large portion of their shares, and later purchased government lands from the Government and obtained long leases on the Crown Lands. Avoiding details, it must be said that the natives never held much of the land."[31] As Jocelyn B. Garovoy notes:

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[27] State v. Zimring, 58 Haw. 106, 566 P.2d 725, 729-31 (1977) (emphases added) (footnotes omitted) (citations omitted).

[28] STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III AN ACT RELATING TO THE LANDS OF HIS MAJESTY THE KING AND OF THE GOVERNMENT 25 (1848).

[29] An Act to Abolish the Disabilities of Aliens to Acquire and Convey Lands in Fee Simple § 1 (Jul 10, 1850) *in* 1 WILLIAM L. LEE, PENAL CODE OF THE HAWAIIAN ISLANDS, PASSED BY THE HOUSE OF NOBLES AND REPRESENTATIVES ON THE 21ST OF JUNE, A.D. 1850, 146-47 (1850).

[30] Exec. Doc. No. 47, 53rd Cong., 2d sess. (Dec. 18, 1893) *in* THE EXECUTIVE DOCUMENTS OF THE HOUSE OF REPRESENTATIVES FOR THE THIRD SESSION OF THE FIFTY-THIRD CONGRESS, 1894-95, 445-58 (1895) (http://libweb.hawaii.edu/digicoll/annexation/blount.html) [hereinafter Blount Report].

[31] *Id.* at 600.

> The *Kuleana* Act of 1850 authorized the Land Commission to award fee simple titles to all native tenants who lived and worked on parcels of Crown, Government, or *Konohiki* Lands. To receive their *kuleana* award, the Land Commission required native tenants to prove that they had occupied, improved, or cultivated the claimed lands. The commission also required claimed lands to be surveyed before they would issue an award for the land. The *kuleana* award could include land actually cultivated and a house lot of not more than a quarter acre.
>
> Most [*maka'āinana*] never claimed their *kuleanas*. Of the 29,221 adult males in [Hawai'i] in 1850 eligible to make land claims, only 8205 [*maka'āinana*] actually received *kuleana* awards.[32]

Blount also wrote that "[i]n the distribution of lands most of it was assigned to the King, chiefs, some whites, and to the Government for its support. Of the masses 11,132 persons received 27,830 acres—about two and a half acres to an individual—called Kuleanas. The majority received nothing."[33] Kamehameha III, Kamehameha IV, and Kamehameha V often sold or gifted parcels of Crown Lands.[34] For example, in 1850, Kamehameha III sold to Dr. Gerrit P. Judd the land that became the Kualoa Ranch on the Windward Coast of O'ahu.[35].

Under the 1852 Constitution and succeeding Constitutions, the King appointed all of the members of the Hawai'i Supreme Court for life.[36]

Kamehameha V's Constitution of 1864 specified that the members of the King's Cabinet were the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General, and they were appointed by the King and served at his pleasure.[37] This Constitution stated that "[n]o act of the King shall have any effect unless it be countersigned by a Minister, who by that signature makes himself responsible."[38]

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[32] Jocelyn B. Garovoy, *"Ua Koe Ke Kuleana O Na Kanaka" (Reserving the Rights of Native Tenants): Integrating* Kuleana *Rights and Land Trust Priorities in Hawai'i*, 29 HARV. ENVTL. L. REV. 523, 527 (2005) (citation omitted).

[33] Blount Report, *supra* note 30 at 600.

[34] *See generally* Nedd, *supra* note 23.

[35] Royal Patent No. 103, 1 KINGDOM OF HAWAI'I, ROYAL PATENTS 403-06 (https://www.waihona.com/previewDoc.asp?mod=g&type=RP&docId=63950); *see also* Allison Schaefers, *Kualoa Ranch to Market Beef*, THE STAR ADVERTISER, Jan. 3, 2011, *available at* http://www.staradvertiser.com/business/kualoa-ranch-to-market-beef/.

[36] *See, e.g.*, CONSTITUTION OF THE KINGDOM OF HAWAI'I OF 1852, art. 89; CONSTITUTION OF THE KINGDOM OF HAWAI'I of 1864, art. 65; CONSTITUTION OF THE KINGDOM OF HAWAI'I OF 1887, art. 65.

[37] CONSTITUTION OF THE KINGDOM OF HAWAI'I OF 1864, art. 42.

[38] *Id.*

The legislature became unicameral and was named the "Legislative Assembly[.]"[39] The King appointed the Nobles.[40] The number of Nobles was "not more than twenty[.]"[41] The four members of the King's Cabinet were ex-officio Nobles.[42] Nobles were required to be not less than twenty-one years of age and to have resided in the Kingdom no less than five years.[43]

The number of Representatives was "not [to be] less than twenty-four, nor more than forty." Representatives were to be elected biannually by the voters.[44] The age qualification for Representatives was reduced to those who "shall have arrived at the full age of Twenty-One years."[45] Only male subjects of the Kingdom were qualified to be, or vote for, Representatives.[46] Representatives had to have been domiciled in the Kingdom for at least three years, the last of which was the year immediately preceding his election.[47] Representatives were required to own real estate "within the Kingdom, of a clear value, over and above all incumbrances [sic], of at least Five Hundred Dollars; or who shall have an annual income of at least Two Hundred Fifty Dollars; derived from any property or some lawful employment."[48] Eligibility to vote for Representatives required possession of real property in the Kingdom of a value

> over and above all incumbrances [sic] of One Hundred and Fifty Dollars or of a Lease-hold property on which the rent [was] Twenty-five Dollars per year — or an annual income of not less than Seventy-five Dollars per year, derived from any property or some lawful employment and shall know how to read and write, if born since the year 1840.[49]

The King's veto of any Bill or Resolution passed by the Legislative Assembly was final.[50]

Kamehameha IV died intestate on November 30, 1863.[51] In *In re Estate of His Majesty Kamehameha IV.*, 2 Haw. 715 (1864), the Hawai'i Supreme Court decided:

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[39] *Id.* art. 45.
[40] *Id.*
[41] *Id.* art. 57.
[42] *Id.* art. 43.
[43] *Id.* art. 58.
[44] *Id.* art. 60.
[45] *Id.* art. 61.
[46] *Id.* art. 61-62.
[47] *Id.* art. 61.
[48] *Id.*
[49] *Id.* art. 62.
[50] *See id.* art. 49.
[51] *See* In re Estate of His Majesty Kamehameha IV., 2 Haw. 715, 725 (1864)

> In our opinion, while it was clearly the intention of Kamehameha III to protect the lands which he reserved to himself out of the domain which had been acquired by his family through the prowess and skill of his father, the conqueror, from the danger of being treated as public domain or Government property, it was also his intention to provide that those lands should descend to his heirs and successors, the future wearers of the crown which the conqueror had won; and we understand the act of 7th June, 1848, as having secured both those objects. Under that act the lands descend in fee, the inheritance being limited however to the successors to the throne, and each successive possessor may regulate and dispose of the same according to his will and pleasure, as private property, in like manner as was done by Kamehameha III.
>
> In our opinion the fifth clause of the will of Kamehameha III was not necessary to pass the reserved lands to Kamehameha IV, any more than the first clause was necessary to pass to him the crown. He was entitled to inherit those lands by force of the act of 7th June, 1848, when he succeeded to the crown, in virtue of the public proclamation made by his predecessor with the consent of the House of Nobles, and he was entitled as the adopted son of Kamehameha III, to inherit the remainder of his estate not devised to any one else, subject to dower.
>
> We are clearly of opinion also that her Majesty Queen Emma is lawfully entitled to dower in the reserved lands, except so far as she may have barred her right therein by her own act and deed. There is nothing in the Act of 7th June, 1848, which can be understood as taking away the Queen's right of dower in the lands therein named; nor is there any law of this Kingdom which renders the matrimonial rights of the wife of the King any less than or any different from those of the wife of any private gentleman. Such was unquestionably the understanding of both Kamehameha III, and his successor as to dower in those lands, which are to be dealt with in all respects as private inheritable property, subject only to the special legislative restriction on the manner of their descent.
>
> But his Majesty Kamehameha IV was possessed of other property, both real and personal, at the time of his death, not affected with the special character attached to the reserved lands. The descent of that part of his estate must be governed by the general law of inheritance and distribution, and her Majesty Queen Emma is therefore entitled as statutory heir to one-half of that property, after the payment thereout of such portion of the late King's debts as are not specifically charged by mortgage or otherwise upon the reserved lands. Debts of the latter class ought clearly to be paid out of the estate encumbered therewith.[52]

[hereinafter Kamehameha IV]; WILLIAM D. ALEXANDER, HISTORY OF LATER YEARS OF THE HAWAIIAN MONARCHY AND THE REVOLUTION OF 1893, at 8 (2012).

[52] *Id.*

The Legislature and Kamehameha V promptly responded to the Hawai'i Supreme Court's opinion with "An Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable" enacted on January 3, 1865.[53] It provided for the payment of the debts secured by mortgages on the King's lands.[54] It stated that the remaining King's lands are to be "henceforth inalienable and shall descend to the heirs and successors of the Hawaiian Crown forever" and that "it shall not be lawful hereafter to lease said lands for any terms of years to exceed thirty."[55] It created a Board of Commissioners of Crown Lands consisting of three persons to be appointed by the King, two of whom were required to be selected from among the members of the King's Cabinet Council.[56] The third was to act as Land Agent and be paid out of the revenues of the land that had been the King's lands.[57] Professor Van Dyke explained that this law "was designed (1) to address and eliminate the considerable debt that the previous Monarchs had accumulated and (2) to protect the Crown Lands from further depletion."[58]

Kamehameha V died on December 11, 1872.[59] His successor, William Charles Lunalilo, died on February 3, 1874.[60] Emma was the widow of Kamehameha IV and the granddaughter of John Young.[61] Emma and David Kalākaua declared themselves as candidates for the throne.[62]

The Blount Report states:

> It may not be amiss to present some of the criticisms against Kalākaua and his party formally filed with me by Prof. W. D. Alexander, a representative reformer.
>
> On the 12th of February, 1874, [Kalākaua] was elected King by the legislature. The popular choice lay between him and the Queen Dowager.

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[53] VAN DYKE, *supra* note 1, at 90.

[54] *Id.*

[55] *See* HAWAIIAN ALMANAC AND ANNUAL FOR 1891: A HANDBOOK OF INFORMATION ON MATTER RELATING TO THE HAWAIIAN ISLANDS, ORIGINAL AND SELECTED, OF VALUE TO MERCHANTS, TOURISTS AND OTHERS 122 (Thos G. Thrum, ed., Honolulu Press Publishing Co. 1886).

[56] *Id.*

[57] *Id.*

[58] VAN DYKE, *supra* note 1, at 378.

[59] 2 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM: 1854-1874, 229 (1953); *see* NORRIS POTTER, LAWRENCE M. KASDON, & ANN RAYSON, HISTORY OF THE HAWAIIAN KINGDOM 122 (2003).

[60] 2 KUYKENDALL, *supra* note 59, at 262; POTTER, *supra* note 59, at 127.

[61] 3 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM: 1874-1893, 4-6 (1967); Blount Report, *supra* note 30, at 986.

[62] *See* 3 KUYKENDALL, *supra* note 61, at 4.

> In regard to this, Mr. Alexander says that "the cabinet and the American party used all their influence in favor of the former, while the English favored Queen Emma, who was devoted to their interest."
>
> Notwithstanding there were objections to [Kalākaua's] character, he says: "It was believed, however, that if Queen Emma should be elected there would be no hope of our obtaining a reciprocity treaty with the United States."[63]

The sugar empire of Claus Spreckels that extended from Philadelphia to California was further extended when, in 1878, Spreckels leased 24,000 acres of Crown Lands in central Maui and added it to the 16,000 acres he co-owned.[64] Ruth Ke'elikolani, the sole heir of Kamehameha V, owned most of the land passed down by her Kamehameha relatives (particularly Victoria Kamāmalu Ka'ahumanu IV).[65] Ruth asserted a dubious claim to ownership of a one-half interest in all of the Crown Lands.[66] Her claim was based on the fact that she was the half-sister of Kamehameha IV, who died intestate.[67] Spreckels purchased from Ruth, for the sum of $10,000, all the interest that she might have had in the Crown Lands.[68] The reason for his purchase was confirmed in 1882 when, as noted by W. D. Alexander, Kalākaua and Walter M. Gibson, the man Kalākaua appointed as Prime Minister of the Kingdom, persuaded the legislature to pass a bill conveying to Claus Spreckels the 24,000 acres of Crown Lands he had been leasing, in order to compromise the claim which he had purchased from Ruth.[69]

In 1876, the Alexander and Baldwin Sugar Company ("A&B Sugar Company") decided to bring water from the north side of Maui to the arid south central plain.[70] A lease from the government allowed it to do so. Later, Spreckels sought a lease to all water not captured by A&B Sugar Company.[71] The Cabinet was slow to act on the request.[72] After receiving from Spreckels a $10,000 gift and a $40,000 loan, Kalākaua replaced his cabinet (Mott Smith, Carter, Hartwell, and Kapena), and his newly appointed cabinet (Kapena, Kaai, Wilder, and Preston) promptly approved

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[63] Blount Report, *supra* note 30, at 573.

[64] VAN DYKE, *supra* note 1, at 100.

[65] *Id.*

[66] *Id.* at 101.

[67] Blount Report, *supra* note 30, at 651.

[68] VAN DYKE, *supra* note 1, at 100.

[69] Blount Report, *supra* note 30, at 651.

[70] POTTER, *supra* note 59, at 129-33; *see* Blount Report, *supra* note 30, at 647; *History*, ALEXANDER & BALDWIN, INC. (2015), http://alexanderbaldwin.com/our-company/history/.

[71] *Complex Legal Issues Surround A&B's Taking of East Maui Water*, ENVIRONMENT HAWAI'I (Aug. 1997), http://www.environment-hawaii.org/?p=3441; *see* Blount Report, *supra* note 30 at 647.

[72] 3 KUYKENDALL, *supra* note 61, at 201.

the request by Spreckels for a thirty-year lease of the water supply he sought.[73] In 1880, the Legislature authorized payment of the $40,000 loan but required reimbursement from the income from the Crown Lands.[74]

In 1882, a public meeting was held where the Planters Labor and Supply Company, a company formed by plantation owners in Hawai'i to facilitate the importation of laborers, adopted two resolutions.[75] First, a charge that the alienation of Crown Lands, extravagance of spending, and contempt for the judiciary had caused a loss of confidence in the government.[76] Second, a request asking Kalākaua to dismiss his Cabinet (Kaai, Gibson, Bush, Preston), especially Gibson. Kalākaua denied both the charges and the request.[77]

In 1886, Kalākaua approved legislation authorizing the sale of a license "to import and sell opium or any preparation of opium, in this Kingdom".[78] The term of the license was four years.[79] The licensee was required to insure that he "will not sell, give or furnish any opium, or preparation of opium, to any native Hawaiian or Japanese, or to any other person who has not received a certificate from some physician stating that opium is the property remedy for the disease from which the bearer is suffering".[80] This 1886 legislation also required "any person or persons desiring to purchase or use opium or any preparation thereof . . . [to] obtain a license . . . authorizing the . . . [purchase or use of] opium or any preparation thereof."[81]

William D. Alexander described relevant subsequent events:

> The main facts of the case, as proved before the court, are as follows: Early in November, 1886, one, Junius Kaae, a palace parasite, informed a Chinese rice-planter named Tong Kee, alias Aki, that he could have the opium license granted to him if he would pay the sum of $60,000 to the King's private purse, but that he must be in haste because other parties were bidding for the privilege. With some difficulty Aki raised the money, and secretly paid it to Kaae and the King in three installments between December 3d and December 8th, 1886. Soon afterwards Kaae called on Aki and informed him that one, Kwong Sam Kee, had offered the King $75,000 for the license, and would

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[73] *Id.* at 200; *see* VAN DYKE, *supra* note 1, at 108.

[74] 3 KUYKENDALL, *supra* note 61, at 683.

[75] *Id.* at 143.

[76] *Id.* at 200; *see* VAN DYKE, *supra* note 1, at 108.

[77] KUYKENDALL, *supra* note 72, at 200; *see* Blount Report, *supra* note 30 at 650, 652.

[78] An Act to Regulate the Importation and Sale of Opium in this Kingdom § 1 (1886)*in* 21 REPORTS FROM THE CONSULS OF THE UNITED STATES NOS. 73-74, 472 (1887).

[79] *Id.* § 8.

[80] *Id.* § 2.

[81] *Id.* § 7.

> certainly get it, unless Aki paid $15,000 more. Accordingly Aki borrowed the amount and gave it to the King personally on the llth.
>
> Shortly after this another Chinese syndicate, headed by Chung Lung, paid the King $80,000 for the same object, but took the precaution to secure the license before handing over the money. Thereupon Aki, finding that he had lost both his money and his license, divulged the whole affair, which was published in the Honolulu papers. He stopped the payment of a note at the bank for $4,000, making his loss $71,000 . . . .
>
> It has been seen that on the 30th of June, 1887, Kalākaua promised in writing that he would "cause restitution to be made" of the $71,000 which he had obtained from Aki, under a promise that he (Aki) should receive the license to sell opium, as provided by the Act of 1886.
>
> The Reform cabinet urged the King to settle this claim before the meeting of the Legislature, and it was arranged that the revenues from the Crown Lands should be appropriated to that object. When, however, they ascertained that his debts amounted to more than $250,000 they advised the King to make an assignment in trust for the payment of all claims pro rata. Accordingly, a trust deed was executed November 21, 1887, assigning all the Crown land revenues and most of the King's private estate to three trustees for the said purpose, on condition that the complainant would bring no petition or bills before the Legislature, then in session.
>
> Some three months later these trustees refused to approve or pay the Aki claim, on which Aki's executors brought suit against them in the Supreme Court . . . .
>
> After a full hearing of the evidence, Judge Preston decided that the plea of the defendants that the transaction between Aki and the King was illegal could not be entertained, as by the constitution the King "could do no wrong," and "could not be sued or held to account in any court of the Kingdom." Furthermore, as the claimants had agreed to forbear presenting their claim before the Legislature in consideration of the execution of the trust deed, the full court ordered their claim to be paid pro rata with the other approved claims.[82]

On June 29, 1887, notice of a public meeting was published in the newspaper.[83] Resolutions approved at the public meeting on June 30, 1887, requested the following from Kalākaua:

> First - That he shall at once and unconditionally dismiss his present Cabinet from office, and we ask that he shall call one of these persons, viz: William L. Green, Henry Waterhouse, Godfrey Brown or Mark P. Robinson to assist him

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[82] WILLIAM D. ALEXANDER, HISTORY OF LATER YEARS OF THE HAWAIIAN MONARCHY AND THE REVOLUTION OF 1893 19-22 (1896).

[83] 3 KUYKENDALL, *supra* note 61, at 359.

in selecting a new Cabinet, which shall be committed to the policy of securing a new constitution.

Second - That Walter M. Gibson shall be at once dismissed from each and every office held by him under the Government.

Third - In order, so far as possible, to remove the stain now resting on the throne, we request of the King that he shall cause immediate restitution to be made of the sum, to wit: Seventy-one thousand dollars ($71,000), recently obtained by him in violation of law and of his oath of office, under promise that the persons from whom the same was obtained should receive the license to sell opium, as provided in the statute of the year 1886.

Fourth - Whereas, one Junius Kaae was implicated in the obtaining of said seventy-one thousand dollars ($71,000), and has since been, and still is retained in office as Registrar of Conveyances, we request, as a safeguard to the property interests of the country, that said Kaae be at once dismissed from said office, and that the records of our land titles be placed in hands of one in whose integrity the people can safely confide.

Fifth - That we request a specific pledge from the King

(1) That he will not in future interfere either directly or indirectly with the election of representatives.

(2) That he will not interfere with or attempt to unduly influence legislation or legislators.

(3) That he will not interfere with the constitutional administration of his cabinet.

(4) That he will not use his official position or patronages for private ends.[84]

The requests were presented to Kalākaua, giving him twenty-four hours to reply, and authorizing another public meeting if he refused to agree to them.[85]

On July 1, 1887, Kalākaua called in the representatives of the United States, Great Britain, Prance, Portugal and Japan.[86] American Minister Merrill wrote that Kalākaua expressed his desire to place the control of the affairs of the kingdom in their hands and they declined.[87]

That same day, in a written reply to the resolutions, Kalākaua responded:

To Honorable Paul Isenberg and the gentlemen composing the committee of a meeting of subjects and citizens:

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[84] *Id.* at 360.
[85] *Id.*
[86] *Id.* at 364.
[87] *Id.*

> Gentlemen: In acknowledging the receipt of the resolutions adopted at a mass meeting held yesterday and presented to us by you we are pleased to convey through you to our loyal subjects as well as to the citizens of Honolulu our expression of good-will and our gratification that our people have taken the usual constitutional step in presenting their grievances.
>
> To the first proposition contained in the resolutions passed by the meeting, . . . we reply that it has been substantially complied with by the formal resignation of the ministry, which took place on the 28th day of June, and was accepted on that date, and that we had already requested the Hon. W. L. Green to form a new Cabinet on the day succeeding the resignation of the Cabinet.
>
> To the second proposition, we reply that Mr. Walter M. Gibson has severed all his connections with the Hawaiian Government by resignation.
>
> To the third proposition, we reply that we do not admit the truth of the matter stated therein, hut [sic] will submit the whole subject to our new cabinet and will gladly act according to their advice and will cause restitution to be made by the parties found responsible.
>
> To the fourth proposition, we reply that at our command Mr. Junius Kaae resigned the office of registrar of conveyance on the 28th day of June, and his successor has been appointed.
>
> To the fifth proposition, we reply that the specific pledges required of us are each severally acceded to.[88]

On July 6, 1887, the Green-Brown-Thurston-C.W. Ashford Cabinet that had been appointed by Kalākaua presented a new Constitution to Kalākaua for his signature and he signed it.[89]

On July 7, 1887, Kalākaua signed a proclamation stating that he "being moved thereto by the advice of my Cabinet Council; and in pursuance of such advice did sign, ordain, and publish a new Constitution."[90]

In his speech before the opening session of the legislature elected pursuant to the 1887 Constitution, Kalākaua stated:

> I take great pleasure in informing you that the Treaty of Reciprocity with the United States of America has been definitely extended for seven years upon the same terms as those in the original treaty, with the addition of a clause granting to national vessels of the United States the exclusive privilege of entering Pearl River Harbor and establishing there a coaling and repair station. This has been done after mature deliberation and the interchange between my Government and that of the United States of an interpretation of

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[88] Blount Report, *supra* note 30 at 803.

[89] 3 KUYKENDALL, *supra* note 61, at 365.

[90] *Id.* at 368.

> the said clause whereby it is agreed and understood that it does not cede any territory or part with or impair any right of sovereignty or jurisdiction on the part of the Hawaiian Kingdom and that such privilege is coterminous with the treaty.
>
> I regard this as one of the most important events of my reign, and I sincerely believe that it will re-establish the commercial progress and prosperity which began with the Reciprocity Treaty.[91]

IV. THE GOALS OF KAMEHAMEHA III'S GREAT MĀHELE

Professor Van Dyke wrote "[t]hese [Great Māhele] distributions were consistent with [Kamehameha III's] goal of protecting the lands of the Native Hawaiians from foreigners."[92] I disagree with this statement. As stated above, in *Zimring*, Chief Justice Richardson noted Kamehameha's reasons for the Great Māhele:

> Responding to pressure exerted by foreign residents who sought fee title to land, and goaded by the recognition that the traditional system could not long endure, Kamehameha III undertook a reformation of the traditional system of land tenure by instituting a regime of private title in the 1840's . . . .
>
> * * *
>
> In 1847, the King together with the Privy Council determined that a land māhele, or division, was necessary for the prosperity of the Kingdom. The rules adopted to guide such division were, in part, (1) that the King shall retain all his private lands as individual property . . . .
>
> Once the [Māhele] agreements with the chiefs and the konohiki had been completed, there was to be a division of the remaining lands between the King and the Government. The King's motives in undertaking such a division were indicated by this court in Estate of His Majesty Kamehameha IV, 2 Haw. 715, 722 (1864):
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> . . . The records of the discussion in Council show plainly his Majesty's anxious desire to free his lands from the burden of being considered public domain, and as such, subjected to the danger of confiscation in the event of his islands being seized by any foreign power, and also his wish to enjoy complete control over his own property. Moved by these considerations and by a desire to promote the interest of his Kingdom, he proceeded with an exalted liberality to set apart for the use of the government the larger portion

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[91] Exec. Doc. No. 608, 50th Cong., 2d sess. (Nov. 8, 1887) *in* 1 INDEX TO THE EXECUTIVE DOCUMENTS OF THE HOUSE OF REPRESENTATIVES FOR THE SECOND SESSION OF THE FIFTIETH CONGRESS, 1888-'90, 836 (1889) (http://digital.library.wisc.edu/1711.dl/FRUS.FRUS188889v01p1).

[92] VAN DYKE, *supra* note 1, at 43.

> of his royal domain, reserving to himself what he deemed a reasonable amount of land as his own estate.[93]

Kamehameha III achieved his primary goal. The Act of June 7th, 1848, stated that the King's lands were "the private lands of his Majesty Kamehameha III, to have and to hold to himself, his heirs and successors forever; and said lands shall be regulated and disposed of according to his royal will and pleasure, subject only to the rights of tenants."[94]

Kamehameha III's approval of the Resident Alien Land Ownership Act of 1850 that permitted the sale of land in fee simple to resident aliens contradicts Professor Van Dyke's assertion that his goal was to protect "the lands of the Native Hawaiians from foreigners."[95]

V. THE ACT OF JANUARY 3, 1865, MOVED THE KING'S LANDS INTO A CROWN LANDS TRUST

The January 3, 1865 Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable converted the King's lands into the "Crown Lands" and commenced the Crown Lands trust.[96] The beneficiaries of the trust were the King and his successors and the people of Hawai'i.

VI. IN 1893, PRIOR TO THE OVERTHROW, HAWAIIANS DID NOT CONTROL HAWAII'S GOVERNMENT; HAWAIIANS DID NOT HAVE SOVEREIGNTY OVER THE NATION OF HAWAI'I

The 1887 Constitution specified that the Cabinet "shall be appointed and commissioned by the King and shall be removed by him, only upon a vote of want of confidence passed by a majority of all the elective members of the Legislature or upon conviction of felony, and shall be subject to impeachment."[97] Except in the situation where the votes in the Legislature were evenly split, this provision gave the Legislature the power to control the Cabinet.[98]

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[93] *Zimring,* 58 Haw. at 112, 566 P.2d at 730.

[94] VAN DYKE, *supra* note 1, at 76; *Kamehameha IV*, 2 Haw. at 717.

[95] *See* VAN DYKE, *supra* note 1, at 50-51.

[96] An Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable, 2 Revised Laws of Hawai'i, 2177-79 (Jan. 3, 1865).

[97] CONSTITUTION OF THE KINGDOM OF HAWAI'I OF 1887, art. 41.

[98] Blount Report, *supra* note 30 at 898 (containing Statement of E.C. McFarlane).

The 1887 Constitution stated that "[t]he Cabinet hold seats ex—officio, in the Legislature, with the right to vote, except on a question of want of confidence in them."[99]

The 1887 Constitution specified in its Article 78: "Wherever by this Constitution any Act is to be done or performed by the King or the Sovereign, it shall unless otherwise expressed, mean that such Act shall be done and performed by the Sovereign by and with the advice and consent of the Cabinet."[100]

In the case of *In re Authority of the Cabinet*, the Hawai'i Supreme Court agreed with the following statements:

> The Government in all its departments must be conducted by the Cabinet, who will be solely and absolutely responsible for such conduct.
>
> Your Majesty shall in future sign all documents and do acts which under the laws or the Constitution require the signature or acts of the Sovereign, when advised so to do by the Cabinet, the Cabinet being solely and absolutely responsible for the signature of any document or act so done or performed by their advice.[101]

In the appeal of *In re Responsibility of Cabinet*, the Hawai'i Supreme Court decided that it was not necessary for the Cabinet to be unanimous.[102] Only three of the four votes were required.[103] Stated simply, Lili'uokalani was required to do what no less than three of the four Cabinet members told her to do. In *Liliuokalani, 1893 to James H. Blount*, Lili'uokalani described herself as "a nonentity, a figurehead."[104]

Professor Van Dyke wrote, "[t]he 1890 census reported that 13,593 were registered to vote, and of these 8,777 were listed as 'natives' and another 777 were 'half-castes' — that is, part-Hawaiians. Of the remainder, half (2,091) were Portuguese Laborers."[105] Professor Van Dyke also wrote:

The 1887 Constitution specified that twenty-four Nobles were to be elected, six from the Island of Hawai'i, six from the Islands of Maui, Moloka'i and Lana'i, nine from the Island of O'ahu, and three from the Islands of Kaua'i and Ni'ihau.[106] The term of each Noble was six-years and one-third of each division were elected biannually.[107] The only persons

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[99] *See* CONSTITUTION OF THE KINGDOM OF HAWAI'I OF 1887, art. 41.

[100] *Id.* art. § 78.

[101] In re Authority of the Cabinet, 7 Haw. 783, 783 (1889).

[102] In re Responsibility of the Cabinet, 8 Haw. 566, 570 (1890).

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

[104] Blount Report, *supra* note 30 at 861 (No. 33, Statement of Lili'uokalani to James H. Blount (1893)).

[105] VAN DYKE, *supra* note 1, at 148 (footnotes omitted).

[106] CONST. OF THE KINGDOM OF HAWAI'I OF 1887, art. 58.

[107] *Id.*

eligible to be Nobles were not less than twenty-five year old subjects of the Kingdom who 1) had resided in Hawai'i for not less than three years, and (2)(a) were the owners of taxable property in the Kingdom of the value of three-thousand dollars over and above all encumbrances, or (b) were in receipt of an annual income of not less than six-hundred dollars.[108]

The only persons authorized to vote for Nobles were not less than twenty-year old male residents of the Hawaiian Islands who (1) were of Hawaiian, American or European birth or descent, (2) paid their taxes, (3) resided in the Kingdom not less than three years and in the district not less than three months immediately preceding the election, (4) owned and possessed, in their own right, taxable property in the Kingdom of the value of not less than three thousand dollars over and above all encumbrances, or actually received an income of not less than six hundred dollars during the year next preceding their registration for the election, (5) caused their names to be entered on the list of voters for Nobles for their Districts, (6) took an oath to support the Constitution and laws, and (7)

> [p]rovided, however, that the requirements of a three years residence and of ability to read and comprehend an ordinary newspaper, printed in the Hawaiian, English or some European language, shall not apply to persons residing in the Kingdom at the time of the promulgation of this Constitution, if they shall register and vote at the first election which shall be held under this constitution.[109]

Twenty-four Representatives were elected biennially.[110] The only persons eligible to be Representatives were not less than twenty-one year old male subjects of the Kingdom, who (1) knew how to read and write either the Hawaiian, English or some European language, (2) understood accounts, (3) had been "domiciled in the Kingdom for at least three years, the last of which was the year immediately preceding their election[,]" and (4) owned "real estate within the Kingdom of a clear value, over and above all encumbrances of at least five hundred dollars;" or had "an annual income of at least two hundred and fifty dollars, derived from any property or some lawful employment."[111]

The only persons authorized to vote for their district Representatives were not less than twenty-year old male domiciled in [Hawai'i] for no less than one year preceding the election who: (1) were "of Hawaiian, American, or European birth or descent;" (2) paid their taxes; (3) if born since the year 1840, knew how to read and write the Hawaiian, English or

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[108] *Id.*, art. 50.
[109] *Id.* art. 59.
[110] *Id.* art. 60.
[111] *Id.* art. 61.

some European language; (4) caused their names to be entered on the list of his district; (5) took an oath to support the Constitution and laws; and (6)

> provided, however that the requirements of being domiciled in the Kingdom for one year immediately preceding the election, and of knowing how to read and write either the Hawaiian, English or some European language, shall not apply to persons residing in this Kingdom at the time of the promulgation of the constitution, if they shall register and vote at the first election which shall be held under this Constitution.[112]

Professor Van Dyke wrote that, in the February 1890 election,

> [A]bout two-thirds of the voters for representatives were Hawaiians and . . . Hawaiians comprised more than a third of the voters for nobles. In the February 1890 election, the National Reform Party, led by Robert W. Wilcox, who voiced the dissatisfaction of the Native Hawaiians about the 1887 Constitution and rallied their political enthusiasm, particularly in Honolulu, won fourteen out of the twenty-four seats in the House of Representatives and took all nine of the seats for Nobles on O'ahu (but lost the other fifteen seats on the neighbor islands). The National Reform Party was able to organize the Legislature (the Nobles and Representatives met together as one body), elect its President and control its committees, and force the members of the "reform" Cabinet, led by Lorrin Thurston, to resign.[113]
>
> The February 1892 election did not break down along racial lines. The elections of 1892 produced a strange assembly, in which no party had a majority. Wilcox and his group formed the Liberal Party, along with people like the Ashford Brothers, who had been active in promoting the [1887] Bayonet Constitution, and they were critical of Queen Lilu'uokalani and called for a constitutional convention. Three conservative parties supported the Queen and stability, generally opposing a constitutional convention and supporting a new trade agreement with the United States. The Liberal Party won only thirteen seats, with the other parties holding thirty-five. Native Hawaiians held twenty-five of the forty-eight seats in the . . . Legislature that met during 1892-93. These results certainly do not indicate that the Native Hawaiians had lost control of the Kingdom. Even with the limiting property and income restrictions governing the voting for the Nobles, Native Hawaiians continued to play the dominant role in decision making, and the election also confirmed that the Queen continued to have broad support.[114]
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> * * *
>
> In the 1890 election, Native Hawaiians had effectively wrested control of the Kingdom from those who had foisted the [1887] Constitution on the Kingdom

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[112] *Id.* art. 62.

[113] VAN DYKE, *supra* note 1, at 149.

[114] *Id.* (footnotes omitted) (internal quotation marks omitted).

> and efforts were underway during the years that followed to reassert a stronger role for the Monarchy. Those who now claim that the Native Hawaiians had lost control of the Kingdom prior to the 1893 overthrow are wrong.[115]

"Sovereignty" is defined as having "supreme authority within a territory."[116] "Authority" is "the power or right to give orders, make decisions and enforce obedience."[117]

The facts, including those cited by Professor Van Dyke, contradict his statements that "[t]hose who now claim that the Native Hawaiians had lost control of the Kingdom prior to the 1893 overthrow are wrong"[118] and that the "Native Hawaiians continued to play the dominant role in decision making."[119]

Important facts to consider include: (1) about one-third of the voters for Representatives were not Hawaiians and about two-thirds of the voters for Nobles were not Hawaiians; (2) in the February 1890 election, Hawaiians won fourteen out of the twenty-four Representative seats and nine out of the twenty-four Noble seats, a total of twenty-three of the forty-eight seats and non-Hawaiians won the other twenty-five seats; (3) the February 1892 election (A) did not break down along racial lines, (B) produced a strange assembly, in which no party had a majority, (C) elected twenty-five Hawaiian legislators and twenty-three non-Hawaiian legislators, and (D) elected thirty-five legislators from three conservative parties that supported the Queen and stability, generally opposed a constitutional convention and supported a new trade agreement with the United States; (4) the Cabinet held seats ex-officio, in the Legislature, with the right to vote and Hawaiians did not control the Cabinet; and (5) Lili'uokalani was, in her words, "a nonentity, a figurehead"[120] because she was required to do what no less than three of the four Cabinet members told her to do.

In Article 82, the 1887 Constitution stated:

> Any amendment or amendments to this Constitution may be proposed in the Legislature, and if the same shall be agreed to by a majority of the members thereof, such proposed amendment or amendments shall be entered on its journal, with the yeas and nays taken thereon, and referred to the next

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[115] *Id.* at 150 (footnotes omitted) (internal quotation marks omitted).

[116] *Sovereignty*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/sovereignty/; *see* Daniel Philpott, Sovereignty, *in* THE OXFORD HANDBOOK OF THE HISTORY OF POLITICAL PHILOSOPHY 561 (George Klosko ed. 2011).

[117] *Authority*, OXFORD ENGLISH DICTIONARY (2d 1989); *see Authority*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[118] *Id.*

[119] *Id.* at 149.

[120] LIL'UOKALANI, *supra* note 8 at 381.

> Legislature; which proposed amendment or amendments shall be published for three months previous to the next election of Representatives and Nobles; and if in the next Legislature such proposed amendment or amendments shall be agreed to by two-thirds of all the members of the Legislature, such amendment or amendments shall become part of the Constitution of this Kingdom.[121]

Hawaiians did not have enough votes in the Legislature to approve amendments to the 1887 Constitution. In 1893, pre-overthrow, it was not possible to amend the 1887 Constitution without the consent of a mix of Hawaiians, Americans, and Europeans in the Legislature. In 1890, the legislature approved constitutional amendments endorsed by the National Reform Party to take effect if and when approved by the 1892 legislature: (1) to change the qualification requirement for voting from "residents" to "subjects of the kingdom"; (2) to reduce the value of property requirement to vote for Nobles from $3,000 to $1,000; (3) to require Nobles to be male; and (4) to authorize the legislature to limit and control the activities of immigrants who came to Hawai'i as agricultural workers.[122] The first three proposed amendments were not approved by the 1892 legislature.

The following statements by Lili'uokalani in *Hawaii's Story By Hawaii's Queen*, further confirm the conclusion that in 1893, pre-overthrow, Hawaiians did not play the dominant role in decision making:

> The day arrived for the opening of the [1892] Legislature, and I felt that my troubles had commenced. With such a party of men as those who comprised the Reform party, and with such unscrupulous men as Thurston, W. O. Smith, Alex Young, I. Marsden, W. C. Wilder, and Henry Baldwin, as leaders, I knew that my cabinet would find it a difficult matter to contend against such a party.
>
> . . . .
>
> In the month of August [1892] the Reform party began their policy of dismissing the ministry. They made promises to Mr. Cummins of the National Reform, and Bush, Wilcox, and Ashford, of the Liberal party, and P. P. Kanoa of seats in the cabinet if they joined their party, and they did so, besides taking Kamauoha, Iosepa, and another member with them, which made the Reform party very strong.
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> . . . .
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> It was a practice among some of the native members to sell their votes for a consideration. This was taught them by the Thurston party. They would

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[121] CONST. OF THE KINGDOM OF HAWAI'I of 1887, art. 82.

[122] *See generally* 1 AFFAIRS IN HAWAI'I- A COLLECTION OF CONGRESSIONAL DOCUMENTS LEADING TO THE ANNEXATION OF HAWAI'I, 874-81 (1895).

> come to me and then return to that party and repeat all that was said, for which they were usually paid something.
>
> The Liberals won and the cabinet was voted out, partly because they were so sure of their success and on account of their own corrupt practices.[123]

In 1893, before the overthrow, American and European residents were Cabinet officers/ex officio legislators (appointed by the Queen subject to removal by a vote of want of confidence passed by a majority of all the elective members of the Legislature or upon conviction of felony or by impeachment), legislators (elected by qualified male voters), Supreme Court Justices (appointed by the King/Queen for life subject to impeachment), and other government officials.

In 1893, before the overthrow, Hawaiians did not vote as a unified group, did not control the Legislature, did not have the votes in the Legislature to change the 1887 Constitution, did not control the Cabinet, did not control the Hawai'i Supreme Court, and did not control the economy. The Queen was the nominal Chief Executive. The Legislature controlled the Cabinet and the Cabinet controlled the Queen.

In 1893, before the overthrow, Hawaiians did not control Hawaii's government. A mix of Hawaiians, Americans, and Europeans who resided in Hawai'i controlled Hawaii's government. That is why: (1) Lili'uokalani sought to change the 1887 Constitution without the Legislature's approval; (2) the Cabinet appointed by Lili'uokalani refused to approve Lili'uokalani's attempt to change the 1887 Constitution; (3) Lili'uokalani aborted her attempt to change the 1887 Constitution; and (4) a small group of qualified voters who were not Hawaiians initiated the overthrow.

VII. FIRST TWO QUESTIONS

Professor Van Dyke partially answered his first question, "Who Owns The Crown Lands Of Hawai'i" when, on page 379 of his book, he asked a second question, "What was the trust status of the Crown lands before the [1893] overthrow?"[124]

Professor Van Dyke's response on page 9 was that the Kings' lands "evolved into a resource designed to support the Hawaiian Monarchs[.]"[125]

Professor Van Dyke's response on page 378 was that "the 1865 enactment took away the power of alienation and required that the Crown

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[123] H.R. DOC. NO. 47-53 at 859.

[124] VAN DYKE, *supra* note 1, at 379.

[125] *Id.* at 9.

Lands be managed exclusively for the benefit of the Monarchy and the people."[126]

On pages 379-380, Professor Van Dyke responded:

> What was the trust status of the Crown Lands before the overthrow? Because the [maka'āinana] did not receive anything near the one-third share that they were supposed to receive during and after the [Māhele], they continued to look to the Crown Lands as lands that were held for their benefit:
>
> > While the fee simple ownership system instituted by the [Māhele] and the laws that followed drastically changed Hawaiian land tenure, the Government and, subsequently, the Crown Lands were held for the benefit for [sic] the people of Hawai'i. For Hawaiians, the Government and Crown lands marked a continuation of the concept that lands were held by the ali'i on behalf of the gods and for the benefit of all.[127]

On pages 9 and 10, Professor Van Dyke responded that the Crown Lands

> were originally part of the personal domain of Kamehameha III and evolved into a resource designed to support the Hawaiian Monarchs, who embodied the Native Hawaiian culture and spirit. The Monarchs understood that these 'Aina (lands) were a collective resource and should be used to support the common Hawaiians.
>
> These Crown Lands should once again be managed by and for the Native Hawaiian People .... But the Crown Lands, which were assigned at the [Māhele] to the Ali'i Nui (the Mo'i), have been denied their special status as Native Hawaiian lands and have been treated simply as part of the Public Lands of [Hawai'i] ....
>
> As the new sovereign Native Hawaiian Nation emerges, the Native Hawaiian People must decide the fate of these lands. The Crown Lands may provide an appropriate core for the land base that the Nation will need. Difficult choices lie ahead, but these choices can best be made with a full understanding of how the Crown Lands passed from Native Hawaiian control despite the best efforts of the Hawaiian Monarchs to fulfill their obligations as [Ali'i] Nui and to prevent the Lands from passing into foreign hands.[128]

Summarized, Professor Van Dyke responded that the Crown Lands are held in trust: (a) "to support the Hawaiian Monarchs;" (b) "for the benefit of the Monarchy and the people;" (c) "for the benefit of all;" (d) "to support the Hawaiian Monarchs" and "the common Hawaiians;" and (e) "for the Native Hawaiian People."

Professor Van Dyke presented two arguments:

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[126] *Id.* at 378.

[127] *Id.* at 379 (footnotes omitted).

[128] *Id.* at 9.

A. First Argument

On page 45, Professor Van Dyke wrote that "the 'poor natives' never received anything near the one-third or one-fourth they were promised, and they were the clear losers in the division."[129] On page 379, Professor Van Dyke wrote that "[b]ecause the [maka'āinana] did not receive anything near the one-third share that they were supposed to receive during and after the [Māhele], they continued to look to the Crown Lands as lands that were held for their benefit[.]"[130] I disagree with Professor Van Dyke's statements that the maka'āinana "were supposed to receive" a "one-third" share of lands "during and after the [Māhele]" and that "the 'poor natives' "were promised" "one-third or one-fourth".[131]

Professor Van Dyke wrote on page 238:

> Of particular importance to our present understanding of the status of the Crown Lands was the argument presented repeatedly during the debates on the Hawaiian Homes Commission Act that Hawaiians were entitled to a share of the Public Lands because they were denied their fair share of the lands distributed during the 1848 [Māhele] and had continuing claim to the Crown Lands. This view can be found, for instance, in a 1918 committee report of the Territorial Senate's Committee on Public Lands:
>
> > As the lands of [Hawai'i] in the Great [Māhele] were cut up one-third to the Chief, one third to the people, and one third to the Crown, *which said Crown lands are now held in trust for the benefit of the people,* this resolution seeks to have portions of same set aside for the benefit of the people of the Hawaiian race.[132]

The 1918 Committee Report's statement that "the lands of [Hawai'i] in the Great [Māhele] were cut up one-third to the Chief, one third to the people, and one third to the Crown"[133] is not true. As noted by Professor Van Dyke on page 44, "[t]he original Principles adopted by the Land Commission on August 20, 1846, and ratified by the Legislature on October 26, 1846, spoke of the idea that 'the King allow to the landlord one-third, to the tenant one-third and retain one third himself.'"[134] A "one-third" distribution to the tenant was the 1846 "idea," not a promise. Then came the 1847 plan.

The 1847 plan is described in *Zimring*:

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[129] *Id.* at 45 (footnote omitted).
[130] *Id.* at 379 (footnote omitted).
[131] *Id.*
[132] *Id.* at 238 (emphasis removed) (footnote omitted).
[133] *Id.*
[134] VAN DYKE, *supra* note 1, at 44 (footnote omitted).

> In 1847, the King together with the Privy Council determined that a land māhele, or division, was necessary for the prosperity of the Kingdom. The rules adopted to guide such division were, in part, (1) that the King shall retain all his private lands as individual property and (2) that of the remaining lands, one-third was to be set aside for the Government, one-third to the chiefs and konohiki [agents of the chiefs], and one-third for the tenants.[135]

Then came the actual division. When they started dividing the land in 1848, Kamehameha III, the Chiefs and the legislature did not implement the 1846 idea or the 1847 plan. The first part of what actually happened is described in *Zimring*:

> The Great [Māhele] was started in 1848, with the chiefs and konohiki first coming forward to settle their interests by agreement with the King . . . . Once the [Māhele] agreements with the chiefs and the konohiki had been completed, there was to be a division of the remaining lands between the King and the Government.[136]

The second part of what actually happened is described in *In re Estate of His Majesty Kamehameha IV*.[137] Kamehameha III "proceeded with an exalted liberality to set apart for the use of the government the larger portion of his royal domain, reserving to himself what he deemed a reasonable amount of land as his own estate."[138] During this process, Kamehameha III assigned approximately 1.5 million acres to the Government and one million acres to himself.[139]

The third part of what actually happened is described by Alexander, Superintendent of Government Survey, in 1891.[140] Alexander states that in 1850, "most of the chiefs ceded a third of their lands to the Government, in order to obtain an allodial title for the remainder" and "as full commutation of the Government right in the remainder of their lands."[141]

The fourth part of what actually happened starts with the Kuleana Act of 1850. Basically, it authorized:

> [F]ee simple titles, free of commutation, be . . . granted to all native tenants, who occupy and improve any portion of any Government land," or any land "held by the King or any Chief or Konohiki" "for the land they so occupy and

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[135] *See Zimring*, 58 Haw. at 112, 566 P.2d at 730.

[136] *Id.*

[137] *Kamehameha IV*, 2 Haw. at 722.

[138] *Id.*

[139] COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE 244 (Alfred W. McCoy , Francisco A. Scarano eds., 2009).

[140] WILLIAM D. ALEXANDER, SURVEYOR GENERAL'S REPORT: A BRIEF HISTORY OF LAND TITLES IN THE HAWAIIAN KINGDOM, App'x 1 (1882). (https://archive.org/details/appendixtorepor00hawagoog).

[141] *Id.* at 16.

> improve, and whose claims to said lands shall be recognized as genuine by the Land Commission.[142]

It also authorized the award to all of them their existing "[h]ouse lots in fee simple, such as are separate and distinct from their cultivated lands."[143] All Kuleanas not validly claimed continued to be owned by the owner of the land of which the Kuleana formed a part. In his book *The Great Māhele*, Jon Chinen wrote:

> Whereas over 1,500,000 acres of land were set aside for the chiefs in The Great [Māhele] of 1848, and approximately 1,000,000 acres were reserved by Kamehameha III as "Crown Lands," and 1,500.000 acres were given by the king to the "government and people," less than 30,000 acres of land were awarded to the native tenants. However, these tracts of land awarded to the native tenants consisted chiefly of taro lands and were considered the more valuable lands in the Islands.[144]

Why did many maka'āinana not receive their Kuleana Act share? There are many reasons. Professor Van Dyke discussed various reasons, most notable is the following:

> After the Ali'i had received their [Māhele] awards, many [maka'āinana] were unable to maintain legal possession of the lands that they and their families had traditionally occupied. The Ali'i were selling off the lands they had been awarded, by choice or by force in order to pay debts, and many of the individuals who replaced the Konohiki were unwilling to permit the [maka'āinana] to remain on the 'Aina. Because the Ali'i were responsible for managing the 'Aina for the benefit of the native tenants, their loss of title effectively disenfranchised the [maka'āinana], leaving them homeless and unable to live self-sufficiently.[145]

In other words, prior to and after the Kuleana Act of August 6, 1850, many Ali'i sold the lands they received during the Māhele without protecting the rights of the common people living and working on those lands at the time of their sale.

The deadline set by An Act to Provide for the Dissolution of the Board of Commissioners to Quiet Land Titles approved on July 20, 1854, for the submission of claims was December 30, 1854.[146]

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[142] *See* KULEANA ACT OF 1850, §§ 1-2 (Kingdom of Hawai'i), http://www.hoakaleifoundation.org/documents/kuleana-act-1850 [hereinafter Kuleana Act].

[143] *Id.* § 5.

[144] JON CHINEN, THE GREAT MĀHELE 31 (1957) (footnotes omitted).

[145] VAN DYKE *supra* note 1, at 45 (footnote omitted).

[146] An Act to Provide for the Dissolution of the Board of Commissioners to Quiet Land Titles, 21 (Jul. 24, 1854).

The fifth part of what actually happened is the mandate in the Kuleana Act of 1850 that there shall be:

> a certain portion of the Government lands in each Island shall be set apart, and placed in the hands of special agents to be disposed of in lots of from one to fifty acres in fee simple to such natives as may not be otherwise furnished with sufficient lands at a minimum price of fifty cents per acre.[147]

"Report No. 839, filed on April 15, 1920, by the House of Representatives Committee on the Territories to accompany H.R. 13500, Rehabilitation of Hawaiians" was part of the discussion leading to the Hawaiian Homes Commission Act.[148] I will refer to it as "Report No. 839". Professor Van Dyke wrote the following about Report No. 839:

> And the report issued by the U.S. House Committee on Territories explained that "the second great factor demanding passage of this [Hawaiian Homes Commission] bill" was the inequitable land distribution system resulting from the [Māhele] and the continuing claim held by the Native Hawaiians, as Prince [Kūhiō] had explained: "[b]ut having been recognized as owners of a third interest in the lands of the kingdom, the common people, believing that in the future means were to be adopted to place them in full possession of these lands, assumed that the residue was being held in trust by the Crown for their benefit. However, the lands were never conveyed to the common people, and after a successful revolution, were arbitrarily seized, and by an article in the Hawaiian constitution became the public lands of the Republic of [Hawai'i]."[149]

I note that Professor Van Dyke, without explanation, converted a claim by "the common people" into a "claim held by the Native Hawaiians." Considering that, as noted on page 217 supra, Professor Van Dyke included every Hawaiian in his definition of 'Native Hawaiian' and that, as explained on pages 214-15 supa, the Hawaiian Homes Commission Act does not include every Hawaiian in its definition of "Native Hawaiian", this unexplained conversion is significant. Footnote 9 on page 240 of Professor Van Dyke's book indicates that Prince Kūhiō spoke to Congress on May 21, 1920. A month earlier, the above quote appeared within the following quote from Report No. 839:

> The second great factor demanding passage of this [Hawaiian Homestead] bill lies in the ineffectiveness of all previous systems of land distribution, when judged practically by the benefits accruing to the native Hawaiians from the operation of such systems. In 1845 an act was passed creating an executive department in which a Board of Royal Commissioners

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147 *See generally* KULEANA ACT, *supra* note 142.

148 Hawaiian Homes Commission Act, 42 Stat 108 (1921).

149 VAN DYKE, *supra* note 1, at 245-46 (footnote omitted) (emphasis omitted).

to Quiet Land Titles was established. This board decided that there were but three classes of vested original rights in land, those of the King or Government, the chiefs, and the people. Later, in 1848, a division was made setting apart the land in three portions. The King and chiefs received for their portion 1,619,000 acres and the Government 1,505,460 acres. Of the balance, amounting approximately to 984,000 acres, the common people received but 28,000 acres at that time and the residue reverted to the Crown. But having been recognized as owners of a third interest in the lands of the kingdom, the common people, believing that in the future means were to be adopted to place them in full possession of these lands, assumed that the residue was being held in trust by the Crown for their benefit. However, the lands were never conveyed to the common people, and after a successful revolution, were arbitrarily seized, and by an article in the Hawaiian constitution became the public lands of the Republic of [Hawai'i].

Subsequently . . . , the Hawaiian land act of 1895 was adopted. An attempt was made to place the Hawaiians back on the land; and so under the act homesteading was commenced in the Islands. Leases of 999 years were granted for small sums with restrictions upon occupation, alienation and descent . . . . In 1910 section 73 was amended in several respects. The most important of these amendments are that leases of agricultural lands are limited to terms of 15 years and must contain a withdrawal clause . . . . About one-half of the homesteads went to native Hawaiians, though these homesteads average less per acre in value than those of other races . . . . The Hawaiians also in a great many cases proved unable to fulfill the conditions necessary to obtain patents for their lands, and so forfeited the homesteads.

Your committee thus finds that since the institution of private ownership of lands in [Hawai'i] the native Hawaiians, outside of the King and the chiefs were granted and have held but a very small portion of the lands of the Islands. Under the homestead laws somewhat more than a majority of the lands were homesteaded to Hawaiians, but a great many of these lands have been lost through improvidence and inability to finance farming operations. Most frequently, however, the native Hawaiian, with no thought of the future, has obtained the land for a nominal sum, only to turn about and sell it to wealthy interests for a sum more nearly approaching its real value. The Hawaiians are not businessmen and have shown themselves unable to meet competitive conditions unaided. In the end the speculators are the real beneficiaries of the homestead laws. Thus the tax returns for 1910 show that only 6.23 per centum of the property of the Islands is held by native Hawaiians and this for the most part is lands in the possession of approximately a thousand wealthy Hawaiians, the descendants of the chiefs . . . .

General policy. – In view of the conditions above, your committee believes it necessary to provide another and different method of homesteading in the Territory of [Hawai'i], as a basis for the solution to the problem

> confronting it. Your Committee is, however, of the opinion that[:] (1) the Hawaiian must be placed upon the land in order to insure his rehabilitation; (2) alienation of such land must, not only in the immediate future but also for many years to come, be made impossible; (3) accessible water in adequate amounts must be provided for all tracts; and (4) the Hawaiian must be financially aided until his farming operations are well under way . . . .
>
> *Hawaiian Homes Commission.* – Sections 303 and 204 set aside for these purposes approximately 194,300 acres of undeveloped agriculture and pastoral lands, to be known as "Hawaiian home lands."[150]

Report No. 839 does not mention the Kuleana Act of 1850. Professor Van Dyke wrote at page 238 that "the argument presented repeatedly during the debates on the Hawaiian Homes Commission Act that Hawaiians were entitled to a share of the Public Lands because they were denied their fair share of the lands distributed during the 1848 [Māhele] and had continuing claim to the Crown Lands."[151] Professor Van Dyke's statement is contradicted by Report No. 837.

The statement that "Hawaiians . . . were denied their fair share of the lands distributed during the 1848 [Māhele]"[152] is not true. The King and the Chiefs were Hawaiians and they received no less than their fair share. Some of the common people received their Kuleana Act share.[153] Clearly, Professor Van Dyke's reference, at pages 245-46, to "the inequitable land distribution system resulting from the [Māhele] and the continuing claim held by the Native Hawaiians"[154] is not applicable to these Hawaiians.

Report No. 839 states that the common people believed "that in the future means were to be adopted to place them in full possession of these lands," and "assumed that the residue was being held in trust by the Crown for their benefit."[155] These statements lack specifics. Are the common people who received or purchased land included in this group? When did the common people begin this belief and this assumption? Was it when the lands were the Kings' lands? Was it when the Kings' lands were converted into the Crown Lands? Was it after the Kings' lands were converted into the Crown Lands? Was this belief and this assumption publically announced prior to the discussion that led to Report No. 839 and the Hawaiian Homes Commission Act of 1921? If so, when and by whom?

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[150] Rehabilitation of Native Hawaiians, H.R. Rep. No. 839, Comm. On Territories, 66th Cong. 2d Sess., 5-7 (Apr. 15, 1920).

[151] VAN DYKE, *supra* note 1, at 238.

[152] *Id.*

[153] KULEANA ACT § 2.

[154] VAN DYKE, supra note 1, at 245-46.

[155] H.R. Rep. No. 839 at 5.

B. Second Argument

On pages 9 and 10, Professor Van Dyke asserted that the Crown Lands

> were originally part of the personal domain of Kamehameha III and evolved into a resource designed to support the Hawaiian Monarchs, who embodied the Native Hawaiian culture and spirit. The Monarchs understood that these 'Aina (lands) were a collective resource and should be used to support the common Hawaiians.[156]

Professor Van Dyke did not cite any evidence supporting the statement that "[t]he Monarchs understood that these 'Aina (lands) were a collective resource and should be used to support the common Hawaiians."[157] Certainly, this was not true when the lands were the Kings' lands. As previously noted, the January 3, 1865 Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable stated that "the said Royal Domain has been greatly diminished, and is now charged with mortgages to secure considerable sums of money[.]"[158] Similarly, it was not true when the lands were the Crown Lands and Kalākaua was King. Kalākaua's involvement in the conveyance of Crown Land to Claus Spreckels, his response to the Planters Labor and Supply Company's complaint about his extravagance of spending and alienation of Crown Lands, his accumulation of debts amounting to more than $250,000, his additional $71,000 debt resulting from his sale of the opium license to the Chung Lung syndicate after he had sold it to Aki, and the trust deed assigning all of the Crown Land revenues and most of Kalākaua's private estate to the three trustees for the purpose paying all claims pro rata are proof that Kalākaua did not understand that "these 'Aina (lands) were a collective resource and should be used to support the common Hawaiians."[159]

Assuming the "common people" believed "that in the future means were to be adopted to place them in full possession of these lands," and "assumed that the residue was being held in trust by the Crown for their benefit," the following facts show that they had no rational basis for their belief and assumption.[160]

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[156] VAN DYKE, *supra* note 1, at 9-10.

[157] *Id.* at 10.

[158] An Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable, 2 Revised Laws of Hawai'i, 2177-79 (Jan. 3, 1865).

[159] *See* ALEXANDER STEVENSON TWOMBLY, HAWAI'I AND ITS PEOPLE: THE LAND OF RAINBOW AND PALM 308, 315, 324 (1900).

[160] VAN DYKE, *supra* note 1, at 245-46 (*quoting* Rehabilitation of Native Hawaiians, H.R. Rep. No. 839, Comm. On Territories, 66th Cong. 2d Sess., 5-7 (Apr. 15, 1920)) (emphases omitted).

First, Kamehameha III and the Ali'i planned and implemented "the inequitable land distribution system resulting from the [Māhele]."[161]

Second, prior to and after the Kuleana Act of August 6, 1850, many Ali'i sold the lands they received during the Māhele without protecting the rights of the common people then living and working on their lands.[162]

Third, Kalākaua's actions while he was King demonstrated that the residue was not being held in trust by the King for their benefit.

Fourth, during the more than thirty-five year existence of the Constitutional Monarchy after Kamehameha III and the other Ali'i planned and implemented the mid-century "inequitable land distribution system resulting from the [Māhele]," nothing any King said or did supported such a belief and assumption and none of the successor Kings or the successor Ali'i planned or implemented an equitable land distribution system for the benefit of the common people.[163]

Fifth, the decision as to who are the beneficiaries of a trust is made by the creator of the trust, not the potential beneficiaries. In this case, the trust was created by the Legislature and Kamehameha V in 1865. Neither they nor their successors designated the "common people" as the beneficiaries of the trust. As noted in *Galt v. Waianuhea*, the income from the "Crown Lands was devoted to governmental purposes, that is, to help maintain the dignity of the sovereign."[164]

VIII. PROFESSOR VAN DYKE'S THIRD AND FOURTH QUESTIONS AND ANSWERS; THE DOCUMENTS CITED DO NOT VALIDATE HIS ANSWER

On page 380 of his book, Professor Van Dyke asked and answered a third question:

> What is the significance of the takeover of the lands by the Provisional Government (1893), the Republic of [Hawai'i] (1894), and then the United States Government (1898) . . . . Even though the 1898 Newlands Resolution and the 1900 Organic Act both clearly stated that these lands must be held in trust for the benefit of the people of Hawai'i (meaning the Native Hawaiian People), the Native Hawaiians lost actual control of these lands. In the 1993 "Apology Resolution," the U.S. Congress characterized these events by saying that "the Republic of [Hawai'i] also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of [Hawai'i], without the consent of or compensation to the Native Hawaiian people of [Hawai'i] or their sovereign government." Although the United States assumed the public

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[161] *Id.* at 245.

[162] *See id.* at 56-57.

[163] *Id.* at 245.

[164] 16 Haw. 652, 655-57 (1905).

> debt of Hawai'i at the time of annexation, that action was not in any sense "compensation" for the takeover of lands, because the public assets of Hawai'i were worth substantially more than the public debt, and the Crown Lands were not truly "public" but were an entitlement of the Native Hawaiian People as the beneficiaries of a trust maintained by their Monarch.[165]

On the same page, Professor Van Dyke asked and answered a fourth question:

> What was the nature of the trust established at the time of annexation (1898)? Because of its understanding that lands had been taken and transferred without consent or compensation, Congress made it clear in both the 1898 Newlands Resolution and the 1900 Organic Act that these lands must be held in trust for the inhabitants of Hawai'i, referring to the Native Hawaiians.[166]

Professor Van Dyke cited five documents in support of his three opinions that:

1. "[T]he Crown Lands were not truly 'public' but were an entitlement of the Native Hawaiian People as the beneficiaries of a trust maintained by their Monarch[;]"[167]
2. "[T]he 1898 Newlands Resolution and the 1900 Organic Act both clearly stated that [the Government and Crown Lands] must be held in trust for the benefit of the people of Hawai'i (meaning the Native Hawaiian People)[;]"[168] and
3. "Congress made it clear in both the 1898 Newlands Resolution and the 1900 Organic Act that these lands must be held in trust for the inhabitants of Hawai'i, referring to the Native Hawaiians."[169]

The five documents cited by Professor Van Dyke in support of his conclusions are:

1. the 1898 Newlands Resolution;[170]
2. the 1900 Organic Act,[171]
3. the twenty-fifth "whereas" clause in the 1993 Apology Resolution,[172]
4. an informal June 24, 1982, opinion by Hawaii's Attorney General in response to a question about submerged lands;[173] and

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[165] *Id.* at 380 (footnotes omitted).

[166] *Id.* (footnotes omitted).

[167] *Id.*

[168] *Id.*

[169] *Id.* at 380.

[170] *Id.* at 380 nn.12 & 17 (*citing* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, July 7, 1898, ch. 55, 30 Stat. 750 (1898) [hereinafter Newlands Resolution]).

[171] *Id.* at 380 n.18 (*citing* An Act to Provide a Government for the Territory of Hawai'i, ch. 339, 31 Stat. 141 (1900) [hereinafter Organic Act]).

[172] *Id.* n.15 (*citing* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510).

5. a 1991 article in the Wall Street Journal.[174]

These documents, considered separately or together, do not validate Professor Van Dyke's opinions.

A. Documents 1 and 2

The 1898 Newlands Resolution states in relevant part:

> The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.[175]

This is a statement that the trust is for "the benefit of the inhabitants of the Hawaiian Islands". No reference is made to "Native Hawaiians".

The 1900 Organic Act states in relevant part:

> (3) The term "public lands" includes all lands in the Territory of [Hawai'i] classed as government or Crown Lands previous to August 15, 1895, or acquired by the government upon or subsequent to such date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; except (1) lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, (2) lands set apart or reserved by Executive order by the President, (3) lands set aside or withdrawn by the governor under the provisions of subdivision (q) of this section, (4) sites of public buildings, lands used for roads, streets, landings, nurseries, parks, tracts reserved for forest growth or conservation of water supply, or other public purposes, and (5) lands to which the United States has relinquished the absolute fee and ownership, unless subsequently placed under the control of the commissioner and given the status of public lands in accordance with the provisions of this Act, the Hawaiian Homes Commission Act, 1920, or the Revised Laws of [Hawai'i] of 1915; and
>
> (6) . . .
>
> (e) All funds arising from the sale or lease or other disposal of public land shall be appropriated by the laws of the government of the Territory of

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[173] VAN DYKE, *supra* note 1, at 212 n.84 (*citing* Letter from Deputy Attorney General William M. Tam (approved by Attorney General Tany S. Hong) to Susumu Ono, Chair, Board of Land and Natural Resources, June 24, 1982).

[174] *Id.* at 218 n.18 (*citing The Prince's Plan is Co-Opted*, WALL ST. J. A-4 (Sep. 9, 1991).

[175] Newlands Resolution.

> [Hawai'i] and applied to such uses and purposes for the benefit of the inhabitants of the Territory of [Hawai'i] as are consistent with the joint resolution of annexation, approved July 7, 1898.[176]

This Organic Act thus asserts that the trust is for "the benefit of the inhabitants of the Territory of [Hawai'i]," and makes no reference to "Native Hawaiians."[177]

Contradicting his statements that "the 1898 Newlands Resolution and the 1900 Organic Act both clearly stated that [the Government and Crown Lands] must be held in trust for the benefit of the people of Hawai'i (meaning the Native Hawaiian People)" and that "Congress made it clear in both the 1898 Newlands Resolution and the 1900 Organic Act that these lands must be held in trust for the inhabitants of Hawai'i, referring to the Native Hawaiians,"[178] Professor Van Dyke wrote in footnote 89 in Chapter 19 of his book at page 213:

> The 1898 Newlands Resolution and the 1900 Organic Act did not "identify Native Hawaiians as a separate political entity, for to do so would have been inconsistent with the overall policy of destroying indigenous political sovereignty." . . . But U.S. policy has changed and now recognizes the importance of supporting the separate political status of native communities; . . . and the references to "inhabitants" in the 1898 Newlands Resolution and the 1900 Organic Act are now seen to have recognized the special political status of Native Hawaiians . . . . Any ambiguity concerning the term "inhabitants" has been cleared up in the "Apology Resolution," . . . whereas clause 25, where the Congress referred only to the "Native Hawaiian people" when it recognized that the "crown, government and public lands" were ceded to the United States "without the consent of or compensation to the Native Hawaiian people of [Hawai'i] or their sovereign government."[179]

Professor Van Dyke's argument fails for at least two reasons. First, the word "inhabitants" is not ambiguous. Second, assuming the truth of Professor Van Dyke's allegation that "U.S. policy has changed and now recognizes the importance of supporting the separate political status of native communities," a post-1900 change of U.S. policy cannot retroactively change the meaning of the unambiguous language of an 1898 Congressional Resolution and a 1900 Act of Congress or cause their unambiguous language to be ambiguous.[180] Professor Van Dyke's

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[176] Organic Act §§ 73(a)(3), (a)(4)(e).

[177] *Id.* at § 73(e).

[178] VAN DYKE, *supra* note 1, at 380 (footnotes omitted).

[179] *Id.* at 213 n.89.

[180] *Id.*

statements are also contradicted by Report No. 839 and the Hawaiian Homes Commission Act of 1921. Neither recognized any ambiguity.

B. Document 3

The Apology Resolution's twenty-fifth "Whereas" clause states: "[w]hereas, the Republic of [Hawai'i] also ceded [to the United States] 1,800,000 acres of crown, government and public lands of the Kingdom of [Hawai'i], without the consent of or compensation to the Native Hawaiian people of [Hawai'i] or their sovereign government."[181]

The Republic of [Hawai'i] ceded Crown, Government and other public lands to the United States in 1898 and these lands then became known as the "Ceded Lands."[182] It did so without the consent of the "sovereign government" of "the Native Hawaiian people of [Hawai'i]" because at that time no such government existed.[183] It did so without "compensation to the Native Hawaiian people of [Hawai'i]" because those lands were owned by, or held in trust for, all of the people of Hawai'i, not only "the Native Hawaiian people of [Hawai'i]."[184]

In *Hawai'i v. Office of Hawaiian Affairs*, the U.S. Supreme Court decided that: (1) the Apology Resolution does not convey any rights or make any legal findings in support of Hawaiian claims; and (2) its thirty-seven "Whereas" clauses have no operative or legal effect.[185] In other words, the contents of the Apology Resolution are no more than the personal opinions of those who voted for it or approved it. Nothing in the Apology Resolution legally binds Congress, the President or the United States to its content. The Supreme Court also decided that, "we must not read the Apology Resolution's nonsubstantive 'whereas' clauses to create a retroactive 'cloud' on the title that Congress granted to the State of [Hawai'i] in 1959."[186]

Assuming the twenty-fifth "Whereas" clause in the Apology Resolution had operative or legal effect, a 1993 Congressional Resolution cannot retroactively change the unambiguous meaning of the language of an 1898 Congressional Resolution and a 1900 Act of Congress.

The Apology Resolution states in part:

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[181] Apology Resolution, *supra* note 18.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] 556 U.S. 163, 175 (2009).
[186] *Id.* at 176.

> *Whereas*, through the Newlands Resolution, the self-declared Republic of Hawai'i ceded sovereignty over the Hawaiian Islands to the United States;
>
> . . .
>
> *Whereas*, the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;
>
> . . .
>
> Now, therefore, be it
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> SECTION 1. ACKNOWLEDGMENT AND APOLOGY.
>
> The Congress -
>
> (1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawai'i on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;
>
> . . .
>
> (3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawai'i on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination . . . .

The Apology Resolution validly recognizes that: (1) the United States did but should not have assisted the 1893 overthrow; and (2) the 1893 overthrow terminated the Nation of Hawai'i which was succeeded by the Republic of Hawai'i, the United States Territory of Hawai'i and the United States State of Hawai'i.

The Apology Resolution "acknowledges" that the overthrow "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people". What is "inherent sovereignty?" Simply stated, "inherent sovereignty" is subordinate and limited sovereignty. The people who have "inherent sovereignty" have rights of self-determination within jurisdictional limits defined by the people who have sovereignty. As noted by Justice Blackmun in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) in his opinion concurring in the judgment in No. 87-1622 and dissenting in Nos. 87-1697 and 87-1711:

> Our approach to inherent tribal sovereignty remained essentially constant in all critical respects in the century and a half between John Marshall's first

> illumination of the subject and this Court's *Montana* decision. Time and again we stated that, while Congress retains the authority to abrogate tribal sovereignty as it sees fit, tribal sovereignty is not implicitly divested except in those limited circumstances principally involving external powers of sovereignty where the exercise of tribal authority is necessarily inconsistent with the tribes' dependent status.208

The following describes the relevant history of the relationship between the United States and the Indian Tribes.

> Prior to the European settlement of the New World, Indian tribes were "self-governing sovereign political communities," *United States v. Wheeler*, 435 U.S. 313, 322-323, 98 S.Ct. 1079, 1085-1086, 55 L.Ed.2d 303 (1978), and they still retain some "elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government," *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, 98 S.Ct. 1011, 1020, 55 L.Ed.2d 209 (1978) . . . .
>
> A tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's "external relations." *Wheeler*, 435 U.S., at 326, 98 S.Ct., at 1087 . . . .[187]

The erroneous opinion that the overthrow "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people" appears to be based on an equally erroneous opinion that the history of the Indian Tribes in the United States is no less than similar to the history of the Hawaiians in Hawai'i.

The Apology Resolution does not answer the following question: The overthrow resulted in the suppression of whose sovereignty? In 1810, Hawaiians had control over the sovereign Nation of Hawai'i. Did they have control in 1893 prior to the overthrow? The answer is no. As a result of the decisions and indecision and actions and inactions of the Hawaiian ali'i during the period from 1778 to 1893 prior to the overthrow, Hawaiians relinquished their control over the sovereign Nation of Hawai'i to a mix of Hawaiians and Caucasians in Hawai'i. The overthrow resulted in the suppression of the sovereignty of this mix of Hawaiians and Caucasians.

The Apology Resolution states that the overthrow "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people." It also states that the overthrow resulted in "the deprivation of the rights of Native Hawaiians to self-determination[.]" Neither statement is true. When, prior to the overthrow, Hawaiians relinquished sovereignty to a mix of Hawaiians and Caucasians in Hawai'i, they did not expressly, implicitly

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[187] Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408; 109 S. Ct. 2994 (1989).

or by operation of law retain "inherent sovereignty" or any rights to self-determination. They unconditionally relinquished sovereignty and all subordinate rights including inherent sovereignty and rights to self-determination.

C. Document 4

In Chapter 20 of his book at page 218, Professor Van Dyke wrote:

> The Hawai'i Supreme Court explained in 1977 that by virtue of the language in the 1900 Organic Act, "Congress provided that the United States would have no more than naked title to the public lands other than those set aside for federal uses and purposes," adding also that "[t]he beneficial ownership of the people of Hawai'i was again acknowledged in the Admission Act." Hawaii's Attorney General explained later in 1982 that these provisions, taken together, meant that "while the U.S. held the naked title to the lands, the beneficial uses were severed and allowed to remain with [Hawaii's] people." The Attorney General letter stated further that the reference to "inhabitants" was meant to refer to "the indigenous populations."[188]

In footnote 18, Professor Van Dyke noted that "[w]hen the Hawaiian islands were later annexed to the United States [in 1898], the islands government [the Republic of Hawai'i] acknowledged that this acreage belonged to native Hawaiians, and ceded it to the United States with the stipulation that it be held in trust for native Hawaiians."[189]

Footnote 7 in Chapter 20, at page 217, identified the "1982 AG letter" as a "Letter from Deputy Attorney General William M. Tam (approved by Attorney General Tany S. Hong) to Susumu Ono, Chair, Board of Land and Natural Resources, June 24, 1982."[190] This letter is an informal opinion letter stating in part:

> In particular, you asked whether the submerged lands were transferred by Section 5(b) or Section 5(l) of the Admission Act. Section 5(b) lands are a part of the public trust, whereas Section 5(l) is not included in the 5(f) trust.
>
> . . . .
>
> The third paragraph [of the 1898 Newlands Resolution] placed a special trust on the ceded lands and their revenues. Acknowledging that [Hawai'i] had a well-established land tenure system and that the U.S. was receiving all the public lands free, Congress recognized that the use [of] the public lands

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[188] VAN DYKE, *supra* note 1, at 218 (footnotes omitted); *see also Zimring*, 58 Haw. at 124-25, 566 P.2d at 736-37.

[189] VAN DYKE, *supra* note 1, at 218 n.18 (*citing The Prince's Plan is Co-Opted*, WALL ST. J., A-4 (Sept. 9, 1991)).

[190] *Id.* at 217 n.7.

> should continue to inure to the benefit of [Hawaii's] inhabitants. Thus while the U.S. held the naked title to the lands, the beneficial uses were severed and allowed to remain with [Hawaii's] people. Except for the example of Texas which had also been an independent sovereign nation prior to statehood, the U.S. had never allowed new states to sever the beneficial uses and retain them for the indigenous population. It was unique in public law. It provided: "all revenue from and proceeds from the same [e.g. the ceded lands] except such part thereof as may be used or occupied for the civil, military, or naval purposes of the United United [sic] States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian islands for educational and other public purposes.
>
> In 1900, Congress passed the Organic Act which provided that: "All funds arising from the sale or lease or other disposal of such lands (i.e. all ceded lands) shall be appropriated by the laws of the Territory of [Hawai'i] and applied to such uses and purposes for the benefit of the inhabitants of the Territory of [Hawai'i] as a re consistent with the joint resolution of annexation . . . "
>
> Therefore, we conclude that the submerged lands are ceded lands granted in Section 5(b) and subject to the public trust established in Section 5(f) of the Admission Act.[191]

This informal opinion letter is a statement that the trust is for "the benefit of [Hawaii's] inhabitants" and "[Hawaii's] people."[192] It is not a statement that the trust is for the benefit of only "the indigenous population."[193]

D. Document 5

As noted by Professor Van Dyke in footnote 18 on page 218, the Wall Street Journal stated that "[w]hen the Hawaiian islands were later annexed to the United Sates [in 1898], the islands' government [the Republic of Hawai'i] acknowledged that this acreage belonged to native Hawaiians, and ceded it to the United States with the stipulation that it be held in trust for native Hawaiians."[194] The 1991 article in the *Wall Street Journal* appears to be its editors' interpretation of the 1898 Newlands Resolution.[195] Their interpretation is wrong.

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[191] Letter from Dep. Attorney Gen. William M. Tam (approved by Attorney Gen. Tany S. Hong) to Susumu Ono, Chair, Board of Land and Natural Resources (June 24, 1982) (on file with author) [hereinafter Tam Opinion Letter].

[192] Tam Opinion Letter, *supra* note 191.

[193] *Id.*

[194] Haw. Dep't of the Att'y Gen., Opinion Letter No. 83-2, 1983 WL 41853 (Haw. A.G., Apr. 15, 1983) [hereinafter Opinion Letter No. 83-2].

[195] VAN DYKE, *supra* note 1, at 218 n.18.

IX. THE "ONE OR MORE" BENEFICIARIES OF THE CROWN LANDS TRUST UNDER THE 1959 ADMISSIONS ACT

In addition to asking "[w]hat was the trust status of the Crown Lands before the [1893] overthrow?" and "[w]hat was the nature of the trust established at the time of annexation (1898)?", Professor Van Dyke on page 381 asked "[w]hat was the nature of the trust confirmed in the Admission Act at the time of statehood (1959)?"[196]

On March 18, 1959, President Eisenhower signed "An Act to Provide for the Admission of the State of Hawai'i into the Union[.]"[197] Section 4 of the 1959 Admission Act states in part:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner . . . .[198]

Section 5 of the 1959 Admission Act states in part:

> (a) Except as provided in subsection (c) of this section, the State of [Hawai'i] and its political subdivisions, as the case may be, shall succeed to the title of the Territory of [Hawai'i] and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.
>
> (b) Except as provided in subsections (c) and (d) of this section, the United States grants to the State of [Hawai'i], effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of [Hawai'i], title to which is held by the United States immediately prior to its admission into the Union.
>
> . . . .
>
> (f) The lands granted to the State of [Hawai'i] by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home

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[196] *Id.* at 379.

[197] Admission Act, Pub. L. No. 86-3, 73 Stat. 4.

[198] *Id.* § 5.

> ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.
>
> (g) As used in this Act, the term "lands and other properties" includes public lands and other public property, and the term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of [Hawai'i] under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.[199]

In essence, the Admission Act placed the Ceded Lands into a "public trust." A smaller part of the Ceded Lands *is* within the jurisdiction of the Hawaiian Homes Commission. The larger part is to be used by the State for "one or more of" five specified purposes.

On pages 257 and 258 of his book, Professor Van Dyke wrote his answer to his question:

> In Section 5(b) of the 1959 Admission Act, Congress transferred about 1.4 million of the roughly 1.75 million acres of Public Lands (the former Crown and Government Lands) to the new State of Hawai'i (which included the Hawaiian Home Lands). But the State of Hawai'i received only "naked" title to these Public Lands, along with the fiduciary responsibilities of a trustee. In Section 5(f) of the Admission Act, Congress stated explicitly that these transferred lands are to be held as a "public trust" by the State and that the revenues generated by these lands are to be used for the following five specific purposes:
>
> . . . for the support of the public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended*, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use.

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[199] *Id.* § 5.

> These carefully crafted provisions were based on the clear recognition that Native Hawaiians had continuing claims to these lands and that they must be held in trust until those claims are finally resolved.[200]

As previously noted, Professor Van Dyke defined "Native Hawaiian" as "all persons descended from the Polynesians who lived in the Hawaiian Islands when Captain James Cook arrived in 1778."[201] This is the Apology Resolution's definition.[202] This is not the Hawaiian Homes Commission Act's definition.[203] Here again, as he did in other parts of his book, Professor Van Dyke quoted a sentence using the phrase "native Hawaiians" as defined in the Hawaiian Homes Commission Act, 1920, as amended, and then interpreted it as defined in the Apology Resolution.

Professor Van Dyke wrote that "[i]n Section 5(f) of the Admission Act, Congress stated explicitly that these transferred lands are to be held as a "public trust" by the State and that the revenues generated by these lands are to be used for the . . . five specific purposes . . . ."[204] The latter statement is wrong. Use for all five of the specific purposes is not mandatory. Section 5(f) says "[s]uch lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide."[205] Clearly, the State has the discretion to decline to use, the lands, the proceeds from their sale or distribution, and the income therefrom for one, or two, or three, or four of the five specified purposes:

(1) for the support of the public schools and other public educational institutions;

(2) for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended;

(3) for the development of farm and home ownership on as widespread a basis as possible;

(4) for the making of public improvements; and

(5) for the provision of lands for public use.

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[200] VAN DYKE, *supra* note 1, at 257-58 (footnotes omitted).

[201] *Id.* at 1 n.1.

[202] Apology Resolution § 2, Pub. L. No. 103-150, 107 Stat. 1510 ("As used in this Joint Resolution, the term 'Native Hawaiian' means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.").

[203] Hawaiian Homes Commission Act of 1920 § 201(a)(7), 42 Stat. 108 (1921) ("The term 'native Hawaiian' means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.").

[204] VAN DYKE, *supra* note 1, at 258.

[205] Admission Act, Pub. L. No. 86-3, 73 Stat. 4, § 5(f).

In *Rice v. Cayetano*, the United Supreme Court answered Professor Van Dyke's question when it noted:

> [Hawai'i] was admitted as the 50th State of the Union in 1959. With admission, the new State agreed to adopt the Hawaiian Homes Commission Act as part of its own Constitution. Pub.L. 86–3, §§ 4, 7, 73 Stat. 5, 7 (Admission Act); see Haw. Const., Art. XII, §§ 1–3. In addition, the United States granted [Hawai'i] title to all public lands and public property within the boundaries of the State, save those which the Federal Government retained for its own use. Admission Act §§ 5(b)-(d), 73 Stat. 5. This grant included the 200,000 acres set aside under the Hawaiian Homes Commission Act and almost 1.2 million additional acres of land. Brief for United States as Amicus Curiae 4.
>
> The legislation authorizing the grant recited that these lands, and the proceeds and income they generated, were to be held "as a public trust" to be "managed and disposed of for one or more of" five purposes: "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible [,][4] for the making of public improvements, and [5] for the provision of lands for public use." Admission Act § 5(f), 73 Stat. 6.[206]

X. CONCLUSION

Starting in 1848, they were the King's lands. In 1865, they became the Crown Lands to be used to fund the expenses of the Chief Executive of the Nation of Hawai'i. In 1894, the Republic of Hawai'i replaced the Nation of Hawai'i. In 1898, the Republic of Hawai'i ceded the Crown Lands and other lands to the United States and these lands became known as the Ceded Lands. In 1921, the United States subcategorized a part of the Ceded Lands as "available lands" as defined by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended (HHCA). The 1959 Admission Act conveyed to the State of Hawai'i all of the Ceded Lands not used or controlled by the United States on or immediately prior to Hawai'i becoming a State. The Admission Act obligated the State to hold these Ceded Lands "as a public trust", to use the "available lands" in accordance with the HHCA, and to use the remaining Ceded Lands, the proceeds from their sale or distribution, and the income therefrom for the benefit of "one or more of" five specified purposes.

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[206] 528 U.S. 495, 507-08 (2000).

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

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

Translation by Pauahi Ho'okano

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