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ARTICLES

COMMENTS

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

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

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The Birth, Deaths, and Reincarnations of Substantive Due Process

By
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Although a vast body of literature on substantive due process already exists,[1] the continuous story of the doctrine, from its birth to the present, is worth telling to demonstrate that its two proclaimed deaths were as premature as Mark Twain's obituary,[2] and to identify the issues likely to arise during its second reincarnation. In the years ahead, we will learn which state laws will be declared unconstitutional under the still viable doctrine of substantive due process as the Supreme Court continues to expound the modern scope of Fourteenth Amendment "liberty" and "due process of law."

The Fifth Amendment, ratified in 1791, provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"[3] The Fourteenth Amendment, ratified in 1868, provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"[4] The wording of both amendments forms a unified concept: a person cannot be deprived of liberty, however defined, unless the deprivation is accomplished according to "due process of law," however defined. That is, the wording suggests that there is no freestanding right to liberty, only a right that liberty will not be deprived without due process of law,[5] nor is there a free standing right to due process of law, only a right to have due process of law observed whenever liberty is deprived.[6] Of course, due process, meaning

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[1] *See, e.g.*, EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS *passim* (1996) (recounting and favoring the development of substantive due process). For the opposing view that the Due Process Clause guarantees only procedural protections, see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT *passim* (1977).

[2] "The report of my death was greatly exaggerated." Frank Marshall White, *Mark Twain Amused*, N.Y.J., June 2, 1897, at A1 (quoting Mark Twain).

[3] U.S. CONST. amend. V.

[4] U.S. CONST. amend. XIV, § 1.

[5] "[T]here is no right to 'liberty' under the Due Process Clause . . . . The Fourteenth Amendment *expressly allows* States to deprive their citizens of 'liberty,' *so long as 'due process of law' is provided.*" Lawrence v. Texas, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting).

[6] "To invoke the protection of the Due Process Clause at all—whether under a theory of

fairness in general, is what the public rightfully has come to expect in many contexts, involving both governmental and often private action alike. But the *constitutional* requirement of due process of law imposes a limitation only on governmental action attempting to deprive a person of rights comprehended within the constitutional meaning of property and liberty. Understanding how the "liberty"/ "due process" protection of the Fourteenth Amendment evolved into what came to be called "substantive due process" requires separate consideration of "liberty" and "due process of law." I turn first to due process of law.[7]

The Supreme Court's first reference to the Fifth Amendment's phrase "due process of law" occurred in 1856 in *Murray's Lessee v. Hoboken Land & Improvement Co.*[8] The Court said that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*."[9] As the Court later explained in *Randall v. Brigham*:

> The words, the 'law of the land,' mean 'due process of law,' and this implies that there shall be some form of legal process, sufficient allegations or charge, due notice to the party proceeded against, the opportunity to answer to

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'substantive' or 'procedural' due process—a party must first identify a deprivation of 'life, liberty, or property.'" Obergefell v. Hodges, 135 S. Ct. 2584, 2632 (2015) (Thomas, J., dissenting).

[7] *See* Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1, 3-4 (2003) (providing a historical analysis of what the Framers of the Fifth Amendment meant by "due" and "process").

[8] 59 U.S. (18 How.) 272 (1856) (Little, Brown & Co. 1866). When citing to a decision in the nominative reports of the Supreme Court, I include the name of the publisher and the date of publication because there are slight variations in the versions of different publishers. *See* Jon O. Newman, *Citators Beware: Stylistic Variations in Different Publishers' Versions of Early Supreme Court Opinions*, 28 J. SUP. CT. HIST. 1 (2003). The phrase "due process of law" first appeared in the *United States Reports* in 1808 as a statement of counsel arguing *United States v. Schooner Betsey & Charlotte*. 8 U.S. (4 Cranch) 443 (1808) (Banks & Bros., Law Publishers 1882). Counsel advised the Court that the phrase meant "by due process of the common law." *Id.* at 451. The phrase next appeared in the *United States Reports* in 1833 again as a statement of counsel arguing *Livingston's Lessee v. Moore*. 32 U.S. (7 Pet.) 469 (1833) (Banks Law Publishing Co. 1899). "Due course of law, as that phrase has been understood since *Magna Charta*, means the ancient and established course of law, the established course of judicial proceedings." *Id.* at 481.

[9] *Murray's Lessee*, 59 U.S. at 276. The Magna Carta provided:

> No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.

WILLIAM S. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 436 (1905).

> and contest the charge or allegations, and to be heard or tried in a legal and regular course of judicial proceedings, by an impartial judge.[10]

Randall interpreted the Massachusetts Constitution, which provided that no person "shall be deprived of his property, immunities, or privileges, but by the judgment of his peers, or the law of the land."[11] The requirements outlined in *Randall* would come to be called "procedural due process."

The Court later considered a special aspect of procedural due process—whether due process of law required the states to observe some of the specific procedural protections set forth in the first eight amendments of the Bill of Rights. In *Walker v. Sauvinet*, the Court ruled that the Due Process Clause did not mean that the Seventh Amendment requirement of a jury trial in cases involving more than twenty dollars applied to the states.[12] In *Hurtado v. California*, the Court ruled that the Clause did not make the Sixth Amendment requirement of an indictment to initiate a criminal prosecution applicable to the states.[13] *Hurtado* is significant to the ultimate development of substantive due process because it stated that the powers reserved to the states must be "exerted within the limits of those *fundamental principles of liberty and justice* which lie at the base of all our civil and political institutions[.]"[14] *Hurtado* appears to be the first decision in which the Court said that Fourteenth Amendment due process protected "fundamental principles of liberty and justice."[15] That standard would guide the Court's later rulings as to which procedural protections of the Bill of Rights applied to the states and ultimately ripen into an expansive doctrine of substantive due process.

The Supreme Court's first use of the phrase "due process of law" as a potentially *substantive* limitation on legislative power occurred many years earlier in *Bloomer v. McQuewan*.[16] The plaintiff argued that an act extending the term of a patent prevented a purchaser of the patented product from using it during the patent's extended term.[17] Although the Court ultimately ruled that "this special act of Congress does not, and was not intended to interfere with rights of property before acquired,"[18] it stated in dictum, after quoting the Fifth Amendment, that a special act of Congress, passed after the patented

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[10] 74 U.S. (7 Wall.) 523, 528 (1869) (W.H. & O.H. Morrison 1870).

[11] *Id.*

[12] 92 U.S. 90, 92–93 (1876).

[13] 110 U.S. 516, 534–38 (1884).

[14] *Id.* at 535 (emphasis added).

[15] *Id.*

[16] 55 U.S. (14 How.) 539 (1853) (Little, Brown & Co. 1856).

[17] *Id.* at 540.

[18] *Id.* at 554.

products had been purchased, "depriving the [purchasers] of the right to use [the products], certainly could not be regarded as due process of law."[19]

As Chief Justice Roberts recently noted in *Obergefell v. Hodges*, "[t]he Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*."[20] In *Dred Scott*, the Court invalidated the provision of the Missouri Compromise that abolished slavery in the United States territory constituting the Louisiana Purchase:

> [A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence [sic] against the laws, could hardly be dignified with the name of due process of law.[21]

Chief Justice Taney reasoned that the invalidated provision had deprived Dred Scott's "owner" of what the Court deemed his "property." Because there was no defect of a procedural nature—indeed, no procedure was used to accomplish the loss of "property"—the decision can be considered to have relied on a substantive component of the Due Process Clause.

The first case in which the Court ruled that a state regulation did *not* violate due process was *Munn v. Illinois*.[22] Illinois had set maximum rates for the storage and transport of grain.[23] The Court said the Clause did not bar statutes imposing restrictions on business said to be "affected with a public interest."[24]

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[19] *Id.* at 553.

[20] 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting) (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the majority opinion of Justices O'Connor, Kennedy, and Souter said that the Due Process Clause had been understood to have a substantive component since at least 1887:

> Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas*, the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them."

505 U.S. 833, 846 (1992) (citations omitted) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)) (citing Mugler v. Kansas, 123 U.S. 623, 660–61 (1887)). Before *Dred Scott*, some state courts had ruled that a state statute regulating economic activity violated a due process clause of a state constitution. *See, e.g.*, Wynehamer v. New York, 13 N.Y. 378 (1856) (invalidating law prohibiting sale of existing stocks of liquor).

[21] *Dred Scott*, 60 U.S. at 450 (W.H. & O.H. Morrison 1859).

[22] 94 U.S. 113 (1876) (Little, Brown, & Co. 1877).

[23] *Id.* at 117–18.

[24] *Id.* at 126 (quotation marks omitted) (quoting 1 LORD CHIEF JUSTICE MATTHEW HALE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND: DE PORTIBUS MARIS 78 (Francis Hargrave ed., 1787)).

After *Dred Scott*, the Court next gave "due process of law" substantive meaning in *Hepburn v. Griswold*.[25] This decision declared unconstitutional that part of the Legal Tender Acts authorizing United States notes to be legal tender in payment of debts.[26] The Court said:

> The only question is, whether an act which compels all those who hold contracts for the payment of gold and silver money to accept in payment a currency of inferior value deprives such persons of property without due process of law. It is quite clear, that whatever may be the operation of such an act, due process of law makes no part of it.[27]

There was no claim that payment of the note was being impaired under a defective procedure. It was the substance of the statute that rendered it "no part" of due process.

The due process ruling in *Hepburn* appears to be one part of a three-part rationale for that decision's ruling of unconstitutionality:

> We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is [1] not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; [2] that such an act is inconsistent with the spirit of the Constitution; and [3] that it is prohibited by the Constitution.[28]

The first part of this conclusion—"not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress"[29]—rejected the claim that making the notes legal tender was within the implied powers of Congress. The second part—"such an act is inconsistent with the spirit of the Constitution"[30]—recognized that the Constitution's obligation of contracts clause is binding only on the states,[31] but nevertheless ruled that "the spirit of this prohibition should pervade the entire body of legislation."[32] The third part—"prohibited by the Constitution"[33]—implicitly referred to the Fifth Amendment's prohibition on depriving a person of property without due process of law.[34] Because the

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[25] 75 U.S. (8 Wall.) 603 (1870) (W.H. & O.H. Morrison 1870), *overruled in part by* Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871) (W.H. & O.H. Morrison 1872).

[26] *Id.* at 625-26.

[27] *Id.* at 624.

[28] *Id.* at 625.

[29] *Id.*

[30] *Id.*

[31] "No State shall . . . pass any . . . law impairing the obligation of contracts[.]" U.S. CONST. art. I, § 10, cl. 1.

[32] *Hepburn*, 75 U.S. at 623.

[33] *Id.* at 625.

[34] *Id.* at 623–24.

product sought to be sold was indisputably property, this decision did not need to determine the meaning of due process when these words were asserted as a requirement for a valid deprivation of liberty.

The response in Justice Miller's dissent to the *Hepburn* majority's reliance on a substantive component of the due process clause previewed the position that Justice Holmes would famously articulate thirty-five years later in his dissent in *Lochner v. New York*.[35] Justice Miller wrote:

> This whole argument . . . is, above all, dangerous as a ground on which to declare the legislation of Congress void by the decision of a court. It would authorize this court to enforce theoretical views of the genius of the government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the National legislature.[36]

Hepburn's ruling of unconstitutionality was overruled the following year by the *Legal Tender Cases*.[37] That overruling resulted from President Grant's 1870 appointments of William Strong to fill a vacancy and Joseph Bradley to a new seat, created after Grant persuaded Congress to enlarge the Court from nine to ten Justices.[38]

Leaving "due process" for a moment, I turn now to the Court's broadened interpretation of Fourteenth Amendment "liberty." The first suggestion, in a Supreme Court opinion, that the liberty protected by the Constitution was broader than freedom from physical restraint appeared in 1884 in Justice Bradley's concurring opinion in *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*[39] He wrote:

> The right to follow any of the common occupations of life is an inalienable right, was formulated as such under the phrase "pursuit of happiness" in the declaration of independence, which commenced with the fundamental proposition that "all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and *the pursuit of happiness*." This right is a large ingredient in the civil liberty of the citizen.[40]

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[35] *See* 198 U.S. 45, 65 (1905) (Holmes, J., dissenting).

[36] *Hepburn*, 75 U.S. at 638 (Miller, J., dissenting).

[37] 79 U.S. (12 Wall.) 457 (1871) (W.H. & O.H. Morrison 1872).

[38] TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 162–63 (2001).

[39] 111 U.S. 746, 760 (1884) (Bradley, J., concurring).

[40] *Id.* at 762.

He continued: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."[41] Then, he significantly added:

> But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen.[42]

Four years later in *Powell v. Pennsylvania*, the Court stated for the first time, although in dictum, that Fourteenth Amendment liberty included "pursuing an ordinary calling or trade."[43] The first Justice Harlan, writing for the Court, said:

> The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guarantied [*sic*] by the [F]ourteenth [A]mendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania.[44]

Nine years later, the dictum in *Powell* became the Court's holding in *Allgeyer v. Louisiana*.[45] *Allgeyer* considered the validity of a Louisiana statute prohibiting out-of-state insurance companies from insuring property located within Louisiana without observing local requirements.[46] In a unanimous opinion, Justice Peckham said:

> The "liberty" mentioned in [the Fourteenth A]mendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into

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[41] *Id.* at 764.
[42] *Id.* at 765.
[43] 127 U.S. 678, 684 (1888).
[44] *Id.*
[45] 165 U.S. 578, 590 (1897) (quoting *Powell*, 127 U.S. at 684).
[46] *Id.* at 583–84.

> all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[47]

Justice Peckham cited Justice Bradley's concurring opinion in *Butchers' Union* and Justice Harlan's dictum in *Powell* as authority for this broad definition of Fourteenth Amendment liberty.[48] In *Allgeyer*, the Court flatly stated that the state statute "deprives the defendants of their liberty without due process of law."[49]

Having ruled that the defendant had a liberty right to make an insurance contract from outside Louisiana, the Court provided a critical, although conclusory, statement as to why the state statute impaired that right without due process of law: "Such a statute as this in question is not due process of law, because it prohibits an act which under the federal constitution the defendants had a right to perform."[50] This statement appears to be the first in which the Court directly linked the limiting effect of "due process of law" with a broadened concept of "liberty." If a state statute impaired a right comprehended by Fourteenth Amendment liberty, it failed, for that very reason, to provide Fourteenth Amendment due process.

The articulation of specific rights in *Allgeyer*, such as the rights of a citizen "to live and work where he will" and "to pursue any livelihood or avocation"[51] gave specific content to the concept of "fundamental liberties" enunciated in *Hurtado* in 1884.[52] *Hurtado* had derived this concept from Fourteenth Amendment due process of law; *Allgeyer* derived examples of the concept from Fourteenth Amendment liberty.

Thus, by 1897, the Court had ruled in *Hepburn* that due process had substantive content,[53] in *Hurtado* that due process substantively protected fundamental liberties,[54] and in *Allgeyer* that Fourteenth Amendment liberty was broader than freedom from physical restraint and included freedom to take certain actions deemed to be the exercise of fundamental rights,[55] and that the substantive content of due process constrained state limitation of Fourteenth Amendment liberty.[56]

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[47] *Id.* at 589.

[48] *Id.* at 589–90 (quoting Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 762 (1884), and *Powell*, 127 U.S. at 684).

[49] *Id.* at 589.

[50] *Id.* at 591.

[51] *Id.* at 589.

[52] 110 U.S. 516, 535 (1884).

[53] 75 U.S. (8 Wall.) 603, 624 (1869).

[54] 110 U.S. at 535.

[55] 165 U.S. at 589.

[56] *Id.*

From 1897 onwards, the Court's interpretation of due process continued along two lines. The first line determined which provisions of the first eight amendments of the Bill of Rights the Due Process Clause of the Fourteenth Amendment made applicable to the states. This line of decisions, often termed "incorporating" the Bill of Rights,[57] primarily concerned procedural rights but also concerned some substantive rights. The second line of decisions determined which state statutes regulating economic and personal activity exceeded limits imposed by the Due Process Clause. This line of decisions concerned the substance of state legislation and established what came to be called "substantive due process."

The first line of decisions, continuing what *Walker* and *Hurtado* had begun, determined which provisions of the Bill of Rights were fundamental rights, [58] which made them applicable to the states. This series of decisions began in 1897 with *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*.[59] The Court implicitly ruled that the Fifth Amendment's clause requiring just compensation for takings of private property for public use was applicable to state and local governments, a ruling stated explicitly in *Lingle v. Chevron U.S.A. Inc.*[60] and *Kelo v. City of New London*.[61] In *Frank v. Magnum*, the Court stated that the implicit fair trial guarantee of the Fifth Amendment's Due Process Clause would be a fundamental right applicable

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[57] *See, e.g.*, Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

[58] The language of "fundamental liberties" was repeatedly used. For example, in *New York, New Haven, & Hartford Railroad Co. v. Interstate Commerce Commission*, the first Justice White stated for a unanimous court:

> To accede to the doctrine relied upon [that a violation of a federal statute warranted an injunction prohibiting not only *similar* future violations but also *any* future violations of the statute] would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the *fundamental liberties* of the citizen.

200 U.S. 361, 404 (1906) (emphasis added). The concept later appeared in Justice Cardozo's dissent in *Herndon v. Georgia*, a case affirming a conviction for incitement. 295 U.S. 441, 455 (1935). "If the rejection of the test of clear and present danger was a denial of *fundamental liberties*, the path is clear for us to say so." *Id.* at 454 (emphasis added). Sometimes the source of such fundamental liberties was said, favorably or unfavorably, to be natural law. *See* Adamson v. California, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring) ("In the history of thought 'natural law' has a much longer and a much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth."), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964); Griswold v. Connecticut, 381 U.S. 479, 581 (1965) (Black, J., dissenting) (citing Lochner v. New York, 198 U.S. 45 (1905)) (referring critically to "the same natural law due process philosophy found in *Lochner v. New York*").

[59] 166 U.S. 226, 241 (1897).

[60] 544 U.S. 528, 536 (2005) (citing *Chicago, Burlington, & Quincy*, 166 U.S. at 241).

[61] 545 U.S. 469, 472 n.1 (2006) (citing *Chicago, Burlington, & Quincy*, 166 U.S. at 241).

to the states.[62] Applying what perhaps is best characterized as the procedural component of the Due Process Clause, the Court ruled that a trial "dominated by a mob, so that the jury is intimidated and the trial judge yields" is "a departure from due process of law in the proper sense of that term."[63] In *Moore v. Dempsey*, the Court again stated that "if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law[.]"[64] Continuing to apply procedural protections to the states, the Court in *Powell v. Alabama* ruled that due process required a state to provide counsel for an indigent and uneducated defendant in a capital case,[65] and *Mooney v. Holohan* ruled that due process prohibited a conviction based on testimony known to be perjured.[66]

Frank, like *Hurtado*, is also pertinent to the ultimate development of substantive due process. The Supreme Court, though denying relief, stated:

> [T]he due process of law guaranteed by the 14th Amendment has regard to *substance* of right, and not to matters [*sic*] of form or procedure; that it is open to the courts of the United States, upon an application for a writ of habeas corpus, to look beyond forms and inquire into the very *substance* of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law[.][67]

It seems likely that the phrase "not to matters" was intended to be rendered "not only to matters."

In *Palko v. Connecticut*, the Court ruled that the Due Process Clause did not render the Sixth Amendment's double jeopardy protection a fundamental right.[68] In making that decision, the Court, echoing, albeit in slightly different language, what it had said in *Hurtado v. California* about "fundamental principles of liberty,"[69] stated that the governing principle was that the Due Process Clause guaranteed, against state impairment, only those rights that were "implicit in the concept of ordered liberty[.]"[70] The Court

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[62] 237 U.S. 309, 347 (1915) ("Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.").

[63] *Id.* at 335. However, *Frank* ruled that the state courts validly rejected petitioner's claim. *See id.* at 345.

[64] 261 U.S. 86, 90–91 (1923). *Moore* permitted a district court exercising habeas corpus jurisdiction to hold a hearing to determine the facts. *Id.* at 91–92.

[65] 287 U.S. 45, 45 (1932).

[66] 294 U.S. 103, 112–13 (1935).

[67] *Frank*, 237 U.S. at 331 (emphasis added).

[68] 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

[69] 110 U.S. 516, 535 (1884).

[70] *Palko*, 302 U.S. at 325.

repeated that phrase in *Adamson v. California*,[71] ruling that due process did not require the states to follow the rule, applicable in federal trials,[72] that a prosecutor may not comment on a defendant's failure to testify.[73] Since *Adamson*, however, the Court has ruled that the Due Process Clause made most criminal procedural requirements of the Bill of Rights applicable to the states.[74]

Interspersed among decisions considering whether the Due Process Clause made specific *procedural* protections in the Bill of Rights applicable to the states were decisions in which the Court considered whether the clause made *substantive* provisions of the first eight amendments applicable to the states. In *Patterson v. Colorado ex rel. Attorney General*, the Court explicitly left "undecided" the issue of whether the free speech guarantee of the First Amendment applied to the states.[75] In *Palko v. Connecticut*, the Court said that the Due Process Clause "*may* make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress[.]"[76] In *Gitlow v. New York*, the Court assumed that the First Amendment's free speech protection was applicable to the states.[77] In making that assumption, the Court relied on the important principle it had announced forty-one years earlier in *Hurtado*—due process protects "fundamental principles of liberty and justice."[78] In *Gitlow*, the Court stated that the freedoms of speech and the press "are among the fundamental personal rights and 'liberties' protected by the due process

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[71] 332 U.S. 46, 54 (1964).

[72] *See, e.g.*, Johnson v. United States, 318 U.S. 189, 196 (1943); Wilson v. United States, 149 U.S. 60, 66 (1893).

[73] 332 U.S. 46, 55–58 (1947), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

[74] These rights include: (1) the right, implementing the Fourth Amendment, barring use at trial of evidence seized in violation of the Amendment, *see* Mapp v. Ohio, 367 U.S. 643, 655-60 (1961) (overruling in part United States v. Weeks, 232 U.S. 383 (1914)); (2) the Fifth Amendment's prohibition against compulsory self-incrimination, *see Malloy*, 378 U.S. at 6 (overruling Twining v. New Jersey, 211 U.S. 78 (1908)); (3) the Sixth Amendment's right to a jury when required in federal criminal trials, *see* Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968); (5) the Sixth Amendment's rights to counsel for all felony cases, s*ee* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942)); (6) the Sixth Amendment's right to a speedy trial, *see* Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967); (7) the Sixth Amendment's right to a public trial, *see In re* Oliver, 333 U.S. 257, 277–78 (1948); (8) the Sixth Amendment's right to confront opposing witnesses, *see* Pointer v. Texas, 380 U.S. 400, 406 (1965); and (9) the Sixth Amendment's right to compulsory process for obtaining witnesses, *see* Washington v. Texas, 388 U.S. 14, 23 (1967).

[75] 205 U.S. 454, 462 (1907).

[76] 302 U.S. 319, 324 (1937) (emphasis added).

[77] 268 U.S. 652, 666 (1925).

[78] 110 U.S. 516, 535 (1884).

clause of the Fourteenth Amendment from impairment by the States."[79] In articulating this "fundamental rights" rationale, the Court ventured further beyond procedural requirements and moved significantly into substantive limitations.[80] Since *Gitlow*, the Court has ruled that many substantive protections of the Bill of Rights are applicable to the states.[81]

The second line of decisions developing substantive due process initially comprised the familiar cases in which the Court invalidated various state economic regulations, finding them to have violated the Fourteenth Amendment because they impaired what came to be known as "liberty of contract."[82] The most famous of these cases is *Lochner v. New York*.[83] *Lochner* concerned the validity of a New York employment statute setting sixty hours as the maximum number of hours bakers could work in a week, as well as establishing a daily limit.[84] Although the dissent by Justice Holmes is frequently cited for its critique of the *Lochner* ruling, the majority opinion of Justice Peckham, who had written *Allgeyer* eight years earlier, is worth considering because it contains statements endeavoring to give content to substantive due process analysis.[85] Justice Peckham began by asserting, "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."[86] Then, explaining the substantive meaning of "due process of law," Justice Peckham said:

> [W]here the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the

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[79] 268 U.S. at 666.

[80] *Id.* at 666–68.

[81] These rights include: (1) the First Amendment's protection of freedom of the press, *see* Near v. Minnesota, 283 U.S. 697, 707 (1931); (2) the First Amendment's guarantee of freedom of assembly, *see* De Jonge v. Oregon, 299 U.S. 353, 364 (1937); (3) the First Amendment's guarantee of the right to petition for redress of grievances, *see* Edwards v. South Carolina, 372 U.S. 229, 235 (1963); (4) the First Amendment's protection against establishment of religion, *see* Everson v. Bd. of Education, 330 U.S. 1, 8 (1947); (5) the First Amendment's protection of freedom of religion, *see* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); (6) the Second Amendment's right to bear arms, *see* McDonald v. City of Chicago, 561 U.S. 742, 791 (2010); (7) the Fourth Amendment's protection against unreasonable searches and seizures, *see* Wolf v. Colorado, 338 U.S. 25, 27-28 (1949); and (8) the Eighth Amendment's protection against cruel and unusual punishments, *see* Robinson v. California, 370 U.S. 660, 667 (1962).

[82] *See* Frisbie v. United States, 157 U.S. 160, 165 (1895) ("[G]enerally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal.").

[83] 198 U.S. 45 (1905), *overruled in part by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963).

[84] *Id.* at 45–47.

[85] *See id.* at 53–56.

[86] *Id.* at 53 (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897)).

> police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[87]

This formulation was repeated three years later in *Adair v. United States*.[88] Thus, a statute accorded due process if it was "a fair, reasonable, and appropriate exercise of the police power of a state," but not if it was "an unreasonable, unnecessary, and arbitrary interference" with the right to liberty.[89]

Justice Peckham illustrated the type of state statutes on the "fair" and "reasonable" side of the due process line by pointing to health and safety measures.[90] For example, he referred to a Utah statute limiting the work of underground miners to eight hours a day.[91] The statute had been challenged as a deprivation of the property of both the employer and the employee.[92] In *Holden v. Hardy*, the Court upheld the statute as a health and safety measure.[93] The Court there quoted approvingly the following passage from the opinion of the Massachusetts Supreme Judicial Court in *Massachusetts v. Alger*:

> Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.[94]

This reference to "reasonable" restraints appears to be the Supreme Court's first attempt to articulate a standard for determining when a statute exceeded the substantive limits of due process.[95] However, the hour limitation for

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[87] *Id.* at 56.

[88] 208 U.S. 161, 173 (1908) (citing *Lochner*, 198 U.S. at 56; *Allgeyer*, 165 U.S. at 578), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

[89] *Id.* at 174. *See also* Nebbia v. New York, 291 U.S. 502, 510–11 (1934) ("[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.").

[90] 198 U.S. at 54–56.

[91] *Id.* at 54–55 (citing Holden v. Hardy, 169 U.S. 366 (1898)).

[92] *Holden*, 169 U.S. at 381–82.

[93] *See id.* at 395–97.

[94] *Id.* at 392 (quotation marks omitted) (quoting Massachusetts v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851)).

[95] The Supreme Court had previously stated that liberty of contract was not immune from all state regulation:

> [S]uch liberty is not absolute . . . . It is within the undoubted power of government to

bakers was not reasonable in *Lochner* because "bakers as a class" are "equal in intelligence and capacity to men in other trades," and "[c]lean and wholesome bread does not depend on whether the baker works but ten hours a day or only sixty hours a week."[96]

Other examples of statutes being upheld despite their substantive limitation of liberty are laws: (1) prohibiting Sunday sales;[97] (2) requiring vaccinations;[98] (3) limiting the maximum hours per day a woman could work in a laundry to ten hours a day;[99] (4) and limiting the time a worker could work in a mill or factory, to ten hours a day, with three more hours permitted if time-and-a-half was paid.[100] *Bunting* appears to be at least an implicit overruling of *Lochner*, although it did not mention *Lochner*.[101]

Notwithstanding these exceptions, the Court continued, in a series of decisions after *Lochner*, to rule statutes imposing conditions on employment and regulating other aspects of commercial activity unconstitutional in violation of the liberty protected by the Due Process Clauses of the Fifth or Fourteenth Amendments. These included statutes: (1) prohibiting discharge of railroad employee for union membership;[102] (2) purporting to regulate an insurance contract made outside the state;[103] (3) preventing employers from requiring employees to forgo joining any union;[104] (4) prohibiting employment agency from collecting a fee from employees;[105] (5) limiting forfeiture of insurance policies;[106] (6) authorizing minimum wage for women

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> restrain some individuals from all contracts, as well as all individuals from some contracts. It may . . . restrain all engaged in any employment from any contract in the course of that employment which is against public policy.

Frisbie v. United States, 157 U.S. 160, 165–66 (1895) (upholding a statute limiting the fee charged for federal pension applications).

[96] 198 U.S. at 57.

[97] *See* Petit v. Minnesota, 177 U.S. 164, 164–65 (1900).

[98] *See* Jacobson v. Massachusetts, 197 U.S. 11, 12–13 (1905).

[99] *See* Muller v. Oregon, 208 U.S. 412, 416–17 (1908).

[100] *See* Bunting v. Oregon, 243 U.S. 426, 433–34 (1917).

[101] Chief Justice Taft wrote: "It is impossible for me to reconcile the *Bunting* Case and the *Lochner* Case, and I have always supposed that the Lochner Case was thus overruled sub silentio." Adkins v. Children's Hosp., 261 U.S. 525, 564 (1923) (Taft, C.J., dissenting) (citing *Bunting*, 243 U.S. at 426; *Lochner*, 198 U.S. at 45).

[102] *See* Adair v. United States, 208 U.S. 161, 166–68 (1908), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

[103] *See* N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 154–55 (1914).

[104] *See* Coppage v. Kansas, 236 U.S. 1, 4–7 (1915), *overruled in part by Phelps Dodge Corp.*, 313 U.S. at 177.

[105] *See* Adams v. Tanner, 244 U.S. 590, 591 (1917), *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726 (1963).

[106] *See* N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 366–67 (1918).

and children;[107] (7) fixing the weight of loaves of bread;[108] and (7) authorizing setting minimum wages for women.[109] Beginning in 1895, the Court labeled such liberty as "liberty of contract."[110] As Chief Justice Roberts recently noted, "[i]n the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty[.]"[111]

Eighteen years after *Lochner*, in *Meyer v. Nebraska*, the Court ruled that a state statute deprived a person of liberty protected by the Fourteenth Amendment in a case that can be viewed as involving either economic or non-economic rights[112]—what some would later call "personal" rights.[113] In *Meyer*, the Court invalidated a statute making it a crime to teach subjects in a foreign language to students who had not completed the eighth grade.[114] Both the teacher's economic right to teach and the parents' non-economic right to have the teacher instruct their children were deemed to be within Fourteenth Amendment liberty.[115] The statute's impairment of these rights

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[107] *See* Adkins v. Children's Hosp., 261 U.S. 525, 539–41 (1923), *overruled in part by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[108] *See* Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 510–11 (1924).

[109] *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 603 (1936), *overruled in part by* Olsen v. Nebraska *ex rel* W. Reference & Bond Ass'n, 313 U.S. 236 (1941).

[110] *See* Frisbie v. United States, 157 U.S. 160, 165 (1895) ("[G]enerally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal.").

[111] Obergefell v. Hodges, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting).

[112] 262 U.S. 390, 401 (1923) (finding that the statute "attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own").

[113] *See* Griswold v. Connecticut, 381 U.S. 479, 486 (Goldberg, J., concurring) ("[T]he concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.").

[114] 262 U.S. at 400–01.

[115] *See id.* In *Meyer*, the Court expounded on the scope of Fourteenth Amendment liberty:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399–400 (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Slaughter-House Co., 111 U.S. 746 (1884); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Minnesota v. Barber, 136 U.S. 313 (1890); Allgeyer v. Louisiana, 165 U.S. 578 (1897); Lochner v. New York, 198 U.S. 45 (1905); Twining v. New Jersey, 211 U.S. 78 (1908); Chicago, Burlington, & Quincy R.R. Co. v. McGuire, 219 U.S. 549 (1911); Truax v. Raich, 239 U.S. 33 (1915); Adams v. Tanner, 244

was called "arbitrary."[116] This ruling of arbitrariness might have been based on a substantive aspect of due process, but the Court's opinion did not explicitly say that the statute's deprivation of the teacher's or the parents' liberty had been accomplished without due process of law.[117] Significantly anticipating the broad scope that liberty would come to have in later decisions, the Court said that Fourteenth Amendment liberty included "the right . . . to marry."[118] Justices Holmes and Sutherland dissented without opinion.[119]

Although *Meyer* involved the right of a teacher to pursue his profession, and hence fits within the *Allgeyer/Lochner* line of cases, it can also be viewed as a case concerning the teacher's non-economic right of academic freedom, rather than the teacher's economic right to pursue an occupation.[120] To the extent that the Court relied on the parents' right to educate their children, the decision also protected a non-economic, rather than an economic, right.[121]

The distinction between economic and non-economic rights was brought into sharp focus two years later in *Pierce v. Society of Sisters*.[122] In *Pierce*, the Court again protected the liberty of parents to choose private school education of their children, unanimously invalidating a statute that required parents to send their children to public schools through the eighth grade.[123] The Court later distinguished non-economic from economic rights, with broader protection for non-economic rights than for economic rights, in the well-known footnote in *United States v. Carolene Products Co.*[124]

U.S. 590 (1917); N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357 (1918); Truax v. Corrigan, 257 U.S. 312 (1921); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Wyeth v. Cambridge Bd. of Health, 200 Mass. 474 (1909)).

[116] *Id.* at 403.

[117] *Id.*

[118] *Id.* at 399. The Court would continue to deem the right to marriage to be within Fourteenth Amendment liberty. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

[119] *Meyer*, 262 U.S. at 403.

[120] *See id.* at 401.

[121] *See id.*

[122] 268 U.S. 510 (1925).

[123] *See id.* at 534–35.

[124] 304 U.S. 144, 152 n.4 (1938). Footnote four strongly suggested that more exacting judicial scrutiny was appropriate for non-economic regulation of "political processes," "dissemination of information," "political organizations," "peaceable assembly," or statutes directed at "religious," national," or "racial" minorities. *Id.* ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.").

The line of decisions after *Lochner* invalidating economic regulations as deprivations of substantive due process is usually said to have ended in 1937 when the Court decided *West Coast Hotel Co. v. Parrish*, which upheld the constitutionality of a Washington statute authorizing minimum wages for women and children.[125] Although the decision can be viewed as another example of the exceptions to substantive due process invalidation which the Court had made in *Bunting* and *Muller*,[126] *West Coast Hotel* is properly understood as a rejection of substantive due process in the economic sphere because the Court explicitly overruled the *Adkins* decision.[127]

West Coast Hotel stated the following standard concerning the effect of the Due Process Clause on statutes limiting Fourteenth Amendment liberty: "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."[128] By 1963, Justice Black would declare:

> The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies[.][129]

Substantive due process was dead. But was it?

Just two years later, in *Griswold v. Connecticut*, the Court considered the constitutionality of a Connecticut statute prohibiting the use of contraceptives.[130] The statute had been applied to a doctor and a Planned Parenthood executive for advising married couples concerning the use of contraceptives.[131] The Court declared the law unconstitutional as a violation of a right to marital privacy, a right said to be derived from "penumbras, formed by emanations" from the guarantees of the First, Third, Fourth, Fifth, and Ninth Amendments.[132] The majority opinion, written by Justice Douglas, did not mention Fourteenth Amendment liberty and disclaimed

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[125] 300 U.S. 379, 399–400 (1937).

[126] *See* Bunting v. Oregon, 243 U.S. 426, 437–38 (1917); Muller v. Oregon, 208 U.S. 412, 420–22 (1908).

[127] 300 U.S. at 400.

[128] *Id.* at 392 (quotation marks omitted) (quoting Chicago, Burlington, & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 565 (1911)).

[129] Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

[130] 381 U.S. 479, 480 (1965).

[131] *Id.*

[132] *See id.* at 484 (citing Poe v. Ullman, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting)).

reliance on the Due Process Clause, perhaps mindful of the disrepute into which the *Lochner* line of cases had fallen.[133]

However, the second Justice White's concurring opinion in *Griswold* explicitly stated that the Connecticut statute "as applied to married couples deprives them of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment,"[134] although he made no mention of substantive due process. He noted that *Meyer* had included the right "to marry, establish a home[,] and bring up children" within Fourteenth Amendment liberty,[135] and that *Pierce* had included the liberty "to direct the upbringing and education of children[.]"[136] In concluding that the Due Process Clause prohibited the Connecticut statute's limitation of this aspect of liberty, White extracted from *Meyer* and *Pierce* the principle "that there is a 'realm of family life which the state cannot enter' without substantial justification."[137] White's opinion neither cited nor distinguished the *Lochner* line of decisions.

The concurring opinion of Justice Goldberg in *Griswold*, joined by Chief Justice Warren and Justice Brennan, also explicitly relied on Fourteenth Amendment liberty and the Due Process Clause, but did not mention substantive due process.[138] Goldberg echoed the "fundamental rights" line of decisions that began with *Hurtado*: "I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."[139] Goldberg's opinion also said: "[T]he Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'"[140] and even invoked the Ninth Amendment.[141]

The second Justice Harlan also concurred in *Griswold*, relying on the Due Process Clause without mentioning substantive due process.[142] Justice Harlan employed the "fundamental rights" approach, concluding that the

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[133] *See id.* at 481–82. "Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. State of New York* should be our guide. But we decline that invitation[.]" *Id.* (citations omitted).

[134] *Id.* at 502 (White, J., concurring).

[135] *Id.* (quotation marks omitted) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[136] *Id.* (quotation marks omitted) (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)).

[137] *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). *Prince* had upheld a statute prohibiting child labor. *Prince*, 321 U.S. at 167–68.

[138] *See* 381 U.S. at 487–88 (Goldberg, J., concurring).

[139] *Id.* at 486.

[140] *Id.* at 487 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[141] *See id.* at 488–91.

[142] *Id.* at 499–502.

Connecticut statute impaired liberty without due process of law "because the enactment violates basic values 'implicit in the concept of ordered liberty.'"[143]

Justice Black, in his dissenting opinion in *Griswold*, joined by Justice Stewart, chided Justices Goldberg and White specifically for relying on what Black termed a "natural law due process philosophy."[144] That Black was accusing Justices Goldberg and White of relying on substantive due process, without using those words, is clear from his observation that Goldberg and White cited *Meyer* and *Pierce*, and from his more pointed statement that their reasoning was supported by *Lochner*, *Coppage*, *Jay Burns Baking Co.*, and *Adkins*, which, he noted, Goldberg and White "do not bother to name."[145] Black also could not resist pointing out that *Meyer*, relied on by both Goldberg and White, had relied on *Lochner* "along with such other long-discredited decisions as, e.g., *Adams v. Tanner* and *Adkins v. Children's Hospital*[.]"[146]

Although the majority and concurring opinions in *Griswold* did not invoke substantive due process by name, how else did they use the Due Process Clause to rule the Connecticut statute unconstitutional? Plainly, they identified no procedural flaw in the process by which Connecticut criminalized the use of contraceptives.[147] The limits of the Due Process Clause, whether protecting privacy, as Justice Douglas said, or fundamental liberties as Justices White, Goldberg, and Harlan maintained, were exceeded because of the substantive content of that clause.

Having ruled that a constitutional right of privacy precluded enforcement of a prohibition on the use of contraceptives, the Court made an important statement about that right seven years later in *Eisenstadt v. Baird*: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted intrusion into matters so fundamentally

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[143] *Id.* at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). More significantly, Harlan followed his own dissenting opinion in *Poe v. Ullman*, which had developed the theme. *Id.* (citing Poe v. Ullman, 367 U.S. 497, 539–45 (1961)).

[144] *Id.* at 516. Justice Black also criticized Justice Harlan, as well as Justices Goldberg and White, for relying on the Due Process Clause. *Id.* at 511. He also criticized Justice Douglas, although not by name, for relying on a generalized right of privacy. *See id.* at 508–10.

[145] *Id.* at 514–15 (citing Lochner v. New York, 198 U.S. 45 (1905); Coppage v. Kansas, 236 U.S. 1 (1915); Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924); Adkins v. Children's Hosp., 261 U.S. 525 (1923)).

[146] *Id.* (citations omitted) (citing Adams v. Tanner, 244 U.S. 590 (1917); *Adkins*, 261 U.S. at 525).

[147] *Id.* at 528 (Stewart, J., dissenting) (noting that appellants did not claim they were denied any elements of procedural due process).

affecting a person as the decision whether to bear or beget a child."[148] *Baird* invalidated, on equal protection grounds, a Massachusetts statute prohibiting distribution of contraceptives to single persons to prevent pregnancy while allowing distribution to married persons for such purpose,[149] but at least one court understood the "bear or beget" language to presage a due process ruling on abortion.[150]

After *Griswold*, the Court's next major decision declaring a state statute to have deprived a person of Fourteenth Amendment liberty in violation of the Due Process Clause was *Roe v. Wade*, invalidating a Texas statute prohibiting abortions, except where necessary to save the woman's life.[151] Building upon the privacy rationale of *Griswold*, [152] the Court first noted that a privacy interest was grounded "in the Fourteenth Amendment's concept of personal liberty."[153] The Court then ruled that "where certain 'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling state interest,'"[154] that "[a]t some point in pregnancy, [the state's] interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision,"[155] and that "[w]ith respect to the State's important and legitimate interest in potential life [of the fetus], the 'compelling' point is at viability."[156]

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[148] 405 U.S. 438, 453–54 (1972) (citing Stanley v. Georgia, 394 U.S. 557 (1969); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

[149] *Id.* at 454–55.

[150] *See* Abele v. Markle, 351 F. Supp. 224, 227 (D. Conn. 1972) (quoting *Eisenstadt*, 405 U.S. at 453) (invalidating a Connecticut statute prohibiting abortion, stating, "*Baird* may have anticipated the outcome of cases such as this," and quoting the "bear or beget" language), *vacated by* 410 U.S. 951 (1973).

[151] 410 U.S. 113, 166 (1973).

[152] Justice Blackmun's opinion noted that the Court had earlier recognized a right to privacy in *Union Pacific Railway Co. v. Botsford*. *Id.* at 152 (citing Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)). In *Botsford*, the Court found that a federal trial court properly denied the motion of a railroad to conduct a surgical examination of a plaintiff who was injured when an upper berth opened and struck her head. 141 U.S. at 251. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id. Botsford* made no mention of the Due Process Clause.

[153] *Roe*, 410 U.S. at 153.

[154] *Id.* at 155 (quoting Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969)).

[155] *Id.* at 154.

[156] *Id.* at 163. The Court subsequently adhered to the viability of the fetus as the point before which a state could not prohibit an abortion. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 870 (1992) ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.").

As significant as the result in *Roe* is, an important aspect of that decision relevant to this Article is the view, expressed by Justice Stewart in his concurring opinion, that the rationale for *Griswold* was substantive due process:

> In 1963, this Court, in *Ferguson v. Skrupa*, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

Barely two years later, in *Griswold v. Connecticut*, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.[157]

Justice Stewart also commented generally on the broadened scope of Fourteenth Amendment liberty:

> "In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed." The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.[158]

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[157] *Roe*, 410 U.S. at 167–68 (Stewart, J., concurring) (footnotes and citations omitted) (citing Ferguson v. Skrupa, 372 U.S. 726 (1963); Griswold v. Connecticut, 381 U.S. 479 (1965)).

[158] *Id.* at 168 (citations omitted) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972)) (citing Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 238–39 (1957); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923); *cf.* Shapiro v. Thompson, 394 U.S. 618, 629–30 (1969); United States v. Guest, 383 U.S. 745, 757–58 (1966); Carrington v. Rash, 380 U.S. 89, 96 (1965); Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964); Kent v. Dulles, 357 U.S. 116, 127 (1958); Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954); Truax v. Raich, 239 U.S. 33, 41 (1915)).

Subsequent decisions confirmed the existence of a privacy right within the scope of Fourteenth Amendment liberty.[159]

After *Griswold* and *Roe*, the Court rebuffed the use of substantive due process to invalidate state regulation of private conduct in *Bowers v. Hardwick* and *Washington v. Glucksberg*.[160] In *Bowers*, the Court rejected a claim that state laws criminalizing sodomy violated the Due Process Clause, at least as to acts of sodomy committed in a home between consenting adults.[161] In *Glucksberg*, the Court rejected a claim that a state law criminalizing assisted suicide violated the Due Process Clause.[162] *Bowers* and *Glucksberg* persuaded some commentators to announce (again) the demise of substantive due process.[163] As one proclaimed, "now the Court [in *Bowers*] has called the evolution of [substantive due process] to a halt and, I believe, has rendered a decision that may portend the second death of substantive due process."[164]

But seventeen years after *Bowers*, the Court overruled that decision in *Lawrence v. Texas* and held that the Fourteenth Amendment invalidated state laws criminalizing sodomy, at least as to acts of sodomy committed in a home.[165] Fourteenth Amendment "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[166] Tracing the post-*Lochner* revival of substantive due process, but careful not to cite *Lochner* itself, the Court said, "[t]here are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters* and *Meyer v. Nebraska*; but the most pertinent beginning point is our decision in *Griswold v.*

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[159] *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974).

[160] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); Washington v. Glucksberg, 521 U.S. 702 (1997).

[161] 478 U.S. at 192–94.

[162] 521 U.S. at 735.

[163] *See, e.g.*, Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 216 (1987) ("[T]he beginning of the second death of substantive due process may be underway.").

[164] *Id.* at 215.

[165] 539 U.S. at 578.

[166] *Id.* at 562.

Connecticut."[167] The Court also relied on *Carey* and *Roe*.[168] *Lawrence* did not overrule *Glucksberg*, indeed, Justice Kennedy's majority opinion did not distinguish or even cite it.[169]

Endeavoring to explain how the Due Process Clause could have a substantive meaning broader than what the drafters of the clause in both the Fifth and Fourteenth Amendments might have envisioned, Justice Kennedy's opinion for the Court in *Lawrence* said:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[170]

Justice Scalia's dissent gleefully placed the majority's decision in the line of substantive due process decisions beginning with *Lochner*, noting that the Texas law punishing sodomy "undoubtedly imposes constraints on liberty."[171] He continued, "[s]o do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery."[172] Reminding the majority of the critical link between Fourteenth Amendment liberty and Fourteenth Amendment due process, Scalia wrote, "there is no right to 'liberty' under the Due Process Clause . . . . The Fourteenth Amendment *expressly allows* States to deprive their citizens of 'liberty,' *so long as 'due process of law' is provided*[.]"[173]

Scalia then pointed out that the Court's prior decisions (whether he agreed with them or not, and he probably did not) had ruled that the substantive

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[167] *Id.* at 564 (citations omitted) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Griswold v. Connecticut, 381 U.S. 479 (1965)). In his dissent, Justice Scalia argued that *Griswold* had "*expressly disclaimed* any reliance on the doctrine of 'substantive due process,' and grounded the so-called 'right to privacy' in penumbras of constitutional provisions *other than* the Due Process Clause." *Id.* at 594–95 (Scalia, J., dissenting) (emphasis in original) (citing *Griswold*, 381 U.S. at 481–82)). Scalia was referring to Justice Douglas's majority opinion in *Griswold*, ignoring the separate concurring opinions of Justices Goldberg, Harlan, and White, each of whom had implicitly relied on substantive due process. *Id.*

[168] *See id.* at 565–66 (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973)).

[169] *See id.* at 562–579.

[170] *Id.* at 578–79.

[171] *Id.* at 592 (Scalia, J., dissenting).

[172] *Id.*

[173] *Id.*

component of due process limited state impairment only of fundamental rights unless narrowly tailored to serve a compelling state interest,[174] and faulted the majority for its unwillingness to classify sodomy as a fundamental right, which would have triggered heightened scrutiny,[175] as *Roe* had done with respect to abortion.[176] Finally, Scalia predicted the Court's next major application of substantive due process: "[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution[.]'"[177]

Twelve years later, the Court acknowledged the accuracy of Justice Scalia's challenge in his *Lawrence* dissent, ruling that the "[t]he right of same-sex couples to marry . . . is part of the liberty promised by the Fourteenth Amendment[.]"[178] Although not explicitly invoking the doctrine of substantive due process, the Court clearly relied on the doctrine as well as the Equal Protection Clause: "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[179] Echoing the concept of the evolving nature of substantive due process expressed in *Lawrence*,[180] Justice Kennedy said, "[i]ndeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[181] In the same vein, he said:

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[182]

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[174] *Id.* at 593 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Reno v. Flores, 507 U.S. 292, 303 (1993); United States v. Salerno, 481 U.S. 739, 751 (1987); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989); Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[175] *See id.* at 593–94 (citing Bowers v. Hardwick, 478 U.S. 186, 192 (1986)).

[176] *Id.* at 595 (citing Roe v. Wade, 410 U.S. 113, 155 (1973)).

[177] *Id.* at 605 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 699 (2000)).

[178] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015). Forty-three years earlier, the Court had dismissed for want of a substantial federal question an appeal from a judgment denying a same-sex couple the right to marry. *See* Baker v. Nelson, 409 U.S. 810 (1972), *overruled by Obergefell*, 135 S. Ct. at 2584.

[179] *Obergefell*, 135 S. Ct. at 2604.

[180] *See* 539 U.S. 558, 578–79 (2003).

[181] *Obergefell*, 135 S. Ct. at 2596.

[182] *Id.* at 2598.

Like the majorities in *Griswold*, *Roe*, and *Lawrence*, the majority in *Obergefell* made no mention of substantive due process and, of course, did not cite *Lochner*.[183] But, as in the earlier decisions, the author of the principal dissent recognized substantive due process when he saw it.[184] "Ultimately," said Chief Justice Roberts, "only one precedent offers any support for the majority's methodology: *Lochner v. New York*."[185] He continued:

> The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to . . . . Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*.[186]

The two reincarnations of substantive due process, first in *Griswold* and *Roe* and again in *Lawrence* and *Obergefell*,[187] raise two basic questions for the future. First, will substantive due process be used to invalidate only statutes affecting non-economic rights or also statutes affecting economic rights? Or, to put it differently, will the distinction between non-economic and economic rights with respect to a presumption of validity, discussed in the famous footnote four of *Carolene Products*, be maintained?[188] Second, whether applied as a limitation only on non-economic rights or also on economic rights, will substantive due process be applied narrowly to invalidate only laws that are plainly arbitrary or broadly to invalidate any laws that a majority of the Supreme Court considers unwise? To put that question differently, will the Court rule in the spirit, if not the name, of *Lochner*?

Emboldened by the two reincarnations of substantive due process, those opposed to statutes challenged as limiting either non-economic or economic rights in violation of the Due Process Clauses of the Fifth and Fourteenth

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[183] *See id.* at 2593–608.

[184] *See id.* at 2621 (Roberts, C.J., dissenting).

[185] *Id.* (citations omitted) (citing Lochner v. New York, 198 U.S. 45 (1905)).

[186] *Id.* (citing *Lochner*, 198 U.S. at 61).

[187] One—perhaps the only—example between *Lawrence* and *Obergefell* of the use of substantive due process to invalidate a prohibition on the exercise of an allegedly non-economic right is *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*. 445 F.3d 470 (D.C. Cir. 2006). *Abigail Alliance* upheld a claim by terminally ill patients that a policy of the Food and Drug Administration denying them access to investigational drugs not approved for public use violated their right to Fourteenth Amendment liberty without due process of law. *Id.* at 486 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The panel decision was subsequently overturned on rehearing in banc. *See* Abigail All. for Better Access to Dev. Drugs v. von Eschenbach, 495 F.3d 695 (D.C. Cir. 2007).

[188] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

Amendments can be expected to mount vigorous challenges to such statutes in the hope that judges and justices, likely to be appointed in the next few years, will be receptive to such lawsuits. I am not predicting the outcomes of such cases, only suggesting that they should be closely watched.

The Queer Case of the LGBT Movement

Justin O'Neill*

Abstract

In Summer 2018, Supreme Court Justice Anthony Kennedy announced his retirement. Commentators immediately began to assess and express concern about what his departure would mean for liberal legal priorities. Yet, socio-legal scholars have long been skeptical of the ability of the courts to push forward significant social change. Why, then, the panic over Justice Kennedy's retirement? This Article suggests one answer is that the rapid success of the marriage equality movement revitalized liberals' faith in the courts. Yet, what made marriage equality particularly amenable to litigation success? This article explores the history of marriage equality in the courts and argues that four factors stand out as relevant: (1) the role that individual litigants, deciding to bring lawsuits disconnected from the central movement, played in pushing the movement forward; (2) the privileged nature of marriage litigants and the claims they were making; (3) the particularly legal nature of the social relationship of marriage; and (4) the existence of Anthony Kennedy on the Supreme Court during the period in which LGBT rights litigation occurred. This article suggests that a deeper understanding of the history of the marriage equality litigation movement will lead to richer conversations about the role of law and courts play in social change.

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Aside from a few minor cliques, homosexuals are in reality almost totally lacking in feelings of solidarity; in fact, it would be difficult to find another class of mankind which has proved so incapable of organizing to secure its basic human and legal rights.
- Magnus Hirschfeld[1]

I. INTRODUCTION

On June 27, 2018, Anthony Kennedy announced his retirement after thirty years as an Associate Justice of the United States Supreme Court.[2] The reaction was swift. Conservatives expressed excitement over Kennedy's potential replacement.[3] On the other side of the aisle, liberal and progressive commentators immediately began to express their worries about what the future might hold for abortion,[4] gay rights,[5] affirmative action,[6] voting

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[1] JAMES D. STEAKLEY, THE HOMOSEXUAL EMANCIPATION MOVEMENT IN GERMANY 82 (1975). Hirschfeld was a prominent German sexologist in the early twentieth century and supporter of homosexual rights. *See generally* ELANA MANCINI, MAGNUS HIRSCHFELD AND THE QUEST FOR SEXUAL FREEDOM (2010).

[2] Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html.

[3] *See, e.g.*, Kevin Daley, Kennedy Calls It Quits: Longtime Swing Justice Hands Trump the Biggest Gift of His Presidency, THE DAILY CALLER (June 27, 2018), http://dailycaller.com/2018/06/27/justice-kennedy-retires/; Editors, Good Riddance, Justice Kennedy, NAT'L REV. (June 28, 2018), https://www.nationalreview.com/2018/06/anthony-kennedy-retirement-good-riddance-rulings-aggrandized-power-of-court/.

[4] *See, e.g.*, Amanda Michelle Gomez, *This Is What Justice Kennedy's Retirement Means for Abortion Rights*, THINKPROGRESS (June 27, 2018), https://thinkprogress.org/justice-kennedy-retirement-states-where-abortion-could-be-illegal-fc01a0c3d97a/.

[5] *See, e.g.*, German Lopez, *Anthony Kennedy's Retirement Is Devastating for LGBTQ Rights*, VOX (June 27, 2018), https://www.vox.com/identities/2018/6/27/17510902/anthony-kennedy-retirement-lgbtq-gay-marriage-supreme-court.

[6] *See, e.g.*, Ian Millhiser, *The Horrifying Consequences of Justice Kennedy's Retirement*, THINKPROGRESS (June 27, 2018), https://thinkprogress.org/the-horrifying-consequences-of-

rights,[7] and partisan gerrymandering.[8] Despite coming on the heels of a term in which he did not side with the liberals in a single 5–4 decision despite his reputation as the Court's swing Justice,[9] Kennedy's retirement nonetheless gave rise to a general consensus that things were going to get much worse on many of the issues that the left cares most about. How did we get to a point where the retirement of a single conservative Supreme Court Justice led to a widespread panic on the part of the left about the future of social change efforts?

This reaction might be even more puzzling to some socio-legal scholars, who have long been skeptical of the ability of courts to engage in significant social change in the first place. A substantial body of scholarship engages with this question. Gerald Rosenberg's widely-read book *The Hollow Hope* purports to demonstrate empirically that major celebrated Supreme Court decisions like *Brown v. Board of Education*[10] and *Roe v. Wade*[11] had much less empirical, on-the-ground impact than generally assumed.[12] Empirical work by scholars such as Lauren Edelman show that not only are courts not likely to enact progressive social change, but that they tend to interpret the Civil Rights Act and other anti-discrimination laws in such a way that leads to denying relief except under the narrowest of circumstances,[13] while others have shown how the courts have limited the ability of people to access their constitutional and statutory rights[14] and why it is difficult for plaintiffs to win

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justice-kennedys-retirement-90c450d9d106/ ("Kennedy is a relative moderate on issues of race compared to Chief Justice John Roberts.").

[7] *See, e.g.,* Richard L. Hasen, *How Justice Kennedy's Successor Will Wreak Havoc on Voting Rights and American Democracy*, SLATE (July 2, 2018), https://slate.com/news-and-politics/2018/07/justice-kennedys-successor-will-wreak-havoc-on-voting-rights-and-democracy.html.

[8] *See* Mark Joseph Stern, *Partisan Gerrymandering Is About to Get Much Worse*, SLATE (June 28, 2018), https://slate.com/news-and-politics/2018/06/partisan-gerrymandering-is-going-to-be-much-worse-after-anthony-kennedys-retirement.html.

[9] Kedar S. Bhatia, *Final Stat Pack for October Term 2017*, SCOTUSBLOG 43–45 (June 29, 2018), http://www.scotusblog.com/wp-content/uploads/2018/06/SB_Stat_Pack_2018.06.29.pdf. The only 5-4 case where Justice Kennedy even joined with a majority of the liberals was *Florida v. Georgia*, a water rights case without obvious political valence, in which he and Chief Justice Roberts joined with Justices Sotomayor, Ginsburg, and Breyer. 138 S. Ct. 2502 (2018).

[10] 347 U.S. 483 (1954).

[11] 410 U.S. 113 (1972).

[12] GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008). For a brief discussion of Rosenberg's evidence on this point, see *infra* Part III-A.

[13] *See* LAUREN EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2016).

[14] *See, e.g.,* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); ERWIN CHEMERINSKY, CLOSING

even when their cases go forward.[15] This also relates to Derrick Bell's classic work arguing that legal rights will only be expanded (in courts or otherwise) when the majority's and minority's interests converge.[16] These examples, along with many others, suggests that the courts were never the right place to put the hopes and dreams of liberal reformers.

This Article argues that one reason for the widespread liberal panic is the remarkable and unusual success of the legal movement for marriage equality. This success helped reinforce the country's modern view of the Court as a source of progressive legal and social change. By achieving a widespread and fairly complete victory that occurred largely in the courtroom (rather than through legislatures and public referenda[17]), the marriage equality movement served as a false beacon of hope that let the Roberts Court continue its reputation as a potential source of protection for individual and group-based rights, even while it simultaneously gutted voting rights,[18] limited access to certain types of abortion,[19] increased the role of monied interests in elections,[20] and made it more difficult for employees to obtain reproductive health care from their employers,[21] to recover for gender-based pay discrimination,[22] or to even sue their employers for discrimination at all.[23] In fact, with few exceptions, the Roberts Court has explicitly rolled back civil

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THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017).

[15] *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

[16] Derrick Bell, Brown v. Board *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

[17] Some states enacted marriage equality through their legislatures or through public referenda. *See* Gizelle Lugo et al., *Same Sex Marriage Ballot Initiatives: Voters in Strong Backing for Equality*, THE GUARDIAN (Nov 7, 2012), https://www.theguardian.com/world/2012/nov/07/same-sex-marriage-ballot-initiatives. But most of the country came to marriage equality through litigation, or legislative activity that occurred in response to litigation. *See infra* Part II.

[18] Shelby Cty. v. Holder, 570 U.S. 529, 557 (2013) (holding §4(b) of the Voting Rights Act of 1965 unconstitutional).

[19] Gonzalez v. Carhart, 550 U.S. 124, 168 (2007) (upholding a federal statute prohibiting certain late-term abortions).

[20] Citizens United v. FEC, 558 U.S. 310 (2010) (overruling several Supreme Court precedents that limited the role corporate entities could play in election activity).

[21] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that a mandate to provide contraceptives substantially burdened a closely-held corporation's exercise of religion under the Religious Freedom Restoration Act).

[22] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (finding that Title VII pay discrimination claims are time-barred when brought more than 180 days after the initial pay-setting decision was made).

[23] Vance v. Ball State Univ., 570 U.S. 421 (2013) (narrowing the definition of a "supervisor" for Title VII vicarious liability claims).

rights at every opportunity—except for gay[24] rights. So what made gay rights different? Why did the marriage equality movement manage to achieve meaningful success in the courts where so many other movements failed?

This Article also suggests that understanding the modern LGBTQ rights movement is essential for understanding the current political and legal cultural moment. While studies of inequality tend to focus on race, gender, and class, there is strong evidence that sexuality plays as large a role in shaping political and social attitudes and outcomes as these categories do.[25] LGBTQ people still face high levels of discrimination[26] and violence,[27] particularly queer people of color and transgender women.[28] And despite a general rise in support of formal rights, sociologists have shown that heterosexual people still display prejudice against same-sex couples in so-called "informal rights," such as engaging in public displays of affection.[29] Thus, while the study of the LGBTQ movement continues to be important objectively for LGBTQ people, it also contributes to our understanding of law and social change more generally as an example of a particularly effective litigation movement.

Part II of this Article recaps the history of same-sex marriage litigation in the United States, with an eye towards exploring the particular aspects of that history that may have led to heightened levels of success in the courts. Part III discusses in more detail some of the literature addressing the relationship between law, social movements, and social change, paying special attention

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[24] The slippage between terms like "homosexual," "gay," "gay and lesbian," "LGBT," and "LGBTQ" in this paper represent the conceptual difficulties involved in discussing this movement as one movement. A whole separate paper could be written on the various ways the movement has used different labels over time. In this paper, I attempt to use the term that seems most descriptive for the time and for the particular issue being addressed. My choice of language is intended to be descriptive, not exclusionary.

[25] *See, e.g.*, Landon Schnabel, *Sexual Orientation and Social Attitudes*, 4 SOCIUS 1 (2018).

[26] *E.g.*, *LGBT Youth Experiences with Discrimination, Harassment, and Bullying in Schools*, THE WILLIAMS INST. (Mar. 22, 2018), https://williamsinstitute.law.ucla.edu/press/lgbt-youth-bullying-press-release/; Susan Miller, *Tolerance Takes a Hit: Americans Less Accepting of LGBT People in 2017, Survey Shows*, USA TODAY (Jan. 25, 2018), https://www.usatoday.com/story/news/nation/2018/01/25/tolerance-takes-hit-americans-less-accepting-lgbt-people-2017-survey-shows/1062188001/.

[27] John Paul Brammer, *Anti-LGBTQ Homicides Nearly Doubled in 2017, Report Finds*, NBC NEWS (Jan. 24, 2018), https://www.nbcnews.com/feature/nbc-out/anti-lgbtq-homicides-nearly-doubled-2017-report-finds-n840011.

[28] *Id.* (identifying thirty-seven of fifty-two anti-LGBTQ homicides as occurring against people of color, predominantly black, and twenty-seven of fifty-two occurring against transgender women).

[29] Long Doan, Annalise Loehr & Lisa R. Miller, *Formal Rights and Informal Privileges for Same-Sex Couples: Evidence from a National Survey Experiment*, 79 AM. SOC. REV. 1172, 1118 (2014).

to classic works in the field that suggest limits on the ability of courts and litigation to make meaningful difference in areas of progressive social concern. Part IV explores a variety of hypotheses about what may have contributed to make marriage equality more successful than the literature in Part III might have suggested it would be. Theories explored include the way that individual plaintiffs played off of and pushed forward the institutionalized movement as a whole, the relative privilege of the plaintiffs in these cases, an analysis of the way same-sex marriage is a particularly *legal* as opposed to (but complimentary to) a *social* right, and the idea that all of the success of the movement might be explained merely by the presence of Justice Kennedy. Part V briefly summarizes and concludes.

II. HISTORY OF U.S. MARRIAGE EQUALITY LITIGATION

In 2015, the U.S. Supreme Court ruled that states were required under the Fourteenth Amendment of the U.S. Constitution to issue and recognize marriage licenses between two people of the same sex.[30] Thus culminated a relatively short history of litigation designed to equalize marriage rights between same-sex and different-sex couples. The modern, full-fronted attack on marriage inequality began in the courtroom in 1991, when three same-sex couples applied for marriage licenses in Hawaii, were denied, and sued the state in local courts. Their eventual surprising, (albeit partial) victory[31]—discussed in greater detail below—led to a flurry of marriage litigation, ultimately resolving the core issue throughout the country a mere twenty-four years later, representing one of the progressive legal movement's greatest victories in this time period.

Contrast this relatively short passage of time with the fifty-eight years that elapsed between the Supreme Court's opinion in *Plessy v. Ferguson*[32] (itself not even the first attempt to push the cause of formal equal rights for African-Americans in the courts[33]) and the *Brown v. Board of Education* decision that did away with *Plessy*'s "separate but equal" standard.[34] Likewise, nearly an entire century passed between the Supreme Court's 1873 decision in *Bradwell v. Illinois*, ruling that women could constitutionally be barred from the legal profession,[35] and its 1971 opinion in *Reed v. Reed*, holding that sex-

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[30] Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015).

[31] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

[32] 163 U.S. 537 (1896).

[33] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (holding the Civil Rights Act of 1875 unconstitutional).

[34] 347 U.S. 483 (1954).

[35] 83 U.S. 130 (1873).

based distinctions were at least subject to some version of heightened scrutiny under the Equal Protection Clause.[36]

In addition to the quick pace of marriage equality's legal victory, even the history of gay activism itself is a relatively short one. The concept of the "homosexual" as a separate sort of person, rather than homosexuality as simply an (immoral) activity that any person might engage in, occurred no earlier than the mid-1800s.[37] A sustained movement for sexual minorities did not exist until the formation of The Mattachine Society in 1950.[38] And even once these social movement organizations managed to start organizing around a shared gay identity and fighting for equal rights based on sexual orientation and gender identity, homosexuality itself was still largely illegal in the United States in the form of laws that criminalized same-sex sodomy, providing an added complication for organizers. As late as 1971, the Lambda Legal Education and Defense Fund, now one of the larger national LGBT legal organizations, was denied a license to incorporate in New York City and had to fight for nearly two years for the mere right to exist and to begin helping LGBT people in the courtroom.[39] The fact that the creation of a gay identity and a gay movement (and the ability of gay legal organizations to even participate in lawsuits in an organized fashion) occurred much more recently than they did with other minority groups makes the rapid speed at which the movement managed to achieve significant rights all the more remarkable. This Part briefly explores the history of marriage equality litigation in the United States.

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[36] 404 U.S. 71 (1971).

[37] *See* John D'Emilio, *Capitalism and Gay Identity*, *in* MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY (1992); 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (1978).

[38] JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 58 n.2 (1983) ("[T]he founding of the Mattachine Society . . . mark[s] the start of an *unbroken* history of homosexual and lesbian organizing that continues until this day."). A Chicago-based gay rights organization, the Society for Human Rights, was founded in 1924 but was quickly shut down the following year after its leaders were arrested. JAMES T. SEARS, BEYOND THE MASK OF THE MATTACHINE 43–45 (2006).

[39] Despite copying verbatim the application of the previously-incorporated Puerto Rican Legal Defense and Education Fund, replacing all the appearances of the words "Puerto Ricans" with the word "homosexuals," the application was denied for being "neither benevolent nor charitable." ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS 1–2 (2005).

A. The Early Days: Baker v. Nelson, the Marriage Debate, and Baehr v. Lewin

While the first major advancements towards marriage equality began in the 1990's and culminated in 2015, the goal of advancing same-sex marriage rights (either directly or through non-marital partnership status) had been discussed since the very early days of the movement.[40] In fact, the issue had even come to the Supreme Court once before in the 1971 case *Baker v. Nelson*.[41] *Baker* was an appeal of a decision by the Supreme Court of Minnesota, which had ruled that the state was not required to issue marriage licenses to two people of the same sex.[42] By at least one account, the justices of the Minnesota Supreme Court were completely uninterested in the case, asking not a single question during the entire 75-minute argument.[43] One Justice was said, by later accounts, to have turned his chair towards the wall so as not have to look at the lawyers arguing the case.[44] The gay plaintiffs appealed the decision to the Supreme Court. The Supreme Court was legally required to hear the appeal,[45] yet the Court dismissed the case regardless, claiming "want of a substantial federal question."[46] This is difficult to reconcile with the lower court decision, which explicitly ruled that Minnesota's marriage law "does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution," thus plainly presenting a substantial federal question.[47] Still, the Supreme Court's dismissal, at least in theory, held precedential value until overturned in 2015's *Obergefell v. Hodges*.[48] Some federal courts explicitly held prior to

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[40] *See* Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 114-125 (2014) (showing the ways movement activists utilized marriage rhetoric in 1980's fights over domestic partnerships).

[41] 409 U.S. 810 (1972).

[42] Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

[43] WILLIAM N. ESKRIDGE & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE'VE LEARNED FROM THE EVIDENCE 22 (2006).

[44] *Id.* The story may be apocryphal, as there does not seem to be any contemporaneous evidence supporting it. *See* Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J. L. & HUMAN. 1, 47 n. 406 (2015).

[45] This was prior to 1988 when Congress changed the law, allowing the Supreme Court to largely control its own docket by eliminating most of the Supreme Court's non-constitutional mandatory jurisdiction. Supreme Court Case Selections Act, 28 U.S.C. § 1257 (1988).

[46] *Baker*, 409 U.S. at 810.

[47] *Baker*, 191 N.W.2d at 187.

[48] 135 S. Ct. at 2605.

Obergefell that they were bound by *Baker v. Nelson* to also dismiss same-sex marriage claims,[49] or at least felt required to engage with the argument.[50]

While the LGBT movement and its associated legally-oriented social movement organizations discussed partnership rights (often explicitly in terms of marriage or marriage equivalents) from the beginning,[51] not everyone in the movement was comfortable with that priority. There were many people on both sides of the question, but the prototypical example of this divide was a debate in the pages of *OUT/LOOK National Lesbian & Gay Quarterly*, a short-lived but highly-influential LGBT magazine noted for its inclusion of both gay men and lesbian voices in the same book, and its attempt to marry academic discourse around issues of sexuality with the lived experiences and activisms of LGBT people.[52] In their Fall 1989 issue, the magazine published a written debate between two executives of Lambda Legal, Tom Stoddard (the executive director) and Paula Ettlebrick (the legal director).[53] Stoddard took up the pro-gay marriage side. He argued that there were practical reasons to support same-sex marriage, namely the economic benefits.[54] He also argued that there were political reasons, saying that the idea of two men or two women marrying challenges heteronormative institutions so much that it is a true litmus test for heterosexual support of gay people and "most likely to lead to a world free from discrimination against lesbians and gay men."[55] And finally he argued from a philosophical point of view, that the terms of the argument should focus solely on the desirability of the *right* to marry, which is a separate question from whether marriage itself is a good or bad thing.[56]

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[49] *See, e.g.*, DeBoer v. Snyder, 772 F.3d 388, 399–402 (6th Cir. 2014) (refusing to consider *Baker* overturned without a clear statement from the Supreme Court); Jackson v. Abercrombie, 844 F. Supp. 2d 1065, 1084–86 (D. Haw. 2012); Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1002–03 (D. Nev. 2012).

[50] *See, e.g.*, Bostic v. Schaefer, 760 F.3d 352, 375 (4th Cir. 2014) ("In light of the Supreme Court's apparent abandonment of *Baker* and the significant doctrinal developments that occurred after the Court issued its summary dismissal in that case, we decline to view *Baker* as binding precedent[.]"); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1194–95 (D. Utah 2013).

[51] *See* NeJaime, *supra* note 40; Boucai, *supra* note 44, at 1.

[52] *See* OUT/LOOK AND THE BIRTH OF THE QUEER, http://www.queeroutlook.org (last visited Sept. 21, 2018).

[53] Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK NAT'L GAY AND LESBIAN Q., Fall 1989, at 9–13; Paula L. Ettlebrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY AND LESBIAN Q., Fall 1989, at 9, 14–17. Digital scans of the entire OUT/LOOK archive is available online. *Electronic Archive of OUT/LOOK*, LESBIAN POETRY ARCHIVE (Sep 17, 2012), http://www.lesbianpoetryarchive.org/outlook.

[54] Stoddard, *supra* note 53, at 10.

[55] *Id.* at 12.

[56] *Id.* at 13.

Ettlebrick took up the opposite position. Starting with the quote, "Marriage is a great institution . . . if you like living in institutions," she drew out a difference between a fight for "gay rights" and one for "gay liberation."[57] The latter requires not just access to mainstream institutions, but challenging those institutions and allowing gay people to define their own types of relationships and methods of relating to one another and the world at large.[58] She also was concerned that arguing for same-sex marriage requires making the argument that gay men and lesbians are no different from heterosexuals, while she would prefer room to say that they are different, albeit still entitled to equal protection.[59] Finally, she focused on encouraging family choice and diversity rather than a one-size-fits-all marriage proscription for same-sex couples.[60] Since Ettlebrick's critique, many other queer activists have also questioned the long-time focus on same-sex marriage that has driven the movement. Some have argued that this focus on marriage has marginalized the diverse forms of family that queer people have developed for themselves over the years,[61] while others have suggested that the focus on marriage might reinforce particular kinds of state-sanctioned racism.[62] While an outsider looking at the surface of the LGBT movement during the mid-2000's or early 2010's would see a generally unified front in favor of extending marriage rights,[63] that broad consensus was never inevitable and it hid much diversity of opinion that existed outside of the mainstream LGBT litigation organizations.

After *Baker* and a pair of other equally unsuccessful cases in the 1970's,[64] and amidst the debate about the wisdom and desirability of pursuing same-sex marriage rights, marriage equality cases did not return to the courts in a serious way for some time. The start of the modern race towards marriage equality began in 1991, when three same-sex couples sued the state of

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[57] Ettelbrick, *supra* note 53, at 9, 14.

[58] *Id.*

[59] *Id.* at 14–16.

[60] *Id.* at 16.

[61] *See, e.g.*, NANCY POLIKOFF, BEYOND (STRAIGHT AND) GAY MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008).

[62] *See* Marlon M. Bailey, Priya Kandaswamy & Mattie Udora Richardson, *Is Gay Marriage Racist?*, *in* THAT'S REVOLTING! GAY STRATEGIES FOR RESISTING ASSIMILATION (Mattilda Bernstein Sycamore ed., 2008).

[63] *See* Andrew R. Flores, *Is There a Debate on Same-Sex Marriage in the LGBT Community?*, THE BILERICO PROJECT (Oct. 4, 2012), http://bilerico.lgbtqnation.com/2012/10/is_there_a_debate_on_same-sex_marriage_in_the_lgbt.php (showing that 85% of LGBT likely voters in 2012 favored marriage equality).

[64] Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015). For a detailed discussion of these two cases, along with *Baker*, see generally Boucai, *supra* note 51.

Hawai'i for denying them marriage licenses.[65] Importantly, those couples were represented by a civil rights attorney, Daniel Foley, that had no connection to the mainstream LGBT movement.[66] Lambda Legal and the ACLU had both specifically declined to provide representation, reflecting both pragmatic concerns about the lack of likelihood of success as well as the ideological concerns about the wisdom of making marriage equality a core issue for the movement,[67] such as those espoused by Ettlebrick. The case proceeded without representation from these organizations, but nonetheless, the Hawai'i Supreme Court ruled that the state constitution required the state's prohibition on same-sex marriages to pass strict scrutiny as a form of sex discrimination and sent the case back to the trial court for further proceedings.[68] This first shocking victory for same-sex marriage galvanized the movement and put the topic squarely near the top of the LGBT movement's agenda for the next two decades.

The *Baehr* case also had negative after-effects. Hawai'i passed a state constitutional amendment prohibiting same-sex marriages rather than follow the court order[69] (though with it the state legislature also created the nation's first statewide same-sex partner benefits program[70]). And before *Baehr* had come back up to the Hawai'i Supreme Court, Congress, in anticipation, passed the Defense of Marriage Act, which prohibited the federal government from recognizing marriage between people of the same sex and allowed states to refuse to recognize same-sex marriages performed in other states.[71] Thus, for the first time, there was explicit federal law designed to stop the spread of equal marriage rights for same-sex couples. This backlash no doubt made life more difficult for LGBT rights advocates, but conditions of possibility emerged—now that legal victory was at least theoretically possible, the courts would continue to serve as a battleground in the emerging cultural war over marriage.

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[65] Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993), *abrogated by Obergefell*, 135 S. Ct. 2584 (2015).

[66] Michael D. Sant'Ambrogio & Sylvia A. Law, Baehr v. Lewin *and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 708–09 (2011).

[67] CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 164–65 (2010). While they refused to represent the plaintiffs, both the ACLU and Lambda Legal filed amicus briefs with the Hawai'i Supreme Court in support of the marriage equality position. *See Baehr*, 852 P.2d at 48. After the Hawai'i Supreme Court ruling, Lambda attorneys joined the case as co-counsel. BALL, *supra* note 67, at 173.

[68] *Baehr*, 952 P.2d at 67–68.

[69] HAW. CONST. art. I, § 23.

[70] HAW. REV. STAT. §§ 572C (1997).

[71] Defense of Marriage Act, 1 U.S.C. § 7 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

B. Building Momentum

Despite the backlash to same-sex marriage represented by the passage of the Defense of Marriage Act, it was not long before the marriage equality litigation tree bore more fruit. In 1999, the Vermont Supreme Court ruled in *Baker v. State* that the Vermont Constitution required equal access to the benefits of marriage for same-sex and different-sex couples.[72] Notably, however, the court refused to say that gays and lesbians were entitled to access the institution of marriage itself.[73] Instead, the court required the Vermont legislature to devise a solution to allow same-sex couples access to the *benefits* of marriage but did not proscribe what form that access had to take.[74] The legislature responded by passing a bill authorizing civil unions for same-sex couples, but not marriage rights.[75] In fact, the legislature explicitly defined marriage as being only between a man and a woman in the civil union legislation, a definition that had not explicitly appeared in Vermont law before.[76] Despite this caveat, several state legislators who voted for the bill lost their seats at the next election for being perceived as too friendly to same-sex couples.[77]

Same-sex marriage advocates would not be waiting long for their first unequivocal court victory, however. In 2003's *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court ruled that the state was required to offer marriage on an equal basis to same-sex couples.[78] Despite some attempts by the state legislature and Governor Romney to stop the ruling from taking effect, Massachusetts became the first state to issue legal marriage licenses to same-sex couples.[79]

Yet *Goodridge* also revitalized the backlash to LGBT rights. It was in response to this decision that President George W. Bush, in his 2004 State of the Union address, proposed a Federal Marriage Amendment to explicitly

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[72] 744 A.2d 864, 867 (Vt. 1999).

[73] *Id.* at 886–87.

[74] *Id.*

[75] VT. STAT. ANN. tit. 15, §§ 1201-07 (2000).

[76] *Id.* at § 1201(4).

[77] Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1510–12 (2016).

[78] 798 N.E.2d 941, 948 (Mass. 2003).

[79] Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriages*, N.Y. TIMES (May 17, 2004), https://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html. Gavin Newsom, as mayor of San Francisco, began issuing marriage licenses to same-sex couples in February 2004, but the California courts later ruled that he had no authority to grant these licenses and voided them all, leaving the Massachusetts marriages to be the first ones with actual legal effect. Lockyer v. City and Cty. of San Francisco, 95 P.3d 459, 464–65, 499 (Cal. 2004).

ban same-sex marriage in the Constitution.[80] Following his call, Congress took up the proposed Federal Marriage Amendment, where it received a majority of votes in the House of Representatives, though far short of the 2/3 majority required for a constitutional amendment.[81] In the Senate, a cloture vote to consider the amendment failed 48–50.[82] Undeterred, and perhaps seeing the writing on the wall as the courts continued to issue sympathetic rulings on equal marriage rights, anti-marriage equality activists began the process of pushing for same-sex marriage bans in state constitutions across the country. On Election Day 2004 alone, voters in eleven states passed bans on same-sex marriage.[83]

Still, conditions federally were not strong enough to support the passing of a marriage amendment. Yet, neither were they positive for same-sex marriage activists. Mainstream LGBT legal organizations were steadfast in their refusal to challenge same-sex marriage bans in federal court, preferring to stay in the state courts.[84] A bad state court ruling would be limited to the state in which it happened, so the logic went. But a bad federal court ruling would have implications for the entire country.[85] Many activists took away from the movement's prior defeat in 1986's *Bowers v. Hardwick*, a Supreme Court case that upheld the constitutionality of state-level sodomy bans,[86] that state courts would be a more promising avenue for LGBT rights.[87] The bad precedent in *Bowers* actually made marriage claims even more difficult from a doctrinal point of view—how do you argue that states are allowed to *criminalize* same-sex sexual behavior (the holding of *Bowers*), while they must also extend marriage rights to these de facto criminals?[88]

But there were also several factors counseling against pessimism in the value of the courts to achieve the movement's goals. Chief Justice Burger

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[80] *Text of President Bush's 2004 State of the Union Address*, WASH. POST (Jan 20, 2004), http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html.

[81] H.J. Res. 106, 108th Cong. (2004).

[82] S.J. Res. 40, 108th Cong. (2004). Senators John Kerry and John Edwards, the Democratic presidential and vice-presidential candidates, respectively, abstained from voting.

[83] James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES (Nov 4, 2004), https://www.nytimes.com/2004/11/04/politics/campaign/samesex-marriage-issue-key-to-some-gop-races.html.

[84] *See* MICHAEL KLARMAN, FROM THE CLOSET TO THE ALTAR 216 (2013).

[85] *Id.*

[86] 478 U.S. 186, 196 (1986).

[87] BALL, *supra* note 67, at 256–58 (discussing the choice to litigate even federal claims in state courts); ANDERSEN, *supra* note 39, at 98–106 (exploring strategic decisions about litigating sodomy bans in state courts post-*Bowers*).

[88] *See* Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting) ("If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.").

and Justices Powell and White, who together constituted 3/5 of the majority in *Bowers*, were no longer on the Court by the mid-1990's.[89] The new Rehnquist Court had actually issued a favorable opinion towards gay rights in *Romer v. Evans*, a 1996 case which held that a Colorado constitutional amendment banning the state and all of its localities from enacting any protection from discrimination on the basis of sexual orientation was unconstitutional under the Equal Protection Clause.[90] Even Justice O'Connor, who had sided with the majority *against* the gay plaintiffs in *Bowers*,[91] joined the majority *favoring* the gay plaintiffs in *Romer*.[92] Based on the changing make-up of the Court and the positive outcome in *Romer*, there was at least some reason to believe that the Supreme Court had become somewhat less hostile to gay plaintiffs than they once might have been.

Against this backdrop, and despite their skepticism of using the federal courts, activists found themselves with a rare opportunity to re-challenge sodomy bans. When news of the arrests of John Lawrence Jr. and Tyron Garner in Texas for engaging in homosexual conduct in Lawrence's bedroom reached activists from Lambda Legal, they decided to use them as an opportunity to try again to invalidate state sodomy laws and overrule *Bowers*.[93] Emboldened by the recent decision in *Romer*, and knowing that sodomy prosecutions were so rare that it might be many years (if ever) before other plaintiffs with clear standing to challenge the bans appeared,[94] movement lawyers took the case all the way to the Supreme Court. Their strategy paid off. The Court, lead again by Justice Kennedy who had written the opinion in *Romer*, expressly overruled *Bowers* and declared sodomy bans

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[89] Bernard Weinraub, *Burger Retiring, Rehnquist Named Chief; Scalia, Appeals Judge, Chosen for Court*, N.Y. TIMES (June 18, 1986), https://www.nytimes.com/1986/06/18/us/burger-retiring-rehnquist-named-chief-scalia-appeals-judge-chosen-for-court.html; Stuart Taylor Jr., *Powell Leaves High Court; Took Key Role on Abortion and on Affirmative Action*, N.Y. TIMES (June 27, 1987), https://www.nytimes.com/1987/06/27/us/powell-leaves-high-court-took-key-role-on-abortion-and-on-affirmative-action.html; Linda Greenhouse, *The Supreme Court; Justice White Announces He'll Step Down From High Court*, N.Y. TIMES (Mar. 20, 1993), https://www.nytimes.com/1993/03/20/us/the-supreme-court-white-announces-he-ll-step-down-from-high-court.html.

[90] *Romer*, 517 U.S. at 635.

[91] *See Bowers*, 478 U.S. 186.

[92] *See Romer*, 517 U.S. 620.

[93] DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 124-30 (2012).

[94] Other plaintiffs considered by movement litigators were men convicted of soliciting sodomy, thus raising the "specter of gay men cruising for sex in public parks" and possibly losing judicial sympathy, or people who had not yet been criminally prosecuted, leaving open an argument about lack of standing. ANDERSEN, *supra* note 39, at 128–29. Given their other choices, the presentment of Lawrence and Garner's case "was a gift to sodomy law reformers." *Id.* at 129.

an unconstitutional infringement on the right to substantive due process.[95] In a sign of the changing of the times, Justice O'Connor, as she had done in *Romer*, sided with the gay plaintiffs despite having ruled against them on the same exact issue in *Bowers*, though she wrote separately in an attempt to distinguish the two cases by ruling on equal protection rather than substantive due process grounds.[96] Justice Scalia wrote a scathing dissent, in which he predicted that the Court's opinion would inevitably lead to same-sex marriage, despite the majority's protestations to the contrary.[97]

Having two victories in the Supreme Court under their belt in less than ten years did not appear to make activists any less hesitant to use federal courts in the marriage context, however. The movement continued avoiding any use of the federal government at all to enshrine marriage rights, though they continued to lobby Congress to pass a non-discrimination act that covered sexual orientation and (sometimes) gender identity.[98] Meanwhile, state litigation continued apace. Between 2003 and 2009, activists received full or partial court victories in New Jersey,[99] California,[100] Connecticut,[101] and Iowa,[102] (as well as a major loss in New York[103]). Several of these victories in turn led to more backlash—in Iowa, several of the justices that ruled in favor of marriage equality lost their seats in recall elections,[104] and in California, voters passed Proposition 8 which stopped same-sex marriages in the state for several years.[105]

Proposition 8 was particularly devastating for the community. It was one thing for states to enact constitutional same-sex marriage bans where same-sex marriage was already disallowed. It was quite another thing to take away marriage rights from people who were already enjoying them. Over 18,000 same-sex couples had married in California between the California Supreme Court's decision that marriage was required under the state's Constitution

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[95] Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

[96] *Id.* at 582 (O'Connor, J., concurring).

[97] *Id.* at 605 (Scalia, J., dissenting).

[98] *See* Shailagh Murray, *Quandary Over Gay Rights Bill: Is It Better to Protect Some or None?*, WASH. POST (Oct. 18, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/17/AR2007101702164.html.

[99] Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

[100] In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

[101] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

[102] Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

[103] Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).

[104] Mallory Simon, *Iowa Voters Oust Justices Who Made Same-Sex Marriage Legal*, CNN (Nov. 3, 2010), http://www.cnn.com/2010/POLITICS/11/03/iowa.judges/index.html.

[105] Tamara Audi, Justin Scheck & Christopher Lawton, *California Votes for Prop 8*, WALL ST. J. (Nov. 5, 2008), https://www.wsj.com/articles/SB122586056759900673.

and the amending of that Constitution to ban such marriages.[106] The perceived cruelty of taking away rights from gay people, in a state perceived to be liberal and tolerant such as California, and on the same day of the election of Barack Obama as President which many celebrated as a particularly progressive moment in the country, stung. But while activists challenged the legality of Proposition 8 in California state courts (a case they would lose 6–1 before the same exact justices that voted 4–3 to bring same-sex marriage to California the year before),[107] they still refused to bring marriage cases federally.

This was the atmosphere in which Gerald Rosenberg wrote an expanded edition of his seminal book *The Hollow Hope*, reiterating his previous thesis that courts are often powerless to enact significant social change and explicitly calling out marriage equality litigators for failing to heed his warnings. In a new chapter on the marriage equality movement, Rosenberg argued that "succumbing to the 'lure of litigation' appears to have been the wrong move. . . . By litigating when they did, proponents of same-sex marriage moved too far and too fast ahead of the curve, leaping beyond what the American public could bear."[108] Even his frequent academic sparring opponent,[109] Michael McCann, said around the same time that "advocacy for gay and lesbian rights . . . has found very little to cheer about in the records of legal action."[110] Scholars of diverse theoretical backgrounds seemed to be in wide agreement that litigation in this area was proving to be a dud.

C. Federal Challenges

Despite Rosenberg's warning and the hesitancy of the mainstream movement organizations to engage in federal litigation, frustrated gay couples (along with the minority of movement activists who wanted to take

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[106] Karen Grigsby Bates, *18,000 Same-Sex Couples Await Ruling in California*, NPR (May 11, 2009), https://www.npr.org/templates/story/story.php?storyId=103965021. The California Supreme Court would rule that the same-sex couples married before the enactment of Proposition 8 were still legally married, as the marriages were legal under state law when they were entered into (in contrast to the people married in San Francisco in 2004 in contravention of state law). Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009).

[107] *Strauss*, 207 P.3d at 59.

[108] Rosenberg, *supra* note 12, at 419.

[109] *See infra* note 153 and accompanying text.

[110] Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI. 17, 34–35 (2006). McCann argues that, in contrast to litigation around issues of black civil rights, environmental issues, and animal rights, which have had some mixed success in the courts, litigators concerned with gay and lesbian rights (along with rights related to welfare and homelessness) "have generated far more backlash or countermobilization from reactionary forces in the United States." *Id.*

federal action but were rebuked by the larger movement) did not just passively accept their fate. If the movement was not interested in taking the case to the federal courts, then they would have to go outside the pre-existing movement apparatus. Chad Griffin, a former staffer for the Bill Clinton White House, grew frustrated with the reluctance of the mainstream LGBT organizations to take the fight against Proposition 8 to federal court and founded a new organization called American Foundation for Equal Rights.[111] The group hired superstar lawyers David Boies and Ted Olsen, famous rivals from either side of the political spectrum who had squared off on either side of *Bush v. Gore*[112] nearly a decade earlier, but neither of whom previously had any connection to issues of gay rights, to challenge Proposition 8 in federal court.[113] The case they filed, known as *Perry v. Schwarzenegger* at the district court, ended up being an important, though incomplete, victory for same-sex marriage advocates. The district court in the case was the first federal court to strike down a gay marriage ban as unconstitutional under the 14th Amendment.[114] More importantly, it did so after a lengthy twelve-day trial that served as a public venue for the airing of the legal arguments on both sides of the issue.[115] Judge Vaughn Walker included in his opinion eighty findings of fact related to same-sex marriage and its effect on society and (particularly) on children and parenting.[116] The 9th Circuit, in an opinion by the late Judge Reinhardt affirmed the decision in a slightly narrower opinion,[117] but the Supreme Court ultimately declined to rule on the merits of the issue.[118] Since both California Governor Arnold Schwarzenegger and Attorney General (and once-and-future Governor) Jerry Brown refused to defend the constitutionality of Proposition 8 in court,[119] the 9th Circuit had allowed the official proponents of the initial Proposition 8 ballot measure to intervene in the suit and defend the measure.[120] The Supreme Court ruled

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[111] Rachel Weiner, *A Gay Marriage Advocate with Ears in the White House*, WASH. POST (May 10, 2012), https://www.washingtonpost.com/blogs/the-fix/post/a-gay-marriage-advocate-with-ears-in-the-white-house/2012/05/10/gIQAfRpVGU_blog.html.

[112] 531 U.S. 98 (2000).

[113] Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 698–99 (2012).

[114] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

[115] For a description of the trial and an ode to its cultural importance, see generally KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL (2015).

[116] *Perry*, 704 F. Supp. 2d at 953–91.

[117] *Perry*, 671 F.3d at 1096.

[118] Hollingsworth v. Perry, 570 U.S. 693, 700–01 (2013).

[119] Maura Dolan, *Schwarzenegger Decides Against Defending Prop. 8 in Federal Court*, L.A. TIMES (June 18, 2009), http://articles.latimes.com/2009/jun/18/local/me-gay-marriage18.

[120] *Perry*, 671 F.3d at 1075.

that these proponents did not have Article III standing, vacating the 9th Circuit's ruling and leaving the original district court opinion in place.[121] This brought marriage equality back to California after nearly five years under the ban but was not the broader ruling in favor of nationwide same-sex marriage that Griffin and other advocates had hoped for. However, it did show that the federal courts might yet prove hospitable to claims that same-sex marriage was a constitutionally protected right.

Even more of a clue that the Supreme Court was inching closer to ruling in favor of full federal marriage equality was its opinion in *United States v. Windsor*.[122] At the same time as the Proposition 8 litigation was making its way through the federal courts, another federal challenge to anti-gay legislation was also percolating. Edith Windsor and Thea Spyer had married in Canada in 2007 and lived in New York, which at the time did not allow the issuance of same-sex marriage licenses but did recognize same-sex marriages performed in other states.[123] When Spyer passed away, Windsor was left with a large federal estate tax bill from the inheritance she had received from her wife.[124] But had the federal government recognized Spyer as her spouse, Windsor would have owed nothing, as federal law allows spouses to inherit without paying an estate tax.[125] Since the Defense of Marriage Act specifically prohibited the federal government from recognizing same-sex marriages,[126] Windsor was forced to pay the IRS $363,053.[127]

Windsor had long been involved in LGBT activist circles, [128] and she decided to challenge her tax bill as unconstitutional. In a repeat of the story of *Baehr v. Lewin*,[129] Windsor shopped her case around to several LGBT legal organizations, but they all refused to take her on as a client.[130] Much as

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[121] *Hollingsworth*, 570 U.S. at 700–01.

[122] 570 U.S. 744 (2013).

[123] *Id.* at 753.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] Jill Hamburg Coplan, *When a Woman Loves a Woman*, NYU ALUMNI MAG. (Fall 2001), https://www.nyu.edu/alumni.magazine/issue17/17_FEA_DOMA.html.

[129] *See* 852 P.2d 44.

[130] Robin Tyler, *How Roberta Kaplan Met Edie Windsor and Changed History*, THE ADVOCATE (Oct. 19, 2015), https://www.advocate.com/commentary/2015/10/19/how-roberta-kaplan-met-edie-windsor-and-changed-history (explaining Windsor's failed attempts to get legal help from Lambda Legal, the Human Rights Campaign, and the ACLU before ultimately hiring a private attorney); Peter Applebome, *Reveling In Her Supreme Court Moment*, N.Y. TIMES (Dec. 10, 2012), https://www.nytimes.com/2012/12/11/nyregion/edith-windsor-gay-widow-revels-in-supreme-court-fight.html ("To her dismay, her case was turned down by a major gay rights organization.").

there was no appetite for a federal lawsuit to challenge state same-sex marriage bans, there was little appetite for a federal lawsuit against DOMA. Undeterred, Windsor found a private lawyer, Roberta Kaplan, to take her case.[131] Kaplan, unlike Boies and Olsen, actually had some experience litigating gay rights cases.[132] She was the attorney that led the unsuccessful attempt to challenge New York's marriage ban in state court.[133] But Kaplan worked for a private law firm and was not explicitly affiliated with any movement organization.[134]

The *Windsor* case eventually made its way to the Supreme Court, and was decided on June 26, 2013, the same day as *Hollingsworth v. Perry*. Unlike *Hollingsworth*, the Court fully decided *Windsor* on the merits (despite other complicated procedural issues similar to those in *Hollingsworth*)[135] and ruled that section 3 of the Defense of Marriage Act (which had been passed in response to the initial Hawai'i marriage litigation) was unconstitutional.[136] The opinion relied on a mixture of federalism,[137] equal protection,[138] and substantive due process[139] grounds to come to its conclusion, without being particularly clear about the how or why or providing a clear answer as to when discriminating on the basis of sexual orientation was allowed or disallowed. The bottom line ruling was clear, however: section three of the Defense of Marriage Act, prohibiting the federal government from recognizing same-sex marriages entered into legally in the states was an unconstitutional assault on the "personhood and dignity" of same-sex couples.[140]

Any potential confusion about the doctrinal ramifications in *Windsor* did not discourage the LGBT movement from finally pushing full speed ahead. Despite having largely opposed initiating the litigation that brought them to this point, the various LGBT legal advocacy organizations started filing marriage cases directly in federal court,[141] now with strong federal precedent

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[131] Tyler, *supra* note 130.

[132] *Id.*

[133] *See* Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

[134] *See* Tyler, *supra* note 130.

[135] United States v. Windsor, 570 U.S. 744, 755–763 (2013).

[136] *Id.* at 775.

[137] *Id.* at 767 ("Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.").

[138] *Id.* at 770 (discussing "strong evidence of [DOMA] having the purpose and effect of disapproval" of same-sex couples).

[139] *Id.* at 774. ("Congress . . . cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.").

[140] *Id.* at 775.

[141] Two examples out of many include Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862 (D.

for the case that same-sex marriage was a protected right under the Constitution. Before long, nearly every state in which a same-sex marriage ban was still on the books had litigation challenging the ban in federal courts across the country,[142] and the pro-marriage equality activists were almost uniformly successful.[143] One court after another struck down same-sex marriage bans, relying on language from *Lawrence* and *Windsor*.[144] As the cases floated up to the appellate level, the circuit courts, too, sided with the same-sex plaintiffs.[145]

As these circuit court cases were decided, it seemed inevitable that the Supreme Court would hear one of them. The Court had seemed at least willing to consider the constitutional question about same-sex marriage in *Hollingsworth* before it decided to kick the case on standing grounds, even though there was no circuit split yet at the time the case came to the Court.[146] Somewhat surprisingly, though, the Court denied review in *all* of the circuit court cases that held marriage was a constitutional right.[147] It was not until the Sixth Circuit, in a set of consolidated cases coming out of Michigan, Ohio, and Kentucky, ruled against the gay plaintiffs[148] and created a circuit split on the question that the Court finally granted certiorari[149] and *Obergefell* came before the Court. The rest, of course, is history. The Court held that states could not deny marriage licenses to same-sex couples,[150] bringing

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S.D. 2015), a same-sex marriage case in South Dakota where two attorneys from the National Center for Lesbian Rights were among the counsel of record, and Baskin v. Bogan, 12 F. Supp. 3d 1144 (D. Ind. 2014), an Indiana case which featured attorneys from Lambda Legal.

[142] Ellen A. Andersen, *Transformative Events in the LGBTQ Rights Movement*, 5 IND. J. L. & SOC. EQ. 441, 467 (2017) ("Within a year of the *Windsor* decision, every state marriage ban was under legal attack.").

[143] *Id.* at 467–68 ("The first twenty courts to hear marriage equality challenges post-*Windsor* unanimously ruled in favor of the same-sex couples bringing suits.").

[144] *See, e.g.*, Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1194 (D. Utah 2013) ("The court agrees with Justice Scalia's interpretation of *Windsor* and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.").

[145] *See, e.g.*, Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

[146] *See* Hollingsworth v. Perry, 570 U.S. 693 (2013).

[147] Bogan v. Baskin, 135 S. Ct. 316 (2014); Walker v. Wolf, 135 S. Ct. 316 (2014); Herbert v. Kitchen (Utah); McQuigg v. Bostic, 135 S. Ct. 314 (2014); Rainey v. Bostic, 135 S. Ct. 286 (2014); Schaefer v. Bostic, 135 S. Ct. 308 (2014); Smith v. Bishop, 135 S. Ct. 271 (2014).

[148] DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

[149] DeBoer v. Snyder, 135 S. Ct. 1040 (2015).

[150] Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

Justice Scalia's prophecy in his dissent in *Lawrence* that the opinion would inevitably lead to marriage rights for gay couples to fruition.[151]

In 1969, the Stonewall Riots[152] were covered in the New York Times deep in page thirty-three, in a story with no byline, framed as a story about policemen being injured.[153] Just short of forty-six years later, *Obergefell* dominated the Times's front page, with the story appearing under a larger-than-usual headline reading "Equal Dignity" and accompanied by pictures of twelve same-sex couples and a pull-quote from Justice Kennedy's majority opinion.[154] While *Obergefell* did not end resistance from marriage opponents and left many issues for future courts to sort out,[155] the movement in a very short period of time managed to achieve a nearly comprehensive victory for marriage equality in the courtroom.

III. LITIGATION AND SOCIAL CHANGE

Given the remarkable pace of success marriage equality enjoyed in the courts, the marriage equality movement serves as a key case study that can help shed new understanding in longstanding academic discussions around the role litigation plays in creating and sustaining social change.

A. Litigation and Social Change Literature

When are social movements successful in achieving major social change through litigation? Carroll Seron and her co-authors suggest that the framing of this question has been strongly shaped by Stuart Scheingold's book, *The Politics of Rights*, where Scheingold argues that we should not think of rights

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[151] Lawrence v. Texas, 539 U.S. 558, 601 (2003).

[152] The Stonewall riots were a response to a 1969 police raid of the Stonewall Inn, a gay bar in Greenwich Village, that are often used to symbolize the start of the modern gay liberation movement. *See* Elizabeth A. Armstrong & Suzanna M. Crage, *Movements and Memory: The Making of the Stonewall Myth*, 71 AM. SOC. REV. 724 (2006) ("The Stonewall riots are typically viewed as the spark of the gay liberation movement and a turning point in the history of gay life in the United States[.]").

[153] *4 Policemen Hurt in 'Village' Raid*, N.Y. TIMES, June 29, 1969, at 33.

[154] Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES, (June 27, 2015), https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html.

[155] *See, e.g.*, Pavan v. Smith, 137 S. Ct. 2075 (2017) (per curiam) (striking down an Arkansas law that allowed married women's male spouse's name on the woman's children's birth certificates, but not a married women's female spouse's name); Pidgeon v. Turner, 538 S.W.3d 73, 86–87 (Tex. 2017), *cert. denied*, 138 S. Ct. 505 (2017) ("The Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons[.]").

as tangible, self-executing realities, but rather as a powerful myth that shapes people's beliefs, though these myths may or may not have on-the-ground practical effect.[156] Building on this tradition, Gerald Rosenberg's highly influential book *The Hollow Hope* suggests that courts are actually relatively powerless to enact significant social change in most cases.[157] He shows that contrary to popular belief, landmark Supreme Court cases hailed by progressive reformers resulted in little on-the-ground change. As two of his main examples, he demonstrates that very little school desegregation in the Southern states followed the *Brown v. Board of Education* decision,[158] and that the seeming increase in abortions obtained post-*Roe* actually started before *Roe* and was little affected by the decision.[159] He concludes that social movements are drawn to litigation like "fly-paper," encouraging movements to place their resources in litigation when they might be put to more productive use elsewhere.[160] Particularly relevant to this Article, Rosenberg argued that the gay rights movement was yet another example of a social movement drawn to litigation against its own interests by producing a massive backlash over marriage equality rather than sticking to the political process and arguing instead for civil unions.[161] This characterization seems today not to have stood the test of time. One of Rosenberg's primary critics, Michael McCann, argues that Rosenberg does not give enough credit to the symbolic resources provided by litigation—how people adapt legal norms for their own purposes, and how the shifting terrain created by litigation opens up opportunities for social action regardless of whether legal opinions affect direct changes in material relations.[162] While the two disagree about the overall usefulness of litigation in progressive change-making, they both seem to agree that court victories proclaiming access to specific rights often do not directly lead to material gains.[163] The ability of the marriage equality

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[156] Carroll Seron et al., *Is There a Canon of Law and Society?*, 9 ANN. REV. L. SOC. SCI. 287 (2013); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974).

[157] Rosenberg, *supra* note 12.

[158] *Id.* at 52.

[159] *Id.* at 179.

[160] *Id.* at 427.

[161] *Id.* at 416–18.

[162] Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 733 (1992). For an example of how this works in the marriage equality context, see Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA. J. CONST. L. 871, 978–79 (2018) (demonstrating how Gavin Newsom, then the mayor of San Francisco, used the legal terrain created by the *Goodridge* decision in Massachusetts as part of his inspiration to issue marriage licenses to same-sex couples in contravention of California law).

[163] Of course, specific court decisions can lead to material changes for individual litigants, such as when a court awards damages to a party for a legal violation. These are different from

movement to obtain nation-wide marriage equality seems to suggest a different approach than either that of Rosenberg or McCann, where at least in some circumstances, real material change has clearly occurred through litigation.

Of course, Rosenberg never argued that courts were *completely* incapable of producing significant social change. Rather, in order for courts to be effective, he offers a variety of conditions that must be met and which occur when:

> 1) [T]here is ample legal precedent for change; *and*,
>
> 2) [T]here is support for change from substantial numbers in Congress and from the executive; *and*,
>
> 3) [T]here is either support from some citizens, or at least low levels of opposition from all citizens; *and*, either
>
> a) Positive incentives are offered to induce compliance; or,
>
> b) Costs are imposed to induce compliance . . . ; or,
>
> c) Court decisions allow for market implementation . . . ; or,
>
> d) Administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or hiding behind[.][164]

While this structure is far from parsimonious, it does provide an outline for what to look for in determining whether a social movement might be more or less successful at using the courts than any other.[165] Yet, given the requirements for both institutional and public support for courts to be able to enact social change, it seems to be the inevitable conclusion of Rosenberg's work that courts will rarely ever be a productive avenue for social movement success. After all, popular policies with both elite and public support can generally be enacted through the political process. Liberal reformers only need to place their hope in courts when they are advocating for policies that do not have much hope to pass through the political process. Success in the courts, then, will only come in rare circumstances.[166]

Yet, post-*Obergefell*, few scholars interested in law and social change have turned much of their attention towards one of the highest-profile and potentially successful movements of recent history—one that challenges this

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the types of wide-spread social changes Rosenberg and company are concerned with.

[164] Rosenberg, *supra* note 12, at 36.

[165] For a refinement of Rosenberg's structure with respect to the marriage equality movement, see generally Kreis, *supra* note 163.

[166] Indeed, Rosenberg does not give any examples of social change through litigation that he deems successful in his book.

central premise that courts are poor architects of social change. Since the mid-1990's, LGBT activists in the United States have managed to use litigation in a variety of successful ways in order to achieve what seemed largely unthinkable at the outset: equal marriage rights for same-sex couples.[167] At the turn of the century, there were zero same-sex married couples in the United States recognized by the federal government. As of June 2017, there were estimated to be approximately 547,000.[168] As Part II of this Article demonstrated, this massive restructuring of the legal status of same-sex couples in this country, and its concurrent redistribution of material benefits, happened in large part through litigation

Marriage is not the only field in which activists have used the courts to further the cause of LGBT rights. Many judges have been increasingly willing in recent years to interpret federal civil rights statutes broadly to include LGBT people, despite it being obvious that the authors of these laws did not have LGBT people in mind when they were written. For example, interpreting the protections against employment discrimination based on sex included in Title VII of the 1964 Civil Rights Act[169] to also include LGBT people, long considered a dead-end approach in the federal circuit courts,[170] has now become a mainstream position, with at least two Circuit Courts of Appeals ruling in favor of gay plaintiffs who experienced employment discrimination on the basis of their sexual orientation[171] with two other Circuits holding the same with respect to transgender identity.[172] While these cases are tentative and may not survive the inevitable Supreme Court review,[173] (especially given Justice Kennedy's retirement) these and other victories make it clear that the movement has, at least in some areas, obtained

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[167] *See infra* Part II.

[168] Adam P. Romero, *Estimates of Marriages of Same-Sex Couples at the Two-Year Anniversary of* Obergefell v. Hodges, THE WILLIAMS INST. (June 2017), https://williamsinstitute.law.ucla.edu/experts/adam-romero/obergefell-effect/.

[169] 42 U.S.C. § 2000e-2 (1991).

[170] *See, e.g.*, Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009); Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984).

[171] Zarda v. Altitude Express Inc., 883 F.3d 100 (2d Cir. 2018) (en banc); Hively v. Ivy Tech, 853 F.3d 339 (7th Cir. 2017) (en banc). *But see* Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017).

[172] EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F. 3d 560 (6th Cir. 2018); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

[173] The Supreme Court denied certiorari in *Evans v. Georgia Regional Hospital*, where the 11th Circuit Court of Appeals ruled against the gay plaintiff. 138 S. Ct. 557 (2017). No clear circuit split yet existed at the time, however, the odds of the Supreme Court granting certiorari to resolve this issue have increased dramatically. *See* H.W. PERRY JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 127 (1991) ("Without a doubt, one of the most important things to all the justices is when there is a conflict in the circuits.").

certain material, measurable outcomes in the courtroom that have often eluded other minority groups.

B. Legal Change vs. Social Change

The canonical empirical studies discussed in the previous section either demonstrated the lack of a necessary connection between legal change and social change[174] or the ability of law to create social change without necessarily having a corresponding legal change.[175] In marriage, however, LGBT movement activists achieved a goal that was simultaneously legal and social, and in doing so provided further insights into the relationship between the two.

What is the difference between a social change and a merely legal change? No one doubts that the Supreme Court can and does create legal change all of the time. In October Term 2017 alone, the Supreme Court altered legal rules about whether states can charge sales tax for purchases made from another state on the internet under the dormant commerce clause,[176] how tolling works for state law claims that are first dismissed in federal court,[177] and the rights of parties to a case in federal court to appeal when their other consolidated cases remain pending.[178] All of these cases change or clarify legal rules, creating a form of legal change that is indisputably within the ability of the judiciary to initiate. But it would be difficult to claim that any of these changes were also social changes of the type that would be of interest to scholars like Rosenberg. Most people just do not see tolling rules as being particularly relevant to their everyday social lives. If marriage equality were a purely legal change, it would have very little to say about these ongoing debates.

Marriage, though, operates at a unique intersection of the legal and the social. While primarily seen as a particular type of relationship between two people, in modern society, it is actually a relationship between three different legal entities—one person, a second person, and the state. The law defines the procedures required to marry[179] (including deciding who is and is not allowed to do so[180]), and it provides particular ways of dealing with married

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[174] *See* Rosenberg, *supra* note 12.

[175] *See* McCann, *supra* note 163.

[176] South Dakota v. Wayfair, 138 S. Ct. 2080 (2018).

[177] Artis v. District of Columbia, 138 S. Ct. 594 (2018).

[178] Hall v. Hall, 138 S. Ct. 1118 (2018).

[179] *See, e.g.*, W. VA. CODE §§ 48-2-201–28-2-204 (2001) (laying out the procedures required to have a validly recognized marriage in West Virginia).

[180] *See, e.g.*, WASH. REV. CODE § 26.04.020 (2012) (listing as ineligible to marry people with certain relationships such as "[w]hen the spouses are nearer of kin than second cousins").

couples that differ from the ways it deals with individuals.[181] Yet, when you attend a wedding, which is the social ceremony that most people use to celebrate the formation of their marriage, the law largely takes a backseat. The vows contain no references to joint filing of taxes and the officiant asks if one takes the other as their wedded spouse[182] to have and to hold, in richer and in poorer, but generally does not ask if the proper paperwork has been filed in the county recorder's office or cite the relevant statutory authority through which the marriage is being entered into. The being married changes your legal status vis-à-vis the state, but it changes your social status as well. After a marriage, people start referring to "your spouse" rather than your boyfriend/girlfriend/partner. They may be more likely to consider you as a package deal. It might be more expected that you attend work functions with your spouse where there never was such an expectation when your relationship was not subsumed under the term marriage. And to end the relationship, while also more difficult legally, is seen as much more dramatic and disruptive than the breaking up of boyfriends, girlfriends, or other non-marital partners.

The fact that marriage equality has been a key part of the ongoing culture wars underscores this fact that it is a social, in addition to a legal, phenomenon. There is no way to understand opposition to same-sex marriage as a policy matter without understanding the key cultural role that marriage plays in the United States and the way that it is tied up in religious identity. Despite its secular nature in the modern world, marriage is still intimately associated for many people with religion and morality. A recent Pew study shows that marriage rates for adults vary dramatically based on religious tradition,[183] indicating that much more than legal concerns are at work with respect to any given person's relationship to the institution of marriage.

These two ways of understanding marriage—the legal and the social—are at least partially separable. Prior to marriage equality, there was no law specifically prohibiting same-sex couples from holding themselves out as married.[184] Many couples did have "commitment ceremonies" during this

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[181] *See, e.g.*, CAL. EVID. CODE § 970 (1965) ("[A] married person has a privilege not to testify against his spouse in any proceeding").

[182] The law is not entirely absent here, of course—one form of the stereotypical wedding vow includes the phrase "lawfully wedded" husband of wife, indicating that the law is still playing a role in this relationship. *See* CARLEY RONEY, THE KNOT GUIDE TO WEDDING VOWS AND TRADITIONS 27–28 (2013) (giving examples of civil wedding vows that contain the phrase "lawfully wedded").

[183] David Masci & Claire Gecewicz, *Share of Married Adults Varies Widely Across U.S. Religious Groups*, PEW RES. CTR. (Mar. 19, 2018), http://www.pewresearch.org/fact-tank/2018/03/19/share-of-married-adults-varies-widely-across-u-s-religious-groups/.

[184] In fact, the concept of a common-law marriage, while no longer legally operative in

time.[185] But many others simply called their ceremonies "weddings,"[186] referred to themselves as grooms or brides, identified themselves as "married," and were accepted by their friends and families as married even if the state did not see them as such. While they did not have any of the legal rights of marriage (unless they lived in a state that offered domestic partnerships or civil unions and chose to enter into one of those legal arrangements), they had access to at least some of the social benefits, at least in some social circles. Still others may do the opposite: avail themselves of the legal requirements but not the social. Imagine a couple who runs away to Las Vegas to get married so that one partner can get on the other's health insurance plan. They never have a big wedding, and they never refer to themselves as spouses. Their legal status has changed, but their social status has not.

Finally, it is important to note that in addition to the legal and the social, marriage is also a phenomenon that takes place at the level of an individual couple. While there are plenty of opinions about how marriages should operate and cottage industries of people providing advice on how to live as a married person are thriving,[187] the ways in which people can live as married are as varied as the number of married couples that exist in the world. Married couples can sleep together or have separate bedrooms.[188] They can have kids, or not.[189] They can have dogs, cats, ferrets (in some states[190]), and hamsters, or not. They can choose to spend the majority of their time alone together or to have a large group of friends that they are regularly integrated into. They can practice various degrees of monogamy or non-monogamy,[191]

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most states and never having applied to same-sex partners, relies on non-married couples holding themselves out as married. *See* N.H. REV. STAT. § 457:39 (1996) (recognizing as married cohabiting people who "acknowledg[e] each other as husband and wife" for three years).

[185] KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 27–29 (2006). For a broad examination of non-marriage commitment ceremonies performed by gay and lesbian couples, see generally ELLEN LEWIN, RECOGNIZING OURSELVES: CEREMONIES OF LESBIAN AND GAY COMMITMENT (1998).

[186] *See, e.g.*, LEWIN, *supra* note 178, at 164–66 (describing an "ordinary Jewish wedding" for a lesbian couple in 1994).

[187] A Google search for the exact phrase "marriage advice" returns more than 5,000,000 results.

[188] *See* Daryl Austin, Opinion, *My Wife and I Sleep in Separate Bedrooms. Our Marriage (and Sex Life) Has Never Been Better*, L.A. TIMES (Mar. 26, 2018), http://www.latimes.com/opinion/op-ed/la-oe-austin-separate-bedrooms-20180326-story.html.

[189] *See* Teddy Wayne, *No Kids For Me, Thanks*, N.Y. TIMES (Apr. 3, 2017), https://www.nytimes.com/2015/04/05/style/no-kids-for-me-thanks.html.

[190] CAL. FISH & GAME CODE § 2118(b) (2003) (banning the import and possession of all members of the order carnivora except domestic cats and dogs).

[191] *See* Susan Dominus, *Is an Open Marriage a Happier Marriage?*, N.Y. TIMES MAG.

share bank accounts or keep their own, share a Netflix account or vigorously guard their own Netflix passwords.[192]

To further attempt to demonstrate the ways in which marriage equality was a social change in addition to a legal change, I obtained a data set from the California Secretary of State indicating how many people signed up for a Registered Domestic Partnership in the state from the creation of the Domestic Partners Registry in 2000 until February 2018.[193] In 1999, the California State Legislature passed Assembly Bill 26, which allowed same-sex couples (and different-sex couples where both partners were over the age of sixty-two[194]) to register and receive a very limited set of benefits, including hospital visitation rights and health insurance coverage for partners of state employees.[195] The law was expanded in a variety of minor and major ways over the next couple of years,[196] culminating in the passage of Assembly Bill 205 in 2003,[197] which created a presumption that all registered domestic partnerships would be treated equivalently to marriage under state law (with a couple of minor enumerated exceptions).[198] The bill took effect on January 1, 2005.[199]

(May 11, 2017), https://www.nytimes.com/2017/05/11/magazine/is-an-open-marriage-a-happier-marriage.html.

[192] Suzannah Weiss, *Sharing Your Netflix Password Is the True Symbol of Being in an Adult Relationship*, MIC (Mar. 17, 2016), https://mic.com/articles/138275/sharing-your-netflix-password-is-the-true-symbol-of-being-in-an-adult-relationship (discussing the pros and cons of "digital intimacy," including sharing passwords for Netflix and other internet services).

[193] E-mail from Domestic Partners Registry, to Justin O'Neill, Graduate Student, University of California, Berkeley (Apr. 24, 2018) (on file with author).

[194] Assemb. B. 26, 1999–2000 Reg. Sess. (Cal. 1999). This was later changed so that heterosexual couples where either partner was over the age of sixty-two were eligible. Assemb. B. 25, 2001–2002 Reg. Sess. (Cal. 2001).

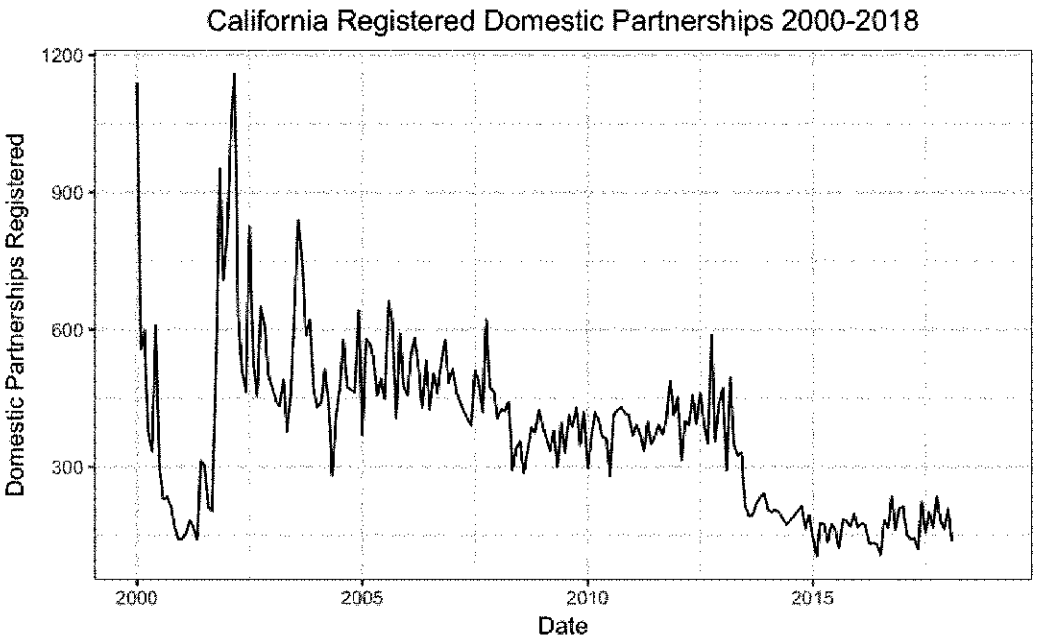
[195] Assemb. B. 26, 1999–2000 Reg. Sess. (Cal. 1999).

[196] For a list of all changes, see NAT'L CTR. LESBIAN RTS., THE EVOLUTION OF CALIFORNIA'S MARRIAGE AND DOMESTIC PARTNERSHIP LAW: A TIMELINE (2010).

[197] Assemb. B. 205, 2003–2004 Reg. Sess. (Cal. 2003).

[198] CAL. FAM. CODE § 297–299.6.

[199] Assemb. B. 205, 2003–2004 Reg. Sess. (Cal. 2003).



After an initial boom of people registering to become domestic partners when the status was first available, the take-up rate of domestic partnerships was not high. Prior to 2005, when the statute changed to become much more expansive, the average number of domestic partnership registrations a month was 488.[200] A rough estimate would suggest that this represents approximately four domestic partnerships for every 10,000 lesbian, gay, or bisexual people in California.[201]

The expansion of rights under the statute had little effect on the take-up rate. From January 2005 until May 2008, the average number of registrations ticked up only by 1, to 489.[202] The first time we see a major change in the data comes after May 2008, when the California Supreme Court ruled in *In Re Marriage Cases* that the State Constitution required the state to issue

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[200] *See* Email from Domestic Partners Registry, *supra* note 193 (compiling the data received from the Domestic Partners Registry and averaging the number of monthly partnerships from the beginning of the program until December 2004).

[201] This number is based on an estimate that 3.5% of the United States population identify as lesbian, gay, or bisexual, and an estimated California population of 39.5 million as of 2017. GARY J. GATES, The WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? (2011); *QuickFacts: California*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/CA (last visited Sept. 24 2018).

[202] *See* Email from Domestic Partners Registry, *supra* note 193 (taking the data received from the Domestic Partners Registry and formulating an average for registrations between 2005 and 2008).

marriage licenses to same-sex couples.[203] At this point, the number of registered domestic partnerships drops noticeably, with the mean monthly registrations from May 2008 to June 2013 sitting at 384.[204] A final drop occurred after *United States v. Windsor*,[205] with only 181 registrations on average per month from the day it was decided until February of 2018 (when the available data ends).

Based on this data, despite having essentially all the same legal rights and responsibilities as heterosexual married couples starting on January 1, 2005, same-sex couples in California seem to have been largely uninterested in a status that contained all of the *legal* benefits of marriage with only few of the *social* benefits. To be certain, some took the state up on its offer of an alternative status, but even the number who did fell off precipitously once marriage was available. This is particularly remarkable because marriage in 2008 was only available very briefly, from the early summer, when the California Supreme Court ruled, until November, when voters passed Proposition 8. Yet, domestic partnership registrations never again increased to their pre-*Marriage Cases* numbers. Once marriage was a conceivable legal option in the state, domestic partnerships were seemingly no longer of much interest, even when marriage was taken away again. This evidence also supports work by social scientists that demonstrate the ways in which same-sex couples, and the larger society, experience civil unions and marriage differently.[206]

The data here, of course, is somewhat limited. First, the state does not break down the issuance of marriage certificates by same-sex or heterosexual couples. Thus, there is no way to compare this registered domestic partnership data to the adoption of marriage by same-sex couples. Second, the data does not represent only same-sex couples. Heterosexual couples in which one or more of the partners are over the age of sixty-two[207] are also eligible to enter into a Registered Domestic Partnership in California, and the data does not distinguish between these two types of partnerships. Still, the marked downturn of domestic partnerships when the California Supreme

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[203] *See* 183 P.3d 384, 453 (Cal. 2008).

[204] *See* Email from Domestic Partners Registry, *supra* note 193 (using the data received from the Domestic Partners Registry to create an average of registrations after *In Re Marriage Cases*).

[205] 570 U.S. 744 (2013).

[206] *See* KATRINA KIMPORT, QUEERING MARRIAGE: CHALLENGING FAMILY FORMATION IN THE UNITED STATES 111–18 (2014) (describing how gay couples experienced being married in San Francisco in 2004 and how those "experiences underscore the social difference between marriage and civil unions").

[207] Initially, both couples had to be over the age of sixty-two, but one of the changes to the Registered Domestic Partnership law relaxed the requirement so only one member of the couple needs to be over the age cut-off. Assemb. B. 25, 2001–2002 Reg. Sess. (Cal. 2001).

Court opened the door to same-sex marriage and the second drop once same-sex marriage returned to California more permanently in June 2013 provide strong evidence that marriage is more desirable by same-sex couples than alternative, equivalent legal statuses. This data supports to the idea that marriage equality was not merely a legal change. The legal statuses of marriage and domestic partnerships were almost identical under state law, yet because of the social context around each type of relationship, they were seen as less desirable.[208]

One final hypothesis is worth considering: because the federal government did not recognize same-sex marriage until after the Supreme Court's decision in *Windsor* in June 2013,[209] and because it still does not recognize domestic partnerships and civil unions, it is not quite accurate to say that registered domestic partnerships were the *complete* legal equivalent to marriage. None of the federal benefits of marriage attached to domestic partners, and it is possible that rather than a distinction based on the social understanding of marriage that kept people from entering into domestic partnerships, it was this understanding of the lack of federal legal benefits that made partnerships unappealing. While this is possible, marriage has historically been thought of as a state-law issue. The majority of legal interactions that turn on marriage, such as custody and dissolution proceedings, occur at the state level. Furthermore, even if the difference between federal and state benefits kept the rates of registered domestic partnerships low, then it would be difficult to explain the drop in registrations after *In Re Marriage Cases*, which came many years before *Windsor* endowed same-sex marriages with federal benefits equivalent to heterosexual marriages. Thus, based on the differences between the social and the legal aspects of marriage, as well as the data on domestic partnerships, we can see that marriage equality was truly

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[208] One of these social reasons, of course, was that the LGBT movement itself actively described these alternative arrangements as less-than marriages, as indicators of a second-class status. As just one example, Mary Bonauto, attorney for Gay and Lesbian Advocates and Defenders (GLAD) who argued the *Goodridge* case, addressed this in her oral argument, saying, "[W]hen it comes to marriage, there really is no such thing as separating the word 'marriage' from the protections it provides. . . . [C]reating a separate system just for gay people simply perpetuates the stigma of exclusion that we now face." ANDERSEN, *supra* note 39, at 220–21. You can also see this in the literature put out by movement organizations. The Human Rights Campaign, for example, explained in one of its pamphlets that, "Comparing marriage to civil unions is a bit like comparing diamonds to rhinestones. One, quite simply, the real deal; the other is not." HULL, *supra* note 186, at 246 n.3 (quoting HUMAN RTS. CAMPAIGN, ANSWERS TO QUESTIONS ABOUT MARRIAGE EQUALITY). In an alternative world in which the movement pushed for alternative statuses rather than marriage, it is not clear whether people in same-sex relationships would have been more receptive to these alternative statuses.

[209] 570 U.S. 744.

a social change in addition to a legal one. If so, the fact that the change occurred primarily in the courts is a strong challenge to the views of Rosenberg and other scholars skeptical that such change is possible.

IV. WHAT MADE MARRIAGE EQUALITY DIFFERENT?

What lessons can we learn from the brief, turbulent, and largely successful history of same-sex marriage litigation in the United States that might help us understand why this movement provided hope that courts could, in fact, be successful venues for achieving progressive social change? This section focuses on several aspects of the story that stand out as important. First, it explores the role that individual litigants played vis-à-vis the movement as a whole. Second, it looks at the ways in which some of the marriage litigation plaintiffs were particularly socially privileged aside from their sexual orientation and how marriage provides the most benefit for those already privileged. Third, it takes up the question of whether, given the intertwined nature of the legal and social aspects of marriage,[210] marriage equality's legal aspect made it more prone to legal intervention than many other social changes. Finally, it takes seriously the possible truth of the so-called "Great Man Theory" of history—namely, that the answer to the question of "what made marriage equality different" is simply: Justice Anthony Kennedy.

A. INDIVIDUAL LITIGANTS

First, the centralized LGBT legal movement was not fully in control of the litigation that was happening under its auspices. At least three of the biggest flashpoints of this history, involving decisions that would shape the course of this rights struggle, were made in contradiction to the desires of the leadership of organizations in the broader movement.[211] From the initial Hawai'i marriage litigation to the federal lawsuits against Proposition 8 and DOMA, litigants acting outside of major movement organizations played a huge role in how litigation shaped the landscape of gay rights. One way to understand this is that litigation, at least in theory, is open to anyone who comes into the courthouse door. Edie Windsor did not need the permission of any organization to bring a lawsuit in federal court, for example. Of course, the reality is more complicated—most people never legally mobilize their rights,[212] and this seems especially likely when such rights have not yet

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[210] *See supra* Part III(B).

[211] *See supra* Part II (describing how in *Baehr*, *Windsor*, and *Perry*, lawsuits were filed without the support of the dominant movement organizations).

[212] William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC. REV. 631 (1980–

been formally established. If people do not generally sue each other over such clearly established legal rights as contract violations,[213] it is difficult to imagine everyday people suing over untested constitutional rights. Successful litigation also benefits from the ability to hire a skilled attorney with the resources to pursue difficult and highly visible cases.[214] Yet legal consciousness among gay individuals and couples is likely to be quite high given the role law and legal restrictions has long played in the lives of sexual minorities' lives,[215] and in many instances people seemed to act on this heightened consciousness to mobilize around their own rights.

This is not to say that institutionalized movement actors were irrelevant to the process. Having a well-organized and well-funded social movement legal apparatus was no doubt essential to the ability of the movement to take advantage of positive doctrinal developments (like *Windsor*) as quickly as they did. And the litigants, despite contradicting the wishes of movement leaders, benefitted from these pre-established apparatuses. At the very least, they would often provide support, in the form of amicus briefs or consultations with non-movement attorneys, after a lawsuit was filed in an attempt to make the best of what they saw as a bad situation.[216] Anthony Michael Kreis argues in a recent article that these "support-structures" were one of the main keys to the success of the movement in the courts.[217] What he and others do not focus on, however, is the ways in which the organized movement apparatus was very conservative in deciding which cases to take on. Even from the beginning, in *Baehr*, Lambda Legal entered into the litigation for the first time only as an amicus at the Hawai'i Supreme Court. It was not until after they had the initial victory in their hands that they also joined the case as co-counsel.[218] Thus, while these support-structures were

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[213] Stewart Macaulay, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963).

[214] For more on the role of funding in public interest litigation, see generally Catherine R. Albiston & Laura Beth Nielson, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOC. INQ. 62 (2014); for more on the importance of attorneys for litigation outcomes, see, e.g., Carroll Seron et al, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC. REV. 419 (2001).

[215] *See, e.g.*, Nancy J. Knauer, *Legal Consciousness and LGBT Research: The Role of the Law in the Everyday Lives of LGBT Individuals*, 59 J. HOMOSEXUALITY 748 (2012).

[216] *See, e.g.*, Brief for ACLU Foundation of Northern California et al. as Amici Curiae Supporting Plaintiffs, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696); Brief for Gay & Lesbian Advocates & Defenders and Lambda Legal Defense & Education Fund, Inc. as Amici Curiae Supporting Respondents, U.S. v. Windsor, 570 U.S. 744 (2013) (No. 12-307).

[217] Kreis, *supra* note 163, at 889.

[218] BALL, *supra* note 67, at 164–65, 173. As a staff attorney at Lambda, Evan Wolfson,

essential to the movement's success, they were driven forward in several instances by the desires of individual litigants.

This is also not to say that the movement organizations were *never* at the forefront of any LGBT rights litigation. *Lawrence v. Texas*, for example, was driven largely by activist lawyers at Lambda Legal, and pre-existing movement infrastructure was mobilized to fight anti-gay ballot initiatives, albeit with limited success for many years. Movement organizations also found themselves working on quieter issues, like child custody with respect to LGBT parents.[219] And when it became clear that the federal courts were open to same-sex marriage claims post-*Windsor*, the vast infrastructure of the organized movement made it easy for activists to mobilize the resources to quickly file lawsuits in many of the states with surviving same-sex marriage bans. But in at least three particular turning points in the movement—*Baehr*, *Perry*, and *Windsor*—they were out-flanked by outsiders or newcomers to the movement. What might the relationship be, then, between the fact that individuals operating outside of the main institutional apparatuses of the movement had an outsized role in influencing the path the movement took on the movement's eventual success?

One way to explain the impact this might have had on the movement is to look at social science work that discusses the pitfalls of a highly-centralized and disciplined social movement. This line of research includes work such as Frances Piven and Richard Cloward's classic book *Poor People's Movements*, which argues in part that formal organizations "blunt the militancy" of disruptive political movements (and thus limit their effectiveness) due to their internal oligarchical structure and the ties such organizations create with other societal elites.[220] As another example, in her

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eventual founder of the organization Freedom to Marry, had pushed the organization to represent the Hawai'i plaintiffs earlier, but they declined. *Id.*

[219] *See* ALISON L. GASH, BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS 89–131 (2015) (explaining how movement actors worked on parental rights and attempted to keep the cases out of the public eye).

[220] FRANCES FOX PIVEN & RICHARD CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL xv (1977). A key example of a formal LGBT organization prioritizing its ties to elites at the expense of its effectiveness was New York Governor Andrew Cuomo's endorsement of the Human Rights Campaign in his 2018 bid for re-election. Steven Peters, *HRC Endorses Gov. Cuomo for Re-Election & Announces Cuomo Will Address NYC Gala Saturday Night*, HUMAN RTS. CAMPAIGN (Jan. 31, 2018), https://www.hrc.org/blog/hrc-endorses-andrew-cuomo-for-re-election-cuomo-will-speak-at-nyc-gala. Cuomo was instrumental in getting the Republican-controlled state legislature to pass marriage equality in 2011. Sandhya Somashekhar, *New York Senate Votes to Legalize Same-Sex Marriage in Win for Gay Rights Advocates*, WASH. POST (June 25, 2011), https://www.washingtonpost.com/politics/new-york-senate-votes-to-legalize-same-sex-marriage-in-win-for-gay-rights-advocates/2011/06/15/AG3XDqjH_story.html. However, his opponent in the Democrat primary was bisexual actress Cynthia Nixon running on a much more progressive and queer-

study of the abortion movement after *Roe v. Wade*, Suzanne Staggenborg argues that such organizations tend to use more formalized and institutionalized tactics rather than disruptive protest activities, and are often more likely to engage in tactics designed to keep the organization alive rather than advance its substantive goals.[221] Much of this decision-making process occurs at the guidance of professionalized staff within social movement organizations.[222]

We may see a variation of these ideas in the marriage equality movement. While litigation is a "formalized and institutionalized" tool—as opposed to forms of direct-action like protests and sit-ins—pushing for marriage equality in the courts may have been seen by movement actors as challenging the status quo too dramatically, leading these actors to resist efforts to litigate these cases. By forcing the movement ahead when it would have preferred to take a slower, more conservative path, the individual litigants in the marriage equality movement—though far from what Piven and Cloward had in mind when writing about "poor people's movements"[223]—managed to take advantage of a well-resourced and organized movement while avoiding the pitfalls that are common to such movements. This also explains why the plaintiffs in *Baker* were unsuccessful in the early 1970's. They, too, were individual litigants, but did not have the well-funded movement structure around them to provide a support-structure for the litigation.[224]

B. Privileged Plaintiffs and Claims

Another element of the story of same-sex marriage litigation is the relative privilege of many of the same-sex marriage plaintiffs. For example, Edith Windsor was inspired to challenge DOMA because of a $363,053 tax bill on the estate left to her by her deceased wife.[225] Thus, Thea Speyer was passing on a very large estate to her wife, considerably larger than the $3,500,000

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inclusive platform, leading many to criticize HRC's decision to endorse Cuomo as indicative of political power-building at the expense of the interests of HRC's constituents. *See, e.g.*, Dominic Holden, *The Country's Top LGBT Group Is Campaigning Against a Queer Democratic Woman, and Some People Are Pissed*, BUZZFEED NEWS (Aug. 23, 2018), https://www.buzzfeednews.com/article/dominicholden/hrc-campaigning-for-andrew-cuomo-over-cynthia-nixon.

[221] Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 AM. SOC. REV. 585, 599 (1988).

[222] *Id.* at 600.

[223] *See supra* Part IV(B).

[224] Kreis, *supra* note 155, at 894 (discussing how the 1970's marriage plaintiffs lacked "any robust organizational infrastructure to prop up a protracted litigation campaign").

[225] United States v. Windsor, 570 U.S. 744, 753 (2013).

estate tax exemption operative in 2009.[226] People in higher income brackets are also more likely to marry,[227] and many of the financial perks associated with marriage (such as the aforementioned estate tax exemption) tend to most benefit couples with assets. White and Asian people in the United States tend to marry at higher rates than other racial groups.[228] If that pattern turns out to hold true for same-sex marriages as well,[229] then marriage equality will provide benefits in racially disproportionate ways, and with more benefit flowing to the rich than to the poor. While there is some evidence to suggest that some racial minority groups tend to value marriage even more than white people,[230] at least among a primarily heterosexual group of survey respondents, the benefits of marriage do tend to flow more to people with class and racial privilege. People with high amounts of privilege, such as policymaking elites, may thus be more likely to understand and sympathize with movement concerns that disproportionately benefit people with some degree of privilege. Judges (predominantly well-off and white, as well as mostly male) may feel more able to relate with a person who unjustly received a high tax bill due to the death of their partner than, for example, a poor woman who cannot access her constitutional rights because of the Hyde amendment rules against using federal funds on abortion.[231]

While the previous sections discussed how litigants brought cases even without the blessing of the mainstream movement, in some cases, movement litigators did hand-pick their litigants. As Professors Russell K. Robinson and David M. Frost write, many of the marriage plaintiffs, particularly post-*Windsor* when the movement was exerting more active control over litigation, were picked in such a way to disguise the "sexuality" part of sexual orientation to assure that judges did not have to think about gay sex when

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[226] *Estate Tax*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax (last updated May 9, 2018).

[227] W. BRADFORD WILCOX & WENDY WANG, OPPORTUNITY AMERICA AND AEI BROOKINGS, THE MARRIAGE DIVIDE: HOW AND WHY WORKING-CLASS FAMILIES ARE MORE FRAGILE TODAY 3 (2017).

[228] Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RES. CNTR. (Sept. 14, 2017), http://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/.

[229] I am unaware of any data about the racial breakdown of same-sex marriages currently available.

[230] *See, e.g.*, Wendy Wang & Kim Parker, PEW RES. CNTR. (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/ ("[A] much higher share of blacks (58%) than whites (44%) say that it's very important for a couple to marry if they plan to spend their lives together.").

[231] Harris v. McRae, 448 U.S. 297, 326–27 (1980) (holding that neither states nor the federal government are constitutionally required to pay for an abortion for women who could not otherwise afford them).

deciding these cases.[232] In some ways, this is standard impact litigation strategy—by using plaintiffs who present a clean case of the question presented, and who can fit most cleanly into judges' preexisting schemas about who is a sympathetic rights-holder and not trigger any lingering animus or discomfort the judges might have with a particular group, impact litigators manage to achieve rights that, in theory, apply to everyone, including those who might not hew so closely to the hegemonic ideal. By picking plaintiffs who were privileged in all obvious ways except for their same-sex partner, the movement was able to engage in this strategy to minimize the risks of litigation in a way that other social movements that focus predominantly on less-privileged people would have a more difficult time doing.

C. Particularly Legal Nature of the Marriage Right

Marriage, in contrast to other forms of civil rights relief, may be a type of right that is particularly well-suited to implementation and enforcement through the judicial branch. Marriage equality, at its base, does not rely on the general public for its enforcement. By contrast, after *Brown v. Board of Education*,[233] implementing school de-segregation required some degree of cooperation from locally elected school boards, state politicians, and even parents who were willing to send their children to integrated schools rather than moving to more segregated areas or enrolling their children in private schools.[234] The huge backlash against bussing students to further away schools in order to achieve desegregation in highly segregated neighborhoods reflects the ways in which school desegregation requires buy-in from a huge number of stakeholders in order to be implemented.[235] By contrast, marriage equality primarily requires buy-in from whomever is in charge of issuing marriage licenses in any given state. Often, those are country clerks,[236] who fall under the imprimatur of the judicial branch as state employees, to whom court orders may be more easily addressed, and who may be more likely to obey the order (though some of them, like Kentucky's Kim Davis, tried to assert the authority to ignore the *Obergefell* decision[237]).

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[232] Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, 60 ARIZ. L. REV. 213, 224–27 (2018).

[233] 347 U.S. 483 (1954).

[234] For various narrative accounts of the types of resistance faced by school desegregation advocates in the wake of *Brown vs. Board of Education*, see generally THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA (Matthew D. Lassiter & Andrew B. Lewis, eds.) (1998).

[235] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6–11 (1971).

[236] *See, e.g.*, CAL. FAM. CODE § 359 (2006) ("[A]pplicants to be married shall first appear together in person before the county clerk to obtain a marriage license.").

[237] Miller v. Davis, 123 F. Supp. 3d 924, 930–32 (E.D. Ky. 2015).

Other questions involving individual willingness to recognize same-sex marriages may still arise—such as the interplay between same-sex marriage and religious freedom[238]—and nothing stops any given individual from refusing to *socially* recognize a marriage for any given non-state-sponsored purpose. But the actual issuance of licenses and the government benefits that flow from that issuance are largely within the ambit of matters traditionally responsive to judicial control. Without radically rethinking the way constitutional law has worked in this country for many years,[239] the state action doctrine would make it impossible to enforce sanctions for constitutional violations against an individual who, for example, moved to avoid a desegregation order.[240] The state action doctrine, however, does allow sanctions against a public employee who refuses to issue licenses to same-sex couples. Taken in conjunction with the discussion earlier in this Article about the intertwined social and legal nature of the marriage right,[241] marriage as a legal status is easy for the legal system to self-implement, meaning marriage as a social status may also be particularly amenable to judicial control.

The idea relates to what Ellen A. Andersen wrote in her 2005 book, *Out of the Closets and Into the Courts*.[242] Her project asks under what conditions LGBT movements might be able to achieve legal change through litigation.[243] She coins a concept called "legal opportunity structures" (LOS) to explain the ability of movements to use the courts to pursue their aims.[244] LOS builds on a more traditional theoretical construct in the sociology of social movements called the political opportunity structure, which focuses on the ways in which political context affects the ability of movements to mobilize.[245] A legal opportunity, by contrast, applies this theoretical framework to specifically legal contexts and analyzes the types of legal

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[238] In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court heard arguments about whether a baker's religious opposition to same-sex marriage gives them a First Amendment right to refuse service notwithstanding a local anti-discrimination law. 138 S. Ct. 1719, 1723–24 (2018). The Court declined to rule on the issue, however, instead ruling for the baker on narrower, religious animus grounds. *Id.* at 1732; *see also* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516 (2015) (explaining the difference between 'complicity' claims, like those in gay wedding cake cases, and traditional religious freedom claims).

[239] *See* The Civil Rights Cases, 109 U.S. 3 (1883).

[240] The state action doctrine holds that constitutional guarantees only prohibit action by state governments, not private actors. *Id.* at 11–13.

[241] *See supra* Part III(B).

[242] ANDERSEN, *supra* note 39.

[243] *Id.* at 5-6.

[244] *Id.* at 6.

[245] *Id.* at 6–7.

framing that allow or disallow certain legal actions to occur.[246] Rather than accepting any claim whole cloth, for a LOS to be conducive to legal success, movements "must articulate their claims so that they fall within the categories previously established by an amalgam of constitutional, statutory, administrative, common and case law."[247]

The fact that marriage equality was largely self-implemented through the judiciary might lead us to a slightly different but complimentary understanding of the importance of legal framing. While Andersen uses her conception of the legal opportunity structure as a way to understand what claims can even be brought within the legal system in the first place (i.e., what questions can be "framed" as legal ones), it may be useful as well for thinking about which types of judicial decisions are more likely to lead to social change than others. Those issues where the remedy lends itself to purely judicial enforcement may be more likely to demonstrate on-the-ground results than those that require the cooperation of a large number of non-judicial stakeholders. In that way, the importance of legal framing may not end when the court issues an opinion, but continue on through the delivery of the actual policy outcome that was achieved.

D. The "Great Man" Theory

Many academics, particularly in the social sciences, bristle against the notion of the "Great Man Theory of History," which is the idea that the course of history can be attributed to the actions of individuals rather than broader, systemic forces.[248] In fact, the discipline of sociology, since its earliest days, has rested on the idea that "Great Man" theories do not convincingly explain social forces. In the waning days of the 19th Century, Herbert Spencer once wrote: "You must admit that the genesis of a great man depends on the long series of complex influences which has produced the race in which he appears, and the social state into which that race has slowly grown. . . . Before he can remake his society, his society must make him."[249] But just as it is true that the Constitution "does not enact Mr. Herbert Spencer's Social

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[246] *Id.*

[247] *Id.* at 12.

[248] *See, e.g.*, Elisabeth Anderson, *Policy Entrepreneurs and the Origins of the Regulatory Welfare State: Child Labor Reform in Nineteenth-Century Europe*, 83 AM. SOC. REV. 173, 178 (2018) ("Acknowledging the role that individual agents can play in driving macro-social change may seem to invite an uncomfortable level of contingency, asociality, randomness, and even 'great man' adulation into causal explanation").

[249] HERBERT SPENCER, THE STUDY OF SOCIOLOGY 30–31 (1896). Herbert Spencer was, of course, best known for his cameo appearance in Justice Holmes's dissent in Lochner v. New York, 198 U.S. 45 (1905).

Statics,"[250] it is hard to escape the idea that it may have enacted Mr. Anthony Kennedy's Social Policies. It is difficult to imagine that this Article would be telling the same story about the success of the marriage equality movement in the courts if it were not for Justice Anthony Kennedy. Imagine, for example, a hypothetical universe in which the only difference was that President Reagan's nomination of Robert Bork to the Supreme Court in 1987 had succeeded.[251] Prior to his nomination, Bork, as a Judge on the Circuit Court of Appeals for the District of Columbia, had few opportunities to rule on issues related to gay rights. In one notable counter-example, however, Bork ruled that the Navy had not violated a petty officer's due process or equal protection rights when it fired him for engaging in homosexual acts.[252] It is not difficult to imagine that a judge who would write, "[t]he effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline" without requiring evidence of this fact because "common sense and common experience demonstrate" it,[253] would unlikely be a sympathetic jurist in future gay rights cases.

This is further evidenced by Bork's activities after he left the federal bench. In a 2001 op-ed in the Wall Street Journal, Bork wrote of the quest by "homosexual activists" for a "radical redefinition of marriage," about how "marriage has come under severe attack" thanks to "decades of superficial liberal rationalism," and posits that "the only hope" is to pass the Federal Marriage Amendment.[254] While he is clearly unhappy with same-sex marriage rights, at times Bork does strike a partially conciliatory tone, conceding at least that "[a]lmost all of us know homosexuals who are decent, intelligent[,] and compassionate people, and we have no inclination to wound

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[250] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[251] Bork's nomination to the Supreme Court was defeated 42–58. Linda Greenhouse, *Bork's Nomination is Rejected, 58–42; Reagan 'Saddened,'* N.Y. TIMES (Oct. 24, 1987), https://www.nytimes.com/1987/10/24/politics/borks-nomination-is-rejected-5842-reagan-saddened.html. The contentious confirmation process led to the coining of the term "borking" to mean "[t]o defame or vilify . . . usually with the aim of preventing his or her appointment to public office." *Bork*, OXFORD ENGLISH DICTIONARY (3d ed., 2002). *But see* John P. Mackenzie, *Bork Wasn't Borked*, WASH. POST (May 21, 2001), https://www.washingtonpost.com/archive/opinions/2001/05/21/bork-wasnt-borked/cb377ffc-515c-4d38-a947-59d2c2fc4a3e.

[252] Dronenburg v. Zech, 741 F.2d 1388, 1391 (D.C. Cir. 1984).

[253] *Id.* at 1398.

[254] Robert Bork, *Stop Courts From Imposing Gay Marriage*, WALL ST. J., Aug. 7, 2001, at A14. Despite arguing against same-sex marriage rights, Bork captures the relative simplicity of the legal argument for it remarkably clearly: "After all, if state law forbids Fred to marry Henry, aren't they denied equal protection when the law permits Tom and Jane to marry?" *Id.* Bork says this as if it were self-obviously incorrect, though he offers no reasoning as to why.

them," and "[m]any Americans have no desire to impose criminal sanctions on homosexual sodomy."[255]

By 2004, however, any conciliatory feelings Bork may have displayed publicly towards homosexuals were gone. In an article published in the journal First Things, a religious journal widely considered to be on the conservative end of the media spectrum,[256] Bork again argues in favor of the Federal Marriage Amendment that would have banned same-sex marriage throughout the country.[257] In the article, he refers to the *Lawrence* opinion as "creating a right to homosexual sodomy" (notwithstanding his previous statement about not wanting to impose criminal sanctions on homosexuals), rails against "[t]he Court's ongoing campaign to normalize homosexuality," and argues that the Supreme Court's inevitable decision in favor of same-sex marriage "[a]s an example of judicial incontinence . . . will rival *Roe v. Wade*, and will deal a severe and quite possibly fatal blow to two already badly damaged but indispensable institutions—marriage and the rule of law in constitutional interpretation."[258]

Assuming, in this hypothetical world, that Bork's appointment did not lead to any other changes in the composition of the Court, would *Romer v. Evans*[259] have come out the same way? Justice Kennedy's opinion for the six-justice majority gave movement litigators an important tool—the understanding that laws "inexplicable by anything but animus"[260] towards gays and lesbians as a group were constitutionally invalid even under rational basis—when deciding whether to bring the case that would end up becoming *Lawrence v. Texas*. It is impossible to know whether there still would have been five votes to strike down the Colorado law in question without Justice Kennedy's leadership on the issue. Regardless, the tone and scope of his opinion in the case would set the tone for LGBT rights litigation for years to come. Without a strong federal precedent like *Romer* in the intervening years since *Bowers*, it is conceivable that the litigators would have passed on bringing a new federal challenge to anti-gay sodomy laws, and another

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[255] *Id.*

[256] *See* T.A. Frank, *Welcome to the Golden Age of Conservative Magazines*, WASH POST (Jan. 25, 2018), https://www.washingtonpost.com/news/style/wp/2018/01/25/feature/why-conservative-magazines-are-more-important-than-ever/; Daniel Larison, *Kleinheider, First Things, and "TheoCons"*, THE AM. CONSERVATIVE (Jan. 10, 2006), http://www.theamericanconservative.com/larison/kleinheider-first-things-and-theocons/ (describing the editors of First Things as being "Catholic neoconservatives").

[257] Robert Bork, *The Necessary Amendment*, FIRST THINGS (Aug. 2004), https://www.firstthings.com/article/2004/08/the-necessary-amendment (last visited Sept. 26, 2018).

[258] *Id.*

[259] 517 U.S. 620 (1996).

[260] *Id.* at 632.

opportunity may not have arisen given the infrequency with which sodomy prosecutions occurred.[261]

Even assuming that *Lawrence* still reached the Supreme Court without the *Bowers* precedent bolstering the convictions of advocates, there is no guarantee that the case would have come out the same way. While we do not know what the vote was to grant certiorari in the case, it is possible that Justice Bork would not have voted to hear it, being happy with the *Bowers* precedent. Possibly this alone would have been enough to end litigation there. If the Court did hear the merits of the case, however, there is also no guarantee that Lawrence and Garner would have won. While the final vote in favor of striking down Texas's sodomy law was 6–3, rather than the 5–4 split in *Romer*, the sixth vote was provided by Justice O'Connor, a member of the majority in *Bowers*, who wrote a separate opinion rejecting the substantive due process argument favored by the majority and instead embracing the idea that Texas's sodomy law violated equal protection by only applying to conduct between members of the same sex.[262] O'Connor wrote that she specifically was *not* joining the Court in overturning *Bowers*, trying to distinguish the two cases by pointing out that the Texas law at issue applied only to homosexual sodomy and not any heterosexual acts and thus violated equal protection.[263] While it is true that the Georgia sodomy law at issue in *Bowers*, on its surface, applied to same-sex and opposite-sex couples alike, the *Bowers* Court treated the law as if it only applied to homosexual acts.[264] And while it is impossible to speculate with full certainty, there is at least a question as to whether Justice O'Connor, if she was the true swing vote in this case, would have sided with Lawrence and Garner on *any* grounds. At the very least, even if the end result of *Lawrence* would have been the same with Justice Bork instead of Justice Kennedy, there likely

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[261] *See* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 118–120 (2012). Carpenter's book tells the story of the *Lawrence* case and makes clear that the plaintiffs would likely have had no interest in pursuing a constitutional challenge to their convictions were it not for a local activist bringing the case to Lambda Legal's attention, and if it were not for the decision by local and national gay rights activists to push the case forward. *See generally id.*

[262] Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

[263] *Id.*

[264] *See, e.g.*, Bowers v. Hardwick, 478 U.S. at 190–92. Writing for the majority, Justice White declared:

> [N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. . . . Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. . . . It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.

Id.

would not have been five Justices who agreed on the doctrinal reason to strike down Texas's sodomy law, which would likely have limited the case's usefulness in deciding future cases.

The impact of different outcomes in *Romer* and *Lawrence* would have been dramatic. While the Supreme Court itself did not decide any other gay rights cases until 2013, after Robert Bork had died[265] (and presumably when he would have died in our hypothetical alternate universe), many lower courts relied on the opinions in *Romer* and *Lawrence* in upholding issues related to gay rights. The *Goodridge* majority opinion in the Massachusetts Supreme Judicial Court, which led to the first officially-recognized same-sex marriages in the United States cites, *Romer* once[266] and *Lawrence* seven separate times.[267] It is clear that the dismantling of various legal infirmities suffered by lesbian, gay, and bisexual people in the years leading up to the first marriage decisions played a large role in setting the stage for those decisions. As Justice Scalia said in his dissent to *Lawrence*, the case's "reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."[268] Without *Lawrence* as a doctrinal foothold, marriage equality's chances of success in the courts may have diminished greatly.

This leads inexorably to the conclusion that the history of marriage equality litigation in the United States was shaped to its core by the presence of Anthony Kennedy, President Reagan's third choice to fill the seat he occupied for just over thirty years on the Supreme Court. This is not to say that marriage equality advocates would necessarily have lost without him. A new Justice appointed by President Obama in 2012 when Bork died may have cast the fifth vote in a marriage equality case. Also, in the absence of the availability of federal litigation, advocates may have been more successful using state courts or the legislative process. But it is equally likely that we would still be living under a hodgepodge of different marriage laws, as conservative states continued banning the issuance of same-sex marriage licenses and recognizing those entered into out-of-state, while more liberal states expanded gay rights in a variety of ways, including full marriage equality.

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[265] Al Kamen & Matt Schudel, *Robert H. Bork, Conservative Judicial Icon, Dies at 85*, WASH. POST (Dec. 19, 2012), https://www.washingtonpost.com/local/obituaries/judge-robert-h-bork-conservative-icon/2012/12/19/49453de4-c5da-11df-94e1-c5afa35a9e59_story.html.

[266] Goodridge v. Dep't. Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003).

[267] *Id.* at 948, 953, 958 n.17, 959, 961 n.23.

[268] *Lawrence*, 539 U.S. at 601 (Scalia, J. dissenting).

V. CONCLUSION

Previous sections have demonstrated the uniqueness of the marriage equality litigation movement, exploring it in relation to the literature on law and social change, and hypothesized some of the reasons that it may have managed to achieve material legal and social changes in the courts where other movements have struggled to do so. As one of the issues that had sat atop the progressive legal agenda for much of the first fifteen years of the twenty-first century, marriage equality was a well-earned victory, but it also contributed to a difficult-to-shake feeling that courts were the friends of progressives, a feeling that flew in the face of the vast majority of evidence to the contrary.

The argument here is not that, without marriage equality, progressives would necessarily have been properly skeptical of the courts. The fact is with a series of conservative electoral victories, both federally but (perhaps more consequentially) at the state and local level, law has trended in a direction resulting in conservative policy outcomes for many years now, with only Anthony Kennedy as an occasional swing vote to keep some progressive priorities on life-support.[269] The hope that the courts would come through for marriage equality, and the realization of that hope in *Obergefell*, gave liberals something to latch onto in the face of what was becoming a court system increasingly inhospitable to progressive claims.

Placing hope in the judiciary is also understandable when the courts are the only place such hope could reasonably be located. In 2017, with Republicans controlling both branches of Congress and the Presidency, a series of court rulings that various versions of the Trump Administration's so-called "travel ban" executive order was likely unconstitutional gave hope to liberal opponents of the order.[270] Some even went so far as to say that the judiciary was part of the burgeoning "resistance," though this rhetoric was generally confined to critics on the right who felt like judges were doing too

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[269] A variety of 5–4 cases that narrowed the scope of progressive priorities without necessarily overturning them completely contributed to this idea. *See, e.g.*, Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project, Inc., 135 S. Ct. 2507 (2015) (holding that disparate impact claims were available under the Fair Housing Act, but limiting their reach due to constitutional concerns); Fisher v. Univ. of Texas, 136 S. Ct. 2198 (2016) (upholding a very narrow public university affirmative action policy); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2312 (2016) (holding Texas's restrictive abortion laws that closed nineteen abortion clinics in the state unconstitutional as an undue burden on a woman's right to abortion).

[270] For just a few examples out of many, see Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017); Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017); Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017); Sarsour v. Trump, 245 F. Supp. 3d 719 (E.D. Va. 2017); Darweesh v. Trump, No. 17 CIV. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017).

much to block the President's agenda.[271] Yet, even this hope was short-lived, as the Supreme Court ultimately upheld a version of the travel ban in a bitterly-divided opinion.[272] Justice Kennedy wrote a meek concurrence reminding the executive branch that they needed to follow the Constitution, while refusing to go so far as to require them to do so.[273]

This Article has attempted to explain a part of our current legal and political moment through exploring the aspects of the marriage equality movement that may have made it more susceptible to legal success than other legal movements. It also argued that understanding the potential of the courts to engage in progressive social change rests on a full understanding of the marriage equality movement's successes. Ultimately, it may hold true that, on a whole, it is a mistake for movements to dedicate too much time and too many resources to litigation, as Rosenberg argues. Yet, it is also true that this strategy did pay dividends for marriage equality activists. Only time will tell if future social movements will manage to achieve similar levels of success as the marriage equality movement, or even if the LGBT movement itself will continue to succeed in its future goals and to defend its pre-existing successes.[274]

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[271] *See, e.g.*, Josh Blackman, *The Legal Resistance to President Trump*, NAT'L REV. (Oct. 11, 2017), https://www.nationalreview.com/2017/10/donald-trump-courts-lawyers-legal-resistance/; Rich Lowry, *Judges for the #Resistance*, POLITICO (Apr. 25, 2017), https://www.politico.com/magazine/story/2018/04/25/judges-for-the-resistance-218104; Ilya Shapiro, *Courts Shouldn't Join the #Resistance*, CATO INST. (May 29, 2017), https://www.cato.org/blog/courts-shouldnt-join-resistance. For a response to these articles, see Dahlia Lithwick & Steve Vladeck, *Resisting the Myth of Judicial Resistance*, N.Y. TIMES (Jan. 25, 2018), https://slate.com/news-and-politics/2018/01/the-judges-whove-ruled-against-trump-arent-part-of-some-judicial-resistance.html.

[272] Trump v. Hawaii, 138 S. Ct. 2392 (2018). It is worth noting that this third version of the travel ban was much narrower in scope than the first two versions, a narrowing that had much to do with early court rulings against the ban and provide some hope for the use of litigation to temper the worst excesses of the Trump Administration. *See* Steve Vladeck, *The Supreme Court's Muslim Travel Ban Case Proves the Power of the Judiciary Branch in the Age of Trump*, NBC NEWS (Apr. 24, 2018), https://www.nbcnews.com/think/opinion/muslim-travel-ban-supreme-court-case-proves-power-judiciary-branch-ncna868736.

[273] *Trump*, 138 S. Ct. at 2423–24 (Kennedy, J., concurring).

[274] *See generally* THE UNFINISHED QUEER AGENDA AFTER MARRIAGE EQUALITY (Angela Jones, Joseph Nicholas DeFillippis & Michael W. Yarbrough eds., 2018).

Getting FNC Back on the Right Track: A Critical Re-Evaluation of the Federal Doctrine of Forum Non Conveniens

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I. INTRODUCTION

Whilst forum non conveniens ("FNC") is a familiar concept to most common law lawyers, especially in the United States, it is by no means constrained, either in effect or relevance, to the common law world. By definition, it is a doctrine which requires a concurrence of jurisdiction between two or more forums, and, as such, it is most likely to emerge in the context of international civil litigation. The forum the suit is originally brought must be a common law jurisdiction, but it is not a prerequisite for the employment of FNC that the alternative forum is also a common law jurisdiction, nor that the foreign forum should itself have the doctrine (or something akin to it). It is a common occurrence that a court in a State with a common law legal system, such as the United States, will dismiss an action on the grounds of FNC in favor of a court in a State with a civil law legal system where FNC is absent, such as France. It may be a common law doctrine, but it has a pesky tendency to impose itself on foreign, non-common law, legal systems, where it is often received as an uninvited and unwelcome visitor.

Hailing from a common law jurisdiction embedded within a European Union of Member State countries with civil law systems, interactions with my civil law contemporaries are an unavoidable occupational hazard. Often have I seen a look of disdain flash across the face of a civilian lawyer and witnessed the contemptuous curl of the lip at the merest mention of the three Latin words, "forum non conveniens." Nothing, it seems, is more likely to guarantee a good haranguing from a civilian lawyer than the idea of judicial discretion to decline jurisdiction. Civilian lawyers find this idea abhorrent. For them, it is anathema that a judge entrusted with the competence and responsibility to decide a dispute should have the option to decline to fulfil that function. They regard it is being a simple matter, if a judge has jurisdiction then he must exercise it. For the civilian lawyer, a judge either is or is not competent to hear a case.

The goal of this Article is not to conduct a comparative analysis of the jurisdictional philosophies of the common law and the civil law. It is not denied that there are strong and compelling arguments in civil law literature against FNC. However, with the greatest respect to my civil law

counterparts, misunderstanding (as well as a touch of prejudice) is often evident in their attitudes toward FNC. There is resistance to appreciate the doctrinal substance of FNC and the policy considerations that justify its existence. At the same time, common law lawyers must acknowledge that FNC is not a one-way street and we are, to an extent, indirectly imposing the doctrine on foreign jurisdictions, trusting its survival to judicial comity. This state of affairs is not aided where the doctrinal foundation of FNC suffers from a lack of clarity as this only facilitates misunderstanding and resentment. Where a United States court opts to dismiss a case on the grounds of FNC in favor of a foreign forum, it engages in an international dialogue with that forum, whether it intends to or not. This Article hopes to facilitate that dialogue in two ways. First, by providing an account of the doctrine's origins and development in terms which can contextualize and enrich the debate. Second, by critically evaluating the federal doctrine in the United States, identifying problems and proposing solutions.

This Article focuses on the federal doctrine of FNC in the United States, however, this is not to suggest that other versions of the doctrine around the common law world do not require similar critical attention. The critical scope of this Article is limited to the United States as pragmatic acknowledgement of the current reality that the center of gravity of international civil litigation is fixed within the United States.

It is the thesis of this Article that there is no singular federal doctrine of FNC in the United States. Instead, there are only doctrines which vary substantially between and even within the federal circuits. This, it is submitted, is the product of an interpretational wrong-turn taken by some courts with regards to the U.S. Supreme Court's articulation of the doctrine of FNC as laid down in *Gulf Oil Corp. v. Gilbert* and *Koster v. (American) Lumbermens Mutual Casualty Co.*[1] This situation was then compounded by the subsequent Supreme Court pronouncements in *Piper Aircraft Co. v. Reyno*,[2] with the consequence that the Court's current instruction to the lower federal courts asks them to do the impossible. The result is an unacceptable degree of doctrinal divergence and inconsistency. Even from a purely domestic perspective, such a state of affairs is undesirable. It generates unnecessary and wasteful litigation and deprives stakeholders of much needed legal certainty and predictability. From an international perspective, it undermines credibility, hinders doctrinal comprehension, and represents an obstacle to acquiescence toward FNC by foreign civil law States. At its worst, this confusion has provided a foundation for accusations that FNC is a

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[1] Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947).

[2] Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

vehicle for the discriminatory treatment of foreign plaintiffs and the protection of U.S. plaintiffs and defendants.

Part I of this Article lays out the historical origins and doctrinal foundations of FNC, providing some essential context and a definition of key terms. An account of its emergence within Scottish law is deserving of special attention, not only because it provides a useful means of introduction, but also because it undoubtedly played some role in the development of the doctrine in the United States. Additionally, it will allow us to draw out a critical component of the debate to be explored in this Article—the deference due the plaintiff's choice of forum.

Attention will then shift to the emergence of FNC within the United States. The doctrine owes less to its Scottish ancestry than one might expect. Furthermore, the doctrine's development was curtailed by constitutional doubts regarding its legitimacy and its theoretical framework was under-defined for a long period of time. Indeed, it was not until midway through the 20th century that FNC eventually found its feet and became a mainstay of United States jurisprudence. The key to this development was the definition of a federal doctrine by the Supreme Court in 1947. Although amply treated in many other sources, it is essential to review these foundational Supreme Court authorities on FNC in order to flag-up the aspects around which the subsequent controversy would emerge.

Part II of this Article will explore the inadvertent Legacy of *Gilbert* and *Koster*. It will trace the emergence of the notion that a foreign plaintiff's choice of forum is entitled to less deference than a U.S. plaintiff's, starting with the district court judgment in *Reyno v. Piper Aircraft Co.*[3] It will then explore the authorities relied upon by the district court, as well as other potential sources for this notion, searching for a compelling rationale. This Part will detail the Supreme Court's intervention in *Reyno* and identify the resulting problems; principal amongst is the instruction by the Court for lower courts to reconcile what appear to be essentially inconsistent propositions.

Part III will focus on the confusion resulting from the lower courts' efforts to implement *Reyno* starting with subsequent Supreme Court judgments discussing the relevant issues of FNC. The lion's share of this Part will focus on how the Circuit Courts of Appeals have wrestled with the challenges posed by *Reyno*, especially the question of how to accommodate the notion of deference to the U.S. citizen or resident's choice of forum. It is beyond the scope of this Article to engage in a circuit-by-circuit analysis of the various mechanisms which have been adopted, as such, three circuits will be

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[3] Reyno v. Piper Aircraft Co., 479 F. Supp. 727 (M.D. Pa. 1979) [hereinafter *Reyno I*], *rev'd*, 630 F.2d 149 (3d Cir. 1980).

examined in detail. Finally, brief mention will be made of the doctrine at the state court level. The section will demonstrate the extraordinary level of doctrinal divergence that exists within the United States with regards to FNC and how this can be traced back to the interpretational wrong-turn taken post-*Gilbert/Koster* and compounded by *Reyno*.

In the conclusion, this article will ponder the riddle at the heart of *Reyno* and ask whether it is possible to find an interpretation of *Reyno* which is consistent with *Gilbert/Koster*. It will be demonstrated that such an interpretation does exist, one that might be adopted without the need to overrule *Reyno,* and which would bring much needed uniformity, clarity, simplicity and international credibility, back to the U.S. federal doctrine of FNC.

II. THE ORIGIN STORIES OF FORUM NON CONVENIENS

A. Scotland: Early History and Essential Features

Two 17th century cases are frequently cited as the first instances of the FNC doctrine at work[4]: *Vernor v. Elvies* from 1610 and *Col. Brog's Heir* from 1639.[5] However, the better view of these, and other early authorities,[6] is that they concerned the question of the existence of judicial competence rather than a judicial discretion to exercise it.[7] It was only in 1846, with *Tulloch v. Williams,* that there was clear acceptance by a court that it had not only had jurisdiction but that it also had the discretionary power to decline to

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[4] "In a few very early Scottish cases the plea of *forum non competens*, which normally was directed to a lack of jurisdiction, was sustained in cases where the jurisdiction seemed clear but the parties were nonresidents and trial in Scotland would have been inconvenient." Edward L. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 387 n.45 (1947); *see also* Peter J. Carney, Comment, *International Forum Non Conveniens—"Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 425 n.41 (1995); RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 7 n.2 (2007); John Bies, Comment, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 493 n.20 (2000).

[5] All foreign (non-U.S.) cases are cited using the Oxford Standard for Citation of Legal Authorities. Vernor v. Elvies (1610) Mor 4788 (Scot.); Col. Brog's Heir (1639) Mor 4816 (Scot.).

[6] *See, e.g.*, Brown's Tr. v. Palmer (1830) 9 S 224 (Scot.); MacMaster v. MacMaster (1833) 11 S 685, 688 (Scot.).

[7] It was for lack of competence and not as a matter of discretion that the courts did not exercise their jurisdiction. "Early Scottish cases dealing with a plea of '*forum non competens*' suggest that the question litigated was one of power or jurisdiction rather than discretion[.]" Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909 (1947).

exercise it.[8] At this stage, the issues of jurisdiction and "forum competens" were treated separately.[9] The former pertained directly to the competence of the tribunal to hear the case, whereas the latter indicated its discretion to decline jurisdiction where the forum, though competent, was deemed to be inconvenient or inappropriate.[10] This understanding of the doctrine, as based on discretion rather than competence, was confirmed in *Longworth v. Hope* in 1865.[11] The defenders made a plea of "forum non competens," asking the Scottish court to decline jurisdiction in favor of the courts of England.[12] Rejecting the plea, the court stated that, "the plea usually thus expressed does not mean that the forum is one in which it is wholly incompetent to deal with the question," but that the true issue was about the "consideration of the appropriate forum."[13] Indeed, the inaptness of the term "competens" to describe the true nature of the doctrine was expressly recognized by Lord Ardmillan.[14] Nevertheless, the doctrine continued to be referred to as "forum non competens." In *Thomson v. North British & Mercantile Insurance Co.*, Lord Benholme suggested that the plea ought instead to be called "forum non conveniens."[15] This was followed in 1873 by *Macadam v. Macadam,* where the court referred to the plea as "forum conveniens."[16] The 1883 case of

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[8] (1846) 8 D 657, 659 (Scot.). The court stated that the Scottish forum was "not an incompetent but an inconvenient forum." *Id. See also* Parken v. Royal Exch. Assurance Co. 8 D 365, 369–70 (Scot.).

[9] Prior to this, the term "forum competens" was understood as referring to the general competence of the court—its jurisdiction. A contemporary case to *Tulloch* likewise distinguished between jurisdiction and forum competens. *See* M'Morine v. Cowie (1845) 7 D 270, 272 (Scot.).

[10] "In such cases the question is not one of jurisdiction, but of *forum competens*, which is properly on the merits—which is the proper forum for accounting? . . . [The] question being as to forum competens, and not as to jurisdiction." *Id.*

[11] (1865) 3 M 1049 (Scot.).

[12] The term "defender" is the equivalent of a "defendant" in the United States. "Defendant" is not used in Scottish law. Glossary, JUDICIARY OF SCOT., http://www.scotland-judiciary.org.uk/29/0/Glossary (last visited Sept. 25, 2018). "Pursuer" is the Scottish law equivalent for the term "plaintiff." *Id.*

[13] *Longworth*, 3 M at 1053.

[14] *Id.* at 1059. Lord Ardmillan wrote:

> The word *competens* is an inappropriate expression. We assume that if there is jurisdiction, there is in a sense a competent forum—an open forum to all parties who are entitled to come within that jurisdiction. But the plea really resolves into this, that in some cases where the Court has jurisdiction, it is not appropriate or fitting that the Court shall exercise that jurisdiction.

Id.

[15] (1868) 6 M 310, 312 (Scot.).

[16] (1873) 11 M 860, 862 (Scot.).

Brown v. Cartwright was the first reported case in which a court actually considered a plea under the full name of forum non conveniens.[17]

When it came to the determination of appropriateness, this was to be divined from a consideration of the interests of justice, such that refusing the plea would amount to "a hardship, and almost an injustice."[18] In *Longworth*, Lord Deas made it clear that the onus was on the party raising the plea to prove that he would suffer an unfair disadvantage and that it was not enough to show that the party had a better chance of success in the other forum.[19] "Unfair disadvantage" was to be understood as a state of affairs where "justice is not likely to be done."[20] Of the various considerations to be taken into account, the court noted two—first, the location of evidence and witnesses and second, the applicable law.[21]

From the early origins of FNC in Scottish law it can be concluded that the doctrine emerged not from considerations pertaining to competence of the chosen forum but from questions of relative convenience. Convenience was understood as referring to the appropriateness of the forum for securing the ends of justice.[22] Its operation was predicated on the existence of concurrent jurisdiction. Indeed, without an alternative available forum there was no scope for its application.[23] The purpose of the doctrine was to facilitate the exercise of a discretionary power to decline jurisdiction in order to best secure the ends of justice by identifying the more appropriate forum.[24] By 1883, the doctrine had been christened under its modern label of "forum non conveniens" but had, since 1846, been applied by courts in all but name. The burden of proof rested on the defendant and the threshold for sustaining the plea was high, a hardship, or unfair disadvantage, amounting almost to an injustice was required and, as such, its successful pleading was to be exceptional.

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[17] (1883) 10 R 1235 (Scot.). The court rejected the plea in Brown, but it was sustained in a case the following year. *See* Williamson v. Ne. Ry. Co. (1884) 11 R 596 (Scot.).

[18] *Longworth*, 3 M at 1053.

[19] *Id.* at 1057.

[20] *Id.*

[21] *Id.* at 1053, 1057.

[22] *Id.* at 1057.

[23] In *Clements v. Macaulay*, Lord Justice Clerk Inglis explained that it was a prerequisite that an alternative forum be available before the plea could succeed. (1866) 4 M 583 (Scot.). He stated:

> I know no case of a plea of this kind being sustained, where the defender did not satisfy the Court that there was another Court where the cause could be tried with advantage to the parties and to the ends of justice. The defender does seem to have thought himself under obligation to suggest what was the proper forum, but he has unfortunately suggested one which has no jurisdiction.

Id. at 592.

[24] *See* Joseph Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 882 (1935).

What is regarded by some as the standard formulation of the doctrine in Scottish law was provided by the Court of Session in *Sim v. Robinow* in 1892.[25] Initially, the Lord Ordinary had repelled the plea, not finding the considerations of convenience to be sufficiently strong.[26] The defender reclaimed, arguing that the plea of FNC ought to be granted where the balance of convenience lay in favor of the foreign forum.[27] Lord Kinnear disagreed, stating that "something more is required than mere practical inconvenience in order to sustain the plea of *forum non conveniens*."[28]

On a review of the authorities, the Court gave, what still remains, a classic articulation and one of the most concise distillations of the spirit of the doctrine in the common law world:

> In all these cases there was one indispensable element present when the Court gave effect to the plea of *forum non conveniens*, namely, that the Court was satisfied that there was another Court in which the action ought to be tried as being more convenient for all the parties, and more suitable for the ends of justice.[29]

The Court was not of the view that this indispensable element existed in the case before it.[30] That it would cause the defender inconvenience and considerable expense was not sufficient justification to sustain the plea.[31] Inherent to which was the recognition that the plea was only to be granted in exceptional circumstances and that, on balance, the pursuer's choice of forum should stand, consistent with the judge's duty not to abdicate completely his own judgment, as expressed by the Latin maxim of *judex tenetur impertiri judicium suum.*[32]

This is an opportune moment to mention what will be a key concern of this paper—the role of deference within the doctrine of FNC. In *La Société du Gaz*, Lord Sumner averred that there was no presumption in favor of the pursuer.[33] He stated:

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[25] (1892) 19 R 665 (Scot.). *See, e.g.,* Anthony Maclean, Comment, *Foreign Collisions and Forum Conveniens*, 22 INT'L & COMP. L.Q. 748, 752 (1973) ("The standard formulation of when the plea of forum non conveniens will be accepted is to be found in *Sim v. Robinow*[.]").

[26] *Sim*, 19 R at 666 n.1.

[27] *Id.* at 668.

[28] *Id.* The court considered this to be in line with precedent, of which Lord Kinnear said: "I am not aware that the Court has ever refused to exercise its jurisdiction upon the ground of a mere balance of convenience and inconvenience." *Id.*

[29] *Id.* at 669.

[30] *Id.*

[31] "It seems to me therefore that it is neither expedient for both the parties, nor proper in the interests of justice, that the action should be dismissed." *Id.*

[32] *See id.* (quoting Clements v. Macaulay 4 M 583, 593 (Scot.)).

[33] La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs

> All that has been arrived at so far is that the burden of proof is upon the defender to maintain the plea. I cannot see that there is any presumption in favour [sic] of the pursuer. Each has his right, the one to take an exceptional course, contrary to the usual maxim of *actor sequitur forum rei*; the other a right to object to that course, if he can make it out on satisfactory grounds. It appears to me that the Court's duty to entertain the suit can be no higher than its duty to listen to, and, if the circumstances warrant it, to sustain the plea. We therefore, to my mind, get no further by the citation of Latin maxims.[34]

It is submitted that Lord Sumner wished to emphasize that the existence of the burden of proof upon a defendant, in seeking a stay on the grounds of FNC, is not a reflection of a deliberate policy to vest an advantage on the person of the pursuer as recognition of the presumptive convenience of his choice of forum. Clearly, it has that practical effect, but it does not exist in service of that purpose. That there is a higher burden of proof than would normally apply in civil actions is not a consequence of the presumptive convenience of the plaintiff's choice of forum. Why does this higher burden of proof exist in the case of FNC? Strangely, this is a question that is seldom asked. It would seem to be somehow self-evident, as being so intuitively sensible that it has never been challenged. Yes, there has been endless debate over the specific standard required for dismissal, but as to why it should be higher than the normal standard of proof for civil actions has not been debated. The question that needs to be asked is, why does a higher burden of proof exist under the doctrine of FNC?

It is submitted that the higher burden of proof for FNC is the result of judicial common-sense and policy. Courts are generally reluctant to dismiss cases over which they have jurisdiction, which is captured by the classic Latin maxim of *judex tenetur impertiri judicium suum*.[35] The reasons for this maxim are legion, but include the promotion of certainty and predictability, the efficient utilization of judicial resources, the proper administration of justice, judicial comity (more probably judicial chauvinism), and so on. Inherent to this is also the judicial respect for the traditional structure of civil litigation. Indeed, Lord Sumner averted to the Latin maxim of *actor sequitur forum rei*, understood as meaning, in the case of personal actions, that the plaintiff must follow the forum of the defendant's domicile.[36] FNC represents an exception to these legal principles and it is out of respect for these that the burden of proof is higher. To the extent that convenience may

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Français" (No. 2) [1926] SC 13, 21 (HL) (appeal taken from Scot.) (UK).

[34] *Id.* at 21–22.

[35] Translated, the phrase means: "A judge is bound to decide (the case before him)." Gaspard Curioni, Note, Interest Balancing and International Abstention, 93 B.U. L. REV. 621, 627 (2013).

[36] *La Société du Gaz*, (1926) SC at 21.

have factored as a consideration in this baseline presumption regarding the burden of proof, the likelihood is that it would have had only a minor influence and certainly only in an objective capacity. Simply put, it goes without saying that FNC dismissal inherently generates inconvenience for the parties and for the forums. Interrupting proceedings as to the substance of a case, even at an early stage, in order to litigate the question of where to sue is undoubtedly time-consuming and costly. Where dismissal is granted, there is additional expense and hardship involved in recommencing in another forum, regardless of where that may be. Therefore, the courts saw merit in discouraging FNC motions by imposing a higher burden for securing dismissal. There is no analysis or determination necessary by a trial court with regards to this baseline presumption. It is a general presumption that applies equally to each and every plaintiff, irrespective of their status or circumstances. The particulars of the convenience and inconvenience of a plaintiff's choice of forum is not a factor at this stage of proceedings. Indeed, the whole point of FNC is to test the actual convenience of the plaintiff's choice against this baseline presumption.

In *La Société du Gaz*, the House of Lords upheld the decision of the Inner House of the Court of Session to dismiss an action on the grounds of FNC.[37] Citing *Sim v. Robinow* and *Clements v. Macaulay*, the Lord Chancellor defined the Scottish plea of FNC as follows:

> [I]f in any case it appeared to the Court, after giving consideration to the interests of both parties and to the requirements of justice, that the case could not be suitably tried in the Court in which it was instituted and full justice could not be done there to the parties, but could be done in another Court, then the former Court might give effect to the plea by declining jurisdiction and permitting the issues to be fought out in the more appropriate Court.[38]

The majority's formulation in *La Société du Gaz* became the ruling authority in Scotland and is cited by many commentators as the principal articulation of the doctrine in Scottish Law.[39]

B. Origins in the United States

The United States is seen by many as the forum of choice for international civil litigation due to the habitual generosity of its juries, its far-reaching rules

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[37] *Id.* at 23–24.

[38] *Id.* at 16–17.

[39] *See, e.g.*, BRAND & JABLONSKI, *supra* note 4, at 9–10; Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 20 (1929); Rhona Schuz, *Controlling Forum-Shopping: The Impact of* MacShannon v. Rockware Glass Ltd., 35 INT'L & COMP. L.Q. 374, 377 (1986); Dainow, *supra* note 24, at 882–83.

of discovery, the availability of contingency fees, and more.[40] As Lord Denning famously said:

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side.[41]

Therefore, it should come as little surprise that U.S. courts, at both the state and federal level, have made recourse to the doctrine of FNC to manage their congested dockets and repel litigation that is viewed as properly belonging elsewhere.[42] As a result of its widespread use, there is an abundance of case law and commentary to explore.

While the modern doctrine of FNC originated from two U.S. Supreme Court cases decided on the same day in 1947, *Gilbert*[43] and *Koster*,[44] there was a long history leading up to that moment at both the state and federal level. While U.S. courts and commentators agree on the Scottish origins of the doctrine,[45] there is little evidence to support its direct importation from Scotland.[46] This is supported by the absence of the term "forum non competens" from United States jurisprudence and that the term "forum non conveniens" only began to appear early in the 20th century.[47] Instead, it appears the doctrine developed in the United States in a "somewhat parallel, but separate and independent manner" to Scotland, merging itself with the limited instances of the exercise of judicial discretion to decline jurisdiction by federal courts and some state courts.[48]

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[40] *See* Desmond T. Barry, Jr., *Foreign Corporations: Forum Non Conveniens and Change of Venue*, 61 DEF. COUNSEL J. 543, 543 (1994).

[41] Smith Kline & French Labs., Ltd. v. Bloch [1983] WLR 730, 733–34 (CA) (Eng.).

[42] *See* Sidney K. Smith, Note, *Forum Non Conveniens and Foreign Policy: Time for Congressional Intervention*, 90 TEX. L. REV. 743, 743 (2012) ("To alleviate concerns about hearing cases with only a tenuous connection to the chosen jurisdiction, American courts have primarily employed the common law doctrine of forum non conveniens.").

[43] Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

[44] Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947).

[45] The U.S. Supreme Court noted the Scottish origins of the doctrine in *Reyno*. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981). Braucher likewise pointed to Scotland. *See* Braucher, *supra* note 7, at 909–10.

[46] *See* C. Paul Rogers, *Scots Law in Post-Revolutionary and Nineteenth Century America: The Neglected Jurisprudence*, 8 LAW HIST. REV. 205, 212 (1990) ("The doctrine is well established now in most states and was codified in section 1404(a) of the 1948 Federal Judicial Code. However, modern decisions provide little evidence of Scottish influence.").

[47] *Id.* at 211. "Thus, while American courts and commentators recognize Scotland as the origin of forum non conveniens, there is little evidence that the early Scots decisions had a significant influence in the development of the doctrine in the United States." *Id.*

[48] *Id.*

From the beginning, a constitutional law question created a hurdle to the emergence of FNC—whether U.S. federal courts had the power to decline jurisdiction at all.[49] It seems clear, at least within admiralty, that federal courts had the power to decline jurisdiction.[50] The strength of opinion was of the view that any discretion to decline jurisdiction was unique to admiralty cases involving foreigners and that these courts were otherwise duty-bound to exercise jurisdiction. On the other hand, there were sufficient exceptions evidenced within case law to support the argument for the possibility of a more general discretionary power of federal courts.[51] Uncertainty thus reigned over the issue of the power to decline jurisdiction. First, the nature and extent of that power was obscure. Second, even within admiralty, the exercise of the discretion to decline jurisdiction eluded formalization.[52] For these reasons, it is impossible to discern from these early federal manifestations much more than the sense of a nascent concept resembling

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[49] At the federal level, Chief Justice Marshall stated: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). Yet in 1804 in *Mason v. Ship Blaireau*, the Supreme Court had averred to the possibility of refusing to exercise valid jurisdiction in an admiralty case involving foreign parties. 6 U.S. (2 Cranch) 240, 264 (1804). Other decisions of the federal courts also support the existence of discretion in admiralty cases involving foreigners. *See* Willendson v. Forsoket, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682); The Maggie Hammond, 76 U.S. (9 Wall.) 435, 451–52 (1869); The Belgenland, 114 U.S. 355, 363–64 (1885). That admiralty should be the source of a judicial discretion is explainable by the greater likelihood of a foreign component and because States tended to adopt very broad jurisdictional competence over such matters. Hobart Coffey, *Jurisdiction Over Foreigners in Admiralty Courts*, 13 CAL. L. REV. 93, 93–94 (1925).

[50] *See* BRAND & JABLONSKI, *supra* note 4, at 40 ("Thus, at least in federal admiralty cases, the ability of United States courts to decline available jurisdiction was clear, throughout the nineteenth century when foreign parties were involved."); *see also* Rogers, *supra* note 46, at 211.

[51] The statement of a New York district court is at least one example of a federal court countenancing declining jurisdiction in tort or contract, albeit in a dispute between foreigners. *See In re* One Hundred & Ninety-Four Shawls, 18 F. Cas. 703, 704 (S.D.N.Y. 1848) (No. 10,521). The court stated:

> As a general principle, the citizens or subjects of the same nation have no right to invoke a foreign tribunal to adjudicate between them, as to matters of tort or contract solely affecting themselves. It rests in the discretion of the court, whose authority is invoked, to determine whether it will take cognizance of such matters or not.

Id.

[52] "There seems to be no definite rule to be derived from the cases for the exercise of this discretion." Coffey, *supra* note 49, at 94. "No general rule can be laid down in answer to this question. It seems to be a matter for the judge in each particular case to decide whether justice can better be done by hearing the case or by dismissing the suit and remitting the parties to another forum." *Id.* at 97. *See also* Bies, *supra* note 4, at 496 n.30.

FNC in some of its fundamental features but falling short of a formal doctrine.

Turning to state level jurisprudence, there is ample evidence of some state courts declining to exercise jurisdiction in non-admiralty cases,[53] so much so that some commentators identify state courts as the origin of FNC in the United States.[54] Not only do these state law cases show courts declining jurisdiction outside of admiralty, some of the familiar doctrinal features of FNC were present in the courts' decisions, i.e., discretion, availability of an alternative forum, and considerations of convenience.[55] It would be remiss not to note that docket congestion was invoked as a justification for declining jurisdiction in a number of these cases.[56] While such overt consideration of issues of public policy are not characteristic of FNC in the Scottish or English experience, they have come to play a central role in the United States.

In contrast to the federal courts, state courts provide evidence of a broader discretion to decline jurisdiction that admitted of greater formalization as a doctrine than its federal manifestation.[57] However, much of the state law precedent for a doctrine approximating FNC came from the New York courts, who frequently declined jurisdiction in tort claims.[58] Whilst case law can found for the same proposition from other courts, such as those of

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[53] *See, e.g.*, Gardner v. Thomas, 14 Johns. 134 (N.Y. 1817); Collard v. Beach, 87 N.Y.S. 884 (N.Y. App. Div. 1904). Justice Scalia once noted that "[e]ven within the United States alone, there is no basis for regarding forum non conveniens as a doctrine that originated in admiralty." Am. Dredging Co. v. Miller, 510 U.S. 443, 449 (1994).

[54] Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L. J. 467, 475 n.50 (2002). Braucher stated that, "[a]t least as early as 1817 a state court asserted and exercised a discretionary power to deny its facilities to a cause as to which it had jurisdiction." Braucher, *supra* note 7, at 914 (citing *Gardner*, 14 Johns. at 134). One commentator cited the 1793 case of *Robertson v. Kerr* as evidence of a court declining to exercise jurisdiction where the ends of justice so required. Barrett, *supra* note 4, at 387 n.36. However, on closer inspection, the court in *Robertson v. Kerr* did not decline jurisdiction but rather held that it had no jurisdiction over the action to begin with. Rea v. Hayden, 3 Mass. 24, 25 n.1 (1807).

[55] For further examples and discussion of early cases cited as demonstrating the origin of an FNC notion, see Roger S. Foster, *The Place of Trial: Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 53 (1930); *see also* Bies, *supra* note 4, at 496 n.30.

[56] *See Collard*, 87 N.Y.S. at 885–86.

[57] *See, e.g., Gardner*, 14 Johns. at 134; Universal Adjustment Corp. v. Midland Bank, Ltd., 184 N.E. 152 (Mass. 1933); Morisette v. Canadian Pac. Ry. Co., 56 A. 1102, 1103 (Vt. 1904); see *also* Braucher, *supra* note 7, at 915–16.

[58] *See* Braucher, *supra* note 7, at 917.

Michigan,[59] Wisconsin,[60] and Texas.[61] It must be acknowledged that, in the main, only a small number of states actually adopted something akin to FNC, whereas many states had either not considered the matter at all, or had expressly rejected it.[62]

Thus, at the beginning of the 20th century, the status of FNC within the United States was far from clear. Some kindred notion existed in a vague form at federal level and, in a handful of states, a more formal doctrine had found a foothold. Against this backdrop, in 1929, a Wall Street lawyer by the name of Paxton Blair published a law review article which would go on to have considerable influence.[63] Blair posited the thesis that U.S. courts had been applying FNC for years without realizing.[64] Blair declared:

> Upon an examination of the American decisions illustrative of the doctrine of *forum non conveniens*, it becomes apparent that the courts of this country have been for years applying the doctrine with such little consciousness of what they were doing as to remind one of Molière's M. Jourdain, who found he had been speaking prose all his life without knowing it.[65]

Blair's thesis is certainly open to criticism,[66] but it arrived at an opportune moment when solutions were being sought to address the growing problem of docket congestion in large centers of population in the United States, particularly New York.[67] Blair's article represented an invitation to formally

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[59] In *Great Western Railway Co. of Canada v. Miller*, the plaintiff had been put-off the defendant's train in the middle of nowhere in Canada and sued in Michigan for damages. 19 Mich. 305 (1869). The Court stated that the parties had submitted to the jurisdiction of the court, but "where the parties are not residents of the United States, and the trespass was committed abroad, the right of action in our courts can only be claimed as a matter of comity, and they are not compellable to proceed in such cases." *Id.* at 315. However, in a case involving U.S. citizens, the Supreme Court of Michigan held itself to be duty bound to exercise jurisdiction on account of the privileges and immunities clause of the Constitution. Cofrode v. Gartner, 79 Mich. 332, 340–42 (1890).

[60] *See* Disconto Gesellschaft v. Terlinden, 106 N.W. 821 (Wis. 1906).

[61] *See* Morris v. Mo. Pac. Ry. Co., 14 S.W. 228 (Tex. 1890).

[62] Barrett, *supra* note 4, at 388 n.40.

[63] *See generally* Blair, *supra* note 39.

[64] Blair did not claim to have introduced the term to the United States. He noted the use of the Latin term in a New York case from 1917. *Id.* at 2 n.4 (citing Bagdon v. Phila. & Reading Coal & Iron Co., 165 N.Y.S. 910 (N.Y. App. Div. 1917)); *see also* BRAND & JABLONSKI, *supra* note 4, at 38.

[65] Blair, *supra* note 39, at 21–22.

[66] *See* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796 n.43 (1985) (criticizing Blair for having suggested that the doctrine was applied since 1817).

[67] *See* Blair, *supra* note 39, at 1 ("Among the problems engrossing the attention of the Bar in the largest centers of population in the United States, the relief of calendar congestion in the trial courts is easily foremost.").

adopt FNC but it also provided a convenient hook upon which to hang it. The need for new legislation could be avoided since it was allegedly already part of the "inherent powers possessed by every court of justice."[68]

At that time, the federal courts still considered themselves duty bound to exercise jurisdiction, except in admiralty, and this impeded the development of a general federal doctrine.[69] It is commonly accepted that the main reason behind the non-adoption of the doctrine at state level was largely due to doubts regarding its compatibility with the privileges and immunities clause of the United States Constitution.[70] Blair's thesis provided powerful encouragement and support for those who wished to formally adopt FNC. The same year Blair's article was published, the obstacle to state level adoption of FNC was resolved by the U.S. Supreme Court in *Douglas v. New York, New Haven & Hartford Railroad Co.*[71] However, it would not be until the federal matter was resolved that the path would be fully cleared. This began with a shift in the U.S. Supreme Court's attitude toward acknowledging the doctrine outside of admiralty.[72] First, in the 1932 case of *Canada Malting Co. v. Paterson Steamship*,[73] and then developed further in subsequent judgments.[74] These cases edged the U.S. Supreme Court closer and closer to the express recognition of a general federal doctrine of FNC. This eventually came in 1947 with *Gilbert* and *Koster* and they provided the final incentive necessary for general state level acceptance.[75]

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[68] *Id.*

[69] *See* Barrett, *supra* note 4, at 394 ("Development of the doctrine of *forum non conveniens* in the federal courts has been impeded by the oft-expressed assertion that a federal court having jurisdiction of the parties and the subject matter of the action is under a duty to exercise that jurisdiction.").

[70] *Id.* at 389 (citing U.S. CONST. art. IV, § 2, cl. 1); Blair, *supra* note 39, at 3, 6–19; Roger S. Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1239–40 (1930); *see also* Barrett, *supra* note 4, at 389–93; Braucher, *supra* note 7, at 914–15; Blair, *supra* note 39 at 6–19.

[71] 279 U.S. 377 (1929). For discussion of the *Douglas* case in the context of FNC, see Barrett, *supra* note 4, at 391–93. This was more explicitly confirmed in 1935: "In 1935, the Supreme Court explicitly stated that a state court could apply the doctrine of forum non conveniens in certain circumstances without violating the Constitution." BRAND & JABLONSKI, *supra* note 4, at 43 (citing Broderick v. Rosner, 294 U.S. 629, 642–43 (1935)).

[72] Brand and Jablonski traced the beginning of this shift to even earlier, to the case of *Slater v. Mexican National Railroad Co*. *See* BRAND & JABLONSKI, *supra* note 4, at 41 (citing Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120 (1904)).

[73] Can. Malting Co. v. Paterson S.S., 285 U.S. 413, 423 (1932); for discussion, see Braucher, *supra* note 7, at 921; Barrett, *supra* note 4, at 395.

[74] *See, e.g.,* Rogers v. Guar. Tr. Co., 288 U.S. 123 (1933); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Williams v. Green Bay & W. Ry. Co., 326 U.S. 549 (1946).

[75] As Stein observed, "[n]ot until 1948 was the doctrine accepted for general application in the federal courts, and it received little or no attention in the state courts until after the federal adoption." Stein, *supra* note 66, at 796.

This brief sojourn through the pre-history of FNC in the United States demonstrates the obscurity of the doctrine's origins. While there was evidence for the exercise of a discretionary power to decline jurisdiction, exhibiting some of the key features of FNC, there was a manifest absence of doctrinal substance. Blair's article provided a compelling practical argument for its general adoption but did not resolve the doctrinal and constitutional concerns. Thus, when it came time for the U.S. Supreme Court to address the status of FNC at the federal level, from which the state courts would take their lead, it was not starting from a blank canvas, nor was it painting by numbers. The Supreme Court had a vague proof of concept but was tasked with complementing that with the criteria necessary to establish a general doctrine with practical utility.[76]

C. The Emergence of a Settled Federal Doctrine

In *Gilbert*, a Virginia resident brought an action in negligence against a Pennsylvania oil company for the destruction of his warehouse in Virginia.[77] The case was brought before the District Court for the Southern District of New York.[78] *Koster*, a companion case to *Gilbert*, was decided by the Supreme Court on the same day and concerned a derivative action brought in New York against the defendant insurance company relating to the alleged breach of fiduciary duties by officers of the company.[79] Koster, a New York resident, had brought the action as a member and policyholder of Lumbermens Mutual Casualty, an Illinois insurance company, in the right of the company and on behalf of all its members and policyholders.[80] In both cases, the district courts had granted FNC dismissals.[81] In *Gilbert*, the court of appeals had reversed, whereas in *Koster*, it had upheld the dismissal.[82] The subsequent appeals gave the U.S. Supreme Court the opportunity to have its say.

The first question, in ways the most essential, to be addressed in *Gilbert* was whether federal courts had the inherent power to decline jurisdiction at all.[83] Giving the opinion for the majority, Justice Jackson stated that the

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[76] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (according to Justice Jackson, "[t]he federal law contains no such express criteria to guide the district court in exercising its power").

[77] *Id.* at 502–03.

[78] *Id.* at 503.

[79] Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 519–20 (1947).

[80] *Id.*

[81] *Gilbert*, 330 U.S. at 503; *Koster*, 330 U.S. at 520.

[82] *Gilbert*, 330 U.S. at 503; *Koster*, 330 U.S. at 520.

[83] *See Gilbert*, 330 U.S. at 506–08.

Court, "in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances."[84] Insofar as competence was concerned, the Supreme Court formally affirmed the intrinsic power of federal courts, whether in admiralty, law or equity, to decline jurisdiction.[85]

From that basis, Justice Jackson went on to review the relevant case law and identified the fundamental elements of the doctrine. He began by stating that FNC "presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."[86] In his view, "[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized[.]"[87] These are certainly vital elements to the core proposition of FNC and agree with the fundamental features shown by the earlier federal and state cases discussed above, but, they are essentially silent on the practical doctrinal content of FNC such as what the criteria and standard should be.

Justice Jackson considered it unwise to attempt to catalogue all the various circumstances in which dismissal would be warranted, opining that it was ultimately a discretionary matter for the court concerned.[88] While a precise itinerary was beyond reach, the factors to be considered were broadly defined by the Supreme Court under the headings of private interest factors and public interest factors.[89] These were to provide the criteria—which had until that point been absent—necessary to guide a federal court in the exercise of its discretion when applying the doctrine of FNC.

1. Private Interest Factors

In its private interest factor analysis in *Gilbert*, the Supreme Court noted, with respect to the New York forum, that the plaintiff was not a resident of New York, that no event connected to the dispute occurred there, and that no

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[84] *Id.* at 504. Justice Jackson endorsed the words of Justice Brandeis in *Canada Malting Co.*, where he stated, "the proposition that a court having jurisdiction must exercise it, is not universally true." *Id.* (citing Can. Malting Co. v. Paterson S.S., 285 U.S. 413, 415 (1932)). The Court also noted that it had, on several occasions, expressly recognized the power of a state court to apply the doctrine of FNC. *Id.* at 504–05.

[85] However, from a doctrinal point of view, Justice Jackson conceded that the state courts, not the federal courts, were the origin of the doctrine of FNC. "The doctrine did not originate in federal but in state courts." *Id.* at 505 n.4.

[86] *Id.* at 506–07.

[87] *Id.* at 507.

[88] *Id.* at 508.

[89] *Id.*

witnesses, except perhaps for experts, resided there either.[90] In so doing, the Court was emphasizing the lack of connecting factors between the dispute and the forum insofar as it could indicate convenience for the plaintiff for trial in that forum. In fact, the only justification for trial in New York was the alleged fact that a New York jury might be more comfortable with awarding the high damages sought than a jury in Lynchburg, Virginia.[91] The district court had rejected this justification and the Supreme Court was similarly dismissive.[92] The plaintiff was unable to indicate any justifiable reason for his choice of forum; his legitimate private interest in trial in the New York forum, compared to that in Virginia, was weak.[93] On the other side, the defendant could point to several factors connecting the case to Lynchburg; notably, the fact that the plaintiff and every other person who participated in the allegedly negligent acts, as well as most witnesses, resided in or around Lynchburg.[94] The private interest factors thus pointed strongly toward the convenience of trial in Virginia.[95]

By private interest factors, the court was referring specifically to the interests of the parties to the litigation and defined these as "practical problems that make trial of a case easy, expeditious and inexpensive."[96] The Supreme Court provided a non-exhaustive list of six important considerations, which have subsequently been adopted by courts as a guide for conducting the private interest analysis.[97] Those considerations are: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) where appropriate, the possibility of viewing premises; (5) questions as to the enforceability of a judgment; and (6) all other practical problems that make trial of a case easy, expeditious and inexpensive.[98]

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[90] *Id.* at 509–10.

[91] *Id.* at 510. Although it was also suggested that advantage might be found in the fact that it would be easier to find a New York jury that would be free from local influences and preconceived notions than in Lynchburg where many people have previous knowledge of the facts. *Id.*

[92] *Id.* at 510–12.

[93] *Id.* at 510–11.

[94] *Id.* at 511.

[95] *Id.*

[96] *Id.* at 508. "An interest to be considered, and the one likely to be most pressed, is *the private interest of the litigant*." *Id.* (emphasis added). For Boyce, the private interest factor analysis, "focuses on litigational efficiency from a practical standpoint." David Boyce, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond* Reyno, 64 TEX. L. REV. 193, 215 (1985).

[97] *Gilbert*, 330 U.S. at 508.

[98] *Id.* at 508–09.

2. *Public Interest Factors*

The public interest factors were not defined in *Gilbert*.[99] Instead, Justice Jackson elected to present examples. He referred to administrative difficulties arising from court congestion and the burden of imposing jury duty upon a community without a connection to the controversy involved.[100] He remarked that some cases may be of wider interest to the community in which the cause of action arose and that there would thus be a local interest in having the case litigated in the locality.[101] In a diversity action, such as *Gilbert*, there was an interest in having the case heard by a forum familiar with the state law that would be applied rather than a forum to which the law may be foreign.[102] Avoidance of complex conflict of laws questions was also regarded as a public interest factor.[103] While not attracting the same degree of attention, the public interest factors also weighed in favor of dismissal in *Gilbert* and in *Koster*.[104]

The emphasis in *Gilbert* and *Koster* was on the private interest factors and as a result the exposition of the public interest factors was brief and lacking in detail. However, in the later Supreme Court case of *Reyno*, the Court would speak of public interest factors as those affecting "the convenience of the forum" by impacting "the court's own administrative and legal problems."[105] Distilling *Gilbert*, the Court in *Reyno* listed the following non-exhaustive factors: (1) administrative difficulties flowing from court congestion; (2) local interest in having localized controversies decided at home; (3) interest in having the trial in a forum familiar with the governing law; (4) avoidance of unnecessary problems of conflict of laws or in the application of foreign law; and (5) unfairness of burdening local citizens in an unrelated forum with jury duty.[106] Making express allowance for the consideration of the public interest in the FNC analysis is one of the features of the U.S. doctrine that distinguishes it from its common law cognates.[107] The role of public policy considerations had been considered by the House of Lords in *MacShannon v. Rockware Glass Ltd.*,[108] and more recently in

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[99] *See id.*

[100] *Id.*

[101] *Id.* at 509.

[102] *Id.*

[103] *Id.*

[104] *See id.* at 511–12; Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 526 (1947).

[105] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981).

[106] *Id.* at 241 n.6 (citing *Gilbert*, 330 U.S. at 508–09).

[107] For a discussion on the other distinguishing factors, see Barrett, *supra* note 4, at 406–08.

[108] MacShannon v. Rockware Glass Ltd. [1978] AC 795, 814, 822 (HL) (appeal taken from

Lubbe v. Cape.[109] In both cases their Lordships rejected any role for public interest factors unrelated to the private interests of the litigants or the ends of justice.[110]

3. *The Balance of Convenience*

Identifying the factors to be considered is only part of the FNC process, a process whose entire purpose, it should always be remembered, is to facilitate a choice of forum in the event of concurrent jurisdiction. In order to arrive at a choice on the basis of considering these factors, some method of assessment is required. *Gilbert* clearly intended a balancing test to apply, but in order to balance interests they must be weighed against some common scale. What criterion/standard was to be applied? Was it the same for private interest factors as for public interest factors? Were the two sets of factors alternative grounds for dismissal or should they be measured cumulatively against a common standard? The Supreme court did not adequately address these questions regarding the applicable standard and practical application of the balancing test in *Gilbert* and *Koster*, leading to confusion and division among the lower federal courts.

When it came to private interests, Justice Jackson defined these as "practical problems that make trial of a case easy, expeditious and inexpensive."[111] In so doing, the suggestive criterion was one of trial convenience for the parties. One would thus expect that the forum conveniens would be the one in which, from the perspective of the private interest factors, trial would be the easiest, cheapest, and most efficient. However, Justice Jackson did not leave the matter there, a mere balance of convenience was not sufficient—something more was necessary. Immediately after referring to trial convenience, Justice Jackson stated that "[t]he court will weigh relative advantages and obstacles to fair trial."[112] Much hinges on what he meant by "fair trial." It is submitted that Justice Jackson meant to identify the threshold or standard of inconvenience required before dismissal will be granted. The point he was attempting to emphasize

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Scot.) (UK).

[109] Lubbe v. Cape plc [2000] 1 WLR 1545, 1561, 1566–67 (HL) (UK).

[110] *See MacShannon*, [1978] SC at 822; *Lubbe*, [2000] SC at 1566–67. Clearly, public policy has an implicit presence in any judicial activity, the degree to which such considerations play a distinct role in the exercise of the discretion to decline jurisdiction (as opposed to a general systemic role) is an area ripe for further research. The reader's consideration is directed towards J.J. Fawcett, *Trial in England or Abroad: The Underlying Policy Considerations*, 9 OXFORD J. LEGAL STUD. 205 (1989) and C.G.J. Morse, *Not in the Public Interest?* Lubbe v. Cape PLC, 37 TEX. INT'L. L.J. 541 (2002).

[111] *Gilbert*, 330 U.S. at 508.

[112] *Id.*

was that a mere balance of convenience would not suffice to warrant dismissal, the degree of inconvenience must cause unfairness to the defendant.

While it has the obvious advantage of giving flexibility to the doctrine, the notion of fairness, without more, is a vague and unhelpful criterion for choice. The guidance to be found in *Gilbert* and *Koster*, as to the meaning of fairness, is far from unequivocal. In *Koster*, Justice Jackson referred to the extreme standard of vexation and oppression.[113] Some have argued that by using such language, he was endorsing abuse of process as the standard required for a dismissal.[114] This viewpoint is based primarily on the following excerpt from the majority opinion in *Koster*:

> Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or non-existent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.[115]

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[113] Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947).

[114] *See* Braucher, *supra* note 7, at 930–31. Robertson stated:

> In its narrow holding, *Gilbert* was probably an abuse of process decision. However, the Court's opinion was vague, and it was ambiguous as well, setting forth a "private interest" approach approximately tracking the abuse of process version forum non conveniens right alongside a "public interest" approach that reflected the most suitable forum philosophy.

David W. Robertson, *Forum Non Conveniens in America and England: A Rather Fantastic Fiction*, 103 L.Q. REV. 398, 401 (1987). While the language used in *Gilbert* and *Koster* can be cited in support of the view that an abuse of process standard was intended, many other factors point in the direction of a less severe, though still onerous, standard. "Abuse of process" is defined as: "The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope." BLACK'S LAW DICTIONARY (9th ed. 2009). It is interesting to note that the term "abuse of process" does not appear in *Gilbert* or *Koster*. There was no reference in either *Gilbert* or *Koster* to the *mala fides* of the plaintiffs' choice of forum. Nowhere was it alleged that the intention of the plaintiff was to vex or harass the defendant in the sense of an abuse of process. Rather, it seems that the plaintiff's choice of forum in both cases was accepted as *bona fide* but not justifiable in the circumstances due to the degree of inconvenience it would cause the defendant. *See Gilbert*, 330 U.S. at 511–12; *Koster*, 330 U.S. at 531–32.

[115] *Koster*, 330 U.S. at 524.

The factual context, provided by the case, for this statement was of a two-party dispute in which the plaintiff had brought his action in his *home forum*.[116] This feature would be seised upon at a later date to justify applying a more onerous burden for dismissal in the case of a U.S. plaintiff who sues in his home forum. The argument being that Justice Jackson was prescribing the vexatious and oppressive standard only for such cases and not as applying generally. We shall return to this issue in due course. For now, the relevant question is what Justice Jackson meant by vexatious and oppressive? Did he mean it in the sense an abuse of process or was he using it loosely to indicate a high degree of inconvenience constituting unfairness?

Let us recall that in *Gilbert*, Justice Jackson remarked, "[i]t is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."[117] The context for this reference to vexation/oppression by Justice Jackson shows that he did not intend to use it as a term of art synonymous with an abuse of process. In fact, he immediately qualified his use of the terms "vex," "harass," and "oppress" as meaning unnecessary and disproportionate expense or trouble.[118] Likewise, in *Koster*, he spoke of "such oppressiveness and vexation to a defendant as to be out of all *proportion* to plaintiff's convenience,"[119] thus envisaging it as a question of comparative convenience, whereas an abuse of process is not a relative concept. It is submitted that Justice Jackson did not intend an abuse of process to be the required standard for a dismissal but that a high degree of inconvenience amounting to unfairness should apply.

Where the plaintiff has chosen his forum, not for reasons of his own convenience, but in order to unduly burden and harass the defendant, this would certainly constitute unfairness. But, falling short of vexation and harassment, the point along the scale of inconvenience at which sufficient unfairness existed to justify dismissal was not specified. Justice Jackson certainly considered that dismissal on grounds of FNC should be "exceptional"[120] and as something to be granted only in "rare cases."[121] Indeed, he stated that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should *rarely* be disturbed."[122] The presence of two distinct standards, "vexation/oppression" and "strongly favors," left

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[116] *Id.* at 520–21.
[117] *Gilbert*, 330 U.S. at 508.
[118] *Id.*
[119] *Koster*, 330 U.S. at 524.
[120] *Gilbert*, 330 U.S. at 504.
[121] *Id.* at 509.
[122] *Id.* at 508 (emphasis added).

the tipping point for dismissal ill-defined and led to judicial and academic uncertainty that continues to generate doctrinal inconsistency to this day.

When it came to the balancing of public interest factors, *Gilbert* and *Koster* are far from illuminating. This is likely a result of the fact that dismissal in both cases was overwhelmingly supported by the balance of private interest factors.[123] Consequently, the two judgments attended less to the public interest factors. The resulting difficulty was that it was unclear what weight was to be given to public interest factors and what place their consideration was to be given in the overall FNC analysis.[124] Were private and public interest factors to be balanced together or separately?[125] In other words, was dismissal dependent on the cumulative balance of these factors, or, did the two sets of factors provide alternative grounds for dismissal? Again, uncertainty reigned over this matter because support for each interpretation could be found in the two Supreme Court judgments.[126] The stronger interpretation is that a cumulative approach is required. Indeed, this was ultimately affirmed by the Supreme Court in 1981 with *Reyno*, where it determined that a court must, in exercising its discretion under the doctrine of FNC, give reasonable consideration to both private interest factors and public interest factors in the balancing of interests.[127] This accords with the view expressed in *Koster* of FNC as amounting to an "*ultimate inquiry* [of]

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[123] *See id.* at 511–12; *Koster*, 330 U.S. at 531–32.

[124] *See* Barrett, *supra* note 4, at 408–09.

[125] According to Wolinsky, most courts took *Gilbert* as calling for a common consideration of private and public interest factors within the same balancing analysis but he cited *Hoffman v. Goberman* as an example of a court treating them as separate grounds for dismissal. Marc O. Wolinsky, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 376 n.26 (1980) (citing Hoffman v. Goberman, 420 F.2d 423, 426–27 (3d Cir. 1970)).

[126] Upon introducing private and public interest factors in *Gilbert*, Justice Jackson appeared to obliquely regard them as cumulative. 330 U.S. at 508. *Gilbert* suggests that the cumulative impact of the factors was the ultimate arbiter for granting or refusing a dismissal. *See id.* In *Gilbert*, Justice Jackson stated: "If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name." *Id.* The factors were named as the private and public interest factors. This excerpt envisages their combination and weighting by the Court, in its discretion, and is suggestive of a cumulative approach. Whereas, in *Koster*, the two sets of factors are presented as alternative grounds for dismissal through Justice Jackson's use of the language of "either . . . or." *Koster*, 330 U.S. at 531–32.

[127] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981). The Court noted:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant *public and private interest factors*, and where its *balancing of these factors* is reasonable, its decision deserves substantial deference.

Id. (emphasis added).

where trial will best serve the convenience of the parties and the ends of justice."[128]

4. The Legacy of Gilbert and Koster

The majority decisions of the U.S. Supreme Court in *Gilbert* and *Koster* established the federal criteria for FNC.[129] The decisions confirmed that the federal courts have an inherent power to decline jurisdiction and identified FNC as the doctrine which furnishes the criteria for making a choice between forums. Although ultimately a question of discretion, such discretion was to be guided by consideration of factors which could be broadly identified under the headings of private interest and public interest factors. However, *Gilbert* and *Koster* were at times vague, leaving a number of issues in a state of uncertainty. There were two particularly troublesome issues. First, the precise standard(s) of inconvenience required to justify dismissal. Taking *Gilbert* and *Koster* together, it is not surprising that commentators and courts alike have read them as at times supporting an abuse of process version of FNC, a standard of vexatious and oppressive, and at other times as requiring a most appropriate forum version, a standard of strongly favors.[130] Second,

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[128] *Koster*, 330 U.S. at 527 (emphasis added).

[129] Raymond T. Abbott, *The Emerging Doctrine of Forum Non Conveniens: A Comparison of the Scottish, English and United States Applications*, 18 VAND. J. TRANSNAT'L L. 111, 136 (1985) (citing *Gilbert*, 330 U.S. at 507) ("Although the common law of various states developed criteria for applying the doctrine, no federal criteria emerged until the United States Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*.").

[130] The guidance provided by *Gilbert* was, in Robertson's view, so unclear that, "[t]he lower courts at various times have read *Gilbert* to support the abuse of process version of forum non conveniens, the most suitable forum version, virtually everything in between, and (with surprising frequency) both." Robertson, *supra* note 114, at 402–03. "Speaking very broadly, it can be said that for the first thirty years after *Gilbert*—until the mid-1970s—the lower courts applied the abuse of process version." *Id.* at 403. Reed noted that the *Gilbert* test would only warrant dismissal where abuse of process was evident. Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 47–48 (2000); *see also* James D. Yellen, *Forum Non Conveniens: Standards for Dismissal of Actions From United States Federal Courts to Foreign Tribunals*, 5 FORDHAM INT'L L.J. 533, 542 (1982) ("[A] motion to dismiss for *forum non conveniens* would normally be granted only when a plaintiff intends to 'vex, harass or oppress' his opponent with unnecessary expense or trouble."). On the other hand, Reus, identifies the *Gilbert* test as one of weighing private and public interest factors with a view to identifying the most suitable forum. *See* Alexander Reus, *Judicial Discretion—A Comparative View of the Doctrine of Forum Non Conveniens*, 16 LOY. L.A. INT'L & COMP. L. REV. 455, 462 (1994). Abbott's article interprets *Gilbert* as constituting a more appropriate forum test. Abbott, *supra* note 129, at 136 n.144, 137 ("The factors associated with the doctrine are designed to help the court decide whether it is appropriate to decline jurisdiction and allow the litigation to proceed in an alternate forum."). The division of opinion over which

the question of the deference due the plaintiff's choice of forum and to what extent, the FNC analysis ought to take account of the citizenship and residence of the plaintiff, most specifically the case of the foreign (i.e., non-U.S.) plaintiff.

D. Codification: Section 1404(a)

Gilbert and *Koster* both concerned the application of FNC by federal courts to competing United States forums—they were inter-state cases, rather than international.[131] The national scope of the doctrine was effectively removed from the ambit of the federal doctrine of FNC by legislative action taken by Congress in 1948 which resulted in the enactment of 28 U.S.C. § 1404(a).[132] Section 1404(a) provides a rule for the transfer of civil actions between federal district courts.[133] It provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."[134] Dismissals in cases falling within the scope of § 1404(a) are thus decided on this statutory basis and not under the inherent power of the court to dismiss under FNC.

It has been claimed that § 1404(a) codified *Gilbert*.[135] Indeed, the Reviser's Note to § 1404(a) states that it was drafted in accordance with FNC.[136] However, the text of § 1404(a) was proposed and adopted in 1945, prior to *Gilbert*. Moreover, the congressional intent had been to make a revision of the doctrine and not merely a declaration of its existing form.[137]

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standard to apply was observed by the D.C. Circuit in *Pain*, the District Court had applied *Gilbert* as a balance of conveniences test, whereas the appellants in the case had urged the Court of Appeals to apply *Koster* which they argued called for a vexatious and oppressive test. *See* Pain v. United Techs. Corp., 637 F.2d 775, 781 (D.C. Cir. 1980).

[131] *Gilbert*, 330 U.S. at 502–03; Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 519–20 (1947).

[132] *See* Yellen, *supra* note 130. Title 28 concerns the judiciary and judicial procedure, section 1404(a) is contained within Part IV (Jurisdiction and Venue) of Title 28. *See* 28 U.S.C. §§ 1 *et seq.*

[133] Barry, *supra* note 40, at 549.

[134] 28 U.S.C. § 1404(a). For general commentary on transfers under section 1404, see David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 448–62 (1990). *See also* Braucher, *supra* note 7, at 933–39.

[135] *See* Abbott, *supra* note 129, at 138 n.152; Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L. REV. 12, 12–13 n.9 (1949); Yellen, *supra* note 130, at 542–43.

[136] 28 U.S.C. § 1404(a) reviser's note (1951).

[137] Norwood v. Kirkpatrick, 349 U.S. 29, 30–32 (1955). *See* Brainerd Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 416–18 (1955); Bies, *supra* note 4,

The object of the revision was to make transfer more common by lowering the burden.[138] This has been borne out by its more liberal application by the courts (comparative to FNC).[139] The courts have applied the *Gilbert* approach to transfers under § 1404(a) but have required a much lesser showing of inconvenience than that necessary for dismissal under FNC.[140]

As a result of § 1404(a), the incidence of FNC motions in federal courts was greatly reduced.[141] The statutory version pre-empted the majority of actions and effectively curtailed the availability of the federal common law doctrine to cases involving a foreign (i.e., non-U.S.) forum,[142] or cases where the alternative forum was a state court as opposed to another federal court.[143] The introduction of § 1404(a), in part, accounts for the low incidence of Supreme Court cases involving FNC after *Gilbert* and *Koster*.[144] This helps to explain why there was a thirty-year gap between *Gilbert*, *Koster*, and the next substantial Supreme Court case, *Reyno*.

III. *REYNO*—SETTING THE RECORD STRAIGHT?

The litigation in *Reyno* concerned an action brought on behalf of the relatives of foreign decedents who perished in a 1976 aircraft accident in Scotland.[145] Wrongful death suits were brought in the Superior Court of California against the defendant manufacturers, Piper Aircraft and Hartzell Propeller, Pennsylvania and Ohio corporations respectively.[146] The case was removed from state court to the District Court for the Southern District of

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at 508–09; *see also* Piper Aicraft Co. v. Reyno, 454 U.S. 252, 253 (1981).

[138] Barry, *supra* note 40, at 549–50.

[139] *See* Carney, *supra* note 4, at 428–31.

[140] *See* Robertson, *supra* note 114, at 404–05; BRAND & JABLONSKI, *supra* note 4, at 49.

[141] *See* Currie, *supra* note 137, at 437.

[142] "As a consequence, the federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad." Am. Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994).

[143] *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 557 (1985).

[144] A number of commentators have also noted that the Supreme Court's reformulation of the due process requirements for personal jurisdiction has also impacted on the scope of application for FNC by replacing the broad jurisdictional rules of *Pennoyer v. Neff*, 95 U.S. 614 (1877), with the minimum contacts-based requirement in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See* BRAND & JABLONSKI, *supra* note 4, at 49–50; Wolinsky, *supra* note 125, at 377–79; Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 663–68 (1992). This impacts the scope of FNC by reducing the number of potential inconvenient forums available to a plaintiff, some are excluded for lack of personal jurisdiction from the outset.

[145] Piper Aircraft Co. v. Reyno, 454 U.S. 252, 238–39 (1981).

[146] *Id.* at 239–40.

California and from there it was transferred under § 1404(a) to the District Court for the Middle District of Pennsylvania.[147] At this point, the defendants sought dismissal on the grounds of FNC.[148]

This section will begin with the district court's opinion in *Reyno*. The reason being that this will permit us to explore the provenance of the notion that a foreign plaintiff's choice of a U.S. forum is entitled to less deference. This will require us to briefly consider the possibility that such deference was a feature of the doctrine of FNC in its early manifestation in admiralty, or whether it was *Gilbert* or *Koster* which gave birth to the idea. This endeavor will then take us on a meandering journey through several lower federal court decisions which promoted the notion and upon which the district court relied in *Reyno*. The search will not only be for the origin of the notion but, more importantly, for a compelling rationale to support it. Thereafter, it will be opportune to attend to the Supreme Court's judgment in *Reyno* itself.

A. The Deference Due a Plaintiff's Choice of Forum

The district court judge in *Reyno*, Judge Herman, applied the *Gilbert* criteria.[149] Having determined that Scotland was an adequate, alternative forum, he noted Justice Jackson's statement in *Gilbert*, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[150] The plaintiff expected the court to defer to its choice of forum but the court was quick to point out that Reyno was not the actual plaintiff in interest.[151] The true plaintiffs were not U.S. citizens, they were foreigners, and this changed the complexion of things. Judge Herman stated: "Generally, the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States."[152] While Judge Herman acknowledged that there is ordinarily a strong presumption in favor of a plaintiff's choice of forum, he decided that this presumption applied with less force when the plaintiff was foreign.[153] A foreign plaintiffs' choice of forum

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[147] *Id.* at 240–41.

[148] *Id.* at 241.

[149] Reyno I, 479 F. Supp. 727, 730–31 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980).

[150] *Id.* at 731 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 504, 508 (1947)).

[151] *Id.* The titular plaintiff, Reyno, was the secretary for the U.S. lawyer representing the relatives of the decedent passengers. *Id.* at 732. Reyno was the administratrix of the decedents' estates.

[152] *Id.* at 731.

[153] *Id.* at 731–32.

was, he said, "entitled to little weight."[154] On this basis, Judge Herman concluded that a necessary step in the FNC analysis was to determine the degree of deference owed the plaintiff's choice of forum, the result of this determination depending on whether he was foreign or not.[155] From where did Judge Herman get this notion?

1. Searching for a Ratio: Admiralty

Some have argued that the favored position of U.S. citizens can be inferred from the treatment of foreigners traditionally manifested in admiralty cases.[156] However, in the pre-*Gilbert/Koster* admiralty cases, there are no express statements endorsing the imposition, at a doctrinal level, of a higher burden for dismissal involving U.S. citizen plaintiffs. The view expressed by Judge Learned Hand in *A/S Den Norske Africa*—that a U.S. citizen's right of access to the federal courts should be absolute where suing *pro se*—is often cited in authoritative terms despite being obiter dictum.[157] So too is the 1946 case of *The Saudades*.[158] In *The Saudades*, a Portuguese defendant sought FNC dismissal against an action brought by U.S. citizens.[159] Denying the motion, the district court declared that it was not aware of any decisions in which an American court with jurisdiction had refused an American plaintiff access thereto, but neither could it find a decision which recognized the absolute right of an American citizen to sue in his own courts and which denied the discretion of the court to decline jurisdiction.[160] The court supposed that a rule might be inferred from the authorities that "an American court may not refuse to try a case brought by an American citizen, unless it feels that injustice would be done by allowing him to proceed in his own

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[154] *Id.* at 732.

[155] *Id.* at 731–32.

[156] *See* Braucher, *supra* note 7, at 920–22 (citing Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240, 264 (1804)) (discussing how Chief Justice Marshall's suggestion "that an admiralty court might decline to exercise its jurisdiction over a salvage dispute between aliens has since become an accepted incident of the admiralty jurisdiction").

[157] U.S. Merch. & Shippers' Ins. v. A/S Den Norske Afrika Og Australie Line, 65 F.2d 392, 392–93 (2d Cir. 1933). In obiter dictum, Judge Learned Hand stated: "Courts are maintained to give redress primarily to their own citizens; it is enough if these conform to the conditions set upon their jurisdiction. All this is entirely true, and would be conclusive, if the libellant sued in its own right." *Id.*

[158] 67 F. Supp. 820 (E.D. Pa. 1946).

[159] *Id.* at 820–21.

[160] *Id.* at 820 ("No decision has been called to my attention and I have found none in which the right to maintain, in an American court, a suit of which the court has jurisdiction has been refused to an American litigant suing in his own right. On the other hand, I find no decision which has turned upon an absolute privilege of a citizen to resort to his own courts and which has denied the existence of discretion to refuse jurisdiction where the plaintiff is a citizen.").

court."[161] By inductive reasoning the inference made from this statement is that a foreigner's right to proceed in a United States forum does not apply with the same force, but this syllogism is not supported by the subsequent thinking of the court. What is to be found in these authorities is a stark example of false inductive reasoning.

The court in *The Saudades* explained that the result of this rule was that "mere inconvenience to the respondent, or to both parties, will not be considered a ground for exercising [discretion] to refuse jurisdiction."[162] The court was acknowledging, albeit reservedly, its discretionary power to decline jurisdiction in a case brought by a U.S. plaintiff provided there was not mere inconvenience but some injustice.[163] The court did not define this standard of injustice, while one could read between the lines and conclude that it intended a higher burden of proof than in the case of a foreigner. It may equally be read as, in effect, prescribing the same standard for U.S. citizens as foreigners, vexation or oppression. In fact, the ruling in *The Saudades*, as in similar cases, was very tentative and limited to the facts.[164] The court paid lip service to the possibility of dismissal against a U.S. citizen but decided that the circumstances of the case did not permit it.[165] There was certainly no overt acknowledgment of different treatment and no general rule to such effect was declared. If anything, it seems a doctrinal distinction was craftily avoided. All we have is the court's observation of the fact that discretionary dismissals of U.S. plaintiffs were extremely rare, possibly non-existent, but this is poor grounds for inference of a doctrinal distinction.[166]

We should not infer a rule of law from the mere existence of a set of circumstances. Just because the courts did not dismiss admiralty claims brought by U.S. citizens does not mean that a higher standard applied to them and a lower standard against foreigners. A significant reason for the lack of decisions dismissing U.S. citizens is that in admiralty it had been very rare for the motion to arise before federal courts in cases involving U.S.

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[161] *Id.* at 821.

[162] *Id.*

[163] *See* Bickel, *supra* note 135, at 45 n.133. Bickel summarized the holding in *The Saudades* as follows: "The court, in taking jurisdiction in a suit by an American libellant against a foreigner, said discretion should exist, but be exercised only in cases in which it would be unjust to allow a citizen to proceed in his own courts. No mere inconvenience should suffice." *Id.*

[164] *See* Barbara M. Yukins, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57, 75 (1967) ("The courts, with few exceptions, have stated repeatedly that forum non conveniens dismissal of such a suit [i.e., involving a U.S. plaintiff] is quite possible but not justified under the circumstances of the particular case.").

[165] *The Saudades*, 67 F. Supp. at 821.

[166] *Id.* at 820–21.

plaintiffs.[167] However, there is another reason which is of greater significance. In general, citizenship of the home forum is an important factor to consider in the FNC analysis, but only insofar as it indicates residence.[168] As a doctrine of practical concern, i.e., convenience, where the plaintiff resides close to the courthouse or within its jurisdiction, then there will usually be strong practical benefits in holding trial there—e.g., familiarity of the plaintiff with the law of the forum, the likelihood of a common language, cost-effectiveness of trial in a geographically proximate location to one's residence, the likelihood that the dispute will have connections to the locality, etc.[169] Likewise, a foreign forum is likely to be inconvenient precisely because the plaintiff does not reside there for the opposite reasons.[170] The doctrine of FNC inherently leans toward retention of an action brought in the home forum of the plaintiff, especially where dismissal is deemed exceptional. This is so, not as a consequence of doctrinal bias, but as a result of the practical nature of FNC (likely mixed with a good measure of judicial chauvinism). One cannot, therefore, infer from the perceived reluctance of courts to dismiss a U.S. plaintiff to a foreign forum a doctrinal basis for deference to a U.S. plaintiff.

At best, admiralty provides us only with weak circumstantial support for the notion of a differing degree of deference between foreign and U.S. plaintiffs. The essence of the argument is that the practice of courts of admiralty showed that U.S. plaintiffs did not get their cases dismissed whereas foreign plaintiffs did. The conclusion to be drawn from this was that different degrees of deference (expressed in differing standards for dismissal) were applied to plaintiffs' choice of forum depending on their status.[171]

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[167] The Supreme Court acknowledged this in *Swift*: "The doctrine is of long standing in admiralty, but this Court has not previously had to apply it to a suit brought by a United States citizen. Such application has been rare even in the lower federal courts." Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684, 697 (1950).

[168] Barrett referred to the case of *The Saudades* to make the point that some courts regard residence within the jurisdiction of the forum as such a strong factor that it will usually be decisive. Barrett, *supra* note 4, at 413 (citing *The Saudades*, 67 F. Supp. at 820) ("When the plaintiff is a resident the courts of some states indicate the trial court has no discretion to refuse jurisdiction; others treat the plaintiff's residence as such a strong factor in favor of exercising jurisdiction that it will usually be decisive."). It is noteworthy that, in relation to *The Saudades*, Barrett specifically used the term residence, rather than citizenship. *Id.*

[169] *See* Wolinsky, *supra* note 125, at 381.

[170] *See id.* at 382–83 ("[I]t is undoubtedly true that American citizens, taken as a class, tend to possess characteristics that make foreign litigation inconvenient for them.").

[171] Abbott expresses the same view. *See* Abbott, *supra* note 129, at 142 ("The acceptance by many United States courts of the proposition that the citizenship of a United States plaintiff should tip the balance in favor of the plaintiff's chosen forum prompted a few courts to apply a corollary to that proposition—that a decision by a foreign plaintiff to bring suit in the United States should be given somewhat less deference.").

However, the courts never explicitly stated that this was the underlying rationale and, as suggested above, there are other plausible explanations to this state of affairs. That being so, the next possible source for the notion may come from *Gilbert* and/or *Koster*. Can either of those two cases be identified as the origin of this concept of differential deference? More importantly, can they justify it on legal principle or policy?

2. Searching for a Ratio: Gilbert and Koster

There is nothing in *Gilbert* to suggest that doctrinal adaptation was necessary in the case of a plaintiff bringing suit in a foreign forum. Indeed, Justice Jackson paid little to no attention to the foreign status of the plaintiff—Gilbert was a Virginian suing in New York.[172] However, *Koster* may be taken (erroneously, it is submitted) as supporting greater deference for a plaintiff that sues in his home forum. The key to understanding the emerging presumption that a higher degree of deference is owed a plaintiff suing in his home forum relies on reading *Koster* as establishing a different standard for dismissal in such cases. In other words, that *Koster* is to be distinguished from *Gilbert*. In simple terms, the view taken by some was that *Koster* intended a heavier burden (i.e., oppression and vexation) be placed on the defendant to secure dismissal where the plaintiff has sued in his home forum, as opposed to the lower burden of *Gilbert* (i.e., strongly favors) which was to apply only where the plaintiff is foreign to the forum.[173] The existence

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[172] Indeed, the foreign status of any of the parties was barely mentioned. Justice Jackson noted that admiralty courts had dismissed cases involving foreigners. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947). He also cited two previous Supreme Court cases in which the Court had upheld decisions of New York courts to dismiss cases on grounds of FNC involving foreigners. *Id.* (citing Douglas v. N.Y., New Haven & Hartford Ry. Co., 279 U.S. 377 (1929); Anglo-Am. Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903)). *Douglas* involved a Connecticut citizen and resident and a Connecticut corporation. *Douglas*, 279 U.S. at 385. *Anglo-American Provision* involved two Illinois corporations. 191 U.S. at 373. With respect to these cases, Justice Jackson described the corporations as foreign corporations, i.e., foreign to New York, and referred to the plaintiff in *Douglas* as a "nonresident." *See Gilbert*, 330 U.S. at 505 ("Even where federal rights binding on state courts under the Constitution are sought to be adjudged, this Court has sustained state courts in a refusal to entertain litigation between a nonresident and a foreign corporation or between two foreign corporations."). These are the only mentions of the "foreign" status of parties to be found in *Gilbert* and the context for them was to make the point that the federal courts had the discretion to dismiss on grounds of FNC. There is nothing to suggest that a foreign plaintiff should be treated any differently to a plaintiff for whom the forum is his home forum.

[173] *See, e.g.*, SIMONA GROSSI, THE U.S. SUPREME COURT AND THE MODERN COMMON LAW APPROACH 84 (2015) (discussing how *Koster* added a disjunctive test to the doctrine by using the language "either . . . or").

of two distinct standards provided proof to some that a different level of deference was due the foreign plaintiff.

This argument hinges on how one interprets Justice Jackson's reference to "home forum" in *Koster*:[174] As will be seen from the case law applying a deferential presumption, the "home forum" is generally understood in reference to citizenship.[175] At other times, the courts refer to citizenship and residence, often doing so interchangeably.[176] From the context of Justice Jackson's statement, it is clear that he was referring to the forum of residence, he was not articulating a principle based on mere citizenship.[177] Yet, this is how he has been interpreted by those who wish to find a distinction between the applicable standard in *Koster* and that in *Gilbert*. For them, citizenship is the preferred concept because of its binary quality. As an all-or-nothing proposition, citizenship would permit a simple distinction; you apply one standard to the citizen, another to the non-citizen. However, if one acknowledges that residence is a key factor, then this simplicity is lost. Although capable of being applied in a binary sense, the concept of residence is richer than citizenship. It invites consideration of location, i.e., practical links between the plaintiff and the forum. Instead of being binary, the notion becomes one of degree.

Rather than justifying the imposition of a different standard, the greater likelihood is that Justice Jackson made reference to the home forum because it was something generally indicative of convenience to the plaintiff. In other words, a factor to be taken into account in the balancing of interests. Where that is indeed the case, then, ipso facto, the defendant will have to show a greater degree of inconvenience to warrant a dismissal. That a person has sued in their home forum is not conclusive proof of a defined and immutable degree of convenience from which one can infer a fixed standard for

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[174] Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947). *See supra* Part II(C)(3) (providing the extract from *Koster* referenced above).

[175] *See, e.g.,* Brett J. Workman, Note, *Deference to the Plaintiff in Forum Non Conveniens Cases*, 86 FORDHAM L. REV. 871, 876 n.34 (quoting Reid-Walen v. Hansen, 933 F.2d 1390, 1394 (8th Cir. 1991)) (explaining that in forum non conveniens cases, the home forum for the plaintiff, "is any federal district in the United States, not the particular district where the plaintiff lives").

[176] *See, e.g.,* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (approving the district court's distinction between resident or citizen plaintiffs and foreign plaintiffs).

[177] *See Koster*, 330 U.S. at 524. At the beginning of the following paragraph in which Justice Jackson referred to the home forum, he stated, "[w]hile, even in the ordinary action, the residence of the suitor will not fix the proper forum without reference to other considerations, it is a fact of 'high significance.'" *Id.* (citing Int'l Milling Co. v. Columbia Transp. Co., 292 U.S. 511, 520 (1934)). Wolinsky made the same observation on *Koster* and noted that *Gilbert* mentioned the plaintiff's residence in connection with relative conveniences and not citizenship. Wolinsky, *supra* note 125, at 391 n.89 (citing *Koster*, 330 U.S. at 525; *Gilbert*, 330 U.S. at 509).

dismissal. Justice Jackson was merely making a practical observation of how the balance of convenience would normally operate in the context of a case where the plaintiff has sued in his home forum. He was not establishing a principle upon which a different standard ought to be applied. This interpretation is supported by the following points.

First, Justice Jackson used the word "normally," suggesting that he was not laying down a legal rule or presumption, but only suggesting what was usually or ordinarily the case.[178] As noted above, there are good reasons why a plaintiff who brings proceedings in his home forum will *normally* have a strong case for retaining jurisdiction. Second, while there was some uncertainty among the courts in the years following *Gilbert* and *Koster* about which standard to apply, the consensus, in either case, was that a single standard applied. With few exceptions, it was only in the 1970s that courts began to interpret *Koster* as requiring a separate standard for foreigners.[179] Finally, if a distinction was intended by the Supreme Court between *Gilbert* and *Koster*, i.e., differential standards for FNC, then quite apart from the question of why the Supreme Court did not indicate this more clearly at the time, why was this differential standard for a plaintiff's choice of his home forum not reflected in § 1404(a)?[180]

The 1950 Supreme Court case of *Swift & Co. Packers v. Compania Colombiana del Caribe* referred to the passage from *Koster*.[181] *Swift* was an admiralty case brought by a U.S. plaintiff in which Justice Frankfurter, referencing *Koster* in a footnote, stated that the "[a]pplication of forum non conveniens principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners."[182] The statement is cryptic, but, it certainly could be read as endorsing a differential approach to the FNC analysis based solely on

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[178] *See Koster*, 330 U.S. at 524 (emphasis added) ("In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.").

[179] The Fifth Circuit addressed a differential standard between foreigners and U.S. plaintiffs in 1955. *See* Burt v. Isthmus Dev. Co., 218 F.2d 353 (5th Cir. 1955); *see also* Hoffman v. Goberman, 420 F.2d 423 (3d Cir. 1970).

[180] In considering motions for transfer under § 1404(a), the courts do give less deference to a plaintiff who has not sued in their home forum. *See* Steinberg, *supra* note 134, at 488–89; Barry, *supra* note 40, at 550. However, this deference is not derivative of § 1404 but from case law, including *Koster*. *See, e.g., Koster*, 330 U.S. at 524; Urbanski v. Bayada Home Health Care, No. 14-2227, 2014 WL 2958199, *2 (E.D. Pa. June 30, 2014); Hershman v. UnumProvident Corp., 658 F. Supp. 2d 598, 601 (S.D.N.Y. 2009); Zangiacomi v. Saunders, 714 F. Supp. 658, 660 (S.D.N.Y. 1989); Transam. Corp. v. Trans-Am. Leasing Corp., 670 F. Supp. 1089, 1093 (D. Mass. 1987); Jordan v. Del. & Hudson Ry. Co., 590 F. Supp. 997, 998 (E.D. Pa. 1984).

[181] 339 U.S. 614, 697–98 (1950).

[182] *Id.* at 697.

U.S. citizenship.[183] On the other hand, it can be seen as just a common-sense acknowledgment of the fact that a case with a domestic component will raise very different considerations because the dispute will more likely have a connection to the forum, something likely to be absent in a dispute between foreigners. Justice Frankfurter was critical of the district court's failure to take these considerations into account, but he did not clarify what he meant by these very different considerations. *Swift* is thus inconclusive. A plausible explanation was that the Court was merely recognizing that a U.S. citizen, thus likely to be a U.S. resident, will find it less of a hardship to litigate in his home forum, and thus the fact of his U.S. residence ought to be taken into consideration in the balancing of convenience.

Nevertheless, *Koster* and *Swift* are open to being read as requiring that a different standard of dismissal should apply to FNC depending on whether the plaintiff is foreign or not. Under this interpretation, a heavier burden would apply in the case of the U.S. plaintiff and a lighter burden in the case of the foreigner. Those who endorse this approach, regard it as giving expression to the notion of a different strength of presumption accruing to the plaintiff's choice of forum and view it as being synonymous with the idea of differential deference.[184] However, the much more likely interpretation is that the difference in the burden upon the defendant to secure dismissal is not a reflection of a deliberate alteration of the applicable standard, but rather, is simply a product of the fact that the FNC analysis is a test in comparative convenience. The same standard for dismissal is applied to both the U.S. and foreign plaintiff. The difference is that, generally speaking, a U.S. plaintiff suing in a U.S. forum is more likely to be able to make a stronger showing of convenience than a foreign plaintiff and, therefore, the defendant seeking FNC dismissal against a U.S. plaintiff will have a harder time establishing the required level of inconvenience. All Justice Jackson was saying in *Koster* was that where such a plaintiff is involved, the defendant is probably (but not invariably) going to have to show a very high level of inconvenience (i.e., approaching vexation and oppression) to overcome the plaintiff's showing of convenience.[185] This is by far the more sensible interpretation and is more consistent with the purpose of FNC as a doctrine focused on convenience. As will be explored below, basing a presumption of convenience on the fact of U.S. citizenship or residence is frequently arbitrary and inconsistent with the principal criterion of FNC, i.e., (in)convenience.

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[183] *See* Yellen, *supra* note 130, at 545 (citing *Swift*, 339 U.S. at 697–98) (noting that *Swift* "is a recognition by the Supreme Court of the lesser weight accorded to the foreign plaintiff's choice of forum").

[184] *See* Abbott, *supra* note 129, at 142.

[185] *See Koster*, 330 U.S. at 524.

Therefore, there is no smoking gun to be found in *Gilbert*, *Koster*, nor in *Swift*, for Judge Herman's notion of differential deference. This would appear to be confirmed by the fact that in the district court opinion in *Reyno,* Judge Herman did not even refer to *Koster* or *Swift* in the context of the deference due a foreigner's choice of a U.S. forum.[186] Instead he relied on several recent authorities for the proposition that a foreign plaintiff's choice of forum is entitled to less weight than an American plaintiff's.[187] The following subsection will continue the search for a rationale for the heightened deference due a U.S. plaintiff by examining these other authorities and, in turn, the additional authorities referred to therein. As will quickly become apparent, this endeavor will have the feel of a wild-goose chase, as one unsatisfactory authority will lead us to another and so on.

3. Searching for a Ratio: Other Authorities

Of the six authorities cited by Judge Herman, only the Second Circuit case of *Olympic Corp. v. Societe Generale* is directly apposite.[188] The other five—*Farmanfarmaian v. Gulf Oil Corp.*,[189] *Michell v. General Motors Corp.*,[190] *Fitzgerald v. Texaco, Inc.*,[191] *McCarthy v. Canadian National Railways*,[192] and the district court's decision in *Olympic Corp. v. Societe Generale*[193]—do not provide compelling support for the proposition that a foreign plaintiff's choice of forum is entitled to less weight.

In *Farmanfarmaian*, a New York district court remarked that the case under its consideration "involves the claim of a foreign plaintiff, whose choice of forum should be given less weight than the choice of an American plaintiff."[194] The first thing to note is that Judge Herman failed to mention that, on appeal, the Second Circuit expressed disapproval of the district

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[186] *See generally* Reyno I, 479 F. Supp. 727 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980).

[187] *Id.* at 731 ("Generally, the courts have been less solicitous when the plaintiff is not an American citizen or resident . . . the plaintiff's choice of forum is generally given less weight when the forum selected is not the plaintiff's home jurisdiction.").

[188] *Id.* at 731–32 (citing Olympic Corp. v. Societe Generale, 462 F.2d 376, 378 (2d Cir. 1972)).

[189] 437 F. Supp. 910, 927 (S.D.N.Y. 1977).

[190] 439 F. Supp. 24 (N.D. Ohio 1977).

[191] 521 F.2d 448, 451 (2d Cir. 1975).

[192] 322 F. Supp. 1197 (D. Mass. 1971).

[193] 333 F. Supp. 121, 124 (S.D.N.Y. 1971) [hereinafter *Olympic Corp. I*].

[194] *Farmanfarmaian,* 437 F. Supp. at 927. *See* Allan Jay Stevenson, *Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 HASTINGS INT'L & COMP. L. REV. 267, 276 (1990) ("*Farmanfarmaian* stands for the principle that a foreign plaintiff possesses a lesser right to sue in the United States than does a United States citizen.").

court's comments in this respect.[195] Second, while this dictum from the district court in *Farmanfarmaian* accords with the view of Judge Herman, no independent rationale was given for it; it is as empty of reasoning as Judge Herman's.[196] Instead, the court relied on authorities from the Second Circuit—two of which, *Olympic Corp.* and *Fitzgerald*—were also cited by Judge Herman.[197]

In *Fitzgerald,* the court undertook a *Gilbert/Koster* FNC analysis.[198] The relevance of *Fitzgerald* to *Reyno* seems limited to an observation made by the Second Circuit (citing *Koster*) that the case before it was "not a case where the plaintiffs or any of them has a 'home jurisdiction' in the Southern District of New York."[199] The Massachusetts district court made the same point in *McCarthy.*[200] However, in neither case was there specific mention of an altered level of deference due a foreign plaintiff's choice of a non-home forum, nor was any special consideration given to the plaintiff's nationality or residence. In fact, the balance of convenience was overwhelmingly in favor of dismissal to the foreign forum in both cases.[201] The significance of which is that the degree of deference due to the plaintiff's choice of forum had not tipped the balance. In other words, there was nothing to suggest that a U.S. plaintiff would have fared any better and thus the factor of nationality/residence was not dispositive. All one can safely infer from these cases is that the nationality of the plaintiff, insofar as it corresponded to

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[195] Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978). The Second Circuit did accept that there was some support for the proposition in the case law. *Id.* The disapproval of the Second Circuit was noted by the court of appeals in *Reyno II. See* Reyno v. Piper Aircraft Co., 630 F.2d 149, 159 (3d Cir. 1980) [hereinafter *Reyno II*], *rev'd,* 454 U.S. 235 (1981).

[196] *Farmanfarmaian,* 437 F. Supp. at 927.

[197] *Id.* at 927 (citing Olympic Corp. v. Societe Generale, 462 F.2d 376 (2d Cir. 1972); Fitzgerald v. Texaco, Inc., 521 F.2d 448, 450–51 (2d Cir. 1975)). The court also cited *Garis v. Compania Maritima Basilio.* 386 F.2d 155 (2d Cir. 1967). This is inapposite, however, because the *Garis* court did not engage in a *Gilbert* and *Koster* FNC analysis. *See generally id.*

[198] *Fitzgerald,* 521 F.2d at 450–51.

[199] *Id.* at 451 (citing Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)).

[200] McCarthy v. Canadian Nat'l Rys., 322 F. Supp. 1197, 1199 (D. Mass. 1971). The court noted that "[i]n the instant case, plaintiff has not sued in her home forum and both parties are strangers to this district." *Id.* Beyond observing the relevance of this fact in the balancing of convenience, the court made no suggestion that a differing standard applied between foreign and U.S. plaintiffs. The facts of the case demonstrated that the balance of convenience was overwhelmingly in favor of trial in Canada. *Id.* at 1198. At the time of the incident, the plaintiff was not a U.S. citizen nor was she resident there, in fact, the only connecting factor to the United States resulted from her subsequent marriage and relocation to the United States. *Id.*

[201] *Fitzgerald,* 521 F.2d at 451; *McCarthy,* 322 F. Supp. at 1199.

residence, was taken as a relevant factor in determining the balance of convenience.

In *Michell*, a Canadian plaintiff brought an action in Ohio against General Motors for damages resulting from a car crash in Ontario, Canada.[202] The plaintiff, who was an infant, had been thrown from a child car seat which it was alleged had been negligently designed and manufactured by the American defendant corporation. The court of appeals affirmed the FNC dismissal by the district court, agreeing that the private and public interest factors pointed squarely toward trial in Canada.[203] The plaintiff argued that the defendant had not cited any case in which an FNC dismissal was granted against a foreign plaintiff who had brought an action in a U.S. court against a U.S. defendant corporation for negligent activity occurring in the United States.[204] However, the court was able to point to the case, cited by the defendant, where a U.S. court dismissed a claim brought by a U.S. plaintiff.[205] The *Michell* court opined that *Pritchard* was an even a stronger case for the defendant because the plaintiff was American.[206] In *Reyno I*, Judge Herman relied on *Michell* to make the inference that an American plaintiff's choice of a U.S. forum was entitled to greater deference than a foreigner.[207] However, a plausible alternative interpretation of Michell is that a U.S. plaintiff is likely to have a closer connection to a U.S. forum, thereby making it more convenient. In other words, the court was not creating a presumptive rule of law but merely making a common-sense observation.[208]

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[202] Michell v. Gen. Motors Corp., 439 F. Supp. 24, 25 (N.D. Ohio 1977).

[203] *Id.*

[204] *Id.* at 28.

[205] *Id.* (citing J.F. Pritchard & Co. v. Dow Chem. of Can., Ltd., 462 F.2d 998 (8th Cir. 1972)).

[206] *Id.*

[207] *Reyno I,* 479 F. Supp. 727, 731 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980) (citing *Olympic Corp. I*, 333 F. Supp. 121, 124 (S.D.N.Y. 1971); *Michell,* 439 F. Supp. at 28) ("[T]he balance of the *Gulf Oil* factors need not be as strong in favour of defendants when the plaintiff is not an American citizen.").

[208] Closer examination of *Pritchard* shows that the *Michell* court failed to mention, other than the nationality of the plaintiffs, some distinguishing features between the two cases. First, the defendant in *Pritchard* was Canadian, not American. *Pritchard*, 462 F.2d at 999. Second, the plaintiff, J.F. Pritchard & Co., was the parent company of a Canadian subsidiary, which had the real interest in the case—the jurisdiction of the U.S. court had only been achieved through an assignment to the parent company. *Id.* The court in *Pritchard* showed no deference to the technically American plaintiff's choice of forum and even declared that there was "more than a Canadian nexus here. The whole case is Canadian." *Id.* at 1002. This latter point demonstrates the danger of giving greater deference to a plaintiff's choice of forum on the basis of domestic nationality alone, as *Pritchard* shows, nationality is not a reliable proxy for convenience.

So far, of the six cases cited by Judge Herman, five provide less than authoritative support for the proposition that a foreign plaintiff's choice of forum is presumptively entitled to less weight than a U.S. plaintiff's.[209] While that inference might be derived indirectly from the dicta provided in those cases, a more sensible and direct inference to be taken is that all that those cases established was that the greater the preponderance of foreign factors, the likelier it is that dismissal will be granted. This leaves us with the last of Judge Herman's authorities, the Second Circuit opinion in *Olympic Corp.*[210]

Speaking of the *Gilbert* criteria, the Second Circuit stated that "[i]n any situation, the balance must be very strongly in favor of the defendant, before the plaintiff's choice of forum should be disturbed[.]"[211] Except for the intensifier "very", the court was in line with the *Gilbert* approach to FNC, but it then expanded on *Gilbert* by claiming that "the balance must be even stronger when the plaintiff is an American citizen."[212] Unlike the other authorities, here we have a clear endorsement of a different standard for FNC dismissal in the case of a U.S. citizen.[213]

Like Judge Herman, the court in *Olympic Corp.* did not provide any rationale for this position, merely citing its own list of authorities. At the top of the list of authorities was *Palmieri*, wherein the Second Circuit stated:

> The doctrine that a United States citizen does not have an absolute right to use United States courts usually is expressed in the context of the citizen doing business abroad, expecting still to use United States courts. Here [defendant]

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[209] *See, e.g.*, Fitzgerald v. Texaco, Inc., 521 F.2d 448, 451 (2d Cir. 1975); Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 927 (S.D.N.Y. 1977); *Michell*, 439 F. Supp. at 28; McCarthy v. Canadian Nat'l Rys., 322 F. Supp. 1197, 1199 (D. Mass. 1971); *Olympic Corp. I*, 333 F. Supp. at 124.

[210] Olympic Corp. v. Societe Generale, 462 F.2d 376 (2d Cir. 1972). Judge Herman cited both the district court and the court of appeals opinions for *Olympic Corp. Reyno I*, 479 F. Supp. at 731 (citing *Olympic Corp.*, 462 F.2d at 378; *Olympic Corp. I*, 333 F. Supp. at 124). However, only the latter requires close consideration because it is there that we find an express statement supporting Judge Herman's proposition. *See Olympic Corp. I*, 333 F. Supp. at 124. In the district court judgment, the court, while considering the balance of convenience, made a remark that could be viewed as suggesting that a defendant would face a higher burden in seeking a dismissal against an American plaintiff: "Though these facts are not decisive by themselves to dismiss the case on the grounds of *forum non conveniens*, especially where an American Plaintiff is involved." *Id.* The statement was made in an off-the-cuff manner and without further elaboration.

[211] *Olympic Corp.*, 462 F.2d at 378 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)). The text of *Gilbert* did not require that the balance be *very* strongly in favor of the defendant, the intensifier "very" was added by the court in *Olympic Corp.*

[212] *Id.* (citing Thomson v. Palmieri, 355 F.2d 64 (2d Cir. 1966); Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633, 645–46 (2d Cir. 1956); Hoffman v. Goberman, 420 F.2d 423, 428 (3d Cir. 1970); Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611 (3d Cir. 1966)).

[213] *Id.*

> came to the United States for capital, and it is not unnatural for [plaintiff] to choose the local forum.[214]

This statement which, if taken in isolation, might be regarded as implicitly endorsing that greater weight should be given to a U.S. citizen's claim.

On a cursory reading, *Palmieri* appears to be a good authority for *Olympic Corp.*'s proposition because it involved a refusal of a foreign corporation's request to dismiss an action brought against it by a U.S. corporation in New York.[215] However, on closer analysis we can see that the nationality of the plaintiff played no distinguishing role in the application of the doctrine to the case. The court upheld the district court's dismissal because it considered that the defendant had substantial links to the forum, making it a natural choice for the plaintiff without mention of any heightened deference due the plaintiff on account of its U.S. citizenship.[216] Rather, because the U.S. plaintiff had brought a derivative action in which the U.S. plaintiff was actually suing in the name of a U.K. corporation, the court considered the case more akin to one involving a foreign plaintiff.[217] Even so, the court applied a vexatious and oppressive standard for FNC, stating as part of its *ratio decidendi* that "[t]he central question is one of convenience, and we should respect plaintiff's choice of forum as long as no harassment is intended."[218]

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[214] *Palmieri*, 355 F.2d at 65.

[215] *Id.*

[216] *Id.* ("While there are strong arguments of convenience for trial of the issues in the United Kingdom, particularly since the case involves internal management of a United Kingdom corporation, there are substantial New York facets of the business."). The court distinguished the case from *Koster*, wherein dismissal was warranted because the defendant's presence in the plaintiff's chosen forum was minimal. In contrast, the defendant in *Palmieri* operated out of New York for the purpose of deriving capital. *Id.* at 66.

[217] *See id.* "Here the plaintiff may be a New York corporation, but it sues in the name of a foreign corporation. Thus, the present case is somewhat more like *DeSairigne* than *The Saudades*." *Id.* (citing DeSairigne v. Gould, 83 F. Supp. 270 (S.D.N.Y. 1949); *The Saudades*, 67 F. Supp. 820 (E.D. Pa. 1946)). In *DeSairigne*, a French national sued a U.S. defendant in New York. *DeSairigne*, 83 F. Supp. at 271. The court determined that it "has the right to decline, and should decline, to entertain jurisdiction. An alien has no constitutional right to sue in our courts. Nor does even an American citizen have an absolute right, under all circumstances, to sue in an American court." *Id.* at 272 (citations omitted) (first citing Heine v. N.Y. Life Ins. Co., 50 F.2d 382 (9th Cir. 1931); then citing U.S. Merch. & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line, 65 F.2d 392 (2d Cir. 1933)). Quoting Justice Holmes, the court reminded the plaintiff that "parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the place that established and would enforce their rights." *Id.* (internal quotation marks omitted) (quoting Cuba R.R. Co. v. Crosby, 222 U.S. 473, 480 (1912)).

[218] *Palmieri*, 355 F.2d at 66.

Ultimately, the court determined that the appropriate analysis was based on convenience and applied the *Gilbert* criteria conventionally without any special allowance made for the citizenship of the U.S. plaintiff.[219] While one might argue that by applying the strict standard of vexation and oppression, the court implicitly endorsed a higher standard for dismissal involving U.S. plaintiffs, the court again did not regard the plaintiff as a typical U.S. citizen but rather as more akin to a foreign plaintiff.[220] Moreover, at the time, courts normally regarded the *Gilbert* test as requiring a vexatious and oppressive standard. As such, the court would likely not have regarded itself as straying from *Gilbert*.[221] Nevertheless, *Palmieri* was interpreted by some courts and commentators at that time as endorsing greater deference to U.S. plaintiffs than foreign plaintiffs.[222]

Of the other cases cited in *Olympic*, i.e., *Vanity Fair Mills*, *Goberman*, and *Mobil Tankers*, dicta can be found supporting a heightened standard for FNC dismissal where a U.S. citizen sues in a U.S. forum.[223] In *Vanity Fair Mills,* while accepting that a U.S. citizen does not have an absolute right under all circumstances to sue in an American court, the Second Circuit observed that, "where, as here, application of the doctrine of forum non conveniens would force an American citizen to seek redress in a foreign court, courts of the United States are reluctant to apply the doctrine."[224] As noted by the Second

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[219] *Id.* at 66–67.

[220] *Id.* at 66.

[221] *See, e.g.,* Lesser v. Chevalier, 138 F. Supp. 330, 331 (S.D.N.Y. 1956) (quotation marks omitted) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)) ("[T]he plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant[.]"); Latimer v. S/A Industrias Reunidas F. Matarazzo, 91 F. Supp. 469, 471 (S.D.N.Y. 1950) (citing *Gilbert*, 330 U.S. at 508) (noting that while the forum was inconvenient for the defendant, it was "by no means apparent that the choice of forum [had] been prompted by an intent to 'oppress' 'vex' or 'harass'").

[222] *See* William C. Strock, Note, *Procedure—Forum Non Conveniens—Foreign Corporations*, 32 J. AIR L. & COM. 586, 591 (1966).

[223] *See* Hoffman v. Goberman, 420 F.2d 423, 428 (3d Cir. 1970) ("It is settled that while an American citizen suing in his own right does not have an absolute right under all circumstances to maintain his suit in a federal court, his election of such a forum should not be disregarded in the absence of persuasive evidence that the retention of jurisdiction will result in manifest injustice to the defendant."); Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir. 1966) ("A citizen of the United States may have no absolute right to have his case tried in a federal court but his election of such a forum should not be disregarded in the absence of persuasive evidence that the retention of jurisdiction will result in manifest injustice to the respondent."); Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 646 (2d Cir. 1956) ("[W]here, as here, application of the doctrine of forum non conveniens would force an American citizen to seek redress in a foreign court, courts of the United States are reluctant to apply the doctrine.").

[224] *Vanity Fair Mills*, 234 F.2d at 646 (citing Burt v. Isthmus Dev. Co., 218 F.2d 353 (5th Cir. 1955); *The Saudades*, 67 F. Supp. 820 (E.D. Pa. 1946)).

Circuit in *Alcoa Steamship*, the judge's observation of judicial reluctance in *Vanity Fair Mills* was not followed-up by any definition of the degree of deference actually to be accorded a U.S. plaintiff in the FNC analysis.[225] In fact, in the circumstances of the case, the court stated that the balance of convenience, i.e., the standard of *Gilbert*, was strongly favored, and thus did not apply a heightened standard in dismissing a U.S. plaintiff.[226] Another case that demonstrates the judicial reluctance to dismiss U.S. plaintiffs to foreign forums is *Burt v. Isthmus Development Co.*[227] *Burt* actually provides stronger support for *Olympic Corp.*'s proposition than *Vanity Fair Mills*.

In *Burt*, a judgment from 1955, the Fifth Circuit pondered the fact that in previous cases involving concurrent jurisdiction between a U.S. and foreign forum, the court had not declined jurisdiction where a U.S. citizen was the plaintiff, whereas, it had done so in domestic cases under §1404(a).[228] This suggested to the court that there was some question of it not being within the power of a federal court to decline jurisdiction over a case brought by a U.S. citizen where an alternative forum existed abroad.[229] The court remarked: "It strikes us as being inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong."[230] Nonetheless, the court did not go to the extreme of declaring itself without discretion to decline jurisdiction but explicitly left the question open.[231] However, in dicta, the court did express the view "that courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country."[232] Again, the principle was expressed that a higher standard for dismissal should apply in the case of a U.S. plaintiff than in the case of a foreign plaintiff.[233]

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[225] Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 156 (2d Cir. 1980) (en banc) (citations omitted) (citing *Vanity Fair Mills*, 234 F.2d at 646).

[226] *See Vanity Fair Mills*, 234 F.2d at 646 ("We are convinced that the balance of convenience is strongly in favor of defendant.").

[227] 218 F.2d 353 (5th Cir. 1955).

[228] *Id.* at 355–56.

[229] *Id.* at 356.

[230] *Id.* at 357. This is contrary to the recognition of the federal court's inherent power to decline jurisdiction by the Supreme Court in *Gilbert*. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947) ("This court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances.").

[231] *Burt*, 218 F.2d at 356–57.

[232] *Id.* at 357.

[233] *Id.*

This principle was later approved by the Third Circuit in *Hoffman* and *Mobil Tankers* (both cases cited in *Olympic*), and elsewhere.[234]

However, not only does *Burt* lack authority, the underlying logic is also unconvincing. The court was asking itself why there were no cases of a U.S. citizen being dismissed on grounds of FNC to a foreign forum.[235] It concluded—from the discrepancy between the incidence of dismissal under the common law doctrine of FNC as opposed to transfer under § 1404(a)—that dismissal of a U.S. citizen to a foreign State forum under the common doctrine is either not possible or subject to a more onerous standard.[236] However, this argument is premised on the same false inductive reasoning discounted earlier in this paper.[237]

In conclusion, chasing down all of Judge Herman's authorities leaves us none the wiser. In fact, most of them prove to be of only minimal value, amounting to little more than suggestive comments mildly supportive of Judge Herman's point of view. The few authorities which did express themselves in sufficiently lucid terms merely echoed Judge Herman's own expression of principle but provided either no reasoned basis at all, or one that was thoroughly unconvincing.

4. Searching for a Ratio: Counter Arguments

The district court of Pennsylvania decided *Reyno I* in 1979.[238] The year before, the Second Circuit, in *Farmanfarmaian*, had disapproved of the proposition voiced by the district court that a foreign claimant's choice of a United States forum is entitled to less weight than a U.S. citizen.[239] However, this view had been *obiter*. *Farmanfarmaian* involved a treaty between the United States and Iran which guaranteed Iranian citizens national treatment.[240] As such, the claimant was entitled, as a matter of treaty law, to have the same standard of FNC applied to his case.[241] In *Reyno I*, Judge Herman had cited the district court judgment but not the Second Circuit's.[242] In 1980, the year after Judge Herman's opinion but before the Supreme Court's, there were two decisions by courts of appeals which rejected

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[234] *See supra* note 223 and accompanying parentheticals. For an example of another case, see Leasco Data Processing Equipment v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972).

[235] *Burt*, 218 F.2d at 355.

[236] *Id.* at 357.

[237] *See Supra* Part II(A)(1).

[238] Reyno I, 479 F. Supp. 727 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980).

[239] Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978).

[240] *Id.* at 881–82.

[241] *Id.* at 882.

[242] *See generally Reyno I*, 479 F. Supp. at 730–32.

according lesser deference to foreign plaintiffs—*Alcoa Steamship* and *Pain*.[243] Both found support in the 1977 decision of the Ninth Circuit in *Mizokami Bros.*[244]

The plaintiff in *Mizokami Bros.* was a U.S. importer whose shipment of bell peppers from Mexico had been refused entry by U.S. Customs due to excess levels of a chemical manufactured and marketed by the German defendant corporation.[245] The plaintiff brought a suit against a number of parties, including the U.S. subsidiary of the chemical manufacturer.[246] The district court dismissed the case on the grounds of FNC because virtually the entire factual nexus of the case pointed to Mexico.[247] The Ninth Circuit agreed, remarking that the plaintiff's sole basis for suing the defendants in the U.S. was the plaintiff's U.S. citizenship, a factor which it did not regard as sufficient to justify refusing a dismissal.[248] While a seemingly run-of-mill FNC dismissal, the case stood in stark contrast to *Burt* and *Olympic* because the court did not go weak at the knees in deferential respect to a U.S. claimant, but instead regarded his citizenship as irrelevant.[249]

In *Alcoa Steamship*, the majority of the Second Circuit, sitting *en banc*, dismissed an admiralty claim brought by a U.S. plaintiff against a Liberian corporation arising from the collision between the defendant's ship and the plaintiff's pier in Trinidad.[250] When addressing the correct standard to be

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[243] Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 156 (2d Cir. 1980) (en banc); Pain v. United Techs. Corp., 637 F.2d 775, 781 (D.C. Cir. 1980).

[244] Mizokami Bros. of Arizona v. Baychem, 556 F.2d 975 (9th Cir. 1977).

[245] *Id.* at 976–77.

[246] *Id.* at 977.

[247] *Id.*

[248] *Id.* at 978 ("The plaintiff falls back on its United States citizenship as the sole and only possible basis for suing these defendants in a court of the United States. This is not enough. In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.").

[249] *See id.*

[250] Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 149–50 (2d Cir. 1980) (en banc). A likely motivation for the motion to dismiss was that, under a Trinidad statute from 1894, the limitation of liability would be just $570,000 as opposed to the full alleged damages of $8 million. *See* Kenneth H. Volk & Matthew M. Cordrey, Note, *Forum Non Conveniens: Two Views on the Decision of the Court of Appeals for the Second Circuit* in Alcoa Steamship Co., Inc. v. M/V Nordic Regent, *-F.2d- (2d Cir. 1980) (en banc)*, 12 J. MAR. L. & COM. 123, 124 (1980). In his dissenting opinion in *Alcoa Steamship*, Judge van Graafeiland discussed how *Palmieri* distinguished itself from *Gilbert* in that the latter did not involve any question of seeking a forum in a foreign State. *Alcoa S.S.*, 654 F.2d at 162 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Thomson v. Palmieri, 355 F.2d 64, 65–66 (2d Cir. 1966)). He then argued that in circumstances where a plaintiff has chosen his home forum then the

applied to a U.S. plaintiff in an FNC analysis, the court endorsed its approach in *Farmanfarmaian*, stating that, "American citizenship is *not* an impenetrable shield against dismissal on the ground of forum non conveniens."[251] The Second Circuit even observed that the "trend of both the common law generally and admiralty law in particular has been away from according a talismanic significance to the citizenship or residence of the parties."[252]

The appellants urged the court to apply a standard of vexation and oppression in the FNC analysis, arguing that *Koster* amounted to an exception to the *Gilbert* approach.[253] The court rejected this argument, explaining that *Koster*, "should be read as a consistent, pragmatic application of *Gilbert*, rather than an exception to it."[254] In the court's view, there was only a single uniform standard for FNC dismissal—the balance of convenience must be strongly in favor of the defendant.[255]

The same year *Alcoa Steamship* was decided, the D.C. Circuit reached much the same conclusion in *Pain v. United Techs. Corp.*[256] The facts of *Pain* related to the crash of a helicopter into the North Sea while traveling from Bergen, Norway to an off-shore drilling platform.[257] The relatives of the decedents brought wrongful death actions against the Delaware manufacturer of the helicopter, United Technologies.[258] All of the plaintiffs were foreign residents (French, British, Norwegian) with the exception of one, who was a U.S. citizen residing in New Hampshire.[259] Some of the plaintiffs held dual-nationality and thus had U.S. citizenship while being non-resident in the U.S.[260] The district court dismissed all claims on grounds of

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standard of vexation and oppression is justified by *Koster*. *Id.* (citing Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)). However, Judge van Graafeiland's statement is misleading. It suggests that by distinguishing itself from *Gilbert*, the court in *Palmieri* was aligning itself with *Koster*. In fact, *Palmieri* distinguished itself from both *Gilbert* and *Koster*. *Palmieri*, 355 F.2d at 65–66. In *Palmieri*, the court stated: "Similarly, *Gulf Oil Corp. v. Gilbert* and *Koster v. (American) Lumbermen's Mutual Casualty Co.*, may be distinguished because there was no question of seeking a forum in a foreign state." *Id.* (citations omitted). It is worth noting that *Koster* did not involve a forum in a foreign state (i.e., nation State) either. *Koster*, 330 U.S. at 520–22.

[251] *Alcoa S.S.*, 654 F.2d at 152 (citing Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880 (2d Cir. 1978)).

[252] *Id.* at 154.

[253] *Id.* at 151.

[254] *Id.* at 152.

[255] *Id.* at 151.

[256] *See* Pain v. United Techs. Corp., 637 F.2d 775 (D.C. Cir. 1980).

[257] *Id.* at 779.

[258] *Id.*

[259] *Id.* at 780, 795.

[260] *Id.* at 797.

FNC.[261] On appeal, the issue concerned the correct standard to be applied for FNC—whether it was the *Gilbert* standard or the *Koster* standard.[262] Like the Second Circuit in *Alcoa Steamship*, the D.C. Circuit did not regard *Gilbert* and *Koster* as establishing different standards for dismissal, but rather saw *Koster* as a consistent and pragmatic application of *Gilbert*.[263]

The D.C. Circuit also specifically addressed the question of the weight to be accorded a plaintiff's citizenship and residence in the balance of convenience.[264] It accepted that the federal courts, in admiralty, had tended to take the citizenship of the parties into account in FNC motions since, historically speaking, the courts had been willing to dismiss where both parties were foreign, but were reluctant to dismiss were it meant sending an American citizen to a foreign forum.[265] Unlike the examples shown above, the D.C. Circuit did not infer from this historical evidence the existence of a legal principle justifying the differentiation in standard applicable to plaintiffs depending on their citizenship.[266] Instead, it drew no conclusion and observed that the issue had been left open by the Supreme Court in *Swift*.[267]

Unconstrained by doctrinal precepts nor binding authorities, the court considered, and found persuasive, the opinion of the Second Circuit in *Alcoa Steamship*.[268] It concluded that citizenship was "largely irrelevant to the factors which *Gilbert-Koster* required courts to consider when making [FNC] determinations,"[269] and considered citizenship as serving as "an inadequate

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[261] *Id.* at 781.

[262] Pain v. United Techs. Corp., 637 F.2d 775, 781 (D.C. Cir. 1980).

[263] *Id.* at 783. The court opined:

> Although the language in these decisions may suggest slightly different approaches to the problem, we do not read *Gilbert* and *Koster* as establishing different standards for dismissal on grounds of forum non conveniens. Rather, we agree with the view recently expressed by the Second Circuit that *Koster* must be seen as "a consistent, pragmatic application of *Gilbert*, rather than an exception to it."

Id. (citing Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 152 (2d Cir. 1980)).

[264] *Id.* at 795–96.

[265] *Id.* at 796 ("Federal courts sitting in admiralty have traditionally taken the citizenship of the parties into account when deciding forum non conveniens motions. Where both parties are foreigners, courts have usually not hesitated to exercise their discretion to decline jurisdiction. Where all plaintiffs are American citizens, by contrast, courts have demonstrated historical reluctance to dismiss where the alternative is litigation in a foreign forum.").

[266] *Id.*

[267] Pain v. United Techs. Corp., 637 F.2d 775, 796 (D.C. Cir. 1980). ("[T]he question concerning the exact weight to be given factors of citizenship and residence in the application of the forum non conveniens doctrine has been explicitly left open by the Supreme Court in *Swift*[.]").

[268] *Id.*

[269] *Id.* at 797.

proxy for the American residence of [the] plaintiff."[270] As to residence, the court specifically noted that this was just one of the considerations to be taken into account in the FNC analysis of convenience, residence in the United States was not to be regarded as in any way dispositive.[271]

It is submitted that the position adopted by the Second Circuit in *Alcoa Steamship* and the D.C. Circuit in *Pain*, represents the correct understanding of the *Gilbert/Koster* doctrine of FNC with respect to the question of the deference due the foreign plaintiff.[272] Interestingly, in its opinion in *Reyno II*, the Third Circuit voiced its agreement with *Alcoa Steamship*.[273]

5. *Searching for a Ratio: Concluding Remarks*

What then is the provenance of the idea that a foreign plaintiff's choice of forum is entitled to less deference? It was certainly not the brainchild of Judge Herman, though he zealously adopted it. He provided no doctrinal rationale for his decision, instead he relied on weak or irrelevant authorities, taking his cue from other courts which had espoused similar trains of thought. Our examination of these authorities reveals a further poverty of judicial reasoning on the matter and only the flimsiest of rationales.

It is submitted that the true basis for granting greater deference to the plaintiff's choice of a home forum, as adopted by Judge Herman and by the authorities cited by him directly and indirectly, are considerations of policy, not legal principle. Until the 1970s, U.S. plaintiffs suing in their home forum did not worry about FNC dismissal. In the years following *Gilbert* and *Koster*, the general tendency of courts was to only grant FNC dismissals in extreme circumstances amounting to an abuse of process.[274] On account of § 1404(a), FNC motions were effectively limited to international cases which were far less numerous then than they are nowadays. The net result of all of this was that there were few FNC motions and even fewer dismissals. This changed in the 1970s when international cases became much more common and federal judges complained of being overworked due to docket congestion.[275]

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[270] *Id.*

[271] *Id.* at 798.

[272] The Second Circuit repeated its position on FNC in 1980. *See* Calavo Growers of Cal. v. Generali Belg., 632 F.2d 963, 966–68 (2d Cir. 1980).

[273] *See* 630 F.2d 149, 159 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981). "Indeed, as the Court of Appeals for the Second Circuit has recently held, the citizenship of the plaintiff does not affect the defendant's burden under Gilbert and Koster. American citizenship of the plaintiff does not increase the defendant's burden, just as foreign citizenship may not lessen it." *Id.* (citing Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147 (2d Cir. 1980)).

[274] *See* Robertson, *supra* note 114, at 403–04.

[275] *See id.* at 407 (naming some factors as contributing to the shift in the 1970s such as

Against this backdrop, judicial tendencies became more liberal toward the dismissal of claims. While this suited the U.S. defendant, it was not in the interests of the U.S. plaintiff. On one hand, the courts wanted to liberalize FNC, while on the other, they were reluctant to send U.S. plaintiffs abroad. The solution was to limit the liberalization of FNC. This could be achieved by ring-fencing the U.S. plaintiff by bestowing a greater level of deference on his choice of forum. Justification for this was based on the fact that in the cases involving FNC, such as international cases, dismissals were predominantly granted where the plaintiff was foreign. From this small selection of cases, the courts inferred the false conclusion that lesser deference was granted the foreign plaintiff and thus greater deference ought to be shown toward the foreign plaintiff. It is true that U.S. plaintiffs are less likely to be dismissed from a U.S. court on grounds of FNC,[276] but this is not justification for a differential approach. All it proves is that, on average, a U.S. plaintiff suing in a U.S. forum is more likely to have sued in the *forum conveniens*. Nevertheless, this was the false logic upon which the decision of Judge Herman and the authorities cited by him were implicitly based.

Of course, there were those who did not accord with this line of thought and refused to apply differing levels of deference. *Reyno* was decided by the district court in 1979. In 1978, the Second Circuit had disapproved of the proposition that a foreign claimant's choice of a U.S. forum is entitled to less weight than a U.S. citizen in *Farmanfarmaian*[277] and cited the opinion of the Ninth Circuit in *Mizokami Bros*[278] in support. What is striking about Judge Herman's opinion in *Reyno I* is that he made no mention of these authorities. Additionally, in the interim period between the district court's and the Supreme Court's judgments in *Reyno I* and *Reyno*, the Second Circuit had doubled-down on its position.

In *Alcoa Steamship*, when addressing the correct standard to be applied to a U.S. plaintiff in an FNC analysis, the Second Circuit endorsed its approach in *Farmanfarmaian*, stating that: "American citizenship is not an impenetrable shield against dismissal on the ground of *forum non conveniens*."[279] The court even observed that the "trend of both the common

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improvements in transport and communications technology, the increase in transnational cases, international judicial comity, and docket congestion).

[276] Yellen observed that, "[a] survey of the case law which followed *Gilbert* illustrates that only under extreme circumstances would a federal court dismiss a suit brought by a United States plaintiff when doing so would relegate him to litigation in the courts of a foreign country." Yellen, *supra* note 130, at 543–544.

[277] Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978).

[278] Mizokami Bros. of Ariz, Inc. v. Baychem Corp., 556 F.2d 975 (9th Cir. 1977).

[279] Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 152 (2d Cir. 1980) (citing *Farmanfarmaian*, 588 F.2d 880, 882).

law generally and admiralty law in particular has been away from according a talismanic significance to the citizenship or residence of the parties."[280] The DC Circuit reached much the same view in *Pain,* concluding that citizenship was "largely irrelevant to the factors which *Gilbert-Koster* required courts to consider when making [FNC] determinations" and opining that it regarded citizenship as serving as "an inadequate proxy for the American residence" of the plaintiff.[281] The D.C. Circuit specifically noted that residence was just one of the considerations to be taken into account in the FNC analysis of convenience, stating that U.S. residence was not to be regarded as in any way dispositive.[282] There was, therefore, a great deal of judicial divergence between the federal courts on the degree of deference owed a foreign plaintiff comparative to a U.S. plaintiff. As such, when the Third Circuit reversed the decision of the district court in *Reyno II,* citing *Alcoa Steamship* approvingly in the process, the stage was finally set for the Supreme Court to have its say.[283]

B. Reyno in the Supreme Court

1. On the Matter of Deference

The Supreme Court concluded that the district court had been fully justified in distinguishing between U.S. and foreign plaintiffs.[284] It explained that while there is ordinarily a strong presumption in favor of a plaintiff's choice of forum, this applies with less force when the plaintiff is foreign.[285] However, U.S. citizenship or residence was not to be regarded an impenetrable shield against dismissal.[286] A U.S. plaintiff could still find themselves dismissed on grounds of FNC where the balance of convenience so required. The Court was thus authorizing a differential stance be taken in the FNC analysis depending on whether the plaintiff was foreign or not. But

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[280] *Id.* at 154.

[281] *See* Pain v. United Techs. Corp., 637 F.2d 775, 797 (D.C. Cir. 1980).

[282] *Id.* at 797 (quoting Wolinsky, *supra* note 125, at 382-383). For a full extract from Wolinsky's article, see *supra* Part II(C).

[283] 630 F.2d 149, 159 (3d Cir. 1980) (citing *Alcoa S.S.,* 654 F.2d at 156), *rev'd,* 454 U.S. 235 (1981).

[284] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) ("The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified.").

[285] *Id.*

[286] *See id.* at 255 n.23 (citing *Pain,* 637 F.2d at 796–97; Mizokami Bros. of Ariz., Inc. v. Baychem Corp., 556 F.2d 975 (9th Cir. 1977)). "As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Id.*

what did it mean by "foreign"?[287] At a number of points, the Court clearly qualified the distinction as being between a foreign plaintiff, and a citizen or resident plaintiff.[288] The difference in treatment was to be expressed by the degree of deference owed the plaintiff's choice of forum; a foreigner was entitled to less deference, the citizen or resident "deserved somewhat more deference."[289] The Court continued by stating:

> When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.[290]

The Court was of the view that "citizenship and residence are proxies for convenience."[291] One could infer from the foreign status of the plaintiff that his choice of a U.S. forum was presumptively less convenient and therefore entitled to less deference.[292] Precisely how much less deference a foreign plaintiff's choice of a U.S. forum is entitled to was not quantified by the Court. In the final paragraph of the majority's judgment, it furtively referred to a foreign plaintiff's choice of forum as applying with "less than maximum force."[293]

The Court supported its position by referencing *Koster*,[294] which it reinforced by alluding to its acknowledgement in *Swift* that very different considerations arise where a U.S. plaintiff is involved.[295] As discussed above, *Koster* does not provide the authority supposed by the Court, nor indeed does *Swift*.[296] The Court also found support for its proposition in the typical practice of lower federal courts who accorded less weight to a foreign plaintiff's choice of forum.[297] Authority should flow down from the Supreme

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[287] *Id.* at 256.

[288] *See id.*

[289] *Id.* at 255 n.23.

[290] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255–56 (1981).

[291] *Id.* at 256 n.24 (citing Pain v. United Techs. Corp., 637 F.2d 775, 797 (D.C. Cir. 1980)).

[292] *Id.* at 255–56.

[293] *Id.* at 261.

[294] *Id.* at 255 n.23 (quoting Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 501, 524 (1947)) ("[I]n any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.").

[295] *Id.* (quoting Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684, 697 (1950)).

[296] *See* discussion *supra* Part II(A)(2).

[297] *See generally Reyno*, 454 U.S. at 235. (citing Founding Church of Scientology v. Verlag, 536 F.2d 429, 435 (D.C. Cir. 1976); Paper Operations Consultants v. S.S. Hong Kong Amber, 513 F.2d 667, 672 (9th Cir. 1975); Fitzgerald v. Texaco, Inc., 521 F.2d 448, 451 (2d

Court to the lower courts, rather than the other way. Relying on lower court practice without evaluating the reasoning contained therein is lazy and tantamount to letting the tail wag the dog. The practice of lower federal courts on the matter is of little relevance where it is based on a weak or non-existent rationale. In truth, the Supreme Court did little more than echo Judge Herman by relying on the same authorities.

The Court was also very selective in its choice of authorities. Despite referencing *Pain* and *Mizokami Bros.*, it is quite amazing that it did not address itself to the rejection of a differential approach in those two cases.[298] More bizarrely, in addition to *Pain*, the Court also cited a scholarly article by Wolinsky[299] as support for the reasonableness of the thesis that the degree of deference due a plaintiff's choice of forum can be inferred from his citizenship/residence.[300] Yet this was not at all what the D.C. Circuit in *Pain*, or Wolinsky in his article, were asserting. In fact, quite the opposite, they specifically advised against taking citizenship and residence as proxies for convenience.[301]

Whereas many of the earlier authorities referred only to the U.S. citizen, taking U.S. residency for granted, the Supreme Court distinguished between the U.S. citizen and the U.S. resident.[302] Did the Court intend that a U.S. citizen who is not resident in the U.S. should be entitled to the same level of deference as one who is resident? Should he be entitled to more deference than the foreigner merely on account of his citizenship? Why should a U.S. citizen who sues in New York but resides in Brazil be entitled to the same level of deference as a U.S. citizen residing in New York? Indeed, why should a Brazilian resident in otherwise exactly the same circumstances as the ex-pat U.S. citizen (with the exception of his citizenship) be entitled to lesser deference?

Cir. 1975); Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir. 1966); Ionescu v. E.F. Hutton & Co., 465 F. Supp. 139 (S.D.N.Y. 1979); Michell v. Gen. Motors Corp., 439 F. Supp. 24, 27 (N.D. Ohio 1977)).

[298] *Id.* (citing Pain v. United Techs. Corp., 637 F.2d 775, 796–97 (D.C. Cir. 1980); Mizokami Bros. of Ariz., Inc. v. Baychem Corp., 556 F.2d 975 (9th Cir. 1977)). The two authorities were cited only in support of the proposition that a "citizen's forum choice should not be given dispositive weight." *Id.*

[299] *See* Wolinsky, *supra* note 125.

[300] That the Court thought them supportive of its position is clear from the statement it made (in parentheses) alongside its citation of *Pain*—that "citizenship and residence are proxies for convenience." *Id.* at 256 n.24 (citing *Pain*, 637 F.2d at 797).

[301] *See Pain*, 637 F.2d at 797; Wolinsky, *supra* note 125, at 383.

[302] *See, e.g., Reyno*, 454 U.S. at 255 ("The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified."). Additionally, the Court stated that "citizens or residents deserve somewhat more deference than foreign plaintiffs . . . ." *Id.* at 255 n. 23.

In the end, although the Court clarified that a lesser degree of deference was indeed owed to the foreign plaintiff, it did not provide any cogent basis for that blanket proposition. Neither did it quantify what degree(s) of deference was due or provide any helpful criteria by which it might be determined. Doubts remained about whether deference was a product of residence or whether it could also be inferred from mere citizenship. Crucially, the matter of how this deference ought to be accommodated into the FNC analysis was not expressly addressed by the Court. Hopes that this would be resolved by the Court's statements as to the applicable standard for dismissal would, as we shall see in the following sub-section, go unfulfilled. *Reyno*'s treatment of the deference issue raised several questions which will be explored shortly. First, what of the non-resident citizen? Second, is it reasonable to infer a presumptive degree of deference on the basis of the fact of U.S. citizenship or residence?

2. *On the Standard for Dismissal*

When it came to clearing up doubts surrounding the applicable standard for FNC dismissal, the Supreme Court affirmed that dismissal "will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice."[303] Later, the Court declared that it was sufficient for dismissal if trial in the plaintiff's chosen forum be burdensome, it need not be unfair.[304] This was a pivotal statement in *Reyno* because it rejected any interpretation of the doctrine as requiring a standard approaching an abuse of process. Bearing in mind that the courts, post-*Gilbert*, had largely adhered to a very strict version of the doctrine, which—if not an outright abuse of process version—demanded such a degree of inconvenience as to amount to unfairness,[305] but the Court was now endorsing an alternative view that it was sufficient it be *burdensome*.[306] In the context of its assessment of the public interest factors, the Court demonstrated that the burden of the choice of forum had to be balanced against the convenience of the forum for the plaintiff. Dismissal was warranted where there existed a heavy burden on the defendant or court

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[303] *Id.* at 249.

[304] *Id.* at 259 ("Finding that trial in the plaintiff's chosen forum would be burdensome, however, is sufficient to support dismissal on grounds of forum non conveniens.").

[305] *See* Yellen, *supra* note 130, at 546–47 (citing Leasco Data Processing Equip. Corp v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972); Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir. 1966); Mizokami Bros. of Ariz., Inc. v. Baychem Corp., 556 F.2d 975 (9th Cir. 1977)).

[306] *Reyno*, 454 U.S. at 259.

which was unjustified by the plaintiff's convenience, i.e., unnecessarily burdensome.[307] This is closer in spirit to the standard actually intended by *Gilbert/Koster*, i.e., strongly favors, but it departs from it insofar as it substitutes the notion of a degree of inconvenience constituting unfairness to one of being merely unnecessarily burdensome. In so doing, *Reyno* liberalized the *Gilbert/Koster* doctrine while maintaining its flexibility.[308]

Reyno appeared to resolve the question of whether there was a singular or dual standard for dismissal. The lower courts tended to apply different standards depending on whether the plaintiff was foreign or not. With its "unnecessarily burdensome" standard, unhelpfully vague as it is, the Supreme Court confirmed that a singular standard for dismissal applied.[309] As argued above, *Gilbert/Koster* did intend a singular standard so, on this point, the Court was correct. Yet, there is a glaring problem with a singular standard—by rejecting the existence of dual standards, one loses an argument for the proposition that a foreign plaintiff is entitled to lesser deference. As discussed above, many found support for deference in distinguishing *Gilbert* and *Koster* on the issue of the applicable standard and concluding that two standards applied, one for the U.S. plaintiff, one for the foreign plaintiff.[310] However, if a single standard is the correct interpretation of *Gilbert/Koster*, as the Court in *Reyno* determined it to be,[311] then this line of argument is lost. More importantly, this then begs the question of how to accommodate the differing level of deference between foreign and U.S. plaintiffs. If the difference in deference cannot be reflected in the standard for dismissal then how does it come into play in the FNC analysis at all? This would prove to be a major issue for the lower federal courts.

C. The Problem with Reyno

The two main problems with *Reyno* are: (1) the continuing absence of a compelling rationale for explicitly distinguishing between foreign and U.S.

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[307] *Id.* at 249.

[308] There is no doubt the Court was concerned with maintaining the flexibility of the discretionary doctrine and, at a number of points, emphasized this objective. *Id.* at 249–250.

[309] *See Reyno*, 454 U.S. at 252 n.19.

[310] *See* Yellen, *supra* note 130, at 544–45 n.65 (citing Founding Church of Scientology v. Verlag, 536 F.2d 429, 435 (D.C. Cir. 1976); Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber, 513 F.2d 667, 672 (9th Cir. 1975); *Leasco Data Processing Equip. Corp.*, 468 F.2d at 1326; *Mobil Tankers Co.*, 363 F.2d at 614; Ionescu v. E.F. Hutton & Co., 465 F. Supp. 139 (S.D.N.Y. 1979); Abouchelache v. Hilton Int'l Co., 464 F. Supp. 94 (S.D.N.Y. 1978); Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa, 428 F. Supp. 1237, 1253 (S.D.N.Y. 1977); Michell v. Gen. Motors Corp., 439 F. Supp. 24, 28 (N.D. Ohio 1977)).

[311] *Reyno*, 454 U.S. at 241.

plaintiffs within an FNC analysis; and (2) how to incorporate different degrees of deference while at the same time following a single standard for dismissal. The question to be asked is whether it is legitimate to distinguish between the deference due a plaintiff's choice of a U.S. forum based on his status as either a U.S. citizen, resident, or foreigner. The only explanation for this difference in treatment must be rooted in the effect of residence, and/or citizenship, on the convenience of the plaintiff. The Supreme Court did, after all, hold that "the central focus of the [FNC] inquiry is convenience."[312]

It is submitted that, from the point of view of convenience, one cannot ascribe to the fact of citizenship alone a sufficiently reliable indication of convenience to justify presumptively granting a citizen greater deference for choosing his home forum. Even residence, which is a more reliable indicator as to convenience, cannot be trusted to fulfil this function with the degree of certainty necessary to establish an across-the-board presumption. This is because citizenship has little, if any, relevance to convenience, and because residence is only relevant to some private interest factors while being irrelevant to others. Moreover, residence may be a reliable basis for inferring certain characteristics, but it is not immutably so.

To illustrate the first point, when considering the deference due to a plaintiff, several of the factors which have a bearing on convenience of trial in the chosen forum actually have no connection to citizenship or residence at all. For example, the availability of contingency fee arrangements in the chosen forum. The convenience of this factor has nothing to do with the residence or citizenship of the plaintiff but everything to do with the locality of the forum. The same is true for other factors, such as the compulsory process for appearance of unwilling witnesses, procedural or substantive legal benefits, and so on. Let us take the example of access to sources of proof or evidence. The (in)convenience of this factor is dependent on the locality of the evidence vis-à-vis the forum, not the citizenship or residence of the plaintiff. The same goes for expert witnesses—where they are abroad, then there will be lesser convenience for trial in the United States, whether the plaintiff is a resident in the United States or not. Another factor commonly brought up in litigation is the ability to implead third-party defendants—indeed, this was a central factor in *Reyno*[313]—yet the (in)convenience of this factor has nothing to do with the plaintiff's citizenship or residence.

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[312] *Reyno*, 454 U.S. at 249.

[313] *Reyno*, 254 U.S. at 259 (finding that the district court was correct in concluding "that the problems posted by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland").

Even for some of the factors to which citizenship and residence are habitually connected, it is not invariably the case that this connection will exist in every case. For example, a relevant private interest factor is the language used by the forum. By and large, if the plaintiff is a citizen of the forum then he will usually speak the same language and, therefore, the choice of that forum will be more convenient. However, that may not necessarily always be true. Strictly speaking, citizenship and residence are irrelevant, except insofar as it acts as a proxy for the native tongue of the plaintiff. A plaintiff may be resident in the United States but not speak English; should he or she be entitled to the same deference as an English-speaking plaintiff? Familiarity with the legal system is sometimes cited as a relevant factor, citizenship may act as a reasonably good proxy for this, but ultimately, it is a question of the relation between the particular plaintiff and the chosen forum. Where a foreign plaintiff is litigating in the United States, the inconvenience will differ depending on whether the foreigner is a citizen or resident of another common law jurisdiction, such as England, or of a civil law jurisdiction, such as Italy. Given the similarity in substantive and procedural law amongst common law systems, the greater convenience arising from the familiarity with the applicable law will favor the Englishman over the Italian, yet the United States' approach to FNC would grant them the same, lesser, degree of deference, whereas, a U.S. citizen who has lived his entire life in England would be granted more deference.

From the perspective of convenience, while citizenship ought certainly to be a consideration in the balancing of convenience, the truth is that it is, per se, practically irrelevant. The only practical relevance it holds is where it is actually functioning as a proxy for some other characteristic, e.g., language or familiarity with the legal system. It is residence which bears relevance to factors of convenience, but even so, residence is not a sufficiently reliable indicator as to convenience. It is not sufficiently safe to ground a presumption as to the deference due a plaintiff's choice of forum. Of course, citizenship and residence ought to be taken into consideration in the balancing of convenience. In many cases, those factors will give a strong indication as to convenience, but they should not be taken as the basis for a clumsy and unreliable presumption as to the deference due. It is ironic, to say the least, that the Supreme Court's citation to Wolinsky should direct us to the following eloquent summation of the issue:

> [I]t is undoubtedly true that American citizens, taken as a class, tend to possess characteristics that make foreign litigation inconvenient for them. It is entirely proper that such characteristics be weighed in a court's balancing of the parties' inconveniences. But American citizenship, as such, correlates imperfectly with those characteristics, and therefore should not be used as a facile proxy for plaintiff's convenience. Such convenience related concerns as geography,

language barriers, and unfamiliarity with foreign systems should be examined directly on their own merits, case by case, without regard for the passport held by the plaintiff.[314]

D. Concluding Remarks on Reyno

It has been said that the Supreme Court's judgment in *Reyno* amounted to a *refinement* of the federal doctrine of FNC as laid down in *Gilbert* and *Koster*.[315] However, it might more accurately be described as a revision. Whether it is a refinement or a revision ultimately depends on how one reads *Gilbert* and *Koster*. These classical statements of the federal doctrine left a number of matters sufficiently uncertain that the federal courts had subsequently reached divergent interpretations on some key issues, especially with regards to the applicable standard for dismissal and whether differing degrees of deference applied.

The following is submitted as the correct reading of *Gilbert* and *Koster*. Dismissals on grounds of FNC were to be granted in exceptional or rare cases, therefore, the plaintiff's choice of forum was to be rarely disturbed. Upon consideration of the private interest factors and public interest factors, dismissal was warranted where the cumulative balance of convenience of those factors was strongly in favor of dismissal. Crucially, the standard for dismissal in all cases was that the balance of convenience *strongly favors* dismissal. That Justice Jackson referred to vexation and oppression in *Koster* was not affirmation that, a priori, a different standard for dismissal applied in the case of a plaintiff who sues in his home forum. It was merely a common-sense observation that a plaintiff who sues in his home forum is more likely to make a greater showing of convenience and that a defendant who, in order to tip the balance to the level of *strongly favors*, will likely need to make a very strong showing of inconvenience, i.e., something akin to vexation and oppression. A posteriori, the doctrine of FNC, by being based on considerations of convenience, is arranged in such a way that it will, more

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[314] Wolinsky, *supra* note 125, at 383. Another commentator describes the *Reyno* standard as having "no apparent rationale," and calls for its abolition, insisting that the same deference be shown both U.S. and foreign plaintiffs. *See* Duval-Major, *supra* note 144, at 681.

[315] *See* Boyce, *supra* note 96, at 214. Boyce states:

> Although *Reyno* will make it more difficult for the foreign plaintiff to resist a forum non conveniens dismissal, the decision does not mark a fundamental change in the way courts analyze forum non conveniens problems. Its analysis of the weight due a foreign plaintiff's choice of forum follows logically from *Koster*. *Gilbert* plainly implied the minimum standard for adequacy that *Reyno* articulates. In effect, *Reyno* merely fine-tunes traditional forum non conveniens analysis with its emphasis on the private convenience of the litigants.

Id. *See also* Carney, *supra* note 4, at 431; BRAND & JABLONSKI, *supra* note 4, at 50.

often than not, defer to the choice of a plaintiff who sues in his home forum. Such deference is passive; it is not actively achieved through some form of judicial determination, such as by assigning a differential standard for dismissal.

On this reading, *Reyno* is not a refinement of the *Gilbert/Koster* doctrine, it is a revision. The Court endorsed Judge Herman's approach as having been fully justified and concluded that the strong presumption in favor of the plaintiff's choice of forum applies with less force when the plaintiff is foreign.[316] In so doing, it confirmed the proposition that the degree of deference due a plaintiff's choice of forum varied depending on his/her categorization as a U.S. citizen or resident or as a foreigner.[317] It discussed the notion of deference in a manner suggestive that it was, *a priori*, to affect the burden facing a defendant in a given case.[318] Yet, on the other hand, it appeared to reject the notion that *Gilbert/Koster* established alternative standards for dismissal and instead affirmed the proposition of a single standard.[319] These two propositions are very difficult, if not impossible, to reconcile.

If, at the outset, one makes the determination that a particular plaintiff's choice of forum is entitled to lesser deference than another plaintiff, and if that determination is intended to play an active role in the FNC analysis, then one is inevitably applying different standards for dismissal. In practical terms, the standard corresponds to the general burden that is upon the defendant to show the requisite level of inconvenience. If one lowers that burden for one category of cases, e.g., foreign plaintiffs, then one has adjusted the standard for dismissal. One can call the standard by the same name in both cases but that only masks the fact that two different standards actually apply. What is really happening is that in one case the plaintiff is being handicapped. This handicap is based on the presumption, deemed reasonable by the Court, that where a foreign plaintiff sues in a United States' court then his choice is deemed less convenient.[320] This is not a reasonable presumption at all, especially where it is based on mere citizenship. It should be unthinkable that a doctrine whose *raison d'être* is the determination of convenience, should rely on such blunt suppositions about convenience at a preliminary stage of its analysis. If, as the Court insisted, convenience is the

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[316] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (commenting that the "distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified").

[317] *See Id.* at 255–56 ("Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.").

[318] *See id.*

[319] *See id.*

[320] *See id.*

central focus of FNC, then it should allow the analysis to do its job and trust that it will inherently favor the domestic plaintiff.

With *Reyno*, the Supreme Court clearly intended to liberalize the doctrine, stating that it was not necessary for dismissal that the balance of convenience amount to unfairness, it was sufficient that it be unnecessarily burdensome.[321] This is irreconcilable with the standard of dismissal laid down in *Gilbert* and *Koster* which required such inconvenience as to amount to unfairness, such that dismissal would be rare and exceptional.[322] Simply put, the burden on the defendant to secure a dismissal was less than it was under *Gilbert* and *Koster*.[323] It is submitted that this is a more substantial alteration to the doctrine than a mere refinement. Whether one wants to define *Reyno* as a refinement or a revision is a moot point because *Reyno*'s holding is far from unequivocal. As will be abundantly demonstrated in the next Part of this paper, *Reyno* has puzzled the lower federal courts, resulting in the emergence of a variety of divergent FNC doctrines.

IV. POST-*REYNO* CONFUSION

Reyno revised FNC in two main ways. First, it revised the deference due a plaintiff's choice of forum. Second, it revised the applicable standard for dismissal. The dilemma this posed for the lower federal courts was one of accommodating two essentially inconsistent propositions. If a single standard for dismissal applies, how does one accommodate a differential stance with respect to deference? If the test is, *as always*, a question of determining if the chosen forum is *unnecessarily burdensome*,[324] then where does the altered deference come into play? How much less deference is a foreign plaintiff's choice of a U.S. forum entitled to? This was never quantified by the Court except for reference to it applying with "less than maximum force."[325] These unresolved issues have led to significant division among the federal circuits.

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[321] *Id.* at 252 n.19.

[322] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947); Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524–25 (1947)

[323] *See* Randall W. Dillard, *The Application of the Forum Non Conveniens Doctrine to Foreign Aviation Litigation in the United States of America*, 17 BRACTON L. J. 15, 16 (1984) ("[T]he burden upon the defendant to establish an inconvenient forum and dismiss a non-American plaintiff is now considerably less than under the *Gilbert* standard.").

[324] *Reyno*, 454 U.S. at 249 (noting that under *Gilbert*, dismissal "will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.").

[325] *Id.* at 261.

The goal of this part is to explore the impact of *Reyno*. First, by reviewing the subsequent Supreme Court judgments on the relevant aspects of FNC. The primary focus of Part III, however, will be on the U.S. circuit courts' attempts to accommodate the demands made by *Reyno*. The approaches taken by three federal circuits will be examined. Extra attention will be paid to the Second Circuit's decision in *Iragorri v. United Technologies Corp.*, as its version of the doctrine exemplifies how even well-intended efforts to reconcile the two *Reyno* propositions can produce an absurd result.[326]

A. Subsequent Supreme Court Judgments

In the years since *Reyno*, the Supreme Court has addressed issues of FNC in a handful of cases, most notably in *American Dredging Co. v. Miller* and *Sinochem International Co. v. Malaysia International Shipping Corp.*[327] However, these cases have added little more than a few snippets of guidance. In *American Dredging*, Justice Scalia noted that the doctrine's modern development has been in response to the phenomenon of forum shopping and described it as being, "at bottom . . . nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined."[328] He also acknowledged that "[t]he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible."[329] A concession likely to excite those civilian lawyers who oppose the doctrine. It may be tentatively suggested that Justice Scalia considered the merits of controlling forum shopping justified the lack of uniformity inherent in the U.S. version of the doctrine, especially in light of the fact that it is a rule of procedure rather than of substance.[330]

In *American Dredging,* Justice Scalia made several comments about FNC, by way of summary, he stated:

> Under the federal doctrine of *forum non conveniens*, "when an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own

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[326] 274 F.3d 65 (2d Cir. 2001) (en banc).

[327] Am. Dredging Co. v. Miller, 510 U.S. 443 (1994); Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422 (2007). *See also* Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex., 571 U.S. 49 (2013); Van Cauwenberghe v. Biard, 486 U.S. 517 (1988).

[328] *Am. Dredging*, 510 U.S. at 453.

[329] *Id.* at 455.

[330] *Id.* at 453; *see also* BRAND & JABLONSKI, *supra* note 4, at 52–53.

> administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case," even if jurisdiction and proper venue are established.[331]

Justice Scalia's choice of language in summarizing the doctrine is very selective and potentially misleading. His language could easily be read as endorsing an affirmation of the vexatious and oppressive standard for dismissal. Additionally, it returns to the language of "either/or" with respect to the grounds for dismissal.[332] He suggested that dismissal is granted where the balance of inconvenience to the defendant is out of all proportion to the inconvenience of the plaintiff, this being an assessment of private interest factors.[333] Then, as an alternative proposition, he suggested that dismissal is appropriate where the court's own inconvenience renders it inappropriate, this being an analysis of public interest factors.[334]

In *Sinochem*, Justice Ginsburg approvingly quoted Justice Scalia's statement referenced above.[335] She also stated, in more general terms, that a court may dispose of an action by an FNC dismissal "when considerations of convenience, fairness and judicial economy so warrant."[336] If anything, *American Dredging* and *Sinochem* represent retrograde steps in the evolution of FNC, contributing to the confusion rather than introducing much-needed clarity.

On the specific issue of the degree of deference, Justice Ginsburg touched on this in *Sinochem*, noting that a defendant ordinarily bears a "heavy burden in opposing the plaintiff's chosen forum," and that when a plaintiff sues in a forum which is not his home forum, "the presumption in the plaintiff's favor 'applies with less force,' for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'"[337] It is submitted that Justice Ginsburg merely echoed the sentiments of *Reyno*. This is regrettable considering the divergence within the federal circuits on the question of the degree of deference due and its place within the FNC analysis.

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[331] *Am. Dredging*, 510 U.S. at 447–48 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981)).

[332] *See id*; *see also* Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 531–32 (1947) (presenting alternative grounds for dismissal, using the language of "either . . . or").

[333] *See Am. Dredging*, 510 U.S. at 447–48.

[334] *See id.*

[335] Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 429 (2007) (quoting *Am. Dredging*, 510 U.S. at 447–48).

[336] *Id.* at 432.

[337] *Id.* at 430 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255–56 (1981)).

B. FNC in United States Circuit Courts

The standard for dismissal continues to vary between the circuits in the wake of *Reyno*. This is not surprising given the fact that the standard was defined with the vague terms "unnecessarily burdensome" and the relationship between it and the standard proposed by *Gilbert/Koster* left undefined. Consequently, some circuits apply a standard which is closer to the liberal one intended by *Reyno*. For example, in the Fifth Circuit, dismissal will be granted where the balance of convenience is in the defendant's favor.[338] However, other districts have kept more steadfastly to the *Gilbert/Koster* standard. The Seventh Circuit looks for "strong reasons."[339] The Eighth Circuit and First Circuit require that the balance be "strongly in favor."[340] Other circuits have even gone so far as to reinstate an "abuse of process" standard for U.S. plaintiffs, such as the Eleventh Circuit that requires "evidence of unusually extreme circumstances" and that the court "be thoroughly convinced that material injustice is manifest."[341] This divergence in applicable standards is problematic. It demonstrates a collective failure to derive a consistent message from *Reyno* regarding the degree of inconvenience required to secure FNC dismissal. It is also worrying from the perspective of international civil litigation; the lack of legal certainty and predictability undermines confidence in the U.S. doctrine of FNC.

Rather than comparing the various standards applied within the circuits, this section will focus on the issue of deference. Part of the reason such divergence exists over the applicable standards is precisely because of the confusion caused by *Reyno* with respect to the differing deference due the foreign and U.S. plaintiff. Hopefully, by resolving one of the issues, securing a single federal standard for dismissal will be easier. This section will start with the Eleventh Circuit, which has stuck to the traditional approach and applied a different standard for dismissal depending on the categorization of

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[338] *See* Gonzalez v. Chrysler Corp, 301 F.3d 377, 379–380 (5th Cir. 2002).

[339] *See* Abad v. Bayer Corp., 563 F.3d 663, 665 (citing *Sinochem*, 549 U.S. at 429–30; *In re* Factor VIII or IX Concentrate Blood Prods. Litig., 484 F.3d 951, 954–56 (7th Cir. 2007)); *see also* Fischer v. Magyar Allamvasutak Zrt, 777 F.3d 847, 866 (7th Cir. 2015) (citing *Sinochem*, 549 U.S. at 429).

[340] *See* Reid-Walen v. Hansen, 933 F.2d 1390, 1394 (8th Cir. 1991); Iragorri v. Int'l Elevator, Inc., 203 F.3d 8, 12 (1st Cir. 2000) [hereinafter *Int'l Elevator*] (requiring that the defendant show that "the compendium of factors relevant to the private and public interest implicated by the case strongly favors dismissal").

[341] *See* SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097, 1101 (11th Cir. 2004) (citing C.A. La Seguridad v. Transytur Line, 707 F.2d 1304, 1308 n.7 (11th Cir. 1983)); *see also* McLane v. Marriott Int'l, Inc., 547 F. App'x 950, 954 (11th Cir. 2013).

the plaintiff as U.S. or foreign. Next, attention will turn to the Second Circuit which has gone another way entirely and invented the notion of a sliding scale of deference. Finally, it will discuss the First Circuit, which, on first impression, appears to have turned a blind eye to *Reyno*'s instruction by showing no differential deference between U.S. and foreign plaintiffs.

1. The Eleventh Circuit

Deference to the U.S. plaintiff's choice of a U.S. forum is accommodated in the Eleventh Circuit's doctrine of FNC by applying an alternative standard for dismissal. In *SME Racks*, the Eleventh Circuit addressed the question of the degree of deference, stating that the "presumption in favor of the plaintiff's initial forum choice in balancing the private interests is at its strongest when the plaintiffs are citizens, residents, or corporations of this country."[342] The applicable standard for dismissal of a case involving a such a plaintiff requires "evidence of unusually extreme circumstances" and that the court is "thoroughly convinced that material injustice is manifest."[343] Where the plaintiff is not a U.S. citizen or resident then the standard is that the balance of private and public interest factors "weigh in favor of dismissal."[344]

Arguably both standards deviate from *Reyno,* but the standard applied to the U.S. citizen is clearly much higher than *Reyno*'s "unnecessarily burdensome" standard.[345] The obvious problems with the Eleventh Circuit's doctrine are that it requires a much heavier standard than supported by Supreme Court authority and it posits more than one standard.[346] This is inconsistent with *Reyno*'s proposition that a single standard for dismissal applies in all cases.[347] It would naturally be justified by the Eleventh Circuit as a means of accommodating *Reyno*'s proposition regarding the added deference due a U.S. citizen/resident's choice of forum. This philosophy was expressed in *Tazoe v. Airbus*, where the Eleventh Circuit stated that the

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[342] *SME Racks*, 382 F.3d at 1101 (citing Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001)).

[343] *Id.* (quotation marks omitted) (quoting *C.A. La Seguridad*, 707 F.2d at 1308 n.7).

[344] *See* Tazoe v. Airbus S.A.S., 631 F.3d 1321, 1330 (11th Cir. 2011) (applying the different standard to Brazilian plaintiffs); s*ee also* Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1284 (11th Cir. 2001).

[345] *Compare SME Racks*, 382 F.3d at 1101, *with* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.19 (1981).

[346] *See SME Racks*, 382 F.3d at 1101 (applying one standard to U.S. plaintiffs); *Tazoe*, 631 F.3d at 1330 (applying another standard to Brazilian plaintiffs).

[347] *See Reyno*, 454 U.S. at 241.

choice of forum of a U.S. citizen is "entitled to 'somewhat more deference,' as we are hesitant to deny citizens access to courts of the United States."[348]

The Eleventh Circuit accords great significance to the U.S. citizenship of the plaintiff, according him exceptionally high deference and thereby placing the foreign plaintiff, potentially discriminatorily, in a disadvantageous position.[349] For example, if a non-resident U.S. citizen residing in France is accorded such an exceptionally high degree of deference when he sues in a district within the Eleventh Circuit, whereas his French neighbor is afforded so much less deference, it is difficult to see how the extent of the difference in treatment is justified on the grounds of convenience. What objective justification is there for this? Although it is conceded that mere U.S. citizenship of a plaintiff does imbue a U.S. forum with some convenience for that plaintiff, even if they are a non-resident, the difference in treatment is utterly disproportionate and therefore discriminatory. It is clearly designed to protect U.S. citizens from dismissal without a reasonable assessment of actual (in)convenience involved.

In *Bell v. Kerzner International Ltd.*, a California plaintiff brought an action in Florida against the defendant for its alleged negligence in responding to a medical emergency at its hotel in the Bahamas.[350] The Eleventh Circuit upheld the decision of the district court judge to dismiss the action on grounds of FNC.[351] It held that the judge had not abused his discretion since it had applied the strong presumption in favor of the U.S. plaintiff's choice of a U.S. forum.[352] Noteworthy is the fact that the presumption applied regardless of the fact that the plaintiff had not sued in her home district.[353] Presumably, had the plaintiff been a Bahamian citizen and resident then she would not have been accorded this same strong presumption and therefore a different standard for dismissal would have applied despite the greater proximity of the Bahamas to Florida than California to Florida. This is clearly not justified on the grounds of convenience. In truth, it is discriminatory. A doctrine which purports to focus on (in)convenience but whose operation substantively differs based on the mere fact of the qualification of the plaintiff's status as either foreign or

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[348] *Tazoe*, 631 F.3d at 1335 (quoting *Reyno*, 454 U.S. at 256 n.23).

[349] *See SME Racks*, 382 F.3d at 1101; Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001) (quotation marks and citations omitted) ("[B]alancing private interests requires determining the convenience of the parties, affording domestic plaintiffs a strong presumption that their forum choice is sufficiently convenient, and a weaker presumption applying in cases brought by foreign plaintiffs[.]").

[350] Bell v. Kerzner Int'l Ltd, 503 F. App'x 669, 669 (11th Cir. 2012).

[351] *Id.* at 671.

[352] *Id.* at 670.

[353] *See id.* at 671.

domestic is discriminatory insofar as that qualification results in arbitrary assumptions as to (in)convenience which do not correspond to the reality of the plaintiff's situation.

On one hand, the Eleventh Circuit has heeded *Reyno*'s call to accord differing degrees of deference between foreign and U.S. plaintiffs, even if the deference afforded the latter is far in excess of that required by *Reyno*. On the other hand, the Eleventh Circuit, by applying different standards for dismissal has ignored the Supreme Court's instruction that a single standard applies. The result is that its version of the doctrine is simultaneously consistent and inconsistent with *Reyno*.

2. *The Second Circuit*

Two of the primary authorities for FNC, one in the First Circuit and the other in the Second Circuit, arise from the same incident and involve the same plaintiff (named *Iragorri).*[354] Both cases concerned actions brought by a widow, on her own behalf and that of her deceased husband's estate as well as his heirs, for the death of her husband who had fallen to his death down an elevator shaft in Cali, Colombia.[355] The decedent, his wife, and two children, were natives of Colombia but had emigrated to Florida in the 1980s and had all subsequently become U.S. naturalized citizens.[356] At the time of the accident, the children and parents were residing temporarily in Colombia while the children were participating in a school exchange program.[357] The plaintiffs had returned to their permanent residence in Florida by the time they commenced their suit.[358] The plaintiff initially brought all her complaints against a number of defendants in the District Court of Connecticut.[359] The unusual factual circumstances of the litigation gave rise to a question regarding the relevance of the plaintiff's residence.[360] The

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[354] *See* Iragorri v. United Techs. Corp., 274 F.3d 65 (2d Cir. 2001) (en banc); Int'l Elevator, 203 F.3d 8, 10–11 (1st Cir. 2000).

[355] *Iragorri*, 274 F.3d at 69–70; *Int'l Elevator*, 203 F.3d at 10–11.

[356] *Iragorri*, 274 F.3d at 69–70; *Int'l Elevator*, 203 F.3d at 10–11.

[357] *Iragorri*, 274 F.3d at 70; *Int'l Elevator*, 203 F.3d at 11.

[358] *Iragorri*, 274 F.3d at 75. The Second Circuit did not regard their temporary residence in Colombia as affecting their status as U.S. plaintiffs, saying, "[t]he fact that the children and their mother had spent a few school terms in Colombia on a foreign exchange program seems to us to present little reasoning for discrediting the bona fides of their choice of the Connecticut forum." *Id.*

[359] *Id.* at 70.

[360] *Id.* at 68–69. The Second Circuit had initially vacated and remanded the decision of the district court to grant the FNC dismissal. *See* Iragorri v. United Techs. Corp., 243 F.3d 678 (2d Cir. 2001). However, specifically in respect of the question relating to the residence of the plaintiff in the United States but outside the federal district, the Second Circuit had

Second Circuit adopted its own unique solution to accommodating *Reyno*'s call for deference by creating a new step in the FNC analysis in *Iragorri*.[361]

The essential question was whether the choice of a Connecticut forum by a Florida resident should be regarded as the choice of a home forum for the purposes of FNC.[362] The Second Circuit had already addressed this question in earlier cases with similar factual scenarios.[363] In *Guidi*, the court held that the home forum of an American citizen for FNC purposes is any U.S. district court, it need not necessarily be the district in which the plaintiff resides.[364] However, this is not readily reconcilable with the view, insisted on by the Supreme Court in *Reyno*, that convenience is the central focus of the FNC analysis.[365] Applying *Guidi*, a plaintiff residing in Hawai'i who brings suit in Buffalo, New York, would be entitled to greater deference than a plaintiff residing in Toronto who also sues in Buffalo. From the perspective of convenience this would be absurd. In terms of distance—a blunt but reasonable indicator of convenience—Toronto is around 100 miles from Buffalo, whereas Honolulu, Hawai'i is approximately 4,690 miles away. The Hawai'i plaintiff's entitlement to greater deference would be based on his having supposedly chosen a "home forum" whereas the Toronto plaintiff would be entitled to less deference for having chosen a foreign forum, despite the Toronto plaintiff's closer proximity to the forum, which generally translates into greater convenience. Nevertheless, under *Guidi*, this would be a logical outcome.

Illogical and unfair as the *Guidi* approach is to someone like our Toronto plaintiff, it does have its benefits. Aside from the obvious benefit for U.S. plaintiffs and defendants, it has the advantage of certainty and predictability for all concerned. This is because of its simple factual basis, i.e., U.S. citizenship and/or residence in the United States, which only permits a binary determination.[366] Once the plaintiff's categorization has been determined, the resultant degree of deference is clear. In *Iragorri*, instead of just

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taken the unusual step of ordering a rehearing *en banc*. *Iragorri*, 274 F.3d at 68–69.

[361] *Iragorri*, 274 F.3d at 73–74.

[362] *Id.* at 71–72.

[363] *See, e.g.*, Guidi v. Inter-Cont'l Hotels Corp., 224 F.3d 142 (2d Cir. 2000); Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88 (2d Cir. 2000).

[364] *Guidi*, 224 F.3d at 146.

[365] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981).

[366] *See Guidi*, 224 F.3d at 146. The court did not have to address the question of the non-resident citizen. *Id.* at 144. In *Iragorri*, the court noted that it understood *Guidi* as referring to U.S. citizens who are also residents of the United States and not the case of an expatriate U.S. citizen residing permanently in a foreign country. *Iragorri*, 274 F.3d at 73 n.5 (citing *Guidi*, 224 F.3d at 144).

following the simple, if flawed, approach of *Guidi*, the court created a test based on a sliding scale of deference theory.[367]

i. The Sliding Scale of Deference

The facts of *Iragorri* exposed how arbitrary and unreasonable it was to assume, from the point of view of convenience, that a U.S. plaintiff's choice of a U.S. forum, in a district other than the one in which he resides, should be entitled to the same degree of deference as it would if he sued in his home district.[368] Faced with this conundrum, the Second Circuit's solution was to adopt a sliding scale of deference.[369]

The obvious course of action for the court would have been to treat a U.S. plaintiff who does not sue in his home district as a foreign plaintiff. Such an option, however, would be unpalatable for a U.S. court, not to mention difficult to reconcile with Supreme Court authorities that placed the U.S. citizen plaintiff in the same category as the U.S. resident, distinguishing them both from foreign plaintiffs.[370] Additionally, the court regarded such an option as unreasonable since, "in many circumstances, it will be far more convenient for a U.S. resident plaintiff to sue in a U.S. court than in a foreign country, even though it is not the district in which the plaintiff resides."[371] There is certainly some truth to this. Using the example of a person from Hawai'i who resides in Paris, France, if the Hawai'i native sues in New York, he has a greater claim to the convenience of that forum than his French neighbor would have. As a U.S. citizen, even though resident abroad, suing in a U.S. federal district other than Hawai'i would offer certain factors of convenience to him that would not, generally speaking, avail a French citizen/resident, such as familiarity with the legal system, language, etc. Yet, would it not be ridiculous to accord that non-resident U.S. plaintiff the same degree of deference as you would a New York citizen residing next to the courthouse? It would be nonsense to treat the resident New Yorker the same as the ex-pat from Hawai'i living in France.

The Second Circuit was clearly in a quandary. On one hand, *Reyno* required that it show differing levels of deference between foreign and U.S. plaintiffs, yet on the other, it was instructed that convenience was the central focus of FNC.[372] The arbitrariness of determining deference based on the

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[367] *Iragorri*, 274 F.3d at 71.

[368] *Id.* at 72–73.

[369] *Id.* at 71.

[370] *See, e.g., Reyno*, 454 U.S. at 255 (finding that distinguishing resident or citizen plaintiffs from foreign plaintiffs is justified).

[371] *Iragorri*, 274 F.3d at 73.

[372] *Id.* at 71–72.

categorization of the plaintiff as foreign or domestic had been exposed by the facts of *Iragorri*. This left the Second Circuit in a bind. It was out of the question to treat the non-resident U.S. citizen as a foreign plaintiff. However, to treat him as a U.S. citizen/resident meant affording the Hawai'i plaintiff who sues in New York the same deference as the New Yorker. Tempting though it would have been to create a third category of plaintiff with its own degree of deference, the court was constrained by the existing categorization.

Since the problem could not be solved by the alterations on the side of categorization then it was on the other side of the equation that the court would have to meddle, i.e., the degree of deference due. Instead of the traditional two-step FNC analysis, *Iragorri* defined three steps, the first of which involved a determination of the degree of deference due a plaintiff's choice of forum.[373] Rather than using a binary arrangement for deference, the court adopted a sliding scale of deference which could more accurately reflect the circumstances of each case.[374] Taking this approach ostensibly allowed the court to leave the categorization of the plaintiff untouched. But, this is just a sleight of hand trick. By altering the deference side of the equation, the court unavoidably changed the categorization side too. The crucial difference was that it could do so without having to manifestly acknowledge it. In reality, *Iragorri* effectively swept away the value previously accorded to the plaintiff's categorization as a U.S. citizen/resident or a foreigner. This is obvious when you consider the question of how to determine where along the scale of deference the plaintiff should be placed. The answer can no longer be provided by the categorization of the plaintiff as either a foreigner or a U.S. citizen/resident.

ii. The Iragorri Three-Step Test

Before explaining how the first step of the *Iragorri* doctrine and its sliding scale of deference works, it is necessary to explain the legal basis upon which the Second Circuit established it. The Second Circuit started by collecting a number of core propositions regarding FNC. The first was, per *Gilbert*, that a plaintiff's choice of forum is entitled to deference, meaning that the court should commence with the assumption that the plaintiff's choice will stand.[375] However, the deference due is not dispositive.[376] Even where a plaintiff brings suit in his home forum it is still open to the defendant to

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[373] *Id.* at 73.

[374] *Id.* at 73–74.

[375] *Id.* at 70–71 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).

[376] *See id.* at 71 (2d Cir. 2001) (en banc) (recognizing that the deference is not dispositive and may be overcome).

challenge it.[377] Where the plaintiff has chosen his home forum, then his choice is due "great deference,"[378] whereas the choice of a U.S. forum by a foreign plaintiff is due "less deference".[379] Throwing this collection of propositions into the cocktail shaker, the court surmised the broad principle that the deference due the plaintiff's choice of forum varies with the circumstances and the degree of deference owed a plaintiff's choice of forum "moves on a sliding scale depending on several relevant considerations."[380] This, the court insisted, was the spirit of the Supreme Court's instructions[381]:

> We regard the Supreme Court's instructions that (1) a plaintiff's choice of her home forum should be given great deference, while (2) a foreign resident's choice of a U.S. forum should receive less consideration, as representing consistent applications of a broader principle under which the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on several relevant considerations.[382]

Taking that viewpoint, the court could define its own vision of the Supreme Court's jurisprudence for determining deference:

> The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice. Stated differently, the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more

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[377] *Id.* "Notwithstanding the deference, 'dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.'" *Id.* (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 n.23 (1981)).

[378] *Id.*

[379] *Id.*

[380] *Id.*

[381] The court relied on *Koster* and *Reyno*. *See Iragorri*, 274 F.3d at 71. However, *Koster* made no reference to a variable degree of deference dependent on the circumstances. *See generally* Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947). As a matter of fact, the word deference is never used in *Koster*, let alone in the part cited by the court in *Iragorri*. *See id.* at 524. To follow *Iragorri's* reasoning, we are forced to accept the interpretation put forth in *Reyno*: "In *Koster*, the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." *Reyno*, 454 U.S. at 255. Yet, the Court did not speak of a sliding scale of deference in *Reyno* either. All it considered was the greater deference due a plaintiff suing in his home forum and the somewhat lesser deference due the foreign plaintiff suing in a U.S. forum. *Id.*

[382] *Iragorri*, 274 F.3d at 71.

> difficult it will be for the defendant to gain dismissal for *forum non conveniens*.[383]

Essentially, the deference due a plaintiff is a reflection of the motivations for their choice of forum, the degree to which the lawsuit is genuinely connected to the United States and to the forum, and the degree to which convenience supports that choice. The goal is to divine the plaintiff's likely motivations for his choice of forum as inferred from several factors indicative of convenience. These factors include the plaintiff's residence in relation to the forum, the availability of witnesses or evidence to the forum, defendant's amenability to suit in the forum, the availability of legal assistance, and "other reasons relating to convenience or expense."[384] The court also looks at factors indicative of inconvenience to the defendant, such as a tactical advantage to the plaintiff from local law, habitual generosity of juries, plaintiff's popularity or defendant's unpopularity, or inconvenience or expense to defendant of litigating in the forum.[385]

From its consideration of these factors, the court makes inferences as to the *likely motivations* for the plaintiff's choice of forum and, depending on their perceived legitimacy, accords a corresponding degree of deference or non-deference:

> [T]he court must consider a plaintiff's likely motivations in light of all the relevant indications. We thus understand the Supreme Court's teachings on the deference due to plaintiff's forum choice as instructing that we give greater deference to a plaintiff's forum choice to the extent that it was motivated by legitimate reasons, including the plaintiff's convenience and the ability of a U.S. resident plaintiff to obtain jurisdiction over the defendant, and diminishing deference to a plaintiff's forum choice to the extent that it was motivated by tactical advantage.[386]

Instead of a binary determination based on identifying the plaintiff as foreign or U.S. citizen/resident, the court advanced the view that the degree of deference ought to be assessed on a sliding scale, relative to the legitimacy of the plaintiff's choice of forum. In other words, no longer was it a case of either great deference to a U.S. plaintiff and somewhat less deference to a foreigner (unhelpfully vague though those notions were) it was now the case that the deference due varied according to the plaintiff's *bona fides* in selecting his chosen forum.[387] That is, the more the court suspects that the

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[383] *Id.* at 71–72.

[384] *Id.* at 72.

[385] *Id.*

[386] *Id.* at 73.

[387] *See id.* at 75 (discussing the bona fides of the choice of the Connecticut forum). In *Pollux Holding Ltd. v. Chase Manhattan Bank*, the Second Circuit stated that "the level of

plaintiff is forum shopping, the less deference will be accorded his choice of forum.[388]

Once evaluated, the degree of deference accorded to the plaintiff's choice of forum will determine the showing of inconvenience required by the defendant to secure dismissal.[389] It is abundantly clear that defendant's burden will be made either easier or harder depending on the deference afforded the plaintiff's choice of forum in the first step. The Eastern District of New York in *Air Crash Near Peixoto de Azeveda*, spoke of the first step in the *Iragorri* test as setting the bar which the defendant must hurdle.[390]

The *Iragorri* test thus consists of a three-step FNC analysis.[391] First, determination of the degree of deference owed the plaintiff's choice of forum.[392] Second, consideration of whether an adequate alternative forum exists.[393] Third, a balancing of private and public interest factors with a view to making a decision on dismissal.[394]

With respect to what standard *Iragorri* prescribes for dismissal, there is not much to go on in the judgment itself. The court quoted the *Reyno* standard of unnecessarily burdensome at one point,[395] and the court later stated that "[t]he action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly

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deference given to a plaintiff's choice of forum depends on the *bona fide* connection the plaintiff has with that forum." 329 F.3d 64, 71 (2d Cir. 2003) (citing DiRienzo v. Philip Servs. Corp., 294 F.3d 21, 28 (2d Cir. 2002)). The *Pollux* judgment used the analogy of a familial relationship to describe the nature of the plaintiff's connection to the forum, describing the plaintiff's relationship to the New York forum as being like that of a distant cousin. *Id.* at 72.

[388] *Iragorri*, 274 F.3d at 72.

[389] *Id.* at 74. The court explained:

> As is implicit in the meaning of "deference," the greater the degree of deference to which the plaintiff's choice of forum is entitled, the stronger a showing of inconvenience the defendant must make to prevail in securing *forum non conveniens* dismissal. At the same time, a lesser degree of deference to the plaintiff's choice bolsters the defendant's case but does not guarantee dismissal.

Id.

[390] *In re* Air Crash Near Peixoto de Azeveda, Braz., Sept. 29, 2006, 574 F. Supp. 2d 272, 282 (E.D.N.Y. 2008) [hereinafter *In re Peixoto Air Crash*].

[391] *Iragorri*, 274 F.3d at 74. The Second Circuit followed the three-step test in subsequent cases. *See, e.g.*, Norex Petrol. Ltd. v. Access Indus., Inc., 416 F.3d 146, 153 (2d Cir. 2005); *Pollux*, 329 F.3d at 70.

[392] *See Iragorri*, 274 F.3d at 73 ("The deference given to a plaintiff's choice of forum does not dispose of a *forum non conveniens* motion. It is only the first level of inquiry. Even after determining whether the plaintiff's choice is entitled to more or less deference, a district court must still conduct the analysis set out in *Gilbert*, *Koster*, and *Piper*.").

[393] *Id.*

[394] *Id.* at 73–74.

[395] *Id.* at 71 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 n.23 (1981)).

preferable."[396] The court presumably regarded these dicta as being consistent. The court reconfirmed its understanding (previously expressed in *Alcoa Steamship*) that *Gilbert* and *Koster* did not establish separate standards for FNC dismissal.[397] Additionally, the court referred to the manner by which the Supreme Court in *Reyno* had characterized *Gilbert* and *Koster* as establishing "a single balancing test" for FNC.[398] This latter point, taken literally, only confirms a singular method of analysis and does not identify the actual standard to be applied, but the context in which it was presented strongly suggests that a single standard for FNC dismissal was contemplated by the Second Circuit.

iii. Critical Evaluation of Iragorri

A positive aspect of the *Iragorri* doctrine is that it does not, at least in theory, determine deference based on the mere fact of U.S. citizenship or residence. A U.S. citizen or resident cannot rely on the presumption of a pre-set degree of higher deference merely on account of possessing a United States passport or from the fact of residing somewhere within the territory of the United States.[399] Instead, a broader range of factors are taken into consideration, of which residence is only one.[400] To its credit, this approach attempts to avoid the discriminatory treatment of foreign plaintiffs. In addition, by inventing its first step and the sliding scale of deference, the Second Circuit found a creative solution to *Reyno*'s demand to show due deference to the plaintiff's choice of forum. Despite these positives, the *Iragorri* doctrine of FNC remains highly problematic.

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[396] *Id.* at 74–75. The court explained that trial courts should be wary of reverse forum shopping and factor it into the defendant's showing of inconvenience:

> Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of *forum non conveniens* not because of genuine concern with convenience but because of similar forum-shopping reasons. District courts should therefore arm themselves with an appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum.

Id. at 75.

[397] *Id.* at 73 n.6.

[398] *Id.* (citing *Reyno*, 454 U.S. at 241).

[399] *See id.* at 74. "Thus, while plaintiff's citizenship and residence can serve as a proxy for, or indication of, convenience, neither the plaintiff's citizenship nor residence, nor the degree of deference given to her choice of forum, necessarily controls the outcome." *Id.* "There is no 'rigid rule of decision protecting U.S. citizen or resident plaintiffs from dismissal for *forum non conveniens*.'" *Id.* (quoting Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 102 (2d Cir. 2000)).

[400] *Id.* at 73 ("It is not a correct understanding of the rule to accord deference only when the suit is brought in the plaintiff's home district.").

One of the biggest problems with *Iragorri* is that its first step lacks a valid doctrinal foundation and cannot be traced to any Supreme Court precedent.[401] No Supreme Court case makes any mention of such a first step in the analysis dedicated to determining the degree of deference due a plaintiff's choice of forum, nor to a sliding scale of deference. The doctrinal foundation upon which the Second Circuit created its first step was by grafting it onto the presumption in favor of the plaintiff's choice of forum upon which every FNC analysis proceeds. This provided a convenient peg upon which the court could hang its first step. It assumed (wrongly) that where the Supreme Court referred to "deference" was to be understood as synonymous with the strength of the a priori presumption in favor of a plaintiff's choice of forum. Therefore, it concluded that if a differing degree of deference was due, then it ought to be reflected in this baseline presumption. Indeed, this explains why the presumption appears in the first step, even though, as matter of logic, it should come after the consideration of the existence of an adequate alternative forum—*Iragorri*'s second step. After all, without an adequate alternative forum, there is no need for further FNC analysis, regardless of the degree of deference due. It is submitted that the court was entirely wrong in merging the notion of deference due the particular plaintiff's choice of forum with the baseline presumption that a plaintiff's choice of forum ought to stand.

As discussed in the earlier part of this paper, the burden of proof under FNC does not exist as a reflection of the presumptive convenience of the plaintiff's choice of forum. There should not be any analysis or determination of this baseline presumption by a trial court. It is general in nature and not specific to the status or circumstances of the particular plaintiff. Just as one does not begin a criminal trial by adjusting the burden of proof to the particulars of the accused and the likelihood of his guilt, one also should not begin an FNC analysis by adjusting the strength of the baseline presumption in favor of the plaintiff. There is, therefore, no legal basis for the Second Circuit's first step of the FNC analysis.

Even if one accepted the Second Circuit's proposition, its first step of the FNC analysis is inconsistent with the Supreme Court's FNC jurisprudence because it invites a whole host of considerations hitherto unmentioned in that context. The Supreme Court only ever spoke of deference in the context of the categorization of the plaintiff as U.S. citizen/resident or foreigner, no mention was ever made of these other factors or of suspicions regarding forum shopping. For instance, in *Reyno*, it was no secret to all concerned

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[401] *See generally Iragorri*, 274 F.3d at 73–75.

that the plaintiffs were forum shopping, even so, the Court made no mention of this whatsoever when it discussed the notion of deference.[402]

In fact, the Supreme Court in *Reyno* expressly refused to take into consideration, as part of the private interest analysis, factors suggestive of forum shopping.[403] The plaintiffs had elected to sue in the United States on a theory of strict products liability, which, at that time, was not available in the United Kingdom, the alternative forum.[404] The court of appeals had regarded this unfavorable change in law as barring FNC dismissal.[405] The Supreme Court disagreed, stating that such a possibility should not be given substantial weight.[406] The plaintiffs had asked that it be taken into account that the defendant's motivation for seeking FNC dismissal was to take advantage of this change in law, one which would be favorable to their interests.[407] However, just as with the case of a change in law unfavorable to the plaintiff, the Court stated that "the possibility of a change in law favorable to defendant should not be considered."[408] While it recognized that the defendants might be engaged in reverse forum-shopping, it stated that:

> [T]his possibility ordinarily should not enter into a trial court's analysis of the private interests. If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum.[409]

The FNC analysis involves identifying the *forum conveniens* through a balancing of *convenience*, not an assessment of the parties' motivations. Once identified, the parties must take that forum for better or for worse. By giving overt consideration to forum-shopping by the plaintiff in the first step of its FNC doctrine, *Iragorri* is inconsistent with the Supreme Court's refusal to consider such motivations.

Furthermore, the first step of the *Iragorri* test is focused on the plaintiff's likely motivations and makes no mention of the defendant's.[410] Ought these not be taken into consideration too? If the burden on the defendant should be adjusted to reflect the extent to which the plaintiff's choice of forum is motivated by forum-shopping, then it logically follows that it ought to be adjusted to reflect the defendant's motivations or *mala fides* for seeking

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402 Piper Aircraft Co. v. Reyno, 454 U.S. 235, 242 (1981).

403 *Id.* at 250.

404 *Id.* at 242.

405 *Id.* at 244–46.

406 *Id.* at 252.

407 *Id.* at 252 n.19.

408 *Id.*

409 *Id.*

410 Iragorri v. United Techs. Corp., 274 F.3d 65, 73 (2d Cir. 2001) (en banc).

dismissal, i.e., reverse forum-shopping. The fact is that reverse forum-shopping is far less conspicuously dealt with in *Iragorri*. All we find is a warning by the Second Circuit that courts should be mindful of defendant's reverse forum-shopping and therefore arm themselves with an appropriate degree of skepticism.[411] Yet the court did not specify how and when this ought to be considered. The language used in the opinion suggests that it is part of the third stage of the test—the balancing of private and public interest factors.[412] Why is the defendant's bad behavior so casually dealt with while the plaintiff's so severely punished? In the end, they both have the same relevance to the ultimate question of what degree of inconvenience must be shown to justify dismissal, yet there is no consistency in treatment. This creates the impression that the test is engineered to benefit U.S. defendants.

Another important critical observation is that the actual assessment of the factors involved in the first step amounts to a duplication of the private interest factor analysis. For instance, the availability of witnesses or evidence is a factor of *Iragorri*'s first step and is also one of the private interest factors considered in the third step—ease of access to sources of proof.[413] The availability of legal assistance is another example of an *Iragorri* first step factor which is frequently a factor of convenience in the private interest analysis.[414] The catchall first step factor named in *Iragorri*, other reasons relating to convenience or expense, is nothing if not a restatement of the *Gilbert* definition of private interest factors as "practical problems that make trial of a case easy, expeditious and inexpensive."[415] Why this duplication? If the central focus of FNC is convenience then why should there be two separate steps dedicated to the consideration of convenience? The answer is simple. The *Iragorri* first step serves a separate function. It is not about convenience, rather it is about trying to read the mind of the plaintiff so as to evaluate the legitimacy of his motivations behind his choice of forum and thereby assign a corresponding degree of deference or non-deference. In so doing, the *Iragorri* approach deflects the central focus of FNC away from what is largely an objective consideration of convenience toward a subjective

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[411] *See id.* at 75.

[412] *Id.* at 73–74.

[413] *Id*; *see also* Khan v. Delta Airlines, Inc., No. 10 Civ. 2080, 2010 WL 3210717, at *4 (E.D.N.Y. Aug. 12, 2010) (quoting *Iragorri*, 274 F.3d at 72) (listing the factors identified in *Iragorri*); Navarette de Pedrero v. Schweizer Aircraft Corp., 635 F. Supp. 2d 251, 259–60 (W.D.N.Y. 2009); *In re* Peixoto Air Crash, 574 F. Supp. 2d 272, 278–79 (E.D.N.Y. 2008).

[414] *See In re* Air Crash Over the Taiwan Straits on May 25, 2002, 331 F. Supp. 2d 1176, 1187–88 (C.D. Cal. 2004); Kristoff v. Otis Elevator Co., No. 96-4123, 1997 WL 67797, at *2 (E.D. Pa. Feb. 14, 1997).

[415] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). Factors such as the relative costliness of litigation have been treated as both a private interest factor and an *Iragorri* deference factor. *See Khan*, 2010 WL 3210717, at *5.

evaluation of legitimacy. It prioritizes legitimacy since the determination made under the first step of *Iragorri* skews the remainder of the analysis. This is an unacceptable basis upon which to conduct an FNC analysis—it forfeits objectivity for supposition and suspicion. This is made all the more egregious by the inconsistency in treatment of the defendant's likely motivations in seeking dismissal.

A major practical problem with *Iragorri* is that it does not provide any clarity as to how the determined degree of deference is actually employed in the subsequent analysis. The idea seems simple, after the first step of the test the court should have arrived at some determination of the deference due the particular plaintiff's choice of forum. But how is this translated into action? We know that it is to inform the burden facing the defendant to secure dismissal, but how? Are there a number of defined points along this sliding scale of deference? If so, how many? Do they correspond to a negative or positive number value for deference which the judge then carries into the third stage of the test? Of course, it must be borne in mind that FNC is a discretionary doctrine and therefore not readily susceptible to such concrete delineation. Nevertheless, a certain degree of clarity and structure is required for the judicious exercise of discretion. That this is lacking in the *Iragorri* doctrine is clear from the practice of the district courts.

Taking a selection of district court cases which have applied the test, the terminology employed varies, with determinations such as, "little deference,"[416] "very little deference,"[417] "significant deference,"[418] "substantially reduced deference,"[419] "lesser degree of deference,"[420] "diminished" deference,[421] and "limited deference."[422] What meaning are these determinations supposed to convey? More importantly, how do they influence the judge's decision whether to grant FNC dismissal? The district court judgments provide no elucidation on this crucial component of the

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[416] *See* Giro Inc. v. Malaysian Airline Sys. Berhad, No. 10 Civ. 5550, 2011 WL 2183171, at *6 (S.D.N.Y. June 3, 2011).

[417] *See In re* Ski Train Fire in Kaprun Austria on Nov. 11, 2000, 499 F. Supp. 2d 437, 446 (S.D.N.Y. 2007) [hereinafter *In re Ski Train Fire*] (citing Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC, 155 F.3d 603, 612 (2d Cir. 1998); Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 74 (2d Cir. 2003)).

[418] *See* Bakeer v. Nippon Cargo Airlines Co., Nos. 09-CV-3374, 3375, 3377, 3378, 2011 WL 3625103, at *12 (E.D.N.Y. July 25, 2011).

[419] *See* Esheva v. Siberian Airlines, 499 F. Supp. 2d 493, 498 (S.D.N.Y. 2007).

[420] *See In re* Peixoto Air Crash, 574 F. Supp. 2d 272, 282 (E.D.N.Y. 2008); Khan v. Delta Airlines, Inc., No. 10 Civ. 2080, 2010 WL 3210717, at *6 (E.D.N.Y. Aug. 12, 2010).

[421] *See* Seales v. Panamanian Aviation Co., No. 07-CV-2901, 2009 WL 395821, at *11 (E.D.N.Y. Feb. 18, 2009).

[422] *See* Navarette de Pedrero v. Schweizer Aircraft Corp., 635 F. Supp. 2d 251, 260 (W.D.N.Y. 2009).

decision-making process.[423] For the purposes of appellate review, the district court judges seem content to tick the box by making some vague pronouncement on the deference due, knowing that the court of appeals will defer to their discretion.

The reality seems to be that the courts will simply rely on some vague impression or gut feeling to guide their decision, something not appreciable by the parties themselves. The effect of *Iragorri*'s sliding scale of deference thus acts to further obscure the exercise of judicial discretion, further removing it from objective examination and making appellate court review (already highly deferential) all the more difficult.

The practice of the district courts within the Second Circuit raises further concerns. Some districts have reverted to affording deference to plaintiffs on the basis of mere U.S. citizenship or residence.[424] In *Khan v. Delta Airlines, Inc.*, a Canadian citizen visiting his daughter in New York suffered personal injuries on his arrival back at the airport in Toronto due to the alleged negligence of the defendant airline.[425] Khan brought proceedings against Delta in the Eastern District of New York.[426] Prior to applying the first step of the *Iragorri* test, the district court stated that "[s]ince Khan is a Canadian citizen who commenced his action in a U.S. forum, we begin this analysis [concerning the degree of deference owed his choice of forum] affording less deference to his choice of a New York forum."[427] This is astonishing. Before the court even turned to the assessment of the *Iragorri* factors for determining the degree of deference owed, the court had preemptively set the level of deference at a low level on account of his non-American citizenship/residence. After considering the *Iragorri* factors, the court compounded the situation for the defendant by determining he "should be entitled to *even less deference* than the ordinary foreign citizen."[428] To put

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[423] The closest one gets is a bland statement in which the court acknowledges the degree of deference and alludes to the balance. In *Seales*, the judge stated:

> Accordingly, the public interest factors weigh against litigating this case in plaintiff's chosen forum, which is not entitled to substantial deference. For the reasons set forth above, COPA has demonstrated that the Eastern District of New York is genuinely inconvenient and that its proposed forum, Jamaica, is significantly preferable. Thus, COPA's motion to dismiss plaintiff's remaining claims on the basis of *forum non conveniens* is granted.

Seales, 2009 WL 395821, at *14.

[424] *See, e.g., Khan*, 2010 WL 3210717, at *4.

[425] *Id.* at *1.

[426] *Id.*

[427] *Id.* at *4.

[428] *Id.* at *6 (emphasis added). That the plaintiff resided in Toronto was deemed an obvious indication of inconvenience of trial in Brooklyn and while the defendant was amenable to process in New York the location of much of the evidence in Canada, cost-effectiveness of trial there, and absence of compulsory process over the Canadian witnesses by the district

the egregiousness of this into context, had Khan resided in Los Angeles as opposed to a mere ninety-minute flight away in Toronto, then he would have been entitled to greater deference from the start. Neither was *Khan* a one-off, the Eastern District took a similar approach in *Peixoto Air Crash.*[429] Although conflicting authorities exist, the Southern District appears to be of the same mindset.[430]

The object of the first step of the *Iragorri* test is to determine the degree of deference owed a plaintiff's choice of forum. It is antithetical, therefore, to begin the first step having already made a partial determination of the deference due. Surely the proper *Iragorri* approach requires the court to consider the factors before reaching any determination on deference. This was the approach taken by the Western District of New York in *Navarette de Pedrero v. Schweizer Aircraft Corp.*,[431] and by some other district courts in the Second Circuit.[432] The reason there is such division amongst the district

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court, all pointed to trial in Canada. *Id.* at *4–5.

[429] *See In re* Peixoto Air Crash, 574 F. Supp. 2d 272, 280 (E.D.N.Y. 2008). "[T]he court begins with the presumption that foreign plaintiffs suing in the United States receive some limited amount of deference and that such deference increases to the extent that the factors reveal plaintiff's ties to the forum." *Id.* (citing Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88 (2d Cir. 2000)). "Taken as a whole, the *Iragorri* factors do not move plaintiffs to any higher level of deference that they started with based on their foreign-citizen status. If anything, plaintiffs are entitled to an even lesser amount of deference than the ordinary foreign-citizen." *Id.* at 282. *Compare id.*, *with* Bakeer v. Nippon Cargo Airlines Co., Nos. 09-CV-3374, 3375, 3377, 3378, 2011 WL 3625103, at *9–12 (E.D.N.Y. July 25, 2011) (arriving at its determination only after having considered all the factors, rather than beginning with the presumption of deference). *See also* Seales v. Panamanian Aviation Co., No. 07-CV-2901, 2009 WL 395821, at *3 (E.D.N.Y. Feb. 18, 2009) ("[W]hile the initial presumption is to defer to the plaintiff's choice, the *Iragorri* factors are tools to assess whether there are any reasons to doubt the presumption of convenience."). In an interesting twist, the judge had to revisit his FNC analysis in *Seales* when the defendant brought forth new evidence showing that the plaintiff had not been resident in the United States at the time the suit was brought. *Id.* at *11. This reduced the level of deference owed the plaintiff from "most deferential" to "diminished." *Id.*

[430] *See In re* Ski Train Fire, 499 F. Supp. 2d 437, 444 (S.D.N.Y. 2007) ("From the outset, because none of these plaintiffs is an American citizen, plaintiff's choice of the United States as a forum commands 'considerably less' deference that it would if this country were their home."). There are a number of other cases, however, in which the approach has been less preemptive in assigning deference from the outset. *See, e.g.*, Esheva v. Siberian Airlines, 499 F. Supp. 2d 493, 497–99 (S.D.N.Y. 2007).

[431] 635 F. Supp. 2d 251, 260 (W.D.N.Y. 2009).

[432] *See, e.g.*, Chirag v. MT Marida Marguerite Schiffahrts, 983 F. Supp. 2d 188, 194 (D. Conn. 2013) ("Rather than approach the issue categorically, *Iragorri* prescribes a 'sliding scale' of deference, instructing courts to consider the totality of the circumstances supporting a plaintiff's choice of forum."); Kopperi v. Sikorsky Aircraft Corp., No. 3:08CV451, 2009 WL 6919972, at *5 (D. Conn. Sept. 2, 2009). The position of the Northern District is not entirely clear but appears closer in spirit to the Western District. *See* PPC Broadband, Inc. v.

courts of the Second Circuit on the method for correctly employing the first step of the *Iragorri* doctrine is symptomatic of the shaky foundations upon which it is built, as well as the aversion of some district court judges to stray from the automatic grant of deference to U.S. plaintiffs. Whatever the reasons, such disunity within the Second Circuit does not bode well for those who might hope that the *Iragorri* doctrine will become the accepted version of the federal doctrine of FNC amongst the other circuits.[433]

The *Iragorri* approach attempts to cure the ills of *Reyno* by accommodating deference into the analysis whilst attempting to maintain the perception of a single standard for dismissal. It is laudable insofar as it succeeds in divorcing itself from a method which assigns deference on the sole basis of U.S. citizenship or residence, even if some of its district courts continue to do so. However, *Iragorri* is based on a flawed doctrinal foundation, it lacks precedential support and is inconsistent with Supreme Court jurisprudence on FNC. Furthermore, it generates further uncertainty for the parties and its vagueness makes it confusing and difficult for courts to apply in practice.

3. The First Circuit

Recall that the plaintiffs in *International Elevator* were Florida residents who had brought their suit in Connecticut rather than in their district court in Florida.[434] However, one of these defendants was found not to be amenable to the jurisdiction of the court so that action was transferred to the district

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Transformix Eng'g Inc., No. 5:14-cv-00315, 2015 WL 339564, at *19 (N.D.N.Y. Jan. 26, 2015). The District Court for the District of Vermont is not clear on the precise methodology involved in step one, but it appears more likely that it holds to view that deference is a product of the consideration of a variety of factors. *See* Desjardin v. Bombardier Recreational Prods., Inc., No. 2:08-cv-264, 2009 WL 1181308, at *2 (D. Vt. Apr. 29, 2009).

[433] The Second Circuit's *Iragorri* approach has proved influential in other circuits. For example, although the Ninth Circuit continues to apply a two-step test for FNC, it makes allowances for differing degrees of deference. In *Lueck v. Sundstrand Corp.*, it held that "a foreign plaintiff's choice of forum merits less deference than that of a plaintiff who resides in the selected forum and the showing necessary for dismissal is reduced." 236 F.3d 1137, 1145 (9th Cir. 2001) (citing Gemini Capital Grp., Inc. v. Yap Fishing Corp., 150 F.3d 1088, 1091 (9th Cir. 1998)). More significantly, it has followed the reasoning of the Second Circuit in *Iragorri* with regards to the proposition that the more it appears that a plaintiff's choice of forum is motivated by reasons of forum shopping, the less deference that choice is due. *See, e.g.*, Ayco Farms, Inc. v. Ochoa, 862 F.3d 945, 950 (9th Cir. 2017); Ranza v. Nike, Inc., 793 F.3d 1059, 1076–77 (9th Cir. 2015); Vivendi SA v. T-Mobile USA Inc., 586 F.3d 689, 695 (9th Cir. 2009).

[434] 203 F.3d 8, 10–11 (1st Cir. 2000).

court in Maine and would eventually be appealed to the Court of Appeals for the First Circuit.[435]

The First Circuit described a two-step framework for FNC. The first stage of the investigation is to establish if there exists an adequate alternative forum.[436] The second stage requires a balancing of private and public interest factors, with the onus being on the defendant to show that "the compendium of factors relevant to the private and public interest implicated by the case strongly favors dismissal."[437] The plaintiff argued that the district court had failed to apply the correct standard.[438] Instead of "strongly favors," the plaintiff thought the district court should have required the defendant to establish such oppressiveness and vexation as to be out of all proportion to the plaintiff's convenience—the supposed standard referred to in *Koster*.[439] The First Circuit rejected the plaintiff's argument.[440] In its view, the Supreme Court in *Koster* had not used the phrase "oppressiveness and vexation" in order to create an independent standard nor to raise the standard required for FNC dismissal.[441]

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[435] *Id.* at 11.

[436] *Id.* at 12 (citing Mercier v. Sheraton Int'l, Inc., 935 F.3d 419, 423–24 (1st Cir. 1991)).

[437] *Id.* (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947); *Mercier*, 935 F.2d at 423–24). Later in the judgment, the court stated:

> The second-stage inquiry, as we have said, directs the trial court to balance an array of factors relevant to both private and public interests, and to ascertain whether that balance justifies dismissal. The usual formulation of the rule of decision, adopted by the district court, focuses on the defendant's ability to prove that the result of the balancing "strongly favors" the alternative forum.

Int'l Elevator, 203 F.3d at 14 (quoting *Mercier*, 935 F.2d at 423–24).

[438] *Int'l Elevator*, 203 F.3d at 15.

[439] *Id.* (citing Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)).

[440] *Id.*

[441] *Id.* "In our view, the lower court's decision demonstrates an awareness of the appropriate legal standards for *forum non conveniens* analysis. The *Koster* Court's use of the term 'oppressiveness and vexation' neither created an independent standard nor raised the bar for dismissal in forum non conveniens cases." *Id.* (citing Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 151–52 (2d Cir. 1980); Pain v. United Techs. Corp., 637 F.2d 775, 783 (D.C. Cir. 1980); Lacey v. Cessna Aircraft Co., 862 F.2d 38, 42, 44 (3d Cir. 1988)). Although it is submitted that the First Circuit's interpretation is the correct one, its argument is open to criticism. The court noted that "the 'strongly favors' language has deep roots in Supreme Court precedent." *Id.* (citing *Gilbert*, 330 U.S. at 508). Not only does this elide the fact that the words "vex," "harass," and "oppress" are also used in *Gilbert*, but it also suggests that *Gilbert* is more authoritative than *Koster*, in which the language of vexation and oppression was used. The court also cited *Norwood v. Kirkpatrick* as an example of subsequent Supreme Court authority which does not support viewing the *Koster* dictum as supplanting the general standard intended by *Gilbert*. *Id.* (citing Norwood v. Kirkpatrick, 349 U.S. 29, 35 (1955)). The court's reference to *Norwood* is not conclusive. The excerpt in question shows the Supreme Court quoting the relevant passages from *Gilbert* and *Koster* in a single breath with respect to the issue of the standard required. *See Norwood*, 349 U.S. at 34–35 (citing *Gilbert*,

The First Circuit also indicated, by way of explanation, that lower courts often have to "tease a standard from a plethora of phrases that collectively describe a legal principle."[442] Although somewhat opaque, it seems the court was suggesting that rather than viewing the supposed *Koster* standard as constituting an exception (thereby an independent standard) it should be viewed as just one of a number of pronouncements based on a common general standard. This dovetails with the court's conclusion on the issue where it stated that "[t]his court heretofore has used the 'strongly favors' standard as a distillation of the 'oppressiveness and vexation' language, and we continue to believe that this is the proper perspective."[443] Viewed collectively, this leads to the conclusion that a single standard for dismissal applies in the First Circuit. In the context of the case, where a U.S. citizen was suing in a U.S. forum (albeit not her home district) the First Circuit did not show a higher degree of deference by applying a higher standard for dismissal. Indeed, it made no attempt to categorize the plaintiff or her choice of forum based on citizenship or residence. On the face of it, the First Circuit's doctrine of FNC makes no distinction between the foreign and U.S. plaintiff, applying a common standard for dismissal to both.[444]

The First Circuit's approach in *International Elevator* is sensible, easy to apply, and very close in spirit and letter to the doctrine as laid down in *Gilbert* and *Koster*. The problem, however, is that the First Circuit appears to ignore *Reyno* to the extent that it does not show differing levels of deference. The court did not directly address the question of whether a different degree of deference is owed a U.S. citizen or resident who sues in his home forum.[445] In fact, it made no mention of deference with respect to any plaintiff's choice of forum. All that we have is a reference to the presumption in favor of a plaintiff's choice and a citation to the precedent of *Nowak*.[446] Whilst it is

330 U.S. at 508; *Koster*, 330 U.S. at 524). Yet the language of vexation and oppression is used in both passages. *Id.* Therefore, it cannot be inferred that the Court did not intend for this standard to be the applicable one, rather than the lower one of "strongly supports." In fact, the consensus of opinion at that time was that *Gilbert* and *Koster* required a showing of inconvenience approaching vexation and oppression. A more reasonable inference from *Norwood* is that the Supreme Court considered that a single standard existed. *See id.* While it can be debated what this standard was, *Norwood* suggests that the Supreme Court at least accepted that the standard was singular, in other words, that a differential standard did not apply between U.S. plaintiffs and foreigners. *See id.*

[442] *Int'l Elevator*, 203 F.3d at 15.

[443] *Id.* (citations omitted) (citing Mercier v. Sheraton Int'l, Inc., 935 F.3d 419, 423–24 (1st Cir. 1991)).

[444] *See generally id.*

[445] It is not clear from the case report, nor from the plaintiff's brief why the plaintiff thought a higher standard ought to have applied. It is unclear whether it was on the grounds of her U.S. citizenship or because she thought a higher standard ought to apply in all cases of FNC.

[446] *See id.* at 17 (citing Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 720 (1st Cir. 1996)).

reasonable to infer from the application of a single standard that no difference in deference was intended, when one drills down into the *Nowak* authority, a difficulty with this inference emerges. In *Nowak*, the First Circuit sustained the refusal to dismiss a U.S. citizen's action to Hong Kong.[447] The *Nowak* court cited *Koster* as identifying the standard to be applied where the plaintiff is suing in his home forum.[448] Furthermore, the court held that the defendant had not managed, in respect of the private interest factors, to establish "the type of 'oppressiveness and vexation' required by *Koster*[.]"[449] *Nowak* seemingly endorsed a higher standard for dismissal in the case of a plaintiff who sues in his home forum, which is seemingly inconsistent with *International Elevator*.

This inconsistency was also apparent in *Adelson v. Hananel*,[450] and was expressly acknowledged, albeit only as a "tension," by the First Circuit in the subsequent case of *Interface Partners International, Ltd. v. Hananel*.[451] In *Adelson*, a U.S. plaintiff argued that he had not been given sufficient deference for his choice of a U.S. forum in an action against an Israeli defendant.[452] The First Circuit stated that the required standard for dismissal was "strongly favors" but then noted that "it is undisputed that a plaintiff enjoys some degree of deference for his original choice of forum."[453] Added to that is the heightened deference which accompanies a plaintiff's choice of *home* forum."[454] It then added that in such cases, "a heavy presumption weighs in favor of that plaintiff's initial forum choice."[455] Again, this appears

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An interesting feature of the court's opinion in *Nowak* is that it was authored by Judge Cummings who was sitting by designation from the Seventh Circuit. *Nowak*, 94 F.3d at 711.

[447] *Nowak*, 94 F.3d at 719.

[448] *Id.* at 720 (citing Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 501 (1947)) (citations omitted) ("Given that [defendant] has the burden of proving the elements of *forum non conveniens*, we shall review the factors alleged to justify dismissal that [defendant] has put forth, bearing in mind that *Koster* places a heavy burden on defendants where, as here, plaintiffs brought suit in their home forum.").

[449] *Id.* (citing *Koster*, 330 U.S. at 524).

[450] 510 F.3d 43 (1st Cir. 1996), *aff'd*, 652 F.3d 75 (1st Cir. 2011).

[451] 575 F.3d 97, 102 (1st Cir. 2009). It is a tension that is seemingly still unresolved. *See In re* Montreal Me. & Atl. Ry., Ltd., 574 B.R. 381, 386 (D. Me. 2017).

[452] 510 F.3d at 46.

[453] *Id.* at 54 (quoting Int'l Elevator, 203 F.3d 8, 12 (1st Cir. 2000)).

[454] *Id.* at 53 (citations omitted) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); *Koster*, 330 U.S. at 524).

[455] In full, the court stated that:

> A logical extension of that heightened deference in favor of a plaintiff's "home forum" applies in cases such as this which involves a U.S. citizen plaintiff who is seeking to litigate in a United States forum. While the Supreme Court held that dismissal is "not automatically barred" in such cases, a heavy presumption weighs in favor of that plaintiff's initial forum choice.

to be inconsistent with *International Elevator* because it supposes that greater deference is presumptively due the U.S. plaintiff's choice of a U.S. forum. However, on closer examination, it becomes apparent that this inconsistency is only illusory.

The district court in *Adelson* had granted FNC dismissal but the court of appeals reversed the decision on the grounds, inter alia, that the trial judge had found that "Adelson's suit was neither vexatious nor oppressive."[456] This could be read in one of two ways. First, that the court thought the trial judge was wrong and the suit was vexatious and oppressive or second, that the court had applied the wrong standard for dismissal. It is submitted that the latter is the correct view because, in the final analysis, the court reaffirmed that the applicable standard for dismissal is "strongly favors," not "vexatious and oppressive."[457] The remaining problem then becomes: if a single standard for dismissal applies, then how did the court propose to accommodate the heightened deference it recognized was due the plaintiff's choice of a U.S. forum? The only clue provided is the court's statement that, "[i]n the past, we have implicitly recognized the 'strong presumption favoring the American forum selected by American plaintiffs.'"[458] It distinguished this *implicit* approach from the *explicit* approach taken by other circuits, such as in *SME Racks*.[459] The approach taken in *SME Racks* was to apply a much higher standard for dismissal involving U.S. plaintiffs suing in a U.S. forum.[460] If this *explicit* approach was not the one preferred by the First Circuit, then what does its *implicit* approach amount to? The court did not enlighten us on this point, but we will have cause to speculate on it in this article's conclusion.

C. FNC in State Courts

Before concluding this paper, it is important to briefly acknowledge that some state courts have expressed themselves on the issue of deference. Although federal law does not govern the doctrine at the state level,[461] state

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Id. (citations omitted) (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 n.23 (1981)).

[456] *Id.*

[457] *Id.* at 54.

[458] *Id.* at 53 (quoting Mercier v. Sheraton Int'l, Inc., 981 F.2d 1345, 1355 (1st Cir. 1992)).

[459] *See Id.* (citing SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097, 1104 (11th Cir. 2004); *see also* Carey v. Bayerische Hypo-Und Vereinsbank AG, 370 F.3d 234, 238 (2d Cir. 2004); Raytheon Eng'rs & Constructors, Inc. v. HLH & Assocs., No. 97-20187, 1998 WL 224531, at *2 (5th Cir. Apr. 17, 1998)) ("Other circuits have more explicitly articulated the strength of this presumption when the plaintiffs are citizens, residents, or corporations of this country.").

[460] *SME Racks*, 382 F.3d at 1104.

[461] *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994) ("Just as state courts, in

courts, for the most part, follow the federal standard for FNC, applying a two-stage test.[462] Dismissal first requires the existence of an adequate alternative forum and second, that the balance of convenience of the private and public interest factors strongly favors the defendant. As to the meaning of "strongly favors," this varies from state to state. When it comes to the deference due a plaintiff's choice of his home forum, the majority of state courts give some recognition to this.[463] The California courts, although they did not initially follow *Reyno,* adopted a position close to it in *Stangvik v. Shiley, Inc.*,[464] such that, "foreign plaintiffs receive no presumption of convenience in their choice of a California forum."[465] The courts of Minnesota and Florida apply the deference principle, affording greater deference to U.S. citizens.[466]

However, the Washington Supreme Court and Oregon Supreme Court have entirely rejected the approach that grants any deference to the plaintiff on the basis of his residence.[467] In *Myers v. Boeing Co.*, the Supreme Court of Washington stated that deference raises concerns about xenophobia and described it as lacking any supportive analysis or reasoning.[468] Recently, the

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deciding admiralty cases, are not bound by the venue requirements set forth for federal courts in the United States Code, so also they are not bound by the federal common-law venue rule (so to speak) of *forum non conveniens*.").

[462] *See, e.g.*, Picketts v. Int'l Playtex, Inc., 576 A.2d 518 (Conn. 1990); Espinoza v. Evergreen Helicopters, Inc., 376 P.3d 960, 981 (Or. 2015) (noting that "most jurisdictions that have adopted [FNC] rely on the two-step framework described by the United States Supreme Court in *Gulf Oil* and subsequent cases to articulate the standards that should guide its application."); *see also* Duval-Major, *supra* note 144, at 659 ("The doctrine in state courts generally follows the federal standard articulated in *Gulf* and *Piper*, with few modifications."); BRAND & JABLONSKI, *supra* note 4, at 71–72.

[463] *See, e.g.*, Langenhorst v. Norfolk S. Ry. Co., 848 N.E.2d 927, 934–35 (Ill. 2006); Ellis v. AAR Parts Trading Inc., 828 N.E.2d 726, 742 (Ill. App. Ct. 2005).

[464] 819 P.2d 14 (Cal. 1991).

[465] Karolyn King, *Open "Borders"—Closed Courts: The Impact of* Stangvik v. Shiley, Inc., 28 U.S.F. L. REV. 1113, 1138 (1994).

[466] The Supreme Court of Minnesota has applied the deference principle with respect to foreign plaintiffs but not in the case of a U.S. plaintiff who is a non-resident of the state of Minnesota. *See* Bergquist v. Medtronic, Inc., 379 N.W.2d 508, 512 (Minn. 1986). This is arguably in line with the general understanding of the federal doctrine as identifying the home forum of a U.S. plaintiff as any U.S. federal court. *See id.* ("Why should the United States taxpayers, or taxpayers of Minnesota in the present case, be presumed to pay for the costs of trial for a plaintiff who is a citizen of a foreign nation; who has a remedy in his own country; and whose defendant consents to being sued in the foreign country?"); Kennecott Holdings Corp. v. Liberty Mut. Ins. Co., 578 N.W.2d 358, 361 (Minn. 1998) ("To accord less deference to the choice of forum of a United States citizen because the plaintiff is not a resident of Minnesota simply defies fairness and logic."). The Florida courts take a similar view. *See* Cortez v. Palace Resorts, Inc., 123 So. 3d 1085, 1094 (Fla. 2013).

[467] *See, e.g.* Myers v. Boeing Co., 794 P.2d 1272, 1281 (Wash. 1990) (en banc); *Espinoza*, 376 P.3d at 981.

[468] *Myers*, 794 P.2d at 1281. The court also stated:

Supreme Court of Oregon expressed its agreement with the Washington Supreme Court's view, stating that "there is no principled reason to vary the degree of deference afforded to the plaintiff's choice of forum based on where the plaintiff, or real party in interest, resides."[469] The Second Circuit *Iragorri* approach to deference—a dedicated first step of the FNC analysis which determines the degree of deference owed—has not yet been influential in the state courts with only a handful of decisions even referring to it.[470]

Thus, while the lesser degree of deference owed a foreign plaintiff is a factor for many state doctrines, it is generally only taken into consideration as a factor in the balancing of convenience and not as a separate step in the analysis.

V. CONCLUSION

With *Gilbert* and *Koster*, Justice Jackson intended a simple test for determining whether dismissal on grounds of FNC is appropriate in any given case. The onus was to be on the defendant to satisfy the court, first, that an adequate alterative forum for the dispute was available, and second, that the degree of inconvenience was such that dismissal was warranted. Dismissals were to be rare and exceptional. Only where the cumulative balance of the relevant private and public interest factors was strongly in favor of dismissal should the plaintiff's choice of forum be disturbed. The burden imposed on the defendant was to be a heavy one, i.e., the inconvenience involved ought to constitute unfairness to the defendant.

Unfortunately, Justice Jackson made reference to the language of vexation and oppression in *Koster* and this (in contrast to the standard referred to in *Gilbert*, i.e., strongly favors) inadvertently fueled doubts as to the intended standard for dismissal. For some, it was supposed that instead of one standard, two had been intended; in the case of a U.S. plaintiff the requisite level of inconvenience must amount to vexation and oppression, whereas in the case of a foreign plaintiff, a lower standard of 'strongly favors' would suffice. This interpretation gained considerable support at a time when courts

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> The Court's logic does not withstand scrutiny. The Court is comparing apples and oranges. Foreigners, by definition, can never choose the United States as their home forum. The Court purports to be giving lesser deference to the foreign plaintiffs' choice of forum when, in reality, it is giving lesser deference to foreign plaintiffs, based solely on their status as foreigners.

Id.

[469] *Espinoza*, 376 P.3d at 987.

[470] *See, e.g.*, Univ. of Md. Med. Sys. Corp. v. Kerrigan, 174 A.3d 351, 408 (Md. 2017) (citing Iragorri v. United Techs. Corp., 274 F.3d 65, 71 (2d Cir. 2001)); Rolls-Royce, Inc. v. Garcia, 77 So. 3d 855, 860 (Fla. Dist. Ct. App. 2012) (quoting *Iragorri*, 274 F.3d at 73).

were keen to liberalize the doctrine of FNC in order to restrict forum shopping by foreign plaintiffs, yet eager to ring-fence the U.S. plaintiff and defendant.

Some courts developed a practice of affording different standards for dismissal to plaintiffs depending on their categorization as U.S. or foreign. This was legitimized by the false assumption that the standard of dismissal in FNC—the general burden on the defendant—was a reflection of the presumptive convenience of the plaintiff's choice of forum. The foreign plaintiff's choice of forum is entitled to less deference, and as such the applicable standard for dismissal in such cases must be adjusted accordingly. In other words, the applicable standard corresponded to the differing deference due the plaintiff's choice of forum (as determined by his/her categorization). This proved an attractive idea. However, by finding a determinative link between the standard for dismissal and the notion of the deference due, a wrong turn was taken in the course of the federal doctrine of FNC.

This wrong turn was predicated upon a misinterpretation of *Gilbert* and *Koster* on two key points. First, that *Gilbert* and *Koster* established two distinct standards for dismissal. Second, and more critically, that the applicable standard was an expression of the degree of deference presumptively due the plaintiff's choice of forum.

When this approach came before the Supreme Court in *Reyno*, it fudged the issue. Instead of setting the doctrine firmly back on track, it perpetuated the confusion by laying down two propositions. First, it endorsed the notion of showing differing degrees of deference between U.S. and foreign plaintiffs. Second, with little analysis of the issue, it rejected the view that *Koster* and *Gilbert* established different standards and affirmed the existence of a singular standard for dismissal. The difficulty that this produced was that these two propositions are not readily reconcilable. Indeed, *Reyno* appeared to set the lower courts the impossible task of showing differing degrees of deference while also applying a singular standard for dismissal. As a result, the lower courts were led to adopt wildly divergent doctrines of FNC.

Up until now, the general approach has proceeded on the understanding that *Reyno* mandated the active incorporation of differing degrees of deference to the plaintiff's choice of forum. For example, the Eleventh Circuit based their FNC approach on the categorization of the plaintiff as U.S. or foreign, whereas the Second Circuit developed a sliding scale of deference based on the assessment of a variety of factors. Under these versions of the doctrine, the standard for dismissal is either explicitly or implicitly adjusted in response to the degree of deference due the plaintiff's choice of forum. In so doing, the courts fail to follow the *Reyno* instruction to maintain a singular standard for dismissal, however, they do accommodate

the *Reyno* instruction to show different levels of deference to U.S. and foreign plaintiffs.

The examples of the Eleventh Circuit and the Second Circuit show the difficulties and pitfalls involved in attempting to resolve the *Reyno* riddle. Neither provide a satisfactory solution. The Eleventh Circuit's approach is particularly inelegant—it fails to apply a single standard and affords deference in such a blunt fashion that it can prove discriminatory. The Second Circuit, in attempting to reconcile the two *Reyno* propositions, has tied itself in knots with its *Iragorri* approach. At best, the Second Circuit's approach is a creative but overly complex and confusing manifestation of a doctrine that should be simple and straightforward. In truth, the *Iragorri* approach suffers from the illogical foundation upon which it is built. Its approach diminishes the objectivity of the FNC analysis by deflecting attention toward the subjective evaluation of the legitimacy of the plaintiff's choice of forum in its invented first step of the test. Both the Second and Eleventh Circuit versions of the doctrine are, to the extent that their determinations of deference do not correspond to objective factors of convenience, prejudicial to the interests of foreign plaintiffs. This objective bias is unedifying for the U.S. federal legal system and diminishes the credibility of FNC as a legitimate judicial tool to be used in international litigation.

There is a solution to the *Reyno* riddle. First, setting the interpretational wrong turn taken with respect to *Gilbert* and *Koster* straight. In *Koster*, Justice Jackson spoke of there being good reason why a plaintiff who has sued in his home forum should have his case heard there. The reference he made to vexation and oppression in *Koster* was not an affirmation that, *a priori*, a different standard for dismissal applied in the case of a plaintiff who sues in his home forum. It was merely a common-sense observation that a plaintiff who sues in his home forum is more likely to make a greater showing of convenience.

> The standard in all cases was to be that the balance of convenience be 'strongly in favor' of dismissal. This standard was not an expression of the presumptive convenience of the plaintiff's choice. As we considered above in the context of Lord Sumner's comments in the Scottish case of *La Société du Gaz*,[471] the higher burden on the defendant is not the result of a deliberate policy to vest an advantage in the plaintiff as recognition of the presumptive convenience of his choice of forum. Rather, it is the product of a number of considerations grounded in judicial common-sense and policy. There is no determinative link between the presumptive convenience of the plaintiff's choice of forum and the standard required to secure dismissal on grounds of

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[471] *See supra* Part I(A).

FNC. This is the main interpretative wrong turn that has been taken, that is, to assume that Justice Jackson was suggesting that a plaintiff suing in his home forum is entitled to greater deference as an *a priori* proposition. In practical terms, this was translated into a different standard for dismissal being applied in the case of the foreign plaintiff than of the U.S. plaintiff. This is entirely wrong, deference cannot be legitimately accommodated into the FNC analysis in this manner.

How then do we accommodate deference? It is axiomatic that a plaintiff who sues in his home forum ought to find his choice of forum being granted more deference than the case of a foreign plaintiff. There is an intuitive logic to this—Justice Jackson recognized as much in *Koster*. It would be odd indeed, if FNC resulted in plaintiffs routinely being sent away from their home forum. We cannot deny that deference is somehow at issue in FNC. The mistake has been to think that we have to somehow *actively* accommodate deference to the FNC analysis at all. Justice Jackson was not calling for any doctrinal adjustment to FNC in the case of a U.S. plaintiff (or conversely in the case of a foreign plaintiff). He was describing how the balancing of convenience would inherently defer to the plaintiff who has sued in his home forum, since that forum will, by and large, be the more convenient one.

As such, the doctrine of FNC, as laid down in *Gilbert/Koster*, passively accommodates the greater deference due a plaintiff's choice of a home forum and likewise accords less deference to a foreign plaintiff's choice. Such deference is passive, it operates *a posteriori*, not through *a priori* doctrinal adaptation. It might be said that FNC gives reflexive effect to the deference due the plaintiff's choice of forum. To show greater deference to a plaintiff who sues in his home forum, all that is needed is to let the doctrine do its job. Since it is based on considerations of convenience, FNC is essentially preconfigured in such a way that it will, more often than not, defer to the choice of a plaintiff who sues in his home forum.

In our consideration of the First Circuit's approach to deference, this Article pointed out its cryptic reference to implicitly recognizing the strong presumption in favor of the U.S. plaintiff's choice of a U.S. forum. It then questioned what it meant by this and how it was to be distinguished from the explicit approach adopted by the First Circuit in other cases. I believe the analysis provided in this Article can resolve the apparent inconsistency that exists in the First Circuit between *International Elevator,* on the one side, and *Nowak* and *Adelson* on the other. Thus supplemented, the First Circuit's version of the doctrine ought to be accepted as the correct reading of the federal version of FNC as laid down in *Gilbert* and *Koster*.

Where does that leave *Reyno*? Can it be salvaged, or does it need to be overruled? Deference to the plaintiff's choice of forum does not require, nor

entitle, courts to adjust the standard for dismissal. Instead, it suffices merely to allow the doctrine to run its course, because its inherent logic will passively (or reflexively) defer to the home plaintiff's choice of a home forum. How does this sit with Reyno? To put this question another way, is the passive incorporation of deference consistent with the Court's judgment in *Reyno*? In the author's view, the Court's language in *Reyno* on the issue of deference is more suggestive of the view that it ought to be actively incorporated into the doctrine in a priori fashion in any given case. But, is it too much of a stretch to interpret *Reyno* as merely calling for the kind of passive incorporation of deference as described in this Article? I would tentatively suggest that it is possible to interpret *Reyno* in these terms and that it would be desirable to do so. Indeed, this is effectively what the First Circuit has already done and the other circuits should do likewise.

In the introduction to this Article it was claimed that the current state of the federal doctrine of FNC in the United States is a hindrance to its comprehension in foreign jurisdictions, and an obstacle to acquiescence, by foreign civil law States, toward its use by U.S. courts. Removing the red herring that is the notion of actively providing for differing levels of deference between U.S. and foreign plaintiffs would help to reestablish the doctrine in line with the original Supreme Court authorities, maintain its objectivity, promote its uniformity, and defuse accusations of discriminatory treatment of foreign plaintiffs. In addition to this, getting the federal doctrine back on track would diminish the volume of unnecessary and wasteful litigation by providing greater legal certainty and predictability to all stakeholders.

FIRST AMENDMENT 2.0: REVISITING *MARSH* AND THE QUASI-PUBLIC FORUM IN THE AGE OF SOCIAL MEDIA

MASON C. SHEFA

INTRODUCTION

The Internet, that seemingly infinite and indomitable expanse of interconnected computers, with its power instantly to shift massive amounts of wealth, knowledge, and ideas, continues to revolutionize American society in ways never before thought possible. Web 2.0,[1] and social media websites

[1] "Web 2.0" is defined as "the stage of development [of the World Wide Web] characterized by a marked increase in the ability to interact with websites, resulting in the emergence of social media websites and the proliferation of user-generated content." *Web*, OED ONLINE, http://www.oed.com/view/Entry/226695 (last visited Feb. 15, 2018). *See also* Tim O'Reilly, *What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O'REILLY (Sept. 30, 2005), http://www.oreilly.com/pub/a/web2/archive/what-is-

in particular,[2] has played a central role in this societal revolution by changing how Americans communicate, engage in politics, network with each other, and participate in the economy. Websites such as Facebook and Twitter have rapidly displaced traditional media as the source from which the public receives its news.[3] The organization of public protests and demonstrations now largely occur on social media due to the ease, on that platform, of quickly spreading information to a large group of people,[4] and because a vast majority of the population has a social media account.[5] The U.S. government has also harnessed the power of social media to communicate policy to the public.[6] Facebook and Twitter have allowed citizens to engage directly with elected representatives and even the President in ways more immediate than ever before.

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web-20.html [https://perma.cc/XZ82-9QVJ].

[2] The terms "social network" and "social media," though commonly used interchangeably, have somewhat distinct meanings. According to the dictionary, "social network" means "an online service or site through which people create and maintain interpersonal relationships." *Social network*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/social%20network [https://perma.cc/KN2P-3SY6] (last visited Feb. 9, 2018). "Social media" means "forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content." *Social media*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/social%20media (last visited Feb. 9, 2018). Some websites were established for the purpose of social networking but have gradually developed into social media sites (such as Facebook), and thus could be described using either term. Other sites, such as Twitter, exist largely in the social media category, providing relatively minimal networking functionality for its users. The Author has chosen to use "social media" in this Note for the sake of consistency, and because the term uniquely implies the presence of crucial speech functionalities that are relevant to this Note's legal analysis.

[3] The popularity of social media websites has threatened the advertisement revenues for such traditional media outlets as well: "Facebook . . . continues to suck ad revenue away from traditional media outlets, threatening the sustainability of businesses that have traditionally played a key role in a functioning democracy." Natasha Lomas, *Even More US Adults Now Getting News from Social Media Says Pew*, TECHCRUNCH (Sept. 9, 2017), https://techcrunch.com/2017/09/09/even-more-us-adults-now-getting-news-from-social-media-says-pew [https://perma.cc/Y2CT-HY2G].

[4] *See* Samantha Madison, *How Social Media Has Changed the Way Political Movements Organize*, GOV'T TECH. (Jan. 10, 2017), http://www.govtech.com/social/How-Social-Media-Has-Changed-the-Way-Political-Movements-Organize.html [https://perma.cc/KL68-LVZ7] ("The way information can spread so quickly [on social media] is a boon to organizing."). Social media "opens up the scope of people that can be involved." *Id. See also* Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28, 30 (2011) ("[S]ocial media have become coordinating tools for nearly all of the world's political movements . . . .").

[5] *See Social Media Fact Sheet*, PEW RESEARCH CTR., http://www.pewinternet.org/fact-sheet/social-media [https://perma.cc/4V5E-5NRW] (last updated Feb. 5, 2017).

[6] *See infra* Part I.

A new idea originating from a single individual, when shared on the Internet via social media, can spread like wildfire, almost instantaneously gathering converts around the world. This effect, known as "going viral," is well-documented and very powerful.[7] Viral ideas originating and shared on social media have prompted revolutions[8] and may have influenced elections.[9] Some have argued that the Internet in general, and social media in particular, has become a positive democratizing force in American and global society because of its unique and powerful ability to facilitate the participation of all people in the global marketplace of ideas.[10] Though this may be true, the

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[7] *See, e.g.*, Elise Moreau, *What Does It Mean to Go Viral Online?*, LIFEWIRE, https://www.lifewire.com/what-does-it-mean-to-go-viral-3486225 [https://perma.cc/ZNK9-KX7G] (last updated June 30, 2018).

[8] *See, e.g.*, Heather Brown, Emily Guskin & Amy Mitchell, *The Role of Social Media in the Arab Uprisings*, PEW RESEARCH CTR. (Nov. 28, 2012), http://www.journalism.org/2012/11/28/role-social-media-arab-uprisings [https://perma.cc/6NTP-8SA2].

[9] *See, e.g.*, Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 67 (2017) ("[T]he influence of fake news [published on social media] in the 2016 election . . . [was] more dangerous than previous incarnations of politically-motivated misinformation and scurrilous allegations."); Richard L. Hasen, *Cheap Speech and What It Has Done*, 16 FIRST AMEND. L. REV. 200, 208 (2018) ("[T]he potential for fake news to influence future election outcomes is manifest as social media continues to grow and as traditional media struggle with viable economic models."); Panagiotis T. Metaxas & Eni Mustafaraj, *Social Media and the Elections*, 338 SCIENCE 472 (2012).

[10] *See, e.g.*, *Social Media: The Great Democratizing Force*, RADIO & TELEVISION BUS. REP. (Aug. 15, 2014), https://www.rbr.com/social-media-the-great-democratizing-force [https://perma.cc/PY6D-UAVZ]; Shirky, *supra* note 4, at 32 ("[C]ommunicative freedom is good for political freedom . . . . [S]ocial media [can be thought of as] long-term tools that can strengthen civil society and the public sphere."). Hillary Clinton, as Secretary of State, echoed these sentiments in a speech at the Newseum: "social networks . . . have opened up new forums for exchanging ideas." Hillary Clinton, U.S. Sec'y of State, Remarks on Internet Freedom (Jan. 21, 2010) (transcript available online at https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm [https://perma.cc/7S34-SDQM]). *But see* Bryan H. Druzin & Jessica Li, *The Power of the Keystroke: Is Social Media the Radical Democratizing Force We've Been Led to Believe It Is?*, HARV. HUM. RTS. J. ONLINE (Feb. 10, 2015), http://harvardhrj.com/2015/02/the-power-of-the-keystroke-is-social-media-the-radical-democratizing-force-weve-been-led-to-believe-it-is. The Internet's power to disseminate information widely and rapidly also, of course, has been employed in nefarious ways. *See, e.g.*, Gaughan, *supra* note 9, at 67–68 ("The internet's democratization of the dissemination of information has facilitated the spread of fake news like never before. A study by BuzzFeed concluded that in the final three months of the 2016 [U.S. presidential] campaign, the twenty most popular fake election stories on Facebook reached more than 8.7 million readers, whereas the twenty most popular real election news stories on Facebook only reached 7.3 million readers." (citing Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.uunR5eGnX#.oqOZvdxj1).

great irony of the digital age is that the forums in which such ideas encounter the global marketplace—and indeed, perhaps most of the marketplace itself—are privately owned.[11] What does it mean that, in today's society, the most effective means of communicating ideas is found on privately owned servers? Does a social media site, such as Facebook, have the power to silence certain viewpoints while permitting others to flourish, simply because it owns the servers and manages the website on which those viewpoints are expressed? Should it have such power?

The U.S. Supreme Court has recognized the harms which private actors can impose on the exercise of free speech when such actors are similar enough to state actors. In *Marsh v. Alabama*,[12] the Court used a functional-equivalence analysis of the private property in question to determine whether the public had free speech rights on the property.[13] Although the Court subsequently backtracked from *Marsh*,[14] some lower courts have continued to rely on the functional-equivalence analysis first formulated in *Marsh* to address modern issues.[15] The ability of private social media sites to discriminate based on viewpoint in the "principal source[] for knowing current events . . . [and] speaking and listening in the modern public square" allows such companies effectively to shut out individuals with whom they

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[11] *See, e.g.*, Peter M. Shane, *"The Expanding First Amendment" in an Age of Free Speech Paradox*, 78 OHIO ST. L.J. 773, 774 (2017) ("Social media comprise the venues for most of our communications explosion, but the electronic public square is overwhelmingly in private hands. These powerful private entities, unlike the government, are legally entitled to censor speech on their platforms, and do so.").

[12] 326 U.S. 501 (1946).

[13] *See id.* at 507–08. When a court conducts a functional-equivalence analysis, it asks whether the private property in question functions with sufficient similarity to public property as to cause it to be treated as if it were public property for First Amendment purposes. *See infra* Part I(C)(i).

[14] *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) (implicitly rejecting the validity of the *Marsh*/*Logan Valley* functional-equivalence analysis and requiring that private property be dedicated to public use before it can be treated as public property for First Amendment purposes); *see also* Prager University v. Google L.L.C., 2018 WL 1471939, at *6 (N.D. Cal. 2018) ("[A]lthough the Supreme Court initially appeared to expand the reach of *Marsh* beyond the context of a company town in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, the Supreme Court quickly disavowed that expansion in two subsequent decisions." (citation omitted)).

[15] *See, e.g.*, United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc., 383 F.3d 449, 454–55 (6th Cir. 2004) (holding that a privately owned sidewalk was a traditional public forum because it "function[ed] as a public sidewalk"); Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas, 257 F.3d 937, 945 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002); Brindley v. City of Memphis, 2018 WL 3420819, at *4–5 (W.D. Tenn. 2018); Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 343–44 (1979), *aff'd*, 447 U.S. 74 (1980).

disagree from the twenty-first century's marketplace of ideas.[16] Recently, in *Packingham v. North Carolina*, the U.S. Supreme Court noted that individuals who are foreclosed from accessing social media altogether are "prevent[ed] . . . from engaging in the legitimate exercise of First Amendment rights."[17] The Court's engagement with the interplay between social media and the Constitution in *Packingham* may thus hint that the time for charting a new course for First Amendment doctrine in the social media era has arrived.

The fundamental questions this Note shall address are the following: Does the First Amendment ensure the public's access to social media websites, which are arguably the most effective medium of communication in today's society? Should free speech principles apply on private websites such as Twitter or Facebook? This Note argues that, for legal and policy reasons, the Supreme Court should resurrect precedent found in *Marsh* and *Logan Valley* in support of the notion that the First Amendment prohibits owners of certain private social media sites, which have effectively become "state actors," from infringing on the free speech rights of its users. The Court should dispense with the strict categories of public forum found in *Perry* and adopt the more workable functional-equivalence analysis in determining which private social media sites qualify as "state actors" and thus harbor the legal responsibility of not infringing on its users' First Amendment rights.

Part I of this Note will discuss the rise of the Internet and social media to a place of vital and consequential importance in American society, and how American society has dramatically changed in response to it. Part II will provide a background of the relevant established legal doctrines which will frame the discussion: the public forum, the right to receive information, and the state action doctrine. Part III will explore the current landscape of court opinions which take up the issue of First Amendment rights on social media sites. Part IV will argue that the quasi-public forum doctrine derived from *Marsh* and *Logan Valley* is a suitable doctrine for addressing free speech issues on private social media sites.

I. THE RISE OF THE INTERNET

Although the Internet is a relatively new phenomenon in the history of this nation,[18] it has assumed a centrally important role in American society,

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[16] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

[17] *Id.*

[18] The Internet "is the outgrowth of what began in 1969 as a military program called 'ARPANET,' which was designed to enable computers operated by the military . . . to communicate with one another by redundant channels even if some portions of the network were damaged in a war." Reno v. ACLU, 521 U.S. 844, 849–50 (1997).

business, government, and culture. As early as 2001, courts have treated computers and Internet access as "virtually indispensable in the modern world of communications and information gathering."[19] According to a recent study by the International Telecommunications Union, 76.18% of Americans use the Internet.[20] Americans have increasingly turned to the Internet to shop,[21] read news,[22] find love,[23] conduct business,[24] communicate

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[19] United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001).

[20] *Percentage of Population Using the Internet in the United States from 2000 to 2016*, STATISTA, https://www.statista.com/statistics/209117/us-internet-penetration [https://perma.cc/W9YX-GVMZ] (last visited Nov. 19, 2017). As many as 90% of U.S. adults use the Internet, and 77% of them use it either "several times a day," or "almost constantly." Monica Anderson & Andrew Perrin, *Tech Adoption Climbs Among Older Adults*, PEW RESEARCH CTR. 7, 21 (2017), http://www.pewinternet.org/wp-content/uploads/sites/9/2017/05/PI_2017.05.17_Older-Americans-Tech_FINAL.pdf.

[21] *See* Jeff Fromm, *"The Amazon Effect" and the Future of Retail Competition*, MILLENNIAL MARKETING (2018), http://www.millennialmarketing.com/2016/11/the-amazon-effect-the-future-of-retail-competition (describing the advent of the Internet and "the subsequent boom of online retailers and e-commerce" as having "changed the consumer journey," and coining the term "The Amazon Effect," referring to the "impact [of] the digital marketplace . . . on the traditional business model"); Lin Grosman, *What the Amazon Effect Means for Retailers*, FORBES (Feb. 22, 2018), https://www.forbes.com/sites/forbescommunicationscouncil/2018/02/22/what-the-amazon-effect-means-for-retailers/#637ec09e2ded (reporting that "a lot of the money going to online retailers is money that used to go to brick-and-mortar businesses").

[22] Amy Mitchell, Jeffrey Gottfried, Michael Barthel & Elisa Shearer, *The Modern News Consumer: News Attitudes and Practices in the Digital Era*, PEW RESEARCH CTR. 3 (July 7, 2016), http://www.journalism.org/wp-content/uploads/sites/8/2016/07/PJ_2016.07.07_Modern-News-Consumer_FINAL.pdf ("81% of Americans get at least some of [their] news through websites, apps or social networking sites."); Michael Scherer, *The Internet Effect on News*, TIME (Mar. 24, 2008), http://swampland.time.com/2008/03/24/the_internet_effect_on_news ("This trend towards story-by-story competition, and away from package-by-package competition, is a blessing and a curse. It is forcing better writing, quicker responsiveness, and it is increasing the value of actual news-making and clear-eyed thinking. But it is also increasing pressure on reporters to push the boundaries of provocation.").

[23] Aaron Smith & Monica Anderson, *5 Facts About Online Dating*, PEW RESEARCH CTR. (Feb. 29, 2016), http://www.pewresearch.org/fact-tank/2016/02/29/5-facts-about-online-dating [https://perma.cc/7JG2-NPYZ] ("Digital technology and smartphones in particular have transformed many aspects of our society, including how people seek out and establish romantic relationships."). According to a Pew study, "15% of American adults now report that they have used online dating sites and/or mobile dating apps," and usage by eighteen to twenty-four-year-olds has nearly tripled. Aaron Smith, *15% of American Adults Have Used Online Dating Sites or Mobile Dating Apps*, PEW RESEARCH CTR. 2 (2016), http://www.pewresearch.org/wp-content/uploads/sites/9/2016/02/PI_2016.02.11_Online-Dating_FINAL.pdf [https://perma.cc/NM83-KJVE].

[24] ERIK QUALMAN, SOCIALNOMICS: HOW SOCIAL MEDIA TRANSFORMS THE WAY WE LIVE AND DO BUSINESS 37 (rev. ed. 2011) ("Businesses don't have a choice on whether or not to DO social media, their choice is how well they DO it.").

and engage with governmental representatives,[25] and discuss politics or current events.

Social media sites, in particular, have risen to vital importance in American discourse. Never before has there been as effective a platform for the communication of ideas as social media. Now, an idea posted to a site such as Facebook, Twitter, or YouTube has the ability instantly to reach hundreds of millions, if not billions, of people around the world.[26] This idea, posted by a single person on social media, enters into the global marketplace of ideas, and competes against millions of alternative ideas. If it gains converts who share the idea, it may spread like wildfire. Social media websites have the unique ability to facilitate this viral dissemination of ideas, largely because of the number of users on such sites, and the technological power of Web 2.0.[27] According to a recent report by the Pew Research Center, 69% of Americans "use[] some type of social media."[28] Of this percentage, 66% use Facebook, 58% use YouTube, 21% use LinkedIn, and 15% use Twitter.[29] The use of social media websites has also revolutionized the ability of government officials to communicate with their constituents,[30] and has become the government's "primary method of communicating with the public."[31]

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[25] *See* Bill Sherman, *Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95 (2011).

[26] Jacob Davidson, *Here's How Many Internet Users There Are*, MONEY (May 26, 2015), http://time.com/money/3896219/internet-users-worldwide [https://perma.cc/ML7A-ZENL] ("The number of Internet users has increased from 738 million in 2000 to 3.2 billion in 2015, according to a new report from the International Telecommunication Union.").

[27] *See generally* JASON GAINOUS & KEVIN M. WAGNER, TWEETING TO POWER: THE SOCIAL MEDIA REVOLUTION IN AMERICAN POLITICS (2014) (discussing the transformative effect social media has had on American society, and the causes of its popularity and power).

[28] *Social Media Fact Sheet*, PEW RESEARCH CTR. (last updated Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/social-media [https://perma.cc/VUW3-66DF].

[29] Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CTR. 6 (2017), http://www.journalism.org/wp-content/uploads/sites/8/2017/09/PJ_17.08.23_socialMediaUpdate_FINAL.pdf.

[30] Sherman, *supra* note 25, at 96 ("[T]oday, it seems that there is hardly a mayor or city councilmember in a major American city without a Facebook page, a Twitter account, and a blog.").

[31] David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 BYU L. REV. 1981, 1985 (2010). In recognition of the potential of the Internet to facilitate a more open government, Congress passed the E-Government Act of 2002, for the purpose of enhancing "the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and . . . establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services." E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended in

This rapid rise of social media to a central place in American society necessitates revisiting antiquated legal doctrines whose underlying assumptions about society have largely become obsolete. The next part of this Note will track the developments of these doctrines and expose their inadequacy for addressing First Amendment issues in the social media era.

II. DEVELOPMENT OF RELEVANT FIRST AMENDMENT DOCTRINES

A. PUBLIC FORUM: FROM DICTA TO DOCTRINE

Prior to 1939, courts treated public spaces, such as public streets, highways, or parks, as the "private" property of the government.[32] Both the state and federal governments were, as landowners, afforded the same rights as private landowners.[33] Justice Oliver Wendell Holmes Jr., while a Justice on the Supreme Judicial Court of Massachusetts, wrote that the government could "absolutely or conditionally . . . forbid public speaking" in the same way that "[an] owner of a private house [could] forbid it in his house."[34]

The beginnings of a new doctrine emerged in Justice Owen Roberts's dicta in *Hague v. Committee for Industrial Organization*.[35] Expanding on the Court's earlier theory treating the government like a private landowner,[36] he wrote:

> [Parks and streets] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. . . . The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . [but] must not, in the guise of regulation, be abridged or denied.[37]

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scattered sections of 44 U.S.C).

[32] *See* Steele v. City of Boston, 128 Mass. 583, 584 (1880) (comparing the City of Boston's ownership of Boston Common to "a private person [who] owned a similar park to which he had given the public free access").

[33] *See* Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895), *aff'd*, 167 U.S. 43 (1897); *see also* Adderley v. Florida, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

[34] *Davis*, 39 N.E. at 113; *see also* Ronald J. Krotoszynski, Jr., *Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some Suggestions for a Better Way Forward*, 78 OHIO ST. L. J. 779, 790 (2017).

[35] 307 U.S. 496 (1939).

[36] *See Davis*, 167 U.S. at 47 (comparing the Massachusetts legislature to an "owner of a private house").

[37] *Hague*, 307 U.S. at 515–16.

By articulating public rights to such property as "use" rights, the Court essentially held that the public has an easement in the property.[38] Using the reasoning of the *Hague* Court, one could describe the relationship between the government, the public, and the property in question thus: the "land owner (the government) [has] real property (the traditional public forum) [which] is burdened by the right of third parties (the public) to use the property."[39] Though the title to the property remains vested in the government, the government has "dedicated [the property] to the use of the public," and as such, the property cannot be regulated unboundedly.[40] The government has willfully donated its "private" property for public use,[41] and thereby has given up much of its control of it. Though the government could sell the property to a private person, thus extinguishing its dedication to the public use,[42] while the property is still so dedicated, the government may not "abridge[] or den[y]" the rights such a dedication provides.[43] The Court implicitly recognized that a prerequisite to the freedom of speech and expression was a forum where such activities could be conducted.[44] Justice Roberts's *Hague* doctrine, remaining unquestioned by the Court,[45] would later control the Court's decisions in such seminal First Amendment cases as *Cox v. New Hampshire*[46] and *Heffron v. International Society for Krishna Consciousness, Inc.*[47]

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[38] Paul E. McGreal, *The Case for a Constitutional Easement Approach to Permanent Monuments in Traditional Public Forums*, 103 NW. U. L. REV. COLLOQUY 185, 197 (2008) ("Rights in the traditional public forum have the same structure as easements.").

[39] *Id.*

[40] *Davis*, 167 U.S. at 47.

[41] The government's sheer ownership of a property in itself "does not automatically open that property to the public." United States v. Kokinda, 497 U.S. 720, 725 (1990).

[42] *Davis*, 167 U.S. at 47 ("[T]he legislature may . . . [put] an end to the dedication to public uses.").

[43] Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939).

[44] *See* Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 807 (1981) (characterizing the *Hague* Court as envisioning an "obligation on the government to make facilities for expression available. The starting point for this obligation is the right of the public to use the streets, parks, and open places for meetings, parades, demonstrations, canvassing, and similar forms of expression").

[45] Grayned v. City of Rockford, 408 U.S. 104, 123 (1972) (Douglas, J., dissenting in part) ("What Mr. Justice Roberts said in [*Hague*] has never been questioned . . . .").

[46] 312 U.S. 569, 576 (1941) (holding that a municipality may give consideration "to time, place, and manner" when using its authority "to control the use of its public streets for parades or processions").

[47] 452 U.S. 640, 650 (1981) (holding that "a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective."). Justice White's use of "safety and convenience" tracks Justice Roberts's "comfort and convenience" language in *Hague*. *Compare id.*, *with Hague*, 307 U.S. at 516.

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court expanded on the *Hague* doctrine by delineating and defining three types of "public forum": (1) the "traditional public forum," (2) the "designated public forum," and (3) the "limited public forum."[48] A traditional public forum is one which has, from "time out of mind,"[49] been used by the public for communicative purposes (such as public streets and parks).[50] In this space, the government "may not prohibit all communicative activity," but may impose content-neutral "time, place, and manner" restrictions, so long as they "are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[51] Content-based restrictions on speech in a traditional public forum must survive strict scrutiny.[52]

A designated public forum comprises "public property which the state has opened for use by the public as a place for expressive activity."[53] In this space, though the government "is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."[54]

The final category of public forum, the limited public forum,[55] is defined as "[p]ublic property which is not by tradition or designation a forum for public communication[.]"[56] The First Amendment "does not guarantee access" to such forums, even though they are government-owned or controlled.[57] Such a forum exists when "a government entity . . . create[s] a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects."[58] The government "may impose restrictions on speech that are reasonable and viewpoint neutral."[59] The standard is less rigorous than strict scrutiny: such a regulation need not stem from a

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[48] 460 U.S. 37, 45–47 (1983).

[49] *Hague*, 307 U.S. at 515.

[50] *Perry Educ. Ass'n*, 460 U.S. at 45.

[51] *Id.*

[52] *Id.* In order for a statute to survive strict scrutiny, the government "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

[53] *Id.*

[54] *Id.* at 46. The designated public forum doctrine was recently reaffirmed in Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009).

[55] This doctrine is also known as "non-public forum." *See, e.g.*, Davison v. Loudoun Cty. Bd. of Supervisors, 267 F. Supp. 3d 702, 716 (E.D. Va. 2017). In the interest of consistency, this Note will use the term "limited public forum."

[56] *Perry Educ. Ass'n*, 460 U.S. at 46.

[57] *Id.* (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981)).

[58] *Pleasant Grove City*, 555 U.S. at 470.

[59] *Id.*

compelling government interest and be narrowly tailored to protect that interest.[60]

Finally, a public forum need not occupy physical space. In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court analyzed a "Student Activities Fund" (SAF) at the University of Virginia using the public forum categories delineated in *Perry*.[61] The Court ultimately held that the fund was a limited public forum, and invalidated the university's guideline denying religious organizations' eligibility for the disbursement of funds from the SAF as unconstitutional.[62]

The Court has generally acted with extreme caution when faced with new and emerging technologies,[63] and has refrained from applying public forum principles to them.[64] For example, in *Denver Area Educational Telecommunications Consortium v. FCC*, the Court refused to determine whether public forum principles should apply to leased access channels on cable television, since cable television was "such a new and changing area."[65] Seven years later, in *United States v. American Library Ass'n*, the Court similarly hesitated "to import 'the public forum doctrine . . . wholesale into' the context of the Internet."[66] Limiting the inquiry to the provision of Internet-connected terminals in public libraries, the Court held that public forum principles were inapposite: "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."[67] The Court reasoned that public libraries did not provide such terminals to patrons so as to provide them with a public forum.[68]

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[60] *See Perry Educ. Ass'n*, 460 U.S. at 46.

[61] Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 830 (1995) ("The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."); *see Perry Educ. Ass'n*, 460 U.S. at 45–46.

[62] *Rosenberger*, 515 U.S. at 836.

[63] With regard to rapidly changing technologies, the Court "should be shy about saying the final word today about what will be accepted as reasonable tomorrow." Denver Area Educ. Telecomm. Consortium, Inc. v. FCC., 518 U.S. 727, 777 (1996) (Souter, J., concurring). Justice Souter adjured the Court "simply to accept the fact that not every nuance of our old standards will necessarily do for the new technology, and that a proper choice among existing doctrinal categories is not obvious." *Id.*

[64] *See, e.g.*, *id.*; United States v. American Library Ass'n, 539 U.S. 194 (2003).

[65] 518 U.S. at 729 ("It is unnecessary and unwise to decide whether or how to apply the public forum doctrine to leased access channels.").

[66] 539 U.S. at 207 n.3 (quoting Denver Area Educ. Telecomm. Consortium, Inc., 518 U.S. at 749).

[67] *Id.* at 205.

[68] *Id.* at 206 ("A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak.").

B. THE RIGHT TO RECEIVE INFORMATION

In 1943, the Court declared that a necessary corollary to the freedom of speech and press was the "right to receive" such speech.[69] Expanding on this doctrine, Justice William J. Brennan, Jr., in his concurrence in *Lamont v. Postmaster General*, characterized this right as a "fundamental right."[70] In reaching this conclusion, he stated that for a marketplace of ideas to operate, the dissemination of ideas requires the freedom "to receive and consider" them.[71]

The Court qualified this right to receive in *Houchins v. KQED, Inc.*[72] In his concurrence to *Houchins*, Justice Potter Stewart wrote that the First Amendment "[does] not guarantee the public a right of access to information generated or controlled by government . . . ."[73] The government must intend that the public have access to such information before the public has a right to access it.[74] This doctrine stems from the idea that the purpose of the First Amendment is not only to "foster[] individual self-expression" by protecting free speech from government restriction, but also to "afford[] the public access to discussion, debate, and the dissemination of information and ideas."[75]

C. THE STATE ACTION DOCTRINE

The Federal Constitution, with the exception of the Thirteenth Amendment, prescribes limitations which apply solely to the federal and

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[69] Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

[70] 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *see* Stanley v. Georgia, 394 U.S. 557, 564 (1969); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

[71] *Lamont*, 381 U.S. at 308 (Brennan, J., concurring); *see* Emerson, *supra* note 44, at 805 ("The right to know, the reverse side of the right to communicate, plays an important role in formulating doctrine concerned with affirmative governmental intervention in the system of freedom of expression.").

[72] 438 U.S. 1 (1978).

[73] *Id.* at 16 (Stewart, J., concurring).

[74] Once the government "has opened its doors" to such information, the Constitution assures the public and the press "equal access" to it. *Id.*

[75] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, the Court observed that:

> This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them . . . . [Second,] the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.

457 U.S. 853, 867 (1982).

state governments. This is known as the state action doctrine. Courts have found ways to circumvent this seemingly hard-and-fast rule, however, because of issues that arise from private actors with a sufficiently close relationship with the state.[76] In some cases, courts have treated such private actors as state actors which are able to violate the Constitution. Once a private actor has become a state actor, the Constitution can limit its behavior. Under what circumstances can a nominally private actor be characterized as the government for constitutional purposes? The Supreme Court has set forth three categories of private-actor state action. First, state action occurs when a private entity exercises "powers traditionally reserved" to the government.[77] Second, state action is found where there is a "sufficiently close nexus between the [government] and the challenged action" of the private entity such that "it can be said that the [government] is *responsible* for the specific conduct of which the plaintiff complains."[78] Third, where the government "possess[es] such influence over a nominally private entity that there exists 'public entwinement in the management and control' of the entity," the actions of the private party may rise to the level of state action.[79] It can thus be said that "a property owner's actions . . . are equivalent to state action" when the property performs "public functions."[80]

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[76] Justice Thurgood Marshall, in his dissent in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), provided a strong argument in favor of limiting the state-action doctrine in certain contexts:

> Private parties performing functions affecting the public interest can often make a persuasive claim to be free of the constitutional requirements applicable to governmental institutions because of the value of preserving a private sector in which the opportunity for individual choice is maximized. . . . In the due process area, a similar value of diversity may often be furthered by allowing various private institutions the flexibility to select procedures that fit their particular needs.

Id. at 372 (Marshall, J., dissenting) (citations omitted).

[77] *Jackson*, 419 U.S. at 352 (majority opinion).

[78] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (quoting *Jackson*, 419 U.S. at 351). Additionally, the Court held that "significant state involvement in private discriminations could amount to unconstitutional state action . . . ." Reitman v. Mulkey, 387 U.S. 369, 375 (1967) (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)).

[79] Morrill v. Skolfield, 2018 WL 3655902, at *1 (D. Me. Aug. 2, 2018) (quoting Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 297 (2001)).

[80] Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 343 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); *see also* Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1366 (2018) (To enforce the First Amendment against online platforms, the courts would have to relax the state action doctrine as applied to speech–or at least speech occurring on privately owned online platforms. Such a transformation in the law is not completely unthinkable . . . .").

i. First Amendment Rights on Private Property

Much precedent supports the notion that private property which functions as public property should legally be treated like public property. In *Marsh v. State of Alabama*, the Court held that First Amendment rights existed in a company-owned private town which had "all the characteristics of any other American town."[81] In reaching this conclusion, the Court relied on three considerations. First, the Court recognized the overriding importance of the distribution of literature to "the preservation of a free society" as precluding its prohibition by a municipality.[82] Second, because the owner of the property in question had "open[ed] up his property for use by the public in general, the more [did] his rights become circumscribed by the statutory and constitutional rights of those who use[d] it."[83] The fact that the legal title to the property was held in private hands was not determinative of the rights of the public to its use.[84] Third, the Court looked to the property's function and its similarity to public property.[85] Finding that "the town . . . [did] not function differently from any other town" and was "freely accessible and open to the people in the area and those passing through," the Court held that "the corporation [could not] curtail" the public's First Amendment liberties on that property.[86]

In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, the Court again took up the question of First Amendment rights on private property, adhering to a functional-equivalence analysis in determining whether a private shopping center could prohibit picketing on

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[81] 326 U.S. 501, 502 (1946).

[82] *Id.* at 505; *see also* Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

[83] *Marsh*, 326 U.S. at 506. This doctrine is quite similar to the common carrier doctrine:

> [T]he common carrier doctrine emerged out of common law rules which historically 'impose[d] a greater standard of care upon carriers who held themselves out as offering to serve the public in general. The rationale was that by holding themselves out to the public at large, otherwise private carriers took on a quasi-public character.'

Time Warner Telecom, Inc. v. FCC, 507 F.3d 205, 210 n.5 (3d Cir. 2007) (citation omitted). *But see* Langvardt, *supra* note 80, at 1365 ("[W]hen the Supreme Court upheld these requirements for cable operators, it did so on the understanding that they were only 'conduit[s] for the speech of others, transmitting it on a continuous and unedited basis to subscribers.' Content moderators, on the other hand, do a great deal of 'editing,' which probably puts them outside the cable-operator precedent.") (quoting Turner Broad. Sys., Inc., v. FCC, 512 U.S. 622, 629 (1994)).

[84] *Marsh*, 326 U.S. at 511(Frankfurter, J., concurring) ("Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations.").

[85] *Id.* at 506–08 (majority opinion).

[86] *Id.* at 508.

its property.[87] In reaching its holding that the Logan Valley Mall "must be treated in substantially the same manner" as a public "'business block' . . . for First Amendment purposes[,]"[88] the Court noted that it saw "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' [was] not under the same ownership."[89] Additionally, because there were "no other reasonable opportunities for the pickets to convey their message to their intended audience," the Court held that the store could not prohibit the picketers from protesting on its property.[90]

The Supreme Court changed course in *Lloyd Corp. v. Tanner*.[91] In *Lloyd Corp.*, a private shopping center had prohibited five individuals from distributing handbills protesting the Vietnam War.[92] The District Court, relying on *Marsh* and *Logan Valley*, conducted a functional-equivalence analysis of the shopping center and determined that the center, being the "functional equivalent of a public business district[,]" violated the pamphleteers' First Amendment rights.[93] The Supreme Court reversed, however, as although the shopping center fulfilled the functional-equivalence test, the center had not dedicated its property to the public for *general* use.[94] Instead, the center had dedicated its property to the public's use "for

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[87] 391 U.S. 308, 318 (1968), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976).

[88] *Id.* at 325; *see also Hudgens*, 424 U.S. at 520 (1976) ("[In *Logan Valley*, because the] shopping center [was] the functional equivalent of a municipality, . . . the First and Fourteenth Amendments [did] not permit control of speech within such a center to depend upon the speech's content.").

[89] *Logan Valley Plaza, Inc.*, 391 U.S. at 319. This language resembles similar language in *Marsh v. Alabama*:

> Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms. We do not agree that the corporation's property interests settle the question.

Marsh, 326 U.S. at 505.

[90] Lloyd Corp. v. Tanner, 407 U.S. 551, 556 (1972) (construing *Logan Valley Plaza, Inc.*, 391 U.S. at 321–23).

[91] *See id.* at 571 (Marshall, J., dissenting) (characterizing the majority's opinion as "an attack not only on the rationale of Logan Valley, but also on this Court's longstanding decision in Marsh v. Alabama").

[92] *Id.* at 556 (majority opinion).

[93] Tanner v. Lloyd Corp., 308 F. Supp. 128, 130–32 (D. Or. 1970), *aff'd*, 446 F.2d 545 (9th Cir. 1971), *rev'd*, 407 U.S. 551 (1972).

[94] *Lloyd Corp.*, 407 U.S. at 565–66.

designated purposes," namely shopping.[95] The Court additionally rejected the "attenuated doctrine" that the dedication of private property to public use automatically caused the property owner to become a state actor.[96] The Court also seemed to limit *Marsh* to its facts.[97] Thus, under *Lloyd Corp.*, for the public to have a right to use certain private property for First Amendment purposes, it is necessary but not sufficient that the property be dedicated to public use.[98] Courts must additionally weigh the "attributes" of the property in question to determine whether it is substantially similar to traditional public forums,[99] and whether there are alternative feasible avenues for engaging in First Amendment rights.[100] Such attributes, however, are not enough on their own to establish that a private actor has designated its property to the use of the public. Unfortunately, *Lloyd Corp.* did not provide a clear test for determining what attributes are enough to meet the substantially similar standard. Four years later, in *Hudgens v. NLRB*,[101] the Supreme Court held that *Lloyd Corp.* overruled *Logan Valley*.[102]

By the time the Supreme Court issued its decision in *United States v. Kokinda*,[103] the *Marsh*/*Logan Valley* functional-equivalence test had been entirely discarded in favor of *Perry*'s categorical approach.[104] In *Kokinda*, the Court decided that a public sidewalk which served the sole purpose of providing access to a post office was not a public forum.[105] Applying the *Perry* categorical standard rather than the pre-*Lloyd Corp.* functional-equivalence standard, the Court relied on the *purpose* of the property in question.[106] Asking whether the sidewalk was dedicated to the public use for

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[95] *Id.* at 569.

[96] *Id.*

[97] *See id.* at 562–63 (agreeing with Justice Black's dissent in *Logan Valley* in which he stated that *Marsh* "was never intended to apply . . . [outside] the very special situation of a company-owned town, completed with streets, alleys, sewers, stores, residences, and everything else that goes to make a town." (quoting *Logan Valley Plaza, Inc.*, 391 U.S. at 330 (Black, J., dissenting))).

[98] *Id.* at 569.

[99] *Id.*

[100] *See Lloyd Corp.*, 407 U.S. at 567 (noting that "[i]t would be an unwarranted infringement of property rights to require [the private rights holder] to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist").

[101] 424 U.S. 507 (1976).

[102] *Id.* at 518–19.

[103] 497 U.S. 720 (1990).

[104] *See id.* at 726 (applying the *Perry* framework).

[105] *Id.* at 729–30.

[106] *Id.* at 728–29 ("As we recognized in *Grace*, the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.").

"First Amendment activity," the Court weighed the fact that the Postal Service had not "expressly dedicated its sidewalks to any expressive activity," but had constructed them "solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office."[107] A history of permitting groups "to leaflet, speak, and picket on postal premises" did not amount to a dedication of the postal property for First Amendment uses.[108] The post-*Perry* Court had replaced function with purpose, while retaining the "dedication" element derived from *Hague* and *Lloyd Corp.*[109]

Lower courts have not charted the same path. The Ninth Circuit appears to have resurrected *Marsh* and *Logan Valley* and has applied them liberally. In *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, the Ninth Circuit held that a union had the right to hold a demonstration on a privately owned sidewalk because the sidewalk was a public forum.[110] In arriving at this conclusion, the court engaged in a functional-equivalence analysis of the sidewalk in question.[111] Although the sidewalk was privately owned, it had "the normal attributes of a public sidewalk," and the owner had "dedicated the sidewalk to public use" which imposed upon the sidewalk "a servitude . . . for unobstructed public use."[112] In this analysis, the court not only looked to whether the owner had dedicated the property to the public,[113] but also to the function of the property in question.[114] This case might signal a return to the function-dedication framework found in *Lloyd Corp.*

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[107] *Id.* at 728, 730.

[108] *Id.* at 730.

[109] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 505 (1939) (determining that the property in question was not "dedicated to any general purpose other than the recreation of the public."); Lloyd Corp. v. Tanner, 407 U.S. 563, 570 (1972) (holding that "there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights").

[110] 257 F.3d 937, 939 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002).

[111] *See id.* at 943.

[112] *Id.* at 941, 943. Interestingly, the court also cited *Marsh v. Alabama*, 326 U.S. 501 (1946) in support of its holding that, because there was "little to distinguish the [private] sidewalk . . . from the connecting public sidewalks," the private sidewalk should not "enjoy[] a different legal status than the public sidewalks." *Venetian Casino Resort, L.L.C.*, 257 F.3d at 945. This suggests that the Ninth Circuit considers *Marsh* to be good law.

[113] *Id.* at 947–48 (discussing the relevance of "the dedication of the sidewalk to public use [in determining whether] the Venetian's sidewalk constitute[d] a public forum subject to the protections of the First Amendment").

[114] *Id.* at 942 ("[I]t is apparent that the function of the replacement sidewalk on the Venetian's property was to be the same as the former public sidewalk in front of the Venetian and the sidewalks connecting on either side of the Venetian property.").

ii. The California Doctrine

California state courts have similarly diverged from the Supreme Court's holdings in *Lloyd Corp.* and *Hudgens*. In *Robins v. Pruneyard Shopping Center*, the California Supreme Court held that a privately owned space, such as a mall or shopping center, may be considered a public forum if it functioned as a town square.[115] In *Ampex Corp. v. Cargle*, the California Court of Appeal extended this line of reasoning to privately owned websites in cyberspace.[116] The court held that a "Yahoo! message board maintained for Ampex was a public forum" because it was "accessible free of charge to any member of the public where members of the public may read the views and information posted, and post their own opinions."[117] Although these cases rely on the more expansive free speech clause found in the California Constitution,[118] they respond to the same issue that this Note raises: how can the freedom of speech be protected on privately owned social media sites that resemble public squares? In California, "public forum" is defined as "a place that is open to the public where information is freely exchanged."[119] Given this definition, California courts have held that websites which are "open and free to anyone" without "controls" are public forums.[120] California's legislature has interpreted the First Amendment to protect "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."[121] This California doctrine, which treats any website that is open to the public and where people may express themselves freely on issues of public interest, appears to adopt a more function-based approach to public forums, rather than a categorical approach

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[115] 592 P.2d 341, 344, 347 n.5 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

[116] 27 Cal. Rptr. 3d 863, 869–70 (Ct. App. 2005).

[117] *Id.* at 869.

[118] *See* CAL. CONST. art. I, § 2(a) (amended 1980). In pertinent part, the California Constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects . . . . A law may not restrain or abridge liberty of speech or press." *Id.* Whereas the First Amendment of the Federal Constitution solely protects free speech by restricting what the government may do, the California Constitution declares a general right to speak freely. *Compare* U.S. CONST. amend. I, *with* CAL. CONST. art. I, § 2(a). In this way, article I, section 2 of California Constitution's "provision [is] more definitive and inclusive than the First Amendment." *Robins*, 592 P.2d at 346; *see also* Fashion Valley Mall, L.L.C. v. NLRB, 172 P.3d 742, 749 (Cal. 2007) ("[T]he free speech clause in article I of the California Constitution differs from its counterpart in the federal Constitution both in its language and its scope.").

[119] Damon v. Ocean Hills Journalism Club, 102 Cal. Rptr. 2d 205, 209 (Ct. App. 2000).

[120] *E.g.*, Glob. Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1264 (C.D. Cal. 2001); ComputerXpress, Inc. v. Jackson, 113 Cal. Rptr. 2d 625, 638 (Ct. App. 2001).

[121] CAL. CODE CIV. PROC. § 425.16(e)(3).

(as found in *Perry*).[122] Before weighing the merits of this approach with regard to private websites, however, it is first necessary to provide a relevant background of cases which deal with the Internet and its legal implications.

III. THE HISTORY OF THE FIRST AMENDMENT AND THE INTERNET

A. RENO v. AMERICAN CIVIL LIBERTIES UNION

The Internet, only a relatively recent phenomenon in the larger context of American history, has been the primary subject of very few landmark cases of the Supreme Court. One of the earliest such cases, *Reno v. ACLU*,[123] concerned whether certain provisions of the Communications Decency Act of 1996 ("C.D.A."),[124] which sought to "protect minors from 'indecent' and 'patently offensive' communications on the Internet," violated the First Amendment's freedom of speech.[125]

The C.D.A. prohibited the "knowing transmission" of any sexually explicit or obscene or indecent "comment, request, suggestion, proposal, image, or other communication" to a minor.[126] The Court held that the C.D.A. constituted a "content-based regulation of speech," and thus applied strict scrutiny.[127] Because the C.D.A. was not narrowly tailored, and "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another," the Court held that the C.D.A. was unconstitutional.[128] The Internet, the Court noted, had become a crucial forum for speech: "[A]ny person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."[129]

Reno's significance became clear in later landmark First Amendment cases. *Reno* was relied on, at least in part, in such important free speech cases

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[122] *See* Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–47 (1983).

[123] 521 U.S. 844 (1997).

[124] 47 U.S.C. § 223(a)(1)(B)(ii), (d) (2013). For the full act, see Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133.

[125] *Reno*, 521 U.S. at 849.

[126] *Id.* at 859; 47 U.S.C. § 223(a)(1)(B)(ii).

[127] *Reno*, 521 U.S. at 868, 871 (applying "the most stringent review" of the C.D.A.'s provisions).

[128] *Id.* at 874.

[129] *Id.* at 870.

as *Hill v. Colorado*,[130] *Ashcroft v. Free Speech Coalition*,[131] *United States v. American Library Ass'n, Inc.*,[132] *Citizens United v. FEC*,[133] *United States v. Stevens*,[134] *Brown v. Entertainment Merchants Ass'n*,[135] and *Packingham v. North Carolina*.[136]

B. *PACKINGHAM v. NORTH CAROLINA*

The Court's recent decision in *Packingham v. North Carolina*,[137] and specifically Justice Kennedy's dicta concerning social media websites, may signal the beginning of a new development in cyberspace jurisprudence.

In 2002, Lester Gerard Packingham, then a twenty-one-year-old college student, had sex with a minor.[138] After pleading guilty to committing an offense against a minor, Packingham registered as a sex offender—a status that can remain for thirty years or more.[139] Eight years later, Packingham received a traffic citation, which a state court dismissed.[140] Pleased that he would not have to pay a fine, Packingham posted about it on his Facebook profile in celebration: "No fine, no court cost, no nothing spent . . . . Praise

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[130] 530 U.S. 703 (2000) (holding that Colorado's statute restricting any person within 100 feet of any healthcare facility from knowingly approaching within 8 feet of another person, without that person's consent, so as to distribute leaflets or engage in oral protests or counseling, violated the First Amendment).

[131] 535 U.S. 234 (2002) (holding that the provisions in the Child Pornography Prevention Act of 1996 which restricted simulated depictions of a minor engaging in sexually explicit conduct was unconstitutionally overbroad).

[132] 539 U.S. 194 (2003) (holding that the Children's Internet Protection Act, which withholds public funding of internet access in public libraries unless such libraries install content-filtering software to block pornography and prevent minors from accessing such material, was not violative of the First Amendment).

[133] 558 U.S. 310 (2010) (holding that a federal law which prohibited corporations from using funds from their general treasury to support candidates for federal office was an unconstitutional limit of speech).

[134] 559 U.S. 460 (2010) (holding that a federal law which criminalized depictions of animal cruelty created for commercial purposes was unconstitutionally overbroad).

[135] 564 U.S. 786 (2011) (holding that a California law restricting the sale of violent video games to minors was unconstitutional because video games are protected under the First Amendment).

[136] 137 S. Ct. 1730 (2017) (holding that a North Carolina law restricting registered sex offenders from accessing social-networking websites which the sex offender knows permits minor children to become members was not narrowly tailored and thus violated the First Amendment).

[137] *Id.*

[138] *Id.* at 1734.

[139] *Id.*

[140] *Id.*

be to GOD, WOW!"[141] This act of sharing his relief on Facebook ironically sent him back into court.

Until June 19, 2017, North Carolina had a statute criminalizing the use of "social networking" websites by registered sex offenders.[142] When a North Carolina police officer discovered Packingham's Facebook post, Packingham was arrested, convicted of violating the statute, and given a suspended prison sentence.[143] After the North Carolina Court of Appeals accepted Packingham's First Amendment defense and struck down the statute,[144] the North Carolina Supreme Court reversed, reinstating it.[145] The U.S. Supreme Court granted certiorari and ruled that the North Carolina statute was unconstitutional because it violated the free speech clause of the First Amendment.[146] Applying intermediate scrutiny, the Court held that the statute was not narrowly tailored to serve a significant government interest.[147]

North Carolina's statute prohibiting registered sex offenders from accessing social networking sites was not unique. In 2011, Louisiana enacted a statute which made unlawful "[t]he intentional use of a social networking website by a person who is required to register as a sex offender and who was convicted of . . . a sex offense . . . [against] a minor."[148] The law was invalidated as unconstitutional the next year.[149] Nebraska enacted a similar law,[150] but the district court enjoined the state from enforcing the statute on

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[141] *Id.* (citation omitted).

[142] The statute prohibited registered sex offenders from accessing a "commercial social networking Web site where the sex offender knows that the site permits minor children to become members *or* to create or maintain personal Web pages on the commercial social networking Web site." N.C. GEN. STAT. ANN. § 14-202.5(a) (emphasis added), *invalidated by Packingham*, 137 S. Ct. 1730.

[143] *Packingham*, 137 S. Ct. at 1734.

[144] *See* State v. Packingham, 728 S.E.2d 146, 154 (N.C. Ct. App. 2013).

[145] State v. Packingham, 777 S.E.2d 738, 741 (N.C. 2015). The North Carolina Supreme Court held that the statute was "a regulation of conduct," even after admitting that "social networking Web sites provide both a forum for gathering information and a means of communication." *Id.* at 744. The court reasoned that the limitation on access to "certain carefully-defined Web sites" only "incidentally burdens the ability of registered sex offenders to engage in speech." *Id.*

[146] *Packingham*, 137 S. Ct. at 1738.

[147] *Id.* at 1736.

[148] LA. STAT. ANN. § 14:91.5 (20121).

[149] Doe v. Jindal, 853 F. Supp. 2d 596 (M.D. La. 2012).

[150] NEB. REV. STAT. § 28-322.05 (2010), *invalidated by* Doe v. Nebraska, 898 F. Supp. 2d 1086 (D. Neb. 2012). The Nebraska statute was even more broad than the definition found in the U.S. Code: it prohibited access to any "social networking site . . . that allow[ed] a person who is less than eighteen years of age to access or use" the site. *Id.* Thus, the statute did not require that the site offer a communicative mechanism, and did not limit the definition to sites which were "likely to include a substantial number of minors." 34 U.S.C. § 20916 (2017).

December 30, 2009, only two days before the law was to take effect.[151] In 2012, the same court held that the statute violated the First Amendment because it was not narrowly tailored.[152]

Justice Kennedy's dicta in *Packingham* may signal a new direction for the Court in terms of deciding what the relationship is between the First Amendment and social media. In his opinion for the Court, Justice Kennedy wrote:

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more . . . . While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace–the 'vast democratic forums of the Internet' in general, and social media in particular. . . . This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.[153]

Later in the opinion, he characterized social media sites as "the modern public square," and remarked that, "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."[154] The import of these dicta should not be underestimated. Recent commentators have argued that Justice Kennedy was invoking the traditional public forum doctrine and intimating that it should apply to social media.[155] Commentators have also noted that Justice Kennedy may have left the door open for resurrecting the *Marsh/Logan Valley* functional-equivalence test and the *Lloyd Corp.* dedication test (collectively, the quasi-public forum doctrine) with respect to social media sites.[156] Kennedy's dicta appear to describe social media sites such as Facebook,

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[151] *See* Doe v. Nebraska, No. 8:09CV456, 2009 WL 5184328, at **1, 10 (D. Neb. Dec. 30, 2009).

[152] *Doe*, 898 F. Supp. 2d 1086.

[153] *Packingham*, 137 S. Ct. at 1735–36 (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)).

[154] *Id.* at 1737.

[155] *First Amendment—Freedom of Speech–Public Forum Doctrine*—Packingham v. North Carolina, 131 HARV. L. REV. 233, 238 (2017) ("[T]he Court's analogizing to public space suggested that the public forum doctrine—whereby the government protects expressive activity on property that it owns or controls—might extend to all or parts of the internet and social media.").

[156] *Id.* at 242 n.96 ("In addition to its effect on the public forum doctrine, *Packingham*'s public space rhetoric could reinvigorate the argument that certain digital platforms qualify as state actors, pursuant to the exception to the state action doctrine in *Marsh* . . . .").

Twitter, and LinkedIn, as functionally equivalent to a "public square."[157] Perhaps, if it can be found that such sites have "dedicate[ed] . . . [their] privately owned and operated [property] to public use,"[158] a court may reasonably hold, based on these dicta, that such sites are prohibited from infringing on its users' First Amendment rights.

i. Lower Court Opinions Citing Packingham

In the short time since the Supreme Court decided *Packingham*, Justice Kennedy's dicta have already produced mixed responses among lower courts. In *hiQ Labs, Inc. v. LinkedIn Corp.*, the Northern District of California relied on Kennedy's dicta in holding that LinkedIn, a social media website, could not prohibit hiQ Labs, Inc., a data-mining company, from accessing its website because LinkedIn's site was open to the public: "The Court's analogy of the Internet in general, and social networking sites in particular, to the 'modern public square,' embraces the social norm that assumes the openness and accessibility of that forum to all comers."[159] Additionally, the court noted that "the act of viewing a publicly accessible website is likely protected by the First Amendment."[160]

Other courts, however, have refused to apply Justice Kennedy's dicta in reaching their decisions. In *Nyabwa v. Facebook*,[161] the plaintiff alleged that Facebook violated his First Amendment rights via 42 U.S.C. § 1983 when it "locked [his] account."[162] While the Southern District of Texas cited *Packingham* in support of the notion that "social media sites like FaceBook [sic] and Twitter have become the equivalent of a public forum for sharing ideas and commentary,"[163] the court held that Nyabwa had failed to state a cause of action against Facebook as "the First Amendment governs only governmental restrictions on speech . . . ."[164] Because the court refused to characterize Facebook as a state actor, it held that Nyabwa had not stated a cause of action against Facebook.[165]

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[157] *Packingham*, 137 S. Ct. at 1737.

[158] Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972).

[159] 273 F. Supp. 3d 1099, 1112 (N.D. Cal. 2017) (citations omitted) (quoting *Packingham*, 137 S. Ct. at 1737).

[160] *Id.* at 1114 n.12 (citations omitted).

[161] No. 2:17-CV-24, 2018 WL 585467 (S.D. Tex. Jan. 26, 2018).

[162] Complaint and Brief for Plaintiff at 2, *Nyabwa*, 2018 WL 585467 (No. 2:17-CV-00024).

[163] *Nyabwa*, 2018 WL 585467, at *1.

[164] *Id.*

[165] *Id.*

IV. PROPOSALS FOR THE FUTURE

The *Perry* categories of public forum are inadequate for responding to the issues of the social media era. Websites such as Facebook and Twitter continue to discriminate based on viewpoint by blocking users who engage in protected First Amendment categories of speech. A visible sign of this is the banning of users who espouse hate speech,[166] which, under current legal doctrine, is protected by the First Amendment.[167] The potential for these sites to restrict the viewpoints of users with whom they disagree has serious implications for the online marketplace of ideas. Allowing a private party to "curate" the twenty-first century's marketplace of ideas to its liking contravenes the vision of American society that the framers of the First Amendment contemplated and strove to realize.[168]

Current legal doctrines are founded on assumptions about society and the communication of ideas which are outdated and no longer applicable in the Internet era. The Court has recognized that "[m]inds are not changed in

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[166] *See, e.g.*, Harper Neidig, *Twitter Launches Hate Speech Crackdown*, THE HILL (Dec. 18, 2017), http://thehill.com/policy/technology/365424-twitter-to-begin-enforcing-new-hate-speech-rules [https://perma.cc/35FG-JJPJ] ("Twitter will start banning users that promote hate speech in their account information and require users to delete images that feature hateful imagery, including racist logos."); Marne Levine, *Controversial, Harmful and Hateful Speech on Facebook*, FACEBOOK (May 28, 2013), https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054 [https://perma.cc/2TPR-N4VX] ("We work hard to remove hate speech quickly . . . .").

[167] Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'") (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929)). *See also* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).

[168] Former Supreme Court Justice Louis Brandeis characterized the Founding Fathers as envisioning an affirmative duty by the government to ensure that free speech is protected:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . . They believed that freedom . . . to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech . . . discussion would be futile . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *see also* Emerson, *supra* note 44, at 807 ("The effective operation of the system of freedom of expression imposes, in some situations, an obligation on the government to make facilities for expression available."). In his article, *Regulating Online Content Moderation*, Kyle Langvardt discusses the potential consequences of a governmental regulation of social media content moderation: "Any official move to limit content moderation on social media platforms will be challenged, both in policy discussions and in formal constitutional litigation, as an abridgment of the platform operators' own 'speech' rights as editors or curators. In challenging the new law under the First Amendment, the platforms would today occupy the high ground." Langvardt, *supra* note 80, at 1364.

streets and parks as they once were."[169] As society changes, so too must legal doctrine progress and evolve to meet the exigencies of the times.[170]

A. DISPENSING WITH THE PERRY CATEGORIES OF PUBLIC FORUM

The Court should dispense with its current category-based analysis of public forum, originating in *Perry*, because its "purpose" element "leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a nonspeech-related purpose for the area,"[171] and because its rejection of a functional-equivalence analysis precludes its adaptability to issues which arise in the context of emerging technologies and social media. Justice Kennedy criticized the Court's slavish adherence to the *Perry* categories in his concurrence in *International Society for Krishna Consciousness, Inc. v. Lee*:

> [The *Perry*] analysis is flawed at its very beginning. It leaves . . . almost no scope for the development of new public forums absent the rare approval of the government. The Court's error lies in its conclusion that the public forum status of public property depends on the government's defined purpose for the property, or on an explicit decision by the government to dedicate the property to expressive activity. In my view, the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property.[172]

Kennedy also argued that the *Perry* approach was ill-suited in the context of new technologies:

> [T]he policies underlying the doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property. . . . Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity.[173]

How may freedom of speech continue to exist if the doctrines meant to protect it cannot reach those spaces which society has chosen to be the most

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[169] Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 802–03 (1996).

[170] The evolving nature of the law, and First Amendment doctrines in particular, could also prove an obstacle for governmental action taken to protect speech rights on social media sites. *See* Langvardt, *supra* note 80, at 1366 ("[A]ny action the government might take to protect speech rights on social networks will depend for its survival on the future state of First Amendment doctrine.").

[171] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring).

[172] *Id.*

[173] *Id.* at 697.

important for public discourse, namely private social media websites? Public discourse in such spaces could be restricted by the viewpoints and biases of the private owners, or worse, certain subjects or all speech could be prohibited. The categorical approach is thus too inflexible to address speech concerns in the context of new and emergent virtual technologies, and should be discarded.

B. RESURRECTING THE QUASI-PUBLIC FORUM DOCTRINE FOR SOCIAL MEDIA

As noted above, some circuit courts and Justice Kennedy favor dispensing with the rigid categories of the public forum and adopting a functional-equivalence analysis, such as is found in *Marsh* and *Logan Valley*.[174] According to this quasi-public forum doctrine, if private property, such as a social media website, is the functional equivalent of a "public square" and is dedicated to the use of the public for speech purposes, a court might hold that it is a quasi-public forum that may not issue or enforce content-based or viewpoint-based restrictions on speech.[175]

i. First Amendment Rights Exist on Facebook and Twitter

Applying the Court's pre-*Perry* precedent, does the public have a right, protected under the U.S. Constitution, to use social media websites for First Amendment purposes? May Facebook or Twitter prohibit its users from espousing certain viewpoints on its website? After all, many members of the public assume that such sites were designed for the very purpose of exchanging ideas. The first questions one must ask before arriving at a conclusion under the quasi-public forum standard are the following: Have Facebook and Twitter *dedicated* the use of their property to the public for speech purposes?[176] Are Facebook and Twitter *functionally equivalent* to spaces in which the First Amendment protects speech?[177] Are there no alternative channels to Facebook and Twitter that would be as effective in

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[174] *See supra* notes 110–114, 172–173 and accompanying text.

[175] *See* Langvardt, *supra* note 80, at 1366–67 ("Counting online platforms as state actors would probably require courts to follow some variation on the 'quasi-municipality' doctrine of *Marsh v. Alabama*. [Additionally,] a case like *Logan Valley* would appear to offer a blueprint for defining online social platforms as state actors.").

[176] *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1972) (quoting Adderley v. Florida, 385 U.S. 39, 39 (1966)).

[177] *See* Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319 (1968), *abrogated by* Hudgens v. NLRB, 424 U.S. 507 (1976).

the communication of ideas?[178] If the answer to all three of these questions is yes, then Facebook and Twitter may not prohibit the public from exercising its First Amendment rights on its website under the quasi-public forum doctrine.

In determining whether a social media website such as Facebook or Twitter has opened its property to the use of the public, evidence of the owner's intent so to dedicate the property is material. In a 2016 statement, Colin Stretch, the Vice President and General Counsel of Facebook, declared that Facebook "remains a platform that is open and welcoming to all groups and individuals."[179] He further noted that the site is "a platform for all ideas."[180] In a similar vein, Tom Stocky, the Vice President of Facebook Search, declared that "Facebook is a platform for people and perspectives from across the political spectrum. . . . [Our] guidelines do not permit the suppression of political perspectives. Nor do they permit the prioritization of one viewpoint over another . . . ."[181] It is clear from these statements that Facebook has opened up its property for the use of the public for expressing ideas and communicating. There is evidence that Twitter has also dedicated its property to the same purposes. On a webpage which details the policies of Twitter, there is a page entitled "Defending and respecting the rights of people using our service."[182] On this page, Twitter claims one of its "core values" is "a two-part commitment to freedom of expression and privacy" which is "grounded in the United States Bill of Rights."[183] These statements, coupled with the fact that anyone may create an account on Twitter, support the notion that Twitter has dedicated its website to the use of the public for speech purposes. These online platforms "are in every sense created for the purpose of being open platforms–a point of central importance in cases involving speech on government property. These considerations suggest that *Logan Valley*'s rationale may apply even more urgently in the social media context."[184] As noted above, Facebook and Twitter may be the functional equivalents of the "public square," and alternatives to these "most important

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[178] *See Lloyd Corp.*, 407 U.S. at 567.

[179] Colin Stretch, *Response to Chairman John Thune's Letter on Trending Topics*, FACEBOOK (May 23, 2016), https://newsroom.fb.com/news/2016/05/response-to-chairman-john-thunes-letter-on-trending-topics [https://perma.cc/L5LJ-4B2G].

[180] *Id.*

[181] Tom Stocky, FACEBOOK (May 10, 2016, 12:38 AM), https://www.facebook.com/tstocky/posts/10100853082337958 [https://perma.cc/ZG5H-SRGN].

[182] *Defending and Respecting the Rights of People Using Our Service*, TWITTER, https://support.twitter.com/articles/20175189 [https://perma.cc/GLG9-7XAS] (last visited Oct. 6, 2017).

[183] *Id.*

[184] Langvardt, *supra* note 80, at 1367.

places . . . for the exchange of views" likely do not exist.[185] Thus, Facebook and Twitter, having satisfied the definition of the quasi-public forum, may not infringe on its users' First Amendment rights under the quasi-public forum doctrine.

ii. Nextdoor

Nextdoor is a social media site that launched on October 26, 2011,[186] with the aim of providing a "private social network for your neighborhood."[187] Users may only join the "Facebook-like website[]" that corresponds with their neighborhood once they verify that they do, in fact, live in that neighborhood.[188] The site operates largely as a virtual neighborhood town hall; members are encouraged to use Nextdoor to "get the word out about a break-in[,] [o]rganize a Neighborhood Watch Group[, and t]rack down a trustworthy babysitter[,]" among other things.[189]

In the few years since its release, Nextdoor has risen almost exponentially in popularity.[190] Not only has Nextdoor attracted advertisers,[191] but the site also has gained the attention of local government agencies and police departments as a possible tool for fighting and preventing crime.[192] Nextdoor

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[185] Packingham v. North Carolina, 137 S. Ct. 1730, 1735, 1737 (2017); *see also* Langvardt, *supra* note 80, at 1367 ("[T]he case is much more serious when a speaker is blocked from Facebook or Twitter, each of which is effectively a whole medium.").

[186] Leena Rao, *Benchmark-Backed Nextdoor Launches as a Private Social Network for Neighborhoods*, TECHCRUNCH (Oct. 26, 2011), https://techcrunch.com/2011/10/26/benchmark-backed-nextdoor-launches-as-a-private-social-network-for-neighborhoods [https://perma.cc/Z8A9-WBWR].

[187] NEXTDOOR, https://nextdoor.com [https://perma.cc/Q4N5-43DS] (last visited Sept. 15, 2018).

[188] Rao, *supra* note 186. Nextdoor employs various methods in confirming a user's residence within a neighborhood. *See id.* For example, "Nextdoor can send a postcard to a new member's address with a unique code printed on it [for logging in] . . . . Nextdoor can also [use] a credit card billing address." *Id.* Additionally, an existing, verified member "can vouch for a neighbor." *Id.*

[189] NEXTDOOR, *About Nextdoor*, https://nextdoor.com/about_us [https://perma.cc/5YBK-2374] (last visited Sept. 15, 2018).

[190] As of 2017, Nextdoor "is in 75 percent of all U.S. neighborhoods." Ingrid Lunden, *Nextdoor, Now in 160,000 Neighborhoods Globally, Expands to Germany*, TECHCRUNCH (Jun. 20, 2017), https://techcrunch.com/2017/06/20/nextdoor-now-in-160000-neighborhoods-globally-expands-to-germany [https://perma.cc/2XAZ-WTWQ] (last visited Sept. 15, 2018).

[191] Leena Rao, *Nextdoor Says It Will Make Tens of Millions in Revenue This Year*, FORTUNE (May 21, 2017), http://fortune.com/2017/05/21/nextdoor-revenue [https://perma.cc/HE5J-F8EW] ("Nextdoor has collected millions of dollars in revenue through advertising . . . .").

[192] *See, e.g.*, Kaveh Waddell, *The Police Officer 'Nextdoor'*, ATLANTIC (May 4, 2016),

has created "partnerships" with police agencies which allow the agencies to "post to specific neighborhoods and send real-time alerts."[193] Additionally, Nextdoor allows "public agencies" such as local governments to "[c]ommunicate with real residents in [their] jurisdiction."[194]

Given these facts, may Nextdoor discriminate against its users on the basis of viewpoint, for example? According to the state action doctrine, as discussed above, Nextdoor could be a state actor, and thus be limited from infringing on its users' First Amendment rights.[195] Nextdoor clearly "is a willful participant in joint action with the State or its agents" given its partnership with local government agencies around the country.[196] Whether Nextdoor is a quasi-public forum under the *Marsh* and *Logan Valley* standard is not as clear. The site functions like a neighborhood town hall, much like how the private company-owned town in *Marsh* functioned like a public town.[197] The fact that Nextdoor is not open to the general public, but requires verified registration, may preclude the site from fulfilling the public dedication prong.[198] Thus, although Nextdoor might not be a quasi-public forum, it arguably still may qualify as a state actor which may not violate its users' First Amendment rights.

CONCLUSION

The Internet has revolutionized the very concepts of "speech," and "information."[199] As Justice Kennedy's dicta in *Packingham* hints, a return to the functional-equivalence test found in *Marsh* and *Logan Valley* might be most effective in navigating the relationship between the First Amendment

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https://www.theatlantic.com/technology/archive/2016/05/nextdoor-social-network-police-seattle/481164 [https://perma.cc/AY5E-DEAR]; Miguel Helft, *A Facebook for Crime Fighters*, FORTUNE (July 1, 2014), http://fortune.com/2014/07/01/nextdoor-local-neighborhood-social-network-police [https://perma.cc/5R3Z-4L52] ("Nextdoor . . . has formed more than 170 partnerships with police departments and agencies . . . .").

[193] Helft, *supra* note 192.

[194] NEXTDOOR, *Nextdoor for Public Agencies*, https://us.nextdoor.com/agency [https://perma.cc/388A-YLZM] (last visited Sept. 15, 2018).

[195] *See supra* Part II(C).

[196] Dennis v. Sparks, 449 U.S. 24, 27 (1980); *see* Helft, *supra* note 192.

[197] *See* Marsh v. Alabama, 326 U.S. 501, 502–04 (1946).

[198] In *Marsh*, the company-owned town was accessible not only to the people that lived there, but also to "those passing through." *Id.* at 508. This fact, however, was just one of several attributes the Court weighed in determining whether the company town was functionally equivalent to a public town. *See id.* at 502–03.

[199] For an interesting discussion about the concept of "speech" in the social media era, including whether clicking the Facebook "like" button is "speech," see Leigh Ellen Gray, *Thumb War: The Facebook "Like" Button and Free Speech in the Era of Social Networking*, 7 CHARLESTON L. REV. 447 (2013).

and social media. Courts should therefore apply the quasi-public forum doctrine, emboldened by Justice Kennedy's dicta in *Packingham*, so as to protect more effectively the marketplace of ideas in the social media era.

Nā Mo'o o Ko'olau: The Water Guardians of Ko'olau
Weaving and Wielding Collective Memory in the War for East Maui Water

Lu'ukia Nakanelua

I. INTRODUCTION

He kino pāpālua: "A dual body" is how Kānaka Maoli (Native Hawaiians)[1] describe divine beings with two or more forms.[2] Relevant here, are those identified as Mo'o (dragons).[3] The physical and metaphysical realm of all fresh waterways in Hawai'i were organized and safeguarded under the totemic representations of Mo'o.[4] Kānaka Maoli revered and feared these deities, believing that if the Mo'o of their region were properly nurtured with offerings and worship, the Mo'o would respond in kind, ensuring abundant harvests and most importantly, healthy stream flow.[5] According to nineteenth-century Kanaka Maoli historian Samuel Kamakau, when fires were lit on altars near villages, Mo'o would appear: twelve to thirty-foot long reptiles, black as night, glistening in the water.[6] Most Mo'o are "female[] shapeshifters capable of appearing as beautiful maidens or water dragons. They dwell in caves, pools, and fishponds and are fierce guardians of freshwater resources."[7]

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[1] "Native Hawaiian," "Kānaka Maoli," or "Maoli" as used in this article, refers to individuals that can trace their ancestry back to the peoples inhabiting the Hawaiian Islands prior to the arrival of Captain James Cook in 1778, regardless of blood quantum. "Kanaka" is the singular, while "kānaka" is the plural. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127 (1986) [hereinafter HAWAIIAN DICTIONARY]. Both "Native Hawaiian" and "Indigenous" are capitalized to mark the unique legal and political statuses of these groups.

[2] MARY KAWENA PUKUI, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS & POETICAL SAYINGS 77 (1983) (also translating the proverb as "[a] supernatural being having two or more forms . . .") [hereinafter 'ŌLELO NO'EAU]. Analogous with Pukui's translation but with another emphasis, the author of this article also uses this proverb to characterize the "supernatural being" as the "Mo'o."

[3] Mo'o is defined as "dragon," "reptile of any kind," or "water spirit" in the Hawaiian language. HAWAIIAN DICTIONARY, *supra* note 1, at 253. The term mo'o is also used to classify orders of traditional priests in the Hawaiian religion. *See* JOHN PAPA II, FRAGMENTS OF HAWAIIAN HISTORY 39, 42 (Dorothy B. Barrère ed., Mary Kawena Pukui trans., 1959). In the context of this article, Mo'o is capitalized to acknowledge the term's use under Maoli epistemology.

[4] LUCIA TARALLO JENSEN & NATALIE MAHINA JENSEN, NĀ KAIKAMAHINE 'O HAUMEA DAUGHTERS OF HAUMEA WOMEN OF ANCIENT HAWAI'I 155–56 (2005).

[5] *Id.* at 159.

[6] MARTHA BECKWITH, HAWAIIAN MYTHOLOGY 125 (1970); *see also* DONALD D. KILOLANI MITCHELL, RESOURCE UNITS IN HAWAIIAN CULTURE 75 (4th ed. 1992) ("[M]o'o gods and goddesses were shaped like the little house lizards. But they were terrifying in appearance as they were black in color and from 12 to 30 feet long.").

[7] Shannon Wianecki, *The Sacred Spine*, MAUI MAG. (Sept. 2012), https://www.mauimagazine.net/the-sacred-spine/. Some examples of Mo'o guardians include: Kihawahine at the Haneo'o fishpond in Hāna, Maui; Mokuhinia at the Mokuhinia Pond in Lahaina, Maui; Hauwahine at Kawainui Pond of Ko'olaupoko, O'ahu; and Laniwahine of 'Uko'a Pond in Waialua, O'ahu. BECKWITH, *supra* note 6, at 125–26;

For Kānaka Maoli, the abundance of fresh water in Hawai'i's rivers, streams, and aquifers, including those of the Ko'olau district in East Maui,[8] were characterized as Kāneikawaiola, physical manifestations gifted from heaven on earth.[9] Village elders recall these beings throughout the district, such as the Mo'o guardian of Waianu stream, a renowned freshwater spring located in 'Ōhi'a gulch below the Hāna Highway, whose water is said to possess healing properties.[10] The late Helen Akiona-Nākānelua, a community historian and farmer, recalled her grandmother's encounter with this Mo'o: "You have to cross over this *kahawai*[11] and then watch below. Certain times she comes out and she sits on that rock combing her hair."[12]

A deeper meaning of Mo'o is that of the dragon's spine; a metaphor for a succession of oral tradition and lineal descendants.[13] A mo'olelo (story)[14] is a progression of words that not only recounts the story of an individual, but is also woven into the collective fabric or memory of Maoli society.[15]

MITCHELL, *supra* note 6.

[8] The Ko'olau district encompasses the northeast coast of East Maui including the Nāhiku, Ke'anae, Honomanū, and Huelo watersheds and communities; the relevant portions at issue in this article. *See* ELSPETH P. STERLING, SITES OF MAUI 108–09 (1998); OFFICE OF ENVTL. QUALITY CONTROL, ENVIRONMENTAL IMPACT STATEMENT PREPARATION NOTICE: PROPOSED LEASE (WATER LEASE) FOR THE NĀHIKU, KE'ANAE, HONOMANŪ, AND HUELO LICENSE AREAS 1-1 to 1-3 (Feb. 2017) [hereinafter EISPN], *available at* http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2017-02-08-MA-EISPN-East-Maui-Water-Lease.pdf.

[9] *See* D. Kapua'ala Sproat, *From Wai to Kānāwai: Water Law in Hawai'i*, *in* NATIVE HAWAIIAN LAW: A TREATISE 529 (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter Sproat, *From Wai to Kānāwai*]. Kāneikawaiola, or "Procreator-in-the-water-of-life[,]" is a reference to Kāne, one of the four principal akua or eponymous ancestors in the Maoli pantheon who is the totemic representation of fresh water resources. E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAI'I: THEIR LIFE, LORE, AND ENVIRONMENT 63–64 (1972); *see also* D. KAPUA'ALA SPROAT, OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAI'I 52 (2009) [hereinafter SPROAT, OLA I KA WAI PRIMER] ("[Kāne is] [s]ometimes referred to as Kāneikawaiola, or Kāne of the life-giving waters.").

[10] *See* 2 KEPĀ MALY & ONAONA MALY, WAI O KE OLA: HE WAHI MO'OLELO NO MAUI HIKINA ORAL HISTORY INTERVIEWS WITH FAMILIES OF HĀMĀKUA POKO, HĀMĀKUA LOA AND KO'OLAU, EAST MAUI 140, 307–08 (2001) [hereinafter MAUI HIKINA INTERVIEWS], *available at* http://uploads.worldlibrary.net/uploads/pdf/elib/collect/maly7/index/assoc/d0.dir/book.pdf

[11] Kahawai means "stream." HAWAIIAN DICTIONARY, *supra* note 1, at 111.

[12] MAUI HIKINA INTERVIEWS, *supra* note 10, at 307.

[13] JENSEN & JENSEN, *supra* note 4, at 156; *see also* HAWAIIAN DICTIONARY, *supra* note 1, at 253.

[14] HAWAIIAN DICTIONARY, *supra* note 1, at 254.

[15] *See* Sam Ka'ai, *An Introduction to Hawaiian Thought, Mo'olelo*, *in* THINKING ACROSS CULTURES: THE THIRD INTERNATIONAL CONFERENCE ON THINKING xi (Donald M. Topping et

Likewise, mo'okū'auhau (genealogy)[16] intimates that Kānaka Maoli viewed the dragon's "interlocking bones as symbolic of their own sacred lineage."[17] Mo'o are indisputably significant as an emblem or totemic representation of fresh water.[18] The people of Ko'olau, Maui, in particular, claim special kinship with several Mo'o that are traditionally renowned in that region.[19] Today, residents, Kānaka Maoli taro famers, subsistence gatherers, and fisherman who are also direct descendants of the original inhabitants of the area (collectively "nā Mo'o o Ko'olau"), are called once more to safeguard their cultural landscape and relationship to it in the complex reality of Hawai'i's scarce and finite freshwater resources, which are increasingly coveted by the economy's rapacious appetite.[20]

The war for fresh water in East Maui,[21] pits the interests of a Kānaka Maoli taro farming community against Alexander and Baldwin ("A&B"), one of

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al. eds., 1989). In 1987, Maui's Sam Kaha'ieuanalio Ka'ai, a master carver and notable lecturer of Native Hawaiian epistemology, contemplated: "does the Mo'o live here anymore?" *See id.* at 2. This query was posed in his keynote address to the Third International Conference on Thinking during the time period between "post-illegal Overthrow" and "pre-Hawaiian Renaissance" where Kānaka Maoli were losing (if not already lost) the ability to think and speak in Maoli terms and concepts. *See* L. Kaipoleimanu Ka'awaloa, *Translation v. Tradition: Fighting For Equal Standardized Testing Ma Ka 'Ōlelo Hawai'i*, 36 U. HAW. L. REV. 487, 490–91 (2014). Correspondingly, it was a generation where Kānaka Maoli culture, "fell into disuse, discarded and interesting only because of its association with the past." *The Lifework and Collective Song of Sam Kaha'i Kaai*, KUA'AINA ASSOCIATES, INC., http://kuaainaassociates.com/Kaai.html (last visited Nov. 12, 2018). In elucidating the mo'o's power and potential to assemble Kānaka Maoli and move forward into a self-defined future, Ka'ai noted that "[w]hen we speak of history, or the foundation of our thoughts, we speak of mo'olelo, and therefore we speak of the dragon. Not the little gecko running up your wall." Ka'ai, *supra*.

[16] Pukui defines "mo'okū'auhau" as "genealogical succession." HAWAIIAN DICTIONARY, *supra* note 1, at 254.

[17] Interview with 'Ōlohe Kyle Nakanelua, Maoli farmer and former Fire Captain, in Maui, Haw. (Aug. 30, 2017) [hereinafter 'Ōlohe Nakanelua Interview].

[18] JENSEN & JENSEN, *supra* note 4, at 156.

[19] 'Ōlohe Nakanelua Interview, *supra* note 17.

[20] *See* Teresa Dawson, *Hawaiian Farmers, Cultural Practitioners Demand Environmental Review for East Maui Water Diversion*, ENV'T HAW. (May 2015), http://www.environment-hawaii.org/?p=8018.

[21] *See* D. Kapua'ala Sproat, *A Question of Wai: Seeking Justice Through Law for Hawai'i's Streams and Communities*, *in* A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 199, 202–15 (Noelani Goodyear-Ka'ōpua et al. eds., 2014) (discussing the conflicts over water in East Maui and the legal proceedings that resulted); Pauahi Ho'okano, *Aia i Hea ka Wai a Kāne? (Where Indeed Is the Water of Kāne?) Examining the East Maui Water Battle*, *in* A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY, *supra*, at 220–31 (detailing the historical and cultural background of the ongoing fight for the water in East Maui). In August 1995, former World Bank Vice President for Sustainable Development Ismail Serageldin made a highly quoted prediction for the new

the most powerful economic forces in Hawai'i, and illuminates the extent to which the State of Hawai'i Department of Land and Natural Resources ("DLNR"), Board of Land and Natural Resources (the "Board"), and the State Commission on Water Resource Management ("Water Commission") have shirked their public trust responsibilities.[22] Since the 1880s, this conflict of water has been a symbolic rallying cry for those on both extremes of a fierce debate about commercial development, environmental protection, and Indigenous rights on a local, national, and international scale.[23] On one hand, this conflict epitomizes years of injustice in which the industrial sugar plantations' wholesale appropriation and redirection of surface water in this region physically and spiritually eviscerated Kānaka Maoli communities, whose Indigenous well-being and livelihood are critically dependent on natural resources, including fresh water.[24] On the other hand, proponents also exploit this conflict in an attempt to justify the development and maintenance of Central, South, and Upcountry Maui's future.[25] Powerful images with a deep grip on the island psyche—such as small-scale organic farmers, the romantic homegrown cowboy, and burgeoning urban communities—allow A&B, along with its respective subsidiaries, to paint

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millennium, "if the wars of this century were fought over oil, the wars of the next century will be fought over water—unless we change our approach to managing this precious and vital resource[.]" Marcus Dubois King, *Water Security*, *in* AN INTRODUCTION TO NON-TRADITIONAL SECURITY STUDIES 162 (Mely Caballero-Anthony ed., 2016)*; see, e.g.*, Geoffrey Willis, *Continuing Water Wars in California—Different Issues, Same Fight*, 56 ORANGE COUNTY LAW. 20, 20 (2014); Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 ECOLOGY L.Q. 279, 284–85 (2003); Jacinta Ruru, *Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand*, 22 PAC. RIM L. & POL'Y J. 311, 312–14 (2013).

[22] *See* Hoʻokano, *supra* note 21.

[23] *See generally* Summer Sylva, *Indigenizing Water Law in the 21st Century: Na Moku Aupuni O Koʻolau Hui, A Native Hawaiian Case Study*, 16 CORNELL J. L. & PUB. POL'Y 563 (2007).

[24] *See generally* D. Kapuaʻala Sproat & Isaac H. Moriwake, *Ke Kalo Paʻa O Waiāhole: Use of the Public Trust as a Tool for Environmental Advocacy*, *in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 247 (Clifford Rechtschaffen & Denise Antolini eds., 2007); D. Kapuaʻala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127 (2011) [hereinafter Sproat, *Wai Through Kānāwai*].

[25] *See* Lisa Kubota, *Tensions Flare in Ongoing Battle for Maui Water Rights*, HAW. NEWS NOW (Oct. 10, 2017, 1:47 AM), http://www.hawaiinewsnow.com/story/36558289/tensions-run-high-during-fierce-fight-over-maui-water-rights; Wendy Osher, *A&B Seeks Renewal of Water Permit for East Maui Diversions*, MAUI NOW (Nov. 9, 2017, 9:46 AM), http://mauinow.com/2017/11/09/ab-seeks-renewal-of-water-permit-for-east-maui-diversions/.

themselves as public trust stewards in their battle to maintain the status quo as a selfless defense of true constitutional and moral government.[26]

On December 12, 2016, the last of Hawai'i's plantation oligarchy,[27] A&B, and its subsidiary, Hawaiian Commercial and Sugar Company ("HC&S"), completed its final sugarcane harvest on Maui, closing the door on the extensive saga of industrial agriculture in Hawai'i.[28] As that chapter closes however, a portion of it remains unresolved: the 140-year-old war over A&B's continued stream diversions of East Maui water to feed what are now empty fields[29] —literally and figuratively violating the State's constitutional, statutory, and moral obligations to "protect, enhance, and reestablish, where practicable, beneficial instream uses of water"[30] to actualize traditional and customary Kānaka Maoli rights and environmental protection.[31]

This story is still unfolding. During the 2016 Legislative Session, legislators poured over a shocking and crafty measure, which will shape the future of water conflicts in Hawai'i.[32] On June 27, 2016, Governor David Ige signed House Bill 2501 into law (Act 126), which allows current revocable permit holders—such as A&B—to continue taking water under no more than three one-year holdover permits while the Board processes their thirty-year long-term water lease applications.[33] Specifically, Act 126 allows A&B and its oldest subsidiary, East Maui Irrigation ("EMI"), to continue appropriating water from East Maui's public streams that flow across State public land areas located in Nahiku, Huelo, Honomanu, and Ke'anae, to

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[26] *See* Shannon Wianecki, *Bittersweet Harvest*, HANA HOU! (Dec. 2016), http://hanahou.com/pages/magazine.asp?MagazineID=66&Action=DrawArticle&ArticleID=1627.

[27] Beginning in the Territory of Hawai'i during the early twentieth century, the "Big Five"—a group of Caucasian capitalists who began as sugarcane processing corporations—wielded immense influence over Hawai'i's economy and political system. Daylin-Rose Gibson, *Remembering the "Big Five": Hawai'i's Constitutional Obligation to Regulate the Genetic Engineering Industry*, 15 ASIAN-PAC. L. & POL'Y J. 213, 217 n.21 (2014) (citing CAROL WILCOX, SUGAR WATER 20 (1996)). The group included A&B, Castle & Cooke, C. Brewer & Co., Amfac (formerly known as American Factors), and Theo H. Davies & Co. *Id.*

[28] Associated Press, *End of An Era: Hawaii's Last Sugar Mill Wraps Up Final Harvest*, HONOLULU STAR ADVERTISER (Dec. 12, 2016, 11:13 AM), http://www.staradvertiser.com/2016/12/12/business/business-breaking/end-of-an-era-hawaiis-last-sugar-mill-wraps-up-final-harvest/.

[29] Colleen Uechi, *Life After Sugar—A Year Later*, MAUI NEWS (Dec. 24, 2017), http://www.mauinews.com/news/local-news/2017/12/life-after-sugar-a-year-later/.

[30] HAW. REV. STAT. ANN. § 174C-71(4) (West 2018).

[31] *See In re* Water Use Permit Applications, 94 Hawai'i 97, 136–38, 9 P.3d 409, 448–50 (Haw. 2000) [hereinafter Waiāhole I].

[32] *See* H.B. 2501, 28th Leg., Reg. Sess. (Haw. 2016).

[33] *See* Act of June 27, 2016, ch. 126, § 1, 2016 Haw. Sess. Laws 420 (codified as amended at HAW. REV. STAT. § 171-58(c)).

Central Maui.[34] Here, A&B's other subsidiary, HC&S, operated its industrial enterprise, thereby "side-stepping a January 2016 court ruling invalidating the corporations' permits to do so."[35] Subsequently, "[o]n December 9, 2016, just days before the final harvest, [the Board] approved continued diversions with conditions."[36]

Indeed, the very framing of the East Maui water issue and other statewide water conflicts as the "status quo" or "injustice" invokes social memory, including which stories define cultural norms.[37] Where did these stories come from, whose stories were ignored or erased, and, most urgently, what new stories can we tell to help reclaim our cultural landscape?[38] Framing group memories of injustice is vital because it will help to "determine[] the power of justice claims or opposition to them."[39] Navigating conflicts with deep social implications over water, or other limited resources, is daunting and painful, and the collective memory of the injustice of these conflicts is critical.[40]

In Hawai'i, wai o ke ola, water is life.[41] It is no coincidence that Hawai'i's water resources "has historically been, and continues to be, a public trust resource."[42] "This trust status requires the State [of Hawai'i ("State")] to both protect and ensure the 'maximum reasonable and beneficial' use of water."[43] "It imposes an 'affirmative duty to take the public trust into account

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[34] *See id.*

[35] Christina Lizzi, *Ola I Ka Wai: The Battle Over East Maui Waters*, KA HULI AO CENTER FOR EXCELLENCE IN NATIVE HAWAIIAN L., https://blog.hawaii.edu/kahuliao/ka-moae/summer-2017/ola-i-ka-wai/ (last visited Oct. 21, 2018); *see* Order Granting Plaintiffs' Motion for Partial Summary Judgment, Filed October 21, 2015 at 4, Carmichael et al. v. Bd. of Land and Nat. Res. et al., No. 15-1-0650-04 (Haw. 1st Cir. Jan. 8, 2016) [hereinafter Nishimura Order].

[36] Lizzi, *supra* note 35; *see* Letter from Ian C. Hirokawa, Special Projects Coordinator, Dep't of Land and Nat. Res., to Bd. of Land and Nat. Res. (Dec. 9, 2016) (on file with author) [hereinafter Board's Revocable Permit Approval Dec. 9, 2016] (recommending the Board approve the revocable permits to A&B and EMI, "provided however, that the Land Board reserves and delegates to the Chairperson the right at any time to review and reestablish new rental charges for any of the subject revocable permits").

[37] *See* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1756–64 (2000).

[38] *See* William Cronon, *A Place for Stories: Nature, History, and Narrative*, 78 J. AM. HIST. 1347, 1376 (1992).

[39] Eric K. Yamamoto & Catherine Corpus Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of Rice v. Cayetano*, *in* RACE LAW STORIES 540, 558 (Rachel F. Moran & Devon W. Carbado eds., 2008).

[40] *See* Doremus & Tarlock, *supra* note 21, at 280.

[41] MAUI HIKINA INTERVIEWS, *supra* note 10, at 1.

[42] Lizzi, *supra* note 35; *see also* Sproat, *From Wai to Kānāwai*, *supra* note 9, at 529.

[43] Lizzi, *supra* note 35.

in the planning and allocation of water resources and to protect public trust uses whenever feasible[,]'"[44] including the traditional and customary rights of Kānaka Maoli.[45] Public trust purposes have priority over private commercial uses.[46] As the Hawai'i Supreme Court declared, "any balancing between public and private purposes must begin with a presumption in favor of public use, access, and enjoyment."[47]

> Under the public trust doctrine, "offstream diverters who seek water for their private commercial use must prove both the social and economic utility of the proposed use and absence of alternative sources of water." In practice, however, [ignorantly or not,] the State continues to violate the public trust doctrine [and dismiss Kānaka Maoli rights] by authorizing corporations' diversions of public water for private profit. The legislature's passage of H.B. 2501 and [the Board's] approval of [a 'holdover status'] for continued diversions exemplify this practice.[48]

The question of A&B's continued access on "holdover status" to water throughout Hawai'i is a threshold struggle over the collective memory of how East Maui water was "procured" by A&B, the "politics as usual" that justified A&B's historical and ongoing monopoly of water on Maui, and the polarized treatment of the public trust doctrine and Kānaka Maoli rights.[49] This battle has broader implications for groups seeking innovative strategies for reclaiming and preserving their public trust resources, including water.[50]

This article explores the catalyst strategy,[51] a pinnacle agency for institutional change, and possible alternatives, through the collective memory of injustice surrounding both East Maui taro farmers and A&B, during the development and passage of HB 2501. Part II of this article explores

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[44] *Id.* (quoting Waiāhole I, 94 Hawai'i 97, 141, 9 P.3d 409, 453 (2000)).

[45] *Waiāhole I*, 94 Hawai'i at 137, 9 P.3d at 449 ("[U]phold[ing] the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose.").

[46] *See* Lizzi, *supra* note 35; *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454.

[47] *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454.

[48] Lizzi, *supra* note 35 (quoting another source).

[49] *See* Horn & Yamamoto, *supra* note 37, at 1760.

[50] *See, e.g.*, Timothy O'Neill, *Water and Freedom: The Privatization of Water and Its Implications for Democracy and Human Rights in the Developing World*, 17 COLO. J. INT'L ENVTL. L. & POL'Y 357 (2006) (discussing the impacts of water privatization on democracy struggles in the case of Cochabamba, Bolivia); Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 343 (2017) (analyzing environmental challenges facing indigenous communities through an environmental justice lens in the case of the Standing Rock Sioux tribe's face off with the Dakota Access Pipeline).

[51] A catalyst strategy encompasses the "ability to convince states and local populations to adjust to the new reality of societal support for environmental protection." Doremus & Tarlock, *supra* note 21, at 285.

collective memory and explains its importance for justice struggles, particularly for combatants in legal battles over water. Part III examines water's cultural and historical significance in Hawai'i and how commercial stream diversions changed those perceptions and perspectives. This section also dives into the role of stream flow in East Maui from the mountains to the sea, and analyzes it in the context of water appropriation. Part IV interrogates the collective memory woven in the legislative history and the conference committee's justifications for the passage of HB 2501, with a distinct focus on the competing narratives deployed by A&B and Ko'olau Maui taro farmers.

II. WIELDING COLLECTIVE MEMORY AS A STRATEGIC TOOL IN SHAPING PUBLIC PERSPECTIVES AND PERCEPTIONS OF WATER IN HAWAI'I

A. Understanding the Mo'o: Collective Memory as an Analytical Legal Framework

"In the beginning was the story. Or rather: many stories, of many places, in many voices, pointing toward many ends."[52]

The Maoli principles of collective memory emphasize the concept of Mo'o and Kiha, also known as Mōkiha,[53] "which embodies the extended understanding of the reptilian totem, often confused as mythology, [as] only one of many totemic elements ascribed to the . . . process known as *Kā-kū-'ai*, an ancient philosophy that interweaves the mystical fibers of the physical world to those of the metaphysical one."[54] Ancient Maoli lore is "the depository of definitive history and metaphysical philosophy" and manifests itself through an "allegorical structure known as *kaona*."[55] To understand Maoli customs and traditions, it is critical to make sense of this Indigenous "thought process cunningly ensconced in metaphor."[56] Eighteenth-and nineteenth-century Christian scholars were neither adept nor accepting of this epistemology.[57] Because of their arrogance and ignorance, "most metaphysical facts were relegated to the dark corners of myth and fantasy

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[52] Cronon, *supra* note 38, at 1347.

[53] JENSEN & JENSEN, *supra* note 4, at 156.

[54] *Id.* at 155.

[55] *Id.*

[56] *Id.*

[57] *Id. See generally* JURI MYKKÄNEN, INVENTING POLITICS: A NEW POLITICAL ANTHROPOLOGY OF THE HAWAIIAN KINGDOM 75–164 (2003).

rather than deciphered as a holistic history which embodied the convictions of a people towards their material and spiritual origins."[58]

In the metaphysical realm, possibly the most ancient totemic image of all fresh waterways was the "dragon" manifestations of Mōkiha.[59] Maoli society was organized around these images, which represented natural resources within each land division, and assigned people into factions of responsibilities.[60] These specific responsibilities later "evolved into natural and supernatural laws concerning the environment—all designed to aid in the perpetuation of the *Maoli* and the Divine Earth which they had created as Spirit and inherited as Humans."[61]

Master carver and notable lecturer of Native Hawaiian epistemology, Sam Kaha'ieuanalio Ka'ai infamously asserted that the Mo'o is a major force of life.[62] Its head peers into the future, the white dawn yet to come.[63] Its front feet are the 'opio (youth), reaching, touching, examining.[64] Next come the m[ā]kua (parents), the stable hind legs of the dragon, and beyond them, the k[ū]puna (elders).[65] The k[ū]puna form the spine, the collective song of all that came before.[66] They tell how other dawns were and how this dawn will be.[67] For Ka'ai, understanding Mo'o as paradigm, the foundation of Maoli understanding of law, culture, and society, is critical to the way Kānaka Maoli create and re-create community identity and ancestral homelands as past, present, and future generations.[68] Likewise mo'olelo (story or history)[69] is an oral or written account resulting from haku mo'olelo, "a way to compose accounts that tell of the [Kānaka] Maoli past."[70] Haku mo'olelo yields a breathable narrative that is indisputably imbued with Kānaka Maoli tradition, committed to memory, and expressed through variations of 'oli (the chant)[71] and mele (the song).[72] Haku mo'olelo, in short, is a method for

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[58] JENSEN & JENSEN, *supra* note 4, at 155; *see also* Maia Lichtenstein, *The Paradox of Hawaiian National Identity and Resistance to United States Annexation*, 16 PENN. HIST. REV. 38, 42–44 (2008).

[59] JENSEN & JENSEN, *supra* note 4, at 156.

[60] *Id.*

[61] *Id.*

[62] Ka'ai, *supra* note 15, at xi.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at xi–xii.

[68] Interview with Sam Kaha'ieuanalio Ka'ai, Master Carver, in Maui, Haw. (Aug. 30, 2017).

[69] HAWAIIAN DICTIONARY, *supra* note 1, at 254.

[70] KANALU G. TERRY YOUNG, RETHINKING THE NATIVE HAWAIIAN PAST xii (1999).

[71] HAWAIIAN DICTIONARY, *supra* note 1, at 285.

[72] HAWAIIAN DICTIONARY, *supra* note 1, at 245; YOUNG, *supra* note 70, at xii.

describing and interpreting Kānaka Maoli subject matter in the context of Hawaiian language frames.[73]

Notably, University of Hawai'i law professor Eric K. Yamamoto was among the first to transform the Mo'o paradigm, or collective memory, by accentuating its "significance in a social justice context."[74]

> [T]he struggle for justice is largely based on how the public and courts view a group's story and image through its history of injustice. In this legal context, collective memory informs the way in which historical injustices are "aggravated or salved." As Professor Yamamoto observed, "[i]ndividuals, social groups, institutions, and nations filter and twist, recall and forget 'information' in reframing shameful past acts (thereby lessening responsibility) as well as in enhancing victim status (thereby increasing power)." The "recounting of historical events often determines whether, and to what extent, historical injustice occurred and the present-day need for rectification."[75]

Collective memory defines a group's past, and thus, "situates a group in relation to others in a power hierarchy."[76] Whoever is in control or shapes the collective memory has the "narrative power to reframe the past so as to include certain events and people, exclude others, and redefine the meaning of landscape accordingly."[77] Compelling narratives function in two ways: (1) by borrowing language, ideas, and images to constitute the stories we need to comprehend the past; and (2) by providing a "grand narrative [that] frames the relationship of the past to the present."[78] Collectively, these narrative structures produce frames for our memories, reinforcing a group's identity to make the past meaningful.[79]

Collective memory is also selective, which creates a lens that is heavily influenced by direct experiences, cultural forms, institutional practices, and political ideologies.[80]

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[73] *See* YOUNG, *supra* note 70, at xii.

[74] Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 490 (2017).

[75] *Id.* (internal citations omitted) (citing Hom & Yamamoto, *supra* note 37, at 1756–58); *see also* Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai'i's Plantations to Congress—Puerto Ricans' Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353, 363 (2011).

[76] Hom & Yamamoto, *supra* note 37, at 1758.

[77] Cronon, *supra* note 38, at 1364.

[78] Hom & Yamamoto, *supra* note 37, at 1762.

[79] *Id.* at 1761–62.

[80] *Id.* at 1762.

> A way of seeing is a way of not seeing, a way of remembering is a way of forgetting, too. If memory were only a kind of registration, a "true" memory might be possible. But memory is a process of encoding information, storing information and strategically retrieving information, and there are social, psychological, and historical influences at each point.[81]

These insights are underscored in Professor Yamamoto's analysis of the U.S. Supreme Court decision in *Rice v. Cayetano*,[82] in which he demonstrates "how collective memory can be deployed to undermine Kānaka Maoli rights and advances in self-determination."[83] In that case, the U.S. Supreme Court majority narrowly recited its version of Hawaiian history, in effect ignoring and thus silencing the Kānaka Maoli narrative.[84] Moreover, the Court "crafted a story of racial discrimination against whites while conveniently omitting the deep history of white racism integral to the dismantling of the Hawaiian nation."[85]

Professors Melody Kapilialoha MacKenzie and D. Kapua'ala Sproat provide another example in their response[86] to a 2016 article on the Crown

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[81] *Id.* (quoting Peter Burke, *History as Social Memory, in* MEMORY: HISTORY, CULTURE AND THE MIND 97, 103 (Thomas Butler ed. 1989)).

[82] 528 U.S. 495 (2000).

[83] MacKenzie & Sproat, *supra* note 74, at 495–96. "In 1996, Harold 'Freddy' Rice, a descendant of a white missionary family, filed suit against Hawai'i governor Ben Cayetano, seeking to invalidate the Office of Hawaiian Affairs' (OHA's) indigenous Hawaiians-only election for the agency's Board of Trustees." *Id.* at 496 (citing *Rice*, 528 U.S. at 509). OHA "is an agency of the State of Hawai'i established as a result of the 1978 Constitutional Convention to combat the lingering effects of colonialism by improving the conditions of Hawai'i's indigenous people." *Id.* at 496 n.76 (citing HAW. CONST. art. XII, § 5); *see also* Melody Kapilialoha MacKenzie, *Native Hawaiians and U.S. Law*, *in* NATIVE HAWAIIAN LAW, *supra* note 9, at 267, 284–85.

[84] Hom & Yamamoto, *supra* note 37, at 1775–76; MacKenzie, *supra* note 78, at 285–86. "The state explained that the Native Hawaiian people, similar to Native Americans, constitute a 'political' class as opposed to a 'racial' minority, and therefore, the election was legal." MacKenzie & Sproat, *supra* note 74, at 496–97.

> The U.S. District Court for the District of Hawai'i rejected Rice's claims and upheld the State of Hawai'i's treatment of Native Hawaiians as a political entity. Rice v. Cayetano, 963 F. Supp. 1547, 1548, 1553–58 (D. Haw. 1997). In doing so, Judge David Alan Ezra both recognized Native Hawaiians as the archipelago's indigenous people and respected their continuing relationship with the state and federal governments as analogous to other native people throughout the United States. *Id.* at 1548, 1553–54. The Ninth Circuit affirmed. Rice v. Cayetano, 146 F.3d 1075, 1076 (9th Cir. 1998). But, the U.S. Supreme Court reversed. [Rice v. Cayetano, 528 U.S. 495, 498–99 (2000)].

Id. at 497 n.78.

[85] *Id.* at 497 (citing Hom & Yamamoto, *supra* note 37, at 1775).

[86] *See generally id.*

Lands Trust,[87] written by the late James S. Burns, former Chief Judge of the Hawai'i Intermediate Court of Appeals, where he took issue with several conclusions reached by the late Professor Jon M. Van Dyke in the book, *Who Owns the Crown Lands of Hawai'i?*[88] Similar to the narrative approach deployed by the *Rice* majority, Burns' Article "claims that before the 1893 overthrow [of the Hawaiian Kingdom], indigenous Hawaiians did not control their government, downplaying, if not justifying, the overthrow of the monarchy."[89]

These insights are further explored in Professor Susan K. Serrano's article on how racialization shaped the modern-day collective memory of Puerto Ricans in Hawai'i and Puerto Rico and the way it was used as a social control to keep Puerto Ricans at the polity's margins of the United States.[90] Analogous to the narrative approach deployed by the *Rice* majority and Burns' article, the *Igartúa-de la Rosa* majority "provided a narrow and selective historical account of Puerto Rico's "negotiated" relationship with the United States."[91] Together, these examples epitomize the "fierce battle over conflicting histories"[92] with significant impacts for indigenous people in Hawai'i and beyond while "illuminat[ing] 'the political and cultural dynamics and strategic import of collective memory for justice claims processed through the U.S. legal system.'"[93]

B. Collective Memory in Practice: Its Power and Implications for Justice Struggles in Hawai'i and Beyond

> *To try to escape the value judgments that accompany storytelling is to miss the point of history itself, for those stories we tell, like the questions we ask, are all finally about value.*[94]

Collective memory is "shaped by and in turn shapes perceptions of justice and injustice," and therefore impacts everything, including the perspectives on water use, claims, and rights of East Maui taro farmers and other

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[87] James S. Burns, *The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?*, 38 U. HAW. L. REV. 213 (2016).

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

[89] MacKenzie & Sproat, *supra* note 74, at 498 (citing Burns, *supra* note 82, at 238).

[90] *See generally* Serrano, *supra* note 75.

[91] *See id.* at 412.

[92] MacKenzie & Sproat, *supra* note 74, at 496 (citing Hom & Yamamoto, *supra* note 37, at 1771); *see also* Yamamoto & Betts, *supra* note 39, at 563.

[93] MacKenzie & Sproat, *supra* note 74, at 496 (quoting Hom & Yamamoto, *supra* note 37, at 1777).

[94] Cronon, *supra* note 38, at 1376.

historically disadvantaged groups.[95] Like the Mo'o's methods of enchantment, collective memory's vital role in strategies aimed to actualize justice stretches "beyond the historical facts and into the mind, spirit, and culture of both past and present[,]" with serious consequences for the future.[96] By doing so, "memories are constructed in the context of 'not only rights norms but also larger societal understandings of injustice and reparation.'"[97] The battles between conflicting collective memories are generally battles between Mo'o, or colliding ideologies, where combatants are fighting to protect their ideals toward water and their relationship to it.[98] Critically, collective memory can be deployed "regressively or progressively, depending on who employs the more compelling narrative."[99]

As a tool for justice struggles, including reclaiming water resources, Professor Yamamoto identifies five strategic points.[100] First, "[j]ustice claims of 'right' start with struggles over memory."[101] Strategy-wise, "therefore, if [groups] seek justice by claiming civil[,] human[, and in this case water] rights, [groups] must at the outset critically engage the dynamics of group memory of injustice."[102]

Second, the:

> Group memory of injustice is characterized by the active, collective construction of the past. It is "active" because it requires present-day activity; it is not about simply recalling past events.[103] That memory is "collective," because it emerges from interactions among people, institutions, media, and other cul-tural forms. It involves "construction" because those collective memories are not found, but rather are built and continually altered.[104]

Third, "[t]he construction of collective memory implicates power and culture."[105] Strategies for "justice claims often turn[] on which memories are acknowledged by decisionmakers."[106] "The struggle over collective memory is thus 'hotly contested by those supporting and those opposing justice claims.'"[107]

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[95] *See* Mackenzie & Sproat, *supra* note 74, at 492.

[96] *See id.* (citing Hom & Yamamoto, *supra* note 37, at 1764).

[97] *Id.* (quoting Hom & Yamamoto, *supra* note 37, at 1764).

[98] *See* Doremus & Tarlock, *supra* note 21, at 287.

[99] Mackenzie & Sproat, *supra* note 74, at 492.

[100] Hom & Yamamoto, *supra* note 37, at 1764–65.

[101] *Id.* at 1764.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* at 1765.

[106] *Id.*

[107] MacKenzie & Sproat, *supra* note 74, at 494 (quoting Hom & Yamamoto, *supra* note 37, at 1765).

"Fourth, '[t]hese contests over historical memory regularly take place on the terrain of culture—of which legal process, and particularly civil rights adjudication, is one, but only one, significant aspect.'"[108] "Decisionmakers 'determine[] which cultural practices, images, and narrative formally frame the memories. And those memories in turn legitimate future understanding of and action on justice claims.'"[109]

> Finally, it is vital that participants in justice struggles[, and struggles for water in particular,] "conceive of law and legal process as contributors to—rather than as the essence of—larger social justice strategies." Therefore, rights struggles must aim to both "achieve the specific legal result and . . . contribute to construction of social memory as a political tool."[110]

Similar to public trials and its accompanying court decisions, legislative sessions are specific sites for the framing of collective memories of injustice.[111] Politicians, specifically legislators, often alternate between forgetting and remembering, and the "treatment of the past through remembering and forgetting crucially shapes the present and future for individuals and entire societies."[112] Legislators often make "paradoxical calls" in their decision-making, seeking to forget about past memories to change the collective memories surrounding certain events and groups, while simultaneously celebrating past memories.[113]

Certainly, "justice claims . . . begin with back-and-forth struggles over the creation of public or collective memory."[114] "Those struggles are a fight over who will tell the dominant story of injustice (or absence thereof) and how that story will be shaped."[115] Like judges, a legislator's choice of what story prevails "is determined by a sifting of the relevant from the irrelevant—a process itself affected by the decision maker's cultural framework."[116] "That framework consists of his or her 'social perceptions, beliefs, and practices that form the lens through which . . . [he or she] sees and evaluates both daily happenings and society as a whole.'"[117] Each legislature's "recounting of

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[108] *Id.*

[109] *Id.*

[110] *Id.* (quoting Hom & Yamamoto, *supra* note 37, at 1765).

[111] *See* Serrano, *supra* note 75, at 363.

[112] MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 119 (1998).

[113] *See* Hom & Yamamoto, *supra* note 37, at 1758.

[114] Serrano, *supra* note 75, at 363 (quoting Yamamoto & Betts, *supra* note 39, at 563).

[115] Yamamoto & Betts, *supra* note 39, at 563.

[116] *Id.* at 565.

[117] Serrano, *supra* note 75, at 363 (quoting Yamamoto & Betts, *supra* note 39, at 565).

historical events often determines whether, and to what extent, historical injustice occurred and the present-day need for rectification."[118]

Put differently, legislative sessions are theatres for storytelling.[119] Similar to the way judgments are rendered on narrow legal questions, legislators "engage dialectically with other dominant political institutions, with [people's] preexisting cultural assumptions, and [with] other sources of cultural authority."[120] "Through case law, public trials, [] media, [and now house and senate bills], ideas about the fitness of social groups to participate in the polity are translated into the material social conditions that confirm and entrench those ideas."[121] In this way, hotly contested issues, "reshape the way the [] public views race and social justice[,]" and now water resources.[122]

"Professor Yamamoto's five strategic points underscore collective memory's powerful role in [water] struggles in Hawai'i and beyond."[123] "In particular, they highlight the ongoing battle over collective memory as well as the importance"[124] of analyzing the strategies employed in the passage and development of HB 2501 due to its implications for the public trust doctrine and Kānaka Maoli culture and claims. "Purposefully or not, [this bill and now act,] inscribe[s] the old, inaccurate memory of" the legal, historical, and cultural significance of freshwater in Hawai'i while subverting "the legal basis for Native Hawaiian rights."[125]

III. WEAVING THE MO'O AND COLLECTIVE MEMORY OF WATER IN HAWAI'I

A. The Historical and Cultural Significance of Freshwater in Hawai'i

He huewai ola ke kanaka na Kāne
Man is Kāne's living water gourd. Water is life and Kāne is the keeper of water.[126]

Prior to the first documented landing of Westerners in 1778, wai or fresh water was acknowledged and revered as the source of all life in Hawai'i.[127]

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[118] *See id.*
[119] *See id.* at 364.
[120] *See id.*
[121] *Id.* (quotations omitted).
[122] *See id.*
[123] MacKenzie & Sproat, *supra* note 74, at 495.
[124] *Id.*
[125] *See id.*
[126] 'ŌLELO NO'EAU, *supra* note 2, at 68.
[127] SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 3; Sproat, *From Wai to Kānāwai*, *supra* note 9, at 526.

He wai-puna, he wai e inu, he wai e mana, he wai e ola, e ola nō, eā: spring water, water to drink, water of divine powers, life-giving water, let there be life.[128] Rivers, "[s]treams[,] and springs supplied drinking water for substantial populations of Kānaka Maoli,"[129] but also nourished thriving ecosystems that connected mountain stream flows to nearshore environments.[130] This ample and consistent flow provided "rich estuaries and fisheries in the [lower reaches of the] streams and oceans, [while fortifying Kānaka Maoli] agriculture and aquaculture, including loʻi kalo—the wetland cultivation of kalo [(taro, or *Colocasia esculenta*)] that was made into the [Kānaka Maoli] staple poi—and loko iʻa—traditional fishponds."[131]

Fresh water was not only physically and economically critical, but was so inherently spiritual "that it was revered as a kinolau, or the physical embodiment of K[ā]ne, one of the four principal [deities] of the Maoli pantheon."[132] No one owned fresh water considering its significance to Maoli society and culture.[133] Water was "shared by all and managed as a public trust resource for the benefit of present and future generations."[134]

Water's essential role in Kānaka Maoli society is best understood when contextualized against the backdrop of significant terms.[135] "In ʻŌlelo Hawaiʻi, the islands' Native language, [and one of the State's official languages][136] the word for freshwater is wai."[137] Kānāwai, or laws, were developed to properly manage freshwater resources.[138] Under the aliʻi nui

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[128] *See* NATHANIEL B. EMERSON, UNWRITTEN LITERATURE OF HAWAIʻI: THE SACRED SONGS OF THE HULA 258–59 (1998).

[129] Sproat, *Wai Through Kānāwai, supra* note 24, at 139.

[130] Sproat, *Wai Through Kānāwai*, *supra* note 24, at 139.

[131] *Id. See generally* D. Kapuaʻala Sproat & Jodi A. Higuchi, *Loko Iʻa: Hawaiian Fishponds*, *in* NATIVE HAWAIIAN LAW, *supra* note 9, at 667–81.

[132] Sproat, *Wai Through Kānāwai*, *supra* note 24, at 140 (citing HANDY & HANDY, *supra* note 9, at 63).

[133] *Id.*

[134] *Id.*; *see also* HANDY & HANDY, *supra* note 9, at 63 (emphasis added) ("The aliʻi nui [great chief] in old Hawaiian thinking and practice, did not exercise personal dominion, but channeled dominion. In other words, *he was a trustee.*").

[135] Sproat, *Wai through Kānāwai*, *supra* note 24, at 140.

[136] HAW. CONST. art. XV, § 4; HAW. REV. STAT ANN. § 1-13 (West 2018); *see also* Kaʻanoʻi Walk, *"Officially" What? The Legal Rights and Implications of ʻŌlelo Hawaiʻi*, 30 U. HAW. L. REV. 243, 252–53 (2007).

[137] Sproat, *Wai through Kānāwai*, *supra* note 24, at 140; *see also* HANDY & HANDY, *supra* note 9, at 57; HAWAIIAN DICTIONARY, *supra* note 1, at 377.

[138] Sproat, *Wai through Kānāwai*, *supra* note 24, at 140.

(high chief),[139] konohiki (resource manager)[140] of each ahupua'a (land division)[141] appointed a kahuwai (water resource manager).[142] The kahuwai was responsible for distributing water within the ahupua'a.[143] 'Ohana (families)[144] were also expected to manage fresh water sources, especially in connection to wetland taro production and taro culture.[145] It was their kuleana, "both a privilege and responsibility."[146] Wai is the most precious resource of Kānaka Maoli, and so the word "[w]aiwai, or water repeated twice, means valuables or wealth."[147] Since wai is at the core of these respective concepts, "it is no coincidence that [health,] wealth[,] and the law were and continue to be defined by access to and appropriate management of Hawai'i's fresh water."[148]

For Kānaka Maoli, water rights were prioritized for wetland taro fields, and so, one of the top priorities for water use was establishing sufficient flow to cultivate the staple crop kalo.[149] In accordance with traditional wetland taro cultivation practices, water from streams were rerouted into 'auwai, or irrigation ditches, that fed taro patches, which were typically built parallel to

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[139] HAWAIIAN DICTIONARY, *supra* note 1, at 20. In ancient Hawai'i, "the ali'i nui [] was both a physical representative of akua [or Gods] and the water authority." SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 4.

[140] *See* HAWAIIAN DICTIONARY, *supra* note 1, at 166 (defining "konohiki" as a "[h]eadman of an ahupua'a land division under the chief"). Land sections were "set aside for the *ali'i* to be made use of, not by the *ali'i* himself, but by his *konohiki* or land supervisor." HANDY & HANDY, *supra* note 9, at 53. "[T]he tenant was required to work the land and harvest the crop for the *konohiki*." *Id.*

[141] HAWAIIAN DICTIONARY, *supra* note 1, at 9 ("Land division usually extending from the uplands to the sea").

[142] *See* HAWAIIAN DICTIONARY, *supra* note 1, at 114 ("One in charge of water rights and division, water master."). "Lunawai" is also a common-place term, however, "kahuwai" will be utilized in this article. *See id.* at 216 (defining "lunawai" as "[w]ater master, one in charge of water distribution."); Sproat, *From Wai to Kānāwai*, *supra* note 9, at 577 n.13 (recognizing "lunawai" and "kahuwai" as common-place terms and utilizing the latter in the treatise).

[143] Sproat, *From Wai to Kānāwai*, *supra* note 9, at 526.

[144] HAWAIIAN DICTIONARY, *supra* note 1, at 276.

[145] A HISTORY OF WATER: 3 THE WORLD OF WATER 40 (T. Tvedt & T. Oestigaard eds., 2006).

[146] SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 3; *see also* HAWAIIAN DICTIONARY, *supra* note 1, at 179 (defining "kuleana" as a "[r]ight, privilege, concern, responsibility").

[147] Sproat, *Wai Through Kānāwai*, *supra* note 24, at 140 (citing HAWAIIAN DICTIONARY, *supra* note 1, at 380).

[148] Sproat, *Wai Through Kānāwai*, *supra* note 24, at 140 (citing HANDY & HANDY, *supra* note 9, at 57–58); *see also* WILCOX, *supra* note 27, at 25 ("[Wai] is the root for the word for wealth, *waiwai*, and law, *kanawai*.").

[149] 'Ōlohe Nakanelua Interview, *supra* note 17; *see also* GROUP 70 INT'L, INC. ET AL., KALO KANU O KA 'ĀINA: A CULTURAL LANDSCAPE STUDY OF KE'ANAE AND WAILUANUI, ISLAND OF MAUI 43–44 (1995) [hereinafter CULTURAL LANDSCAPE STUDY].

the ʻauwai.[150] Upon exiting the final taro patch within that ʻauwai system, the water was then redirected back into the stream as a matter of maintaining uninterrupted flow from the mountain to the sea.[151] This complete flow fosters an ideal reproductive environment for native stream life, including ʻoʻopu (goby), ʻōpae (shrimp), awa (mullet), and hīhīwai or wī (snail).[152] Among the most important factors wetland kalo cultivation required, is a precisely defined, stable field system with a consistent and reliable source of flowing water throughout each patch to keep kalo at sufficiently cooler temperatures to prevent rot and other diseases.[153] In reconciling natural topographic constraints, wetland kalo field systems were flexibly designed.[154] The taro landscape appeared, as a whole, "a simple network of inter-connected rectangles defined by banks which hold in water."[155] "Upon closer inspection, it is apparent that field design, water flow, and water delivery are a response to subtle variations in the natural landscape."[156] Further inspection also reveals:

> The social requirement for the planning, development and maintenance of these irrigated systems [characterized] a stable political system and community cooperation. Although the cultivation and maintenance of individual fields could be the purview of single families or individuals, the maintenance of the water supply system, on which the entire [taro field] system depended, had to be organized on a community level.[157]

Soon after the waves of foreigners washed over Hawaiʻi's shores, the islands became a hotspot for industrial agriculture, specifically the cultivation of sugar cane.[158] As sugar plantations ascended to a seat of power in Hawaiʻi, they were strategically located throughout the archipelago for reasons including: fertile soil area; level topography; and a mild climate with little annual variation.[159] As a "thirsty" crop, it takes approximately 500 gallons of water to produce one pound of refined sugar.[160] On Maui, like the other Hawaiian Islands, these plantations transformed traditional systems of

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[150] ʻŌlohe Nakanelua Interview, *supra* note 17; *see also* SAMUEL MANAIAKALANI KAMAKAU, KA POʻE KAHIKO: THE PEOPLE OF OLD (1964); WILCOX, *supra* note 27, at 26.

[151] ʻŌlohe Nakanelua Interview, *supra* note 17.

[152] *Id.*

[153] *See* CULTURAL LANDSCAPE STUDY, *supra* note 149, at 44.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* at 43.

[158] *See* WILCOX, *supra* note 27, at 15.

[159] *See id.* at 1.

[160] *Id.* at 1, 11.

land tenure and water management primarily to suit irrigation demand for crops including the construction of extensive ditch systems to capitalize on cascading streams from the mountains and divert the water to the plantations that were located in historically dry areas, reservoir construction for storage, and digging wells to pump groundwater.[161]

Inconsistent with Maoli laws, customs, and traditions that managed water as a public trust, incoming foreigners perceived and proceeded to treat water as a commodity for private use.[162] Caucasian businessmen in particular, focused primarily on maximum crop yield, imported labor, and increased global trade for plantation profit rather than the legal, cultural, and environmental harms that resulted from taking the entire flow of streams and springs.[163]

"Conflicts over fresh-water resources erupted, first between plantation interests and Kānaka Maoli and later between competing plantations."[164] In fact, some of the earliest petitions for water rights involved challenges to diversions being used to take water from East Maui streams and proposed water leases interfering with homestead water reservations.[165] Western notions of private property were primarily utilized in court decisions issued under both the Kingdom of Hawai'i and later the Territory of Hawai'i as both the actual resource and water law in Hawai'i were harnessed to grow plantation seeds and needs.[166]

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[161] *Id.* at 15–16. *See generally* H.A. WADSWORTH, A HISTORICAL SUMMARY OF IRRIGATION IN HAWAII (1933).

[162] Sproat, *Wai Through Kānāwai, supra* note 24, at 141; *see* WADSWORTH, *supra* note 157, at 139; WELLS A. HUTCHINS, THE HAWAIIAN SYSTEM OF WATER RIGHTS 23 (1946).

[163] WILCOX, *supra* note 27, at 24–27. A&B, who is the subject stakeholder in this case, "acquired additional sugar lands and also operated a sailing fleet between Hawai'i and the [Continental United States]." *Big Five*, HAWAIIHISTORY.ORG, http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=29 (last visited Nov. 1, 2018). The shipping concern became American-Hawaiian Line, and later Matson, who, along with, the sons and grandsons of the early missionaries played central roles in the overthrow of the Kingdom of Hawai'i in 1893, creating a short-lived republic. *See id.* In 1898, the Republic of Hawai'i was annexed by the United States and became the Territory of Hawai'i, aided by the lobbying of the sugar interests. Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 78–80 (1991).

[164] Sproat, *Wai Through Kānāwai, supra* note 24, at 141–42; *see also* D. Kapua'ala Sproat, *Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law*, 33 U. HAW. L. REV. 537, 544 (2011) [hereinafter Sproat, *Where Justice Flows*] (citing Territory v. Gay, 31 Haw. 376 (1930); Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 14 Haw. 50 (1902), *on subsequent appeal*, 15 Haw. 675 (1904); Horner v. Kumuliilii, 10 Haw. 174 (1895); Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895); Peck v. Bailey, 8 Haw. 658 (1867)).

[165] Ho'okano, *supra* note 21, at 222–25; *see* Sproat, *Wai Through Kānāwai*, *supra* note 24, at 142.

[166] Sproat, *Where Justice Flows*, *supra* note 164, at 543–44; Sproat, *Wai Through*

After the roughly century-long reign of sugar barons, a paradigm shift in jurisprudence occurred "to reaffirm public management and control over water resources."[167] A critical juncture to this paradigm shift "followed statehood in 1959, when Hawai'i began to select its own judges rather than having them appointed in Washington D.C., which had been the practice while Hawai'i was a territory."[168] As an important legal foundation for Hawai'i's common law, "[l]ocally appointed judges better understood Hawai'i laws and issues, including native custom and tradition[.]"[169] As expounded upon below in Part II-B, this profoundly shaped the legal regime of water resources in Hawai'i today.[170]

B. The Historical and Cultural Significance of Freshwater in East Maui

> *My people have been cultivators from very ancient times; it was by agriculture that they made a living for themselves, for their families, and for those dependent on them. For some it was a favorite occupation.*[171]

Nineteenth-century Hawaiian historian Samuel Manaiakalani Kamakau infamously coined the term "mahi'ai 'ana" or cultivation of the land, which captures a longstanding heritage that continues today in portions of the

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Kānāwai, *supra* note 24, at 142.

[167] Sproat, *Where Justice Flows*, *supra* note 164, at 545 (citing WILCOX, *supra* note 27, at 34).

> [M]aintaining that after statehood in 1959, a transformation occurred in the government's priorities for water coinciding with a change in the makeup of the Hawai'i Supreme Court, which was "no longer dominated by justices with interests sympathetic to sugar. The new court shifted its emphasis to acknowledge some basic Hawaiian concepts of water law by way of two landmark cases: *McBryde and Reppun.*"

Id. at 545 n.57 (citations omitted).

[168] *Id.* (citing WILCOX, *supra* note 27, at 34).

[169] Sproat, *Where Justice Flows*, *supra* note 164, at 545; *see* Williamson B.C. Chang, *The Life of the Law Is Perpetuated in Righteousness: The Jurisprudence of William S. Richardson*, 33 U. HAW. L. REV. 99, 105–07 (2010) (describing the legal practice before territorial judges, who were appointed from abroad and often not from Hawai'i); *see also* HAW. REV. STAT. ANN. § 1-1 (West 2018) (embracing English common law except as held by, *inter alia*, Hawaiian usage).

[170] *See* Sproat, *Where Justice Flows*, *supra* note 164, at 545.

[171] 1 KEPĀ MALY & ONAONA MALY, WAI O KE OLA: HE WAHI MO'OLELO NO MAUI HIKINA A COLLECTION OF NATIVE TRADITIONS AND HISTORICAL ACCOUNTS OF THE LANDS OF HĀMĀKUA POKO, HĀMĀKUA POKO, HĀMĀKUA LOA AND KO'OLAU, MAUI HIKINA (EAST MAUI), ISLAND OF MAUI 14 (2001).

Hawaiian islands—including the lands on the northeast coast of East Maui.[172] Areas such as Kea'anae-Wailuanui:

> [M]anifest[ed] a viable traditional economy which has maintained historic and cultural integrity, traditional lifestyle and social continuity to an equal or greater extent than any of the other taro growing landscapes in Hawai'i. Physical isolation, economic constraints, the characteristics of the environment itself, and the traditional attitude of the community have all contributed to this integrity.[173]

Moreover, in the late 1840s, there were nearly 500 taro patches in cultivation that were claimed in that area by applicants for Land Commission Awards.[174] Other historically populated areas included the large stream valley of Honomanu, and the succession of small deep gulches sprinkled throughout toward Nahiku.[175] The ever-flowing wealth drew the attention of sugar barons who diverted East Maui water for their commercial use.[176]

A&B's surface water diversion system, the EMI Aqueduct System, takes water from approximately 50,000 acres of land, of which approximately 33,000 acres (formerly Crown Lands)[177] are held in trust by the State and

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[172] *Id.*

[173] CULTURAL LANDSCAPE STUDY, *supra* note 149, at 43 ("Today, commercial Hawaiian taro cultivation is confined to few areas in the islands: Hānalei/Waioli, Hanapēpē and Waimea on Kaua'i, Waikāne/Waiāhole on O'ahu, Honokohau [(now Waikapū)], Waihe'e, Kea'anae/Wailuanui on Maui, and Waipi'o Valley on the island of Hawai'i.").

[174] *See generally* CULTURAL LANDSCAPE STUDY, *supra* note 149. "The Māhele of 1848 was a division of nearly all the lands in the Hawaiian Kingdom." KAMANAMAIKALANI BEAMER, NŌ MĀKOU KA MANA LIBERATING THE NATION 142–53 (2014) (examining the Māhele as a means to secure the land rights of Kānaka Maoli). To acquire ownership of land, an individual made a claim to the Land Commission. *Id.* at 144. If approval was granted, the native tenant, who was usually Kānaka Maoli, received a Land Commission Award, which was presented to the Minister of Interior, who issued a Royal Patent. *Id.* The Royal Patent gave the native tenant sole ownership of their land upon payment of a commutation to the government. *Id.*

[175] *See* HANDY & HANDY, *supra* note 9, at 498–502.

[176] SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 21.

[177] The back cover of *Who Owns The Crown Lands of Hawai'i* provides:

> The 1846 Māhele (division) transformed the lands of Hawai'i from a shared value into private property, but left many issues unresolved. Kauikeaouli (Kamehameha III) agreed to the Māhele, which divided all land among the mō'ī ([high] king), the ali'i (chiefs), [konohiki (land stewards),] and the maka'āinana (commoners), in the hopes of keeping the lands in Hawaiian hands even if a foreign power claimed sovereignty over the islands. The [high] king's share was further divided into Government and Crown Lands, the latter managed personally by the ruler until a court decision in 1864 and a statute passed in 1865 declared that they could no longer be bought or sold by the mō'ī and should be maintained intact for future monarchs.

JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008). The legal status of Crown Lands remains a highly contentious topic of debate and misunderstood to this day.

approximately 17,000 acres are owned by EMI.[178] The EMI Aqueduct System services Maui County Department of Water Supply domestic and other water needs in Upcountry Maui, agricultural users at the Kula Agricultural Park ("KAP"), and 30,000 acres of agricultural lands once dedicated to sugarcane cultivation in Central Maui.[179] "For more than a century, [the EMI Aqueduct System] has been used to transport water from the wet, northeastern part of Maui, Hawaii, to the drier, central part of the island, mainly for large-scale sugarcane cultivation."[180] This collection system spans the Nahiku, Keʻanae, Honomanu, and Huelo watersheds.[181] These watersheds consist of over roughly 40 identified streams,[182] "388 separate intakes, 24 miles of ditches, and 50 miles of tunnels, as well as numerous small dams, intakes, pipes, and flumes."[183] Of the forty streams, A&B has historically operated diversions on thirty-seven.[184]

Beginning in 1876, the Kingdom of Hawaiʻi leased Crown Lands to sugar interests to construct surface water diversion systems, including the elaborate EMI Aqueduct System, that pilfered water from free flowing streams to irrigate sugarcane fields in Maui's central plain.[185] The system has, up until 2017, diverted an average of 160 million gallons of water per day ("mgd"), with a maximum capacity of approximately 450 mgd.[186] Comparatively, 140 mgd is the average municipal use of water on the island of Oʻahu, where nearly one million residents, about 80% of the state's population, reside.[187]

Compare Burns, *supra* note 83, at 245 (analyzing the complex cultural and legal history of Hawai'i's Crown Lands and arguing, *inter alia*, that the Māhele was not inequitable because Hawaiians received land), *with* MacKenzie & Sproat, *supra* note 74, at 483 (interrogating the battle over the collective memory of injustice surrounding important events in Hawaiʻi's history including the Crown Lands).

[178] *See* EISPN, *supra* note 8, at 1-7.

[179] *Id.* at 1-4. The Nahiku community also draws up to 20,000 gallons per day directly from the system. *Id.*

[180] *Id.* at 1-1.

[181] *Id.*

[182] *Id.* at 1-9. Waikani is identified as a stream even though it is a waterfall on the Wailuanui stream. *Id.*

[183] *Id.* at 1-1.

[184] *Id.* at 1-9. A&B has since "abandoned the diversion of one stream in 2007, and is in the process of abandoning all of its diversions on 5 additional streams[.]" *Id.*; *see also id.* at 1-11 to 1-12.

[185] *See id.* at 1-12.

[186] *Id.; see also* Chris Sugidono, *Tour of East Maui Irrigation Ditch System Draws Just 1 Commissioner*, MAUI NEWS (Dec. 3, 2017), http://www.mauinews.com/news/local-news/2017/12/tour-of-east-maui-irrigation-ditch-system-draws-just-1-commissioner/.

[187] Board of Water Supply, City and County of Honolulu, *2016 Water Master Plan*, 1-1, https://www.boardofwatersupply.com/bws/media/files/water-master-plan-final-2016-10.pdf.

This system took an inordinate share of East Maui's water with major impacts on Hawai'i's natural and heritage resources.[188] This scheme was repeated on all the major Hawaiian islands, which thereby affected Kānaka Maoli self-determination.[189] As the burden of the plantations began to weigh heavily on Maoli communities and cultivation systems, the Mo'o, a Maoli consciousness, was awakened.[190] Unwilling to accept such dire and neocolonial circumstances imposed by the plantations, residents from East Maui mobilized in an effort to guard the continuity and integrity of the water resources in their region.[191]

As one example, "[i]n 1881, a group of community members from the Ke'anae and Wailuanui area sent a formal letter of protest regarding the diversion of water to the commissioners of Crown Lands, the Honorable H.A.P. Carter and the Honorable J. S. Walker:

> Nonoi aku nei makou i ko olua oluolu. Aole e lilo kekahi pono wai o na aina lei alii, oia mai Honomanu, Keanae, Wailua i ka ona Miliona . . . No ka mea, ina e lilo kekahi pono wai o na aina lei alii i hoike ia maluna, alaila, e pilikia ana na makaainana o ke 'lii e noho ana ma ua mau aina ala . . . Oiai ua ike ia na hana a ka ona miliona i ka wai o na aina i hala, a no keia pilikia i ike ia oia ka makou e noi aku nei ua oki loa ke kii ana mai i ka wai o na aina i hoikeia maluna.
>
> We request your kindness. Do not allow any water rights of the *Crown Lands* of Honomanu, Ke'anae, and Wailua to be lost to the millionaire . . . because, if any of the water rights on the *Crown Lands* that were mentioned above were

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[188] *See* Sproat, *Wai Through Kānāwai, supra* note 24, at 128.

[189] *See id.* at 143–45 (examining the harms of colonization, particularly stream diversions of the plantation era, on Kānaka Maoli in Nā Wai 'Ehā on Maui); R. Hōkūlei Lindsey, *Native Hawaiians and the Ceded Lands Trust: Applying Self-Determination as an Alternative to the Equal Protection Analysis*, 34 AM. INDIAN. L. REV. 223, 257 (2009–10). For Indigenous People, including Kānaka Maoli, self-determination is measured by: (1) cultural integrity; (2) lands and natural resources; (3) social welfare and development; and (4) self-government. S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 342 (1994). Anaya notes:

> [M]any Hawaiians found they no longer could farm or gain access to the traditional gathering areas in the mountains and the ocean that once supported them. Other Hawaiians were left landless. As a result, many were forced to move to urban areas to seek employment. They abandoned traditional subsistence living, which had supported the Hawaiian culture for centuries.

Id. at 315 (quoting NATIVE HAWAIIAN RIGHTS HANDBOOK 44 (Melody Kapilialoha MacKenzie ed., 1991)).

[190] *See* Ho'okano, *supra* note 21, at 224–25.

[191] *See id.* The communities banded together to create a nonprofit organization called Nā Moku Aupuni o Ko'olau Hui "with the intention to protect and preserve the traditional taro farming lifestyle and practices, through water restoration, along with educating future generations of people who come from that region through scholarship." *Id.*

> lost, then, the subjects of the king living on said lands will be in [great] trouble. We already know what the millionaire has done with the water on other lands, and as a result of this previous trouble, which is well known, this is the reason why we are sending our plea to immediately stop taking water of the lands that were named above.[192]

Although the original term of the lease to develop, divert, and use the water that runs across State lands within the four watersheds was for twenty years, A&B retained and expanded its control over water flowing from East Maui streams through a series of lease agreements with the Territorial Government, beginning in 1938, and later the State of Hawai'i.[193]

For over 140 years, sugar plantations arose, merged, and have since closed although the principal plantation interests remain EMI (the oldest subsidiary of A&B) and A&B's new ticker symbol ALEX, which signifies the company's conversion to a real estate investment trust.[194] Despite many changes, including the closure of Hawai'i's final plantation located on Maui and no real revelation of A&B's diversified agricultural plans,[195] plantation irrigation systems persist—diverting the same amount of water to what is now empty fields while perpetuating further "subordination of Maoli people, culture, and resources."[196]

IV. THE LEGAL LANDSCAPE OF WATER IN HAWAI'I

Issues impacting Kānaka Maoli set against the backdrop of Hawai'i's colonial history "(including the United States' role in the illegal overthrow of the sovereign Hawaiian Kingdom in 1893) . . . implicate restorative justice principles that underscore the importance of respecting Indigenous rights in partial redress for the harms of American colonialism."[197] Nevertheless,

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[192] *Id.* at 222–23.

[193] *See* EISPN, *supra* note 8, at 1-14.

[194] *See Alexander & Baldwin to Strengthen Hawaii Real Estate Platform Through Real Estate Investment Trust (REIT) Structure*, PR NEWSWIRE (July 10, 2017, 5:00 PM), https://www.prnewswire.com/news-releases/alexander--baldwin-to-strengthen-hawaii-real-estate-platform-through-real-estate-investment-trust-reit-structure-300485020.html. In July 2017, A&B announced that it will operate through a taxable real estate investment trust. *Id.* Today, A&B is Hawai'i's premier commercial real estate company with roughly 87,000 acres, making it the State's fourth largest private landowner. PR NEWSWIRE, *supra*.

[195] *See* Melissa Tanji, *Volner: A&B Not Farming Any GMO Food, Animal Feed Crops*, MAUI NEWS (Sept. 6, 2017), http://www.mauinews.com/news/local-news/2017/09/volner-ab-not-farming-any-gmo-food-animal-feed-crops/.

[196] Sproat, *Wai through Kānāwai*, *supra* note 24, at 145.

[197] *Id.*

justice for Kānaka Maoli, "benefits all of Hawai'i's people, many of whom are not "Hawaiian" by ethnicity or nationality."[198]

Hawai'i's current legal landscape encompasses a detailed regime for freshwater resource management, including state constitutional provisions, the Water Code in Hawai'i Revised Statutes ("HRS") Chapter 174C, the administrative rules for the Commission on Water Resource Management in Hawai'i Administrative Rules ("HAR") sections 13-167 to 13-171, and court decisions interpreting the relevant laws.[199] On its face, these water laws appear to be framed more generally, however, a closer look reveals a unique tribute to the rights of Kānaka Maoli[200] and the wider Hawai'i community.[201] In addition to the arduous efforts it took to create and maintain, this regime was also a direct response to generations of colonial consciousness and interests that continue to grip and occupy Maoli ancestral homelands.[202] Such repressive institutions took massive volumes of surface and ground water for industrial agriculture while annihilating agrarian Maoli and

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[198] *Id.* at 145–46.

[199] *See generally* HAW. CONST. art. XI, §§ 1, 7; HAW. REV. STAT. ANN. § 174C (West 2018); HAW. CODE R. §§ 13-167-1 to 13-171-60 (LexisNexis 2018).

[200] *See* Sproat, *Where Justice Flows*, *supra* note 164, at 547 ("Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained."); *see, e.g.*, HAW. REV. STAT. ANN. § 174C-101(c) (West 2018). *See generally* Sproat, *From Wai to Kānāwai*, *supra* note 9, at 538–51. Section 174C-101, concerning Native Hawaiian water rights provides, in relevant part:

> Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of h[ī]h[ī]wai, ['Ā]opae, ['Ā]o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

HAW. REV. STAT. ANN. § 174C-101(c) (West 2018). Further, "[t]he appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or receive a permit under this chapter." *Id.* § 174C-101(d).

[201] *See, e.g.*, *In re* Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 417, 83 P.3d 664, 680 (2004) [hereinafter Wai'ola] ("The Code mandates consideration of the large variety of public interests. The definition of 'public interest' in the Code broadly encompasses the protection of the environment, traditional and customary practices of native Hawaiians, scenic beauty, protection of fish and wildlife, and protection and enhancement of the waters of the State.").

[202] *See* HAW. CONST. art. XI, §§ 1, 7. In 1978, Hawai'i's voters ratified those amendments and in 1987 implemented the Hawai'i's State Water Code, Hawai'i Revised Statutes Chapter 174C, as a comprehensive management tool for Hawai'i's water resources. Sproat, *Where Justice Flows*, *supra* note 164, at 547–48 (detailing the evolution of law in Hawai'i, effecting water in particular, rooted in Kānaka Maoli customs and laws).

ecological communities reliant on continuous stream flow from the mountain to the sea.[203]

Today, there is an acknowledgement that colonialism has negatively impacted Maoli communities.[204] In the spirit of this acknowledgement, the federal government and state legislature have separately committed to reconciliation efforts with Kānaka Maoli.[205] Where the rubber meets the road in the community at large, however, the law has yielded insincere results.[206]

A. Hawai'i's Public Trust Doctrine and its Application

Although many trace the origins of the public trust doctrine to English and Roman Law, "cases and laws from the Kingdom of Hawai'i, along with Hawaiian custom and tradition, firmly established the principle that natural resources, including water, were not private property, but were held in trust by the government for the benefit of the people."[207] In 1892, United States continental jurisprudence adopted the public trust doctrine in the landmark case *Illinois Central Railroad Co. v. Illinois*, reaffirming that each state in its sovereign capacity holds permanent title to all submerged lands within its borders and holds these lands in public trust.[208] Hawai'i jurisprudence, however, has expanded the public trust doctrine, encompassing "all water resources, unlimited by any surface-ground distinction" and requiring the State to "take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision making process."[209]

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[203] Sproat, *Where Justice Flows*, *supra* note 164, at 542–44.

[204] *See* JONATHAN KAY KAMAKAWIWIOʻOLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 3 (2002).

[205] *See* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993) ("Joint Resolution [t]o Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawai'i."). In 2011, Hawai'i's State Legislature introduced a bill acknowledging its commitment to Kānaka Maoli and the special trust relationship between the United States and Maoli. H.B. 1627, 26th Leg., Reg. Sess. (Haw. 2011).

[206] *See* D. Kapua'ala Sproat, Comment, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321, 321–23 (1998); Isaac Moriwake, Comment, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. HAW. L. REV. 261, 287 (1998).

[207] SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 7; Sproat, *Wai through Kānāwai*, *supra* note 24, at 148, 148 n.99 ("[T]he first constitution of the Kingdom of Hawai'i declared that the land and its resources 'belonged to the chiefs and people in common, of whom [the King] was the head and had the management of the landed property.'").

[208] 146 U.S. 387, 436–37 (1892).

[209] Waiāhole I, 94 Hawai'i 97, 135, 143, 9 P.3d 409, 447, 455 (2000).

The public trust doctrine's codification in Hawai'i's Constitution not only highlights its importance but also reflects the State's efforts to reconcile with Kānaka Maoli and their interests as a matter of reversing the course of the plantations' water appropriation history.[210] In so doing, "Hawai'i's Constitution was amended and the Water Code adopted with directives requiring the water commission to take the initiative to protect and preserve the public's interest in fresh water resources, with specific provisions for Maoli rights and interests."[211] Article XI, Section 1, of the Hawai'i Constitution states "[a]ll public natural resources are held in trust by the State for the benefit of the people."[212] Accordingly, it imposes a duty on the State to "conserve and protect" its natural resources "[f]or the benefit of present and future generations" and to promote their use and development "in a manner consistent with their conservation[.]"[213] Article XI, Section 7 further provides that the "State has an obligation to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people" and established the Water Commission under DLNR.[214] The Water Commission has primary authority over water use and management in Hawai'i, and among its plethora of duties, it establishes water conservation, quality, and use policies, defines reasonable-beneficial uses, protects surface and ground waters, and regulates all uses of Hawai'i's water resources while assuring appurtenant rights,[215] existing riparian uses,[216] and correlative uses.[217] Most importantly, both previously mentioned provisions adopted the public trust doctrine "as a fundamental principle of constitutional law in Hawai'i."[218]

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[210] *See* Sproat, *Wai through Kānāwai, supra* note 24, at 149–50.

[211] *Id.* at 147.

[212] HAW. CONST. art. XI, § 1.

[213] *Id.*

[214] *Id.* § 7.

[215] "Appurtenant rights appertain or attach to parcels of land that were cultivated, usually in the traditional staple kalo, at the time of the Māhele when private property was instituted in Hawai'i." Sproat, *Wai through Kānāwai, supra* note 24, at 135 n.36 (citing Reppun v. Bd. of Water Supply, 65 Haw. 531, 563, 656 P.2d 57, 78 (1982).

[216] "Riparian rights protect the interests of people who live along the river or stream banks to the reasonable use of water from that river or stream on the riparian land." Sproat, *From Wai to Kānāwai, supra* note 9, at 542.

[217] HAW. REV. STAT. ANN. § 174C-5 (West 2018) (detailing the Commission's general powers and duties). "Correlative rights protect the interests of individuals who own land overlying a ground water source or aquifer." Sproat, *From Wai to Kānāwai, supra* note 9, at 543.

[218] Waiāhole I, 94 Hawai'i 97, 132, 143, 9 P.3d 409, 444, 455 (2000).

B. The Water Code

"Today, the use of fresh water in Hawai'i is managed largely through the State Water Code" [219] (the "Code"). Despite a clear connection through the hydrologic cycle, the Code manages fresh water by attempting to distinguish between ground and surface water.[220] Regulation under the Code, therefore, depends on whether water is tapped "under ground via wells and pumps, or above ground by taking water from streams or springs via tunnels or ditch systems."[221]

The Code has several tools to manage water resources, including the designation of Water Management Areas ("WMA").[222] The Water Commission has a "dual mandate of 1) protection and 2) maximum reasonable and beneficial use."[223] Although the Water Commission has the responsibility to manage water resources statewide, it has limited authority to regulate water use through water use permitting provisions of the Code unless an area is designated a surface or ground WMA.[224] "The Water Code requires designation when a resource is or may be threatened with degradation."[225] "This can be raised either by the Water Commission on its own volition or by an interested member of the public."[226] "Decisions by the Water Commission to designate a surface or ground WMA are final and are not judicially reviewable."[227] The Water Code established a "bifurcated system of water rights."[228] "In WMAs, the [C]ode regulates all consumptive uses of water via water use permits."[229] Currently, "all of O'ahu (except Wai'anae), the island of Moloka'i, and the 'Īao aquifer on Maui have been designated [ground] WMAs."[230] "In April 2008, the Water Commission designated Nā Wai 'Ehā, Maui, as the first surface [WMA] in the history of

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[219] Sproat, *From Wai to Kānāwai, supra* note 9, at 540. *See generally* HAW. REV. STAT. ANN. §§ 174C-1 to 174C-101 (West 2018) (State Water Code).

[220] Sproat, *From Wai to Kānāwai, supra* note 9, at 540.

[221] *Id.*; HAW. REV. STAT. ANN. § 174C-44 (West 2018) (describing criteria for groundwater designation and regulation); HAW. REV. STAT. ANN. § 174C-45 (West 2018) (describing criteria for surface water designation and regulation).

[222] HAW. REV. STAT. ANN. § 174C-41 (West 2018).

[223] *Waiāhole I*, 94 Hawai'i at 139, 9 P.3d at 451.

[224] Sproat, *From Wai to Kānāwai, supra* note 9, at 544.

[225] *Id.*; *see also* HAW. REV. STAT. ANN. § 174-41(a) (West 2018).

[226] Sproat, *From Wai to Kānāwai, supra* note 9, at 544; *see also* HAW. REV. STAT. § 174-41(b).

[227] SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 17 (citing Ko'olau Agric. Co. v. Comm'n on Water Res. Mgmt., 83 Hawai'i 484, 494, 927 P.2d 1367, 1377 (1994)).

[228] *Id.*; *e.g.*, Sproat, *From Wai to Kānāwai, supra* note 9, at 545.

[229] Sproat, *From Wai to Kānāwai, supra* note 9, at 545.

[230] *Id.*; *e.g.*, SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 17.

the Water Code."[231] By contrast, like the case in East Maui, "water rights in non-designated areas are subject to the common law."[232] The Water Code, however, still provides the Commission broad powers as it is tasked with certifying all water uses, review and rule on all petitions to amend the Interim Instream Flow Standards ("IIFS"), and review and rule on claims for appurtenant rights.[233]

In addition, the Water Code also affirms Maoli traditional and customary rights.[234] The Code also recognizes, as articulated in Article XII, Section 7,[235] and HRS sections 1-1 and 7-1,[236] "[t]raditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter."[237]

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[231] Sproat, *From Wai to Kānāwai, supra* note 9, at 545; *e.g.*, SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 17.

[232] SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 17 (quoting Waiāhole I, 94 Hawai'i 97, 178, 9 P.3d 409, 490 (2000)); *e.g.*, Sproat, *From Wai to Kānāwai, supra* note 9, at 545.

[233] HAW. REV. STAT. ANN. § 174C-5 (West 2018). An Instream Flow Standard ("IFS") is a "quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses." *Id.* § 174C-3 (defining all beneficial instream uses of stream water). An IFS is permanent, whereas an interim IFS ("IIFS") is temporary. *Id.* "In establishing an IIFS, the Commission must adhere to the same balancing standard, established for an IFS. SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 23.

[234] Sproat, *Wai through Kānāwai*, *supra* note 24, at 149–50.

[235] HAW. CONST. art. XII, § 7.

[236] Sproat, *Wai through Kānāwai*, *supra* note 24, at 150 (citing HAW. REV. STAT. § 1-1 (1993)).

> [N]oting the common law of England is "declared to be the common law of the State of Hawai['i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage"; [HAW. REV. STAT.] § 7-1 ("[P]eople on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit[; further, t]he people shall also have a right to drinking water, and running water, and the right of way.").

Id. at 150 n.108.

[237] HAW. REV. STAT. ANN. § 174C-101(c) (West 2018). The Code also protects appurtenant rights and allows the Department of Hawaiian Home Lands to reserve water for the current and foreseeable development of its lands. *Id.* §§ 174C-101(a), (d).

C. State and County Agencies' Public Trust Duty

Like the Water Commission, "state and county agencies have an independent duty to conserve natural resources, including water."[238] The struggle for water in Waiāhole, specifically the decision in *Waiāhole I*, "reaffirmed that Hawai'i law has always and continues to recognize the public trust doctrine, which mandates that all waters are held in trust for all of the State's citizens."[239] This watershed decision established the Commission's "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[240]

> Thus far, the Hawai'i Supreme Court has identified only a handful of "public trust purposes," including environmental protection, traditional and customary Kānaka Maoli rights, appurtenant rights, domestic water uses, and reservations for the Department of Hawaiian Home Lands. Public trust purposes have priority over private commercial uses, which do not enjoy the same protection. The public trust dictates that "any balancing between public and private purposes [must] begin with a presumption in favor of public use, access, and enjoyment" and "establishes use consistent with trust purposes as the norm or 'default' condition."[241]

"The public trust also prescribes a higher level of scrutiny for private commercial uses."[242] "State and county boards and commissions must, therefore, closely examine requests to use public resources for private gain to ensure that the public's interest in the resource is fully protected."[243] "Moreover, 'permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource.'"[244] "In addition to the public trust, the Hawai'i Supreme Court also adopted the 'precautionary principle,' ruling that the 'lack of full scientific certainty should not be a basis

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[238] D. KAPUAʻALA SPROAT, KŪKULU WAIWAI: BUILDING PONO WATER MANAGEMENT IN HAWAIʻI NEI 6 (2014), *available at* https://www.waikato.ac.nz/__data/assets/pdf_file/0004/227353/Kapuas-Water-Summary-10.5.14.pdf (citing HAW. CONST. art. XI, § 1; Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 225, 140 P.3d 985, 1005 (2006)); *see also* Kauai Springs, Inc. v. Planning Comm'n of the Cty. of Kaua'i, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014) [hereinafter Kauai Springs].

[239] Sproat, *Where Justice Flows*, *supra* note 164, at 556 (citing Waiāhole I, 94 Hawai'i 97, 131–32, 9 P.3d 409, 443–44 (2000)) (internal quotations omitted).

[240] *Waiāhole I*, 94 Hawai'i at 141, 9 P.3d at 453.

[241] Sproat, *Wai through Kānāwai*, *supra* note 24, at 148–49 (quoting *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454).

[242] Sproat, *supra* note 238, at 7 (citing *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454).

[243] *Id.*

[244] *Id.* (quoting *Waiāhole I*, 94 Hawai'i at 160, 9 P.3d at 472).

for postponing effective measures to prevent environmental degradation[.]'"[245] Furthermore, "where [scientific] uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource" while recognizing the principle must vary on a case-by-case basis.[246]

The groundbreaking affirmation of the public trust principles in *Waiāhole I*, have been further upheld in subsequent water rights cases such as *Nā Wai 'Ehā* in Central Maui,[247] *Waiola* on Moloka'i,[248] and the case of *Kauai Springs* in Kōloa.[249] Given that agencies have critical "duties under the public trust independent of [any] permit requirements,"[250] the Hawai'i Supreme Court, in *Kauai Springs*, crafted further guidance for state and county agencies to fulfill their mandates and appropriately consider the public trust:

> [1] The agency's duty and authority is to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial use[;]
>
> [2] The agency must determine whether the proposed use is consistent with the trust purposes[;] . . .
>
> [3] The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection[;]
>
> [4] The agency should evaluate each proposal for use on a case-by-case basis, recognizing that there can be no vested rights in the use of public water[;]
>
> [5] If the requested use is private or commercial, the agency should apply a high level of scrutiny[; and]
>
> [6] The agency should evaluate the proposed use under a "reasonable and beneficial use standard, which requires examination of the proposed use in relation to other public and private uses.[251]

Moreover, the Court highlighted four affirmative showings that permit applicants must make to carry their burdens under the public trust:

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[245] *Id.* at 8 (quoting *Waiāhole I*, 94 Hawai'i at 114, 9 P.3d at 426).

[246] *Waiāhole I*, 94 Hawai'i at 114, 142, 9 P.3d at 454 (holding that, "at minimum, the absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures designed to further the public interest").

[247] *In re* 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawai'i 228, 287 P.3d 129 (2012) [hereinafter Nā Wai 'Ehā].

[248] *In re* Wa'iola O Moloka'i, Inc., 103 Hawai'i 401, 83 P.3d 664 (2004) [hereinafter Wai'ola].

[249] Kauai Springs, 133 Hawai'i 141, 324 P.3d 951 (2014).

[250] *Id.* at 177, 324 P.3d at 987.

[251] *Id.* at 174, 324 P.3d at 984.

> [1] Permit applicants must demonstrate their actual needs and the propriety of draining water from public streams to satisfy those needs[;]
>
> [2] The applicant must demonstrate the absence of a practicable alternative water source[;]
>
> [3] If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact or that the requested use is nevertheless reasonable and beneficial[; and]
>
> [4] If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved.[252]

Above all, "a lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource."[253]

Even with all the "information," including the black letter law, history, and scientific studies, facts are most effective when the collective memory of injustice is framed properly.[254] In the analysis below, the supporting and opposing testimonies in HB 2501 spotlight a fervent struggle over collective memory—a battle over who would tell the authoritative story of colonization, stream diversions in particular, and the resulting structures and archives of power in Hawai'i.[255] In a dazzling array of social justice struggles and claims, especially for water, collective memory must be deployed as a legal framework to "expand the law's narrow framing of injustice and focus on historical facts to more fully portray what happened and why it was wrong."[256] By interrogating the battle over the collective memory of injustice surrounding the critical events in East Maui's stream diversion history leading up to the development and passage of HB 2501, and other colonial wrongs committed against Kānaka Maoli along the way, this case study unveils how the political, economic, and historical dynamics frame injustice on the ground. The public testimonies offered, the development, and subsequent passage of HB 2501, illuminate several strategic points about the battles over the collective memory of injustice and the significance of those struggles for water and indigenous rights in Hawai'i and beyond.

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[252] *Id.* at 174–75, 324 P.3d at 984–85.

[253] *Id.* at 174, 324 P.3d at 984.

[254] *See* Serrano, *supra* note 75, at 362.

[255] *See* Section V, *infra*.

[256] *See* Horn & Yamamoto, *supra* note 37, at 1757.

V. MO'O WARFARE A CASE STUDY: BATTLES OVER THE COLLECTIVE MEMORY OF WATER IN EAST MAUI

Struggles for stream restoration in East Maui for Kānaka Maoli kalo farmers, subsistence gatherers, and fishermen (collectively "Mo'o"), continue, even though leases dating back to the Kingdom of Hawai'i limited diversions to the extent that kalo production could not be lessened or affected injuriously.[257] Even after A&B closed its chapter on industrial sugar on Maui, EMI continued to swipe an average of 160 million gallons per day from Ke'anae, Honomanu, Nahiku, and Huelo watersheds up until 2017.[258] Stream flows from former kingdom and now state-managed watershed areas in East Maui irrigate over 33,000 acres to A&B's primarily empty fields in Central Maui.[259]

"In May 2001, after years of informal attempts to resolve BLNR's leases," a grassroots group, primarily comprised of Maoli taro farmers, gatherers, and fishers from the Ke'anae-Wailuanui area, "organized themselves under the nonprofit Nā Moku Aupuni O Ko'olau Hui, Inc. (["]Nā Moku["])."[260] In an effort to restore stream flow, there were two parallel strategies.[261] First, "Nā Moku petitioned the Water Commission to amend the IIFSs for twenty-seven diverted streams."[262] Relevant here, however, was Nā Moku's challenge to "BLNR's annual permit renewal by filing a contested case hearing request."[263]

A. The Challenge: A&B's Proposed Thirty-Year Lease

On May 14, 2001, A&B filed an application with BLNR for a long-term lease, in the form of a thirty-year water lease ("Water Lease") pursuant to HRS § 171-58(c) for the "right, privilege, and authority to enter and go upon" the four license areas "for the purpose of developing, diverting, transporting, and using government-owned waters."[264] The Water Lease Application also

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[257] *See generally* CULTURAL LANDSCAPE STUDY, *supra* note 149.

[258] *Restore streams, revitalize Native Hawaiian communities*, SIERRA CLUB OF HAWAI'I, https://sierraclubhawaii.org/east-maui-streams/ (last visited Mar. 3, 2019).

[259] *See* Teresa Dawson, *Hawaiians Seeking Stream Restoration Challenge 'Holdover Status' of Diversions*, ENV'T HAW. (Feb. 2016), http://www.environment-hawaii.org/wp-content/uploads/2016/01/February-2016.pdf.

[260] Sproat, *From Wai to Kānāwai*, *supra* note 9, at 567.

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] EISPN, *supra* note 8, at 1-1.

requested the continuation of monthly temporary permits on a holdover basis until such Water Lease was approved.[265]

On May 24, 2001, Nā Moku challenged A&B's Water Lease Application, "requesting that BLNR, as the public trustee overseeing the water resources from state lands, protect the appurtenant and traditional and customary rights of its kalo-farming [community] members."[266] Moreover, "[i]n the interim, BLNR continued the holdover status of A&B and EMI's revocable permits, enabling the companies to continue diverting between 164 and 450 million gallons of water per day ("mgd")."[267]

Nā Moku subsequently appealed the Board's January 24, 2003 order rejecting its challenge to A&B's proposed Water Lease to the First Circuit, in which Judge Eden Elizabeth Hifo reversed.[268] First, "Judge Hifo ruled that BLNR erred by concluding that it could determine what was in the 'best interest' of the state in the absence of data on the amount of 'excess' water in the stream—that is, the amount beyond what was needed to support appurtenant water rights and traditional and customary Native Hawaiian practices."[269] Most importantly, Judge Hifo held that

> the proposal for a 30-year lease of any or all excess water that may exist after there finally is a determination of riparian and native Hawaiian rights to the said water from 33,000 acres of state land, as a matter of law, does not constitute a minimal or no significant effect on the environment.[270]

"Therefore, the judge ruled that an environmental assessment (EA),[271] and possibly an environmental impact statement, was required before BLNR could issue a long-term lease."[272] "Judge Hifo [also] agreed with Nā Moku

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[265] *Id.*

[266] Sproat, *From Wai to Kānāwai*, *supra* note 9, at 567.

[267] Lizzi, *supra* note 35.

[268] *See generally* Order Affirming in Part and Reversing in Part State of Haw. Bd. Of Land Nat. Res. Findings of Fact and Conclusions of Law and Order, Dated January 10, 2003; Amended January 24, 2003 Regarding Petition Contesting Application for Long Term Disposition of Water Licenses and Issuance of Interim Revocable Permits at Honomanu, Keanae, Nahiku, and Huelo, Maui, Maui Tomorrow v. State of Hawaii, No. 03-1-0289-02 (Haw. 1st Cir. Oct. 10, 2003), 2003 WL 25926800 [hereinafter Hifo Order]; *see also* Sproat, *From Wai to Kānāwai*, *supra* note 9, at 567.

[269] Sproat, *From Wai to Kānāwai*, *supra* note 9, at 568 (citing Hifo Order, *supra* note 268, at 4).

[270] Hifo Order, *supra* note 268, at 6.

[271] EAs are triggered by nine types of actions. *See* HAW. REV. STAT. ANN. § 343-5 (West 2018).

[272] Sproat, *From Wai to Kānāwai*, *supra* note 9, at 568. "[T]he continued operation of existing structures" could not overrule the statute's requirement for such an EA where the effect on the environment could be significant. Hifo Order, *supra* note 268, at 5–6.

that any EA had to address the diversions' total effects, measuring the impact from the initial, undiverted state and not merely the effects of continued diversion."[273]

On March 23, 2007, BLNR granted partial relief on Nā Moku's contested case over the Water Lease by approving a release of six million gallons per day to Waiokamilo Stream for Nā Moku's irrigation needs.[274] "Despite the order, 'EMI has maintained that it ceased all diversions from Waiokamilo Stream shortly thereafter because it knew that the undiverted flows would not sustain a flow of 6 mgd except during rainy conditions[.]'"[275] Since then, in December 2016, the Board again renewed the revocable licenses in "holdover status."[276] Nā Moku and other Mo'o again filed a claim in First Circuit Court asserting that the Board failed to comply with proper environmental review for "actions that propose the use of state or county lands" pursuant to HEPA.[277]

On January 8, 2016, Judge Rhonda A. Nishimura invalidated A&B's and EMI's four revocable permits.[278] Although Judge Nishimura held that the Board's issuance of the revocable permits did not constitute an "action" requiring environmental review, she found that the Board exceeded its authority by repeatedly issuing annual temporary permits on a holdover basis opining: "A&B's continuous uninterrupted use of these public lands on a holdover basis for the last 13 years is not the 'temporary' use that HRS Chapter 171 envisions."[279] Both the Board and A&B appealed the decision.[280] The court stayed the invalidation pending the appeal.[281]

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[273] Sproat, *From Wai to Kānāwai*, *supra* note 9, at 568. "Judge Hifo's reversal was further based on BLNR's failure to consult with the Water Commission, as required by the regulation." *Id.* at 600 n.413. "Section § 11-200-8(a) of the Hawai'i Administrative Rules requires the agency purporting to invoke the exception to performing an EA to consult with other agencies." *Id.* (citing Hifo Order, *supra* note 268, at 6).

[274] *See* Dawson, *supra* note 20.

[275] Dawson, *supra* note 20 (quoting Native Hawaiian Legal Corporation attorney Ashley Obrey); *see* Ho'okano, *supra* note 21, at 226–27 (detailing the drama of appointing a stream monitor to insure compliance with the order, the stream monitor's claim he did not have authority to release water despite court order, a taro farmer lifting the gates diverting water into EMI's Ko'olau ditch at the site inspection, and the fallout from that inspection).

[276] Board's Revocable Permit Approval Dec. 9, 2016, *supra* note 36.

[277] HAW. REV. STAT. ANN. § 343-5(a)(1) (West 2018).

[278] Nishimura Order, *supra* note 35, at 4.

[279] *Id.*

[280] Letter from Ian C. Hirokawa, Special Projects Coordinator, Dep't of Land and Nat. Res., to Bd. of Land and Nat. Res. at 3–4 (Nov. 9, 2017) (on file with author) [hereinafter Board's Revocable Permits Approval Nov. 9, 2017].

[281] *Id.* at 4 ("Although the permits were invalidated by the Circuit Court, the ruling was stayed pending the appeal. Therefore, the permits remain in holdover status until that time.").

B. The Backlash: An Overview of HB 2501 (Act 126)

House Bill ("HB") 2501 was introduced on January 27, 2016.[282] The explicit purpose of the bill was a response to Judge Nishimura's January 8, 2016 ruling to invalidate the Board's issuance of temporary revocable permits to A&B, which created an "uncertainty [that] clouds the future not only of the lands used to grow sugar on Maui but for permit holders across the State."[283] Like its companion bill, Senate Bill 3001, HB 2501 sought to amend HRS section 171-58 to "allow a holdover permit to be issued for applicants seeking to renew their previously authorized water rights lease[.]"[284] HB 2501 would enable the Board to authorize holdover permits on a yearly basis for up to three consecutive years where an applicant is in the process of applying to the Board for a long-term water lease.[285] HB 2501 also required that the holdover permit be consistent with the public trust doctrine, that it be limited to existing lease applicants, and that the bill sunset on June 30, 2019.[286] An additional provision, however, allows the Board discretion to reauthorize any holdovers who applied under the Act prior to the sunset date.[287]

As an example of how hotly contested this bill was:

> Approximately thirty-five organizations submitted written testimony supporting H.B. 2501, and sixty-five organizations submitted testimony in opposition. Proponents included politically and economically powerful players such as A&B and its subsidiary EMI, Monsanto, Syngenta, the State Department of Agriculture, and the Office of the Mayor of Maui County. A number of farmers and ranchers, businesses, and water-dependent power utilities also rallied to support A&B. Their message was consistent: without A&B and EMI's continued East Maui water diversions, agriculture, the

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[282] HAWAII STATE LEGISLATURE, https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=2501&year=2016 (last visited Mar. 1, 2019). Representative Ryan I. Yamane (H-district 37: Mililani, Waipio Gentry, Waikele), Justin H. Woodson (H-district 9: Kahului, Puunene, Old Sand Hills, Maui Lani), Kyle T. Yamashita (H-district 12: Spreckelsville, Pukalani, Makawao, Kula, Keokea, Ulupalakua, Kahului), former Representative Joseph M. Souki (H-district 8: Kahakuloa, Waihee, Waiehu, Puuohala, Wailuku, Waikapu), and the late Representative Clift Tsuji (H-district 2: Keaukaha, parts of Hilo, Panaewa, Waiakea) introduced H.B. 2501. *See generally* Chad Blair, *Alexander & Baldwin Reinserted into Bill to Extend Hawaii Water Leases,* CIVIL BEAT (Apr. 21, 2016), http://www.civilbeat.org/2016/04/alexander-baldwin-reinserted-into-bill-to-extend-hawaii-water-leases/.

[283] H.R. 28-7, Reg. Sess., at 1338 (Haw. 2016) (Conf. Comm. Rep.).

[284] H. Journal, 28th Leg., S.C. Rep. 212-16 (Haw. 2016).

[285] H.B. 2501, 28th Leg., Reg. Sess., at 1 (Haw. 2016).

[286] *Id.* at 1, 3.

[287] *Id.* at 4.

> economy, and Upcountry Maui residents would be in peril. A&B testified, "[f]or over 100 years, it has been the state's East Maui waters that have enabled the Central Maui isthmus to be in productive agriculture. And it is these waters that will enable it to remain in agriculture, after sugar." They blamed Circuit Court Judge Nishimura's ruling for creating "limbo" by leaving revocable water permit holders on unstable ground, which in turn caused great concern among farmers and ranchers [throughout Hawai'i].[288]

In opposition, organizations such as the Sierra Club of Hawai'i, Nā Moku, the Native Hawaiian Legal Corporation, Earthjustice, Office of Hawaiian Affairs, including kalo farmers, Ko'olau Maui residents and families, environmentalists, and members of the Native Hawaiian community mobilized.[289] Testimonies centered around "the over 140-year history of diversions harming Native Hawaiians, taxpayers, and native stream-life."[290] Rounding off the Mo'o narrative, testimonies recounted the "injustice of special treatment for A&B [and its subsidiaries], reiterating water's public

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[288] Lizzi, *supra* note 35; *see, e.g.*, *Hearing on H.B. 2501 Before the H. Comm. on Water & Land*, 28th Leg., Reg. Sess., at 28 (Haw. 2016) [hereinafter *H.B. 2501 Hearings*], https://www.capitol.hawaii.gov/Session2016/Testimony/HB2501_TESTIMONY_WAL_02-08-16_.PDF, (statement of Land Use Research Foundation of Hawai'i) ("Having been made aware of the issues with the statutory provision as currently written, this Committee should take appropriate action to address the problem and amend the law to allow BLNR to take narrow exception and to issue a holdover permit for an extended holdover period in cases involving exceptional circumstances, particularly when the issuance of such permit will best serve the interests of the State."); *H.B. 2501 Hearings*, *supra* at 24 (statement of Meredith Ching, Senior Vice President of Government & Community Relations, Alexander & Baldwin, Inc.) (pointing out that should the Circuit Court decision be upheld, this will "significantly impair the availability of water in Central and Upcountry Maui for agricultural and domestic uses.").

[289] *See, e.g.*, *H.B. 2501 Hearings*, *supra* note 288, at 2 (statement of OHA) ("Notwithstanding long-standing laws recognizing water as a public trust resource, however, for over a century large plantation interests have laid exclusive claim to substantial amounts of water, in furtherance of their private, commercial endeavors."); *id.* at 41 (statement of Earthjustice) ("As the Supreme Court recently reaffirmed, the 'public trust encompass[es] all the water resources of the State.'") (quoting Kauai Springs, 133 Hawai'i 141, 171, 324 P.3d 951, 981 (2014)). "The Department cannot fulfill this constitutionally imposed mandate if, as HB 2501 proposes, it is allowed to circumvent existing procedures for issuing leases to use the state's freshwater resources." *Id.* (statement of Earthjustice).

[290] Lizzi, *supra* note 35; *see, e.g.*, *H.B. 2501 Hearings*, *supra* note 288, at 32 (statement of Sierra Club of Hawai'i) ("HB2501/SB3001 is silent on the issue of payment for the 'hold-over' permit. As it is now, the people of Hawai'i receive almost no financial compensation for the taking of their water. Since the 1980's, A&B has paid only $160,000 to the State to use 33,000 acres of public land and to take 164 million gallons of water everyday. That amounts to less than $5 per acre per year and less than 1/4 of one penny per 1,000 gallons of water. For context, A&B sells some of its privately owned water to the County of Maui for residential use. A&B charges Maui County $2 million every year for 9 million gallons of water per day.").

trust status, and [offering a] range of alternatives available to provide water for A&B's diversified agriculture plan and Upcountry Maui residents."[291]

Ultimately, the legislators found the colonizer's narrative to be the most compelling, and HB 2501 was passed.[292] On June 28, 2016, Governor David Ige signed HB 2501 into law as Act 126.[293]

C. The Battle Over Collective Memory: Nā Mo'o versus The Colonizer

War does not decide the justice of any question. It only determines which party is the most ferocious and savage.[294]

Hawai'i's laws regulating our water resources are principal sites to frame collective memories of injustice.[295] On its face, HB 2501 allows nearly a dozen individuals and private companies throughout Hawai'i with revocable permits to divert streams that run across state lands, for a period of three years (with the opportunity to extend) in lieu of securing long-term water leases from the Board.[296] The practical and legal implications, however, inundate the social justice landscape.[297] As previously described, "justice struggles through claims of right are, first and foremost, active, present-day struggles over collective memory. How a community frames past events and connects them to current conditions often determines the power of justice claims or of opposition to them."[298] Furthermore, a cultural narrative can be sustained or contested through the sculpting and retelling of stories, by way of the judicial and now the legislative process.[299] Indeed, this is reflected in the "dissonant framing of the 'injustice'" in the passage of HB 2501.[300] Was A&B lobbying for domestic water needs of Upcountry residents and diversified agriculture

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[291] Lizzi, *supra* note 35; *see, e.g.*, *H.B. 2501 Hearings*, *supra* note 288, at 33 (statement of Sierra Club of Hawai'i) ("A&B does not need to take the public's water. First, A&B has at least 20 million gallons per day of water from Na Wai Eha, and over 80 million gallons of water a day from private sources they control. Second, A&B admits to wasting at least 35 million gallons a day of water because their diversion pipes are old and leaky.").

[292] *See* Act of June 27, 2016, ch. 126, § 1, 2016 Haw. Sess. Laws 420 (codified as amended at HAW. REV. STAT. § 171-58(c)).

[293] *Id.*

[294] GEORGE NICHOLSON, ON THE CONDUCT OF MAN TO INFERIOR ANIMALS 54 (4th ed. 1819) (emphasis added).

[295] *See* Serrano, *supra* note 75, at 363.

[296] *See* H.B. 2501, 28th Leg., Reg. Sess. (Haw. 2016).

[297] *See* Horn and Yamamoto, *supra* note 37, at 1771.

[298] *Id.*

[299] *See* Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 21 (1994).

[300] *See* Horn and Yamamoto, *supra* note 37, at 1771.

in central Maui on behalf of the public interest? Or is A&B part of persisting, long-term efforts to maintain the institutional clutches of "U.S. colonialism, in which race, economics, and politics played major roles?"[301]

Two illustrative examples emphasize the need for this article. The legislature's justifications for the passage of HB 2501 as reflected in its legislative history, ignorantly or not, continues to promote the theft of water from East Maui taro farmers now in the name of diversified agriculture as an ode to the former glory days of "King Sugar" and a platform to reframe water law and custom in Hawai'i. Reinvigorating this "old, erroneous memory is both [injurious] to [Kānaka Maoli] and undermines indigenous [and public] legal claims by actively constructing the past in a misleading way."[302] Investigating the collective story that the Legislature recalled in their committee and conference committee reports highlights the gravity "of the collective memory of injustice for both K[ā]naka Maoli" rights and legal claims, including the public trust management of Hawai'i's freshwater resources.[303]

1. The conference committee's claims regarding Judge Nishimura's January 2016 ruling are misguided.

Essentially, the conference committee's concerns with Judge Nishimura's decision in *Carmichael, et al. v. Board of Land and Natural Resources* (Civ. No. 15-1-0650-04) mischaracterizes the history of water management in East Maui.[304] Relying primarily and selectively on the testimony provided by organizations such as A&B and its subsidiary EMI, Land Use Research Foundation of Hawaii ("LURF"), Chamber of Commerce Hawaii, Building Industry Association-Hawaii, Monsanto, the State Department of Agriculture, Hawai'i Farm Bureau, and the Office of the Mayor of Maui County, the conference committee elevated the colonizer's narrative by carving out a sensational narrative comparable to the classic hero's tale of how Western law and custom rescued primitive tribes.[305] In this case, the

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[301] *See id.* at 1772.

[302] MacKenzie & Sproat, *supra* note 74, at 499.

[303] *Id.*

[304] *See* H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.).

[305] *See id.* ("Your committee finds that it is in the State's interest to respond to the closure of the sugar industry and to facilitate the revitalization of Maui's economy."). *Compare H.B. 2501 Hearings, supra* note 288, at (statement of Warren Watanabe, Executive Director, Maui County Farm Bureau) ("Maui's water infrastructure grew out of the sugar plantations. . . . We agree that our laws should properly apply to these water systems, but we also think our laws should recognize the reliance of the island of Maui on these systems."), *with H.B. 2501 Hearings, supra* note 288, at 52 (Statement of Carol Lee Kamekona) ("A&B was told by Judge Eden Hifo more than a decade ago it must do an EA in order to continue its diversions, but

conference committee acknowledges that it is A&B who continues to provide Kānaka Maoli and the residents of Central, South, and Upcountry Maui with a source of water for their homes, farms, ranch, as well as jobs, in the twenty-first century.[306] In "flipping the script," A&B and its allies tirelessly alluded to the Upcountry customers who depend on the water from East Maui for their domestic and agricultural needs.[307] More importantly, A&B's transition efforts from its sugar operations to diversified agriculture "may [also] be in jeopardy without an adequate supply of water."[308] Implicit in their message: Native Hawaiian farmers seek to monopolize the water for themselves, abandoning the need to provide waters to immigrant farmers, and agencies working on behalf of all individuals.[309]

The conference committee characterized A&B's closure of its sugar operation as "emblematic of the challenges that the State faces when one era ends and a new future is contemplated."[310] There was no mention of viewing the crossroad in management of the permits as an opportunity for the long-awaited restoration of stream flow and water rights in East Maui.[311] Nowhere in its various committee or conference committee reports did it mention that farming has often failed to continue on prime agricultural lands vacated by Hawai'i sugar plantations over the last fifty years, and instead touted the potential for agriculture and alternative energy, despite years of the lands reaming fallow and abandoned.[312] For example, by 1975, the Kohala Sugar

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ignored her court order. Inn [sic] the meantime, for many decades, although o[u]r East Maui Taro Farmers were deprived of water they have always followed and respected the law.").

[306] *See* H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.).

[307] *See H.B. 2501 Hearings, supra* note 288, at 113 (statement of David DeLeon, Government Affairs Director, Realtors Association of Maui). DeLeon claimed that "[w]ithout that [East Maui stream] flow, there will be no cover crop on the 36,000 acres HC&S is currently farming, and the South Maui community will be subjected to unprecedented dust storms and potentially massive wildfires." *Id.*

[308] *H.B. 2501 Hearings, supra* note 288, at 25 (statement of Meredith Ching, Senior Vice President of Government & Community Relations, Alexander & Baldwin, Inc.).

[309] *H.B. 2501 Hearings, supra* note 288, at 29 (statement of Stephanie Whalen, Executive Director, Hawaii Agriculture Research Center) ("That is not the way our constitutional system is supposed to work. If the regular opponents of these issues put as much energy and finances into advocating for sufficient resources for the agencies to do their work then there wouldn't be the need for their endless legal challenges.").

[310] H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.).

[311] *See id.*; S. Journal, 28th Leg., S.C. Rep. 3598 (Haw. 2016); S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016); H. Journal, 28th Leg., S.C. Rep. 212-16 (Haw. 2016); H. Journal, 28th Leg., S.C. Rep. 1012-16 (Haw. 2016).

[312] *See* H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.); S. Journal, 28th Leg., S.C. Rep. 3598 (Haw. 2016); S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016); H. Journal, 28th Leg., S.C. Rep. 212-16 (Haw. 2016); H. Journal, 28th Leg., S.C. Rep. 1012-16 (Haw. 2016).

Company shutdown on Hawai'i island had dissolved North Kohala's principal employer and economic base.[313] By June 1971, Governor John A. Burns created a Task Force to address Kohala Sugar's shut down, however, despite their attempts to introduce new industries in the area, including agriculture, none were successful.[314] Another example includes the shutdown of Pioneer Mill, another sugar plantation in West Maui, in the 1990s, which was replaced with a long-range plan to guide development in the region.[315] Moreover, after Oahu Sugar Company closed in the mid-1990s, 1,100 of its agricultural acreage eventually went toward the development of O'ahu's "second city" named Kapolei.[316] In light of A&B's recently announced efforts to transition sugar operations at HC&S to diversified agriculture,[317] A&B claims that without this holdover measure, agricultural lands in Central Maui and statewide "may be in jeopardy without an adequate supply of [reliable and affordable] water."[318] A&B's testimony further reinforces that, "[a]ny agricultural future for Central Maui is dependent on the EMI ditch system continuing to collect and deliver water from the wetter side of the island."[319]

On the other hand, the Mo'o distinguish the holdover measure first, as an attempt to mislead farmers and ranchers regarding the issue as Judge Nishimura's ruling does not affect any revocable permit holders except the invalidated "holdover" status A&B once held.[320] No one other than A&B possessed a long-term holdover revocable permit pursuant to HRS Sections

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[313] *See* Carol A. Maclennan, *Hawai'i Turns to Sugar: The Rise of Plantation Centers, 1860–1880*, *in* 31 THE HAWAIIAN JOURNAL OF HISTORY 97, 105 (1997). Beth Thoma Robinson, *North Kohala Land for Sale in Historic Halawa*, HAW. LIFE (Mar. 22, 2010), https://www.hawaiilife.com/blog/north-kohala-land-for-sale-in-historic-halawa/.

[314] STEPHEN P. BOWLES ET. AL., KOHALA WATER RESOURCES MANAGEMENT AND DEVELOPMENT PLAN PHASE II XV–XVI (1974) (on file with author).

[315] *Maui Grown Coffee Brings It All Back Home*, KAANAPALI DEVELOPMENT, http://www.kaanapalidevelopment.com/news/MNKO-MGC.pdf (last visited Nov. 7, 2018).

[316] *See generally* Teresa Dawson, *$31 Million Purchase Price Only the Start of State Expenses for O'ahu Sugar Land*, ENV'T HAW. (July 2001), http://www.environment-hawaii.org/?p=3168.

[317] *H.B. 2501 Hearings, supra* note 288, at 24 (statement of Meredith Ching, Senior Vice President of Government & Community Relations, Alexander & Baldwin, Inc.).

[318] *Id.* at 23–24; *see also* Teresa Dawson, *HC&S Claims Diversified Ag Needs Will Exceed 100 Million Gallons a Day*, ENV'T HAW. (Dec. 2016), http://www.environment-hawaii.org/?p=9433 ("The assurance of the availability of an economically feasible source of water is necessary to justify such major investments by A&B and others who will be farming on HC&S land.").

[319] *H.B. 2501 Hearings*, *supra* note 288, at 28 (statement of Land Use Research Foundation of Hawai'i).

[320] *See* Transcript of Proceedings at 46–47, Carmichael v. Bd. of Land and Nat. Res., No. 15-1-0650 (Haw. 1st Cir. Nov. 24, 2015); *see also* Nishimura Order, *supra* note 35.

171-55,[321] 171-58 because there was no statutory language allowing the Board to grant "uninterrupted use of these public lands on a holdover basis for . . . 13 years[.]"[322]

The conference committee ignored Judge Nishimura's and the courts' "legally duty-bound to apply HRS 171 to situations such as the [current one involving A&B and its subsidiaries]," and employed the health, safety, and welfare harms rhetoric of public rights to defeat the public trust and Kānaka Maoli claims.[323] In fact, the conference committee further justifies the unique situation this measure would create by finding that "it is in the State's interest to respond to the closure of the sugar industry and to facilitate the revitalization of Maui's economy"[324]—alluding that A&B's projected transition to diversified agriculture will do just that.[325]

Though supporters of the holdover measure insist that HB 2501, "is of special interest to agriculture,"[326] the Mo'o and others in opposition, indicate "HB 2501 is a special-interest bill favoring one large company, A&B, contrary to the State's obligation to protect public trust resources for the people and future generations."[327] Likewise, the Mo'o points out that the

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[321] "Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction, under conditions and rent which will serve the best interests of the State, subject, however, to those restrictions as may from time to time be expressly imposed by the board. A permit on a month-to-month basis may continue for a period not to exceed one year from the date of its issuance; provided that the board may allow the permit to continue on a month-to-month basis for additional one year periods." HAW. REV. STAT. ANN. § 171-55 (West 2018).

[322] Nishimura Order, *supra* note 35, at 4; H. Journal, 4th Leg., S.C. Rep. 522-67 (Haw. 1967). The legislature mandated that the Board affirmatively decide annually whether revocable permits should be extended. The House Committee on Lands explained that this section of the law was amended:

> to require that at the end of each year during the continuance of a permit, the board must give its approval before a permit may be continued. It is intended that a permit on a month to month basis shall be for a duration of one year unless extended by the board. At the end of each year, if the permit on a month to month basis is extended for another year, the board approval must be had. Certain language clarity was necessary inasmuch as existing law does not expressly state that a periodic annual review is required but may be construed to mean that only one initial review is necessary after the first one year period.

H. Journal, 4th Leg., S.C. Rep. 522 (Haw. 1967).

[323] *H.B. 2501 Hearings*, *supra* note 288, at 28 (statement of Land Use Research Foundation of Hawai'i).

[324] H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.).

[325] *H.B. 2501 Hearings*, *supra* note 288, at 24–25 (statement of Alexander & Baldwin Inc.)

[326] *Id.* at 19 (statement of Hawai'i Farm Bureau).

[327] *Id.* at 142 (statement of Aarin Gross, Individual).

measure provides no assurance that the amount of water A&B continues to divert from East Maui will indeed be used for diversified agriculture.[328] The Mo'o further characterizes A&B's efforts to force the amendment of a public water statute as a "last-ditch effort (pardon the pun) to legitimize its historic and cruel theft of East Maui stream water."[329]

Again, the conference committee employed the constitutional rhetoric of the State's affirmative duty to "conserve and protect agricultural lands, [and] promote diversified agriculture" as a way to defeat Kānaka Maoli claims; significantly ignoring the Mo'o and dramatically altering the collective memory of A&B's historic and continued irrigation.[330] Out of the 133,105 acres of Important Agricultural Lands,[331] the conference committee paid specific attention to the agricultural acreage owned by A&B by specifically pointing out "there are 27,000 acres of Important Agricultural Lands whose status may be threatened if water rights were terminated."[332] In doing so, it dramatically described Judge Nishimura's decision to invalidate A&B's revocable permits on a holdover basis as an "abrupt termination of water rights on Maui" and relies on the Attorney General Office's worry that: "[N]ot continuing the permit[s] could result in people being left with no drinking water, farmers being left with no water for their fields, and schools and hospitals being forced to shut down."[333]

Another ramification of the Legislature's twisted narrative of A&B's irrigation history in East Maui and its doomsday portrayal of Judge Nishimura's decision is the excessive pressure and fear instilled by A&B's lobbyists and supporters.[334] The emphasis on the State's constitutional duty to conserve and protect agricultural lands, serving domestic and agricultural water needs of 36,000 Upcountry residents and small scale farmers, rather than its duty to uphold the public trust, including the protection of traditional

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[328] *See id.* at 32–33 (statement of Martha Townsend, Director, Sierra Club of Hawai'i).

[329] *Id.* at 40 (statement of Conservation Council for Hawai'i).

[330] HAW. CONST. art. XI, § 3; H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.) ("Embracing this transition is in line with the State's constitutional duty to conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.").

[331] Dep't of Agric., *Designated Important Agricultural Land—By Island*, HAWAII.GOV, https://hdoa.hawaii.gov/wp-content/uploads/2013/02/IAL-voluntary-summary.e14_rev-11-03-17.pdf (last updated Nov. 3, 2017).

[332] H.R. 28-7, Reg. Sess., (Haw. 2016) (Conf. Comm. Rep.). "[I]f a sufficient supply of water is no longer available to allow profitable farming of the land" a landowner may petition to remove the Important Agricultural Lands designation. *Id.* (citing HAW. REV. STAT. ANN. § 205-50 (West 2018)).

[333] H.R. 28-7, Reg. Sess., at 1338 (Haw. 2016) (Conf. Comm. Rep.).

[334] *See* Troy J.H. Andrade, *(Re)righting History: Deconstructing the Court's Narrative of Hawai'i's Past*, 39 U. HAW. L. REV. 631, 671 (2017).

and customary Native Hawaiian rights, provides an apt example of the impacts posed by the passage of HB 2501.[335] These lobbyists, then, become institutionally inscribed and speak with the authority of the State to legitimize their actions.[336] Willingly or not, embracing the lobbying efforts of A&B and its allies, without questioning or acknowledging the divisiveness of water issues, further silences the Moʻo perspective of these special interest measures.[337] Turning a blind eye to these lobbying pressures, "does a disservice to the advancement of justice for all."[338]

"What emerges from the [Legislature's] selective, often euphemistic, historical framing" is a story of institutional classism against A&B and the residents, small-scale farmers, and ranchers of Upcountry Maui.[339] According to the committee's construction of A&B's irrigation history on Maui, while the concerns of Maui taro farmers, Kānaka Maoli, and environmentalists "are very real and need to be incorporated into a final solution regarding water rights on Maui," Judge Nishimura's decision "has created a very serious situation for agriculture in the State and brought into question the validity of water and land revocable permits."[340] Ultimately, "[w]hen those in power are threatened by groups reconstructing historical injustice, they seek to discredit the developing memory or resurrect the old memory themselves to maintain the status quo."[341]

The battle over collective memory surrounding Judge Nishimura's decision, underscores its power and possibilities for justice struggles, as another strategy to "partially transform the old memory . . . into a new memory . . . that justifies continued hierarchy[.]"[342] The

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[335] *See* H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.); Hom & Yamamoto, *supra* note 37, at 1765; MacKenzie & Sproat, *supra* note 74, at 512 ("This undermines the collective memory of the injustices committed against Native Hawaiians by seeking to discredit the developing memory and resurrect the old, inaccurate memory to undercut Native Hawaiian legal claims[.]").

[336] *See* SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW 265 (2000) (illustrating how "social meanings outside of law shape the statutes" and pressures in the context of criminalization patterns in Hawai'i.). "[T]he law is neither purely a tool for imposing the rule of dominant groups nor a weapon for resistance, but a site of power, defined by its texts, its practices, and its practitioners, available to those who are able to turn it for their purposes." *Id.*

[337] *See* Andrade, *supra* note 334, at 679.

[338] *Id.*

[339] *See* Hom & Yamamoto, *supra* note 37, at 1775.

[340] S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016); *see also* H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.).

[341] MacKenzie & Sproat, *supra* note 74, at 484 (citing Hom & Yamamoto, *supra* note 37, at 1765).

[342] *See* Hom & Yamamoto, *supra* note 37, at 1765. An example includes transforming the

mischaracterizations that savagely played out in the hearings surrounding HB 2501 warps the collective memory of the injustices committed against Kānaka Maoli and subvert their means of social and legal relief to right those wrongs.[343]

2. A&B's previous and newly authorized holdover status of their revocable permits is not consistent with Hawai'i's codification and application of the public trust doctrine.

Another example of how the conference committee twisted the collective memory of injustice to resuscitate the colonizers narrative of water lease history in East Maui involved the assessment of A&B's revocable permits, which is rooted in a misinterpretation of the jurisprudential foundations and history of the public trust doctrine in Hawai'i.[344] The Hawai'i Supreme Court continuously holds that "the object [of the public trust doctrine] is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes 'use.'"[345] The Court further mandates a presumption in favor of protecting public uses of the public trust resource.[346] Despite the Court's protections, the Legislature continued to dismiss the various constitutional and cultural protections recognized by the courts.

A&B's supporters characterize the expiration of A&B's existing permits during the last sixteen years of protracted litigation as "underlying extraordinary circumstances . . . which [were] completely outside the control of the permittee."[347] Cherry-picking from less relevant provisions of the Constitution,[348] the conference committee crafted an exceptional account

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old memory, justifying the 1893 overthrow of the Kingdom of Hawai'i by claiming that indigenous Hawaiians did not control their government and "unconditionally relinquished sovereignty and all subordinate rights including inherent sovereignty and the rights to self-determination[.]" MacKenzie & Sproat, *supra* note 74, at 498 (providing examples of inaccurate characterizations of Native Hawaiian history to "distort the collective memory of the injustices committed . . . and discount the legal and other vehicles established to right those wrongs.").

[343] *See* MacKenzie & Sproat, *supra* note 74, at 498.

[344] *See generally* Board's Revocable Permit Approval Dec. 9, 2016, *supra* note 36; Board's Revocable Permits Approval Nov. 9, 2017, *supra* note 280.

[345] Waiāhole I, 94 Hawaii 97, 140, 9 P.3d 409, 452 (2000).

[346] *Id.* at 142, 9 P.3d at 454.

[347] *H.B. 2501 Hearings*, *supra* note 288, at 28 (statement of Land Use Research Foundation of Hawai'i) ("[I]t would be irresponsible for this Legislature to stand by and ignore the potential economic and social consequences, as well as the health and safety issues that could arise due to the courts being legally duty-bound to apply HRS 171 to situations such as the present[.]").

[348] *See, e.g.*, HAW. CONST. art. XI, § 3 (regarding the conservation and protection of

comparable to a story of how a disaster of epic proportions could "aggravate[] or salve[]"[349] the health, safety, and welfare of "our communities"[350] while creating a "very serious situation for agriculture in the State[.]"[351]

Even though the Hawai'i Supreme Court has identified a set of public trust purposes, nowhere did the conference committee's report mention any of them.[352] Instead, the conference committee majority articulated its own set of public uses, including "the provision of drinking water; the generation of clean, renewable energy; and the support of [diversified] agriculture and agricultural lands" as having "a clear value to the public."[353]

While these priorities should be protected, these responsibilities do not rise to the level of constitutional protections recognized by the Hawai'i Supreme Court.[354] Further, according to the Water Code, the aforementioned objectives are "declared to be in the public interest"[355] and therefore, "do not enjoy the same protection" as public trust purposes.[356] In addition, the conference committee failed to mention that the Court in *Waiāhole I* already clarified that "private commercial use," such as industrial and diversified agriculture, is not a protected public trust use.[357] Contrary to the conference committee's mistaken adoption of the constitutional rhetoric deployed by A&B,[358] the Court in *Waiāhole I* holds that even though private, commercial uses of natural resources may offer benefits to the public, such as increasing tax revenues or providing job opportunities within the State, private

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agricultural lands and the promotion of diversified agriculture); *id.* § 10 (concerning the use of public lands for farm development and home ownership).

[349] Hom & Yamamoto, *supra* note 37, at 1757.

[350] H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.).

[351] S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016).

[352] *See* H.R. 28-7, Reg. Sess., at 1338 (Haw. 2016) (Conf. Comm. Rep.); Waiāhole I, 94 Hawai'i 97, 136–39, 9 P.3d 409, 448–51 (2000) (identifying three purposes or uses protected by the public trust: water resource protection, domestic use protection, and the exercise of Native Hawaiian traditional and customary rights); Wai'ola, 103 Hawai'i 401, 431, 83 P.3d 664, 694 (2004) (holding a reservation of water constitutes a public trust purpose).

[353] H.R. 28-7, Reg. Sess., at 1339 (Haw. 2016) (Conf. Comm. Rep.).

[354] *See Waiāhole I,* 94 Hawai'i at 146, 9 P.3d at 458.

[355] HAW. REV. STAT. ANN. § 174C–2(c) (West 2018).

[356] SPROAT, OLA I KA WAI PRIMER, *supra* note 9, at 8 ("Public trust purposes have priority over private commercial uses, which do not enjoy the same protection.").

[357] *Waiāhole I*, 94 Hawai'i at 138, 9 P.3d at 450 (holding "that the public trust may allow grants of private interests in trust resources under certain circumstances" but that in no way does a private commercial use qualify as a public purpose that is protected by the trust).

[358] *See* H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.); S. Journal, 28th Leg., S.C. Rep. 3598 (Haw. 2016); S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016); H. Journal, 28th Leg., S.C. Rep. 212-16 (Haw. 2016); H. Journal, 28th Leg., S.C. Rep. 1012-16 (Haw. 2016).

commercial use is not a protected trust purpose that could benefit from protection under article XI, section 1.[359]

The conference committee further distorts the State's affirmative duty by leaving out the *Waiāhole I* Court's clarification that when weighing competing interests in public resources, the State must start with a "presumption in favor of public use, access, and enjoyment."[360] In other words, public trust uses of natural resources in Hawai'i, specifically water, are the "norm or default condition" while private commercial uses undergo a "higher level of scrutiny."[361]

Perhaps most revealing was the conference committee's pass over of the precautionary principle. As a developing principle of environmental law:

> Where scientific evidence is preliminary and not yet conclusive regarding the management of [natural] resources which are part of the public trust, it is prudent to adopt 'precautionary principles' in protecting the resource. That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. . . . In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect that resource.[362]

How, then, does HB 2501 and the holdover status it affords its revocable permit holders, A&B in particular, comport with the public trust doctrine in light of the Legislature's and A&B's dismissive treatment of the precautionary principle?[363] Even if there is a lack of scientific certainty, "the burden ultimately lies with those seeking or approving such [private commercial] uses to justify them in light of the purposes protected by the trust."[364]

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[359] *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454.

[360] *Id.* at 142, 9 P.3d at 454.

[361] *Id.* at 142, 9 P.3d at 454 (quotations omitted).

[362] *Id.* at 114, 9 P.3d at 426 (quoting the Water Commission's decision).

[363] *See, e.g.*, S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016) ("Your Committee further finds that while the Board may traditionally defer to the [Water] Commission [] to determine the volume of water a permitee or lessee may withdraw from a stream, the Board has the authority to make an independent decision, in the absence of a Commission decision, when issuing a disposition of water rights by lease. The Board may adopt lease language that would automatically amend the lease and incorporate a final [Water] Commission decision, once one is issued."); *H.B. 2501 Hearings*, *supra* note 288, at 25 (statement of Meredith Ching, Senior Vice President of Government & Community Relations, Alexander & Baldwin) (urging legislators to authorize holdover status for permits to continue a previously authorized disposition of water rights, "until the [Board] can complete the process for issuing a water lease for sale at public auction").

[364] *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454.

This means that the party seeking to use the public trust resource for private commercial uses bears the burden of demonstrating that the use is "not injurious to the rights of others."[365] As evidenced by the overwhelming testimony by the Moʻo and their allies against HB 2501, detailing the limitations on Kānaka Maoli ability to exercise traditional and customary practices in the greater East Maui area due to the lack of adequate flowing streams and into the nearshore marine environment and the State's inability to uphold its public trust obligations.[366] Even though the conference committee acknowledges that the concerns raised by the Moʻo "are very real and need to be incorporated into a final solution regarding water rights on Maui,"[367] it further defiantly ignores the precedent of the Court by perpetuating A&B's status quo permitting and diversions, allowing A&B to engage in proposed projects without studying the impacts on Kānaka Maoli natural and heritage resources, and forcing East Maui to continue subsidizing the future for the rest of the island.[368]

As seen by the triumph of HB 2501, which creates an inaccurate and insincere manipulation of the public trust doctrine, the Legislature flagrantly disregarded its affirmative duties to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people" and to "protect the use of water in the exercise of [Kānaka Maoli] traditional and customary rights."[369] This flagrant disregard contributes to the collective memory of injustice, which highlights "the political and cultural dynamics, and the strategic import of collective memory for justice claims processed through the U.S. legal system[,]" frustrating not only the Moʻo of East Maui but the Kānaka Maoli community at large, who remain susceptible to the harms from

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[365] *Id.* at 143, 9 P.3d at 455.

[366] *See, e.g.*, *H.B. 2501 Hearings*, *supra* note 288, at 132 (statement of Mary Ann Kamalani Pahukoa, East Maui Resident and Farmer) ("Keʻanae to Wailuanui is one of the few remaining areas in Hawaiʻi where ʻopae can be gathered. Virtually every stream had ʻopae at some time during the year. However, because of the diversion, it has made it extremely difficult for the elders, and keiki of east Maui to gather food for their home."); *id.* at 34 (Petition in Opposition to HB 2501 and SB 3001) ("This bill would create "hold-over permits" for millions of gallons of water diverted from public streams everyday with no environmental impact statement, no mitigation for the harm caused to native stream ecosystems, and no regard for the farmers that have used that stream water for generations to irrigate their taro crops.").

[367] S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016)

[368] *See* Summer Sylva, Note, *Indigenizing Water Law in the 21st Century: Na Moku Aupuni O Koʻolau Hui, A Native Hawaiian Case Study*, 16 CORNELL J. L. & PUB. POL'Y 563, 578–79 (2007) (arguing that this commonly held disposition "underscores the profound institutional impediments that continue to deprive a marginalized group of Native Hawaiian taro farmers of their natural flowing water source").

[369] HAW. CONST. art. XI, § 7; *see* Kauai Springs, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014) (quoting *Waiāhole I*, 94 Hawai'i at 137, 9 P.3d at 450).

stream diversions.[370] The Legislature presented itself as a rational political body in considering the passage of this holdover measure, as the Senate Committee on Water, Land, and Agriculture said it "has weighed all the facts surrounding this measure[.]"[371] Furthermore, the conference committee stated the intent of this measure was to prevent "the resulting negative social and economic impacts that would threaten our communities" without an "adequate supply of reliable, cost-efficient water."[372] The conference committee did not fall prey to the excessive pressure from A&B lobbyists and its supporters, the Senate Committee on Water, Land, and Agriculture said, it acted in the "interest of all."[373]

Overall, the open-ended grant to A&B and its allies to take water from public streams turns the public trust doctrine on its head. The Legislature selectively utilized the colonizers' narrative to invoke the classic tale of A&B's heroism as the primary economic and social provider for the Maui community.[374] Moreover, the Legislature operated under the social construct that A&B's continued East Maui stream diversions are needed to continue meeting "the water needs of 36,000 [U]pcountry [Maui] residents and farmers"[375] while ensuring that "Central Maui has a sustained source of water for agriculture."[376] The public trust doctrine mandates that the State "maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses."[377] Thus, given these mandates, both the nature of HB 2501 and A&B's holdover status of their revocable permits pursuant to the public trust doctrine are disconcerting.

The State, specifically the Legislature, recognized its role in perpetuating historic harms against marginalized groups and has firmly committed itself to reparatory justice through reconciliation efforts.[378] Notwithstanding this

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[370] *See* MacKenzie & Sproat, *supra* note 74, at 496 (quoting Hom & Yamamoto, *supra* note 37, at 1777).

[371] S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016).

[372] H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.).

[373] S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016).

[374] *See* H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.); S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016).

[375] *See* H.R. 28-7, Reg. Sess. (Haw. 2016) (Conf. Comm. Rep.).

[376] Rob Perez, *Water Bill Criticized as a Way to Skirt Court*, STAR ADVERTISER 5 (Feb. 7, 2016), https://sierraclubhawaii.org/wp-content/uploads/2016/02/East-Maui-Stream-Honolulu-Advertiser-Articles.pdf.

[377] Kauai Springs, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014).

[378] *See* Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 45 (2009) (citing A BROKEN TRUST: THE HAWAIIAN HOMELANDS PROGRAM: SEVENTY YEARS OF FAILURE OF THE FEDERAL AND STATE GOVERNMENTS TO PROTECT THE CIVIL RIGHTS OF NATIVE HAWAIIANS, HAWAI'I ADVISORY

acknowledgement, the Legislature continues to fail its public trust duties pursuant to Article XI, Section 1 and Section 7, which mandates that all waters are held in trust for the benefit of the State's citizens, as well as its affirmative duty under Article XII, Section 7, which provides protections for Kānaka Maoli to practice traditional and customary rights.[379]

VI. CONCLUSION

> *"Scars are but evidence of life[.] . . . Evidence of choices to be learned from . . . evidence of wounds . . . wounds inflicted of mistakes . . . wounds we choose to allow the healing of. We likewise choose to see them, that we may not make the same mistakes again."*[380]

While the war over water in East Maui is historically, ecologically, and legally complex, this case study illuminates the collective memory of injustice as a critical theoretical development. A&B's backlash against the Nishimura decision in 2016 was difficult to foresee, but easy to forestall. Another blunder will undisputedly occur again, unless we address the source cause: the threshold struggle over the collective memory of injustice surrounding the monopoly of water in East Maui. Similar to the "host of other legal controversies around the world that involve [Indigenous] Peoples' struggle for self-determination through varying forms of environmental justice[,]" conceivably, the most significant challenge for the Legislature was "to meaningfully consider the rights and interests of Indigenous groups" and the community at large.[381]

Legislation can play a substantive role in interpreting and reinterpreting collective memory. As a matter of course, the State can legitimately use legislation as a tool to outline the collective memory of its citizens, especially those in underrepresented groups. Though controversial, it is an opportunity to remind the State of its "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[382] What is disturbing about the

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COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS 21 (1991)). "The Apology Resolution recognized that the Hawai'i state legislature had already expressed a firm commitment to reconcile with Native Hawaiians for misappropriating and mismanaging Hawaiian lands held in trust." *Id.*

379 *See* Waiāhole I, 94 Hawai'i 97, 137–41, 9 P.3d 409, 449–53 (2000).

380 MARCIA LYNN MCCLURE, THE WHISPERED KISS (2011) (emphasis added).

381 *See* Sproat, *Wai Through Kānāwai, supra* note at 24, at 209–10.

382 *Waiāhole I*, 94 Hawai'i at 141, 9 P.3d at 453 (citations omitted).

conference committee's "ideological historicism[,]"[383] in conjunction with the impacts on the ground in the community, is that it illustrates the status quo of perpetuating the colonizer's narrative resulting in the erasure of the Mo'o and the community-at-large from the water conversation. Professor D. Kapua'ala Sproat warns of similar tactics deployed by A&B in the continuing battle for water in Nā Wai 'Ehā on Maui in their attempts to justify, or at least co-exist with, environmental and economic inequity while claiming a commitment to upholding the public trust.[384]

> [T]he "boogeyman of an HC&S shutdown" weighed heavily on the commission majority. Despite its own findings that HC&S had historically used only a fraction of the water it was currently banking, had voluntarily reduced its own acreage, and had not attempted to acquire the leased fields it now claimed were vital to its very "survival," in the end, claimed economic impacts carried the most weight with the commission majority, informing its determination of practicability and other issues and overshadowing the law's original design and specific mandate to protect and restore Indigenous rights and interests.[385]

Environmental historian William Cronon also observes the power and possibilities of narrative form in shaping group memory: "By writing stories about environmental change, we divide the causal relationships of an ecosystem with a rhetorical razor that defines included and excluded, relevant and irrelevant, empowered and disempowered."[386] Remembering a fundamental principle of constitutional law in Hawai'i, such as the public trust doctrine, by merely mentioning it in the text of a measure that runs in contrast to the spirit of the principle, is not enough to legitimize its passage and more importantly is erroneous. Has the Legislature neutralized the plantation past by distorting the State's memories all in the name, rather than the merits of the public trust? Has it drawn upon "conservative historical accounts and construct[ed] a twisted memory, now inscribed in law, that comports with"[387] the committee's asserted belief that "it is in the interest of all for Hawai[']i to be self-reliant, achieving a sustainable community where food is grown locally and sustainably and water is clean and well managed . . . [?]"[388]

Further downstream, if A&B and its supporters succeed in legally skirting the public trust doctrine, its applicable laws, and Native Hawaiian rights, the State citizenry will accrue immense economic and cognitive costs. Even so,

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383 Hom & Yamamoto, *supra* note 37, at 1776.

384 *See generally* Sproat, *Wai Through Kanawai*, *supra* note 24.

385 *Id.* at 206–07 (citations omitted).

386 Cronon, *supra* note 38, at 1349.

387 Hom & Yamamoto, *supra* note 37, at 1776.

388 S. Journal, 28th Leg., S.C. Rep. 3058 (Haw. 2016).

Kānaka Maoli and the community at large remain hopeful since the State has pledged its efforts to protecting both the public trust[389] and Native Hawaiian rights,[390] by "express[ing] a commitment to justice and, when injustice occurs, reparation."[391]

The collective memory woven into HB 2501 and its consequences distorts Hawai'i's public trust protections and further erases Kānaka Maoli rights. The conference committee twisted a history of plantation privilege and profit into a justification for present-day equality for A&B. The Legislature undermined other State constitutional rights principles of resource protection and conservation, and the public trust doctrine itself by dismissing the mandated presumption in favor of public use, access, and enjoyment while balancing between public and private purposes in terms of competing water uses. In the same vein, by narrowly framing history to justify its passage of HB 2501, the Legislature not only "generate[s a] precedent for forthcoming [legislation] that undermines the principle of justice through reparation"[392] but also "confuses and constrains the larger community's understanding of [these] legal claims."[393]

Thereby, as Professor Yamamoto advised, "understanding the political and cultural dynamics and strategic import of collective memory for justice claims processed through the U.S. legal system is an integral part, though only one part, of the larger project of re-forming civil rights in uncivil times" and in this case both Kānaka Maoli rights and the public trust in the era of exclusivity.[394] The quest for a solution regarding water rights on Maui will not get any easier with delay. The 140-year war for water in East Maui between the Moʻo and A&B highlights the need for institutional and structural change in Hawai'i as soon as possible. The "collective memory of injustice" as a legal analytical framework presents a sensible paradigm for identifying key historical narrative structures, which "provide critical context—the essential language, ideas, and images of the 'stories'—necessary to understand past events."[395] Equally important, in a social justice context, this framework illuminates the "complexity of how collective

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[389] *See* HAW. CONST. art. XI, §§ 1, 7; Waiāhole I, 94 Hawai'i 97, 9 P.3d 409 (2000).

[390] *See, e.g.*, Office of Hawaiian Affairs v. House & Cmty. Dev. Corp. of Haw., 117 Hawai'i 174, 177 P.3d 884 (2008), *rev'd and remanded*, Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) (acknowledging that the State cannot promote reconciliation to garner good graces and then when politically convenient, undermine promised reparatory action).

[391] Hom & Yamamoto, *supra* note 37, at 1777.

[392] *Id.*

[393] MacKenzie & Sproat, *supra* note 74, at 534.

[394] *See* Hom & Yamamoto, *supra* note 70, at 1777.

[395] MacKenzie & Sproat, *supra* note 74, at 489.

memory is socially constructed and subject to manipulation."[396] When reviewing and advocating for future measures, especially those regarding the disposition of water resources and rights, the Legislators' "recounting of historical events often determines whether, and to what extent, historical injustice occurred and the present-day need for rectification."[397]

Like public trials and their accompanying court decisions, legislative sessions and its accompanying committee and conference committee reports are particular theaters for the framing of the collective memory of injustice. While marginalized communities may utilize these theaters to "challenge the dominant memory—often with transformative benefits,"[398] legislators may also utilize these forums to reshape the way Hawai'i's public views our water resources through social justice. Though armed with the strong protections in the black-letter law, using collective memory as a legal framework is critical when contemplating justice struggles through current claims of right. Without this meaningful tool, decision-makers will continue to narrowly frame history and injustice. In their roles as the guardians of Hawai'i's precious water resources, the Mo'o and its allies in East Maui will continue in the fierce battle over the collective memory of injustice, using the power of their own "thunderous voice[s] down the corridors of time" to shape the current legal landscape, while carving out pathways to restore justice and stream flow in Hawai'i's communities and beyond.[399]

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396 *Id.* at 490.

397 *See* Serrano, *supra* note 75, at 363.

398 *Id.* at 430.

399 *See Ka'ai*, *supra* note 15, at xii.

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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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