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

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

Translation by Pauahi Ho‘okano

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The Law Review expresses its appreciation to the administration, faculty, staff, and students of the William S. Richardson School of Law.

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To the Class of 2020, On Becoming Richardson Lawyers

Hazel Beh[*] [**]

Thank you for choosing me to speak at your graduation. To family and friends, thank you for sharing these awesome students with us. We know what we demanded of them took precious time away from you all over these years. Thank you for your patience. This is a wonderful class. You are all well on your way to becoming Richardson Lawyers as evidenced by your enthusiastic participation in pro bono, moot court competitions, journals, the Hawai'i Innocence Project, and clinics—all the while maintaining your exceptional academic work.

You are also a resilient class who together have weathered this strange time of COVID-19. In all my years, I could never have dreamed that such a crisis would befall our world. This makes your accomplishments all the more impressive.

We often talk about what it means to be a Richardson Lawyer. Yet most of you probably didn't get to meet CJ Richardson personally, and might not completely understand why we hold him in such high regard.

I want to share with you some stories about your dean, Aviam Soifer. I think Avi is a manifestation of a Richardson Lawyer, and he is someone you do know. I want to share with you examples from Avi's life that I hope will give you courage, hope, and inspiration as you travel your own journey as a Richardson Lawyer.

A few years ago my brother died suddenly. Avi poked his head into my office at 6:00 a.m. as he often did, and I mentioned my brother's death. Avi didn't mumble "sorry for your loss" and flee as one might expect. Avi sat down and said, "Tell me about your brother." Here is one Richardson attribute. A Richardson Lawyer is present in the lives of others. Caring about humanity begins with caring for those around you.

---

[*] Professor of Law, Emerita, William S. Richardson School of Law. The author served as Associate Dean for Academic Affairs with Dean Soifer during the years when the Law School saw robust academic growth in its academic program. The author is also a graduate of the William S. Richardson School of Law.

[**] These remarks were prepared for the William S. Richardson School of Law commencement ceremony on May 12, 2020. Due to COVID-19, the ceremony was cancelled, and this speech was never delivered. Nevertheless, it is the hope of the author and the Editorial Board that the high achievements, energetic spirit, and commitment to upholding the law of the graduating class of 2020 are acknowledged.

My second Avi story involves his undergraduate days at Yale. At the time, Yale was an all-male school, and at that time there was a national movement to pressure Ivy League schools to go coeducational. Now, Avi had been surrounded by strong women all of his life. And he had gone to public schools, not those private preparatory all boys' schools that many of his Yale classmates had attended. When he got to Yale, Avi recognized how much stronger that institution would be if they admitted women. He also recognized the corrosive effect of sexism in that all-male setting. Avi couldn't fathom men clinking glasses with spoons to cheer on a man who had an attractive date. In Avi's world women were not objects or trophies. At that time student protests regarding coeducation at Yale largely involved putting posters around campus. But Avi was a community organizer. In an historical account of Yale's transformation, Avi is credited with organizing a coeducational week, recruiting 750 women from East Coast colleges to descend on Yale to stay in the dorms and attend classes.[1] That week is regarded as the turning point in the coed movement at Yale. Here is another Richardson attribute. Avi didn't just challenge the establishment and he didn't just make noise. Avi enlisted, mobilized, and organized others to take action. A Richardson Lawyer is not just about talk. A Richardson Lawyer's passion fuels action for justice.

During Avi's midcareer he was dean at a well-respected Catholic law school. When the school's administration asked Avi to identify his faculty by their religion of course, the request went against this Jewish man's core values and personal convictions. As he knew would happen, when he refused, he lost his deanship. Here is another Richardson attribute. Sometimes doing the right thing comes with a heavy price. A Richardson Lawyer never puts career above personal values and integrity. A Richardson Lawyer is prepared to pay the price—even a steep price—to do what is right and good.

As you know, Avi always gives me credit for designing the part time law school. But the part time program never could have been realized without Avi. Avi gives me credit, as he does so many others, but he never takes the credit that is due him. A Richardson Lawyer is a credit giver not a credit taker. Here is the secret of such generosity. By inspiring and enabling others to be their best, you will be able to accomplish so much more than you could have alone. During Avi's tenure our law school has flourished: A new building, expanded clinics, more opportunities for pro bono, a wealth

[1] Anne G. Perkins, *Unescorted Guests: Yale's First Women Undergraduates and the Quest for Equity, 1969-1973*, 52–53 (Graduate Doctoral Dissertations, 2018).

of international programs, and more enthusiastic and generous law school friends and donors. We have thrived because Avi has let us all soar.

You are well on your way to being Richardson Lawyers. You have lifted one another up and rejoiced in the success of your classmates. You have engaged in the study of law and fully embraced the promise of law to make our world better. Your class has shown its generous and kind spirit. You have worked for social justice in big and small ways.

There are so many challenges ahead. This world needs Richardson Lawyers to tackle gross disparities in economic, health, and social well-being. We need Richardson Lawyers to confront climate change. We need Richardson Lawyers to shore up threats to our democracy, and to promote democratic ideals around the world.

Sadly, my generation has passed on to you several of the most intractable and life-threatening crises our world has ever known. Yet, I am optimistic that together this generation of Richardson Lawyers filled with passion, a can-do spirit, integrity, and generosity will rise to meet these challenges and lead us to a better future.

The Legality of Nearshore Cyber-Related Operations: Breaching the Peace, Innocent Passage, or Something Else?

Todd Emerson Hutchins[*][**]

This work is dedicated to Professor Jon Van Dyke, a great scholar, mentor, and friend, who believed in the role of international law to ensure peace in the seas. I pray his scholarship and memory will continue to inspire a safer, more peaceful world.

This article explores the legality of nearshore cyber-related operations under international law. Part I briefly introduces key maritime cyber-technologies, such as digital communication interceptors, undersea data cable tapping, and national firewall penetration that can be employed from ships and aircraft to infiltrate or interfere with coastal state digital communications. Part II explains how the Law of the Seas governs permissible foreign nearshore activities striking a balance between coastal state security vis-à-vis seafaring states' freedom of navigation rights. Interestingly, divergent trends emerge between treaty law and state practice, particularly with regard to nearshore espionage under the contentious regime of 'non-innocent passage.' Part III considers the permissibility of various cyber-related activities in the different maritime zones. Part IV explores the use of force in the maritime cyber operations context, noting the challenge addressing activities that fall below the threshold of 'armed attack' and activities aimed at third countries via a coastal state's computer network. Part V seeks to reconcile treaty law and state practice by articulating a nearshore cyber activity framework, which includes an 'innocent cyber passage' regime permitting data transfer through coastal state networks, so long as no harm is done. Finally, the article concludes by explaining how crafting international norms for nearshore cyber activities provides an excellent starting point for framing the broader regulation of cyber activities under international law.

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[*] The ideas expressed do not represent U.S. Navy, U.S. Department of Defense, or U.S. government positions or policy. The author has no firsthand knowledge of any operation or activity mentioned. All hypotheticals are purely conjectural.

[**] The author is a Lieutenant Commander in the United States Navy. He holds an LLM in National Security and Cybersecurity from The George Washington University Law School and a J.D. from the University of California, Berkeley School of Law. Much appreciation is given to Professor Paul Rosenzweig for guidance throughout my L.L.M., especially with this project.

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INTRODUCTION: OFFSHORE CYBER OPERATIONS AND THE BRINK OF WAR

In the darkness of night during the early hours of June 20th, 2019 far above the black waters of the Strait of Hormuz separating Iran and Oman, the United States Navy's Broad Area Maritime Surveillance (BAM-S) high altitude, long range surveillance aircraft flew quietly—collecting intelligence and, according to THE GUARDIAN, "sucking up huge quantities of data from Iran."[1]

The publicly acknowledged specifications of this $220 million unmanned, semi-autonomous drone reflect powerful capabilities.[2] The massive BAM-S can stay aloft at an altitude above 55,000 feet for over thirty hours.[3] With a wingspan greater than a Boeing 737, it can fly from Los Angeles to New York and linger there for eight hours, all before flying back to LA on a single tank of gas while carrying the weight of a school bus.[4] After launch, BAM-S can complete missions without a pilot or

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[1] Julian Borger, *How a Drone's Flight Took the US and Iran to the Brink of War*, THE GUARDIAN (June 21, 2019), https://www.theguardian.com/world/2019/jun/21/iran-latest-trump-drone-attack-timeline-airstrikes-called-off. The media gave many names to the unmanned aerial vehicle ("UAV"). It was a Navy RQ-4N, converted for long range use from an Air Force RQ-4A Global Hawk. It is a prototype for the MQ-4C Triton. Sebastien Roblin, *A War Begins? How Iran Shot Down a U.S. RQ-4N Surveillance Drone*, THE NAT'L INTEREST: THE BUZZ (June 21, 2019), https://nationalinterest.org/blog/buzz/war-begins-how-iran-shot-down-us-rq-4n-surveillance-drone-63717.

[2] Lily Hay Newman, *The Drone Iran Shot Down Was a $220M Surveillance Monster*, WIRED (June 28, 2019), https://www.wired.com/story/iran-global-hawk-drone-surveillance/.

[3] *Id.*; *see also* Jourdi Bou, *MQ-4C Triton Prepped for Service from Guam*, GRAPHIC NEWS (June 12, 2017), https://www.graphicnews.com/en/pages/36041/MILITARY-MQ-4C-Triton-to-spy-on-North-Korea- (describing capabilities of the MQ-4C).

[4] *See* *Boeing Next-Generation 737*, BOEING, https://www.boeing.com/commercial/737ng/ (last visited Oct. 28, 2019) (noting wingspan is

additional instructions. Its high-tech onboard capabilities include infrared and thermal imaging, radar, electro-optical imaging, and more.[5] The military credits it as decisive in the fight against the Islamic State.[6] Each aircraft can be customized for specific missions utilizing unique equipment, leading observers to note "there could always be super-secret spy tech onboard that we don't know about."[7] One not-so-secret technology is the digital communications interceptor also known as Stingray or cell-site simulator, which the U.S. government has acknowledged employing in other contexts.[8] These interceptors act as 'spoof towers' tricking mobile devices, like smart phones, into connecting, then hacking into the data communications. Installed on a drone, the Stingray could capture vast data from cellular network users.[9]

Whatever the BAM-S was doing, Iran viewed it as a threat. The Iranian military fired a Sayyad-2C surface-to-air missile from a launcher truck on the coast, which honed on the U.S. drone traveling four times faster than the speed of sound.[10] On impact, the kinetic power coupled with the explosive force shredded the drone in a fiery midair blast that continued simmering as it fell into the sea.[11] The political fallout was equally explosive. President Trump immediately ordered retaliatory strikes against Iran set to kill up to one hundred and fifty people, which he rescinded just ten minutes prior to launch.[12] Congress clamored for action.[13]

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117 feet); *How Much Does a School Bus Weigh*, QUORA (last visited Oct. 28, 2019), https://www.quora.com/How-much-does-a-school-bus-weigh-in-tons (observing a typical American school bus weighs 12.5 to 14 tons). The MQ-4 has a wingspan of over 130 feet and maximum takeoff weight of more than sixteen tons.

[5] Newman, *supra* note 2.

[6] *See* Tyler Woodward, *Under Heavy Fog, Deployed Maintainers Repair Aircraft Engine in Support of CJTF-OIR*, DVIDS (Jan. 12, 2017), https://www.dvidshub.net/image/3097425/under-heavy-fog-deployed-maintainers-repair-aircraft-engine-support-cjtf-oir ("Global Hawks have provided Coalition partners with accurate intelligence for precisely striking important [ISIS] facilities. . . .").

[7] Newman, *supra* note 2 (quoting Ulrike Franke, Policy Fellow, European Council on Foreign Relations).

[8] *Stingray Tracking Devices: Who's Got Them?*, AM. C.L. UNION (Nov. 2018), https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them.

[9] Stephen Pritchard, *Drones are Quickly Becoming a Cybersecurity Nightmare*, THREAT POST (Mar. 22, 2019), https://threatpost.com/drones-breach-cyberdefenses/143075/ (citing Tony Reeves's presentation at CRESTCon hacking conference London, UK).

[10] Roblin, *supra* note 1.

[11] *See* Thomas Gagnier, *U.S. Navy RQ-4 Smoke*, DEF. VISUAL INFO. DISTRIB. SERV. (June 20, 2019), https://www.dvidshub.net/video/691395/us-navy-rq-4-smoke.

[12] Michael D. Shear et al., *Strikes on Iran Approved by Trump, Then Abruptly Pulled Back*, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/world/middleeast/iran-us-drone.html; Patrick Wintour

The fallout included a war of words regarding the legality of the BAM-S' activities and Iran's response. The two nations party to the near disaster foisted blame on the other for the strike. Claiming the drone had entered Iranian sovereign airspace, the Iranian Revolutionary Guard Deputy Commander bragged the "downing of the US drone [proved Iran] will show decisive and knockout reactions to aggression against this territory."[14] The U.S. fired back insisting the BAM-S was lawfully in "international airspace."[15] In response to the U.S. claiming "[we respond to] war with a harsh defense,"[16] Iran stated the U.S. drone was in "stealth mode [with its transponder turned off]"[17] and that U.S. operators had been warned prior to the downing.[18] American leaders lambasted "Iranian reports that this aircraft was shot down over Iran are categorically false. The aircraft was over the Strait of Hormuz and fell into international waters."[19] The U.S. Department of Defense released a map (Figure 1) showing the site of the shoot-down eighteen nautical miles from the Iranian coast in international waters.[20] Iranian Foreign Minister Javad Zarif took to Twitter claiming

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& Julian Borger, *Trump Says He Stopped Airstrike on Iran Because 150 Would Have Died*, THE GUARDIAN (June 21, 2019), https://www.theguardian.com/world/2019/jun/21/donald-trump-retaliatory-iran-airstrike-cancelled-10-minutes-before (quoting President Trump's tweet: "'We were cocked & loaded to retaliate last night on 3 different sights [sic] when I asked, 'How many will die?' '150 people, sir', [a General answered]. 10 minutes before the strike I stopped it, not . . . proportionate to shooting down an unmanned drone.'").

[13] *See* Wintour & Borger, *supra* note 12 (citing Liz Cheney, a Republican congresswoman and daughter of former Vice-President Dick Cheney: "We simply can't allow America's adversaries to think that they can shoot down a US military drone with impunity.").

[14] Diana Stancy Correll, *Pentagon Issues Map Depicting US Drone Shot Over International Waters*, MIL. TIMES (June 20, 2019), https://www.militarytimes.com/news/2019/06/20/pentagon-issues-map-depicting-us-drone-shot-over-international-waters/; W.G. Dunlop, *Iran Drone Downing Highlights Limitations of US Unmanned Aircraft*, YAHOO! NEWS (June 25, 2019), https://news.yahoo.com/iran-drone-downing-highlights-limitations-us-unmanned-aircraft-013924612.html.

[15] U.S. Central Command (@CENTCOM), TWITTER (June 20, 2019, 3:43 AM), https://twitter.com/CENTCOM/status/1141703098152493056.

[16] Wintour & Borger, *supra* note 12 (citing Iranian Foreign ministry spokesman Seyyed Abbas Mousavi).

[17] Borger, *supra* note 1.

[18] Wintour & Borger, *supra* note 12 (citing Gen. Amir Al Hajizadeh, chief of the Revolutionary Guard's aerospace division).

[19] Correll, *supra* note 14 (quoting Lt. Gen. Joseph Guastella, Commander of U.S. Air Forces Central Command).

[20] *See* Talia Kaplan, *Pentagon Releases Map Disputing Claim US Drone Violated Iranian Airspace; Iran's Version is Very Different*, FOX NEWS (June 20, 2019), https://www.foxnews.com/world/pentagon-releases-map-disputing-claim-us-drone-violated-iranian-airspace-irans-version-is-very-different.

"[the US] has conducted covert action against us & now encroached on our territory . . . We'll take this new aggression to the #UN & show that the US [is] lying about international waters"[21] releasing a hand drawn map (Figure 2) showing the drone entering Iran's territorial sea within twelve nautical miles of the coast.[22] President Trump had the last word declaring the incident was a mistake by a "loose and stupid" rogue Iranian general.[23]

Figure 1 – U.S. Department of Defense Map showing location of shoot-down over international waters in the Strait of Hormuz.

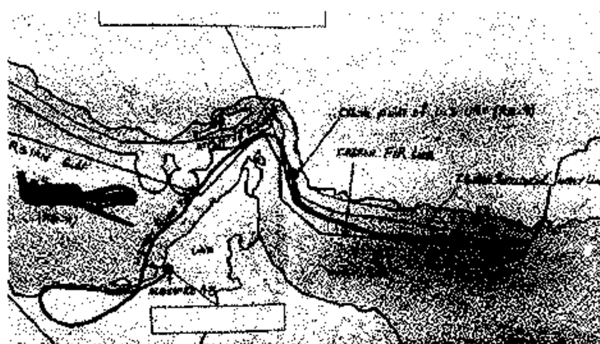

Figure 2 – Map released by the Iranian Foreign Ministry purporting to show the shoot-down location

This tense situation raises important questions regarding the legality of cyber nearshore cyber operations under international law. While there has been robust scholarly discussion regarding international law's applicability to cyber operations generally there has been scant scholarly attention to the legality of nearshore cyber operations, which are governed by unique international legal frameworks under the Law of the Sea. The *Tallinn Manual 2.0 on the International Law Applicable to Cyber Warfare*, a non-binding study generated by academic experts ("Tallinn experts"), which aims to enunciate the rules in the cyber domain, offers only a brief chapter on maritime cyber, merely echoing the wording of the United Nations Convention on the Law of the Sea ("UNCLOS")[24] without detailed

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[21] Borger, *supra* note 1 (referencing a tweet by Javad Zarif stating "[US drone] was targeted at 04:05 . . . near Kouh-e Mobarak.").

[22] *Id.*

[23] *Id.*

[24] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397

analysis.[25] Maritime law expert James Kraska mentions maritime cyber activities in one brief sentence and footnote in his work on submarine espionage.[26] Neither provides an in-depth review. The absence of academic scholarship on this important area of international law is troubling given the importance of maritime cyber activities to peace and security. Moreover, there is great urgency in reaching a common global understanding on the legality of nearshore cyber operations and lawful responses to perceived violations. This article explores how cyber-related operations fit within the existing international law frameworks governing activities off coastal nations, while initiating a conversation regarding how the law should develop to deter interstate confrontations.

I. MARITIME CAPABILITIES AND TACTICS THAT COULD ENABLE CYBER OPERATIONS

Likely stemming from Hollywood spy dramas, popular perceptions of cyber activities envisage intrusion completely detached from the constraints of the physical world: hackers elusively digitally sneak into computers around global via the Internet, often exclaiming, *we're in* to explain a firewall has been penetrated.[27] In reality, physical geography matters. It is far easier to intercept data being sent to a cell phone by tricking it to connect with a *spoofing* cell site simulator, than it is to break through multiple digital layers of national and network firewalls, along with personal device and system passwords.[28] Physical proximity to a target

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[hereinafter UNCLOS].

[25] *See* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS r. 45–54 (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL 2.0].

[26] James Kraska, *Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters*, 54 COLUM. J. TRANSNAT'L L., 164, 245 & n.458 (2015). (noting that submarines can conduct cyber espionage).

[27] Kor Adana, *Why Can't Films and TV Accurately Portray Hackers?*, BBC FUTURE (Aug. 2, 2017), https://www.bbc.com/future/article/20170802-why-cant-films-and-tv-accurately-portray-hackers; *see e.g.*, Emma Stefansky, *10 Things Movie Hackers Always Say*, THRILLIST (Sept. 15, 2020), http://www.thrillist.com/entertainment/nation/best-lines-in-hacking-movies-things-hackers-say.

[28] PANAYOTIS A. YANNAKOGEORGOS, STRATEGIES FOR RESOLVING THE CYBER ATTRIBUTION CHALLENGE 9-16 (3rd ed., 2016); *Bolstering Data Privacy and Mobile Security: An Assessment of IMSI Catcher Threats: Hearing Before the Subcomm. On Oversight of the H Comm. on Science, Space, and Technology*, 115th Cong. 41 (2018) (statement of Jonathan Mayer, Assistant Professor, Princeton University) (noting criminals and foreign intelligence services "could easily use cell-site simulators to collect highly confidential information about government operations, deliberations, and employee movements" without the challenges of hacking into a network).

allows for the employment of technologies that facilitate data interception, capture, manipulation, and destruction much easier. Technologies, which could be employed from nearshore maritime platforms, can penetrate a national firewall by directly connecting to local network and manipulating data streams, inserting malicious code, preparing for a distributed denial of service attack via bots, or setting a digital minefield of logic bombs.[29] These also make detection within a network much more difficult, since the hacker is hiding inside.[30] Understanding how these technologies work and are employed is vital to understanding how they fit in to maritime legal regimes.

A. Technical Review of Maritime Cyber Operation Enabling Techniques

1. Surface and Airborne Digital Communication Interceptors & Manipulators

Cell-site simulators, also referred to as Stingrays or international mobile subscriber identity (IMSI) catchers, "masquerade as legitimate cell-phone towers," tricking mobile devices within a certain radius into connecting to them, rather than an actual cell phone tower.[31] When a mobile devices such

[29] *Cell-Site Simulators/IMSI Catchers*, ELEC. FRONTIER FOUND. (Aug. 28, 2017), https://www.eff.org/pages/cell-site-simulatorsimsi-catchers (noting capability to "intercept metadata [and content intended for a specific phone, while also] can be configured to divert calls and text messages, edit messages, and even spoof the identity of a caller in text messages and calls."); Kim Zetter, *How Cops Can Secretly Track Your Phone*, THE INTERCEPT (July 31, 2020), https://theintercept.com/2020/07/31/protests-surveillance-stingrays-dirtboxes-phone-tracking/ (Stingrays " can inject spying software onto specific phones or direct the browser of a phone to a website where malware can be loaded onto it."); Rajesh Narayanan, *Attack of the Bot Army*, MEDIUM (Jul. 8, 2018), https://medium.com/@nrajesh/attack-of-the-bot-army-fd0f4c42c769 (explaining how inserted malware can control a device and use it in a denial of service attack); Tim Fisher, *What Is a Logic Bomb?*, LIFEWIRE (Mar. 30, 2020), https://www.lifewire.com/logic-bomb-4778655 (describing how inserted malware can wreak havoc on a system or be used in denial of service attacks when specific conditions are met); Cathal McDaid, *Keeping a Low Profile- Detecting the Presence of IMSI Catchers Around the World*, ADAPTIVE MOBILE SEC. (Aug. 20, 2019), https://www.adaptivemobile.com/blog/adaptive-mobile-imsi-catchers (explaining how cell-site simulators can actively or passively intercept based on proximity); Sydney J. Freedberg, Jr., *Cyber Subs: A decisive Edge for High-Tech War?*, BREAKING DEF. (Mar. 10, 2015), https://breakingdefense.com/2015/03/cyber-subs-a-decisive-edge-for-high-tech-war/.

[30] *See* YANNAKOGEORGOS, *supra* note 28, at 13–16 (detailing how techniques that obscure the actual location of a cyber attack make attribution extremely challenging).

[31] Devlin Barrett, *Americans' Cellphones Targeted in Secret U.S. Spy Program*, WALL ST. J. (Nov. 13, 2014), https://www.wsj.com/articles/americans-cellphones-targeted-in-secret-u-s-spy-program-1415917533?tesla=y&mg=reno64-wsj. Cellular devices are

as a smart phone connects to a cell-cite simulator, data is intercepted and can be downloaded or altered.[32] By placing a cell-site simulator on an airborne platform, cell phone signals can be captured over a much wider area.[33] The United States government developed an airplane-based system capable of sweeping data from thousands of cell phones at a time.[34] This system intercepts communications, but also has the capability to track the phone's location and movement along with determining ownership.[35] It can read identifying data (the cell phones unique identity number or hexadecimal electronic serial number (ESN) directly from the device, while intercepting metadata regarding calls, e.g. number dialed and duration of the call, the contents of phone calls and text messages, along with data transfers revealing websites visited and the contents of email messages.[36] A commercially available system manufactured by Digital Receiver Technology, Inc. can monitor and record the digital voice data of up to 10,000 targets at the same time.[37] The most advanced systems can alter content by inserting code during the transmission.[38] These capabilities could enable an array of cyber activities.[39] While most effective from higher altitudes, even submarines can acquire digital communications sent over various frequencies, including nearby cell phone transmissions.[40] The American Civil Liberties Union identified multiple federal agencies as having acquired cell-site simulators, including the Federal Bureau of

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designed to find and connect with the cell site with the strongest signal. The phones are tricked by the cell simulators strong signal. *Id.*

[32] Mayer, *supra* note 28.

[33] Timothy B. Lee, *The Government Has Special Airplanes Designated to Spy on Peoples' Cell Phones*, VOX (Nov. 13, 2014), https://www.vox.com/2014/11/13/7217557/cell-phone-airplane-spying (referring to a Department of Justice program intended "to spy on criminal and terrorist suspects").

[34] *Id.*; Barrett, *supra* note 31 (observing that the FBI also used airborne cell simulators); G.W Schulz & Melissa del Bosque, *Documents: Texas National Guard Installed Cellphone Spying Devices on Surveillance Planes*, TEXAS OBSERVER (Nov. 6, 2017), https://www.texasobserver.org/texas-national-guard-spying-devices-surveillance/ (reporting that the Texas National Guard spent $373,00 to install cellphone eavesdropping devices on aircraft for counter-narcotics missions).

[35] Lee, *supra* note 33.

[36] ELEC. FRONTIER FOUND., *supra* note 29.

[37] Jennifer Lynch, *DRT 1301C Survey Equipment*, THE INTERCEPT, https://theintercept.com/surveillance-catalogue/drt-1301c/ (last visited Oct. 29, 2020).

[38] *Id.*; Schulz & del Bosque, *supra* note 34.

[39] Applications include the collection of data tag locations, photos, photo geotag locations, pattern of life tracking, call logs, contact lists/acquaintances, photos against social media to show acquaintances, their social networks, and possibly even passwords.

[40] Nick Brown, *Spy Games: The Dark Arts of Intelligence at Sea*, JANE'S NAVY INT'L (2006).

Investigation, Drug Enforcement Agency, Secret Service, Immigration and Customs Enforcement, Customs and Border Protection, the National Security Agency, along with the Army, Navy, Marine Corps, and Special Operations Command.[41] Domestically, there has been substantial interest in the legal community, particularly among civil liberty organizations, concerned with law enforcement using cell-site simulators.[42] In response, U.S. courts have begun dealing with these simulators.[43] Seventh Circuit Chief Judge Wood concernedly noted "with certain software (known as 'Fishhawk' and 'Porpoise'), the Stingray [cell-site interceptor] is much more than a high-tech pen register [a device that reveals cell-phone numbers dialed which the U.S. Supreme Court found did not constitute a search for Fourth Amendment purposes]. It can capture emails, texts, contact lists, and images."[44] In *Carpenter v. United States*, the U.S. Supreme Court rejected gathering historical cell site records (which cell-site simulator technology can also accomplish) finding a violation of privacy in "sweeping" "near perfect surveillance" that is "detailed, encyclopedic, and effortlessly compiled."[45] Concerns regarding privacy and the intrusiveness of the new technology even led to state legislative enactments, which placed controls on law enforcement uses.[46] Due to this heightened scrutiny, several federal agencies issued guidelines for use of cell-site simulators requiring law enforcement obtain a judicial warrants except in exceptional circumstances.[47] However, at the international level, there has been no

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[41] AM. C.L. UNION, *supra* note 8.

[42] The Electronic Frontier Foundation filed a Freedom of Information lawsuit to shine light on the U.S. Marshals Service's use of cell simulators on planes. Complaint, Elec. Frontier Found. v. Dep't of Just., 141 F.Supp. 3d 51 (2015) *available at* https://www.eff.org/document/dirtbox-foia-complaint. The American Civil Liberties Union tracks and maps law enforcement agencies (currently, 75 agencies in 27 states and the District of Columbia) that use cell site simulators. AM. C.L. UNION, *supra* note 8.

[43] State of Maryland v. Andrews, 134 A.3d 324, 327 (Md. Ct. Spec. App. 2016) (holding that the Fourth Amendment precludes employment of a cell-site simulator without a warrant to locate and track suspects); United States v. Damian Patrick, 842 F.3d 540, 545 (7th Cir. 2016) (finding it was improper for police to secretly use a cell-site simulator to locate a defendant through his cell phone without a warrant).

[44] *Damian Patrick*, 842 F.3d at 546–52 (Wood, C.J., dissenting) (arguing that the case should be remanded to determine whether Fourth Amendment rights had indeed been violated rather than the majority's view that a "fugitive cannot be picky about how he is run to ground").

[45] *See* 138 S. Ct. 2206 (2018); Orin Kerr, *Understanding the Supreme Court's Carpenter Decision*, LAWFARE (June 22, 2018), https://www.lawfareblog.com/understanding-supreme-courts-carpenter-decision.

[46] Jason Tashea, *Cell Block*, A.B.A. J., July 2016, at 20, 21 (Colorado, Montana, & Washington require warrants); *see also* Act of Oct. 8, 2015, ch. 659, 2015 Cal. Stat. 5170.

[47] Tashea, *supra* note 46, at 20 (noting the Department of Justice and Department of

similar discussion regarding whether as a matter of international law the use of a cell-site simulator would constitute a wrongful act and, if so, what nations can do in response.

2. Submarine Cable Tampering, Jamming, Cutting or Tapping

Over ninety-nine percent of international data sent over the Internet occurs through submarine communications cables, which often run nearshore, through international straits, or across vast stretches of the ocean deep.[48] These cables are essential to worldwide communications and the global economy—facilitating international transfers of on average over $10 trillion each day.[49] The United Nations described these cables as "vitally important to the global economy and the national security of all states."[50] Yet, such cables are highly vulnerable with no defenses beyond the armored plating in which they are encased. These cables could be harmed by electromagnetic pulses and are easily cut by commercially available tools or a small explosive charge. If a submarine communication cable was cut, ordinary users in the United States would experience tremendous losses of bandwidth and potentially be cut off from data, since key digital service provider, like Google, Facebook, and Amazon Web Services, store much of their users' electronic files on servers and in data centers overseas in foreign countries.[51] If submarine cables were tapped and manipulated, this

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Homeland Security have imposed these requirements).

[48] Douglass Main, *Undersea Cables Transport 99 Percent of International Data*, NEWSWEEK (Apr. 2, 2015), https://www.newsweek.com/undersea-cables-transport-99-percent-international-communications-319072

[49] Tim Johnson, *Undersea Cables: Too Valuable to Leave Vulnerable*, GOV'T TECH. (Dec. 12, 2017), https://www.govtech.com/network/Undersea-Cables-Too-Valuable-to-Leave-Vulnerable.html.

[50] G.A. Res. 65/37, at 3–4 (Dec. 7, 2010).

[51] Garrett Hinck, *Evaluating the Russian Threat to Undersea Cables*, LAWFARE (Mar. 5, 2018), https://www.lawfareblog.com/evaluating-russian-threat-undersea-cables; Andrew Keane Woods, *Against Data Exceptionalism*, 68 STAN. L. REV. 729, 739–40 (2016) ("[O]ne of the greatest societal and technological shifts in recent years has been the move from storing data on a local machine—such as a cell phone or computer—to storing that data remotely on faraway servers, which can be accessed by a network such as the Internet."); *Data Residency*, AMAZON WEB SERVS. POL'Y PERSPS. (Aug. 2020), https://d1.awsstatic.com/whitepapers/compliance/Data_Residency_Whitepaper.pdf (arguing Amazon should not be limited to storing American user data in the United States); Guoxin Liu & Haiying Shen, *Minimum-Cost Cloud Storage Service Across Multiple Cloud Providers*, IEEE CONFERENCE ON DISTRIBUTED COMPUTING SYS. 129–38 (2016), https://ieeexplore.ieee.org/document/7536512 (noting cloud service providers use algorithms to automatically shift data to the lowest costs data center around the world).

information would be compromised. Importantly, submarine cables carry sensitive diplomatic and military communications.[52]

Generally, hacking a fiber optic cable is not considered technically difficult,[53] and tapping an undersea cable is challenging yet not unheard of. The armored sheaths would need to be penetrated while avoiding shocks from the cable's power supply. The highly sensitive fiber optic cables would have to be spliced and delicately manipulated, which is considerably more demanding when attempted hundreds or even thousands of feet under the sea.[54] That said, Russia and the United States are capable of carrying out such operations.[55] According to journalist Bob Woodward, the United States successfully executed the task during OPERATION IVY BELLS, when U.S. Navy and Central Intelligence Agency (CIA) deep-sea divers deployed from the USS HALIBUT submarine within the Soviet territorial waters of Shelikhova Bay, Siberia to place induction taps and recording devices onto a submarine cable enabling the capture of classified naval communications to and from Moscow's Far East naval fleet.[56] W. Craig Reed, geopolitical-military researcher, opines "submarines absolutely still have the capability to do these kind of missions."[57] Bryan Clark, a senior naval strategist, reveals "there are a lot of countries and companies that have the ability to send vehicles down to the sea floor and have them manipulate, install, or take away undersea cables."[58] Indeed, in recent years, submarine cables seem to be receiving greater attention. In 2013, Egypt detained divers attempting to cut the SEA-ME-WE-4 fiber optic cable, which carries the majority of internet traffic between southeast Asia, south

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[52] Hinck, *supra* note 51.

[53] Ben Ferguson, Eight Myths about Hacking Fiber Networks, NAT'L CYBER SEC. ALL. (Dec. 20, 2017), https://staysafeonline.org/blog/eight-myths-hacking-fiber-networks-two-key-solutions/.

[54] Richard Chirgwin, *Spies Would Need Superpowers to Tap Undersea Cable*, THE REGISTER (Sept. 18, 2014), https://www.theregister.co.uk/2014/09/18/spies_arent_superheroes/.

[55] Hinck, *supra* note 51.

[56] Bryan Brumley, *NBC Story on Spying Called Old News*, PHILADELPHIA INQUIRER (May 21, 2986), https://www.cia.gov/library/readingroom/docs/CIA-RDP91-00561R000100120047-7.pdf; Marcia Wendorf, *Operation Ivy Bells: The U.S. Top-Secret Program that Wiretapped a Soviet Undersea Cable*, INTERESTING ENG'G (Aug. 19, 2019); BOB WOODWARD, VEIL: THE SECRET WARS OF THE CIA, 1981–1987, at 455–63 (2005).

[57] Matt Blitz, *How Secret Underwater Wiretapping Helped End the Cold War*, POPULAR MECHS. (Mar. 30, 2017), https://www.popularmechanics.com/technology/security/a25857/operation-ivy-bells-underwater-wiretapping/ (quoting former U.S. Navy submariner W. Craig Reed).

[58] Johnson, *supra* note 49 (citing Bryan Clark a former U.S. naval strategist and senior fellow at the Center for Strategic and Budgetary Assessments).

Asia, the Middle East, and north Africa to western Europe.[59] Had these divers not been apprehended, almost the entire continent of Africa and sub-continent of India would have been taken offline.[60] In 2015, United States military publicly monitored Russia's high-tech YANTAR ship said to be carrying deep-sea submersibles and cable cutting gear while loitering over the North Atlantic submarine cable corridor.[61] NATO submarine commander, Rear Admiral Lennon, observed "we are now seeing Russian underwater activity in the vicinity of undersea cables that I don't believe we have ever seen. Russia is clearly taking an interest in NATO nations' undersea infrastructure."[62] The international community clearly has a stake in submarine cables as the physical backbone of the global Internet and threats to these vulnerable cables seems to be increasing.

3. Nearshore National Firewall Penetration

Some nations have built virtual walls around their countries' computer networks using firewalls to defend "cyber sovereignty."[63] As described in *The Atlantic*, China channels all Internet communication to and from the outside world through a very small number of fiber-optic cables, routers, and servers which closely filter, screen, and monitor each data transmission.[64] Network intelligence specialist, Young Xu explains that China uses complex algorithms and digital screening procedures to block certain internet protocol (IP)addresses, thus preventing access to blacklisted websites.[65] Its domain names system (DNS) tampering reroutes digital requests deemed threating (or undesirable).[66] The system conducts complete

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[59] Amanda Williams, *Three Egyptian Divers Tried to Hack Through Internet Ocean-Floor Cables*, DAILY MAIL (Mar. 28, 2013), https://www.dailymail.co.uk/sciencetech/article-2300595/Pictured-Egyptian-divers-tried-hack-cables-attack-crashed-internet-worldwide.html.

[60] *Id.*

[61] Johnson, *supra* note 49.

[62] Pete Barker, *Undersea Cables and the Challenges of Protecting Seabed Lines of Communication*, CIMEC (Mar. 15, 2018), http://cimsec.org/undersea-cables-challenges-protecting-seabed-lines-communication/35889.

[63] China, Cuba, Iran, North Korea, Russia, Saudi Arabia, Syria, Turkey, and Yemen maintain separate Internets behind national firewalls that filter incoming and outgoing content. Keith Wright, *The 'Splinternet' is Already Here*, TECHCRUNCH (Nov. 17, 2019), https://techcrunch.com/2019/03/13/the-splinternet-is-already-here/.

[64] Abigail Cutler, *Penetrating the Great Firewall*, THE ATLANTIC (Mar. 2008), https://www.theatlantic.com/magazine/archive/2008/03/penetrating-the-great-firewall/306690/.

[65] Young Xu, *Deconstructing the Great Firewall of China*, THOUSAND EYES (Mar. 8, 2016), https://blog.thousandeyes.com/deconstructing-great-firewall-china/.

[66] For example, a request to google.cn at times is rerouted to its Chinese competitor.

content filtering logging much of the metadata and substance.[67] It also refers detected suspicious code, digital communications, and data flows to-and-from certain geographic areas or addresses for additional review to thwart malware and digital attacks, such as distributed denial of service (DDoS).[68] Other national firewalls differ in design and intensity, but all channel data communications through specific entry portals creating a closed domestic network.

To avoid these highly controlled chokepoints, maritime technologies can enable cyber operations by opening alternative ways to enter the national firewall protected network. For instance, one might need to be within a network to mount a distributed denial of service attack by controlling a bot Army within a national network to attack a target since national firewalls would likely be able to detect a high traffic flow and shut it off, if initiated or controlled from outside the network. National firewalls might be also configured to be highly sensitive to communications originating from a specific country or set of IP addresses.[69] One way to avoiding national firewalls entails using satellite linkups. In 2015, the Turla gang of hackers hijacked satellites links to conceal the location of their control servers, so that they could steal data from powerful government computers without anyone being able gain clues about who was conducting the operation; but that method is limited by bandwidth and slow data transfer rates.[70] This

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Baidu.cn. *Id.*

[67] *Id.*

[68] *Id.* (noting aspects of the Great Firewall include packet-filtering (comparing data to a set criteria for the packet's protocol header, i.e. IP addresses, package type, port, and protocol, which can identify computer viruses and other malicious code), stateful inspections (keeping track of whether the data is part an established transmission session), application-level gateway screening (reviewing details, routing instructions, and other transmission data), deep packet inspection (monitoring data in the packet, identifying the application creating the message, indicating encryption, antivirus, malware, and intrusion detection)).

[69] *See e.g.*, *Firewall Filter Match Conditions Based on Address Fields*, JUNIPER NETWORKS TECH LIBRARY (June 21, 2020), https://www.juniper.net/documentation/en_US/junos/topics/concept/firewall-filter-stateless-match-conditions-address-fields.html (explaining how firewalls can be configured to evaluate and filter packet address fields, such as Internet Protocol source and destination addresses from certain countries). While this might be overcome by providing false origination data in the header, many systems have shifted to hypertext transfer protocol secure (HTTPS), which requires bi-directional client-server communications to verify the integrity of a sender instead of an impostor. A properly configured firewall might flag data transfers that do not follow this now-standard protocol.

[70] *See* Dan Goodin, *How Highly Advanced Hackers (Ab)used Satellites to Stay Under the Radar*, ARSTECHNICA (Sept. 9, 2015), https://arstechnica.com/information-technology/2015/09/how-highly-advanced-hackers-abused-satellites-to-stay-under-the-radar/ (noting that by entering a network through satellite hackers were able to conceal the location of control servers).

leaves maritime operations, such as cell-site simulator link-up or submarine cable punch-in, as potential pathways for facilitating entry into a nationalized coastal state computer networks to enable cyber operations.[71] The use of a maritime platform connected to a coastal state network could help to mask the origin of the cyber activities being launched against a third state, thereby allowing for easier penetration of that country's digital firewalls, while increasing the challenge of attribution (as it would appear to derive from the coastal state, rather than the seagoing nation).[72]

B. Recent Nearshore Electronic Warfare and Digital Operations

Recent incidents around the globe have raised concerns regarding nearshore electronic warfare and digital operations. In 2014, the Swedish government mounted an intensive search for what was believed to be a Russian submarine inside its territorial waters.[73] Another suspected Russian submarine popped up off the Royal Navy's submarine base at Faslane, Scotland, United Kingdom in December 2014.[74] In April 2015, Finnish authorities spotted a foreign submarine in its territorial waters, which they chased out with explosive depth charges.[75] Throughout 2018, the Russian

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[71] Sydney J. Freedberg, *Cyber Subs: A Decisive Edge for High-Tech War?*, BREAKING DEF. (Mar. 10, 2015), https://breakingdefense.com/2015/03/cyber-subs-a-decisive-edge-for-high-tech-war.

[72] As of yet, there are no publicly recognized maritime cyber attacks against third countries or known third country intrusions; but the false flagging has become common. *See* Andy Greenberg, *Russian Hacker False Flags Work—Even After They're Exposed*, WIRED (Feb. 27, 2018), https://www.wired.com/story/russia-false-flag-hacks/ ("False flags . . . are quickly becoming as standard a part of the [hacking] toolkit as phishing links and infected [] attachments . . . US intelligence agencies have concluded that Russian hackers not only attempted to disrupt the Winter Olympics in Pyeongchang, but sought to frame North Korea.").

[73] Sighted over 100 times and confirmed by radar, Swedish leaders opted for weapons to "get [the sub] to stop doing whatever it is doing." Roland Oliphant, *Why Would a Russian Submarine Enter Swedish Waters?*, THE TELEGRAPH (Oct. 20, 2014), https://www.telegraph.co.uk/news/worldnews/europe/sweden/11174289/Why-would-a-Russian-submarine-enter-Swedish-waters.html; Simon Osborne, *Russian 'Hidden Submarine': Real Reason Behind Swedish Hunt Revealed in Shock Report*, THE EXPRESS (Oct. 8, 2014), https://www.express.co.uk/news/world/1187535/russia-news-military-submarine-sweden-news.

[74] Tony Osborne, *Canadians, French, U.S. Hunt for Submarine Off Scotland*, AVIATION WEEK NETWORK (Dec. 9, 2014), https://aviationweek.com/defense-space/canadians-french-us-hunt-submarine-scotland.

[75] Juhana Rossi, *Finland Chases Off Suspected Submarine: Country's Maritime Forces Detect Underwater Activity Inside Finnish Waters*, WALL ST. J. (Apr. 28, 2015), http://www.wsj.com/articles/finland-chases-off-suspected-submarine-1430212090; Jussi Rosendahl, *Finnish Military Fires Depth Charges at Suspected Submarine*, REUTERS (Apr.

spy ship, VICTOR LEONOV, reportedly attempted to intercept communications along the U.S. eastern seaboard, near major National Aeronautics and Space Administration (NASA) and Navy facilities.[76] In November 2018, Russia also hacked into the maritime global positioning system (GPS) confusing over 1,300 civilian ships and airplanes in Black Sea near Ukrainian Crimea. Russian hackers changed vessels' reported GPS locations to bogus coordinates up to 65 km from the ships' actual positions. The Japanese Maritime Self-Defense Force detected a Chinese type 815 electronic surveillance ship inside Japan's territorial seas less than 12 nautical miles off Kagoshima, presumably collecting electronic intelligence and communications traffic.[77] Japanese authorities ordered the vessel to leave. In July 2019, the U.S. Coast Guard issued notice to mariners after a merchant vessel reported its network had been disrupted by malware possibly implanted via connection while underway at sea.[78] These examples illustrate the growing unease of coastal states regarding suspicious nearshore cyber activities.

II. LAW OF THE SEA

Historically, there has always been a tension between the rights and duties of coastal states vis-à-vis oceangoing states operating vessels offshore. Coastal states have long voiced concern regarding security and economic interests when foreign vessels operate off their coasts.[79] This tension appeared throughout the formation of customary Law of the Sea,

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27, 2015), https://www.reuters.com/article/us-finland-navy/finnish-military-fires-depth-charges-at-suspected-submarine-idUSKBN0NJ0Y120150428; Andrew Marszal, *Finland Fires Warning Shots at "Foreign Submarine" Near Helsinki*, THE TELEGRAPH (Apr. 28, 2015), https://www.telegraph.co.uk/news/worldnews/europe/finland/11568042/Finland-fires-warning-shots-at-foreign-submarine-near-Helsinki.html.

[76] Ryan Browne & Zachary Cohen, *Russian Spy Ship Spotted 100 Miles Off North Carolina Coast*, CABLE NEWS NETWORK (Jan. 22, 2018), https://www-m.cnn.com/2018/01/22/politics/russia-spy-ship-us-coast/index.html; Bill Bostock, *US Accuses Russian Spy Ship of 'Unsafe' Maneuvers Off US East Coast for Sailing With No Warning Lights, Ignoring Other Ships, and Risking a Crash*, BUS. INSIDER (Dec. 17, 2019), https://www.businessinsider.com/us-accuses-russian-spy-ship-leonov-unsafe-conduct-florida-coast-2019-12.

[77] Kyle Mizokami, *Chinese Spy Ships Shadow U.S. and Allies*, POPULAR MECHS. (June 15, 2016), https://www.popularmechanics.com/military/navy-ships/a21367/chinese-spy-ships-shadow-us-allies/.

[78] *See Significant Cyber Incidents*, CTR. FOR STRATEGIC AND INT'L STUD., https://www.csis.org/programs/technology-policy-program/significant-cyber-incidents (last visited Oct. 4, 2020).

[79] Arthur D. Martinez, *Conflicting Law of the Sea Principles: Mare Liberum Versus Mare Clausum*, 14 TOWSON U. J. INT'L AFFAIRS 93, 94–100 (1980).

which eventually manifested into treaties, like the United Nations Convention on the Law of the Seas.[80] However, new doctrines and state practice strain this treaty law. Understanding the evolution of the Law of the Sea is important as questions regarding cyber activities echo previous discussions concerning prior technological changes. Like cyber technologies today, these prior changes shifted the balance between coastal state security and seagoing states' freedom of navigation.

A. Historic Evolution of the Maritime Regimes Under Customary International Law

The Law of the Sea is considered one of the earliest forms of customary international law. The principle that ships could move freely on the ocean and that no state could claim sovereignty over the ocean were pivotal developments in international law representing some of the earliest understandings between modern nation states.[81] Hugo Grotius' 1609 treatise *Mare Liberum* (Freedom of the Seas) declared the right of all states to freely travel and use the oceans.[82] On the high seas, vessels of seagoing nations can conduct whatever activities they like, except when those activities would endanger other vessels.[83] However, these lofty high sea freedom principles were challenged when practiced off the shore of coastal states that legitimately sought to ensure security and control resources. Thus, the Law of the Sea represents a balancing of coastal state rights with seafaring nations. A historical review of the balancing between these rights frames various cyber activities by analogy to previous technological developments important to coastal security from the distance a cannon ball can shoot to submarine espionage, covert mining, and U-2 spy planes. In this sense, contemporary cyber activities share conceptual underpinnings with past technological innovations.

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[80] Alan Beesley, *The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners—A Pattern for Future Multinational International Conferences*, 46 L. & CONTEMPORARY PROBLEMS 183, 186–189 (1983); William K. Agyebeng, *Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea*, 39 Cornell Int'l L.J. 371, 389 (2006).

[81] *See generally* HUGO GROTIUS, MARE LIBERUM 7 (James Brown Scott ed., Ralph Van Deman Magoffin trans., 1916).

[82] To counter Portuguese attempts to prohibit Dutch traders from transiting through the East Indies, Grotius asserted the sea was a common resource that could be used and freely navigated by all nations for their purposes. *Id.*; HUGO GROTIUS, THE FREE SEA XV-XVI (David Armitage ed., Richard Hakluyt trans., 2004), https://scholar.harvard.edu/files/armitage/files/free_sea_ebook.pdf.

[83] *See* UNCLOS, *supra* note 24, at part VII, arts. 87, 88, 98, 99, 106, 108, & 113.

1. Maritime Zones: Balancing Rights of Seagoing and Coastal States

The first manifestation of the balancing of rights was recognition of a 'territorial sea' adjacent to the coastal state. In this "belt of water immediately adjacent to the coast of a nation" "the Sovereignty of the state extends."[84] Yet, the extent of this "Sovereignty" and control has historically been subject to great debate with some jurists declaring coastal state rights over the territorial sea being "more limited" than land territory,[85] while others suggest a coastal nation "exercises absolute and exclusive authority"[86] over the territorial sea just as it would its land territory.[87] Fourteenth century jurist, Bartololus de Sassoferrato, wrote that adjacent states should have an "imperium" over the coastal sea to the extent of 100 miles, which to him was something less than a two day-journey, yet his pupil, Baldus de Ubaldis, who also became a notable scholar opined the territorial sea was limited to a distance of 60 miles.[88] By the late seventeenth century, British, Spanish, and Portuguese assertions of *mare clausum* or "closed sea," extended sovereign jurisdiction and control over the various parts of the ocean to certain states.[89] In essence, the de facto dominion over adjacent water by naval might altered conceptions about the extent of freedom of the navigation were limited by the inherent power and influence of coastal states. What emerged was a compromise, the territorial sea. As articulated in 1702 by van Bijnkershoek in the form of the "cannon shot rule," sovereign national rights could be acquired over the seas through actual control—at the time, the effective range of a shore-based cannon.[90] This compromise struck a balance between the freedom of seagoing states to navigate and exploit resources on the high seas with the rights of coastal states to assert control over adjacent waters important to protect their

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[84] Convention on the Territorial Sea and the Contiguous Zone, pt. I, art. 1, 15 U.S.T. 1608; RESTATEMENT (THIRD) OF THE FOREIGN RELS. LAW OF THE UNITED STATES § 511(a) (AM. LAW INST. 1987).

[85] *See* United States v Louisiana, 363 U.S. 1, 34 (1960) ("a [maritime] boundary, even if it delimits territorial waters, confers rights more limited than a land boundary").

[86] Church v. Hubbart, 6 U.S. 187, 234 (1804).

[87] RESTATEMENT (THIRD), *supra* note 73, §512. The Ann, 1F. Cas. 926, 927 (C.C.D. Mass. 1812) (No. 397).

[88] SAYRE A. SWARZTRAUBER, THE THREE-MILE LIMIT OF TERRITORIAL SEAS: A BRIEF HISTORY 22 (1970).

[89] Michael Widener, *Freedom of the Seas, Part 8*, YALE L. (Oct. 23, 2009), https://library.law.yale.edu/news/freedom-seas-part-8 (noting "Britannia rules the waves – and waives the rules.").

[90] CORNELIUS VAN BYNKERSHOEK, DE DOMINIO MARIS DISSERTATIO 1702 (Ralph Van Deman Magoffin trans., Oxford Univ. Press 2d ed. 1923) (1744); *see also* SWARZTRAUBER, *supra* note 88.

security interests.[91] Scholars credit this as the first manifestation of "international law—to govern humanity's common interest in the use of shared space and shared resources."[92] By the early nineteenth century the "cannon ball rule" had become customary law among nations recognizing the breadth of the territorial sea as a reflection of the technical maximum distance of coastal cannonball shot.[93]

2. Development of Innocent Passage Distinct from High Seas Freedom of Navigation

In 1894, the *Institut de Droit International* recognized the belt of water adjacent to coastal states as 'territorial' sea, but simultaneously noted the right of all vessels without distinction to be permitted to travel through as *passage inoffensif* or innocent passage.[94] Even with this recognition, states vigorously disputed the rights within the innocent passage regime. Key nations enacted domestic legislation adding conditions for foreign vessels exercising passage, such as requiring submarines to surface or excluding warships altogether.[95] Some jurists claimed warships did not "enjoy an absolute right to pass through a state's territorial waters any more than an army may cross the land territory."[96] States also disagreed on the breadth of the territorial sea. When the League of Nations planned a conference to codify customary Law of the Seas in 1930, the Preparatory Committee accepted a rule permitting warships to exercise innocent passage, but required submarines to surface and show their flag.[97] If transiting ships violated the rules of innocent passage, the coastal state was empowered to demand the ships depart the territorial sea.[98] Yet, the codification

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[91] H.S.K. Kent, *The Historical Origins of the Three-Mile Limit*, 48 AM. J. INT'L. L. 537, 538–40. (Oct 1954).

[92] Widener, *supra* note 89.

[93] SWARZTRAUBER, *supra* note 88, at 46–61.

[94] 13 ANNUAIRE DE L'INSTITUT DE DROIT 329–30 (1894-1895), *reprinted in* U.S. Naval War Coll., 13 INT'L L. TOPICS & DISCUSSIONS 1913, at 27, 28 (1914).

[95] *See* LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA, UNITED NATIONS LEGIS. SERIES, Dec. 1956, U.N. Leg., Ser. ST/LEG/SER B/6, 361–62; *id.* at 409–10 (listing Sweden's regulation); 1 D. P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 278-79 (I. A. Shearer ed., 1984) (noting Germany's regulation); *Belgium Regulations Relative to the Admission of Foreign Warships into Belgium Ports and Harbors Brussels*, Dec. 30, 1923, *reprinted in* BRITISH AND FOREIGN ST., 118 BRIT. & FOREIGN ST. PAPERS 43 (1923).

[96] PHILLIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, 120–21 (1927).

[97] *Territorial Waters*, League of Nations Doc. C.74M.39. 1929 V (1929), *reprinted in* 24 AM. J. INT'L L. SUPP. 25, 38–40 (1930).

[98] *Id.*

conference failed to agree on the extent of coastal state control over the territorial sea and its breadth.[99] Likewise, for the high seas beyond territorial jurisdiction, customary navigational freedoms were also confirmed in international law. First, the International Law Association's 1926 Resolution on the Laws of Maritime Jurisdiction recognized "no State or group of States may claim any right of sovereignty, privilege or prerogative over any portion of the high seas or place any obstacle to the free and full use of the high seas."[100] Second, in 1927 the Institute of International Law issued a resolution recognizing the right of unfettered open sea navigation while noting that only the flag State have exclusive control of seagoing ship operations at sea.[101] These developments clearly codified the meaning of the territorial sea and the balance with navigational freedoms in international law. Nations remained divided on an appropriate width for the territorial sea, which coastal states sought as a protective buffer against naval invasion.[102]

3. Maritime Sovereignty and Innocent Passage in early International Jurisprudence

Early international jurisprudence focused on the Law of the Sea, specifically the balance between the sovereign rights of seagoing nations to transit unhampered and the coastal state jurisdiction. In the famed *Lotus* case deciding jurisdiction over a collision on the high seas, the Permanent Court of International Justice identified "the first and foremost restriction imposed by international law upon a State is that it . . . may not exercise its power in any form in the territory of another State," consequentially, coastal states cannot exercise jurisdiction over foreign ships beyond their

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[99] *See* Jesse S. Reeves, *The Codification of the Law of Territorial Waters*, 24 AM. J. INT'L L. 486, 490–93 (1930).

[100] INT'L LAW ASS'N, Res. on the Laws of Maritime Jurisdiction, art. 13, Vienna, Aug. 5–11, 1926, 34 INT'L L. ASS'N Y.B. 103 (1926).

[101] Inst. of Int'l Law, Res. on Open Sea Navigation, art. 1, Lausanne, Sept. 1, 1927, Y.B. INST. INT'L L. 88 (1927) (original in French), http://www.idi-iil.org/idiF/resolutionsF/1927_lau_03_fr.pdf, (recognizing the customary law principle of *contrôle exclusive* by the flag state).

[102] Kraska, *supra* note 26, at 216; Martinez, *supra* note 79, at 97; W. L. Schachte, Jr., *The History of the Territorial Sea from a National Security Perspective*, 1 TERRITORIAL. SEA J. 143, 147 (1990) (quoting Elihu Root in the XI Proceedings of the North Atlantic Fisheries Case Arbitration as saying "the sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis on which is established the territorial zone. . . .").

territorial seas.[103] Later, the International Court of Justice (ICJ) considered territorial sea rights and duties in its first case—the Corfu Channel.[104] The ICJ found that Albania, as a coastal state, had a duty to keep its territorial seas free of mines and to warn passing foreign ships of dangers.[105] The ICJ also held that the United Kingdom's warships had a right of passage through Albania's territorial sea noting, "[i]t is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent* . . . there is no right for a coastal State to prohibit such passage through straits in time of peace."[106] Albania claimed that no right of innocent passage existed for foreign warships.[107] The ICJ rejected this argument instead focusing specifically on the "*manner* in which the innocent passage was carried out" noting the warships' guns were unloaded in normal positions and although Sailors were at battle stations ready to respond, if attacked, they did not demonstrate hostility.[108] Also importantly, there was no evidence the British ships were conducting espionage against or otherwise interfering with Albanian national security.[109] Still, the Court said the United Kingdom had exceeded the scope of activities permitted under innocent passage and used illegal force, when later minesweeping in Albanian territorial waters.[110] This ruling upheld the right of unimpeded innocent passage by warships through the territorial sea of foreign nations, but simultaneously recognized conditions for the passage—namely that activities be non-threatening, continuous, and expeditious. The ICJ also considered concept of State sovereignty over the territorial sea in *Military & Paramilitary Activities*, where the court held "the basic legal concept of

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[103] The case involved a high sea collision between a French steamship and a Turkish vessel. Turkish officials tried and convicted the French ship captain for manslaughter. The ICJ held that since the actions took place on a French ship on the high seas that the Turkish court lacked jurisdiction, but that the case would have been different inside the Turkish territorial sea, where jurisdiction would exist. It should be noted that UNCLOS created Contiguous Zone slightly expands the territory where coastal states can exercise enforcement jurisdiction to 24 nautical miles. *See* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); *see also* Hugh Handeyside, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat*, 29 MICH. J. INT'L L. 71, 73–76 (2007).

[104] Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 4 (Apr. 9).

[105] *Id.* at 23.

[106] *Id.* at 28.

[107] *Id.*

[108] *Id.* at 30–32.

[109] *See id.*

[110] *Id.* at 35.

state Sovereignty in customary international law, expressed in inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above."[111] These early international judicial findings paved way for further codification through more specific language in treaties.

4. Codification into Treaty

Partially in response to the jurisprudential work of the International Court of Justice in the Corfu Channel Case, the first United Nations Conference on the Law of the Sea convened in 1956 with goal of translating customary law into a comprehensive framework for ocean governance.[112] Key objectives included delineating the rights of coastal *vis-a-vis* seagoing States, as well as detailing offshore maritime activities. The conference resulted in two conventions signed in 1958: The Convention on the High Seas and its counterpart the Convention on the Territorial Sea and Contiguous Zone. The Convention on the High Seas reaffirmed broadly accepted freedoms of navigation, including openness to ships and aircraft of all nations and a prohibition on non-flag states asserting jurisdiction on vessels there.[113] Its sister, the Convention on the Territorial Sea and the Contagious Zone, codified customary international law understandings recognizing coastal state sovereignty extending "to a belt of sea adjacent to its coast"[114] subject only to the "right of innocent passage" for "ships of all states."[115] Coastal states were forbidden from "hampering" this passage.[116] The Convention noted "passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State."[117] To avoid the security concern of an underwater submarine off the coast, which delegates recognized as "inherently threatening," the Convention required submarines

[111] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 212 (June 27).

[112] Galina G. Shinkaretskaia, *The International Court of Justice and the Development of the Law of the Sea*, 12 MARINE POL'Y 201, 201–208 (1998); Edward McWhinney, *The Codifying Conference as an Instrument of International Law-Making: From the "Old" Law of the Sea to the "New,"* 3 SYR. J. INT'L L. & COM. 301, 303 (1975); Kraska, *supra* note 26, at 218.

[113] Flag states represent the country where a vessel is registered. At sea, vessels fall under the jurisdiction of the flag state. Convention on the High Seas, art. 2(1), (4), Apr. 29, 1958, 450 U.N.T.S. 11.

[114] *Id.* at art. 1.

[115] *Id.* at art. 14(1).

[116] *Id.* at art 15.

[117] *Id.* at art. 14(4).

to "navigate on the surface" and "to show their flag."[118] The Convention gave the coastal state broad authority to "take the necessary steps in its territorial seas to prevent passage which is not innocent."[119] It also enabled the coastal state to temporarily suspend innocent passage by foreign ships "if such a suspension was essential for the protection of its security."[120] Additionally, as a precursor to transit passage through international straits regime later created in UNCLOS, it noted that "there shall be no suspension of the innocent passage of foreign ships through *straits* which are used for international navigation."[121] However, while codifying rights,[122] the Convention failed to delineate the breadth of the territorial sea.[123] This was a serious shortcoming as it left the law in flux throughout the Cold War, yet by the time of the adoption of United Nations Convention on the Law of the Seas in 1982, "most nations asserted sovereignty over a twelve-mile territorial sea."[124]

5. America's Security-Focused View of the Territorial Sea

From an American domestic law perspective, the territorial sea legal regime has also evolved with regard to balancing the freedom of navigation with coastal state security interests. The Supreme Court observed "at the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders,"[125] but that it had evolved over time. In 1793, President George Washington adopted the overtly security-oriented cannon shot rule in proclaiming a three nautical mile territorial sea.[126] This remained the American position until 1988, when President Ronald Reagan extended the width to twelve nautical miles in

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[118] *Id.* at art. 14(6).

[119] *Id.* at art. 16(1).

[120] *Id.* at art. 16(3). Suspension was to be temporary and must apply equally to all foreign vessels. *Id.*

[121] *Id.* at art. 16(4).

[122] While States agreed regarding coastal state sovereignty over a territorial sea subject to the right of innocent passage and to the conditions under which passage could be considered innocent ("not prejudicial to peace, good order, or security of the coastal State"), no agreement was reached regarding the breadth of the sea. *See id.* at art. 14(2).

[123] *Id.* at art.1, 14 (recognizing in art. 1 "sovereignty" in the territorial sea and the right to innocent passage in art. 14).

[124] LEGAL ISSUES RAISED BY PROPOSED PRESIDENTIAL PROCLAMATION TO EXTEND THE TERRITORIAL SEA, MEMORANDUM OPINION FOR THE LEGAL ADVISOR; DEPT. OF STATE (Oct. 4, 1998).

[125] United States v. California, 332 U.S. 19, 32 (1947).

[126] Harry Scheiber & Chris Carr, *Constitutionalism and the Territorial Sea*, 2 TERRITORIAL SEA J. 68 (1992).

part for security reasons.[127] At the time, the Soviet Union spy ships conducted intelligence gathering off the coast to eavesdrop on American military communication networks.[128] State Department officials described the Presidents motivation as a "desire to keep Soviet intelligence-gathering vessels farther from the shoreline."[129] This evolution reflects American observance of the inextricable link between the activities in the territorial sea and security.

6. State Practice of Maritime Surveillance Diverges from Trends in Treaty Formation

While trends in the codification of the Law of the Sea during the latter part of the Twentieth Century indicate widespread acknowledgment of coastal state sovereignty over a territorial sea subject only to limited innocent passage rights, state practice began to substantially diverge with regard to intelligence and reconnaissance activities. Instead of manifesting respect for the sovereignty of coastal territorial sea, major seagoing nations routinely entered into coastal states' territorial seas to conduct surveillance. Russia, China, and the United States, all are alleged to have repeatedly entered into other states' territorial seas in manners incongruent with innocent passage. While such divergent practice might be dismissed as an aberration, the fact that key states, particularly United Nations Security Council permanent members, routinely conduct these activities suggests a more nuanced and complex paradigm may be developing in customary international law. This phenomenon is all the more disconcerting because it runs counter to historic customary law developments and to international treaty law. It has also caused some scholars to believe that technical advances in weaponry and surveillance have made the territorial sea as a security buffer a "vestige of a bygone era."[130]

Through the Cold War and more recently, Soviet and Russian vessels routinely entered foreign territorial seas to apparently gathering intelligence on numerous occasions. In Sweden alone, Soviet submarines entered the Swedish territorial sea to conduct espionage on almost 200 confirmed instances with another 200 suspected intrusions.[131] In one instance, a Soviet

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[127] *See* Proclamation No. 5928, 3 C.F.R. 547 (1988).

[128] Andrew Rosenthal, *Reagan Extends Territorial Waters to 12 Miles*, N.Y. TIMES, Dec. 29, 1988, at 17.

[129] *Id.*

[130] F. David Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO L. REV. 625, 689 (1984).

[131] GORDAN MCCORMICK, STRANGER THAN FICTION: SOVIET SUBMARINE OPERATIONS IN SWEDISH WATERS 5 tbl.1 (Project Air Force, 1990).

submarine snooped so close to shore near a Swedish naval base that it ran aground.[132] The United States deplored the incident as "blatant disregard for Swedish territorial integrity" for the purpose of "hostile espionage."[133] The Soviet Union or Russia similarly intruded Norway's territorial waters at least 230 times since 1970.[134] In Latin America, the Dominican Republic complained to the United Nations Security Council about Soviet incursions into its territorial sea.[135] Similarly, Argentina and Chile reported Soviet ships entering their territorial waters.[136] Other Soviet nearshore espionage appears linked to gathering naval intelligence off the Italian naval base of Taranto in 1982,[137] and the United States' ballistic missile base at Holy Loch, Scotland, United Kingdom.[138] Although the Russians conduct many of these clandestine naval operations, they are not alone.

China similarly deploys its ships into foreign territorial seas for intelligence gathering. A Chinese submarine found in Japanese territorial sea near Sakishima Gunto in the Ryukyu island chain in 2004 prompted Prime Minister Junichiro Koizumi, as commander of the Maritime Self-Defence Force (JMSDF), to insist it surface and show its flag."[139]

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[132] U-137 ran aground in Swedish internal waters on October 27, 1981. Russia claimed the submarine had unintentionally wandered into territorial waters due to a faulty navigational equipment (compass error); however, observers have challenged the veracity of this noting that implausibility of the submarine threading submerged through a perilous serious of narrow straits and would legally needed to have declared a force majeure entry, but never sent a distress signal. Marie Jacobsson, *Sweden and the Law of the Sea*, *in* 28 THE LAW OF THE SEA: THE EUROPEAN UNION AND ITS MEMBER STATES 495, 517 (Laura Pineschi & Tullio Treves eds., 1996).

[133] Frank J. Prial, *Sub Leaves Sweden; Joins Soviet Flotilla*, N.Y. TIMES (Nov. 7, 1981), http://www.nytimes.com/1981/11/07/world/sub-leaves-sweden-joins-soviet-flotilla. html (quoting Max Kampelman, U.S. envoy for European Security).

[134] Marian Leighton, *Soviet Strategy Toward Northern Europe and Japan*, *in* SOVIET FOREIGN POLICY IN A CHANGING WORLD 285, 300 (Robin F. Laird & Erik P. Hoffmann eds., 1986).

[135] In March 1952, the Dominican Republic observed multiple Russian submarines in its territorial waters. *"Soviet" Submarines to be Cited to U.N.*, N.Y. TIMES, Mar. 5, 1952, at 6.

[136] Argentine Admiral Isaac Rojas noted the Soviet vessel was "obviously on an unfriendly and inconfessable [sic] mission." President Arturo Ercoli said "was in Argentine territorial waters, it was openly in violation of international law." *Admiral Sees Unfriendly Act*, N.Y. TIMES, May 23, 1958, at 13; *Submarine Off Chile Attacked*, N.Y. TIMES, May 22, 1967, at 27.

[137] *Italians Issue a Protest over Intrusion by Sub*, N.Y. TIMES, Mar. 2, 1982, at A4.

[138] GARY E. WEIR & WALTER J. BOYNE, RISING TIDE: THE UNTOLD STORY OF THE RUSSIAN SUBMARINES THAT FOUGHT THE COLD WAR 176–77 (2003).

[139] Miyoshi Masahiro, *The Submerged Passage of a Submarine Through the Territorial Sea–The Incident of a Chinese Atomic-Powered Submarine*, 10 SING. Y.B. INT'L L. 243, 243–49 (2006); Yukiya Hamamoto, *The Incident of a Submarine Navigating Underwater in Japan's Territorial Sea*, 48 JAPANESE ANN. OF INT'L L. 123, 124 (2005).

Following diplomatic protest, China "expressed regret" that a nuclear-powered submarine had entered Japan's territorial sea, but claimed the incident was unintended due to "technical errors."[140] In 2016, a Chinese surveillance and reconnaissance ship again entered Japanese territorial waters several times. Yet again in 2018, a Chinese spy ship followed Indian warships arriving for triumvirate (US, India, Japanese) naval exercise into Japan's territorial sea; however, in this instance, China claimed to be exercising unannounced innocent passage.[141] Notably, the Japanese expressed concern that the spy ship likely continued to use its sensors while following the Indian vessels in Japan's waters,[142] which would be inconsistent with innocent passage regime.

Some nations and individuals allege the United States also evidenced the practice of entering territorial seas to collect intelligence. A former United States submariner claims "U.S. fast attack submarines routinely slipped into Soviet waters near Vladivostok to observe shipping in the largest Russian naval and commercial port in the Far East"[143] and to spy on Soviet atomic bomb test range at Novaya Zemlya[144] as well as other locations.[145] Given the sensitivity, the extent of U.S. activities in the Soviet territorial waters remains mostly unknown. However, several serious mishaps are indicative of state practice, including the USS GATO,[146] USS PINTADO,[147] and USS BATON ROUGE[148] collisions with other submarines in claimed Soviet and

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[140] Masahiro, *supra* note 124, at 244.

[141] *China Shaken of US, India, Japan Triumvirate: Chinese Spy Ship Sneaks into Japanese Territorial Waters Tracking Indian Ships*, INDIA TIMES (July 12, 2018), https://economictimes.indiatimes.com/news/defence/china-shaken-of-us-india-japan-triumvirate-chinese-spy-ship-sneaks-into-japanese-territorial-waters-tracking-indian-ships/articleshow/52765173.cms?from=mdr.

[142] *Id.*

[143] Kraska *supra* note 26, at 202 (quoting W. CRAIG REED, RED NOVEMBER: INSIDE THE SECRET U.S.-SOVIET SUBMARINE WAR 3–9, 312–16 (2010)).

[144] REED *supra* note 146, at 62.

[145] Seymour M. Hersh, *Submarines of U.S. Stage Spy Missions Inside Soviet Waters*, N.Y. TIMES, May 25, 1975, at 1.

[146] Seymour M. Hersh, *A False Navy Report Alleged in Sub Crash*, N.Y. TIMES, July 6, 1975, at 1.

[147] The collision occurred within Soviet territorial sea at a depth of 200 feet near the Soviet naval base at Petropavlovsk on the Kamchatka Peninsula. *Collision of U.S. and Soviet Subs Off Siberia in 1974 Is Recounted*, N.Y. TIMES, July 4, 1975, at 21.

[148] The United States claimed the accident occurred slightly over 12 nautical miles from the Russian shoreline of Kildin Island in waters it considered international, while the Russians noted it was 5 nautical miles within its territorial sea due to the straight baselines it drew. Sebastien Roblin, *In 1992, a Russian Nuclear Attack Submarine Slammed into an American Sub (Right off Russia's Coast)*, THE NAT'L INT. (Dec. 13, 2016), https://nationalinterest.org/blog/the-buzz/1992-russian-nuclear-attack-submarine-slammed-american-sub-18735; *see* also *Protest Lodged*, IZVESTIYA (Moscow), Mar. 27, 1992.

subsequently Russian territorial waters in 1969, 1974, and 1992, respectively. In 1964, the Chinese government alleged that the United States had provocatively intruded into territorial waters at least 300 times to collect intelligence.[149] In 1960, Cuba alleged that the cruiser USS NORFOLK entered territorial waters coming within three miles of Cayo Blanco.[150] The United States also routinely transits vessels through the Northwest Passage, which Canada claims as internal waters, but the U.S. considers an international strait.[151] As part of its Freedom of Navigation program the United States routinely enters into foreign territorial seas under the right of innocent passage, although during these transits the United States asserts its activities are fully consistent with international law.[152]

Notably, few other countries appear to regularly conduct surveillance activities in foreign territorial seas. Although there have been numerous instances of North Korean vessels entering the South Korean territorial sea outside of the innocent passage regime,[153] little precedential value can be attached to North Korean activities with respect to establishing customary practice, because it is legally still at war. Nonetheless, Russian, American, and Chinese activities in foreign territorial seas may be suggestive of the development of customary practices separate from that of the innocent passage regime. Key states regularly operating in foreign territorial seas in ways that are inconsistent with the innocent passage regime certainly indicates a wrinkle in the law. Importantly, when such activities are revealed, they are protested against or challenged by coastal states, which indicates this divergent practice has definitely not attained status as a widely accepted customary right.

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morning ed. at 2, translated in FBIS-SOV-92-060, Mar. 27, 1992, at 6.

[149] *300th Peking "Warning" to U.S.*, N.Y. TIMES, June 30, 1964, at 3.

[150] Kraska *supra* note 26, at 204; *see* Jack Raymond, *Capital Protests Cuban Ship's Fire on U.S.* Submarine, N.Y. TIMES, May 15, 1960, at 1.

[151] Donald R. Rothwell, *The Canadian-U.S. Northwest Passage Dispute: A Reassessment*, 26 CORNELL INT'L L. J. 337, 341–43 (1993) (U.S. State Dep't says "the USA can neither accept nor acquiesce in the [Canadian] assertion."); Thomas C. Pullen & Charles Swithinbank, *Transits of the Northwest Passage, 1906-1990*, 27 POLAR REC. 365, 365-367 (1991) (recording twenty-three transits of the Northwest Passage, fifteen of which were by United States-flagged vessels).

[152] *See* DEP'T OF DEF., ANNUAL FREEDOM OF NAVIGATION REPORT (2017); *see* also UNCLOS, *supra* note 24, at art. 17.

[153] Kraska, *supra* note 26, at 207; *NK Naval Boats Violate Western Sea Border*, KOREA TIMES (May 16, 2010), http://www.koreatimes.co.kr/www/news/nation/2010/05/113_65946.html; Nicholas D. Kristof, *Sub's Goal Infiltration, Seoul Says*, N.Y. TIMES, June 27, 1998, at A3; Nicholas D. Kristof, *North Korean Sub Sinks Under South Korean Tow*, N.Y. TIMES, June 24, 1998, at A8.

By contrast, the state practice conducting surveillance operations just *outside* the limits of the territorial sea appears consistent with recognized maritime law, routine practice, and accepted international norms. For example, the United States found no reason to object to Soviet submarines five miles off the coast of California (when U.S. claimed a three nautical mile territorial sea)[154] saying foreign submarines were "free to roam the high seas as they please."[155] Likewise the United States regularly operates just outside of 12 nautical miles off China and other countries as part of its freedom of navigation program, including intelligence gathering flights.[156] China regularly conducts naval intelligence operations off the U.S. coast near Hawai'i and Guam.[157] Such activities by intelligence gathering ships are clearly potentially adverse, but begrudgingly accepted as consistent with high seas freedoms, even if just a smudge outside the technical bounds of a twelve nautical mile territorial sea. Yet as technologies improve, cyber activities will undoubtedly be able to be conducted from even greater distances offshore. In December 2019, the Indian Navy chased away the Chinese spy ship SHIYAN operating just outside of its territorial sea in international waters near the Andaman island chain.[158] This suggests accepted international law norms may be changing based on new technical realities. This begs the question of whether these activities, enabled by new technologies, could constitute a threat to coastal state security such that the width of the territorial sea should be extended to diminish the new cyber risks.

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[154] *Submarine Hunted by Navy on Coast*, N.Y. TIMES, Mar. 31, 1950, at 21.

[155] *No Curb on Submarines*, N.Y. TIMES, Mar. 27, 1948, at 2.

[156] Raul Pedrozo, *Military Activities in and over the Exclusive Economic Zone*, in FREEDOM OF SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTIONS 235, 239–48 (Myron H. Nordquist, Tommy T.B. Koh & John Norton Moore eds., 2009); Eric Donnelly, *The United States-China EP-3 Incident: Legality and Realpolitik*, 9(1) J. CONFLICT & SEC. L., 25, 29, 35 (2004).

[157] Kevin Kerrigan, *China's Aircraft Carrier Passes Near Guam*, THE GUAM DAILY POST (June 27, 2019), https://www.postguam.com/news/local/china-s-aircraft-carrier-passes-near-guam/article_2cf9a436-97f4-11e9-a62f-7bc0bb14594c.html; Kathrin Hille, *Chinese Navy Begins U.S. Economic Zone Patrols*, FIN. TIMES (June 2, 2013), http://www.ft.com/cms/s/0/02cc257c-cb4a-11e2-8ff3-00144feab7de.html; Kyle Mizokami, *Why a Chinese Spy Ship is Hanging Out Next to Hawaii*, POPULAR MECHS. (Jul. 17, 2018), www.popularmechanics.com/military/navy-ships/a22172524/chinese-spy-ship-hawaii-rimpac/.

[158] Liu Zhen, *Chinese Research Vessel Expelled by Indian Warship for Operating near Andaman and Nicobar Islands*, S. CHINA MORNING POST (Dec. 4, 2019), https://www.scmp.com/news/china/diplomacy/article/3040638/chinese-research-vessel-expelled-indian-warship-operating-near.

B. Third United Nations Convention on the Law of the Sea

The Cold War strained international relations as the two superpowers postured against each other with shows of naval force near coastal states, which uncomfortably sought to establish some sort of buffers.[159] This resulted in a tense and confusing period for ocean law. The debate over nearshore naval activities grew heated as some coastal states claimed to nationalize large swaths of the ocean as territorial waters and deny access to foreign warships.[160] Nine South American nations claimed two hundred nautical mile territorial seas and prohibited unauthorized access.[161] Such pronouncements seriously challenged freedom of navigation. Responsively, in 1973, the United Nations General Assembly agreed to convene a comprehensive convention on the law of the seas. The Convention included "more than 140 sovereign states, 6 non-independent states, 8 national liberation movements, 12 specialised agencies, 19 intergovernmental organisations, a number of quasi-autonomous units of the UN, as well as a host of NGOs" taking place during a series of sessions from 1973–1982.[162] Uniquely, a détente developed between the United States and Soviet Union as they worked together to permit coastal states to extend rights and jurisdiction so long as access and freedom of the seas were preserved.[163] The Convention innovatively allocated enumerated and balanced rights in maritime zones, which allowed coastal states to exercise more controls closer to shore, while becoming increasingly permissive to seagoing nations further from shore. The different maritime zones include the High Seas, coastal state Exclusive Economic Zone, Contiguous Zone for enforcement actions, Territorial Sea, and Internal Waters, where states would exercise different degrees of sovereignty and control.

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[159] United Nations Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea: A Historical Perspective*, https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited on Nov. 1, 2020).

[160] Nine nations claimed 200 nautical miles from their coastlines as sovereign rights zones. Declaration of Montevideo on Law of the Sea, May 8, 1970, 9 I.L.M. 1081.

[161] *Id.*

[162] *Third United Nations Conference on the Law of the Sea*, UNITED NATIONS CODIFICATION DIV. PUBL'N DIPLOMATIC CONFS., https://legal.un.org/diplomaticconferences/1973_los/ (last visited Sept. 29, 2020); Garry Taylor, *The Law of the Sea and "Creeping Jurisdiction" of Coastal States*, LINKEDIN PULSE (July 21, 2015), https://www.linkedin.com/pulse/law-sea-creeping-jurisdiction-coastal-states-garry-taylor.

[163] Taylor, *supra* note 162.

1. High Seas Freedoms

Under UNCLOS, outside of twelve nautical miles "no State may validly purport to subject any part of the high seas to its sovereignty."[164] The high seas "are open to all States"[165] to enjoy "[f]reedom of the high seas," including, *inter alia*, navigation, overflight, fishing, and scientific research.[166] At the Convention, an "ostensible consensus" was reached that all states had a right to conduct military activities outside of the territorial seas.[167] However, states must exercise the rights "with due regard for the interests of other States in their exercise of the freedom of the high seas"[168] and only for "peaceful purposes."[169] This high seas legal regime established a multilateral governance structure bound by provisions of treaty law and customary international law, while safeguarding seagoing vessels from national appropriation. UNCLOS, created a separate Exclusive Economic Zone and area of deep-seabed administered by the International Seabed Authority regime to protect economic interests, but these zones, which overlap the high seas, do not substantially constrain the high seas freedoms.[170]

2. The Non-Prejudicial to Coastal State Security Meaning of Innocent Passage

The territorial sea and rights to innocent passage were also delineated by UNCLOS. A distance of twelve nautical miles from shore was set as the point where high seas freedoms must give way to the coastal state's territorial sea. Echoing the language of the 1958 Territorial Sea Convention, UNCLOS requires that innocent passage through the territorial sea not be "prejudicial to the peace, good order or security of the coastal state."[171] Inclusion of this provision was vitally important to a vocal group of states

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[164] UNCLOS, *supra* note 24, at art. 89.

[165] *Id.* at art. 87.

[166] *Id.*

[167] Ivan Shearer, *Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance*, 17 OCEAN Y.B. 548, 561 (2003) (noting that discussion focused on the coastal state's Exclusive Economic Zone (EEZ) extending from twelve to two hundred nautical miles from the coastal state baseline).

[168] UNCLOS, *supra* note 24, at art. 87.

[169] *Id.* at art. 88.

[170] The EEZ allocates coastal State sovereignty over resources (fish, oil, etc.). UNCLOS, *supra* note 24, at art. 56. In the Area, which represents the ocean floor of the Deep Seabed under the high seas, the inter-governmental International Seabed Authority regulates and controls mineral-related activities. *Id.* at Part XI.

[171] UNCLOS, *supra* note 24, at art. 19(1).

at the Conference that sought to condition the right of innocent passage on either coastal state notification or consent; they eventually conceded only once assured such passage would be non-threatening.[172] To these states, warships "by their very nature" were deemed inherently threatening "irrespective of any objective assessment of the character of their passage."[173] They felt warships should not be automatically entitled to the right of innocent passage and vigorously fought to restrict warships in the territorial sea, even vocally objecting during the final sessions of the Conference.[174] To appease these states, specific proscriptions were added to the innocent passage regime as *prima facie* violations of innocent passage "prejudicial to the coastal State" in UNCLOS Article (19)(2):

> (a) any *threat or use of force* against the sovereignty, territorial integrity or political independence of the coastal State, or in *any other manner in violation of the principles of international law* embodied in the Charter of the United Nations;
>
> (b) any exercise or practice with weapons of any kind;
>
> (c) any act *aimed at collecting information* to the prejudice of the defence or security of the coastal State;
>
> (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
>
> (k) any act aimed at *interfering with any systems of communication* or any other facilities or installations of the coastal State;
>
> (l) any other activity not having a direct bearing on passage.[175]

Although not explicitly granted, the right of innocent passage to warships on an unimpeded and unannounced basis can be inferred.[176] Language was added clearly defining that "sovereignty of a coastal State extends . . . to an adjacent belt of sea, described as the territorial sea."[177] Also importantly,

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[172] *See* Third United Nations Conference on the Law of the Sea, *Algeria, Bahrain, Benin, Cape Verde, China, Congo, Democratic People's Republic of Korea, Democratic Yemen, Djibouti, Egypt, Guinea-Bissau, Iran, Libyan Arab Jamahiriya, Malta, Morocco, Oman, Pakistan, Papua New Guinea, Philippines, Romania, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Suriname, Syria, Uruguay and Yemen: Amendment to Article 21*, U.N. Doc. A/CONF.62/L.117 (Apr. 13, 1982).

[173] Kraska *supra* note 26, at 220.

[174] Third United Nations Conference on the Law of the Sea, *176th Plenary Meeting*, ¶ 1, U.N. Doc. A/CONF.62/SR.176 (Apr. 26, 1982).

[175] UNCLOS, *supra* note 24, at art. 19(2)(a)–(c), (d), (k), (l) (emphasis added).

[176] U.S. NAVY ET AL., NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 2.5.2.4 (2007).

[177] UNCLOS, *supra* note 24, at art. 2(1). Exceptions include "rendering assistance to persons, ships or aircraft in danger or distress." *Id.* at art. 18; *see also* Rick Button,

UNCLOS does not provide for nonconsensual overflight of the territorial sea (with exceptions for emergencies and *force majeure*),[178] seemingly suggesting that for security purposes the territorial sea should be viewed as land since international law does not permit land overflight in treaty or custom.[179] Taken together, the self-evident meaning of "innocent passage" coupled with the comprehensive prohibitions of UNCLOS Article 19(2) illustrate that such passage must not be prejudicial or harmful to coastal states.

3. *Differences between the Innocent Passage and Straits Transit Passage*

UNCLOS created a special regime for straits used for international navigation that are completely overlapped by territorial seas, thus leaving no high seas passage in between.[180] The United States State Department identified 265 such straits globally,[181] although academics suggest only about one hundred exist.[182] Many are sensitive geopolitical chokepoints, such as Gibraltar, Singapore, and the Dardanelles (Turkish) straits, that have been flashpoints for historic naval engagements.[183] At the Convention, major maritime powers insisted upon the creation and incorporation of a special regime—a transit passage—through these waterways to ensure the

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International Law and Search & Rescue, 70 NAVAL WAR COLL. REV. 25, 39–41 (2017).

[178] *See* UNCLOS, *supra* note 24, at art. 2(2).

[179] Frank Fedele, *Overflight by Military Aircraft in Time of Peace*, 9 A.F. L. REV. 8, 17 (1967); Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559, 568–69 (1953) (observing legal aspects of territorial air intrusions and noting that diplomatic protests are often lodged and that occasionally intruders are compelled to land or be shot down).

[180] UNCLOS, *supra* note 24, at art. 37 ("This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.").

[181] Jon M. Van Dyke, *Transit Passage Through International Straits*, University of Hawai'i Law School Faculty Papers 1 (2008), https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/content/faculty/Straits100308.pdf (referring to the 265 qualifying straits identified by State Dep't geographer Lewis Alexander found in LEWIS M. ALEXANDER, NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT: GEOGRAPHICAL IMPLICATIONS FOR THE UNITED STATES 99, 188–198, tbl.12-A (J. Ashley Roach ed., 1986)).

[182] Kraska, *supra* note 26, at 221.

[183] *See List of Major Straits of the World*, QUICKGS, http://www.quickgs.com/major-straits-of-world/ (last visited Oct. 3, 2020); Lewis M. Alexander, *The Role of Choke Points in the Ocean Context*, 26 GEOJOURNAL 503, 503–509 (1992); Andy Wong, *How the 'Gibraltar of the East' Fell: A Historical Analysis of the Singapore Strategy Up to WWII*, WAVELL ROOM (Mar. 26, 2020), https://wavellroom.com/2020/03/26/how-the-gibraltar-of-the-east-fell-a-historical-analysis-of-the-singapore-strategy-up-to-wwii/.

unimpeded global movements of ships, submarines, and aircraft.[184] Importantly, warships, submarines, and military aircraft can travel through these straits in their "normal modes," which means submarines may remain submerged and aircraft can fly through coastal State territorial seas at these locations.[185] The United States, United Kingdom, USSR, France, and Japan insisted that transit passage providing rights for submarines and aircraft constituted an essential freedom of navigation that could not be compromised.[186] These countries wanted to ensure ballistic missile submarines used for nuclear deterrence could navigate underwater through the straits to avoid detection.[187] Thus, the separate and distinct regime of transit passage emerged as a legal offshoot of innocent passage. As a compromise, warships would be allowed to transit through coastal state territorial seas at international straits in their "normal mode" of operation, but "refrain from activities other than those incident to their normal modes."[188]

Transit passage and innocent passage, both similarly require foreign vessels to travel with "continuous and expeditious movement"[189] and to "refrain from any threat or use of force against the sovereignty, territorial integrity[,] or political independence" of bordering states.[190] However, the transit passage regime is more permissive than innocent passage, especially for aircraft, submarines, and vessels in formation. Yet, some debate exists as to whether there is any substantive difference for surface ships. It could be argued that a "normal mode" of operation might enable a vessel to conduct transit passage in any manner, so long as it is in "normal mode." Such a proposition is supported by a textual distinction between innocent passage and transit passage in UNCLOS. Innocent passage forbids "any other activity *not having a direct bearing on passage*," whereas transit passage demands that ships and aircraft "refrain from activities *other than*

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[184] *See* John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 80–81, 95–110 (1980).

[185] UNCLOS, *supra* note 24, at art. 39(1)(c).

[186] Kraska *supra* note 26, at 221.

[187] Moore, *supra* note 184.

[188] UNCLOS, *supra* note 24, at art. 39(1)(c) ("Ships and aircraft while exercising the right of transit passage, shall . . . refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress. . . .").

[189] *Id.* at art. 18(2) (noting innocent passage requirement that passage be "continuous and expeditious"); *id.* at arts. 38(2), 39(1)(a) (noting that the purpose of transit passage must be "continuous and expeditious transit" and providing rules for the exercise of the right of transit passage).

[190] *Id.* at art. 39(1)(b).

those incident to normal modes."[191] The subtle difference is important as it might permit ships and aircraft to continue activities if in their "normal mode." Under this logic, a spy plane could continue spying if in "normal mode" and an electronic attack aircraft could continue jamming, just as an aircraft carrier could continue launching and recovering aircraft.[192] But, senior statesmen refute this interpretation as inconsistent with the intent of the state parties at the convention. John Norton Moore, a senior member of the United States delegation to the Convention, carefully noted the strait transit regime was designed to facilitate mobility and should not be construed to entitle foreign military ships and aircraft from engaging in activities "inimical to the security" of states adjacent to international straits.[193]

Nonetheless, at some point activities "incidental to normal navigation cross[] the threshold from operational oceanography, such as sea state and temperature, required to safely navigate, [thus] crossing the line of non-innocent passage . . . to the prejudice of the peace, good order, or security of the territorial sea."[194] Thus, there is broader room for discussion regarding activities that might be permissible in straits transit than in innocent passage. Also, unlike innocent passage which a coastal state can restrict or temporarily curtail for security reasons,[195] straits transit cannot be suspended for any purpose during peacetime or war. However, during transit, belligerents must not conduct offensive operations against enemy forces. These differences illustrate that more activities might be permissible in straits transit than in innocent passage, but the activities cannot deviate from "normal mode[s] of operation"[196] or be "inimical to the security of the bordering coastal state."[197]

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[191] *Id.* at art. 19(2)(*l*), 39(1)(c) (emphasis added).

[192] Under innocent passage "any other activity not having a direct bearing on passage" is prohibited. *Id.* at art. 19(2)(l). Under transit passage, ships and aircraft are merely to "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit." *Id.* at art. 39(1)(c).

[193] Off. of Media Servs., Bureau of Pub. Affs., *Statement by Mr. Moore, Committee II, July 22*, 71 DEP'T ST. BULL. 409, 410 (1974) [hereinafter Statement of Mr. Moore].

[194] Kraska, *supra* note 26, at 222–23.

[195] UNCLOS, *supra* note 24, at art. 25(3) ("The coastal State may . . . suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if suspension is essential for the protection of its security, including weapons exercises.").

[196] UNCLOS, *supra* note 24, at art. 39(1)(c).

[197] Statement of Mr. Moore, *supra* note 196.

4. Legality of Maritime Activities Not Explicitly Authorized as a Right Under UNCLOS

The navigational provisions of UNCLOS, such as innocent passage and straits transit, are enunciated as protected rights. However, this begs the question whether activities inconsistent with the conditions set forth for exercising those rights are *per se* illegal or merely unprotected? Many "media [outlets], legal scholars, and national leaders of affected coastal states firmly renounce [surveillance operations, such as] submarine espionage in their territorial waters as inherently unlawful."[198] Even the Tallinn experts adopt this approach opining that activities inconsistent with innocent passage are unlawful.[199] However, "applicable international law on the subject is somewhat more circumspect."[200] While acknowledging the affirmative right of innocent passage, some scholars argue that although passage is inconsistent with the terms guaranteed by the right, the inconsistency does not necessarily cause the passage to be illegal as a matter of international law (even if coastal domestic law is violated).[201] Ocean law expert James Kraska explains that "innocent passage is a right that submarines may exercise, but the U.S. view is that it is not a prohibition on submerged transit [through the territorial sea of foreign state]."[202] To him, "peacetime espionage in the territorial sea of another state occupies an uncomfortable gray area between clearly lawful conduct and an unmistakable international delict."[203] Several key Law of the Sea scholars have proposed the theory of *non-innocent passage*, an unprivileged passage, to explain that apparent divergence between UNCLOS and state practice.[204]

5. Non-Innocent Passage as an Unprivileged Alternative to Innocent Passage

Non-innocent passage refers to transit through a coastal state's territorial sea outside of the two regimes described in UNCLOS (innocent and transit passage). This theory relies on the concept of innocent passage being a right to be exercised with special privileges, namely the ability to transit unfettered. While some jurists assert transit through the territorial sea

198 Kraska, *supra* note 26, at 169.
199 TALLINN MANUAL 2.0, *supra* note 25, r. 32, at 168.
200 *See* Kraska, *supra* note 26, at 169.
201 *Id.* at 172.
202 *Id.*
203 *Id.* at 174.
204 *Id.* at 222–29; Froman, *supra* note 130 at 630, 657–664.

outside of innocent or transit passage is *per se* illegal,[205] a small group of scholars insist transit outside of innocent passage is not prohibited, but merely unprivileged or not specially protected under international law.[206] This position is extremely controversial. UNCLOS itself makes no mention of non-innocent passage. Critics could argue that this absence from the Convention's text proves non-innocent passage does not exist as a legal regime. On the other hand, proponents contend what is not specifically prohibited is presumed to be permissible under international law.[207] They hold that UNCLOS's silence on non-innocent passage merely means it "does not apply to it and thus does not restrict it."[208] They forcefully contend that treaty terms "should not be expanded or enlarged through interpretation."[209] However, this is a bold and highly contentious position considering UNCLOS functions as an omnibus "Constitution for the Oceans,"[210] with precise definitions explaining the applicable rights and duties of states.

Yet, proponents of the non-innocent passage theory counter that UNCLOS's innocent passage regime does not specially authorize right of assistance entry or safe harbor, either. Yet both are well recognized legal justifications for unauthorized entry into foreign territorial seas universally considered to be lawful.[211] Non-innocent passage has mainly been expressed in discourse regarding submarine activities where proponents suggest the theory reconciles extensive state practice by submarines in the

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[205] *See* Stephen Kong, *The Right of Innocent Passage*, 11 MINN. J. GLOB. TRADE 373, 385 (2002) (noting North Korean entry into S. Korean territorial sea outside of innocent passage would be considered illegal); Francesco Francioni, *Peacetime Use of Force, Military Activities, and the New Law of the Sea*, 18 CORNELL INT'L L.J. 203, 205–206 (1985); YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 105 (3rd ed. 2019) (providing an example of submerged submarine as non-innocent passage, but noting "every measure short of armed force should be taken to require the submarine to leave."); Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VIRGINIA J. INT'L L. 809 (1984) (saying only three regimes exist for lawful passage, thereby excluding the possibility of another non-illegal regime).

[206] *Id.* at 226 ("Innocent passage does not create a general obligation that must be kept—*pacta sunt servanda*—but rather it offers a privilege that may be accepted or rejected.").

[207] S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at ¶¶ 41–48 (Sept. 7).

[208] Kraska, *supra* note 26, at 226.

[209] *Id.* at 227 (citing *In re* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821)).

[210] "A Constitution for the Oceans": Remarks by Tommy T.B. Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea (Dec. 10, 1982), https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf; *see also* Robert C. De Tolve, *At What Cost? America's UNCLOS Allergy in the Time of Lawfare*, 61 NAVAL L. REV. 2 (2012).

[211] Kraska *supra* note 26, at 226.

territorial sea with UNCLOS's prohibition on submerged foreign submarines.[212] Critics would caution that non-innocent passage could provoke violent responses, but proponents argue that "not all occurrences of prejudicial passage will evoke response," and find the "rational calculus" of interstate relations, rather than any rigid formulaic analysis of legal rules, should apply to such unique situations.[213]

While this theory appears rational and could be textually supported by UNCLOS (by absence), the result of such an interpretation would undermine UNCLOS's carefully balanced provisions. The territorial sea has long been considered akin to land territory in terms of sovereignty.[214] In that sense, non-innocent passage would be analogous to driving a tank across the border without permission—a clear violation of state sovereignty to be avoided as a matter of international policy, if not also law. Nevertheless, the global community must come to terms with the fact that several states seem to regularly practice "non-innocent passage" as an unprivileged maritime regime outside of UNCLOS or hold that UNCLOS does not circumscribe espionage activities in the territorial sea. Addressing this important wrinkle in international law will be fundamental before the global community can address nearshore cyber operations.

III. LEGALITY OF MARITIME CYBER-RELATED OPERATIONS

In general, as reflected by the Tallinn experts, "cyber operations may be mounted from ships and submarines at sea, aircraft above the sea, offshore installations, or through submarine communication cables, both in peacetime and during armed conflict."[215] Yet the experts also observed "vessels may also be subject to coastal state jurisdiction depending on their

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[212] *Id.* ("Non-innocent submarine passage and espionage may not qualify as violations of the international law of the sea, or even as inconsistent actions with international law more generally.").

[213] FROMAN, *supra* note 133, at 44; *id.* at 68 ("The reasons for non-innocent passage lie not in the breadth of the territorial sea nor even in its juridical character; rather they lie in relentless competition of national sovereignties sparked by suspicion and alarm over other states' political institutions or social values. . . .").

[214] *See* UNCLOS, *supra* note 24, at art. 2; *see also* FRANCIS NGANTCHA, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA: THE CURRENT REGIME OF 'FREE' NAVIGATION IN COASTAL WATERS OF THIRD STATES 7 (1990) ("[T]he rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State may exercise over other parts of its territory. . . . It is also the principle underlying a number of multilateral conventions—such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944—which treat the territorial sea in the same way as other parts of State territory."); TANAKA, *supra* note 204, at 9.

[215] TALLINN MANUAL 2.0, *supra* note 25, at 232.

location, activity, and whether they are shielded from coastal State jurisdiction due to their [own] sovereign immune status."[216] The Tallin experts did not elaborate in detail what this entailed. This section explains in greater depth the legality of cyber activities ranging from self-defense and espionage to kinetic attacks in the various spatial maritime zones enunciated in UNCLOS.

A. Permissible Cyber Activities in Different Maritime Zones

1. High Seas

On the high seas beyond coastal state jurisdiction, vessels have the greatest latitude to conduct cyber operations. Per UNCLOS, high seas activities aboard vessels are governed under the exclusive jurisdiction of the flag state (the country where the vessel is registered).[217] No other state is permitted to exercise jurisdiction (subject to limited exceptions).[218] The Tallinn experts believed this exclusive flag state control "includes jurisdiction over cyber operations conducted from vessels."[219] Following this reasoning, the only constraints on high seas cyber activities are those imposed by the flag state's domestic law, the United Nation Charter's universal prohibitions on "unpeaceful" activities,[220] UNCLOS's reservation of the high seas for peaceful purposes,[221] and the provisions of law of war.[222] The Tallinn experts reflected, "[c]yber operations on the high seas may be conducted only for peaceful purposes, except as otherwise provided for under international law."[223] Similarly, within the Exclusive Economic Zone (EEZ), high seas freedoms for the purpose of military operations apply in totality. Cyber operations can freely be conducted in the EEZ, just as they would in the high seas, but with the one added caveat that seagoing vessels "must have due regard" for the coastal state's economic interests in living & nonliving resources.[224] These broad legal freedoms to conduct cyber operations on the high seas, however, are constrained by practical

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[216] *Id.* at 233.

[217] UNCLOS, *supra* note 24, at art. 92(1).

[218] *See id.* Exceptions exist for stateless or quasi-stateless ships (without apparent nationality), *see id.* at art. 92(2), and suspected slavery which provides the right of visit and boarding by foreign warships, *see id.* at art. 99, 110(1)(b).

[219] TALLINN MANUAL 2.0, *supra* note 25, at 232.

[220] U.N. Charter art. 2, ¶ 3 (stating requirements for peaceful interstate relations).

[221] UNCLOS, *supra* note 24, at art. 88 ("The high seas shall be reserved for peaceful purposes.").

[222] *See* discussion *infra* IV. Use of Force in Maritime Cyber Operations.

[223] TALLINN MANUAL 2.0, *supra* note 25, r. 45, at 233.

[224] *See id.* at 234.

technical difficulties. The high seas are a technically challenging place from which to conduct cyber operations because they are at the outer limit of the effective cell-site simulator range and submarine cables are usually at greater depths.

2. Territorial Sea

Cyber operations in the territorial sea, while operating under the innocent passage regime, appear completely at odds with several of the listed prohibited activities in UNCLOS Article 19(2), specifically the "threat or use of force," intelligence gathering, interfering with communications system or installations, and the catch-all "any other activity not having a direct bearing on passage" restraint.[225] Plainly read, Article 19(2) makes a broad range of cyber activities inherently not innocent.[226] For instance, depending on how broadly "interfere" with communications systems is defined, all network intrusions could be deemed unpermitted. Likewise, any action that would disrupt, such as denial of service attack, altering/deleting data, or changing functionality would be banned as inconsistent with innocent passage.[227] The ban on intelligence collection during innocent passage also forecloses the ability of a seagoing state to infiltrate a coastal State's cyber networks to gather intelligence detrimental to its security.

One possible exception to a complete ban on intelligence collection during innocent passage would permit intelligence gathered through routine navigational sensors. U.S. officials have implied that intelligence could be collected, if incidental to innocent passage, such as taking soundings, lookout observations, and other data acquired by navigational sensors.[228] Though textually inconsistent with innocent passage's article 19(2) provisions, which significantly, if not completely, circumscribe cyber operations while in innocent passage, given that innocent passage's sole purpose is to allow seafarers to transit without prejudicing the security interests of the coastal state, the permitting collecting intelligence for the safety of navigation seem logically tailored and appropriate, especially

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[225] *See* UNCLOS, *supra* note 24, at art. 19(2).

[226] Kraska, *supra* note 26, at 219.

[227] *See* UNCLOS, *supra* note 24, at art 19(2).

[228] The Chairman of the United States Joint Chiefs of Staff Admiral, William J. Crowe, stated during a U.S. Senate hearing: "If you gather intelligence in the process, all right. But you cannot do anything unusual in order to gather intelligence while you are engaged in innocent passage. In fact, you cannot do anything to operate out of the ordinary pattern except to go. That is it." COMM. ON ARMED SERV., S., U.S. CONG., DEPARTMENT OF DEFENSE AUTHORIZATION FOR APPROPRIATIONS FOR FISCAL YEAR 1989: HEARINGS BEFORE THE COMMITTEE ON ARMED SERVICES, UNITED STATES SENATE, ONE HUNDREDTH CONG., SECOND SESSION, ON S. 2355, 97–98 (1988).

since Article 19 reflects tolerance for activities "having a direct bearing on passage."[229] Tallinn experts agree positing "[i]n order for a vessel to claim the right of innocent passage through a coastal State's territorial sea, any cyber operations conducted by the vessel must comply with the conditions imposed on that right."[230] Consequently, the range of cyber operations permissible in the territorial sea under the innocent passage regime is extremely circumscribed. Only cyber activities that have a direct bearing on passage which do not interfere with coastal state communications systems or prejudice coastal states' security would be permitted under innocent passage.

3. Non-Innocent, Nonharmful Cyber and Electromagnetic Activities in the Territorial Sea

However, based on state practice and loose interpretations of UNCLOS, the possibility of non-innocent passage for cyber activities remains. While the Tallinn experts identified activities that would render passage non-innocent' and which are virtually identical to UNCLOS (19)(2) with the mere addition of the words 'cyber operations' cut and pasted, they left open the possibility for activities outside of innocent passage legal passage regime.[231] The experts observed that some technical capabilities would be

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[229] UNCLOS, *supra* note 24, at art. 19(2).

[230] TALLINN MANUAL 2.0, *supra* note 25, r. 48, at 241.

[231] Specifically:

(1) the unlawful threat or use of force by cyber means against the coastal State;

(2) exercise or practice involving cyber-enable weapons that is not limited solely to the ship and its systems;

(3) cyber activities designed to collect information prejudicial to the security of the coastal State;

(4) propaganda distributed by cyber means bearing on the defense or security of the coastal State;

(5) launching, landing, or taking on board of aircraft or other military devices, including those that engage in, or are capable of conducting cyber activities;

(6) research or survey activities, including those conducted through cyber or cyber facilitated means;

(7) cyber operations intended to interfere with communications systems or installations of the coastal State; and

(8) any other cyber activity not having direct bearing on passage.

inconsistent with innocent passage, such as providing wireless access to insurgent or protest groups whose communications are being blocked by the coastal state.[232] However, for the most part, their analysis was devoid of specifics and they ignored non-innocent passage altogether, perhaps indicative of their uncomfortableness with the theoretical regime.

Interestingly and somewhat paradoxically, a majority of Tallinn experts agreed that "passive (nonintrusive) assessments [of coastal State] wireless networks by vessels in innocent passage" should be permissible,[233] despite previously noting the strict rules of Article 19(2) would apply.[234] This further reflects some willingness in the international community to acknowledge limited circumstances where cyber activities might be permitted in the territorial sea. A minority of experts disagreed, countering that probing a land-based cellular network has no impact on a vessel's ability to safely navigate and thus would be disallowed as interference with coastal state communication systems or an "activity having no direct bearing on passage" forbidden by UNCLOS Article 19(2).[235] This tension among Tallinn experts reflects the divergence between state practice related to non-harmful surveillance and treaty language that prohibits all activities not having a bearing on the passage. Here, the majority's premise that nonharmful actions from the territorial sea may be lawful and consistent with innocent passage under international law is clearly at odds with Article 19(2)'s prohibitions. The minority is textually-correct based on the plain language of UNCLOS, but the majority might be closer to more accurately describing the state of the law as practiced. In their attempted restatement of current international law with respect to nonharmful cyber operations within the territorial sea, the majority of Tallinn experts seem to have correctly identified the law; but did not explain the basis for this position permitting *passive nonintrusive* connections while in innocent passage, which deviates from UNCLOS.[236] For instance, they could have invoked the theoretical regime of non-innocent passage or identified a *de minimis* exception to Article 19(2). Instead, perhaps because the experts did not wish to draw attention to or explain their position's incongruence with UNCLOS, the majority of experts chose not to explain the basis for accepting "passive (nonintrusive) assessments" of coastal state networks as permissible under international law, thus leaving an unresolved an important wrinkle in cyber law.

Id. at 242.

[232] *Id.* at r. 48 paras. 7–8., 242–43.

[233] *Id.* at 243.

[234] *Id.* at 242.

[235] *See id.* at r. 48, at 243 (referring to UNCLOS *supra* note 24, at art. 19(2)).

[236] *Id.*

4. Cyber and Electromagnetic Operations in Strait Transit

The more permissive regime of transit passage through international straits would permit a broader array of cyber operations, if "incident to normal mode of operation" and nonthreatening to a coastal state's political independence or territorial integrity. When confronted with transit passage, the Tallinn experts seemingly disregarded the regime merely noting "cyber operations in a strait used for international navigation must be consistent with the right of transit passage"[237] without further elaboration. This is unfortunate because innocent passage and transit passage are separate and distinct legal regimes. Perhaps, the experts choose to avoid the issue, because any cyber activity conducted in transit passage would have to be a part of the platform's normal mode of operation. For example, a cell site simulator would have to be the normal mode of operation, thus by their very nature ships exercising these rights would have to be information warfare, spy, or cyber platforms. Yet, these ships do exist; and their normal modes of operating may include cyber activities. Consequently, UNCLOS would not prohibit those ships from conducting cyber activities, since they are normal and incidental.[238] However, such ships would still remain subject to international law against interfering with political independence or territorial integrity of other states.[239] But activities that do not harm the coastal state would be permitted. For instance, passive cyber surveillance targeting a third country would be allowed. The straits transit regime is more permissive than innocent passage for cyber activities, but the aperture remains fairly constrained, such that only nonharmful activities could be permitted, such as probing, espionage, and possibly third-country operations.

IV. USE OF FORCE IN MARITIME CYBER-RELATED OPERATIONS

A. Aggression, Use of Force, and Breaches of Peace

Under the universally applicable United Nations Charter, states agree to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . . ."[240] Additionally, the Charter directs states to avoid "other breaches of the peace. . . ."[241] Similarly, Article 301 of UNCLOS titled "Peaceful use of the

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[237] *Id.* at r. 52, at 249.
[238] UNCLOS, *supra* note 24, at art. 39.
[239] U.N. Charter art. 2, ¶ 4.
[240] U.N. Charter art. 2, ¶ 4.
[241] *Id.* at art. 1, ¶ 1.

seas" dictates that "States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."[242] However, this is not a ban on military activities. As the Tallinn experts found, "military activities not involving a prohibited use of force are within the scope of high seas freedoms. . . ."[243] Taken together, this means any cyber activities from the sea must be "peaceful," which under international law means avoiding the "use of force" and other cyber activities that "breach the peace" by threatening sovereignty or political independence.

1. Use of Force in the Cyber Realm

"The legal definition of what exactly is a use of force in the cyber realm is far less settled than in the kinetic realm."[244] Few states have articulated positions on what constitutes use of force and when they do, their opinions lack definitive bright line parameters; instead, they offer only extreme examples.[245] Still these enunciations are analytically helpful to frame the issues. For instance, Harold Koh, a former U.S. State Department legal advisor, provides a generalized test for whether a cyber action constitutes a use of force by assessing "the context of the event, the actor perpetrating the action (recognizing challenging issues of attribution in cyberspace), the target and location, effects and intent, among other possible issues."[246] To him, "[c]yber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force."[247] The United Kingdom expresses similar views and offers extreme examples,

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[242] UNCLOS, *supra* note 24, at art. 301.

[243] TALLINN MANUAL 2.0, *supra* note 25, r. 45, at 234 (reflecting UNCLOS art. 87(1)).

[244] Ryan Goodman, *Cyber Operation and the U.S. Definition of "Armed Attack,"* JUST SEC. (Mar. 8, 2018), https://www.justsecurity.org/53495/cyber-operations-u-s-definition-armed-attack/.

[245] *See, e.g.*, Harold Hongju Koh, Legal Advisor, U.S. State Dep't, International Law in Cyberspace, Address Before the U.S. Cybercom Inter-Agency Legal Conference (Sept 18, 2012), *in* Chris Borgan, *Harold Koh on International Law in Cyberspace* (Sep. 19, 2012), opiniojuris.org/2012/09/19/harold-koh-on-international-law-in-cyberspace/; Brian J. Egan, Legal Advisor, U.S. State Dep't, International Law and Stability in Cyberspace, Address Before UC Berkeley Law (Nov. 10, 2016), https://www.justsecurity.org/wp-content/uploads/2016/11/Brian-J.-Egan-International-Law-and-Stability-in-Cyberspace-Berkeley-Nov-2016.pdf; Jeremy Wright, Att'y Gen., Cyber and International Law in the 21st Century, Address Before Chatham House (May 23, 2018), https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century.

[246] Koh, *supra* note 245.

[247] *Id.*

including triggering a nuclear meltdown, opening a dam to destroy a city, or crashing a jetliner.[248]

International jurists have created three main analytic models for dealing with unconventional cyber attacks, but these scholarly opinions are far from constituting international law.[249] These approaches are the *instrument-based* approach, *effects-based* approach, and the *strict liability* approach.[250] The instrument-based approach considers whether the damage of a cyber attack could previously have been caused by a kinetic attack. The effects-based approach looks to the consequences of the attack. The strict liability approach would consider any intrusion into a system to automatically constitute an armed attack. In the academic sphere, most follow the "effects-based" approach, which is best articulated in Professor Schmitt's normative framework which lays out six criteria for evaluating cyber activities as armed attacks."[251] He advocates considering the severity, immediacy/length of attack, directness of the cyber activity to the harm caused, invasiveness based on location of attack, measurability/quantifiable harm, and presumptive legitimacy (or lack thereof), such as a justification under international law.[252] Also helpfully, but detail-sparse, the Tallinn experts opine "some cyber actions are undeniably not uses of force."[253] These experts are similarly conflicted regarding where precisely to draw the line between permissible and impermissible cyber activities. Although these jurist's views are informative, given the complete lack of international jurisprudence and scant recitations of state views, it is nearly impossible to conclusively to determine what constitutes a use of force under present international law regarding cyber activities. This is a "limbo period in which legal uncertainty and factual uncertainty remain at such high levels."[254] Consequently, maritime cyber operations must be individually considered as constituting self-defense, espionage, cyber activities above and below the threshold of armed attack, plus those targeting third states.

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[248] Wright, *supra* note 248 ("[T]he UK considers it clear that cyber operations that result in, or present an imminent threat of, death and destruction on an equivalent scale to an armed attack will give rise to [a right to self defense].").

[249] Matthew Sklerov, *Chapter 4. Responding to International Cyber Attacks as Acts of War*, *in* INSIDE CYBER WARFARE (Jeffery Carr ed., 2d ed. 2011).

[250] Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 913–15 (1999).

[251] *Id.*

[252] *Id.* at 914–15.

[253] TALLINN MANUAL 2.0, *supra* note 25, at 333.

[254] Goodman, *supra* note 244.

B. Maritime Cyber Self Defense, Espionage, Attack, & Acts Below Threshold of Armed Attack

1. Right of Self Defense in Maritime Cyber, even Within Foreign Territorial Seas

The international law of armed conflict has long recognized the "inherent right" of self-defense, which is available "if an armed attack occurs" or is imminent.[255] Vessels on the high seas may respond to armed attack or imminent attack.[256] The Tallinn experts extend the right to defend one's self, even while engaged in innocent passage, by undertaking cyber activities necessary for "safety and security."[257] However, such defensive acts must be necessary and proportionate. *Necessary* is easily defined as that which is necessary to counter the threat. However, the meaning of *proportionality* is the subject of some disagreement. The U.S Department of Defense advises "weighing of the contemplated actions with the justification for taking action . . . only to the extent that it is required to repel the armed attack and restore the security of the party attacked."[258] However, commentators debate whether this should be considered as *tit for tat* or *mean-ends*.[259] The tit for tat analysis would look at whether responsive actions are roughly commensurate in measure of force, while the means end test assesses whether the means employed are the least harmful while still accomplishing the legitimate objective of adequately defending against attack.[260] The latter is more commonly accepted, especially in academic circles; but neither, test is particularly helpful when considering the sometimes highly attenuated harm of cyber activities. Per the Tallinn experts, self-defense includes very benign actions such as monitoring cyber infrastructure in order to ensure that it is not being subjected to hostile cyber operations and receiving patches to fix vulnerabilities in software,[261] but does not contemplate the range of potentially significant cyber

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[255] U.N. Charter art. 51.

[256] *See* Anna van Zwanenberg, *Interference with Ships on the High Seas*, 10 INT'L & COMPAR. L.Q. 785, 786–792 (1961).

[257] TALLINN MANUAL 2.0, *supra* note 25, r. 48, at 243.

[258] DEP'T OF DEF. 2019 LAW OF WAR MANUAL, at 41, ¶ 1.11.1.2. (citing Oil Platforms (Iran v. U.S.), Counter-memorial and Counter-claim, 1997 I.C.J. 141, ¶ 4.31 (June 23) ("Actions in self-defense must be proportionate. Force can be used in self-defense, but only to the extent that it is required to repel the armed attack and to restore the security of the party attacked.").

[259] *See* David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 25 EUR. J. INT'L L. 235, 237 (2013).

[260] *Id.*

[261] TALLINN MANUAL 2.0, *supra* note 25, r. 48, at 243.

responses that could be employed defensively. Theoretically, a robust range of cyber activities could be employed in the face of an imminent attack, such as hacking into weapons system, diverting missiles using GPS systems, or shutting down the mobile phone of an official authorized to launch the attack. Yet, as of this writing, there has been no scholarly discussion or jurisprudence focused on cyber defense to support this position. In any event, a self-defense response must be bounded by the case specific limitations of necessity and proportionality.

2. Cyber Espionage at Sea

Considered "unregulated by international law," espionage does not fit well into international legal frameworks, especially during peacetime.[262] Although it is almost always prohibited by domestic law, it is widely practiced. On land, espionage during peacetime is viewed as an illegal violation of territorial sovereignty.[263] At sea, "the lack of clarity or agreement concerning operational norms and law for [maritime] espionage add an additional element of volatility . . . that could turn deadly."[264] Considering the robust state practice of espionage within the territorial sea of coastal states, especially by UN Security Council permanent members, it is not surprising there is a lack of consensus regarding the practice. Some jurists argue intelligence collection even within foreign countries has not historically been considered contrary to international law.[265] Others counter "[t]he traditional doctrine of state sovereignty views intelligence gathering within the territorial sea or internal waters of a coastal state as an unlawful intrusion into sovereign territory, and a violation of international law."[266]

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[262] *See also* JOHN KISH, INTERNATIONAL LAW AND ESPIONAGE XV (David Turns ed., 1995) (noting "the permissibility of espionage in customary international law"); Richard A. Falk, Foreword to ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW, at v (Roland J. Stanger ed., 1962) ("[I]nternational law is remarkably oblivious to the peacetime practice of espionage. Leading treatises overlook [it] altogether."); A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595, 596 (2007) (peacetime espionage is "a lacuna that is a blank space or gap in the law").

[263] Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, *in* ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 3 (Roland J. Stranger ed., 1962); Kish, *supra* note 262 at 88.

[264] Kraska *supra* note 26, at 212.

[265] Myres S. McDougal et al., *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365, 395 (1973) ("The gathering of intelligence within the territorial confines of another state is *not*, in and of itself, *contrary to international law* unless it contravenes policies of the world constitutive process affording support to protected features of internal public order.") (emphasis added).

[266] Kraska, *supra* note 26, at 213 ("Conventional wisdom leaves no doubt that . . . intelligence collection inside another country's territorial sea is patently illegal as a

Looking to other international domains, customary practice has permitted satellite espionage from outer space, airborne intelligence gathering from international airspace, and from the high seas.[267] By contrast, scholars recognize sovereignty over the territorial sea noting "there is no international acceptance of spying inside either the land territory or the territorial sea of a state."[268] Indeed, UNCLOS specifically prohibits "any act aimed at *collecting information* to the prejudice of the defence or security of the coastal State" as part of innocent passage through the territorial sea.[269] Thus under UNCLOS, any form of cyber espionage prejudicing the defense or security of a coastal state would be forbidden in innocent passage through the territorial sea.

Concerning this point, it is important to note the United States is not a signatory to UNCLOS. Despite then-U.S. President Ronald Reagan declaring the United States would conform to UNCLOS's navigational provisions under the belief that they represent customary international law,[270] American leaders have suggested it does not limit espionage activities within foreign territorial seas. In 2004, Director of National Intelligence, J.M. McConnell, suggested "the overwhelming opinion of Law of the Sea experts and legal advisors is that the Law of the Sea Convention simply does not regulate intelligence activities, nor was it intended to."[271] Former State Department Legal Advisor William H. Taft IV likewise opined "with respect to whether [UNCLOS's articles related to innocent passage] would have any impact on U.S. intelligence collection, the answer is *no* . . . collecting information to the prejudice of the defense or security of the coastal State . . . activities are not prohibited or otherwise affected by [UNCLOS]."[272] Similarly, a report to the Senate Foreign

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matter of international law . . . akin to intelligence activities conducted on the land territory . . . .").

[267] *Id.* at 213–14.

[268] *Id.* at 214.

[269] UNCLOS, *supra* note 24, at art. 19(2)(c).

[270] Statement on United States Ocean Policy, PUB. PAPERS 378 (Mar. 10, 1983); Proclamation No. 5030, 48 Fed. Reg. 10,601 (1983), *reprinted in* 16 U.S.C. § 1453 (1972).

[271] Letter from J.M. McConnell, Dir. of Nat'l Intelligence, to Hon. John D. Rockefeller IV & Hon. Christopher S. Bond, United States Senate (Aug. 8, 2007), S. EXEC. REP. NO. 110-9, at 32–33 (2007) (recalling testimony of Central Intelligence Agency Assistant Director for Collection).

[272] Written Statement of William H. Taft IV, Legal Adviser, U.S. Dep't of State, Before the S. Select Comm. on Intelligence on June 8, 2004 Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part IX of the Law of the Sea Convention, S. EXEC. REP. NO. 110-9, at 34, 36–37 (2007) (claiming the U.S. was "not aware of any States taking the position [that UNCLOS or 1958 Convention] set[] forth the conditions for the right of innocent passage prohibit[ing] or otherwise regulat[ing] intelligence collection or submerged transit of submarines").

Relations Committee regarding potential UNCLOS treaty ratification in 2007 declared "[UNCLOS] set forth conditions for the enjoyment of the right of innocent passage in the territorial sea, but *do not prohibit or otherwise affect activities or conduct that is inconsistent with that right* and therefore not entitled to the right."[273] These statements by senior U.S. leaders indicate an openness to espionage activities are outside of the regimes laid out by the LOSC.

A few occasions are documented, such as Operation Ivy Bells or intelligence gathering by the USS YORKTOWN and USS CARON in Soviet territorial waters off Crimea in 1988.[274] The USSR objected and commentators observed the U.S. passage could not be considered innocent.[275] However, months later, the United States and the Soviet Union agreed to a "uniform interpretation" of innocent passage at Jackson Hole, Wyoming, which did not comment on "surveillance," but noted "warships, regardless of cargo, armament or means of propulsion" are entitled to the right of innocent passage without prior notification.[276] Moreover, American practice with respect to other states would undermine its own arguments that espionage should not be prohibited in territorial seas as a matter of international law. The U.S. shows no tolerance for other nations practicing non-innocent passage or intelligence gathering in its territorial waters. When Soviet Electronic Intelligence (ELINT) spy ships entered the American territorial sea, U.S. officials immediately ordered them to leave.[277] As a matter of policy, this seems hypocritical; however, from a legal standpoint, it completely undermines any American argument for non-innocent passage. Recognizing the power to order the expulsion of nonconforming vessels reflects recognition of an international right to do so. The international right to remove, logically, must be paired with a

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[273] S. EXEC. REP. NO. 110-9, at 12 (2007) (emphasis added).

[274] *See* John W. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MIL. L. REV. 137 (1992); Richard Halloran, *2 U.S. Ships Enter Soviet Waters Off Crimea To Gather Intelligence*, N.Y. TIMES (Mar. 19, 1986), https://www.nytimes.com/1986/03/19/world/2-us-ships-enter-soviet-waters-off-crimea-to-gather-intelligence.html.

[275] Alfred P. Rubin, *Innocent passage in the Black Sea?*, THE CHRISTIAN SCI. MONITOR (Mar. 1, 1988), https://www.csmonitor.com/1988/0301/eship.html (opining that "[i]f the radio shacks of the US warships were listening to anything from the coastal state not directly aimed at them, if the officers on the bridge were scanning the land, or if, in the language of the Geneva Convention, 'any other activity not having a direct bearing on passage' was involved, the passage was not 'innocent'").

[276] Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., Sept. 23, 1989, 28 I.L.M. 1444.

[277] *See* Leonard C. Meeker, *Legal Aspects of Contemporary World Problems*, 58 DEP'T STATE BULL. 465, 468 (1968).

reciprocal absence of legal right to enter the territorial sea outside of the regime of innocent passage. Thus, the position that non-innocent passage can be employed to permit espionage is critically eroded by the American exercise of expulsion. It would be nonsensical to permit a state to enforce a prohibition, while not implicitly recognizing the underlying basis for the prohibition as law. This inconsistency was highlighted by members of Congress opposed to UNCLOS accession, who noted that the treaty "does not carve out an exception for espionage from its sweeping provisions against collecting intelligence.[278] To them, the United States may breach of its treaty obligations, if ratified.[279] This practice outside of UNCLOS's provisions may mean: 1) customary international law has not yet coalesced, but is trending away from UNCLOS; 2) non-innocent passage as a non-illicit practice has become tacitly adopted by at least a handful of powerful states; or 3) key states in the global geopolitical order are routinely violating international law.

3. Nearshore Cyber Espionage Not Prejudicial to Coastal State

However, there remains another option. UNCLOS can be read in a way that suggests not all espionage activities are prohibited, because UNCLOS only prohibits collecting information "prejudicial" to the coastal state.[280] Consequently, it might be permissible to conduct cyber intelligence gathering in the territorial sea, without violating Article 19(c), so long as the coastal State is not prejudiced or harmed.[281] For example, intelligence gathered in coastal state waters might be useful for countering non-state actors, such as terrorists, while having no adverse impact on the state itself. Other intelligence might be used to verify good faith in negotiating or compliance with international agreements further enhancing trust-building in bilateral diplomacy. Additionally, state pronouncements evidence at least some support for the notion that not all espionage is hostile or adverse. Indeed, after the Soviet Union shot down a U.S. U-2 spy plane over its

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[278] S. EXEC. DOC. NO. 110-9, at 26 (noting the minority views of Senators DeMint and Vitter). "The Treaty fails to clearly include intelligence, surveillance, and reconnaissance activities under 'military activities.' While administrations have stated that these terms are covered, [Congress] consider these separate functions and have different committees that oversee the intelligence community and the armed services. When there is a disagreement on terms, this disagreement is settled by the courts." *Id.*

[279] *See id.*

[280] UNCLOS, *supra* note 24, at art. 19(c).

[281] Similar arguments have previously been made in reference to submarine espionage. *See* Kraska *supra* note 26, at 225.

territory France noted that while borders were violated, that it was "normal practice" to spy to keep track of weapons positions.[282]

The Tallinn experts also seem to recognize this nuance "although peacetime cyber espionage by States does not *per se* violate international law, the method by which it is carried out might do so."[283] A majority of Tallinn experts felt espionage was not *per se* illegal.[284] They note however, that espionage conducted in a "manner that violates international law," particularly that violating "the principle of sovereignty" may render and operation unlawful.[285] Taken together with UNCLOS, this means any cyber activities oriented at intelligence collection against the Coastal state would not be permissible in the territorial sea while conducting innocent passage under UNCLOS. However, as a matter of international law, cyber espionage may be technically permissible either: 1) under the controversial doctrine of non-innocent passage; 2) if not adverse to the coastal state; or 3) if there was a general exception for espionage. Regardless, espionage, particularly in cases where there is little harm to the coastal states, as will be discussed further below, represents the most challenging aspect of fitting cyber activities within the existing international law framework.

4. Cyber Attack

Observers have noted a "terminological gap between the legal and non-legal communities" regarding the meaning of the word "attack."[286] Lay persons and computer network administrators often refer to "cyber attack" as "actions taken through the use of computer networks to disrupt, deny, degrade or destroy information."[287] This encompasses a broad range of activities, most of which causes no damage and little disruption. For example, in general parlance, a denial of service (DoS) operation preventing users from accessing a website is considered an 'attack,' as would, hackers entering a network to gather stored financial data. However,

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[282] *See* Cable Dated 18 May 1960 from the Minister of Foreign Affairs of the Union of Soviet Socialist Republics Addressed to the President of the Security Council, Rep. of the S.C. on Its Fifteenth Session, U.N. Doc. A/4494 at 12 (1960).

[283] U.S. DEP'T OF DEF., DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2012), http://www.dtic.mil/doctrine/dod_dictionary/.

[284] TALLIN MANUAL 2.0, *supra* note 26, at 170.

[285] *See id.*; *see* also Ashley Deeks, *An International Legal Framework for Surveillance* 55, VA. J. INT'L L. 291, 302–03 (2015).

[286] Michael N. Schmitt, *'Attack' as a Term of Art in International Law: The Cyber Operations Context*, *in* PROCEEDINGS OF THE 4TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT 283, 284 (Christian Czosseck et al. eds., 2012).

[287] U.S. DEP'T OF DEF., DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2012), http://www.dtic.mil/doctrine/dod_dictionary/.

within the international legal community, *attack* constitutes a term-of-art under the Law of Armed Conflict (LOAC) conveying specific meanings that trigger rights and remedies, including the justification to the use of physical force in response, as discussed below in section six.[288] In this sense, *attack* is an important operative threshold generally referring to "acts of violence" against an adversary.[289] However, figuring out what this means in the cyber realm poses a novel challenge.

Even within the legal community the meaning of 'armed attack' is not commonly understood. Challenges and confusion go all the way to the meaning of the words themselves. Some have argued that the UN Charter meaning of "armed attack" should be understood as "armed aggression" based on the equally authentic French translation "*aggression armee*."[290] Merely violating territory does not seem to be sufficient under international law to constitute an armed attack warranting countermeasures. In *Nicaragua*, the ICJ found that only "the most grave forms of the use of force" constituted an armed attack, whereas "less grave forms" did not.[291] Nicaragua claimed the U.S., such as training and arming, actions were tantamount to "armed attack."[292] The Court found attacking ports, oil installations, and a naval facility constituted "armed attacks." But, the Court found training, arming, equipping, and supplying paramilitary forces conducting armed insurgency against the government, or mere 'frontier incidents', would not necessarily rise to the level of an armed attack.[293] The Court did not elaborate a precise test for when low-level interventions or coercion would constitute an "armed attack," but said that the "scale and effects" and "gravity" of the actions must be carefully considered.[294] In this way, as a legal matter, the meaning of *attack* is directly and proportionally related to whether physical force can be used in response. This sets a very

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[288] U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 47–48 (2016).

[289] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 49, ¶ 1, June 8, 1977, 1125 U.N.T.S. 17512.

[290] Öykü Irmakkesen, *The Notion of Armed Attack under the UN Charter and the Notion of International Armed Conflict – Interrelated or Distinct?* 4 (Aug. 2014) (unpublished L.L.M. Thesis, Geneva Academy).

[291] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 191 (June 27).

[292] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Pleadings, 1985 I.C.J. 3, ¶¶ 11–20 (Apr. 30).

[293] Nicar. v. U.S., 1986 I.C.J. ¶¶ 195, 228 (By "recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua," the U.S. "committed a prima facie violation of [the customary non-use of force] principle."

[294] *Id.* ¶¶ 195, 247, 249.

high bar for *attack*, which can be especially challenging when applied to cyber activities.

States and jurists do not necessarily agree with the ICJ decision in *Nicaragua* finding entry into the territorial sea by warships did not constitute an attack. The United States has historically set a very low bar for the amount of force necessary to constitute an "armed attack," such that it could respond with force in self-defense.[295] Commentators note that the U.S. position of more readily finding an armed attack, "may risk unintended, accidental, and unnecessary militariz[ation of] conflicts" in response to cyber activities, but by lowering the trigger for the right of self-defense" may deter potential aggressors from acting in the first place.[296] The best evidence of the U.S. position comes from February 2019 when, according to the Washington Post, U.S. Cyber Command conducted offensive cyber operations against a Russian-government-linked hacking operation believed to have interfered with American elections.[297] Sources said the mission, approved by the president, "took the Russians offline [possibly using malware or denial of service attack]," thus shutting them down to prevent interference with American midterm elections.[298] Professor Paul Rosenzweig, a former senior U.S. Department of Homeland Security official and cyber law expert, observed "if the U.S. had done so using a missile . . . it would have been an armed attack . . . yet somehow, in doing it via cyber means, the United States has managed to avoid [the implication of armed attack], evaded public scrutiny . . . ; and possibly set a new standard for 'sub-warlike' cyber activity and begins the creation of new international norms of behavior in the domain."[299] This example clearly illustrates a willingness of the United States to respond, but also illustrates the difficulty in ascribing specific legal meaning to state cyber practices. On one hand, the shutdown of Russian hackers could suggest the United States believed the cyber intrusion and political interference threat constituted an imminent attack on American political independence warranting a proportionate defensive response. On the other hand, it could indicate the United States

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[295] Goodman, *supra* note 245. ("[T]he United States has long maintained that a State can use force in self-defense in response to any amount of force by another State.").

[296] *Id.*

[297] Ellen Nakashima, *U.S. Cyber Command Operation Disrupted Internet Access of Russian Troll Factor on Day of 2018 Midterms*, WASH. POST (Feb. 27, 2019), https://www.washingtonpost.com/world/national-security/us-cyber-command-operation-disrupted-internet-access-of-russian-troll-factory-on-day-of-2018-midterms/2019/02/26/1827fc9e-36d6-11e9-af5b-b51b7ff322e9_story.html.

[298] *Id.* (citing U.S. Senator Mike Rounds's comment that "[w]ithout Cybercom's efforts, there 'would have been some very serious cyber-incursions.'").

[299] Paul Rosenzweig, *The New Contours of Cyber Conflict*, LAWFARE (Feb. 27, 2019), https://www.lawfareblog.com/new-contours-cyber-conflict.

did not find Russia's attack significant enough to constitute an armed attack and thus responded in kind with something less than an armed attack as discussed below in section five. Regardless, the incident illustrates the difficulty of defining armed attack in the cyber realm.

In the maritime domain, defining an armed attack is similarly challenging. Israeli LOAC scholar, Yoram Dinstein, argues the intrusion by another State into the territorial sea by a military vessel can be viewed as an "incipient armed attack" triggering the right of self-defense.[300] While his position, seems inconsistent with UNCLOS and the holding of the ICJ in the *Corfu Channel* case, his very low threshold helps to illustrate the broad spectrum of what might constitute an armed attack in the territorial sea.[301] To him, the mere presence of a warship capable of conducting hostile cyber operations would trigger armed attack,[302] while to others, like Harold Koh and the Tallinn majority, cyber activities would have to result in serious damage or physical harm similar to a kinetic attack.[303] Applying Harold Koh's analytic test , a maritime cyber activity would be considered an attack, only if it "result[s] in death, injury, or significant destruction. . . ."[304] This would obviously include cyber actions that open dams, launch weapons, block emergency communications, release criminals from prison, crash vehicles, and turn off medical devices. Since the UN Charter and UNCLOS contain clear prohibitions against prejudicial activities and threatening security, a maritime cyber attack would clearly be illegal in the territorial sea, in transit passage, and the high seas absent some other justification, such as self-defense as discussed in section one above.

5. Maritime Cyber Activities Below the Threshold of Armed Attack

Legal consensus is almost non-existent with regard to what constitutes a wrongful cyber operation below the threshold of armed attack,[305] which is challenging because "all, or almost all of the conflict . . . in cyberspace occurs at the sub-armed attack level."[306] Yet, just because activities do not

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[300] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 215 (6th ed. 2017) (referring to U.N. Charter art. 51).

[301] *Id.*

[302] *Id.*

[303] Koh, *supra* note 245; TALLINN MANUAL 2.0, *supra* note 25, r. 71 ("[experts] unanimously concluded that some cyber operations may be sufficiently grave to warrant classifying them as an 'armed attack'.").

[304] Koh, *supra* note 245.

[305] Peacetime Cyber Espionage, NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, https://cyberlaw.ccdcoe.org/wiki/Peacetime_cyber_espionage (last visited Nov. 6, 2019).

[306] Paul Rosenzweig, *Tallinn 2.0*, LAWFARE (Apr. 27, 2015),

rise to the level of an armed attack does not make them permissible under international law. In *Nicaragua*, the ICJ recognized wrongful activities that "do not constitute an armed attack but may nevertheless involve a use of force [prohibited by the UN Charter]."[307] To the Court "the most grave forms of the use of force" needed to be distinguished from "other less grave forms,"[308] just as the UN Charter dictates that "other breaches of the peace" be avoided.[309] However, there has been little discussion in international law regarding what constitutes "other breaches of the peace."[310] Cyber activities conducted from the sea, such as changing the contents of an email, replacing code, transmitting messages, manipulating social media, and sending false information to sensors interfering with coastal state systems, would fall below the threshold for armed attack or serious use of force. Yet, in these instances a coastal state might still feel threatened by a breach of peace and violation of sovereignty.

Fundamentally, what's at stake in discussions regarding the legality of cyber activities below the threshold of armed attack is national cyber sovereignty. In the maritime context, this relates specifically to the control (or lack thereof) that a coastal state can exercise over nearshore activities. Sovereignty, control, and jurisdiction were key issues in development of Law of the Sea, which are now embodied into very regimented legal framework with almost universal acceptance, whereas notions of sovereignty in the cyber domain are far more fluid with little agreement. Some have argued that cyber activities occurring over the Internet should be considered independent of the geographical, terrestrial jurisdictions.[311] These scholars conceive of "[c]yberspace as a distinct 'place' for purposes of legal analysis by recognizing a legally significant border between

https://www.lawfareblog.com/tallinn-20.

[307] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶¶ 176, 194, 210 (June 27).

[308] *Id.* ¶ 191.

[309] U.N. Charter art. 1, ¶ 1.

[310] Traditionally this has been viewed as a prong allowing the Security Council to take actions to prevent a situation from deteriorating, even if there has not been a use of force. *See* U.N. Charter arts. 39, 42.

[311] *See* John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://www.eff.org/cyberspace-independence ("We must declare our virtual selves immune to your sovereignty, even as we continue to consent to your rule over our bodies."); David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) ("Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility—and legitimacy—of laws based on geographic boundaries."); Duncan B. Hollis, *Re-Thinking the Boundaries of Law in Cyberspace: A Duty to Hack?*, *in* CYBERWAR: LAW & ETHICS FOR VIRTUAL CONFLICTS (J. Ohlin et al. eds.) (2015).

cyberspace and the 'real world.'"[312] However, some governments and academics scoff at such assertions as ludicrously out of touch with the real world. Instead, they assert that cyber activities do take place in a real space—"underneath it all is an ugly physical transport infrastructure: copper wires, fiberoptic cables, and the specialized routers and switches that direct information from place to place."[313] They stress the abiding significance of territorial sovereignty.[314] Some scholars and states believe cyberspace is assimilated to territorial sovereignty by finding control over cyber-domain is coextensive with physical terrain.[315] They hold that states should be able to exercise "absolute and complete" control over cyberspace.[316] Such states assert a right to "seal and defend their cyber borders, stopping cyber intrusions at the border and protecting "cyber territory."[317] To these states, entry or interference with their computer networks without consent "violat[es] territorial sovereignty."[318]

Other states consider the entirety of cyberspace a global commons outside of any sovereign jurisdiction.[319] Under this theory, cyberspace exists as an international commons outside the bounds of national jurisdiction, akin to the high seas or outer space.[320] These states feel

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[312] Johnson & Post *supra* note 311, at 1378.

[313] JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 73 (2006).

[314] Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOB. LEGAL STUD. 475, 476 (1998) ("The Internet is not, as many suggest, a separate place removed from our world. Like the telephone, the telegraph, and the smoke signal, the Internet is a medium through which people in real space in one jurisdiction communicate with people in real space in another jurisdiction.").

[315] Kristen E. Eichensehr, *The Cyber-Law of Nations*, 103 GEO. L.J. 318, 336 (2015).

[316] *Id.* (analogizing the Convention on International Civil Aviation art. 1, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 ("[E]very State has complete and exclusive sovereignty over the airspace above its territory.").

[317] *Id.* (citing Int'l Code of Conduct for Info. Sec., art. II(5)).

[318] Wright, *supra* note 248.

[319] U.S. DEP'T OF DEF., STRATEGY FOR HOMELAND DEFENSE AND CIVIL SUPPORT 12 (2005), https://www.hsdl.org/?view&did=454976 ("The global commons consist of international waters and airspace, space, and cyberspace."); GOV'T OF CAN., CANADA'S CYBER SECURITY STRATEGY 2 (2010), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/archive-cbr-scrt-strtgy/archive-cbr-scrt-strtgy-eng.pdf ("[Cyberspace] is a global commons. . . .").

[320] A 1961 United Nations General Assembly Resolution declares "[o]uter space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation." G.A. Res. 1721 (XVI) A, ¶ 1(b) (Dec. 20, 1961); *see also* G.A. Res. 1962 (XVIII), ¶ 2 (Dec. 13, 1963); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art. 2, Oct. 10, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (proclaiming "[o]uter space, including the moon and other celestial bodies, is not subject to national

information should flow freely on the Internet and all should be free to use it. They also suggest they should be able to conduct activities on another states network, so long as it does not constitute a "prohibited intervention" as described in the UN Charter.[321] Likewise, a number of prominent academics suggest cyberspace is separate and distinct from the appropriating domains of the territorial world.[322] Professor Lawrence Lessig notes the "internet is a commons: the space that anyone can enter, and take what she finds without the permission . . . [it] lays itself open for anyone to see—to see, and to steal, and to use as one wants."[323] This debate has focused mainly on censorship through content controls and firewalls, considering the meaning of sovereignty with regards to cyberspace and the extent to which a nation-state can assert rights to preclude cyber activities. It raises the important question of whether data that nation states and their citizens place into cyberspace remain under the absolute control and sovereignty of that state or whether that data is more akin to a ship traveling on the high sea beyond the domain of any nation, where the state has an interest in protecting, but which the state cannot control because it is a commons outside of national jurisdiction. International jurisprudential authorities have not yet taken up this divisive issue. This article does not seek to reconcile this important question regarding sovereign rights over data in cyberspace or internet governance, which has been extensively debated among states and scholars.[324] Instead, it accepts the pragmatic reality that nation states will exercise their territorial powers to the maximum extent possible to exert control over the cyber domain as it relates to their interest. Inevitably, "good fences are erected to make good neighbors, and so it must be with cyberspace."[325] For the most part, states have pursued their own policies with respect to the openness of the Internet, tacitly acknowledging that they cannot change the practices of other states.

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appropriation by claim of sovereignty.").

[321] Wright, *supra* note 248 ("[w]e can[not] currently extrapolate . . . a specific rule or additional prohibition for cyber activity beyond that of a prohibited intervention.").

[322] *See* Justyna Hofmokl, *The Internet Commons: Towards an Eclectic Theoretical Framework*, 4 INT'L J. COMMONS 226 (2010).

[323] Lawrence Lessig, *Code and the Commons*, Keynote Address at the Fordham Law School Conference on Media Convergence, 3 (Feb. 9, 1999).

[324] *See* Eichensehr *supra* note 289; Paul Rosenzweig, *WCIT Treaty Breakdown: A Summary and Some Analysis*, LAWFARE (Dec. 14, 2012, 10:36 AM), http://www.lawfareblog.com/2012/12/wcit-treaty-breakdown-a-summaryand-some-analysis/ (identifying conflict among major states "between competing visions of internet governance").

[325] Chris C. Demchak & Peter Dombrowski, *Rise of a Cybered Westphalian Age*, STRATEGIC STUD. Q., Spring 2011, at 32.

Therefore, there has not been an urgency to align norms at the international level.

However, nearshore cyber activities occupy a legal space at the intersection of cyber law and the rigid maritime zones of ocean law, where the philosophical argument of control of data and the ability to close off national cyberspace comes into clear focus. Does cyber network penetration, however slight, constitute a use of force that is prohibited by international law? Coastal states might assert they have a right to maintain domestic sovereignty by controlling transborder transmissions into their territory, while seagoing cyber operators hold that sovereignty is not actually being interfered with by activities that have *de minimus* effects.[326] Here, coastal states try to erect cyber borders, while seagoing states try to conduct operations on a free Internet. Consequently, in assessing the legality of cyber operations below the threshold of armed attack, the extent to which coastal state sovereignty is violated will be determinative. Unfortunately, the global opinion has not crystalized regarding whether states have a right to digital sovereignty, and if so, to what extent.

6. *Tapping, Jamming, Cutting, and Destroying Submarine Cables*

The legal regime for submarine cables is outdated and does not provide adequate protection given the vital importance of the communications to the global system. While international rights to lay and maintain submarine cables, even though the territorial seas of other nations, are well-established, undersea cables have little legal protection under international law.[327] The 1884 Convention for the Protection of Submarine Telegraph Cables makes it illegal to "break or injure a submarine cable, willfully or by culpable negligence, in such manner as might interrupt or obstruct telegraphic communications" during peacetime.[328] However, this 136 year-old treaty is highly limited. Its primary purpose was to require states parties to adopt domestic legislation protecting cables and imposing financial responsibility for damages at the state-to-state level.[329]

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[326] Stephen D. Krasner, *Sovereignty: An Institutional Perspective*, 21 COMP. POL. STUD. 66, 86 (1988).

[327] UNCLOS, *supra* note 24, at art. 51(2) (All nations may lay and maintain undersea cables, but must show "due regard" for the coastal state, who "may not regulate or impede" the laying of cables, but can request prior notice to repairing or replacing."); Garrett Hicks, *Cutting the Cord: The Legal Regime Protecting Undersea Cables*, LAWFARE (Nov. 21, 2017), www.lawfareblog.com/cutting-cord-legal-regime-protecting -undersea-cables.

[328] Convention for the Protection of Submarine Telegraph Cables art. II, Mar. 14, 1884, 24 Stat. 989, T.S. No 380.

[329] Tara Davenport, *Submarine Cables, Cybersecurity and International Law: An Intersectional Analysis*, 24 CATH. U. J. L. & TECH. 57, 67 (2015).

The Convention does not contemplate the range of modern state cyber and information activities involving cables. For example, the current international law regime related to cables does not regulate the tapping for espionage that does not interrupt or obstruct.[330] This is especially important as recent news reports suggest a state spy agency "secretly gained access to the network of cables [by tapping, which] carry the world's phone calls and internet traffic."[331] Privacy activists suggest this is worrisome because governments can "make copies of everything that traverses these cables, if they wanted to."[332] Likewise, the Convention does not contemplate how submarine cables should be treated during armed conflict. Nor does it contemplate cyber warfare or other nefarious actions that could be conducted through the cables. This is important because the practice of physical interference with undersea cables dates back to World War I when the British cut an undersea cable connecting Germany to the global telegraph system, while simultaneously intercepting and reviewing over 80 million messages related to the German war effort sent through its telegram link stations in Cairo, Cape Town, Gibraltar and Zanzibar.[333] This tapping into the German communication network provided an "intelligence windfall," including the now-infamous telegram, in which German foreign secretary, Arthur Zimmermann, offered Mexico the American states of Texas, Arizona, and New Mexico in exchange for an alliance against the United States. Its disclosure caused the United States to enter the war on the side of the British.[334] More recently during the Cold War, the OPERATION IVY BELLS cable tapping was said to be similarly strategically decisive.[335]

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[330] The 1884 Convention for the Protection of Submarine Telegraph Cables and UNCLOS do not prohibit activities aside from *interrupting* and *obstructing*.

[331] Ewen MacAskill et al., *GCHQ Taps Fibre-Optic Cables for Secret Access to World's Communications*, THE GUARDIAN (June 21, 2013), https://www.theguardian.com/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa.

[332] Olga Khazan, *The Creepy, Long-Standing Practice of Undersea Cable Tapping*, THE ATLANTIC (July 16, 2013), https://www.theatlantic.com/international/archive/2013/07/the-creepy-long-standing-practice-of-undersea-cable-tapping/277855/.

[333] Gordon Corera, *How Britain Pioneered Cable-Cutting in World War One*, BBC NEWS (Dec. 15, 2017), https://www.bbc.com/news/world-europe-42367551; *see also* David Kenyon, *The Zimmermann Telegram: The Telegram That Brought America Into the First World War*, BBC HISTORY EXTRA (Feb. 28, 2019), https://www.historyextra.com/period/first-world-war/zimmermann-telegram-brought-america-us-into-ww1-code-breaking-sigint-germany-mexico/.

[334] Corera, *supra* note 333; *see* also JONATHAN REED WINKLER, NEXUS: STRATEGIC COMMUNICATIONS AND AMERICAN SECURITY IN WORLD WAR I 949 (2008).

[335] Steve Weintz, *The Stupidly Easy Way to Win WWIII: Cut the Cables*, THE NAT'L INTEREST: THE BUZZ (July 29, 2018), https://nationalinterest.org/blog/buzz/stupidly-easy-way-win-world-war-iii-cut-cables-27162.

Today, the impact of an attack involving submarine cables could be even more devastating. Mark Sedwill, the United Kingdom national security advisor observed "you can achieve the same effect as used to be achieved in, say, World War Two by bombing the London docks or taking out a power station by going after the physical infrastructure of cyberspace in the form of internet undersea cables."[336] Others note cutting undersea cables would be "the ultimate denial-of-service cyber weapon."[337] Yet, there has been no scholarship or international movement to specifically protect submarine cables as civilian objects during time of war.

Prominent scholars note "the present legal regime is deficient in ensuring the security of cables."[338] Professor Heintschel von Heinegg of the NATO Cooperative Cyber Defence Center of Excellence opines "the current legal regime has gaps and loopholes and that it no longer adequately protects submarine cables."[339] Both, UNCLOS and the 1884 Convention, only address the protection of cables outside of territorial seas with "no obligations on coastal States to adopt laws or regulations to protect submarine cables within territorial waters."[340] Tallinn experts suggest submarine communication cables of a *coastal* state cannot be lawfully tapped as it would constitute a violation of sovereignty and innocent passage.[341] This finding is logical considering any underwater craft used to cut the cables would be a submersible, which are required to be surfaced during innocent passage. However, the Tallinn experts opined that the cutting of a third country's international submarine cable transiting through the territorial sea or international strait technically within the waters of a coastal state would not violate the sovereignty of the country owning the cable or the coastal state and would thus be permissible.[342] Such a position

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[336] Pete Barker, *Undersea Cables and the Challenges of Protecting Seabed Lines of Communication*, CTR. FOR INT'L MAR. SEC. (CIMSEC) (Mar. 15, 2018), http://cimsec.org/undersea-cables-challenges-protecting-seabed-lines-communication/35889.

[337] Weintz, *supra* note 335.

[338] Davenport, *supra* note 329, at 108; *see also* Robert Beckman, *Submarine Cables – A Critically Important but Neglected Area of the Law of the Sea*, Presented at Indian Soc'y of Int'l Law Conference on Legal Regime of Sea, Air, Space, and Antarctica (Jan. 2010), https://cil.nus.edu.sg/wp-content/uploads/2010/01/Beckman-PDF-ISIL-Submarine-Cables-rev-8-Jan-10.pdf.

[339] Wolff Heintschel von Heinegg, *Protecting Critical Submarine Cyber Infrastructure: Legal Status and Protection of Submarine Communications Cables Under International Law* 291, 309–10, *in* PEACETIME REGIME FOR STATE ACTIVITIES IN CYBERSPACE (Katharina Ziolkowsi ed., 2013), https://cryptome.org/2014/01/nato-peacetime-cyberspace.pdf.

[340] Davenport, *supra* note 329, at 76.

[341] TALLINN MANUAL 2.0, *supra* note 25, r. 54, at 253–56.

[342] *Id.* r. 54, at 257 ("[A] tapping operation in the territorial sea or archipelagic waters does not violate the sovereignty of other States, such as those that laid and operate the cable.").

would ignore the country owning the cable's rights under international law. Also, interestingly the Tallinn experts did not consider the legality of a coastal state hacking into, but not otherwise damaging or interfering with, another state's cable laid through its territorial sea. These shortcomings with the submarine cable protection regime show that this area is woefully in need of international attention and protection.

C. Cyber Operations Against Third States via Coastal State Networks

Under UNCLOS, the duties owed by a vessel when exercising innocent passage and transit passage are due to the coastal state, whose waters are being transited, not to other states, whether they be neighboring states or states linked to via the global Internet infrastructure. Specifically, Article 19(2) only textually limits activities "prejudicial to the peace, good order or security of the coastal State."[343] There is no mention of third states. This leaves open the possibility of an oceangoing state conducting cyber operations against a third country while in innocent passage or transit passage through the territorial seas of a coastal state. Such an operation might be useful to mask the offshore state's involvement to avoid attribution. For instance, a cell-site simulator could be used to engage and exploit a coastal state network to conduct an operation elsewhere against a third state. When the third state conducted cyber forensics after the operation to determine the source, a process called attribution, the use of the coastal state would confuse the process by masking the origin of the attack. Since cyber forensics is often limited to checking header information and sometimes rerouting data, an attack launched from sea via a connection to the coastal state's network would make the operation appear to have originated from computers within the coastal state's network, rather than the transiting vessel's flag or sponsor state.[344] There has been little scholarly discussion of this point. While the majority of Tallinn experts opined this would not be compatible with innocent passage, presumably because it constitutes an activity not directly bearing on the passage, which could "compromise good order of the coastal State by affecting its relations

[343] UNCLOS, *supra* note 24, at art. 19(2).

[344] Digital forensics is often limited to subtle clues, such as information provided by the sender, which can be spoofed but will appear anonymous when investigated, this will cause investigators to next retrace the routing, which may be cumbersome reviewing logs and information from remailer servers involved in the transfer. By launching from a third country, it will direct investigators there instead of the seagoing state. M. Tariq Banday, *Analysing E-Mail Headers for Forensic Investigations*, 6 J. DIGIT. FORENSICS, SEC., & L. 49, 61–62 (2011).

with other States.[345] They also noted that Article 8 of the Hague Convention V does not require a "neutral Power . . . to forbid or restrict the use of . . . telephone cables or wireless telegraphy apparatus."[346] Experts extend these rights to cyber capabilities. Thus, a state could operate against a third state via a coastal state in general without violating the coastal state's neutrality. The strongest case for these permissible operations in the territorial sea would be digital espionage against a third state, particularly when there is no perceived knowledge of the activity or harm to the coastal state.

There has been no scholarly discussion to date of cyber activities aimed against third countries launched from ships in straits transit or on the high seas. The transit passage regime is much more permissible than innocent passage and only speaks to the rights of bordering states. This provides a loophole in the language of UNCLOS, which seagoing states could exploit to conduct cyber activities while in straits passage against third countries. Such activities would only be bounded by the UN Charter and the Law of Armed Conflict.

Interestingly since straits transit rights were created by UNCLOS without prior customary practice unlike innocent passage, a clear understanding of the regime cannot be gleaned from historical precedent or a progressive evolution of the law. While those seeking to limit activities in transit passage will point to innocent passage for historical meaning; others can point to high seas freedoms. Consequently, UNCLOS's text is the sole source scholars and practitioners can rely on to inform the meaning of straits transit rights for the purpose of assessing the legality of cyber-related operations in international straits. However, coastal states may also be able to legitimately object to third country operation noting that the victim states will likely misattribute adverse cyber activities to them rather than the state perpetrating the action, thereby frustrating coastal states' diplomatic relations and adversely impacting their security interests.

D. Naval Cyber Weapons

UNCLOS Art 19(2) broadly prohibits exercise or practice with "weapons of any kind" during innocent passage in coastal states' territorial seas.[347] Logically, this includes cyberweapons.[348] However, this raises questions

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[345] TALLINN MANUAL 2.0, *supra* note 25, r. 48, at 243.

[346] Convention Between the United States and Other Powers Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 8, Oct. 18, 1907, 36 Stat. 2310.

[347] UNCLOS, *supra* note 24, at art. 19(2).

[348] TALLINN MANUAL 2.0, *supra* note 25, r. 48, at 243.

whether techniques and specific lines of malicious code can truly be considered a weapon. The point is undecided. The ICJ, in its advisory opinion regarding the legality of nuclear weapons, opined that the type of weapon is immaterial to the legal analysis under the UN Charter and LOAC.[349] Under this logic, the Tallinn experts opine cyberweapons should be treated the same as any other; however, prominent scholars, Jeff Biller and Michael N. Schmitt, counter by arguing cyber capabilities are not "weapons" or "means of warfare" though they are a "method of warfare."[350] Thus, facially, it is unclear whether the employment of cyber capabilities would automatically constitute a violation of UNCLOS art. 19(2) prohibition. Additionally, UNCLOS art. 19(2)(b) can be read narrowly to refer only to "exercises and practice" with weapons, thus, an actual use of the weapon could potentially also be permitted, so long as, it did not violate the 19(2)(a) provision of "or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations."[351] During straits passage or on the high seas only the UN Charter and the LOAC would dictate the lawfulness of the maritime nation's employment of a cyber weapon.

V. WAY AHEAD

A. Benefits of a Common Understanding and Uniform Global Norms

Given the serious risk of miscalculation and lack of recognized international norms, the maritime cyber domain is ripe for an international agreement. Over the past decade, numerous proposals for establishing global norms, such as the proposed International Code of Conduct for Information Security,[352] the Global Commission on the Stability of

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[349] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 39 (July 8).

[350] Tallinn Manual 2.0, *supra* note 25, r. 103, at 452–53; David Fidler, *Cyber Capabilities Are Not Weapons of War? A Closer Look at the Analogy to Biological Weapons*, COUNCIL ON FOREIGN RELS. (July 23, 2019), https://www.cfr.org/blog/cyber-capabilities-weapons-war-closer-look-biological-weapons.

[351] UNCLOS, *supra* note 24, at art. 19(2)(a).

[352] In September 2011, The Permanent Residents of China, The Russia Federation, Tajikistan, and Uzbekistan proposed "[t]o reaffirm all States' rights and responsibilities to protect, in accordance with relevant laws and regulations, their information space and critical information infrastructure from threats, disturbance, attack and sabotage" to the United Nations. *China, Russia and Other Countries Submit the Document of International Code of Conduct for Information Security to the United Nations*, CHINESE EMBASSY (Sept. 13, 2011), http://nz.chineseembassy.org/eng/zgyw/t858978.htm.

Cyberspace (GCSC) Rules of the Road,[353] and the North Atlantic Treaty Organization (NATO)-backed academic Tallinn Manual on the International Law Applicable to Cyber Warfare,[354] have sought to "advance a "global understanding of what is, and what is not, acceptable in cyberspace."[355] However, these efforts to restate the law have failed or had little practical effect, because there is little consensus regarding international law related to cyber activities below the threshold of armed attack.[356] Perhaps, this effort stretched too far, too quickly. While an all-encompassing global cyber law would beneficially set rules leading to greater predictability and stability, such a far-reaching goal seems implausible due to the infinite technical nuances and myriad of overlapping existing legal regimes.

The complexity of nearshore maritime cyber operations illustrates the challenge of trying to develop a framework that satisfies competing interests in just one discrete area of the law. The advent of cell-site simulators and undersea cable splicing technologies enable a range of previously unheard-of opportunities for cyber operations to link into coastal state networks to spy, steal, alter, or shutdown systems. The existing maritime law of armed conflict flowing mainly from UNCLOS and the Geneva Conventions is ill-suited to deal with cyber operations, particularly those below the threshold of armed attack. Moreover, UNCLOS's territorial sea regime, which was designed in large part to create a security buffer, seems fundamentally threatened by technologies that stretch the meaning of innocent passage. The law is further complicated by notions of non-innocent passage and espionage exceptions. The omnibus prescriptions of the Tallinn Manual fail to account for these nuances, particularly with regard to the state practice of key permanent members of the U.N. Security Council. This may explain why customary law has not coalesced around the Tallinn Manual. Key states, including Russia, China, and the United States,

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[353] An organization sponsored by an influential hodge-podge of the Dutch, French, Singaporean, African Union, Estonian, and Japanese governments, along with Microsoft, Google, DEF CON, and BlackHat USA seeking to establish norms against "tampering," "commandeering the general public's ICT devices for use as botnets." *Full Report*, CYBERSTABILITY.ORG, https://cyberstability.org/report/ (last visited Oct. 3, 2020).

[354] *See* TALLINN MANUAL 2.0, *supra* note 25.

[355] *Global Commission Introduces Six Critical Norms Towards Cyber Stability*, GLOB. COMM'N OF THE STABILITY OF CYBERSPACE (Dec. 16, 2018), https://cyberstability.org/news/global-commission-introduces-six-critical-norms-towards-cyber-stability/ (quoting Izumi Nakamitsu, UN Under-Secretary General for Disarmament Affairs).

[356] Rosenzweig, *supra* note 299 (noting Tallinn "was of modest practical importance" and noted that the process might be the beginning of global consensus that "will go a long way to putting cyber conflict on sound international law footing").

would not be able to agree to the Tallinn Manual's rules for innocent passage without significantly changing operations, particularly with respect to espionage.

These difficulties are not reason to give up. Reaching a common understanding of the legal issues associated with nearshore cyber activities, particularly in the territorial sea and international straits, will enhance predictability, confidence, and stability in foreign relations. Undoubtedly, a framework for nearshore maritime cyber operations is necessary. British Attorney General Wright issued a call to action "the very pervasiveness of cyber makes silence from states on the boundaries of acceptable behavior in cyberspace unsustainable," if the framework is not changed, it will "become a more dangerous place." While cyber operations in the territorial sea currently rest at the nexus of detailed and highly specific legal regimes of governing ocean space and the topsy, turvy, anything goes, as long as, no one gets hurts law of operations in cyberspace, this creates the opportunity for a pragmatic, consensus-based agreement that builds on the historic balance between coastal state security and sovereignty, while respecting the rights of seagoing countries to transit.

B. Innocent Cyber Passage

The dilemma over maritime cyber activities could and should be resolved by looking to the historical underpinnings of ocean law- coastal states' right to security balanced against seagoing states' right to innocently pass through. Based on current customary law as well as UNCLOS and LOAC treaties, States should be allowed to conduct 'innocent cyber passage,' [357] freely passing through the computer networks of a coastal state, as long as, they do no harm or prejudice coastal state security. This would reflect the common nature of the Internet, while also accounting for the coastal state's need for security. Under this framework, seagoing nations could connect with coastal state networks, so long as they do no harm. Harm would be judged by the standards of the Law of Armed Conflict. Such an understanding would prevent coastal states from using force against seagoing vessels, while putting those ships on notice to respect the coastal state. Innocent network probing and nonharmful surveillance would not be considered internationally wrongful. However, stealing data, denying service, setting logic bombs, entering secured databases, and other activities that interrupt service or manipulate information would be considered

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[357] Concepts in this section build off groundbreaking ideas and work of Steven M. Barney, *Innocent Packets? Applying Navigational Regimes from the Law of the Sea Convention to the Realm of Cyberspace,"* 48 NAVAL L. REV. 56, 73–74 (2001).

prejudicial and thus prohibited under cyber innocent passage. These activities would be considered internationally illegal and violators could be asked to leave but would not constitute an armed attack such that the coastal state could respond with force. More significant cyber activities that cause violent destruction or physical injury would reach the threshold of armed attack, such that the coastal state could employ force in self-defense.

Elements of this approach may displease many states. Coastal states and states wanting to erect cyber borders would be unhappy that seagoing states could access their networks. States accustomed to maritime espionage or that had adopted non-innocent passage would feel their operations were constrained. Yet, the root of any meaningful agreement is compromise. Certainly, all states would benefit from peaceful, non-harmful nearshore cyber operations. Moreover, the creation of such an understanding could aid in efforts to establish cyber norms more broadly, data could be thought of as conducting innocent passage or straits transit with the Internet, like a territorial sea or international strait used by the global community. The data could pass through state networks unhampered, but likewise, cannot harm the state. Those seeking to formulate the law of cyberspace can learn from the age-old lessons of the Law of the Sea.

C. Greater Protections for Submarine Cables During War and Peace

Submarine cables are vitally important to the global system but lack adequate protections. Given their sensitivity and the risk of damage, including collateral damage to billions of people that rely on communications for the livelihoods and lives. A framework should be enacted globally to protect undersea cables from more than "interrupting or obstructing" communications. The physical infrastructure of these cables should be considered akin to a vessel on the high seas or in innocent passage, that is considered the sovereign territory and exclusive jurisdiction of the flag/owner state. Any manipulation or physical alteration should be subject to international law as a wrongful act, even if below the threshold of armed attack. These protections should also apply during wartime.

Wartime cutting of cyber connections should be considered an especially egregious act. While these cables certainly carry military communications, they also carry vital information necessary for billions of civilian enterprises from trade to science, medicine, and humanitarian relief. The internet has become a vital part of the human experience linking families, peoples, and information. Under current law, a military commander or national authority could order the cutting of a cable if deemed *necessary*

and proportionate to achieve a military objective.[358] Cutting enemy communications would undoubtedly provide military advantage, but the potential damage to the civilian population of cutting them off from the internet would be especially devastating. The global community could try, as was attempted with nuclear weapons and landmines, to develop a universal treaty prohibiting cutting submarine cables during war time, perhaps as an additional protocol to the Geneva Conventions. However, some states will object reserving the right to cut cables in times of extreme necessity. Nevertheless, the global community would be wise to highlight the issue to show global condemnation of the practice, so no state would take the decision of cutting the cable lightly. Perhaps over time and through conflicts, if states avoided cutting cables, it would be considered *opinio juris* and form into customary international law.

CONCLUSION

Nearshore cyber operations will remain contentious and risk sparking violent international confrontation, until international norms can be agreed upon and followed. Yet out of this friction comes a rare opportunity. Due to the tangible physical considerations and the existing legal framework provided by the law of the sea, nearshore cyber operations represent the ideal starting point for crafting a broader regime to govern transnational cyber operations. Here, the boundlessness of cyberspace intersects with exacting physical realities of national jurisdiction. Shaping a regime that works successfully in this nearshore context, particularly with respect to cell-site simulators or submarine communication cable protections, could serve to frame and recognize instructive principles for broader international cyber governance. A global discussion regarding the legality of nearshore cyber activities would also provide the occasion to frankly discuss the doctrines of non-innocent passage and coastal espionage, which seem to have emerged in state practice contravening UNCLOS's rigid prescripts from innocent passage. As states grapple with issues of sovereignty and control in cyberspace, they have much to learn from the Law of the Sea, which has developed over centuries into a comprehensive (though obviously incomplete) framework for how states will coexist in shared environment. The time-tested principle of 'innocent passage' should be applied in the cyber context to permit the non-harmful transfer of data. Similar to the different levels of control provided to coastal states in

[358] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 51(5)(b), 57, June 8, 1977, 1125 U.N.T.S. 3.

UNCLOS, different zones exist in cyberspace with limited access for networks behind firewalls or sensitive sites, such as defense, government, political parties, security, banks, and utilities. Addressing these points, will enable the global community to engage in a conversation and reach consensus regarding nearshore cyber activities. Indeed, important technical, political and diplomatic considerations at stake. As the world seeks to find a unified approach to govern activities in cyberspace, the Law of the Sea provides an instructive example of balancing international interests in the past, while tackling nearshore cyber activities offers an ideal starting point for today's urgently needed dialogue.

Hoist the Yellow Flag and Spam® Up: The Separation of Powers Limitation on Hawai'i's Emergency Authority

Robert H. Thomas*

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I. INTRODUCTION

In its various iterations—Kingdom, Republic, Territory, and State—Hawai'i's government has a long and storied experience responding to public health emergencies.[1] For example, over the past two centuries, the

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* Robert Thomas is the Joseph T. Waldo Visiting Chair in Property Rights Law at William & Mary Law School, and practices with Damon Key Leong Kupchak Hastert in Honolulu, Hawai'i. LL.M. Columbia Law School; J.D. University of Hawai'i. He writes about takings, land use, property law, and other subjects at *inversecondemnation.com*. This article is based in part on four presentations, "*Government Emergency Powers and the Constitutional Implications Arising from Pandemic Orders*," for the American Bar Association in September 2020, "*Lessons for the COVID-19 Pandemic From Hawaii's History*," at the King Kamehameha V Judiciary History Center in June 2020, "*Safety vs. Freedom: Are There Limits to Lockdowns*," at the Grassroot Institute of Hawai'i in April 2020, and "*Lockdowns, testing and tracking: Are they all really legal?*" at the Grassroot Institute of Hawaii in June 2020. Copyright © 2020 Robert H. Thomas.

[1] *See, e.g.*, Robert C. Schmitt and Eleanor C. Nordyke, *Death in Hawai'i: The Epidemics of 1848-1849*, 35 HAWAIIAN J. HIST. 1 (2001) (estimating that 10,000 residents, more than 10 percent of the population at the time, died during a series of measles, whooping cough, dysentery, and influenza outbreaks); Doug Herman, *Shutting Down Hawai'i: A Historical Perspective on Epidemics in the Islands*, SMITHSONIAN MAG. (Mar. 25, 2020), https://www.smithsonianmag.com/history/shutting-down-hawaii-historical-perspective-epidemics-islands-180974506/ (Detailing successive "epidemics in waves: cholera (1804), influenza (1820s), mumps (1839), measles and whooping cough (1848–49) and smallpox (1853). These led King Kamehameha V, in 1869, to establish a quarantine station on a small island off Honolulu. Leprosy arrived around that time and led the kingdom, under pressure from Western advisors, to quarantine those suspected of being

government has imposed strict quarantine regulations and required sequestration of incoming travelers to guard against smallpox;[2] transported people afflicted with Hansen's disease to isolation in Kalaupapa, Moloka'i;[3] and burned down large portions of downtown Honolulu in response to an outbreak of bubonic plague.[4] Hawai'i's government has also dealt with its share of emergencies unrelated to public health: it imposed years of martial law after the attack on Pearl Harbor,[5] and has responded to tsunamis,[6]

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infected (predominantly Native Hawaiians) on the island of Moloka'i[.]"); Robert C. Schmitt and Eleanor C. Nordyke, *Influenza Deaths in Hawai'i, 1918-1920*, 33 HAWAIIAN J. HIST. 1, 101 (1999) ("Largely forgotten today, the worldwide influenza pandemic of 1918-1920 killed more than 21 million persons, including at least 675,000 Americans and more than 2,300 people just in Hawai'i. . . . The pandemic received surprisingly little attention at the time and has been largely ignored by many historians until quite recently. This relative indifference to the pandemic was especially marked in Hawai'i.") (footnote omitted).

[2] *See* Gibson v. The Steamer Madras (Madras), 5 Haw. 109, 117 (Haw. Kingdom 1884); *In re* Chow Bick Git, 4 Haw. 385, 396 (Haw. Kingdom 1881) (recognizing the authority of "His Majesty in Privy Council" to adopt regulations requiring quarantine to combat the spread of smallpox); Territory v. Araujo, 21 Haw. 56, 58–59 (Haw. Terr. 1912) (recognizing limited authority of an agency to adopt rules for agricultural quarantine as long as that agency stays within delegated authority); Peterson v. Carter, 6 Haw. 283, 286 (Haw. Kingdom 1881) (steamship owner liable for expenses of passengers landed under Kingdom smallpox quarantine regulations).

[3] *In re* Segregation of Lepers, 5 Haw. 162, 164–66 (Haw. Kingdom 1884) (analyzing the requirement in the Hawai'i Civil Code that allowed the Kingdom's Board of Health to "remove" infected persons to either Kalawao on Moloka'i, or Kaka'ako on O'ahu).

[4] *See* Wong Chow v. Transatlantic Fire Ins., 13 Haw. 160, 161–62 (Haw. Terr. 1900) (noting "[t]he bubonic plague broke out in Honolulu on December 12, 1899. A number of cases occurred in Chinatown, which was in an insanitary condition, and several in other parts of the city. Chinatown, consisting of fifteen blocks, bounded by the Nuuanu stream and Kukui, Nuuanu, Marine and Queen streets, was placed in quarantine by the Board of Health, and to maintain the quarantine the local militia was placed on duty. . . . In the early part of January the Board adopted fire as a means of disinfection and thereafter from time to time until the 20th of that month burned a number of buildings. . . . The Fire Commissioner caused the fire to be started by and under the supervision of the Honolulu Fire Department on the morning of the 20th of January. The fire, having been so started, accidentally spread to Kaumakapili Church in the same block and thence through nearly all the blocks in Chinatown to the water front, including the store of the plaintiffs, which was several blocks from where the fire started."); *see also* Leialoha v. Wolter, 21 Haw. 624, 627 (Haw. Terr. 1913) (rejecting claim of adverse possession because the property had been quarantined for bubonic plague, and later fenced off after the "great fire of 1900").

[5] *See* Duncan v. Kahanamoku, 327 U.S. 304, 307 (1946) ("The following events led to the military tribunals' exercise of jurisdiction over the petitioners. On December 7, 1941, immediately following the surprise air attack by the Japanese on Pearl Harbor, the Governor of Hawaii by proclamation undertook to suspend the privilege of the writ of habeas corpus and to place the Territory under 'martial law.'"). *See generally* HARRY N. SCHEIBER, JANE L. SCHEIBER, BAYONETS IN PARADISE: MARTIAL LAW IN HAWAI'I DURING WORLD WAR II (2016).

hurricanes,[7] volcanic eruptions,[8] and even a report of inbound nuclear missiles (fortunately, a false alarm).[9] As a result of these experiences, the Hawai'i Supreme Court has a long history of considering legal questions related to the power of government to plan for and respond to emergencies, which recognized government's substantial power, with a few inherent limitations. But until 2014, when the Hawai'i legislature adopted a comprehensive structural overhaul, Hawai'i's emergency response statutes and organization were a patchwork of scattered provisions that did not conform to modern emergency management and response practices.[10] The statutory update continued the longstanding delegation of an overwhelming amount of authority to the governor (and mayors, in the case of local events) to respond to emergencies.[11]

The law's first major test has been a very dramatic one. The COVID-19 worldwide pandemic erupted in full in March 2020,[12] and Hawai'i

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[6] *See Tsunami*, CITY & CNTY. OF HONOLULU (Jun. 23, 2020), https://www.honolulu.gov/site-dem-sitearticles/35781-tsunami.html ("Hawaii has had a long history of deadly tsunami impacts. Tsunamis are a series of very dangerous, large, long ocean waves. . . . Since 1946, more than 220 people have died in the State of Hawaii, including 6 on Oahu.").

[7] *See* Jason Daley, *Why Hawaiian Hurricanes Are So Rare*, SMITHSONIAN MAG. (Aug. 23, 2018), https://www.smithsonianmag.com/smart-news/why-are-hawaiian-hurricanes-so-rare-180970116/.

[8] *See* Maya Wei-Haas, *Hawaii volcanoes, explained*, NAT. GEOGRAPHIC (Jan. 10, 2019), https://www.nationalgeographic.com/science/earth/reference/hawaii-volcanoes-explained/ (listing notable eruptions).

[9] *See* Celia Kang, *Hawaii Missile Alert Wasn't Accidental, Officials Say, Blaming Worker*, N.Y. TIMES (Jan. 30, 2018), https://www.nytimes.com/2018/01/30/technology/fcc-hawaii-missile-alert.html.

[10] HAW. REV. STAT. § 127A-1 (2019). The purpose of the law "is to update and recodify Hawaii's emergency management laws to conform with nationwide emergency management practices." Conf. Comm. Rep. No. 129-14 (Haw. 2014) (H.B. No. 849, H.D. 2, S.D. 2, C.D. 1, at 1 27th Leg., Reg. Sess.). The statute repealed the statutes on Disaster Relief, and the Civil Defense Emergency Act. *Id.*

[11] *See* HAW. REV. STAT. § 127A-13 (2019) (describing governor or mayors' delegated powers in declared emergencies).

[12] COVID-19 is "the respiratory disease caused by the novel coronavirus SARS-CoV-2. As of April 6, 2020, over 330,000 cases have been confirmed across the United states, with over 8,900 dead. The virus is 'spreading very easily and sustainably' throughout the country, with cases confirmed in all fifty states, the District of Columbia, and several territories." *In re* Abbott, 954 F.3d 772, 779 (5th Cir. 2020) (footnotes and citations omitted); *see also* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) ("COVID–19 [is] a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others."); *see also* Elkhorn Baptist Church v. Brown, 466 P.3d 30, 34 (Or. 2020) ("As we all

Governor David Ige exercised his statutory authority to issue a declaration of emergency by proclamation on March 4, 2020.[13] The emergency proclamation and, thus far, twelve supplemental proclamations,[14] collectively suspended a wide range of statutes, ordered activities deemed "nonessential" to stop or be limited, imposed a two-week self-quarantine on interisland, mainland, and international travelers, effectively shut down one of the main engines of the Hawai'i economy—tourism—and compelled most residents to remain at home as much as possible.[15] The March 4, 2020 proclamation declared that the emergency would terminate on April 29, 2020, but as the public health crisis appeared to grow and continue, subsequent supplemental proclamations purported to extend the termination date, at latest count to October 31, 2020.[16]

Even though legal challenges to similar emergency restrictions have developed in other jurisdictions,[17] Hawai'i's courts have not dealt with many objections to the governor's exercise of these emergency powers.[18] Perhaps because it is mostly predictable how a court would analyze a challenge to emergency powers under the U.S. Constitution. The leading

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know, a novel coronavirus was first detected in late 2019, and it has spread rapidly across the globe, killing hundreds of thousands of people.").

[13] *See* OFF. OF THE GOVERNOR, STATE OF HAW., EMERGENCY PROCLAMATION FOR COVID-19 (2020).

[14] *See* OFF. OF THE GOVERNOR, STATE OF HAW., THIRTEENTH PROCLAMATION RELATED TO THE COVID-19 EMERGENCY (2020). All of the Governor's proclamations are available at https://governor.hawaii.gov/covid-19/.

[15] *See id.* at 5–8.

[16] *See id.* at 32.

[17] *See, e.g.*, *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613; *In re Abbott*, 954 F.3d at 779; *Elkhorn Baptist Church*, 466 P.3d at 34; Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020). For a thorough list of coronavirus-related litigation, see *Lawsuits about state actions and policies in response to the coronavirus (COVID-19) pandemic, 2020*, BALLOTPEDIA, https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020.

[18] As of this writing, there have been two lawsuits filed in the Hawai'i federal court. Several Hawai'i residents, under the name "For Our Rights," sued the Hawai'i Governor and Attorney General in the U.S. District Court for the District of Hawaii, asserting the governor's emergency declaration automatically expired, among other claims. *See* Complaint, For our Rights v. Ige, Civ. No. 1:20-cv-00268 (D. Haw. June 9, 2020) (available at "*New Complaint (Hawaii) Governor's Covid Emergency Orders Are Past Their Pull Date*," https://www.inversecondemnation.com/inversecondemnation/2020/06/new-complaint-hawaii-governors-covid-emergency-orders-are-past-their-pull-date.html). A second lawsuit alleged right-to-travel, equal protection, and due process claims. *See* Complaint for Declaratory and Injunctive Relief, Carmichael v. Ige, Civ. No. 1:20-cv-00273 (D. Haw. June 15, 2020) (available at "*New (Hawaii) Complaint: Coronavirus Orders Violate Right To Travel, Equal Protection, Due Process (And More)*," https://www.inversecondemnation.com/inversecondemnation/2020/06/new-hawaii-complaint-.html).

U.S. Supreme Court case about the power of government to protect the public health, *Jacobson v. Massachusetts*,[19] upheld the state's vaccine requirement, concluding that a person's liberty could be limited by reasonable regulations designed to protect "the safety of the public."[20] The Court based its reasoning on public "self-defense," noting that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[21] Even though the power cannot be exercised in "an arbitrary, unreasonable manner,"[22] *Jacobson* affirmed the very low floor for most constitutional challenges to exercises of police power generally, and exercises of such power in emergencies specifically.

In this article I examine whether Hawai'i law might compel a different analysis. Most state emergency power statutes, like Hawai'i's, contain internal limitations on delegated emergency power. I argue that Hawai'i's statute contains a single major check on the executive's delegated authority: the "automatic termination" provision, under which an emergency proclamation terminates by law the sixtieth day after it was issued, or when the governor or mayor issues a "separate" proclamation, whichever comes first.[23] This provision is an essential limitation on the power of the executive, with the only real question being whether that limitation will be enforced by the courts. Despite the statute's clear limitation on power, I conclude that the circumstances in which a court would sustain a challenge to the governor's or a mayor's power as a matter of Hawai'i law are very limited, and that the primary remedy which a court will likely recognize is a political one. It should not be so, however. Under existing precedents, there are at least two ways in which a court might analyze this limitation. This article examines the prominent narrative threads that have emerged from Hawai'i's judicial history of adjudicating claims arising out of public health crises, quarantines, and emergencies, as a way of comparing the directions a court might take.

This brings me to the title of this article, and its reference to Spam® (the canned luncheon meat, not annoying unsolicited email)[24]. When emergencies loom, Hawai'i residents are known to stock up on essentials

[19] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[20] *Id.* at 28.

[21] *Id.* at 27.

[22] *Id.* at 28.

[23] *See* HAW. REV. STAT. § 127A-14(d) (2019) ("A state of emergency and a local state of emergency shall terminate automatically sixty days after the issuance of a proclamation of a state of emergency or local state of emergency, respectively, or by a separate proclamation of the governor or mayor, whichever occurs first.").

[24] *See Spam*, FED. TRADE COMM'N: CONSUMER INFORMATION (2011), https://www.consumer.ftc.gov/articles/0038-spam (defining spam as "[u]nwanted commercial email").

like toilet paper, rice, and Spam®.[25] If the courts are reluctant to enforce the sole limitation on executive power in the statute, then all that is left is to stock up on Spam®, keep vigilant, and hold political officials accountable. This means identifying the shortcomings in the present law and clarifying the statute at the earliest possible opportunity. This is what the article ultimately proposes. The alternative is rule by indefinite executive decree as the COVID-19 emergency starkly illustrates, a result that Hawai'i's emergency response statute plainly rejects.

Section II provides background about the inherently limited power of the government to undertake extreme measures without triggering judicial intervention. Section III details Hawai'i's statutory delegation of emergency powers to the governor and county mayors, while section IV analyzes the sole major check on that power, the automatic termination of emergency declarations which ends a declaration when the governor or mayor issues a "separate" declaration, or sixty days has passed. Section V examines the two main narrative threads that emerged from the Hawai'i Supreme Court's decisions about public health emergencies and other exercises of the police power. I conclude with a few observations and suggestions. My purpose here is not to assert what the government's response to particular emergencies should be—or whether the response to the ongoing COVID-19 emergency is scientifically correct[26]—but only to highlight and identify areas in which the legislative and judicial analysis could be more meaningful and transparent, as a way of suggesting how Hawai'i's law can be improved for the next emergency.

II. LIMITS ON EMERGENCY POWERS—THREE CONSTITUTIONS

Before analyzing how government authority to prepare and respond to emergencies has been delegated and distributed, I ask a more fundamental

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[25] *See* Tiffany Hill, *Hawaii's Emergency Preparedness Store*, HONOLULU MAG., http://www.honolulumagazine.com/Honolulu-Magazine/October-2013/Honolulu-Are-you-prepared-for-hurricanes-nukes-earthquakes-and-tsunamis/Hawaiis-Emergency-Preparedness-Store/ ("Most people buy cases of Spam and bottles of water at Times and bags of charcoal for their hibachis at Costco, but for those who want to go above and beyond FEMA's recommendations, there's a one-stop shop in Waipio that sells everything one needs to endure a disaster, for months.").

[26] *But see* A. Kam Napier, *Pupu Platter: Hawaii's Covid policies, as science, wouldn't pass an ethics review*, PAC. BUS. NEWS (Oct. 16, 2020), https://www.bizjournals.com/pacific/news/2020/10/16/hawaii-covid-policies-potentially-unethical.html ("Globally, a vast medical experiment is underway, a hodgepodge of public health interventions imposed without consent, improvised during a live pandemic to see what works. And it wouldn't pass ethical muster at a single university where actual science is conducted.").

question: what limits exist on such power? After all, the very nature of an emergency suggests something extraordinary and unusual, and indeed some courts have stated that the constitution and the rights it recognizes are "curtailed" in an emergency.[27] I start with the proposition that this is incorrect. While emergencies may require rapid and unusual responses as governments react to evolving situations, the usual rules constraining the exercise of power does not grow during an emergency, nor are private rights curtailed or limited. As the U.S. Supreme Court recognized in *Home Building and Loan Association v. Blaisdell*,[28] an emergency "does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."[29] The Court noted that "the [U.S.] Constitution was adopted in a period of grave emergency."[30] The Constitution was designed to work equally well in "normal" times as in trying times.[31] As the Court stated:

> Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the states were not determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.[32]

By providing that "this chapter shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States," Hawai'i's emergency preparation and

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[27] *See In re* Abbott, 954 F.3d 772, 784 (5th Cir. 2020) ("The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905))).

[28] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[29] *Id.* at 425; *see also Ex parte* Milligan, 71 U.S. 2 (1866).

[30] *Blaisdell*, 290 U.S. at 425.

[31] See *id.* at 448–50.

[32] *Id.* at 425–426; *see also* Wis. Legislature v. Palm, 942 N.W.2d 900, 917 (Wis. 2020) ("As the United States Department of Justice has recently written in a COVID-19-related case raising constitutional issues, 'There is no pandemic exception . . . to the fundamental liberties the Constitution safeguards. Indeed, 'individual rights secured by the Constitution do not disappear during a public health crisis.' These individual rights, including the protections in the Bill of Rights made applicable to the states through the Fourteenth Amendment, are always in force and restrain government action.'" (citing Temple Baptist Church v. City of Greenville, No. 4:20-cv-64-DMB-JMV, 2020 WL 1932929 (N.D. Miss. April 14, 2020), ECF No. 6)).

response statute expressly recognizes the inherent constitutional limitations on governmental power, even power to respond to an emergency.[33]

But which constitution? I suggest there are three constitutions in play. First, the U.S. Constitution, which, in the absence of invidious discrimination or infringement on a protected right, sets a very low bar for constraining the power of state and local governments, even in non-emergency times.[34] The rational basis test erects a formidable wall for anyone challenging an exertion of government power to respond to circumstances the government decides require a drastic response. *Miller v. Schoene* is the case most responsible for this because the decision is viewed as holding that police power measures that are arguably more compelling (or, more accurately, more immediate) than run-of-the mill regulations do not offend due process.[35] There, the government was seeking to eradicate a fungus that threatened an important part of the state's economy.[36] While that certainly seems more pressing than, say, a zoning ordinance, under the rational basis test the courts are not supposed to qualitatively weigh the asserted government purpose or the means chosen to advance it.[37] In *Miller*, Virginia ordered the destruction of otherwise unthreatened cedar trees without compensation because they could carry a disease harmful to nearby apple trees.[38] The important government interest there was the preservation of the apple trees over the cedar trees—a choice the state was entirely free to make, unrestrained by the due process clause.[39] The Court concluded the destruction order was a valid exercise of the police power, and courts

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[33] *See* HAW. REV. STAT. § 127A-1(c) (2019) ("It is the intent of the legislature to provide for and confer comprehensive powers for the purposes stated herein. This chapter shall be liberally construed to effectuate its purposes; provided that this chapter shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States, but, in so construing this chapter, due consideration shall be given to the circumstances as they exist from time to time. This chapter shall not be deemed to have been amended by any act hereafter enacted at the same or any other session of the legislature, unless this chapter is amended by express reference.").

[34] *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 414 (1915) (holding that prohibition of the operation of existing brickyards in some but not all parts of a city was not a due process violation. In "the absence of a clear showing" of improper purpose, the courts "must accord good faith" to the government's claim it barred brickyards as a police power measure.).

[35] Miller v. Schoene, 276 U.S. 272, 280–81 (1929).

[36] *Id.* at 278.

[37] *Id.* at 280.

[38] *Id.* at 278.

[39] *Id.* at 280 (noting that the power of the government to prefer one interest "over the property interest of [another], to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").

should not question too vigorously the government's assertion that the action was needed.[40] The government's power was not enhanced by virtue of the emergency, and this was—unusual circumstances aside—a rather typical exercise of police power.[41]

The second constitution to limit the government's power is the Hawai'i Constitution. Although due process and equal protection claims under the Hawai'i Constitution are not reviewed under the overwhelmingly low rational basis test as their federal constitutional counterparts,[42] Hawai'i's courts have been nonetheless reluctant to enter the fray too deeply, especially during an ongoing crisis. In addition to its individual rights provisions, the Hawai'i Constitution also contains safeguards in its separation-of-powers structure,[43] under which Hawai'i's courts have avoided resolving a narrow bandwidth of legal claims on the grounds that they involve political questions—that is, the Hawai'i Constitution delegates resolution of these legal questions to a branch other than the judiciary.[44]

The third constitution is what has been labeled the "popular constitution" that exists, unwritten, in the broader culture.[45] I call this the "playground constitution," embodying rules that a broad swath of the populace believes are part of the legal canon, and which often contain a grain of accuracy but do not capture the nuance of the actual legal rules. For example, "finders keepers, losers weepers,"[46] and possession being "nine-tenths of the law."[47]

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[40] *Id.* at 281.

[41] *Id.* ("We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute." (citing *Hadacheck*, 239 U.S. at 411)).

[42] *See infra* notes 155–72 and accompanying text.

[43] HAW. CONST. art. III, § 1 ("The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States."); HAW. CONST. art. V, § 1 ("The executive power of the State shall be vested in a governor."); *see* Alakai Na Keiki, Inc. v. Matayoshi, 127 Hawai'i 263, 275, 277 P.3d 988, 1000 (2012) ("We recognize that '[t]he separation of powers doctrine is not expressly set forth in any single constitutional provision, but like the federal government, Hawaii's government is one in which the sovereign power is divided and allocated among three co-equal branches.'" (citing Haw. Insurers Council v. Lingle, 120 Hawai'i 51, 69, 201 P.3d 564, 582 (2008))).

[44] *See, e.g.*, Tr. of Off. of Hawaiian Affs. v. Yamasaki, 69 Haw. 154, 173, 737 P.2d 446, 457 (1987) (concluding that claim that Office of Hawaiian Affairs was entitled to a certain percentage of ceded lands trust funds was a political question).

[45] *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES–POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[46] *See Finders, keepers*, WIKIPEDIA, https://en.wikipedia.org/wiki/Finders,_keepers ("Finders, keepers is an English adage with the premise that when something is unowned or abandoned, whoever finds it first can claim it. This idiom relates to an ancient Roman law of similar meaning and has been expressed in various ways over the centuries. Of particular

In the emergency context, I have observed that playground constitutional limitations on government's emergency powers are often treated as greater than the actual limitations as adjudicated by the courts for decades.[48] My point here being that whatever limits may exist on the power of government in emergencies—either in positive law or the public perception—the courts are generally deferential to assertions of government power, and have been overwhelmingly deferential to assertions of emergency power.

With these concepts in mind, I next examine the powers the legislature has delegated to the governor under Hawai'i's emergency management statutes.

III. EMERGENCY POWERS IN HAWAI'I

Hawai'i's emergency management statutes, substantially revised in 2014, delegate to the governor extraordinarily muscular powers.[49] Although the statute recognizes that the existence of an emergency does not allow actions "inconsistent with the Constitution and laws of the United States"[50]—the

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difficulty is how best to define when exactly something is unowned or abandoned, which can lead to legal or ethical disputes.") (footnote omitted).

[47] *See* Transcript of Oral Argument at 59, Rodrigues v. F.D.I.C., 2012 WL 1945497 (U.S. Dec. 3, 2019) (No. 18-1269) ("JUSTICE SOTOMAYOR: I'm sorry, counsel. It makes no sense. Possession is nine-tenths of the law. I was taught as a child, even before I was a lawyer. So, possession has some state law consequences.").

[48] *See, e.g.*, Jim Breslo, *Are State Shutdown Orders Constitutional?*, THE AM. SPECTATOR (Mar. 30, 2020), https://spectator.org/are-state-shutdown-orders-constitutional/ ("Neither the governor nor the mayors have the authority to suspend the state constitution, regardless of the emergency. According to Meuser, a sweeping ban prohibiting people from leaving their homes is a clear overreach. 'If you do not have probable cause to determine that a person has the virus, you cannot deprive them of their liberties,' he said. 'You cannot deprive them of their ability to attain and maintain property, which is a job.'"); Bad Legal Takes (@BadLegalTakes), TWITTER (June 16, 5:32 AM), https://twitter.com/BadLegalTakes/status/1272736324206784512 ("I will no longer wear a mask inside any business. It's unconstitutional to enforce. Let's make this bullshit stop now! Who's with me?"); *see also* u/GibsonYeats, REDDIT (May 22, 2020), https://www.reddit.com/r/badlegaltakes/comments/got5x2/the_constitution_doesnt_apply/ (posting a screenshot of a twitter exchange by Cliff Maloney (@LibertyCliff) and Jonathan Rash (@EthanAllenLaw): "I don't know who needs to hear this, but there is no 'pandemic clause' in the Constitution allowing local, state, or federal government to suspend any of your rights.").

[49] *See* HAW. REV. STAT. ch. 127A (2019); *see also* HAW. REV. STAT. §§ 125-1–2 (2019) (delegating to the governor the power to declare an emergency when circumstances "imperils the availability of public commodities . . . or which results in any substantial interruption of commerce to or within the State[.]" and allowing the governor to take over commerce).

[50] HAW. REV. STAT. § 127A-1(c) (2019) ("This chapter shall be liberally construed to

statute contains few other internal limitations, and a review of its provisions reveals the assignment of an overwhelming amount of power and discretion in the state governor both during a declared emergency, and in other times.

The legislature delegated to "the governor or mayor, as applicable" all emergency powers, and allowed the governor (or county mayors) to further delegate powers to "governmental, private-sector, and nonprofit agencies and organizations, officials, officers, employees, and other individuals[.]"[51] The statute deems these powers delegated to state (or county, as applicable) emergency management agency directors "[u]nless otherwise directed by the governor or mayor," and may be further delegated by them to others.[52] For example, the statute allows the governor to declare a state of emergency if an "emergency or disaster" either has occurred or may soon occur.[53] The statute defines "emergency" very broadly:

> "Emergency" means any occurrence, or imminent threat thereof, which results or may likely result in substantial injury or harm to the population or substantial damage to or loss of property.[54]

But the statute also vests in the governor the sole discretion to apply this definition: the governor alone has this power to determine that an emergency exists, and to declare a state of emergency.[55] Nor may any other official or agency other than the governor (or the mayor in a local emergency) issue a proclamation of an emergency.[56] The executive's discretion is virtually unassailable: the governor is the "sole judge of the existence of the danger, threat, or circumstance giving rise to a declaration of a state of emergency" in the state or a county.[57]

What are those powers? The statute first delegates to the governor broad powers, even without any declaration of an emergency. The governor "may

effectuate its purposes; provided that this chapter shall not be construed as conferring any power or permitting any action which is inconsistent with the Constitution and laws of the United States, but, in so construing this chapter, due consideration shall be given to the circumstances as they exist from time to time.").

[51] *Id.* § 127A-11(a).

[52] *Id.* § 127A-11(b).

[53] *Id.* § 127A-14(a).

[54] *Id.* § 127A-2. The statute also defines "disaster" as "any emergency, or imminent threat thereof, which results or may likely result in loss of life or property and requires, or may require, assistance from other counties or states or from the federal government." *Id.*

[55] *Id.* § 127A-2 (defining a "state of emergency" as "an occurrence in any part of the State that requires efforts by state government to protect property, public health, welfare, or safety in the event of an emergency or disaster, or to reduce the threat of an emergency or disaster, or to supplement the local efforts of the county.").

[56] *Id.* § 127A-11(a)(1).

[57] *Id.* § 127A-14(c); *see also id.* § 127A-2.

exercise" the following powers as part of her emergency management function:

- Prepare plans, identify emergency workers, train and prepare, create emergency logos, and the like.[58]
- Take over and use public property.[59] Provide for its repair, insurance, renovation, or replacement if damages.[60]
- Receive and expend money.[61]
- Acquire—by agreement or involuntarily by an exercise of eminent domain—the ownership or use of "materials and facilities[,]" free of the usual public procurement rules.[62]
- Execute contracts.[63]
- Protect public utilities.[64]
- "Restrict the congregation of the public in stricken or dangerous areas or under dangerous conditions."[65]
- Evacuate the civilian population on a "non-compulsory" basis.[66]
- Order government agencies to enforce the law, and act to promote public functions such as medical, fire, police, rescue, construction, housing, and similar operations.[67]
- Modify the hours of government business.[68]

The statute's enumeration of powers for non-emergency times ends with a broad catch-all provision: the governor may take "any and all steps necessary or appropriate to carry out the purposes of this chapter notwithstanding that those powers in section 127A-13(a) may only be exercised during an emergency period."[69] County mayors are delegated similarly broad powers within their respective counties.[70] About the only limitation on the governor's authority is an express—but limited and

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[58] *Id.* § 127A-12(a) (1)–(5).
[59] *Id.* § 127A-12(b)(5).
[60] *Id.* § 127A-12(b)(17).
[61] *Id.* § 127A-12(b)(7).
[62] *Id.* § 127A-11(b)(8).
[63] *Id.* § 127A-12(b)(11).
[64] *Id.* § 127A-12(b)(13).
[65] *Id.* § 127A-12(b)(14).
[66] *Id.* § 127A-12(b)(15).
[67] *Id.* § 127A-12(b)(16).
[68] *Id.* § 127A-12(b)(18).
[69] *Id.* § 127A-12(b)(19).
[70] *See id.* § 127A-12(c).

subject to restrictions—carve-out for "[m]edia access" in closed "emergency areas."[71]

In an actual declared emergency, the power of the governor and mayors expands dramatically:

- Require the "quarantine or segregation of persons who are affected with or believed to have been exposed to any infectious, communicable, or other disease that is, in the governor's opinions, dangerous to the public health and safety[.]"[72]
- Requisition and take over property.[73]
- Suspend laws such as licensing laws, quarantine laws, "and laws relating to labels, grades, and standards[.]"[74]
- "Suspend any law that impedes or tends to impede or be detrimental to the expeditious and efficient execution of, or to conflict with, emergency functions, including laws which by this chapter specifically are made applicable to emergency personnel[.]"[75] This includes the power to suspend laws regulating the ability of out-of-state utilities to operate in the state.[76]
- Take over emergency response from local control.[77]
- Require evacuation of the civilian population.[78]
- Take over or regulate the market to "prevent hoarding, waste, or destruction of materials, supplies, commodities, accommodations, facilities, and services, to effectuate equitable distribution thereof[.]"[79]

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[71] *See id.* § 127A-12(d) ("Media access shall be permitted in emergency areas closed pursuant to this section; provided that the designated emergency management authority for the affected area has determined that media access is reasonable and safe and does not hinder ongoing response and recovery activities. Media access shall be limited to duly authorized representatives of any news service, newspaper, radio station, television station, or online news distribution network.").

[72] *Id.* § 127A-13(a)(1).

[73] *See id.* § 127A-21 (2019) (noting that the governor or mayor may "requisition and take over any materials, facilities, or real property or improvements"). Other jurisdictions refer to this as "commandeering." *See, e.g.*, CAL. GOV'T CODE § 8572 (West 2020) ("In the exercise of the emergency powers hereby vested in him during a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof.").

[74] HAW. REV. STAT. § 127A-13(a)(2).

[75] *Id.* § 127A-13(a)(3).

[76] *Id.* § 127A-13(a)(4).

[77] *Id.* § 127A-13(a)(5).

[78] *Id.* § 127A-13(a)(7).

- Suspend existing state holidays and establish others.[80]
- Adjust the hours for voting.[81]
- "Assure the continuity of service by critical infrastructure facilities, both publicly and privately owned, by regulating or, if necessary to the continuation of the service thereof, by taking over and operating the same[.]"[82]
- If, "in the governor's opinion," state law is not adequate, the governor may regulate or prohibit of weaponry, items used in creating explosives, anything "particularly capable of misuse" or "obstructive of law enforcement, emergency management, or military operations" including intoxicating liquor and the liquor business. The governor may seize and require forfeiture of these items.[83]

As in the previous section, mayors are delegated similarly broad powers within their respective counties.[84]

IV. AFTER THE HARD STOP: "SEPARATE," OR "SUPPLEMENTAL?"

The only systemic check on the governor's emergency authority is process-based and temporal. A declared state of emergency automatically terminates no more than sixty days after proclamation.[85]

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[79] *Id.* § 127A-13(a)(8).

[80] *Id.* § 127A-13(a)(9).

[81] *Id.* § 127A-13(a)(10).

[82] *Id.* § 127A-13(a)(11).

[83] *Id.* § 127A-13(a)(12).

[84] *See id.* § 127A-13(b)(1)–(5). The statute also establishes broad immunity from civil liability for the state, counties, "[a]ny owner or operator of a public utility or critical infrastructure facility," and private or nonprofit organizations, for death, injury, or property damages as the result of affirmative acts, or omissions, undertaken or not undertaken in the course of exercising emergency response duties. *Id.* § 127A-9(a). In short, no civil lawsuits. That section also exempts "[m]embers of the United States Army, Air Force, Navy, Marine Corps, or Coast Guard on any duty or service performed under or in pursuance of an order or call of the President of the United States or any proper authority, and the National Guard from any other state ordered into service by any proper authority" from criminal and civil liability. *Id.* § 127A-9(c); *see also id.* § 127A-20 (2019) (granting immunity from civil liability for negligence to private shelters who house people without compensation during an emergency or disaster).

[85] *Id.* § 127A-14(d) (2019). Requisitions of property are also subject to the requirement to provide compensation, but that is not an immediate check on the power, only an after-the-fact obligation to make a property owner whole. The Hawai'i statute, like similar provisions in other jurisdictions, expressly recognizes the obligation of the state to compensate property owners whose property is taken over:

As the major legal limitation on the governor's power, the termination provision is arguably the most important part of the statute. If the majority of other jurisdictions are any indication, the time limitation is a critical feature of the delegation of emergency power, because most jurisdictions impose some time limitation or other structural check on the emergency powers of the executive, even though a handful of jurisdictions such as Michigan establish no time limit at all.[86] Arizona and Oregon, for example,

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> Whenever the governor or mayor requisitions and takes over any property or the temporary use thereof, the owner, or other person entitled thereto, shall be paid as compensation for the property or use, such sum as the governor or mayor determines to be fair and just, within twenty days after it has been requisitioned and taken; provided that the compensation for temporary use may be paid in monthly or lesser installments.

Id. § 127A-22(a); *see also* CAL. GOV'T CODE § 8572 (West 2020) ("the state shall pay the reasonable value thereof"). This section conflicts with both the U.S. and Hawai'i Constitutions' just compensation clauses because it limits the compensation to a sum the governor or mayor determines to be fair and just. Property owners are entitled to just compensation, a value that is determined by the courts, not the other branches. The U.S. Supreme Court has expressed the separation-of-powers rule that the legislature has no power to dictate how much compensation is paid for a taking. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893) (determining that although a "legislature may determine what private property is needed for public purposes . . . the question of compensation is judicial."). "Just" compensation means the "full and perfect equivalent for the property taken[,]" not an amount that the executive officer determines is fair. *Id.* at 326. The follow-on subsection, in which a property owner is penalized for objecting to the governor or mayor's determination of fair compensation by being entitled to only 75 percent of the offer, is even more constitutionally infirm. *See* HAW. REV. STAT. § 127A-22(b) (2019) ("If any person is unwilling to accept, as full and complete compensation for the property or use thereof, the sum determined by the governor or mayor, the person shall be paid seventy-five per cent of the sum determined by the governor or mayor. The person shall also be entitled to sue the State or county for such additional sum as, when added to the sum already received by the person, the person may consider fair and just compensation for such property or use, in the manner provided by chapter 661 for actions against the State and any other applicable chapter for actions against the county.). The statute also seems to run afoul of the requirements of the eminent domain code, which allows immediate possession of property only after the deposit of estimated compensation and the issuance of an order by the court. *See id.* §§ 101-28, -29. Section 127A-21(b), however, assumes that compensation shall be provided. *Id.* § 127A-21(a) (providing for service of notice on the owner or occupier of requisitioned property, "provided further that whenever all persons entitled to compensation for the property have not been served in the manner aforesaid, the governor or mayor shall publish a notice of the requisition at the earliest practicable date."). The same time limit governing emergency proclamations also applies to property requisitions, which "terminate automatically" no later than sixty days after the declaration is issued, or the governor or mayor issues a separate proclamation. *See id.* § 127A-21(b).

[86] *See* MICH. COMP. LAWS § 10.31(2) (2020) (emergency proclamation or declaration "may be amended, modified, or rescinded, in the manner in which they were promulgated.

have no express time limitations but vest power in the governor or the legislature to decide when an emergency has ended. For example, some states split authority between the governor and the legislature, with the governor initially having discretion and with the statutes making clear that the power then devolves from the governor to the legislature.[87] An approach taken by some other jurisdictions makes clear in their emergency management statutes the need for separation of powers, and that the legislature has an essential role in emergency management and response, particularly as a short-term crisis stretches on.[88] This demonstrates that

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from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists"); MISS. CODE ANN. § 33-15-11(18) (2020) ("The Governor shall review the need for continuing the declaration of emergency impact area at least every thirty (30) days until the emergency is terminated, and shall proclaim the reduction of the emergency impact area or termination of the declaration of emergency impact area at the earliest date or dates possible."); N.C. GEN. STAT. § 166A-19.20(c) (2020) ("A state of emergency declared pursuant to this section shall expire when it is rescinded by the authority that issued it."). *See also* VA. CODE ANN. § 44-146.17 (2020).

[87] *See* ARIZ. REV. STAT. ANN. § 26-303F (2020) ("The powers granted the governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the governor or by concurrent resolution of the legislature declaring it at an end."); OR. REV. STAT. § 401.204(1)-(2) (2020) (declaring "[t]he Governor shall terminate the state of emergency by proclamation when the emergency no longer exists, or when the threat of an emergency has passed[.]" and "The state of emergency proclaimed by the Governor may be terminated at any time by joint resolution of the Legislative Assembly."); Elkhorn Baptist Church v. Brown, 466 P.3d 30, 44 (Or. 2020) ("The Governor's emergency powers under ORS chapter 401 are not limited to a specific number of days. Instead, they continue until the state of emergency is terminated.").

[88] *See, e.g.*, CAL. GOV'T. CODE § 8630(b)–(d) (West 2020) ("Whenever a local emergency is proclaimed by an official designated by ordinance, the local emergency shall not remain in effect for a period in excess of seven days unless it has been ratified by the governing body. (c) The governing body shall review the need for continuing the local emergency at least once every 60 days until the governing body terminates the local emergency. (d) The governing body shall proclaim the termination of the local emergency at the earliest possible date that conditions warrant."); GA. CODE ANN. § 38-3-51(a) (2020) ("No state of emergency or disaster may continue for longer than 30 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of emergency or disaster at any time. Thereupon, the Governor shall by appropriate action end the state of emergency or disaster."); IND. CODE § 10-14-3-12(a) (2020) ("The state of disaster emergency continues until the governor: (1) determines that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist; and (2) terminates the state of disaster emergency by executive order or proclamation. A state of disaster emergency may not continue for longer than thirty (30) days unless the state of disaster emergency is renewed by the governor. The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time."); N.H. STAT. ANN. § 4:45II(a) (2020) (establishing a 21-day limit for declarations of emergencies, but providing that the governor may "renew a declaration of a state of emergency as many times

Hawai'i is a part of an overwhelming majority of states that have concluded these rule-by-decree emergency powers of executive officers should be granted only for a very limited time and should not be open-ended.[89] Thus,

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as the governor finds is necessary to protect the safety and welfare of the inhabitants of the this state[.]" but also recognizing that the legislature "may terminate a state of emergency by concurrent resolution adopted by a majority vote of each chamber" that terminates the governor's power to renew a declaration (but not to declare a "new emergency")); NEV. REV. STAT. § 414.070 (2020) ("Any such emergency or disaster, whether proclaimed by the Governor or by the Legislature, terminates upon the proclamation of the termination thereof by the Governor, or the passage by the Legislature of a resolution terminating the emergency or disaster."); N.M. STAT. ANN. § 12-10A-5 (West 2020) (public health emergency declaration terminates automatically after 30 days, "unless renewed by the governor after consultation with the secretary of health"); N.D. CENT. CODE § 37-17.1-05 (2019) ("A disaster or emergency must be declared by executive order or proclamation of the governor if the governor determines a disaster has occurred or a state of emergency exists. The state of disaster or emergency shall continue until the governor determines that the threat of an emergency has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist."); 35 PA. CONS. STAT. § 7301(c) (2020) ("The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency."); 30 R.I. GEN. STAT. § 30-15-9 (2020) ("The state of disaster emergency shall continue until the governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than thirty (30) days unless renewed by the governor. The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time."); S.D. CODIFIED LAWS § 34-48A-5 (2020) (limiting governor's emergency powers to six months, with renewals of additional periods left to the governor's discretion); TEX. GOV'T CODE ANN. § 418.014 (2020) (limited a state of disaster to 30 days "unless renewed by the governor" or terminated by the legislature "at any time"); UTAH CODE ANN. § 53-2a-206 (LexisNexis 2020) (providing a 30-day limit "unless extended by joint resolution of the Legislature, which may also terminate a state of emergency by joint resolution at any time"); W. VA. CODE ANN. § 15-5-6(b) (LexisNexis 2020) ("Any state of emergency or state of preparedness, whether proclaimed by the Governor or by the Legislature, terminates upon the proclamation of the termination by the Governor, or the passage by the Legislature of a concurrent resolution terminating the state of emergency or state of preparedness: *Provided*, That in no case shall a state of preparedness last longer than thirty days."); WIS. STAT. ANN. 323.10 (West 2020) ("A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature. A copy of the executive order shall be filed with the secretary of state. The executive order may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution.").

[89] One can see why, since emergency power is very extensive and shortcuts many of the usual democratic checks on power. Pretty soon, everything becomes an "emergency." *See*

although process-based, Hawaiʻi's time limit serves as an essential democratic check on arrogation of executive power by emphasizing that the delegation to the governor from the people via the legislature is muscular, but very temporary. And that once the delegation automatically terminates, absent a separate declaration setting forth separate reasons, the authority to declare and manage emergencies reverts to the legislature.

Courts have not been presented with many opportunities to interpret these types of time limits. But recently, the Oregon Supreme Court in *Elkhorn Baptist Church v. Brown* considered the scope of the governor's emergency powers and mostly avoided a ruling on whether the Oregon governor's emergency orders responding to COVID-19 were subject to the state's time limitations on public health and "catastrophic disaster" emergencies.[90] Oregon statutes delegate to the governor certain powers in emergencies, and other more limited powers in "public health" emergencies. The governor's power in emergencies is not subject to any express time limitations, while in public health emergencies, by contrast, the power is limited to no more than twenty-eight days.[91] In her emergency declarations in response to COVID-19, Oregon's governor invoked her general emergency powers, and not her public health emergency powers, to limit the size of public gatherings. The governor's orders restricted these activities for longer than twenty-eight days. Several churches challenged the emergency orders, asserting the emergency orders were subject to the time limitation applicable to public health emergencies, because, well, this is a public health emergency.[92]

The Oregon Supreme Court disagreed, concluding that the governor invoked her general emergency powers, and even though the COVID-19 emergency is a public health emergency (generically), the governor's orders were not implemented under the public health emergency statute.[93] The governor could choose which power to exercise. Consequently, the

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Catherine Padhi, *Emergencies Without End: A Primer on Federal States of Emergency*, LAWFARE (Dec. 8, 2017), https://www.lawfareblog.com/emergencies-without-end-primer-federal-states-emergency.

[90] Elkhorn Baptist Church v. Brown, 466 P.3d 30, 30–52 (Or. 2020).

[91] *Compare* OR. REV. STAT. § 401.192(4) (2020) (providing that emergency powers continue until emergency is terminated), *with* OR. REV. STAT. § 433.441(5) (2020) (providing that public health emergency powers expire "no more than 14 days after the date of the public health emergency is proclaimed unless the Governor expressly extends the proclamation for an additional 14-day period").

[92] *Elkhorn Baptist Church*, 466 P.3d at 51("Plaintiffs acknowledge that, in her first executive order regarding the coronavirus pandemic, the Governor declared a state of emergency pursuant to ORS 401.165, described above.").

[93] *Id.*

governor's emergency orders were not subject to any time limitations.[94] The court recognized that public health emergencies are limited to twenty-eight days and concluded that the legislature intended that if such an emergency continues for more than twenty-eight days, the governor may declare a state of emergency and invoke her broader powers.[95] The governor's public health emergency power is considered an additional tool, not a separate or subordinate one.[96] In other words, by adopting the public health emergency option, the legislature did not intend to curb the governor's general powers to declare and respond to emergencies.[97] The court similarly rejected the church's argument that the governor's emergency declarations were subject to the thirty-day time limitation on "catastrophic disaster" powers in the Oregon Constitution, because the governor had not expressly invoked such powers.[98] Again, the governor could have invoked these powers but has the discretion to not do so.[99] The COVID-19 emergency may be a catastrophic disaster, but the governor need not formally have invoked her catastrophic disaster powers. The court also concluded that the lack of a time limit in the general emergency statute[100] did not run afoul of the thirty-day limitation in the Oregon Constitution, because the governor's powers under the statute are not as extraordinary, and thus, she could be delegated those powers without any time limitation.[101]

But in dicta, the court viewed the statutory twenty-eight-day and constitutional thirty-day time limits as hard stops on the separate emergency response powers delegated under the public health crisis statute and Article X-A of the constitution, unless extended under the applicable provision.[102] The court recognized the purpose of these limitations as curbing the "extraordinary nature" of the powers exercised by the governor.[103] This recognizes that the delegation of power to the governor is truly temporary.

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[94] *Elkhorn Baptist Church*, 466 P.3d at 46 ("One of the reasons that the ORS chapter 433 emergency statutes were enacted was to give the Governor an option for responding to a public health emergency by taking a step short of declaring a state of emergency under chapter 401.").

[95] *Id.* at 47.

[96] *Id.* at 52 ("As we have explained, the Governor's orders were issued pursuant to ORS chapter 401, and they are not subject to the time limit in chapter 433.").

[97] *See id.*

[98] *Id.* at 49–51 (citing OR. CONST. art. X-A, § 6(1)).

[99] *Id.* at 50 ("The powers granted by Article X-A are extraordinary, and the Governor may reasonably decline to invoke them.").

[100] OR. REV. STAT. § 401.192(4) (2019) (providing that emergency powers continue until emergency is terminated).

[101] *Elkhorn Baptist Church*, 466 P.3d at 49–51.

[102] *Id.* at 50.

[103] *Id.*

and if the legislature delegates only temporary authority to the governor, the delegation is truly limited, not merely a guideline.[104]

The Hawai'i statute is straightforward and leaves little room for a claim of ambiguity: the declaration of an emergency "shall terminate automatically" upon one of two events: sixty days after it is issued, or the governor (or mayor) issues a "separate" proclamation.[105] That this is the sole democratic check on the governor's power suggests the use of "shall" imposes a mandate and a declaration simply evaporates by its own accord on the sixtieth day at the latest, hard stop.[106] The statute, however, should not be read as depriving the governor of authority to respond to a continuing crisis. That would be an absurd outcome because an emergency can certainly last more than sixty days, as the COVID-19 pandemic illustrates. There are two alternatives: the delegated emergency response authority terminates not later than the sixtieth day and returns to the legislature, or the governor can simply issue a new, "separate" declaration of an emergency based on the then-current situation, which would terminate the existing declaration and re-start the sixty-day clock.[107]

For whatever reasons, Governor Ige has eschewed that approach, even while tacitly acknowledging the automatic termination limitations. The initial proclamation of the COVID-19 emergency on March 4, 2020 declared the emergency would continue until April 29, 2020 (short of the sixty-day automatic termination date), "or by a separate proclamation, whichever occurs first."[108] But as the public health crisis persisted, instead of issuing new proclamations to respond, the Governor issued a series of follow-on proclamations labeled "Supplemental Proclamations" which referenced the initial proclamation and that "it has become necessary to supplement the Proclamation[.]"[109] For example, the governor's first Supplemental Proclamation declared:

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[104] *Id.*

[105] HAW. REV. STAT. § 127A-14(d) (2019).

[106] *See* Leslie v. Bd. of Appeals of Cnty. of Hawai'i, 109 Hawai'i 384, 393, 126 P.3d 1071, 1080 (2006) ("As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means "must" and is inconsistent with a concept of discretion." (quoting BLACK'S LAW DICTIONARY 1375 (6th ed.1990))).

[107] HAW. REV. STAT. § 127A-14(d) (2019) (providing that the governor or mayor may issue "a separate proclamation" which automatically terminates the existing declaration).

[108] *See* OFF. OF THE GOVERNOR, STATE OF HAW., EMERGENCY PROCLAMATION FOR COVID-19 7 (2020).

[109] *See* OFF. OF THE GOVERNOR, STATE OF HAW., SUPPLEMENTARY EMERGENCY PROCLAMATION FOR COVID-19 1 (2020).

> NOW, THEREFORE, I, DAVID Y. IGE, Governor of the State of Hawai'i, determine that an emergency or disaster as contemplated by sections 127 A-2 and 127A-14, Hawaii Revised Statutes (HRS), continues in the State of Hawai'i, supplement the Proclamation, which otherwise remains in full force and effect, and authorize and invoke the following additional measures under the HRS[.][110]

The March 16, 2020 Supplemental Proclamation also extended the disaster emergency relief period beyond the April 29, 2020 termination date to May 15, 2020, beyond the sixtieth day after March 4, 2020 (May 3, 2020) on which the initial Proclamation automatically terminated.[111] Additional supplemental proclamations extended the emergency relief period to May 20, 2020,[112] further to June 30, 2020,[113] again to July 31, 2020,[114] then to August 31, 2020,[115] to September 30,[116] and most recently to October 31,

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[110] *Id.* at 1. Every succeeding supplemental proclamation issued by the governor have been labeled as "supplemental" proclamations:

> WHEREAS, I issued on March 4, 2020, a Proclamation declaring a state of emergency to support ongoing State and county responses to COVID-19; on March 16, 2020, a Supplementary Proclamation suspending certain laws to enable State and county responses to COVID-19; on March 21, 2020, a Second Supplementary Proclamation and Rules Relating to COVID-19 implementing a mandatory self-quarantine for all persons entering the State; on March 23, 2020, a Third Supplementary Proclamation to mandate and effectuate physical distancing measures throughout the State; on March 31, 2020, a Fourth Supplementary Proclamation implementing a mandatory self-quarantine for all persons traveling between any of the islands in the State; and on April 16, 2020, a Fifth Supplementary Proclamation implementing enhanced safe practices and an eviction moratorium; on April 25, 2020, a Sixth Supplementary Proclamation amending and restating all prior proclamations and executive orders related to the COVID-19 emergency; on May 5, 2020, a Seventh Supplementary Proclamation related to the COVID-19 Emergency; in May 29, 2020, an Eighth Supplementary Proclamation related to the COVID-19 Emergency[.]

See, e.g., OFF. OF THE GOVERNOR, STATE OF HAW., NINTH SUPPLEMENTARY PROCLAMATION RELATED TO COVID-19 1 (2020) (emphasis omitted).

[111] *See* OFF. OF THE GOVERNOR, STATE OF HAW., SUPPLEMENTARY EMERGENCY PROCLAMATION FOR COVID-19 7 (2020).

[112] OFF. OF THE GOVERNOR, STATE OF HAW., SECOND SUPPLEMENTARY PROCLAMATION 2 (2020).

[113] OFF. OF THE GOVERNOR, STATE OF HAW., EIGHTH SUPPLEMENTARY PROCLAMATION RELATED TO THE COVID-19 EMERGENCY 34 (2020).

[114] OFF. OF THE GOVERNOR, STATE OF HAW., NINTH SUPPLEMENTARY PROCLAMATION RELATED TO THE COVID-19 EMERGENCY 31 (2020).

[115] OFF. OF THE GOVERNOR, STATE OF HAW., TENTH SUPPLEMENTAL PROCLAMATION

2020.[117] Perhaps an expedient and practical response in light of the evolving situation and changing circumstances, but one that on the whole does not conform to the statute's limitations, or the separation of powers rationale behind the automatic termination requirement.[118] The Hawai'i statute adopts a hard stop and there is no express authority for a declaration of emergency to continue longer than sixty days. Indeed, the very notion of "supplemental" declarations seems like an attempt to navigate between the statute's limitation that emergency declarations are effective for no more than sixty days and to contradict the statute's command that "separate" declarations automatically terminate an existing declaration.[119] By their nature, the Supplemental Declarations *supplement* the governor's initial March 4, 2020 declaration.[120] That is, they are dependent, not independent—in other words, subordinate and in addition to—the initial emergency declaration.[121]

What about an argument that any difference between a "separate" proclamation and a "supplemental" proclamation is one of form and not substance? After all, if the governor might simply issue a new proclamation declaring an emergency, why shouldn't the governor be able to issue supplemental proclamations that have the same effect? The statute does not

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RELATED TO THE COVID-19 EMERGENCY 28 (2020).

[116] OFF. OF THE GOVERNOR, STATE OF HAW., TWELFTH PROCLAMATION RELATED TO THE COVID-19 EMERGENCY 31 (2020).

[117] OFF. OF THE GOVERNOR, STATE OF HAW., THIRTEENTH PROCLAMATION RELATED TO THE COVID-19 EMERGENCY 32 (2020).

[118] *In re* Taxes of Johnson, 44 Haw. 519, 530, 356 P.2d 1028, 1034 (1960) ("[I]t must be supposed that the legislature, in enacting a statute, intended that the words used therein should be understood in the sense in which they are ordinarily and popularly understood by the people, for whose guidance and government the law was enacted[.]"); *see also* HAW. REV. STAT. § 1-14 (2009) ("The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.").

[119] *See* HAW. REV. STAT. § 127A-14(d) (2019) ("A state of emergency and a local state of emergency shall terminate automatically . . . by a separate proclamation of the governor or mayor.").

[120] OFF. OF THE GOVERNOR, STATE OF HAW., NINTH SUPPLEMENTARY PROCLAMATION RELATED TO THE COVID-19 EMERGENCY 2 (2020) ("NOW, THEREFORE, I, DAVID Y. IGE, Governor of the State of Hawai'i, hereby amend and restate all prior proclamations and executive orders, and authorize and invoke the following as set forth herein.").

[121] *See* Dist. Council 50, of Int'l Union of Painters & Allied Trades v. Lopez, 129 Hawai'i 281, 290, 298 P.3d 1045, 1054 (2013) ("Applying the ordinary meaning of 'incidental and supplemental' to HRS § 444-8(c), it is apparent that the legislature meant to provide specialty contractors with a limited ability to perform work outside of their licensed specialty area. However, the 'incidental and supplemental' work must not make up the majority of the project, and must instead be 'subordinate' and in addition to licensed work 'of greater importance.'").

define the meaning of "separate," or give any clue about whether it is sufficient that the governor produce a document that is literally separate (different) from the original proclamation, or requires the governor to issue a new, separate proclamation, in effect rebooting the entire proclamation.[122] The answer lies in process. The statute supports the separation of powers idea that emergency response is a subject that has not been wholly turned over to the governor, and the legislature—as the general delegate of popular sovereignty—remains an integral part of the response. The governor may have the power to act unilaterally in an emergency, but only for a limited time. After that—absent a new emergency (which might be simply the existing emergency updated to account for whatever circumstances might have changed)—the legislature retains the power to create the law on how to respond to emergencies.

There must be a difference between "supplementing" an existing proclamation and issuing a "separate" declaration because otherwise the sixty-day limitations period after which a proclamation "automatically expires" would be meaningless if a governor could simply infinitely supplement a proclamation, despite that express restriction.[123] If the legislature had intended to grant the power to the governor to determine the existence of an emergency indefinitely, there is no doubt that it could have done so in simple terms, and it would not have included the express time limitation in section 127A-14(d).[124] And if a court were to conclude that

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[122] The term "separate" is used twice in the statute, in section 127A-14(d) (which sets forth the governor's power to issue emergency proclamations), and in section 127A-21 (which automatically terminates a "requisition" sixty days after a proclamation or "separate proclamation."). HAW. REV. STAT. § 127A-21(b) (2019). The legislative history sheds no light on the meaning of "separate proclamation," and it appears the provision was adopted without any debate or discussion of that term or the consequences of automatic termination. Nor does it illuminate the question of how emergency declarations are terminated. The only reference in the Conference Committee Report is that section 127A-14 "[e]stablishes how proclamations are promulgated and terminated consistent with current authority for civil defense proclamations." *See* H.R. REP. No. 248-14 (2014).

[123] *See* Potter v. Haw. Newspaper Agency, 89 Hawai'i 411, 422, 974 P.2d 51, 62–63 (1999) ("Our rules of statutory construction require us to reject an interpretation of [a] statute that renders any part of the statutory language a nullity."); Blair v. Harris, 98 Hawai'i 176, 179, 45 P.3d 798, 801 (2002) ("Courts are bound to give effect to all parts of a statute, and no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." (quoting Keli'ipuleole v. Wilson, 85 Hawai'i 217, 221, 941 P.2d 300, 304 (1997))).

[124] *Compare* § 127A-14(d) ("A state of emergency and a local state of emergency shall terminate automatically sixty days after the issuance of a proclamation of a state of emergency or local state of emergency, respectively, or by a separate proclamation of the governor or mayor, whichever occurs first."), *with* ARIZ. REV. STAT. § 26-303F (2020) ("The powers granted the governor by this chapter with respect to a state of emergency shall

"separate" included "supplemental," that ruling would not conform to the Hawai'i Supreme Court's admonition that courts should avoid "enlarging" the language of a statute, because "[w]e do not legislate or make laws."[125]

> We cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. We do not legislate or make laws. Even where the Court is convinced in its own mind that the Legislature really meant and intended something not expressed by the phraseology of the Act, it has no authority to depart from the plain meaning of the language used.[126]

The exigencies of the circumstances do not excuse a failure to conform to the statute's express limitations. In times of emergencies it becomes even more important to adhere to the few statutory and constitutional limitations on government assertions of power. The statute envisions the governor responding to extended emergencies by issuing "separate" proclamations, not continuing them indefinitely by supplementation. This is a limitation on the power of the governor that—unlike the storied Pirate Code—is more of an actual rule than a mere guideline.[127]

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terminate when the state of emergency has been terminated by proclamation of the governor or by concurrent resolution of the legislature declaring it at an end."). MICH. COMP. LAWS SERV. § 10.31(2) (LexisNexis 2020) (providing that an emergency proclamation or declaration "may be amended, modified, or rescinded, in the manner in which they were promulgated, from time to time by the governor during the pendency of the emergency, but shall cease to be in effect upon declaration by the governor that the emergency no longer exists"), MISS. CODE ANN. § 33-15-11(18) (2020) ("The Governor shall review the need for continuing the declaration of emergency impact area at least every thirty (30) days until the emergency is terminated, and shall proclaim the reduction of the emergency impact area or termination of the declaration of emergency impact area at the earliest date or dates possible."), N.C. GEN. STAT. § 166A-19.20(c) (2020), and OR. REV. STAT. § 401.204(1)–(2) (2020).

[125] State v. Demello, 136 Hawai'i 193, 197, 361 P.3d 420, 424 (2015) (quoting State v. Dudoit, 90 Hawai'i 262, 271, 978 P.2d 700, 709 (1999)).

[126] *Id.*

[127] *See* Mark Tushnet, *The Pirate's Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPPERDINE L. REV. 481, 482 (2018) (alteration in original) ("[T]he [pirate's] code is more what you'd call guidelines than actual rules." (quoting PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures & Jerry Bruckheimer Films 2003)); *see also* State v. Rodrigues, 63 Haw. 412, 414, 629 P.2d 1111, 1113 (1981) ("A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." (quoting Davis v. Burke, 179 U.S. 399, 403 (1900))).

V. TWO NARRATIVES

Despite my conclusion that the statute means what it plainly says—and that as a consequence, the governor's power to declare an emergency is time-limited and conditioned—I am much less sanguine about whether that limitation will be enforceable in court, and by whom. The Hawai'i Supreme Court's rulings reveal two main narrative threads that could help analyze that question. The first is a structural rationale in which the automatic termination provision is acknowledged by the courts as a limitation on the governor's authority but is one which ultimately cannot be privately enforced in court. The second is a separation of powers approach, under which individuals who are affected by these orders may challenge them in court. Which of these a court views as the more essential will likely determine the outcome.

A. Political Enforcement

Before I discuss how a court might treat the automatic termination limitation, a more general look at how Hawai'i's courts consider assertions of government power to respond to public health crises is warranted. The Kingdom of Hawai'i Supreme Court's approach in *The King v. Tong Lee*[128] is the best historical example of how a modern Hawai'i court would likely treat arguments challenging the reach of government power. Much has changed in the 140 years since *Tong Lee*, but the principles the court announced are enduring threads in both Hawai'i and federal constitutional law. The Supreme Court of the Kingdom was governed both by Hawai'i's common law (which was expressly based on English precedent),[129] as well as a constitution modeled in many parts on the U.S. Constitution. In short, the court applied what later became known as "rational basis" judicial scrutiny to a claim that a public health crisis existed, and whether the means undertaken was the best (or even a correct) approach to addressing it.[130] I cite this example simply because it the first case as far as I can tell in which a Hawai'i court employed the phrase "police power," and which upheld the

[128] The King v. Tong Lee, 4 Haw. 335 (Haw. Kingdom 1880) (en banc).

[129] Hawai'i's reliance on English law continues to this day. *See* HAW. REV. STAT. § 1-1 (2019) ("The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise 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; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.").

[130] *See Tong Lee*, 4 Haw. at 341–43.

upheld the broad authority of government to regulate conduct and economic activity that is even arguably detrimental the public health.[131]

In *Tong Lee*, the Kingdom's legislature prohibited the laundry business within a small radius of an intersection (Nu'uanu Avenue and King Street) in downtown Honolulu because "the increasing number of laundries and wash-houses within the limits of the City of Honolulu tend[ed] to the propagation and dissemination of disease."[132] The regulation was adopted because the wastewater was a vector for disease.[133] It just so happened that this radius encompassed Honolulu's "Chinatown," leading to what was probably a well-founded belief that the prohibition was more of an anti-Chinese measure than an action truly designed to protect public health in a neutral or comprehensive way.[134] After all, the Kingdom only barred laundering for money; the regulation did not limit large-scale private washing operations or generally prohibit the dumping of other wastewater within the radius nor did it prohibit commercial laundries elsewhere on the island or the Kingdom, both of which a measure truly for public's health might likely have included.[135]

Lee challenged the statute as a violation of the due process clause of the Hawaii Constitution.[136] He asserted his right to use his property (his laundry business and his land), which this statute unreasonably deprived him of without a supportable basis.[137] If public health was the real reason for this law, Lee argued, it was both too narrow (it did not prohibit all commercial laundries) and was not tailored to the stated purpose (there was no showing that Lee's laundry was unsanitary).[138] The Supreme Court of the Kingdom easily disposed of this argument:

> The authority to enact a law of this character is derived from the inherent power which every sovereign State possesses to protect the life, property and health of its citizens. Says Judge Shaw: "We think it is a well settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property,

[131] *See id.* at 339–40.

[132] *Id.* at 335.

[133] *See id.* at 336–37.

[134] *Id.* at 335–36; *see* Eleanor C. Nordyke & Richard K. C. Lee, *The Chinese in Hawaii: A Historical and Demographic Perspective*, 23 THE HAWAIIAN J. HIST. 196, 202 (1989) (noting that the Chinese government imposed restrictions on emigration to Hawai'i due to reports of abuse in policies and mistreatment of Chinese plantation workers).

[135] *Tong Lee*, 4 Haw. at 338.

[136] *Id.* at 340.

[137] *See id.*

[138] *Id.* at 338.

> nor injurious to the rights of the community. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations on 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."
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> "This is very different from the right of eminent domain; the right of a Government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the Legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, or the subjects of the same."[139]

There is a lot about *Tong Lee* that has not necessarily survived the 140 years since the opinion was issued. The racial undertones, for example.[140] But the police power principle is still a very strong thread, and the court's holding remains the general approach today:

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[139] *Id.* at 339–40 (citing Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851)); *see also id.* at 341 ("Chief Justice Shaw also says: 'Nor does the prohibition of such noxious use of property (a prohibition imposed because such use would be injurious to the public), although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. . . . But he is restrained, not because the public have occasion to make the like use or make any use of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use, contrary to the maxim *sic utere tuo ut alienum non laedas.*'").

[140] Certainly today, if Lee challenged a similar measure, he might have a better chance were he to press an equal protection claim. But he did not, unlike the plaintiffs in two cases that arose later in a similar circumstance. For example, in Wong Wai v. Williamson, 103 F. 384 (N.D. Cal. 1900) and Jew Ho v. Williamson, 103 F. 10 (N.D. Cal. 1900) the court enjoined enforcement of a San Francisco ordinance that was based on city officials' belief "that danger does exist to the health of the citizens of the city and county of San Francisco by reason of the existence of germs of the [plague] remaining in the district hereafter mentioned [Chinatown]." *Jew Ho*, 103 F. at 12. San Francisco supported the ordinance by referring to Mugler v. Kansas, 123 U.S. 623 (1887) and the city's police powers. However, that case did not serve as a trump card because the plaintiffs alleged and proved that the ordinance was not reasonably designed to protect the public health, but in actuality targeted racial discrimination: "[t]he evidence here is clear that this is made to operate against the Chinese population only, and the reason given for it is that the Chinese may communicate the disease from one to the other. That explanation, in the judgment of the court, is not sufficient. It is, in effect, a discrimination, and it is the discrimination that has frequently been called to the attention of the federal courts where matters of this character have arisen with respect to Chinese." *Jew Ho*, 103 F. at 23.

> The State, by its Legislature, possesses the right to make such laws as it deems to be wholesome, and the exercise of this power is subject to no review except by the body of society itself, except so far as these laws may be inhibited by the Constitution itself, or be repugnant to its provisions.[141]

The Supreme Court of the Kingdom of Hawai'i's approach is also consistent with the analysis later employed by the U.S. Supreme Court in what has become the most well-known decision on the power of government to protect the public health. In *Jacobson v. Massachusetts*, the Court distinguished "an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint," with what it labeled "[r]eal liberty."[142] The Court upheld the state's vaccine requirement, concluding:

> Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that [] persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State;
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> . . . .
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> It is, then, liberty regulated by law.[143]

Individual liberty, the Court concluded, does not include the ability to jeopardize "the safety of the public."[144] The Court based its reasoning on public "self-defense," noting that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[145] The only limitation being that the government's powers cannot be exercised in "an arbitrary, unreasonable manner," or "go so far beyond what was reasonably required for the safety of the public."[146] Applying this rule, courts generally do not seriously question another branch's conclusions unless some right deemed "fundamental" is also at stake.

Four years after *Tong Lee*, in an advisory opinion in *Segregation of Lepers*,[147] the Supreme Court of the Kingdom of Hawai'i reached a similar

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[141] *Tong Lee*, 4 Haw. at 342.
[142] 197 U.S. 11, 26 (1905).
[143] *Id.* at 26–27 (citation omitted).
[144] *Id.* at 28.
[145] *Id.* at 27.
[146] *Id.* at 28.
[147] Segregation of Lepers, 5 Haw. 162 (Haw. Kingdom 1884).

conclusion under the Hawaii Constitution. The court answered a request for an opinion posed by the Legislative Assembly about a provision in the Kingdom's Civil Code that allowed the Board of Health to "remove" infected persons to a separate location.[148] This law deemed being afflicted with leprosy to be a crime and allowed confinement of the victims of the disease to two locations in the Kingdom (Kalawao on Moloka'i, and Kaka'ako on O'ahu).[149] The court considered whether confinement was "contrary to the Constitution."[150]

The court easily disposed of the first question: "leprosy is not a crime, . . . [i]t is a disease."[151] It may be a crime to willingly transmit the disease, but merely having a disease is not a criminal act.[152] The court then considered the constitutionality of the confinement, first noting that in the nearly two decades since its adoption, the law had "not been tested by an application for a writ of habeas corpus, or otherwise. . . ."[153] That, the court concluded, "may be taken as a general acquiescence by the community in the wisdom of the law."[154] The court considered several provisions in the Kingdom's Constitution similar to provisions in the U.S. Constitution and the modern Hawaii Constitution, such as due process, and a prohibition against deprivations of life, liberty, and property.[155] The court relied on the then-recent decision by the United States Supreme Court in the *Slaughter-House Cases*, which recognized the broad power of government regulate life, liberty, and property in the name of the public health and safety (in other words, the "police power").[156] The Supreme Court of the Kingdom of Hawai'i noted that when the government exercises the police power, it is acting in a sphere of "overruling necessity."[157] The court referred to the maxim, "*salus populi suprema est lex*,"[158] and held that because Hansen's

[148] HAW. CIV. CODE § 302 (1859) ("When any person shall be infected with the smallpox, or other sickness dangerous to the public health, the Board of Health, or its agent may, for the safety of the inhabitants, remove such sick or infected person to a separate house, and provide for him with nurses and other necessaries, which shall be at the charge of the person himself, his parents or master, if able, otherwise at the charge of the Government."); *see also In re* Kaiahua, 19 Haw. 218, 219 (1908) (detailing the Territory of Hawai'i's health regulations related to Hansen's disease).

[149] *See Segregation of Lepers*, 5 Haw. at 162.

[150] *Id.* at 163.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*; *see* HAW. CONST. art. 6 & 14 (1864).

[156] *Segregation of Lepers*, 5 Haw. at 164–65; *see* Slaughter-House Cases, 83 U.S. 36 (1872).

[157] *Segregation of Lepers*, 5 Haw. at 166 (citing Dwarris on Statutes).

[158] *Id.*; *see also Salus Populi Suprema Lex Esto*, MERRIAM-WEBSTER (2020) (translating

disease is capable of being communicated to human beings, it was within the authority of the Kingdom's Legislature to adopt regulations segregating persons afflicted:

> As at present advised, we are of the opinion that the law authorizing the segregating and isolating of lepers is not only a wholesome law and constitutional, but that without such a law the result would eventually be that much of our useful population would leave these islands, ships would cease to touch here, our products would fail to find a market abroad, and these fair islands would become a pest-house to be avoided by the whole civilized world.[159]

The unstated question left unanswered by the court was whether—and under what circumstances—a court might find that an otherwise valid exercise of the police power might be deemed to be in violation of the Hawai'i Constitution. The court implied that it would give great deference to the legislature's judgment about the necessity of the regulation.[160]

In its most recent decision on government power to respond to a health crisis, the Hawai'i Supreme Court employed a similar rationale. In *Mahiai v. Suwa*, the court upheld the State Board of Agriculture's order—responding to an outbreak of bovine tuberculosis—to slaughter all cattle on the island of Moloka'i and to impose a two-year moratorium on ranching.[161] The disease had been present in Hawai'i since at least 1933, and the entire island of Moloka'i had been under quarantine for ten years before the court's opinion.[162] But after the Board secured funds from the federal government, it ordered the slaughter of all cattle in order to eradicate the disease.[163] Ranchers challenged the order, asserting that the governing statute only gave the Board the power to order slaughter of cattle known to be exposed to the disease, not merely those that might have been.[164] The Hawai'i court, employed a rationale which was just recently adopted by the Oregon Supreme Court in *Elkhorn Baptist Church v. Brown*—that the

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the Latin phrase to mean "let the welfare of the people be the supreme law.").

[159] *Segregation of Lepers*, 5 Haw. at 166–167.

[160] *See id.* at 166 ("It will be seen from a perusal of the whole Act concerning leprosy that the Legislature regarded this disease as contagious, or capable of being communicated to other human beings. From the best information the Court can obtain, this is a characteristic of this disease. Upon this view of the disease, laws segregating lepers have been enacted in nearly all countries of the world.").

[161] 69 Haw. 349, 352–53, 742 P.2d 359, 363–64 (1987).

[162] *Id.*

[163] *Id.*

[164] *Id.* at 356, 742 P.2d at 365–66.

government was not required to choose to exercise a more limited power, and could exercise broader authority.[165]

The Hawai'i court concluded that delegation of the specific authority to order cattle that were actually infected with bovine tuberculosis to be destroyed did not limit the Board's authority—delegated in a separate statute—to act more broadly and order destroyed any animal that is either infected or exposed to disease.[166] The court also held that the Board was within its authority when it concluded that the cattle had been exposed to bovine tuberculosis.[167] Finally, the court rejected the ranchers' equal protection challenge.[168] The ranchers claimed that they had been subject to selective treatment because only cattle were ordered destroyed, not other animals on Moloka'i, most notably the wild animals in an exotic animal park.[169] The court easily disposed of the argument, first noting that all cattle were treated similarly, and that nothing required the Board to treat all animals the same way as cattle.[170] Cattle ranching practices, not the keeping of exotic animals, was the vector for bovine tuberculosis.[171] In essence, the court applied the rational basis test and upheld the Board's order.[172]

As a whole, these decisions tell us that a court applying Hawai'i law will begin with the presumption that the government's exercise of emergency power is a reasonable—and thus constitutional—attempt to respond to the circumstances, and will also seek to avoid being put in the position of second-guessing the other branches' emergency response. But Hawai'i law does not compel a court to totally defer to executive and legislative judgments and courts should not uphold assertions of power not grounded in ascertainable facts and a degree of actual means-ends tailoring. For example, in a series of more recent decisions, the Hawai'i Supreme Court exhibited a willingness to put teeth into judicial review of legislation.[173] The court concluded that under Hawai'i law, rational basis does not mean "conceivable" basis, and judicial review for "arbitrary and capricious" due process and equal protection challenges under the Hawaii Constitution are subject to more intense judicial scrutiny than their federal constitutional

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[165] *See id.*; Elkhorn Baptist Church v. Brown, 466 P.3d 30, 44 (2020); *see also supra* text accompanying note 90–101.

[166] *Mahiai*, 69 Haw. at 357, 742 P.2d at 366 (citing HAW. REV. STAT. §§ 142-6, 18 (1986)).

[167] *Id.* at 358–59, 742 P.2d at 366–67.

[168] *Id.* at 361, 742 P.2d at 368.

[169] *Id.* at 360, 742 P.2d at 367–68.

[170] *Id.* at 361, 742 P.2d at 368–69.

[171] *Id.* at 361, 742 P.2d at 369.

[172] *See id.* 360-61, 742 P.2d at 368–69.

[173] *See* Silva v. City & County of Honolulu, 115 Hawai'i 1, 165 P.3d 247 (2007); Sierra Club v. Department of Transportation, 120 Hawai'i 181, 202 P.3d 1226 (2009).

counterparts.[174] Hawai'i's vision of rational basis review is much different, grounded in the actual record, not a conceivable basis.

In *Silva v. City & County of Honolulu*, the court invalidated the different statutes of limitations periods applicable to tort claims against the State, and the counties.[175]

> We hold that there is no rational basis for the classification scheme effectuated by HRS § 46–72 as it read in 2004. The County offers no rationale for the distinction between the classes, nor can we deduce one. The record on appeal and the legislative history are silent with respect to any budgetary, logistical, or other difference between the County and the state that might justify the unequal treatment of victims of their torts.[176]

Similarly, in *Sierra Club v. Department of Transportation*, the court invalidated a facially neutral statute on the basis that it was not a "general" law but a law intended to benefit a known private party.[177] In doing so, the court pushed aside the usual deference courts pay to legislative judgments—including the legislature's judgment about what it is doing and more importantly why—and held that the legislature's intent in the statute was to benefit a single private entity. The test, the court concluded, was to measure the statute by its "substance and practical operation."[178]

> Sierra Club contends that whether a law is special or general should be determined by its "substance and practical operation, rather than on its title, form or phraseology."
>
> In contrast, DOT and Superferry argue that Act 2 is a general law that does not violate any provision of the Hawaii Constitution. They argue that the correct test for a general law is whether it creates a rationally based classification and whether the law applies to all members of the class created. For the following reasons, we agree with Sierra Club.[179]

In other words, the court rejected traditional rational basis review under which a court will uphold a law if there is any conceivable basis to support it.[180] The Hawai'i Supreme Court's refusal to absolutely defer to the other branches' assertions means that even an emergency measure is subject to a harder look than federal law would allow under *Jacobson*.[181] Emergency

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[174] *Silva*, 115 Hawai'i at 14, 165 P.3d at 260; *Sierra Club*, 120 Hawai'i at 199–200, 202 P.3d at 1244–45.

[175] 115 Hawai'i 1, 165 P.3d 247.

[176] *Id.* at 14, 165 P.3d at 260.

[177] 120 Hawai'i 181, 202 P.3d 1226.

[178] *Id.* at 199–200, 202 P.3d at 1244–45.

[179] *Id.*

[180] *See id.*

[181] *See* Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) (concluding that the only

measures must be backed by ascertainable facts in the record, not mere speculation and conjecture. This is a significant Hawai'i law departure from classic low-intensity federal judicial review of police power measures.[182]

The same motivation that compels courts to abstain from probing inquiries into the justifications for police powers measures generally—a belief in institutional incompetence, the undemocratic nature of the judiciary, for example—might also drive a court to seek other reasons to avoid serving as the vehicle to curb the other branches' exercise of statutory emergency powers. Thus, despite the clear limitations imposed by the automatic termination provision, I question whether the courts would be willing to police how the legislature and the governor implement the emergency power.

I ask first whether—despite lacking the express delegation to extend or renew an emergency declaration—the governor has the implied power to do so, thus permitting her or him to continue exercising emergency powers past the sixty day automatic termination limit.[183] By delegating to the governor the power to plan for, react to, and declare an emergency exists, I argue the legislature also impliedly included the related power to extend an emergency declaration when the situation demands it.[184] After all, the

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limitation is that the police power cannot be exercised in "an arbitrary, unreasonable manner.").

[182] *See* Lana'ians for Sensible Growth v. Land Use Comm'n, 146 Hawai'i 496, 463 P.3d 1153 (2020) (overturning an agency's definition of "potable" water and substituting the court's own view); Hawaii Insurers Council v. Lingle, 120 Hawai'i 51, 61, 201 P.3d 564, 574 (2008) (holding that fees imposed by a state agency were not "taxes" or "user fees," but were "regulatory fees" despite the legislature's claim the exactions were "taxes"); Cnty. of Hawai'i, v. C & J Coupe Fam. Ltd., 119 Hawai'i 352, 198 P.3d 615 (2008) (concluding that in public use rational basis challenges to exercises of eminent domain, courts must take seriously claims that the stated public use is pretextual to a private benefit, and must not simply accept the government's claim at face value that a taking is for a public use or purpose).

[183] *See, e.g.*, GA. CODE ANN. § 38-3-51(a) (West 2014) ("No state of emergency or disaster may continue for longer than 30 days unless renewed by the Governor. The General Assembly by concurrent resolution may terminate a state of emergency or disaster at any time. Thereupon, the Governor shall by appropriate action end the state of emergency or disaster."); IND. CODE § 10-14-3-12(a) (2009) ("The state of disaster emergency continues until the governor: (1) determines that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist; and (2) terminates the state of disaster emergency by executive order or proclamation. A state of disaster emergency may not continue for longer than thirty (30) days unless the state of disaster emergency is renewed by the governor. The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time."); TEX. GOV'T CODE § 418.014 (2009) (limited to thirty days "unless renewed by the governor" or terminated by the legislature "at any time").

[184] *Cf. In re* Kauai Elec. Div. of Citizens Utils. Co., 60 Haw. 166, 179–80, 590 P.2d 524,

legislature expressly noted that "[i]t is the intent of the legislature to provide for and confer comprehensive powers for the purposes stated herein," and consequently, "[t]his chapter shall be liberally construed to effectuate its purposes[.]"[185] That would be consistent with the Hawai'i Supreme Court's frequent acknowledgement "that one provision of a comprehensive statute should be read in context of other provisions of that statute and in light of the general legislative scheme."[186] It would also be consistent with the Hawai'i Supreme Court's historically deferential approach to exertions of government authority to protect the public health.[187]

A court applying Hawai'i law could also avoid the contentious problem of appearing to inject itself into an ongoing crisis by concluding that although section 127A-14's automatic termination requires a hard stop at sixty days, private litigants cannot enforce it. The Hawai'i Supreme Court has developed a long line of decisions analyzing whether a statutory directive also grants a private right of action to enforce it. Mostly tracking the U.S. Supreme Court's rationale in these kind of cases,[188] Hawai'i courts will recognize the ability of a private party to enforce a statute if three factors are met.[189] First, if the plaintiff is a member of the class "for whose especial benefit the statute was enacted."[190] Second, if the legislature intended to create or deny a private remedy.[191] And third, if it is a privately enforceable claim "consistent with the underlying purposes of the

534–35 (1978) (stating that legislative delegation of authority to agency to regulate rates and supervise public utilities necessarily implies the power to grant interim rate increase conditioned on refund provision).

[185] HAW. REV. STAT. § 127A-1(c) (2020); *see also id.* § 127A-1(a)(2) ("To confer upon the governor and upon the mayors of the counties of the State the emergency powers necessary to prepare for and respond to emergencies or disasters. . . ."); Bishop v. City & Cnty. of Honolulu, 32 Haw. 111, 116 (Haw. Terr. 1931) (holding that the City and County of Honolulu may undertake actions not expressly delegated by the legislature under a grant of authority to do things "necessary and proper" to carry out the delegated power); W.C. Peacock & Co. v. Republic of Hawai'i, 12 Haw. 27, 39 (Haw. Terr. 1899) (noting that the federal government had all necessary and proper incidental powers over the Territory).

[186] Kam v. Noh, 70 Haw. 321, 326, 770 P.2d 414, 417–18 (1989).

[187] *See, e.g.*, The King v. Tong Lee, 4 Haw. 335 (Haw. Kingdom 1880) (en banc).

[188] *See* Reliable Collection Agency v. Cole, 59 Haw. 503, 584 P.2d 107 (1978) (first citing Cort v. Ash, 422 U.S. 66 (1975); and then citing Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977)).

[189] *See* Cnty. of Hawai'i v. Ala Loop Homeowners, 123 Haw. 391, 407, 235 P.3d 1103, 1119 (2010) (internal quotation marks omitted) (quoting Pono v. Molokai Ranch, Ltd., 119 Hawai'i 164, 185, 194 P.3d 1126, 1147 (2008), *abrogated* by Tax Found. Haw. v. State, 144 Hawai'i 175 (2019)).

[190] *Id.*

[191] *Id.*

legislative scheme."[192] The court has viewed the private right to sue expansively, but only for a narrow bandwidth of claims, mostly relating to the environment and agricultural rights.[193] Even though the first and third factor would cut in favor of a private right of action, I believe that because of the lack of clear expression of legislative intent to allow private litigants to enforce the emergency management statute, there exists a strong possibility the courts would reject private enforcement of section 127A-14(d)'s time limitations because "legislative intent appears to be the determinative factor,"[194] and there is nothing indicating the legislature intended to make this a justiciable issue.

The closely related political question doctrine also could lead a court away from deciding these types of challenges. In *Trustees of Office of Hawaiian Affairs v. Yamasaki*, for example, the Hawai'i Supreme Court avoided resolving the long-standing question of whether the Office of Hawaiian Affairs was entitled to a fixed 20 percent share of "ceded lands" revenues.[195] Upon annexation by the United States, the Republic of Hawai'i ceded fee ownership of government lands (also known as "Crown lands") to be held in trust, with the derived revenue to be used for specified public purposes.[196] When Hawai'i became a state, the Admission Act noted that the revenue was to be directed for five different purposes.[197] The Office of Hawaiian Affairs was the state agency created to "formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to them."[198] The legislature also adopted a statute that required that twenty percent of the ceded lands revenues "shall be expended" by the

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

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

[194] Alakai Na Keiki, Inc. v. Matayoshi, 127 Hawai'i 263, 285, 277 P.3d 988, 1010 (2012) (internal quotation marks omitted) (quoting Whitey's Boat Cruises, Inc. v. Napali–Kauai Boat Charters, Inc., 110 Hawai'i 302, 313, 132 P.3d 1213, 1224 (2006) (holding that the procurement code created a private right of action, but also holding that the plaintiff could not assert a tort claim)). *See also* Kaleikini v. Yoshioka, 128 Hawai'i 53, 69, 283 P.3d 60, 76 (2012) (statute expressly provided for private enforcement); *Whitey's Boat Cruises*, 110 Hawai'i at 313, 132 P.3d at 1224 (no private right to action to enforce state and county permitting statutes and ordinances); Hungate v. Law Office of David B. Rosen, 139 Hawai'i 394, 406, 391 P.3d 1, 13 (2017) (no private right to action to enforce duties under foreclosure statutes); Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, 113 Hawai'i 77, 85, 148 P.3d 1179, 1187 (2006) (no private right to action for an association to enforce unfair competition statute).

[195] 69 Haw. 154, 737 P.2d 446 (1987).

[196] *Id.* at 159, 737 P.2d at 449.

[197] *See* Admission Act, Pub. L. No. 86-3, § 5, 73 Stat. 4 (1959).

[198] *Yamasaki*, 69 Haw. at 163, 737 P.2d at 452 (internal quotation marks and brackets omitted) (citation omitted).

agency.[199] Yet it remained unclear what percentages and amounts the Office of Hawaiian Affairs was to receive, resulting in what the Supreme Court called an "unsettled state of affairs regarding funds."[200] The Office of Hawaiian Affairs sued various other state agencies and officials, seeking a declaration that it was entitled to a fixed percentage of the damages the State of Hawai'i had received for illegal sand-mining on a parcel of ceded land on Maui, and revenue from major state-owned properties such as Sand Island, the Honolulu International Airport, and the Aloha Tower complex.[201]

The Hawai'i Supreme Court declined to consider this hot-button issue, concluding that the question was political, because the percentage of revenue which the statute required be "expended" by the Office of Hawaiian Affairs was a requirement without enforceable standards:

> Inasmuch as section 10-13.5 simply states "twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter," the task at first sight appears to be one of statutory interpretation. But a closer look at the disputes reveals they do not constitute traditional fare for the judiciary; and if the circuit court ruled on them, it would be intruding in an area committed to the legislature. It would be encroaching on legislative turf because the seemingly clear language of HRS § 10-13.5 actually provides no "judicially discoverable and manageable standards" for resolving the disputes and they cannot be decided without "initial policy determinations of a kind clearly for nonjudicial discretion."[202]

Adjudicating this issue would have forced the Supreme Court into deciding between competing legislative commands, all "couched in all-inclusive terms."[203] The Court declined to choose winners and losers in what appeared to be an intra-government dispute.[204]

A recent decision by the Wisconsin Supreme Court—*Wisconsin Legislature v. Palm*—illustrates one way a court could both recognize the limitations on a governor's power, but at the same time avoid enforcing an individual remedy.[205] In that case, the legislature sought a declaratory ruling

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[199] *See* HAW. REV. STAT. § 10-13.5 (2020).

[200] *Yamasaki*, 69 Haw. at 165, 737 P.2d at 453.

[201] *Id.* at 166, 737 P.2d at 453.

[202] *Id.* at 172–73, 737 P.2d at 457 (1987) (internal brackets omitted) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

[203] *Id.*, at 175, 737 P.2d at 458. A separate statute regarding the airport, for example, directed that "[a]ll moneys received" from rent and other charges "shall be expended" by the Department of Transportation. *Id.* (internal brackets omitted).

[204] *See id.*

[205] *See* 942 N.W.2d 900 (Wis. 2020).

that the state's health secretary's COVID-19 emergency order that allowed only businesses deemed "essential" to remain open, shut down "non-essential" travel, and ordered the populace to remain at home.[206] The health secretary—not the governor—issued the order, and the order did not rely on the governor's earlier emergency declaration.[207] The challengers alleged that the order was a "rule," and could only be promulgated under the rulemaking provisions of Wisconsin law.[208] The majority concluded the order was a rule,[209] and the health secretary could implement it only after adoption under the rulemaking process.[210] The majority emphasized the need for transparency, procedural safeguards, and public trust,[211] but also noted that even the governor's powers to react quickly and decisively to emergencies are curbed by a sixty-day limit.[212] The longer the emergency, the more the time for public input, "[b]ut in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely," and that "60 days is more than enough time to follow rulemaking procedures."[213] Although the court was not presented with an argument that the health secretary's order was illegal because it had expired, this dicta would suggest a narrow reading of automatic time limits in emergency management statutes such as Hawai'i's.[214]

The other rationale supporting the Wisconsin court's majority was separation of powers. The legislature could delegate its authority, but there must be "adequate standards for conducting the allocated power."[215] The majority rejected the health secretary's argument that she possessed the broad authority to implement emergency measures to respond to and control communicable diseases, and this grant of power meant that the scope and effects of the order was beyond the authority of the court to

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[206] *Id.* at 904–05.

[207] *Id.* at 906.

[208] *Id.* at 907 (citing WIS. STAT. § 227.24 (2019) (noting that emergency orders issued without administrative rulemaking are effective only for 60 days, with extensions up to 120 days)).

[209] *Id.* at 910.

[210] *See* WIS. STAT. § 227.24 (stating that emergency rules remain in effect only for 150 days, unless extended).

[211] *See Palm*, 942 N.W.2d at 913.

[212] WIS. STAT. § 323.10 (2020) ("A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature. A copy of the executive order shall be filed with the secretary of state. The executive order may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution.").

[213] *Palm*, 942 N.W.2d at 914 & n.14 (citing WIS. STAT. § 323.10).

[214] *See id.*

[215] *Id.* at 912–13 (internal quotation marks omitted) (quoting Martinez v. DILHR, 478 N.W.2d 582, 585 (Wis. 1992)).

review.[216] The Wisconsin court's majority narrowly construed the terms in the applicable statute, and concluded that the order "goes far beyond what is authorized in [the statute]."[217] For example, the statute permits the health secretary to quarantine persons who are infected with communicable diseases, or who are suspected of being infected,[218] but in the order, the health secretary purported to require all persons in Wisconsin to stay home, with limited exceptions.[219] This, the court concluded, was "an obvious overreach."[220] The *Palm* majority also cautioned against reading too much into broad introductory statements in statutes, instead noting that "imprecise delegations of power to administrative agencies" should be narrowly construed.[221]

The remedy adopted by the Wisconsin Supreme Court majority hints at how courts can both acknowledge the limitations on executive authority, but also be very reluctant to interfere during an ongoing crisis by viewing the remedy as essentially political in nature. Although the court held that the legislature possessed standing to challenge the health secretary's order[222] and entered a declaratory judgment declaring the health secretary's order "unlawful, invalid, and unenforceable," the court declined to enter injunctive or other relief.[223] The majority noted that the court had been considering the arguments for two weeks, and in that time:

> [W]e trust that the Legislature and Palm have placed the interests of the people of Wisconsin first and have been working together in good faith to establish a lawful rule that addresses COVID-19 and its devastating effects on Wisconsin. People, businesses and other institutions need to know how to proceed and what is expected of them. Therefore, we place the responsibility for this future law-making with the Legislature and DHS where it belongs.[224]

This same theme animated Chief Justice Roberts' concurrence in the only challenge to a COVID-19 order to reach the U.S. Supreme Court so far:

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216 *Id.* at 918.

217 *Id.* at 916.

218 *Id.* at 915–16 (citing WIS. STAT. § 252.02(4) (2019)).

219 *Id.* at 916.

220 *Id.*

221 *Id.* at 917 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 225 (2012)).

222 *Id.* at 908 ("The Legislature's claim is grounded in the concept of separation of powers that is inherent in the Wisconsin Constitution. We previously have concluded that petitioners had standing to sue when, as legislators, they claimed that a member of the executive branch invaded the Legislature's core powers. Accordingly, we conclude that the Legislature has standing to proceed on the two claims for which we granted review." (citation omitted)).

223 *Id.* at 918.

224 *Id.*; *see also id.* at 918–19 (Roggensack, C.J., concurring).

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "the safety and the health of the people" to the politically accountable officials of the States "to guard and protect."[225]

If the courts will not adjudicate this issue, then what? Petitioning government and voting—not suing—is the only other check on government power.

B. Individual Enforcement

There's little doubt that a court applying the rule first adopted in *Tong Lee*[226] and applied in countless decisions between then and today[227] would not seriously question the governor's conclusion that an emergency exists, and in all but the most pretextual circumstances, would defer to the judgment of the governor, even without applying the legislature's direction that the governor is the "sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency."[228] In other words, there is little likely to be gained by challenging the actual need or necessity of a declaration of emergency.[229] Hawai'i's courts should, however, examine more closely the means-ends fit between the reasons for action and the tools chosen to respond to an emergency. But even that is a dauntingly high wall for a challenger to overcome and does not directly resolve how—or if—a court would enforce the automatic termination limitation, even if the requirements of the statute are clear. In this section, I argue that the Hawai'i Supreme Court has demonstrated a willingness to resolve this kind of separation of powers claim.

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[225] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

[226] The King v. Tong Lee, 4 Haw. 335 (Haw. Kingdom 1880) (en banc).

[227] *See, e.g.*, State v. Mallan, 86 Hawai'i 440, 446, 950 P.2d 178, 184 (1998) (concluding that "where no fundamental rights or suspect classifications are involved, there is a due process violation only if there is no rational basis to sustain the challenged statute" (internal quotation marks omitted) (quoting Estate of Coates v. Pac. Eng'g, 71 Haw. 358, 363–64, 791 P.2d 1257, 1260 (1990))).

[228] HAW. REV. STAT. § 127A-14(c) (2020); *see also* HAW. REV. STAT. § 127A-2 (2020) (defining a state of emergency as "an occurrence in any part of the State that requires efforts by state government to protect property, public health, welfare, or safety in the event of an emergency or disaster, or to reduce the threat of an emergency or disaster, or to supplement the local efforts of the county.").

[229] *See* § 127A-14(c).

Four years after *Tong Lee*[230] recognized the government's broad power to regulate for the public health, the Kingdom of Hawai'i Supreme Court reaffirmed that extensive authority in *Gibson v. The Steamer Madras*.[231] The court, however, also concluded that establishing the duration of necessary restrictions was an issue analyzed through a much narrower lens.[232] What became known as the "Madras Affair" was part of a larger controversy involving mass immigration from China to Hawai'i and other places in North America.[233] The issue presented was whether the government could recover the costs of isolating an inbound ship and its passengers. The Madras arrived in Honolulu from Hong Kong, and the captain attested "that there was no sickness on board," but also separately pointed out that he knew "he has smallpox on board[.]"[234] The ship was not formally quarantined.[235] Instead, it was held offshore for nearly two months, during which time several passengers escaped by boat or by swimming ashore.[236] In response, the government posted guards to prevent others from doing the same.[237] A month later, the authorities certified that the ship had not reported any new cases for two weeks.[238] The Board informed the captain that the ship would be granted a landing, upon condition that certain passengers would go into further quarantine, and that the ship indemnify the government for all of the incurred expenses.[239] When the captain balked, the Kingdom's Board of Health brought a libel in admiralty, seeking to recover $1,742 it had expended in posting guards to prevent passengers on the Madras from going ashore.[240] In response to the suit for the recovery of the costs of security, the captain asserted he had

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[230] *Tong Lee*, 4 Haw. at 335.

[231] Madras, 5 Haw. 109 (Haw. Kingdom 1884).

[232] *See id.*

[233] *See* RALPH S. KUYKENDALL, THE KALAKAUA DYNASTY 145 (Univ. Haw. Press ed. 1967) ("The Chinese question again forced itself upon the attention of the community in the spring of 1883 when, within a space of six weeks (March 29-May 7), seven steamers brought nearly 3,400 Chinese male immigrants to Honolulu. Five of the steamers came from China and two from San Francisco, but the Chinese on the latter two had been transferred at San Francisco from eastbound trans-Pacific steamers that did not touch at Honolulu. One of the ships, *Madras*, had smallpox on board, but the Hawaiian authorities took prompt and effective measures to prevent the disease from getting on shore.") (footnote omitted).

[234] Madras, 5 Haw. at 109 ("Two of the passengers were at that time sick with the said disease, of which fact the master was aware[.]").

[235] *Id.* at 121 (stating "in the case of the Madras no quarantine regulations were prescribed to be performed.").

[236] *Id.* at 109–10.

[237] *Id.* at 110.

[238] *Id.* at 112.

[239] *Id.* at 113.

[240] *Id.* at 110.

tried to control the escaping passengers, that he had informed the health authorities that several passengers had smallpox, that he hoist a yellow flag (indicating that the ship was in quarantine), and that he asked the authorities to remove the sick passengers to formal quarantine ashore.[241] Thus, he argued, the ship should not be liable for the costs.[242] The court reviewed the Kingdom's quarantine regulations[243] that required the owner of a vessel under quarantine to pay "[a]ll expenses incurred" by the government. The court first noted the "vital necessity" of the quarantine itself:

> There can be no question as to the vital necessity of maintaining a strict surveillance over vessels arriving here with dangerous and contagious diseases on board. It is the duty of the State to protect the public health.[244]

The court recognized that the regulations did not define "quarantine," so it relied on the dictionary definition ("restraint of intercourse" for forty days).[245] The Kingdom had the discretion to tailor the length of isolation, either shortening it to account for "the exigencies of any particular case," or lengthening it by imposing "further quarantine."[246] The question was whether the Madras was in "quarantine" as the term was used (but not defined) in Hawai'i law.[247] The Kingdom's health regulations established the *length* of the quarantine (fifteen days) but did not define the term itself.[248] If the government incurred the security costs while the ship was "in quarantine," the ship would be liable.[249] But if not, there would be no recovery of cost.[250]

The court concluded the vessel had not been placed under quarantine by the April 19 declaration.[251] Yes, some of the crew had been restricted, but the passengers had not been.[252] Importantly, the declaration did not establish a specific length of time for the quarantine, although the regulations set the time as fifteen days for crews and passengers on vessels

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241 *Id.* at 112.

242 *Id.* at 121.

243 HAW. CIV. CODE § 298 (1859) ("All expenses incurred on account of any person, vessel or goods under any quarantine regulations shall be paid by such person or vessel, or owner of such vessel or goods respectively."); *see also* The Steamer Mee Foo, 6 Haw. 294, 295 (Haw. Kingdom 1881) (concluding that the government could not assert two similar claims for reimbursement for quarantine costs and abating the later-filed action).

244 Madras, 5 Haw. at 115.

245 *Id.* at 116 (citing WEBSTER'S DICTIONARY).

246 *Id.* at 116.

247 *Id.* at 116–17.

248 *Id.* at 120.

249 *See id.* at 119–20.

250 *See id.*

251 *Id.* at 121.

252 *Id.*

with smallpox.[253] Even in cases of public health, the ship's owners were entitled to due process: they must have been "made aware of the restraint imposed, and its duration and consequences."[254] With such notice, the ship could have decided whether to remain and be subject to whatever conditions may be imposed, or if not, leave:

> For instance, if a vessel should arrive here from a port infested with cholera, and a quarantine of twelve months should be established for her, it is quite possible that the vessel might not be willing to submit to it, and, if the nature of her voyage admitted of it, she might return to the port whence she came without undergoing quarantine.[255]

In sum, the court considered it imperative at the outset for the government to have told the quarantined persons how long the quarantine will last.[256] But absent that—and other express conditions of quarantine—the ship could not be held liable for the costs.

> If the Madras had been placed in a definite quarantine, and quarantine regulations required her to be watched with guards in patrol boats, or otherwise, during this period, these and whatever expenses were necessarily incurred in maintaining this quarantine would have to be paid by the vessel.[257]

But the authorities had not informed of the length or conditions of the quarantine, and the vessel was "kept in a state of uncertainty for a period of nearly two months, and all the while the expenses were being incurred."[258] If the government had enforced a twenty-one-day quarantine immediately, the expenditure could have been avoided.[259] The court concluded that the government's obligation was to act quickly and transparently, and absent that, the ship could not be liable for the costs.[260] The court accepted the very real danger of smallpox, but noted that the government's action leaving the ship offshore did not lessen the danger, and indeed confining the passengers on board for two months resulted in spreading the disease on the ship.[261] In short, the court was willing to examine the tailoring of the government's

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[253] *Id.* at 117; *see also* HAW. QUARANTINE R. 2 (1880) ("On the arrival of any vessel at any port of this kingdom having had or still having any person sick of smallpox on board, the vessel shall be detained in quarantine; the sick shall be sent to the quarantine hospital, and the crew and passengers shall be submitted to quarantine for fifteen days.").

[254] Madras, 5 Haw. at 117.

[255] *Id.*

[256] *See id.*

[257] *Id.* at 118.

[258] *Id.*

[259] *Id.*

[260] *Id.* at 118–19.

[261] *Id.* at 118.

measure to the actual dangers faced.[262] Chief Justice Judd concluded that the *de facto* quarantine imposed on the Madras was not a "quarantine" as described in the regulations allowing recovery of costs.[263] Thus, the government could not recover all of the expenses it incurred.[264] Rather, the Chief Justice allowed one week of expenses as a reasonable amount.[265] Justice McCully wrote separately (but also for the entire three-Justice court), concluding that the Board had the authority to quarantine a vessel and its passengers "for so long as is necessary to insure that the ship, crew, passengers and freight bring no contagion or infection into the Kingdom, and that when a time is set it may be extended when it appears that it is necessary for the purpose."[266] The court rejected the government's argument that the exigent circumstances of a public health emergency meant that the courts must give the government a lot of leeway in applying regulations.[267] But keeping the ship from landing passengers and instead keeping it offshore and under guard, meant that it was not "quarantined."[268]

The Hawai'i Supreme Court's analysis in a much more recent case involving "holdover" agency commissioners might also shed some light for how the court treats private litigation claims involving the distribution of power among other branches of state government. In *Sierra Club v. Castle & Cooke Homes Hawaii, Inc.*, a commissioner on the State Land Use Commission, who had not been approved by the Hawai'i Senate for a second term, continued to serve until a replacement commissioner was approved.[269] The Sierra Club sought to disqualify the holdover commissioner, and to invalidate anything he had done to consider an application for land use approvals for a controversial housing project.[270] The Commission rejected the Sierra Club's objection and approved the

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[262] *See id.* at 119.

[263] *Id.*

[264] *Id.*

[265] *Id.* The owners of The Madras later brought suit—and prevailed—for damages to the ship by the government's refusal to allow the ship to land, but instead "with force and arms for a period of about fifty-three days from the said 10th day of April, A.D. 1883, to the 4th day of June, A.D. 1883, or thereabouts, prevented and detained the said Madras from coming inside of the said port of Honolulu, from entering at the said Custom House, from landing any of the said passengers in quarantine or otherwise, and during this period of time neglected and refused to establish any quarantine to be performed by the said Madras, though requested to do so by the representatives of the plaintiffs[.]" Chapman v. Hawaiian Gov't, 8 Haw. 653, 654 (Haw. Kingdom 1887).

[266] Madras, 5 Haw. at 121.

[267] *See id.*

[268] *Id.*

[269] 132 Hawai'i 184, 320 P.3d 849 (2013).

[270] *Id.* at 186, 320 P.3d at 851.

project, with the holdover commissioner casting the deciding vote.[271] The Hawai'i Supreme Court concluded that the commissioner did not qualify under the statute as a "holdover" member, nor was he a *de facto* commissioner.[272] The statute allowed for holdover commissioners, but only if they are "not disqualified."[273] Relying on a popular and law dictionaries' definition of "disqualified," the court concluded that the commissioner had been disqualified by virtue of the Senate's rejection of his nomination for an additional term on the Commission.[274] The court rejected the Intermediate Court of Appeals' reasoning that the commissioner was not disqualified by Senate rejection (and could only be disqualified by the two-term limit on commissioners).[275] The Supreme Court held that the Senate's authority to reject a commissioner for an additional term would be thwarted if the statute was read as allowing a commissioner to occupy a seat even after the Senate had rejected another term, simply because a new commissioner had not yet been confirmed.[276] Otherwise, the Senate's advice and consent power would be diminished, allowing the executive to "bypass the will of the Senate."[277] Despite this deciding separation of powers rationale, the court undertook no analysis of whether the holdover requirements were privately enforceable, or even considered such an argument. The Hawai'i Senate was not a party in the litigation.

The *Sierra Club* court also rejected a theory very similar to the idea that the emergency statutes allow the governor to employ supplemental emergency declarations in lieu of "separate" declarations if responding to an emergency that lasts longer than sixty days.[278] The Commission in *Sierra Club* argued that allowing a commissioner to continue to serve even

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[271] *Id.*

[272] *Id.* at 201, 320 P.3d at 866.

[273] *See* HAW. REV. STAT. § 26-34(b) (2019) ("Any member of a board or commission whose term has expired and who is not disqualified for membership under subsection (a) may continue in office as a holdover member until a successor is nominated and appointed; provided that a holdover member shall not hold office beyond the end of the second regular legislative session following the expiration of the member's term of office.").

[274] *Sierra Club*, 132 Hawai'i at 193, 320 P.3d at 858 ("Therefore, a member who is nominated but rejected by the Senate is 'disqualified' from serving as a holdover member.").

[275] *Id.*

[276] *Id.* ("Under the ICA's interpretation, the Senate would have no recourse during this time to terminate the member's holdover status despite rejecting the member's nomination for a second term. Yet, if it was the legislature's intent to so restrict its power and to limit the members who could be disqualified from serving as holdovers, the legislature could have simply disqualified any member who had served more than two terms. Instead, the legislature referenced 'subsection (a)' in its entirety to define the way a member is 'disqualified' from serving as a holdover member.").

[277] *Id.* at 196, 320 P.3d at 861.

[278] *See id.*

after the Senate's rejection of a second term did not infringe on the Senate's advise and consent role because the Senate had already consented to the commissioner's first term, and the holdover period should simply be viewed as an extension of that term, and not a second, independent term.[279] The court concluded that in light of the Senate's rejection of a second term, it could not be said that the Senate impliedly consented to the continuing service of the commissioner.[280] The Senate's express rejection of a second term rejected any implied consent.[281] The court determined that the actions of the Commission undertaken while the Senate-rejected holdover remained were void.[282]

Applying this rationale to the question of whether a supplemental emergency declaration qualifies as a "separate" declaration under section 127A-14(d) (thus allowing the governor to avoid the automatic termination requirement) should lead a court to conclude that a supplemental declaration does not qualify, and that the governor should either issue a new declaration, or lose authority to act after sixty days. In order for the delegation of emergency response power from the legislature to the governor to be valid under the nondelegation doctrine,[283] the delegation must not be standardless, but must include guidelines for how that power is exercised.[284] In section 127A-14, in the delegation of authority to the governor, the legislature provided such guidelines, expressly limiting the governor's power to sixty days, unless the governor issues a new proclamation.[285] After that time, and in the absence of a separate declaration (which also has the effect of terminating the prior declaration), the power devolves back to the legislature.[286]

The Hawai'i Supreme Court also has employed a broad approach to standing and recognizing individual claims overcoming separation of powers claims, especially those based on mandatory government actions. For example, in *Schwab v. Ariyoshi*,[287] the court considered whether the legislature improperly adopted a bill by procedures that were alleged to

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[279] *See id.*

[280] *Id.*

[281] *Id.*

[282] *Id.* at 206, 320 P.3d at 871.

[283] *See* State v. Willburn, 49 Haw. 651, 426 P.2d 626 (1967) (recognizing the nondelegation doctrine under Hawai'i constitutional law).

[284] *See, e.g.*, *In re* Application of Kauai Elec. Div. of Citizens Util. Co., 60 Haw. 166, 180–81, 590 P.2d 524, 535 (1978) (determining that legislative delegation of authority to agency to regulate rates and supervise public utilities necessarily implies the power to grant interim rate increase conditioned on refund provision).

[285] HAW. REV. STAT. § 127A-14(d) (2019).

[286] *Id.*

[287] 58 Haw. 25, 564 P.2d 135 (1977).

have violated the Constitution's requirement that a bill "embrace but one subject."[288] The bill—entitled "A Bill for an Act Making Appropriations for Salaries and Other Adjustments, Including Cost Items of Collective Bargaining Agreements Covering Public Employees and Officers"—was intended to "ratify the salary increases" that certain unionized public employees had achieved by collective bargaining with the State.[289] The court noted that "various amendments were made" along the way, but that "the title of the bill was not touched or amended."[290] The "various amendments" included broadening the scope of the bill to nonunion government employees who were not covered by the collective bargaining agreements.[291] Thus, the taxpayer plaintiffs argued that the bill "embraced" two subjects: the salaries of unionized government employees, and the salaries of nonunion government employees.[292]

The court expressed no hesitation about considering the arguments and concluded that the bill was not contrary to the "one subject" requirement in Article III of the Hawaii Constitution because "[a]ll parts of the bill embrace one general subject, to wit: salaries."[293] Yes, the particular classes of employees covered by the bill had been expanded between introduction and enactment, but government employee salaries "are so connected and related to each other, either logically or in popular under-standing, as to be parts of or germane to that general subject."[294] The court held that applying a "liberal construction" of the constitutional requirement meant that as long as the initial title of the bill—making appropriations for salaries "including" union employees—was "in the ordinary mind the general subject of the act," and thus generally related to the subsequent amendments (which simply also included nonunion employees), the bill was constitutionally adopted.[295] The court declined to delve too deeply into whether the bill "could have been composed in language which would have been clearer and more precise,"[296] and concluded that "[t]he power of the legislature should not be interfered with unless it is exercised in a manner which plainly conflicts with some higher law."[297] Thus, the legislature's power to determine the content of a bill and the legislature's discretion to amend

[288] *Id.* at 30, 564 P.2d at 139.
[289] *Id.* at 27, 564 P.2d at 137.
[290] *Id.* at 27, 564 P.2d at 140.
[291] *Id.* at 27–28, 564 P.2d at 137–38.
[292] *Id.* at 30, 564 P.2d at 139.
[293] *Id.* at 33, 564 P.2d at 140.
[294] *Id.*
[295] *Id.* at 34, 564 P.2d at 141.
[296] *Id.*
[297] *Id.* at 39, 564 P.2d at 144.

proposals after introduction, is limited by "some higher law" (the three readings requirement), which requires that if a measure is revised so that the amendment is "dissimilar or discordant" with the original, the reading count must reboot.[298] The court did not simply defer to the legislature's claim that the subject of the bill (in its different iterations) could conceivably be related to the title, but reserved the question for judicial resolution, although with appropriate deference to the legislature's judgment.[299] The court noted that a finding that the title of a bill embraced more than one subject would empower the court to strike it down as unconstitutional if the challenger proves "unconstitutionality beyond a reasonable doubt" by showing that the constitutional infirmity is "plain, clear, manifest, and unmistakable."[300] This same standard should govern a court's review of an individual's claim that the governor's supplemental proclamations violate the automatic termination provision.

Similarly, in *Taomae v. Lingle*, the court expressed no hesitation in enforcing a private claim.[301] The court confirmed the essential role of the judiciary in the separation of powers structure and held that to give life to the three readings requirement—and more importantly to the vital public participation which the requirement serves—courts must carefully review claims that the legislature failed to follow the required process.[302] Understanding that case's timeline is critical to grasping the court's rationale. Taomae asserted that an amendment to the Constitution proposed by the legislature was not validly adopted because the amendment had not been read three times by each house of the legislature.[303] The State argued the bill had been read three times in both the Senate and the House (indeed, it had been read four times in the House).[304] The court noted that the House introduced the bill ("A Bill for an Act Relating to Sexual Assault") and

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[298] *See id.* at 33, 564 P.2d at 140 ("These parts are not and cannot be held to be dissimilar or discordant subjects which would render the act unconstitutional.") (citing Johnson v. Harrison, 50 N.W. 923, 924 (Minn. 1894) ("To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subject that by no fair intendment can be considered as having any legitimate connection with or relation to each other.")).

[299] *Schwab*, 58 Haw. at 33, 564 P.2d at 140.

[300] *Id.* at 31, 564 P.2d at 139.

[301] 108 Hawai'i 245, 118 P.3d 1188 (2005).

[302] *Id.* at 255, 118 P.3d at 1198. *See also* HAW. CONST. art. III, § 15 ("No bill shall become law unless it shall pass three readings in each house on separate days. No bill shall pass third or final reading in either house unless printed copies of the bill in the form to be passed shall have been made available to the members of that house for at least forty-eight hours.").

[303] *Taomae*, 108 Hawai'i at 254, 118 P.3d at 1197 (citing HAW. CONST. art. III, § 15) (reaffirming that constitutional amendments proposed by the legislature must "be passed 'in the manner required for legislation.'").

[304] *Id.* at 248–49, 118 P.3d at 1191–92.

over the course of the next month, amended the bill and held readings three times.[305] The bill then moved to the Senate. After the first reading there, the Attorney General opined that a statutory amendment alone would not accomplish the goal (to overturn a criminal law ruling by the Supreme Court), and the Constitution also needed to be amended to empower the legislature to define certain terms.[306] In response, the Senate amended the bill to "add a constitutional amendment."[307] The amended bill then was read two more times in the Senate and after being sent back to the House was read there an additional time (what the court termed a "final" reading), after which it was placed on the ballot.[308] The State argued the bill was valid under Article III, section 15, because the total of seven readings of the bill more than met the "three readings in each house" requirement.[309] The state supreme court rejected the argument:

> [T]he legislature failed to satisfy the requirement set forth in article XVII, section 3, that a proposed constitutional amendment be passed "in the manner required for legislation" because the constitutional amendment, see §§ 1 and 2 of the bill, did not receive three readings in each house as required by article III, section 15. The plain reading of article XVII, section 3 requires that a proposed constitutional amendment advance though the processes set forth in article III, section 15, including the requirement that "[n]o bill shall become law unless it shall pass three reading in each house on separate days."[310]

The court held "[i]n this instance, the constitutional amendment included in H.B. 2789, H.D. 1, S.D. 1 received only three readings in total."[311] The court emphasized the "critical purpose" of the three readings requirement: "full debate," and "that each house of the legislature has given sufficient consideration to the effect of the bill."[312] The court noted that "the bill in its final form, including the constitutional amendment" was read only twice in the Senate and once in the House, and "[t]his was a patent violation of article III, section 15."[313] Because the court exercised original jurisdiction in *Taomae*, it applied *Schwab*'s burden of proof, and concluded:

> In light of the foregoing reasons, we also conclude that the failure to give the proposed constitutional amendment three readings in each house on separate

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[305] *Id.* at 249, 118 P.3d at 1192.

[306] *Id.*

[307] *Id.* at 253, 118 P.3d at 1195.

[308] *Id.* at 249–50, 118 P.3d at 1192–93.

[309] *Id.* at 253–54, 118 P.3d at 1196–97.

[310] *Id.* at 254, 118 P.3d at 1197 (citing HAW. CONST. art. III, § 15).

[311] *Id.*

[312] *Id.* at 255, 118 P.3d at 1198 (citing Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951) (Jackson, J., concurring)).

[313] *Id.* at 254, 118 P.3d at 1197.

> days was a plain, clear, unmistakable violation of the constitution beyond a reasonable doubt.[314]

In short, the substantial change in the substance of the bill rendered all prior readings ineffective, and the Hawaii Constitution required a reboot of the process.

These decisions, especially in light of the tighter reading of emergency powers in *Madras*, should overcome any objections that the automatic termination requirement in the emergency response statute is merely an aspirational goal, or a limitation on the governor's power that only can be enforced through political processes.

VI. SUGGESTIONS FOR REFORM

Despite my conclusion that the courts should not be reluctant to enforce the sole democratic check on the executive's emergency powers by maintaining the clear statutory emergency power boundaries between the other two branches, I do not think either of the two possible narrative threads highlighted above presents an obvious answer to whether the time limitation will be enforced by the courts, and if so by whom. This accounts for my lack of confidence that a court considering a claim for private enforcement could be convinced to overcome the judiciary's institutional reluctance to act during a crisis where the environment is rapidly changing, and courts have no institutional or constitutional legitimacy to respond to an emergency other than to enforce the law.[315] Should that occur, the power is left where it has always been, in the hands of the people and the branch most directly responsive to their influence: the legislature. Of course, what I term the "playground constitution"—the law as the public perceives it to be—must also be considered. After all, the public's compliance with severe and repeated emergency response measures over a long period of time is largely dependent upon voluntarily compliance and ultimately, an acceptance of the legality, necessity, and proportionality of the response.[316]

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[314] *Id.* at 255, 118 P.3d at 1198.

[315] *See, e.g.*, Wis. Legislature v. Palm, 942 N.W.2d 900, 917 (Wis. 2020).

[316] *See, e.g.*, A. Kam Napier, *Pupu Platter: Could there be a third Hawaii Covid lockdown?*, PAC. BUS. NEWS (Oct. 23, 2020), https://www.bizjournals.com/pacific/news/2020/10/23/experts-against-lockdowns.html ("Lockdowns were always a choice, and lockdowns predicated on case counts were always a disastrous choice. . . . Expecting people to behave perfectly, and punishing them economically when they don't, is absurd."). *Cf.* Josh Campbell, *Trapped in paradise: Breaking quarantine could mean prison time for tourists in Hawaii*, CNN (May 11, 2020), https://www.cnn.com/travel/article/hawaii-tourist-arrests-quarantine/index.html ("Roving neighborhood police patrols. Uniformed soldiers manning checkpoints. A vast surveillance

In light of the express limitation on the executive's unilateral emergency powers in the statute, it should not be a surprise if the public questions the executive's authority to impose measures after the expiration of the clear statutory period.[317] Technical legal distinctions and wordsmithing—drawing a distinction between a new and a "supplemental" proclamation, for example—may be rightly perceived as simply ignoring the statutory requirements, leading to a lack of public confidence or trust, and resistance to what otherwise might be acceptable measures.

If nothing else, the COVID-19 public health emergency has dramatically exposed the statute's flaws. Hawai'i's governor—and to some extent the county mayors[318]—is exercising his emergency powers by adopting and enforcing sweeping measures that have in many cases indefinitely and severely limit private contractual rights and the normal operation of the economy, freedom to travel, the usual functioning of government (including government transparency), all for a time longer than section 127A-14 contemplates. Hawai'i's statute should be clarified to affirm that sixty days is a hard stop on the governor's power, after which she must reassess the

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network of hotel staff and health department officials on the lookout for anyone breaking quarantine. This isn't an authoritarian dictatorship. It's the US state of Hawaii, where officials have been enforcing some of the strictest measures in the country aimed at stopping the spread of the coronavirus.").

[317] *See, e.g.*, David Lazer, Matthew A. Baum, Katherine Ognyanova, & John Della Volpe, *The State of the Nation: A 50-State COVID-19 Survey* at 15 (Apr. 2020), https://kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%2012%20APPROVAL%20SEP%202020.pdf (noting Hawai'i's "relatively low" public rating that government is "reacting properly"); Andrew Solender, *Governors Who Took Strict Covid-19 Measures Enjoy Highest Approval, Survey Shows*, FORBES (Sep. 15, 2020), https://www.forbes.com/sites/andrewsolender/2020/09/15/governors-who-took-strict-covid-19-measures-enjoy-highest-approval-survey-shows/?sh=3fff5175340b ("The bottom of the list also features several governors in Western states, such as Kate Brown (D-Ore.) and David Ige (D-Hawaii), as well as Brad Little (R-Idaho) and Kevin Stitt (R-Okla.), all under 40%."); *see also With tourism at a standstill, governor says he's preparing for $1.5B in cuts to state's budget*, HAW. NEWS NOW (Apr. 15, 2020), https://www.hawaiinewsnow.com/2020/04/15/live-governor-outlines-states-covid-response-hawaiis-case-counts-grows/ ("Gov. David Ige made the comments at a news conference Wednesday, during which he was peppered with questions about his administration's proposed pay cuts of up to 20% for state employees. Ige would not confirm the reports, saying he was still in talks with unions. But when asked whether he could impose the pay cuts unilaterally, he said he could. 'I do have the authority to enact many different actions in order to continue the operations of the state,' he said. He added that 'all options' for balancing the budget are on the table. Public sector unions have called the proposed cuts draconian and unacceptable.").

[318] *See, e.g.*, Jennifer Sinco Kelleher, *Hawaii mayor: Florida man flouting quarantine was 'covidiot'*, ASSOCIATED PRESS (Apr. 8, 2020), https://apnews.com/article/d7f739e44fbb2dc07e552d33bb92d9fc.

necessity. If the courts indeed cannot be convinced to enforce the temporal check on the governor's power during an emergency, the legislature should amend section 127A-14 at the earliest opportunity to clarify that the governor is only delegated the emergency power for a limited time, after which the legislature has an essential role, and that the governor cannot act in derogation of the temporary power by indefinitely extending an emergency proclamation by "supplemental" proclamations.

I suggest these amendments would make the limits of the governor's and the legislature's respective authorities clearer:

> **§127A-14 State of emergency.** (a) The governor may declare the existence of a state of emergency in the State by proclamation if the governor finds that an emergency or disaster has occurred or that there is imminent danger or threat of an emergency or disaster in any portion of the State. The proclamation shall state with particularity the automatic termination date of the state of emergency, which shall be no more than sixty days after the date the proclamation is issued.
>
> (b) A mayor may declare the existence of a local state of emergency in the county by proclamation if the mayor finds that an emergency or disaster has occurred or that there is imminent danger or threat of an emergency or disaster in any portion of the county. The proclamation shall state with particularity the automatic termination date of the local state of emergency, which shall be no more than sixty days after the date the proclamation is issued.
>
> (c) The governor or mayor shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency in the State or a local state of emergency in the county, as applicable. This section shall not limit the power and authority of the governor under section 127A-13(a)(5).
>
> (d) A state of emergency and a local state of emergency shall not be effective more than ~~terminate automatically~~ sixty days after the issuance of a proclamation of a state of emergency or local state of emergency, respectively, and all such proclamations shall terminate automatically sixty days after issued. If an emergency continues more than sixty days, the governor or mayor may issue~~, or by~~ a new, separate proclamation ~~of the governor or mayor~~ setting forth the reasons for issuing the new proclamation, and including a termination date for the state of emergency or local state of emergency, respectively, which shall be no more than sixty day after the new proclamation is issued~~, whichever occurs first~~. The governor or mayor may not issue a supplemental proclamation that extends any emergency declaration beyond sixty days from the date of the original proclamation. At any time, by concurrent resolution the legislature may declare that a state of emergency or local state of emergency is terminated.

As under the present statute, the delegation would have a time-limited hard stop. But the legislature's responsibility to check the governor's power will also be made more explicit, as would be the governor's authority to respond to emergencies that last longer than sixty days, provided she explains why it is necessary to do so by rebooting the proclamation process. The suggested amendment would also make clear the legislature's authority to end any emergency declaration at any time. If these suggestions are not deemed worthwhile, the legislature has a host of examples of similar statutory language from other jurisdictions that would work equally well.[319]

VII. CONCLUSION

There is more than sufficient historical precedent for a court today to enforce the temporal limitation on the governor's power under Hawai'i's emergency preparation and response statute. Whether the courts will do so remains to be seen. That being so, the surest avenue to enforce the separation of powers rationale behind the sixty-day hard stop limit on emergency proclamations is to Spam® up for now and amend the statute at the earliest opportunity.

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[319] *See, e.g.*, CAL. GOV'T. CODE § 8630(b)–(d) (2020); GA. CODE ANN. § 38-3-51(a) (2014); IND. CODE § 10-14-3-12(a) (2020); NEV. REV. STAT. § 414.070 (2020); N.H. STAT. ANN. § 4:45II(a) (year); N.M. STAT. ANN. § 12-10A-5 (2018); N.D. CENT. CODE § 37-17.1-05 (2019); PA. STAT. § 7301(c) (2020); R.I. STAT. § 30-15-9 (2020); S.D. CODE § 34-48A-5 (2020); TEX. GOV'T CODE § 418.014 (2020); UTAH CODE § 53-2a-206 (2020); W. VA. CODE § 15-5-6(b) (2020).

No Vacancy or Open for Business? Making Accommodations for Digital Platform Short-Term Rentals in Major American Municipalities

Braedon Sims and Jordan Carr Peterson*

Technological development encourages changes in the law if new technology sufficiently reorders organizational or individual practices such that citizens, businesses, and governments encounter a new social or economic reality as a result of technological change. Internet platform companies create particular dilemmas for public officials who must try to harness the efficiency gains associated with the platform economy while minimizing the proliferation of negative externalities it encourages. In this Article, we consider the opportunities and challenges created for local governments by the rise of digital, peer-to-peer short-term rental platforms such as Airbnb by analyzing the regulatory provisions governing transient accommodations in residential zones from municipal ordinances across 219 major cities in the United States.

We situate developments in land use policy related to transient accommodations alongside other instances of technologically induced changes in the law, and consider the extent to which attempts to regulate short-term rentals mirror efforts to integrate other sectors from the sharing economy into the regulated sphere. We explain the geography and function of municipal ordinances governing the short-term rental marketplace nationwide, and analyze the different purposes most likely served by each regulatory mechanism by evaluating the manner in which the various approaches to regulating short-term rentals allocate burdens and benefits in the local community. In addition to providing a full overview of the regulatory landscape governing short-term rental activity in residential zones in major

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* Braedon Sims, B.A. Candidate, Texas Christian University (expected Spring 2021). Jordan Carr Peterson, Assistant Professor of Political Science, School of Public and International Affairs, North Carolina State University; Ph.D., University of Southern California (2018); J.D., University of Florida Levin College of Law (2012); B.A., University of Southern California (2008). We would like to acknowledge the C. Boyden Gray Center for the Study of the Administrative State at the Antonin Scalia Law School at George Mason University for its support of this research as well as the opportunity to present at its research roundtable on regulating internet platform companies. Additionally, we appreciate commentary and feedback on earlier drafts of this work from Jennifer Huddleston, Andrew Kloster, Adam Mossoff, Nolan McCarty, Nicholas G. Napolio, Mike Sances, Brent Skorup, and Adam White.

American municipalities, we offer evidence from detailed case studies of the lawmaking process in three significant municipalities whose approach to regulating transient accommodations in residential neighborhoods is either especially stringent, informed by laissez faire principles, or relatively balanced in scope and nature. These case studies in regulation include an analysis of the policy process via close readings of primary sources such as city council minutes and records, and permit us to investigate how different permutations of local interests inform the regulatory processes regarding land use in municipal governments. We conclude by advocating for local officials to be permitted flexibility to regulate short-term rentals using the means most consistent with their particular community's needs.

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INTRODUCTION

Technological advancements beget changes in law, if not always immediately.[1] The extensive mechanization of the American economy during the Industrial Revolution permitted dramatic increases in productive capacity while rendering occupational circumstances in the American workplace much more dangerous.[2] Technological developments, particularly in manufacturing, led to a proliferation of industrial accidents and induced demand for a new scheme of injury compensation via modifications to American tort law, culminating in the widespread adoption of workers' compensation regimes in the first half of the twentieth century.[3] Likewise, the rise of the internet as a forum for expression lowered the costs of circulating information, allowing for more democratic participation in content production, but complicated existing notions of publisher liability since online content distributors played an extremely limited role in content generation as compared with traditional publishers.[4] Congress addressed this legal uncertainty in 1996 by enacting Section 230 of the Communications Decency Act, which granted broad immunity to online content distributors as regards user-generated content.[5] In essence,

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[1] *See, e.g.*, Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403 (2013) (analyzing whether and how courts should apply the Fourth Amendment guarantee against unreasonable searches and seizures to cellular phones seized incident to valid arrests); Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to Keep Up with Technological Change*, 2007 UNIV. ILL. J.L. TECH & POL'Y 239 (2007) (examining various attempts to assure legal rules continue to operate effectively as technological circumstances change over time); Monroe E. Price and John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976 (1997) (evaluating legislative and judicial action related to telecommunications policy in the face of rapid technological change).

[2] Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 51–52 (1967).

[3] *See generally id.* Early in the Industrial Revolution, courts shielded corporate defendants from liability in workplace accidents through such means as enacting the fellow servant rule—which acted as a bar on employer liability if one employee was harmed by another employee's negligence—and introducing into popular use affirmative defenses such as the doctrines of contributory negligence and assumption of risk. *Id.* at 58; *see also* Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946) (tracing the emergence of contributory negligence to judicial skepticism of jury trials against corporate defendants in the nineteenth century). Eventually, labor's frustration with the aforementioned developments in the common law of industrial accidents led to the widespread adoption of statutory workers' compensation regimes. *See* Friedman & Ladinsky, *supra* note 2, at 65–72.

[4] Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 635, 635–36 (2020).

[5] *See* 47 U.S.C. § 230(c)(1) (2018); *see also* Skorup & Huddleston, *supra* note 4, at

technological change alters the opportunity structure for policy revision by leaving status quo laws insufficient to address the political, social, and economic needs of individuals and businesses operating in a new reality.

Like its system of compensation for occupational injuries or liability rules for disputes arising out of speech by third parties, a community's land use policy represents an expression of its public values.[6] Most American cities regulate development through the enactment of zoning ordinances, which stretch almost without exception into the many hundreds of pages and govern nearly every imaginable use of urban land.[7] First introduced by major American cities in the 1910s, comprehensive municipal zoning statutes—which establish use and dimensional regulations for the development of land citywide—generally divide urban space into residential, commercial, or industrial districts, ostensibly to maintain separate spheres of development that keep the relative tranquility of home life geographically removed from the noise, traffic, and pollution associated with commercial and industrial activity.[8] While zoning ordinances have proved controversial both as an unreasonable restriction on property rights[9] and as a means of institutionalizing social and economic inequities,[10] the

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[6] *See generally* WILLIAM A. FISCHEL, ZONING RULES! THE ECONOMICS OF LAND USE REGULATION (2015) (suggesting that communities prioritize real estate investments by conceiving of zoning as a collective property right); SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION (2014) (arguing that ideals of the American framers regarding what qualifies as desirable living space undergird the preeminence of single-family residential zoning in the United States); JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE (2006) (contending that extensive single-family residential zoning distorts the operation of a free market in real estate development).

[7] *See, e.g.*, JACKSONVILLE, FLA., CODE ch. 656 (comprising sixteen parts governing municipal standards for a diverse array of land uses, from the minimum acreage for a mobile home park, in section 656.503, to the maximum depth of an excavated pit unearthed to create a manmade lake or pond, in section 656.904).

[8] *See* Sonia Hirt, *Mixed Use by Default: How the Europeans (Don't) Zone*, 27 J. PLAN. LITERATURE 375, 376–77 (2012). Cities designate further subdivisions within these broader categories of zones based on the characteristics of their intended use, with single-family residential zones generally considered to receive the highest degree of legal protection from intrusive development. William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317, 317–18 (2004).

[9] *See* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 416–24 (1977); Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 578–82 (1990).

[10] *See* Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1125 (2010); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21

Supreme Court has held that enacting a comprehensive zoning plan is a permissible exercise of a local government's police power.[11]

Contemporary municipal governments, along the lines of lawmaking institutions reckoning with rapid technological development in the past, bear the responsibility of ensuring that their zoning regulations continue to fulfill community demands as peer-to-peer digital platforms like Airbnb transform the conventional range of uses for traditionally residential land.[12] With owners and occupants of property in residential zones increasingly offering their dwellings to travelers as short-term accommodations, cities must decide whether and to what degree they will tolerate rental activity in residential neighborhoods.[13] In June 2015, the Los Angeles City Council confronted exactly that choice by passing a motion directing the city's Planning and Land Use Management Committee to prepare an ordinance governing the permissibility of short-term rental activity in residential zones.[14] At that stage, offering dwellings in residential zones as transient accommodation—in other words, short-term rental use—was in all likelihood presumptively illegal as it constituted commercial activity in a residential zone.[15] Recognizing that "technology and innovation have expanded and fundamentally changed the way people travel and vacation," the council directed the planning committee to draft an ordinance that "[a]uthorizes a host to rent all or part of their primary residence to short-term visitors" but that "[p]rohibits hosts from renting units or buildings that are not their primary residence or are units covered by the Rent Stabilization Ordinance," and that mandates the remittance of transient occupancy taxes to the city by short-term rental hosts.[16] The council's expression of its desire to enact an ordinance that limited but did not proscribe short-term rental activity in residential zones engendered trenchant disapproval from local groups in the Los Angeles metropolitan area, such as the Benedict Canyon Association, which responded to the

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STAN. L. REV. 767, 780–82 (1969).

[11] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926); Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[12] *See generally* Jake Wegmann & Junfeng Jiao, *Taming Airbnb: Toward guiding principles for local regulation of urban vacation rentals based on empirical results from five U.S. cities*, 69 LAND USE POL'Y 494 (2017).

[13] *See* Cory Scanlon, *Re-zoning the Sharing Economy: Municipal Authority to Regulate Short-Term Rentals of Real Property*, 70 SMU L. REV. 563, 566 (2017).

[14] Los Angeles City Council, Motion referred to Planning and Land Use Management Committee (June 2, 2015), https://clkrep.lacity.org/onlinedocs/2014/14-1635-S2_mot_06-02-2015.pdf.

[15] *See id.* ("The City's current zoning regulations do not anticipate or effectively govern short-term rentals. . . .").

[16] *Id.*

council's announcement by suggesting that the proposed ordinance "effectively creates a zoning change [for their single-family residential area] to 'Motel'" and that "[h]aving short term neighbors significantly alters the character and peace and quiet of our residential neighborhood."[17] This opposition notwithstanding, the council proceeded apace with the regulatory process and ultimately finalized its home-sharing ordinance in May 2018.[18]

This Article analyzes the choices made by municipal governments facing the same sort of situation as that addressed by the Los Angeles City Council in the anecdote above. Namely, we consider the regulatory tools employed by local officials attempting to ensure their city's land use policy continues to effectively accomplish its aims given changes in patterns of economic activity due to technological developments, while simultaneously mitigating tension among stakeholders in debates over the encroachment of the short-term rental market into residential neighborhoods. Part I describes the development of the market for digital-platform transient accommodations, considers the costs and benefits of increased short-term rental activity in residential zones, and presents the unique challenges inherent in regulating aspects of the sharing economy. Part II introduces the results of our analysis of municipal zoning ordinances in 219 major American cities, articulates a typology of regulatory features found in our sample, and evaluates the different sorts of social, economic, or political interests likely served by each regulatory mechanism. Part III investigates the regulatory paths taken in three cities whose officials demonstrate notably divergent estimations regarding how the law should treat short-term rental activity in residential zones. Part IV concludes by discouraging a uniform approach to transient accommodations across heterogeneous municipalities, and instead advocates for flexibility in the regulation of short-term rentals in residential zones based on community and municipal needs.

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[17] Benedict Canyon Association, Testimony *Regarding the Motion to Prepare an Ordinance Governing Short Term Rentals* (Jun. 21, 2015), https://clkrep.lacity.org/onlinedocs/2014/14-1635-S2_cis_8-21-15.pdf. The Benedict Canyon Association is a homeowners' group near Beverly Hills whose stated goal is "to preserve the beauty, safety, and quality of life in Benedict Canyon" and which maintains that it "has remained non-political in its 74-year history." BENEDICT CANYON ASS'N, https://www.benedictcanyonassociation.org/ (last visited Aug. 6, 2020).

[18] L.A. CITY COUNCIL, PLAN. AND LAND USE MGMT. AND HOUS. COMM., FILE NO. 14-1625-S2, PLANNING AND LAND USE MANAGEMENT AND HOUSING COMMITTEE'S REPORTS (2018) https://clkrep.lacity.org/onlinedocs/2014/14-1635-S2_CA_05-04-2018.pdf.

I. THE RISE AND RAMIFICATIONS OF DIGITAL PLATFORM SHORT-TERM RENTALS

A. The Nascence and Growth of Digital Platform Transient Accommodations

In October 2007, Brian Chesky and Joe Gebbia informally founded what would become the gold standard for digital, peer-to-peer short-term rental platforms when they rented out several air mattresses in their San Francisco apartment during an international design conference to compensate for their landlord having increased their rent to 125% of its prior rate.[19] A year later, they officially founded Airbnb the firm. After securing startup capital from venture firm Y Combinator,[20] the company was on the road to worldwide success as the centerpiece in the accommodations sector of the sharing economy. By 2009, Airbnb listed an estimated 2,500 rental units nationwide, and its listings began to diversify.[21] For instance, while some hosts merely provided a sofa or extra bedroom, many began to list entire houses or apartments on the site.[22] Current estimates provided by Airbnb indicate the site makes available seven million unique places to stay in over 100,000 cities in over 220 countries and regions.[23] In the past two years, Airbnb has also expanded its web platform to include not just transient accommodations ("stays"), but also "experiences," "adventures," and "restaurants," and the firm's recently estimated internal valuation was about $38 billion.[24] Likewise, Airbnb is by no means alone in the digital-platform short-term rental market; its competitor firms include, but are not limited to, prominent companies such as Vrbo (Vacation Rental By Owner),[25] HouseTrip,[26] and TripAdvisor's FlipKey.[27]

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[19] Kate Bramson, *Airbnb's launch holds lessons for RISD grads, co-founder says*, PROVIDENCE J. (June 3, 2017), https://www.providencejournal.com/news/20170603/airbnbs-launch-holds-lesson-for-risd-grads-co-founder-says.

[20] Leena Rao, *Y Combinator's Airbed and Breakfast Casts a Wider Net for Housing Rentals as AirBnB*, TECHCRUNCH (Mar. 4, 2009), https://techcrunch.com/2009/03/04/y-combinators-airbed-and-breakfast-casts-a-wider-net-for-housing-rentals-as-airbnb/.

[21] Bramson, *supra* note 19.

[22] *Id.*

[23] *About Us*, AIRBNB, https://news.airbnb.com/about-us/ (last visited July 29, 2020).

[24] Theodore Schleifer, *Airbnb sold some common stock at a $35 billion valuation, but what is the company really worth?*, VOX RECODE (Mar. 19, 2019), https://www.vox.com/2019/3/19/18272274/airbnb-valuation-common-stock-hoteltonight.

[25] *Get to Know Vrbo*, VRBO, http://www.vrbo.com/l/about-vrbo/ (last visited July 29, 2020).

[26] *About HouseTrip*, HOUSETRIP, https://www.housetrip.com/content/about_us (last visited July 29, 2020).

[27] FLIPKEY, https://www.flipkey.com/ (last visited July 29, 2020).

The rise of digital, peer-to-peer transient accommodation platforms has been swift and its economic successes paramount, but this has not come without its fair share of controversy.[28] Along with other short-term rental platforms like Vrbo, Airbnb has come under scrutiny from policymakers both at the municipal and state levels due primarily to the firms' having constructively imposed a network of unregulated quasi-hotels on neighborhoods across the world—a technological advance with serious social and economic consequences that Daniel Guttentag has described as a "disruptive innovation."[29] Among other legal and ethical complications, policymakers in many different public institutions have begun to identify and implement proportionate regulatory responses to the challenges presented by Airbnb's disruption of the local hospitality industry without foregoing the economic promise associated with technological innovation.[30]

B. The Benefits and Costs of Increased Short-Term Rental Activity

A burgeoning local short-term transient accommodation market represents a double-edged sword for most communities. To begin, there are benefits for both travelers and owner-operators (or "hosts," in Airbnb's parlance). From the traveler's perspective, as a consumer, there are relatively clear affordability benefits, as "Airbnb accommodation is typically cheaper than traditional accommodation."[31] Likewise, evidence suggests that there are radiating financial benefits for communities experiencing heavier short-term rental activity in the form of increased consumption at local businesses, perhaps in part due to travelers having additional disposable income as a result of cost savings on their accommodations.[32] In addition to the economic gains, many travelers prefer peer-to-peer short-term rentals to traditional hotels due to perceptions that peer-to-peer accommodations provide a more intimate and personalized

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[28] *See, e.g.*, Gaby Hinsliff, *Airbnb and the So-called Sharing Economy is Hollowing Out Our Cities*, THE GUARDIAN (Aug. 31, 2018), https://www.theguardian.com/commentisfree/2018/aug/31/airbnb-sharing-economy-cities-barcelona-inequality-locals.

[29] Daniel Guttentag, *Airbnb: disruptive innovation and the rise of an informal tourism accommodation sector*, 18 CURRENT ISSUES IN TOURISM 1192, 1194 (2015).

[30] *Id.* at 1201–02; *see infra* Part III.

[31] Guttentag, *supra* note 29, at 1196.

[32] *See* Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 104–05 (2017) (explaining that Airbnb guests tend to spend more money at local businesses than hotel guests because the duration of their stay is longer, in part due to the lower cost of Airbnb accommodations compared to a hotel).

experience with the local environs as well as with the host.[33] Owner-operators benefit rather obviously from the increased allocative efficiency engendered by digital peer-to-peer rental platforms that can supplement owner-operators' income through renting out what would otherwise be unused space either in their primary residence or in any additional dwellings they might own.[34]

The rise in short-term rental activity subsequent to the advent of digital peer-to-peer platforms has not occurred without its detractors. Critiques all focus on negative externalities associated with increases in short-term rental activity and have tended to come in two forms: those which emphasize the economic complications for the existing transient accommodation sector (i.e., hotels),[35] and those focusing on the impact of increases in short-term rental activity on community characteristics, from the supply of affordable housing to the ambience of residential neighborhoods.[36] Those concerned with the effect of short-term rentals on incumbent firms in the hospitality sector allege that, with some truth to the claim, in the absence of legal requirements that short-term rental owner-operators collect occupancy or resort taxes and ensure their properties meet comparable health and safety standards as hotels, short-term rentals such as Airbnb or Vrbo hosts provide the same service as traditional transient accommodations with little or none of the regulatory overhead otherwise demanded.[37] Critics troubled by the effects of short-term rentals in residential areas on the supply of affordable housing in the proximate community contend that transient accommodations in noncommercial zones disrupt the housing market by

[33] *See* Amanda Belarmino et al., *Comparing Guests' Key Attributes of Peer-to-Peer Accommodations and Hotels: Mixed-Methods Approach*, 22 CURRENT ISSUES IN TOURISM 1, 6 (2019).

[34] *See* Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?*, 19 STAN. TECH. L. REV. 293, 298–99 (2016).

[35] *See, e.g.*, Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, 54 J. MKTG. RSCH. 687, 687–89 (2017) (concluding based on a series of difference-in-differences analyses that increases in Airbnb supply in Texas negatively affected both hotel room revenue and occupancy rates there).

[36] *See, e.g.*, Dayne Lee, Note, *How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL'Y REV. 229, 230 (2016) (suggesting that digital platform transient accommodations accelerate gentrification in their adjacent communities, reduce economic and racial integration, and are less accessible by vulnerable communities who lack reliable internet connections); Dana Palombo, Comment, *A Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Residential Rentals into Modern Law*, 4 AM. U. BUS. L. REV. 287, 307 (2015) (noting that zoning certain areas as residential, rather than commercial or mixed-use, preserves important aspects of a community's character).

[37] *See* Zervas et al., *supra* note 35 at 689.

raising rents as well as property values.[38] Alternatively, those more worried about the existing character of local neighborhoods given increases in short-term rental activity echo arguments made by opponents of development more generally (commonly designated as NIMBYs[39] in planning circles): increases in traffic, noise, and unidentified visitors, ultimately lead to diminishment of community character as well as property values.[40] Many residents are especially concerned with the potential emergence of short-term rentals as "party houses" in their neighborhood, an apprehension only made more acute by the increased demand for social distancing interventions to combat the 2020 coronavirus pandemic.[41]

C. Forgiving the Informality: Regulation of the Sharing Economy

The challenge facing those responsible for formulating and implementing local regulatory policy related to peer-to-peer transient accommodations involves attempting to strike a balance that preserves the economic opportunity (e.g., increases in consumption at local businesses, etc.) associated with greater short-term rental activity in residential neighborhoods without foisting an intolerable level of negative externalities onto incumbent firms in the hospitality sector or neighbors and residents in noncommercial zones.[42] The hospitality sector, of course, is not the first component of the U.S. economy whose operations have been complicated

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[38] *See* Hung-Hao Chang, *Does the Room Sharing Business Model Disrupt Housing Markets? Empirical Evidence of Airbnb in Taiwan*, 49 J. HOUS. ECON. 1, 2 (2020) (finding that rents are higher in areas of Taiwan with more short-term rental activity); Kyle Barron et al., *The Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb*, SSRN: URB. RES. EJOURNAL (Mar. 4, 2020), http://ssrn.com/abstract=3006832 (explaining that increases in short-term rental activity are associated with higher rents and home prices largely due to substitution effects on the short-term rental market).

[39] *See* Timothy A. Gibson, *NIMBY and the Civic Good*, 4 CITY & CMTY. 381, 381–86 (2005). "NIMBY" stands for "Not In My Back Yard" to signal such individuals' opposition to development near them. *See id.* Emerging experimental research suggests that in metropolitan areas with an elevated cost of living, NIMBYism may be demonstrated not only by homeowners, but by renters as well, who support increasing the housing supply in the abstract, as long as it is sufficiently removed from them. Michael Hankinson, *When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, 112 AM. POL. SCI. REV. 473, 480–91 (2018).

[40] Tristan P. Espinosa, *The Cost of Sharing and the Common Law: How to Address the Negative Externalities of Home-Sharing*, 19 CHAP. L. REV. 597, 601–03 (2016).

[41] *See, e.g.*, Carly Baldwin, *East Brunswick Home Identified As Airbnb 'Party House'*, PATCH (Aug. 3, 2020), https://patch.com/new-jersey/eastbrunswick/east-brunswick-identified-airbnb-party-houses (describing Airbnb's response to a 700-person party hosted in a New Jersey short-term rental in July 2020).

[42] *See supra* notes 31–41 and accompanying text.

by the rise of peer-to-peer-sharing platforms,[43] and considering attempts to regulate peer-to-peer market entrants in other industries serves as a useful predicate to our subsequent analysis of municipal regulatory approaches to digital platform short-term rentals in Parts II and III.[44]

Because at their outset most peer-to-peer platforms that arrange exchanges of goods or services are not directly regulated by the government, instead conducting their business either illegally or extralegally, they are conventionally considered to operate in "informal sectors" of the economy.[45] Organizations operating in informal sectors enjoy at least one major competitive advantage vis-à-vis incumbent firms because they evade any number of cumbersome regulatory standards imposed on established firms; for instance, Uber entered the urban transportation network by offering a peer-to-peer ridesharing platform that connected drivers to passengers without worrying about the barriers to entry, price controls, licensing requirements, minimum insurance requirements, or consumer health and safety standards regulating taxi drivers.[46] Rather than either allowing such firms to continue operating unabated by regulation or employing punitive regulatory schemes that render further activity cost-prohibitive, scholarship suggests that it behooves local policymakers to design a regulatory framework that permits their city to reap the economic rewards of innovation while minimizing undesirable social and economic consequences.[47] The regulatory measures that satisfy these criteria, of course, necessarily vary from one area of economic activity to another based on the unique set of costs and benefits the "disruptive" sector generates for the surrounding community.[48]

In Part II below, we assess the state of regulations governing the provision of transient accommodations in residential neighborhoods given

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[43] *See, e.g.*, Judd Cramer & Alan B. Krueger, *Disruptive Change in the Taxi Business: The Case of Uber*, 106 AM. ECON. REV. 177 (2016) (examining the relative efficiency of ridesharing services like Uber as compared against traditional sector incumbents, i.e., taxis, and finding that the capacity utilization—the fraction of time or miles driven that drivers have a fare-paying passenger in tow—of UberX drivers to exceed that of taxi drivers by 30% as measured in time and 50% when measured in miles).

[44] *See infra* Parts II–III.

[45] *See, e.g.*, Colin C. Williams, *Out of the Shadows: A Classification of Economies by the Size and Character of Their Informal Sector*, 28 WORK, EMP. & SOC'Y 735, 736 (2013).

[46] *See* Ruth Berins Collier et al., *Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States*, 16 PERSP. ON POL. 919, 922–23 (2018).

[47] *See* Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 908 (2015).

[48] *See, e.g.*, Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241 (2015) (discussing how sharing businesses create regulatory challenges in policy realms as diverse as occupational health, consumer safety, monopolization, and corporate finance).

the explosion of digital-platform short-term rentals in the years since the advent of Airbnb and its competitors. Namely, we provide a comprehensive taxonomy of legal and regulatory mechanisms instituted by American municipal governments to grapple with the double-edged sword of increasing short-term rental activity in traditionally residential zones. Designing a tenable regulatory framework for peer-to-peer rental activity proves particularly challenging for two reasons. First, the diversity of motivations among interested parties who either prefer more or less stringent regulation of digital platform short-term rentals makes policy optimization difficult as local governments try to craft compromise policies that meet the demands of certain groups without unduly frustrating the preferences of others.[49] Second, the decentralized and largely invisible nature of peer-to-peer rental activity creates high enforcement costs for jurisdictions that seek to enact regulations governing short-term rentals in residential zones. In other words, the formulation of municipal short-term rental policy alone does little to ensure the city's ability to effectively implement whatever policy it develops.[50] As a result, pragmatic local policymakers designing regulatory standards for short-term rentals in residential zones must attempt to discern what costs their city's government and residents are willing to bear in order to see their preferred land use policies realized.

II. THE REGULATION OF SHORT-TERM RENTALS IN MAJOR U.S. CITIES

The approaches taken by major cities in large United States metropolitan areas to regulate digital platform short-term rentals vary widely. In this Part, we first provide a descriptive overview of the sample of cities under consideration in our research and introduce summary findings from our original data on the regulatory framework governing short-term rentals in major U.S. jurisdictions. We then present a typology of regulatory mechanisms across relevant jurisdictions, in which we discuss the likely motivation for and potential costs associated with each type of regulation.

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[49] *See supra* notes 31–48 and accompanying text (describing the various sources of advocacy for and against short-term rental activity in residential zones).

[50] *See* Laurence J. O'Toole, Jr., *Research on Policy Implementation: Assessment and Prospects*, 10 J. PUB. ADMIN. RES. THEORY 263 (2000) (surveying various theories of policy implementation as a stage in the policy process).

A. *Local Regulation of Short-Term Rentals in Major Metropolitan Areas*

For this Article, we have investigated the regulatory approach to short-term rentals in residential zones across the principal cities of the fifty most populous metropolitan statistical areas in the United States. Metropolitan statistical areas (MSAs), familiar to researchers in geography and the social sciences who employ data published by the U.S. Census Bureau, are designated by the executive branch Office of Management and Budget (OMB) pursuant to standards updated decennially in the Federal Register.[51] According to the most recent OMB notice regarding the designation of MSAs, a region qualifies as an MSA if it is a core-based statistical area "associated with at least one urbanized area that has a population of at least 50,000," and that the encompassing MSA "comprises the central county or counties containing the core, plus adjacent outlying counties having a high degree of social and economic integration with the central county or counties as measured through commuting."[52] Principal cities within MSAs include the largest city in the MSA as well as additional cities in the MSA that meet certain population and employment criteria.[53]

To provide a summary impression of how principal cities in major American MSAs approach the regulation of short-term rentals, we present in Figure 1 below a map of the continental United States to which we append (based on our reading of local codes in all 219 cities in our sample) either a blue circle for those cities whose ordinances contain at least one regulation of short-term rental activity in residential zones, or a red circle for those cities that have not yet enacted any provisions governing transient accommodation in traditionally residential areas. The map gives a general sense of the variation in cities across the United States whose regulations

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[51] 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 Fed. Reg. 37,245 (June 28, 2010).

[52] *Id.* at 37,252. Core based statistical areas, defined in the same OMB notice from the Federal Register, comprise geographical entities including the county or counties "associated with at least one core . . . of at least 10,000 population, plus adjacent counties having a high degree of social and economic integration with the core as measured through commuting ties with the counties containing the core." *Id.* at 37,251.

[53] *See id.* at 37,250. Per the 2010 criteria, additional cities within a given MSA are considered principal cities if they (1) had a 2010 Census population of at least 250,000 or if at least 100,000 persons work there; (2) had a 2010 Census population of at least 50,000 but less than 250,000 and where the number of workers employed there is greater than or equal to the number of workers living there; or (3) had a 2010 Census population of at least 10,000 but less than 50,000 and were minimally one-third the population of the largest city in the MSA and in which the number of workers working in the city is greater than or equal to the number of workers living in that city. *Id.*

are considered in this Article, and also indicates some broad geographic trends that may be associated with heterogeneity across major American municipalities in their regulation of short-term rentals in residential zones. Likewise, the power of state legislatures to curtail local policy action is demonstrated in those states that have preempted municipalities from developing their own regulatory requirements for transient accommodations in residential areas: prominently, in 2016, the Arizona legislature enacted Senate Bill 1350, which prohibited cities and towns in the state from banning or restricting the use of short-term rentals other than to protect public health, safety, and welfare.[54]

[54] ARIZ. REV. STAT. § 9-500.39(A)–(B) (2020); Stefan Etienne, *Arizona's Governor Ducey Signs SB 1350 into Law, Prohibiting the Ban of Short-term Rentals*, TECHCRUNCH (May 13, 2016), https://techcrunch.com/2016/05/13/arizonas-governor-ducey-signs-sb-1350-into-law-prohibiting-the-ban-of-short-term-rentals/. While preemption by the state legislature seems to have effectively prevented municipal regulatory action in Arizona, this was not uniformly the case in states that had enacted legislation to preempt local regulation of transient accommodations: despite preemptive legislation in Indiana, the affluent Indianapolis suburb of Carmel voted to enact new short-term rental regulations even after the statutory deadline from the preemption legislation's grandfather clause had passed. *See* Aileen Chuang, *No Love for Airbnb? Carmel Thumbs Nose at Indiana's New Short-Term Rentals Law*, INDIANAPOLIS STAR (Mar. 24, 2018), https://www.indystar.com/story/news/politics/2018/03/24/carmel-thumbs-nose-indianas-short-term-rentals-law-airbnb/455817002/. The Indiana statute preempting regulation of short-term rentals by municipalities excepted any ordinance adopted prior to January 1, 2018. IND. CODE § 36-1-24-1(a) (2020).

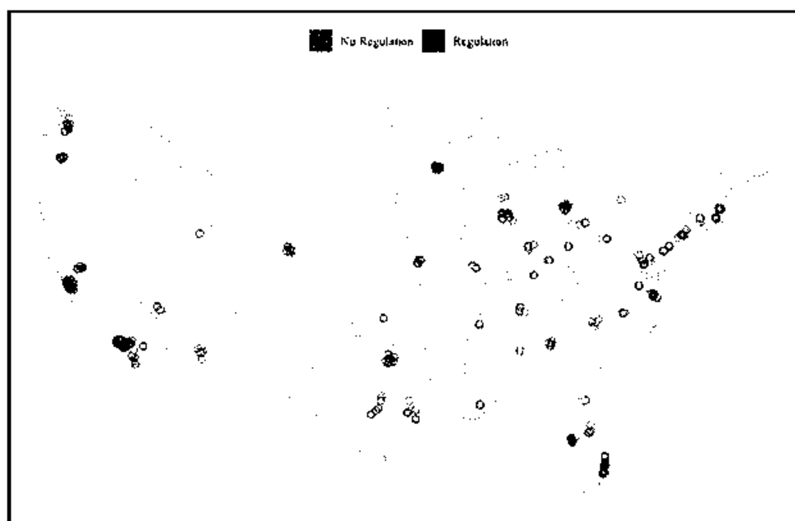

Figure 1: Municipal Approaches to Regulating Short-Term Rentals in the United States

While there are compelling reasons to consider regulatory approaches to digital platform short-term rentals in cities beyond those we examine, as discussed subsequently in Part IV of this Article, we limit our consideration to principal cities in the fifty most populous metropolitan statistical areas for two reasons. First, conceptually, we contend that examining regulatory decisions by municipal officials in relatively large cities provides us with a universe of cases in which there are comparatively high stakes involved in decisions whether or not to reshuffle the burdens and benefits involved in the provision of services. In other words, since cities are designated principal cities in MSAs based on the substantiality of their population (not to mention, in the case of designating additional principal cities, factors specifically related to the size of the municipal workforce), we infer that regulatory choices are not taken lightly by local officials, who likely concern themselves with the economic vitality of their city or community.[55] Second, for practical purposes—and because this is the first article to our

[55] *See, e.g.*, Harold Wolman, *Local Economic Development Policy: What Explains the Divergence between Policy Analysis and Political Behavior?*, 10 J. URB. AFF. 19 (1988) (suggesting that local policymakers offer fiscal incentives for local economic development in part as a response to executives in firms operating in the proximate area); Christian R. Grose & Jordan Carr Peterson, *Economic Interests Cause Elected Officials to Liberalize Their Racial Attitudes*, POL. RSCH. Q. (2020) (finding that local elected officials modify their opinions on contentious social issues when those quandaries are framed in terms of their potential economic threat to the local business community).

knowledge that attempts to consider in any comprehensive manner local approaches to regulating digital platform short-term rentals across major American municipalities—we cabin our analysis to the sample described here to place reasonable limitations on the obligation to gather and code data on local regulations and avoid what could otherwise amount to a cost-prohibitive set of data tasks. For reasons we discuss more thoroughly in Part IV below, we believe it would be prudent for future scholars to expand the consideration of local short-term rental regulations beyond only principal cities in the largest MSAs.

B. Typology of Regulatory Mechanisms Across U.S. Municipalities

The approaches taken by municipalities seeking to regulate digital platform short-term rentals in residential zones within their jurisdiction vary as regards the type of actions constituting compliance by owner-operators, the potential costs associated with or induced by compliance, and the social or economic purpose the regulations are intended to fulfill. In this subpart, we analyze each of eleven regulatory mechanisms adopted by at least one major municipal government in the United States. In particular, we focus on the implications of each regulatory mechanism for the property rights of owner-operators, as well as their capacity to cure or mitigate one or more social ills alleged by critics to be associated with the presence and proliferation of digital platform transient accommodations.

1. Total Ban

The most draconian possible approach to regulating short-term rental activity is for local governments to ban their operation in residential zones altogether.[56] Of course, this does not in theory preclude an individual or entity, such as a property management firm, from operating an Airbnb or Vrbo in a mixed-use or commercial zone, but such action is unlikely for two reasons. First, as discussed in Part I above, a large part of the appeal for travelers who seek accommodations using digital platforms is the opportunity to have their recreational experience more closely mimic the residential circumstances of a typical city inhabitant, as opposed to that of a tourist.[57] It is incompatible with this central goal of offering short-term renters the chance to stay in residential neighborhoods if digital platforms

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[56] N.Y.C., N.Y., ZONING RESOLUTION art. I, ch. 2, § 12-10 (2017) (defining "Residence" in a manner that excludes transient accommodations); EDINA, MINN., CODE OF ORDINANCES § 36-1254(c)(8) (2020) (establishing that transient occupancy is not permitted as a customary use of residential property). *See infra* notes 62–63 and accompanying text.

[57] *See* Belarmino et al., *supra* note 33.

providing access to short-term rental markets instead list accommodations outside a city's conventional living space. Second, to the extent that transient accommodations are owned by individuals rather than other legal entities, most of these individuals presumably do not own real property in commercial or mixed-use zones.[58] Simply put, allowing owner-operators to list their residentially zoned property on digital platforms for short-term rental may well be the only chance many Americans have to derive additional income from their real property. Total bans on transient accommodations in residential zones, then, foreclose the possibility of individuals or entities deriving supplementary income from residential real estate.

Banning short-term rental accommodations entirely in residential zones promotes the core objective advanced by NIMBY activists who oppose nonresidential activity—as well as many types of new residential activity—geographically proximate to their homes.[59] To the extent that the presence of rental accommodations listed on Airbnb or other popular sites threatens the character of local neighborhoods and communities, total bans on transient accommodation in residential zones eliminate the purported problem by (formally, if not functionally) preventing owner-operators from listing their additional homes or spare rooms on digital rental platforms. Further, proscribing short-term rental activity in residential areas likely serves the economic interests of those firms in the traditional hospitality sector that oppose permitting private citizens to offer their property as short-term lodging due to the possibility that opening such a residential market will have a substitution effect for traditional hotels.[60]

The municipalities that ban short-term rental activity entirely in residential zones range from cities as large as New York City to smaller communities such as Edina, Minnesota.[61] Not surprisingly, and as discussed in Part II below, cities with strict regulations have been demonstrably more

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[58] While comprehensive data on ownership of real property—other than for the owner's residential use—are not readily available at the national level, the data on owner-occupied housing are at least illustrative. According to the 2010 Census, just over sixty-five percent of housing units are owner-occupied. *2010 Census of Population and Housing*, U.S CENSUS BUREAU 8–9 (2013). This suggests that at most, under two-thirds of the population owned the dwelling they live in, casting doubt on the likelihood that a substantial proportion of the population owns additional property in nonresidential zones that could be used for providing transient accommodations. *See id.*

[59] *See* Gibson, *supra* note 39 and accompanying text.

[60] *Cf.* Linda Canina & Steven Carvell, *Lodging Demand for Urban Hotels in Major Metropolitan Markets*, J. HOSPITALITY AND TOURISM RES. 291, 302 (2005) (finding a price substitution effect in the hospitality sector as the demand for hotel rooms at a given property is associated with the average daily rate at that property's competitors).

[61] *See supra* note 56.

likely to have seen digital short-term rental platforms initiate litigation against their regulations.[62] In practice, of course, even a blanket, formal prohibition such as these does not guarantee enforcement of the proscription; for instance, a quick search for any of these "total ban" jurisdictions on Airbnb yields a bounty of available rentals, leaving open a number of important questions for future scholars to consider regarding the efficacy and vigor of policy implementation across these particularly prohibitive municipalities. Nevertheless, it stands to reason that the total ban ordinances have at minimum a deterrent effect on short-term rental activity in residential zones within these municipalities.

2. *Single-Stay Maxima*

Maximum limits on the length of any individual renter's stay in the short-term rental unit are the first of two durational or temporal limitations on short-term rental operators that cities in our sample impose.[63] For instance, Providence, Rhode Island, defines the occupancy period for short-term rentals as a "period of fewer than 28 consecutive calendar days."[64] These restrictions primarily represent the point past which the legal association between an owner-occupier and a renter, respectively, would convert to a landlord-tenant relationship, at which point a rash of additional duties and obligations would be conferred upon the property owner (and rights upon the tenant).[65] Rather than functioning to preserve the character of residential neighborhoods or limit competition in the local transient accommodation sector, this regulation largely serves to protect the rights of renters in long-term contractual relationships with landlord-owners by legally distinguishing short-term rental agreements from long-term leases.[66] It is relatively less likely that single-stay maxima mitigate concerns of NIMBY groups concerned with the preservation of neighborhood character since limiting the duration of any single visitor's stay in a transient

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[62] *See infra* notes 112–130 and accompanying text (describing in particular litigation between short-term rental owner-operators and the City of Miami Beach).

[63] *See infra* notes 64–67 and accompanying text.

[64] PROVIDENCE, R.I., ZONING ORDINANCE § 201 (2014).

[65] *See, e.g.*, Jerald Clifford McKinney, II, *Caveat Who?: A Review of the Landlord Tenant Relationship in the Context of Injuries and Maintenance Obligation*, 35 U. ARK. LITTLE ROCK L. REV. 1049 (2012) (considering the legal obligations landlords owe tenants in the context of injury compensation). Although the legal obligations of landlords exceed those of short-term rental hosts, research suggests the legal duties of landlords have diminished in recent decades as a result of the decline of the implied warrant of habitability doctrine. David A. Super, *The Rise and Fall of the Implied Warrant of Habitability*, 99 CAL. L. REV. 389, 423–38 (2011).

[66] *See supra* notes 63–65 and accompanying text.

accommodation does not reduce the likelihood that a residential property might be employed as a short-term rental at any other point in time. In fact, if an ever-changing carousel of new faces is truly of concern to opponents of short-term rentals in residential zones—as, for example, alleged by a complainant before the Clearwater, Florida Code Enforcement Board—shorter single-stay maxima may exacerbate or compound their frustrations by inducing greater frequency in turnover from one short-term renter to the next.[67]

3. *Annual Day Limits*

In addition to defining the period past which a short-term rental agreement in a residential zone becomes, for legal purposes, a residential lease, a number of jurisdictions also impose a limit on the number of days per year a property zoned as residential may be used as a short-term rental accommodation.[68] These include Pasadena, California, whose city code provides that owner-operators can list their primary residences (but not vacation homes) on short-term rental platforms, and stipulates that a primary residence is one where they "reside . . . for a minimum of 9 months per year."[69] By concurrently limiting short-term rentals in residential zones to primary residences and defining primary residences as owner-occupied residential property for at least three-quarters of the year, this sort of regulation establishes a maximum number of days per year a given residential property can be used for the purposes of providing short-term rental accommodations.[70] Unlike single-stay caps, this kind of regulation likely does address the concerns of neighborhood activists who seek to limit short-term rental activity in residential areas: even if a great deal of nearby residents elect to list their primary residence as a transient accommodation pursuant to such an ordinance, they are legally limited to renting it out under those circumstances to three months annually.[71] This both reduces the earning capacity for owner-operators that list their property on digital

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[67] John Guerra, *Short-term rentals continue to draw fines, liens in beach communities*, TAMPA BAY NEWSPAPERS (May 23, 2019), https://www.tbnweekly.com/clearwater_beacon/article_72c40f88-7ca1-11e9-9bfb-5737e983212c.html.

[68] BERKELEY, CAL., MUN. CODE § 23C.22.050(B)(2) (limiting owners seeking to offer short-term rentals in non-owner occupied premises to ninety or fewer days annually); PASADENA, CAL., CODE OF ORDINANCES § 17.50.296(B)(5) (2018).

[69] *Id.*

[70] *See id.*

[71] *See id.*

platforms and sets an annual statutory maximum for the time a residential property might serve as transient accommodation.

4. *Density Controls*

City governments also enact geographically based limitations intended to minimize excessive concentration of short-term rentals in residential zones.[72] These density controls stipulate minimum distance requirements between short-term rental properties within the city's jurisdiction.[73] For instance, the Las Vegas municipal code requires that the property lines between short-term rental properties in residential zones be no closer than 660 feet apart.[74] A similar provision in the Louisville-Jefferson County, Kentucky Land Development Code allows no less than 600 feet between short-term rental properties in residential areas, "measured in a straight line from nearest property line to nearest property line."[75] This type of regulation doubtless slows any tendency for the incidence of short-term rental activity to change the character of residential areas in preventing penetration by transient accommodations into residential zones.

Unlike temporal restrictions, density controls confer a first-mover advantage onto those who register or apply earliest for any conditional use permits required to operate short-term rentals, as a potential owner-operator's right to use their property for the purposes of offering short-term accommodation is, should such a regulation be enacted, contingent on sufficiently few proximate property holders having also elected to use some component of their dwelling for the purposes of transient accommodations. What such regulations should necessarily imagine, though, is the potential for the residential short-term rental market to become saturated with conditional use permits: if the entire residential grid becomes unavailable for the issuance of additional permits due to a statutory density control, how should the ongoing legal rights to operate short-term rentals in residential zones be allocated? If previously held conditional use permits are consistently given first priority in a city's decision to reissue short-term rental rights, and newcomers are functionally foreclosed from obtaining the legal capacity to operate transient accommodations due to the presence of a nearby short-term rental unit, such statutory frameworks might eventually

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[72] *See infra* notes 73–76 and accompanying text.

[73] *See, e.g.*, LAS VEGAS, NEV., UNIFIED DEV. CODE § 19.12.070 (2011). Specifically, the Las Vegas ordinance deems the operation of a short-term rental in a residential zone a conditional use (for which permitting is required) and then stipulates that the minimum distance between relevant conditional uses may not be less than 660 feet. *Id.*

[74] *Id.*

[75] LOUISVILLE, KY., LAND DEV. CODE § 4.2.63(D) (2020).

encounter the same disadvantages as professional licensure schemes in the context of employment.[76]

5. *Parking Requirements*

Among the more controversial provisions in local zoning and land use policy for planners and scholars of urban planning are off-street parking requirements for new development.[77] Despite criticism of off-street parking requirements, some local governments have established minimum parking requirements for owner-operators of short-term rentals as well.[78] For example, the New Orleans Comprehensive Zoning Ordinance stipulates minimum required vehicle spaces for a number of different land uses, including but not limited to short-term rentals in commercial, large residential, and partial-unit or small residential districts.[79]

Minimum on-site parking requirements for short-term rental properties are largely intended to reduce the local impact of increases in vehicular traffic to the area on the surrounding neighborhood, which have resulted in complaints from residents in some communities.[80] It is not entirely clear, however, why separate off-street parking requirements should be enacted for properties used as short-term rentals since many cities establish minimum on-site parking requirements for properties in residential zones that would necessarily apply to a given unit prior to being listed as a short-term rental.[81] One possible rationale for imposing legal requirements for

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[76] *See, e.g.*, Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1111–16 (2014) (suggesting that occupational licensure amounts to a cartel scheme by encouraging the inequitable exclusion of qualified individuals from licensed professions).

[77] *See, e.g.*, C.J. Gabbe et al., *Parking Policy: The Effects of Residential Minimum Parking Requirements in Seattle*, 91 LAND USE POL'Y 1, 5–8 (2020) (finding that minimum off-street parking requirements in Seattle lead to a host of negative social and environmental consequences); DONALD C. SHOUP, THE HIGH COST OF FREE PARKING 1-15 (2005) (arguing that mandatory provision of free off-street parking by developers imposes externalities on cities, their economy, and the local environment).

[78] *See, e.g.*, NEW ORLEANS, LA., COMPREHENSIVE ZONING ORDINANCE § 22.4 (2016).

[79] *Id.* § 22.4.A. In commercial and large residential districts, New Orleans requires that short-term rental units provide one vehicle parking space per two guest bedrooms but scales the parking minima for short-term rentals in small residential zones based on the applicable dwelling type. *Id.*

[80] *See* Hosam Elattar, *Newport Beach Tightens Grip on Short-Term Rentals*, VOICE OC (Feb. 14, 2020), https://voiceofoc.org/2020/02/newport-beach-tightens-grip-on-short-term-rentals (suggesting that the Newport Beach, California City Council elected to amend its city's short-term rental ordinance due to residents' complaints regarding shortages of street parking near short-term rental accommodations).

[81] *See, e.g.*, NEWPORT BEACH, CAL., MUN. CODE § 20.40.040 (2020) (delineating

off-street parking on residential properties listed as short-term rentals separately from off-street parking requirements for properties in residential zones more generally is that some dwellings in residential zones may be grandfathered in as exempt from minimum parking requirements as places of residence, but would be less likely to circumvent a requirement that short-term rental units provide on-site parking.

6. Registration Requirements

The most common (and probably most straightforward) regulatory mechanism employed by municipal governments in our sample is a registration requirement.[82] This requirement mandates that owner-operators of short-term rental properties file certain documents reporting information about their unit to the relevant office of the city government to obtain a permit to operate. For example, the San Francisco Administrative Code allows operation of a short-term rental unit in a residential zone if "[t]he Residential Unit [being operated as a short-t erm rental] is registered on the Short-Term Residential Rental Registry."[83] If owner-operators successfully apply for and receive an operating permit, they must file subsequent quarterly reports detailing the number of days their unit has been rented out during the preceding quarter for their short-term rental to remain in good legal standing with the city.[84]

Registration requirements present a number of advantages to local governments seeking to regulate digital platform short-term rentals in their jurisdiction. First, demanding that owner-operators obtain licenses from the city to rent short-term units provides city officials with data that otherwise might prove challenging (if not impracticable) to obtain regarding the location and expanse of short-term rental activity within their borders.[85] Second, such provisions vest discretion in local officials to control the diffusion of short-term rental activity by allowing a city office to determine whether an individual's application to operate a short-term rental complies

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minimum off-street parking requirements for a variety of land uses within the city, including for residential zones).

[82] *See infra* notes 83–86 and accompanying text.

[83] S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(E) (2020).

[84] *Id.* § 41A.5(g)(3)(A)–(C).

[85] For example, Airbnb's retention of data on short-term rental operators' identity, rental property, and geographic location from city officials was the subject of a protracted legal dispute between the company and New York City, which recently ended in a settlement by whose terms Airbnb agreed to provide the city with quarterly data on listings and owner-operators there. Olivia Carville, *Airbnb Agrees to Give Host Data to NYC in Settlement*, BLOOMBERG https://www.bloomberg.com/news/articles/2020-06-12/airbnb-settles-lawsuit-with-nyc-over-providing-host-data (June 15, 2020).

with other relevant municipal standards for short-term units. Particularly since local officials reserve the right to alter use-related regulations after the initial grant of licenses, local governments may subsequently use their discretion to meaningfully constrict the proliferation of short-term rental activity in some or all of a city's residential zones. Last, registration requirements provide an indirect means for local governments to raise revenue by creating an oversight mechanism for short-term rental owner-operators' compliance with local transient occupancy taxes.[86] Taken together, registration requirements are a powerful tool for local governments seeking to monitor the extent of short-term rental activity within their political control as well as to harness the lucrative revenue opportunities created by the short-term rental market for the city.

7. *Neighbor Notification Requirements*

In addition to stipulating certain standards for the transmission of information to one municipal agency or another regarding an owner-operator's intent to list a short-term rental, some cities demand that potential owner-operators furnish residents of adjacent lots with a notification letter announcing their intent.[87] One representative neighbor notification requirement—from the Portland, Oregon, municipal code—specifies with some precision the contents of the notification letter.[88] Per the Portland code, potential owner-operators are required to "[p]repare a notification letter that: (1) [d]escribes the operation and the number of bedrooms that will be rented to overnight guests; (2) [i]ncludes information on how to contact the resident, and the operator if the operator is not the resident," and (3) describes how the proposed short-term rental meets a battery of use-related regulations and standards described immediately prior to that subsection of the code.[89] The ordinance limits the geographic scope of the notification requirement by mandating delivery of the notification letter to "all residents and owners of property abutting or across the street from the accessory short-term rental."[90]

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[86] *See* S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(C) (2012) (requiring that an owner or resident operating a short-term rental in San Francisco "compl[y] with any and all applicable provisions of state and federal law and the San Francisco Municipal Code, including . . . by . . . collecting and remitting all required transient occupancy taxes").

[87] *See* PORTLAND, OR., CITY CODE § 33.207.040(C)(1) (2017).

[88] *Id.*

[89] *Id.* § 33.207.040(C)(1)(a); *see id.* § 33.207.040(A)–(B) (describing use-related regulations and standards for accessory short-term rentals in Portland, including but not limited to minimum durational requirements for resident occupancy during the year, permit requirements, and the building standards for bedrooms in short-term rental units).

[90] *Id.* § 33.207.040(C)(1)(b)(1).

Neighbor notification requirements in local short-term rental ordinances such as the example from the Portland municipal code likely serve several objectives. First, and most practically, such provisions establish an accountability mechanism by making owner-operators of short-term rentals more directly answerable to their immediately adjacent neighbors should there arise any suspicions of misconduct by guests at a short-term rental property. Providing neighbors with contact information for the owner-operator of the short-term rental is especially important in an age of increasing social distance: a 2018 Pew Research Center study found that only 31% of all American adults reported knowing all or most of their neighbors, and in urban and suburban areas that figure dropped to 24% and 28%, respectively.[91] The requirement that short-term rental owner-operators furnish the occupants of proximate properties with their contact information serves to functionally decrease this social distance. Second, neighbor notification provisions may exert a deterrence effect if potential owner-operators fret over the social costs of broadcasting to their neighbors that they intend to run a short-term rental in the neighborhood. For instance, if aspiring owner-operators value good relations with their neighbors but worry that serving adjacent owners and residents with the required notification letter might create tension due to opposition among the neighbors, aspiring owner-operators may be less likely to embark on the short-term rental venture. Absent the notification requirement, potential owner-operators may attempt to list and rent a short-term unit without drawing the attention (and, possibly, ire) of their neighbors.

It is important to note that there are limits to the efficacy of neighbor notification requirements in short-term rental ordinances. For example, as noted earlier, the Portland code only requires delivery of the notification letter to property owners and residents in lots immediately abutting or across the street from short-term rentals in the jurisdiction.[92] This stops short of requiring that potential owner-operators notify everyone on their block or street, or requiring the notification of all neighbors within a certain radius of the potential short-term rental. The more limited approach taken in Portland likely acknowledges certain pragmatic difficulties in establishing a more geographically expansive "notification zone": for instance, in small, planned communities, requiring notification of owners and residents of properties with listed addresses on the same street would not be particularly difficult, but would probably create an unreasonable burden for a potential

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[91] Kim Parker et al., *What Unites and Divides Urban, Suburban, and Rural Communities*, PEW RSCH. CTR., 64 (2018), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2018/05/Pew-Research-Center-Community-Type-Full-Report-FINAL.pdf.

[92] PORTLAND, OR., CITY CODE § 33.207.040(C)(1)(b) (2017).

owner-operator whose property happens to have an address on a boulevard that stretches for miles in either direction. Creating a radius-defined notification zone instead might represent a partial solution to that problem, but also might unfairly penalize potential owner-operators in more densely populated areas.

8. *Owner Occupancy Requirements*

Some municipalities curtail short-term rental activity within their borders by making permissible only those short-term rental units where the property owner remains present during the guest's stay.[93] For example, the Cambridge, Massachusetts, zoning code permits "[o]nly operator-occupied . . . and owner-adjacent short-term rentals."[94] For the purposes of the Cambridge code, operator-occupied short-term rentals are dwellings that serve as the primary residence of the owner-operator and in which no more than three bedrooms are rented for transient accommodation.[95] Likewise, owner-adjacent short-term rentals are those dwellings rented as transient accommodations that are separate from but in the same residential building as the owner-operator's permanent residence as long as the owner-operator owns all units in the building and there are four or fewer dwelling units in the building.[96]

Owner-occupancy requirements—both those that limit short-term rental activity to the bedrooms within an owner-occupied dwelling as well as those that limit activity to adjacent dwellings within an operator-owned building—severely constrain the permissible scope of the short-term rental market within a municipality. From the city's perspective, this sort of regulation likely addresses the complaint that short-term rental activity has the potential to make certain traditionally residential geographic subdivisions within a city either commercial or hybrid in character. In other words, by narrowing the sphere of legally rentable residential units to those within the immediate control of the owner-operator, cities diminish the likelihood that entire streets or multifamily complexes might be converted to transient accommodations. Without density controls, of course, owner-occupancy requirements do not guard against the possibility that the majority of a neighborhood's residents might independently elect to operate a short-term rental in their dwelling or building, but at a minimum owner-occupancy requirements prohibit further increases in short-term rental units

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[93] *See infra* notes 94–97 and accompanying text.

[94] CAMBRIDGE, MASS., ZONING ORDINANCE § 4.64(1) (2019).

[95] *Id.* § 4.62(d).

[96] *Id.* § 4.62(e).

owned or managed by absent or itinerant third parties.[97] This also serves, then, as an indirect way to enhance the accountability of owner-operators by ensuring they are in close proximity to their short-term rental units should their guests create disturbances.

9. *Guest Occupancy Limits*

Demanding owner occupancy is not the sole condition imposed on the occupancy characteristics of dwellings offered as short-term accommodations by regulatory provisions in U.S. municipal codes. Some cities also establish maximums on the number of occupants to whom a short-term accommodation in a residential zone can be legally rented.[98] As an example, the Philadelphia city code couples an annual day limit and single-stay maximum[99] with an occupancy limit, by permitting provision of transient accommodation—called "limited lodging" in the Philadelphia ordinance—in residential zones so long as the unit "remain[s] as a household living unit with housekeeping facilities in common, but not to allow for occupancy by more than three persons (including the owner and lodgers) who are unrelated by blood, marriage, adoption, or foster-child status, or are not Life Partners."[100] Rather than imposing a uniform maximum at the level of the entire dwelling unit, the Pasadena, California, municipal code scales the maximum allowable capacity in properties used as short-term rentals based on the number of bedrooms in the dwelling.[101] The Pasadena ordinance stipulates that short-term rentals in residential zones in Pasadena "shall not be used by more than 2 guests per bedroom plus 2 additional guests at one time."[102]

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[97] By the terms of the owner occupancy requirements, owner-occupants can rent out their home; without density maxima, an entire neighborhood could turn into owner-occupied short-term rentals. *See supra* notes 95–96.

[98] *See infra* notes 99–104 and accompanying text.

[99] PHILA., PA., CODE OF ORDINANCES § 14-604(13)(b)(1) (2020). In Philadelphia, "limited lodging" (i.e., short-term rentals) constitutes property "the primary use of which is for household living, and where the total accommodation of visitors provided is for fewer than ninety-one (91) days per year but where the provision of lodging to any particular visitor is for no more than thirty (30) consecutive days." *Id.* If property is offered as transient accommodation "for greater than 90 . . . [and less than] 180 days annually," the property is considered a "limited lodging home," a supplementary designation for which owner-operators must receive a conditional use permit from the city. *Id.* § 14-604(13)(b)(2); *see also id.* §§ 14-104(2) (establishing the requirement to obtain a city-issued permit for nonconforming uses), 14-303(6) (articulating the procedure to apply for a zoning permit).

[100] *Id.* § 14-604(13)(c)(1).

[101] *See* PASADENA, CAL., CODE OF ORDINANCES § 17.50.296(F)(5) (2020).

[102] *Id.*

The likely impetus for municipalities enacting ordinances that contain a maximum number of guests for short-term rentals is the omnipresent bogeyman cited by opponents of opening up residential zones to transient accommodations: the so-called party house.[103] By establishing a statutory cap on the number of guests per short-term rental, municipalities hope to reduce the negative externalities for neighbors of short-term rental properties in residential zones.[104] While such guest occupancy limits do not directly regulate the geographic extent of short-term rental activity within a city or neighborhood, they may functionally constrain both owner-operators and potential guests under certain conditions. In particular, travelers seeking to book lodging for a vacation and economize by splitting costs among a number of individuals may have their aims frustrated if the local government in their intended destination has enacted a maximum number of guests at short-term rentals. This may diminish profits for owner-operators in popular tourist areas that tend to attract large groups, and especially so if median room rates in the proximate area are higher than average, in which case multiple travelers unable to legally rent a single unit as a collective group may be priced out of visiting altogether.

10. Nonuniform Regulations across Residential Zones

Rather than regulating short-term rental activity in all residential zones uniformly, some municipalities take a more granular approach by placing enhanced restrictions on short-term rentals in single-family (as opposed to multifamily) residential zones. For instance, the Austin, Texas, Code of Ordinances designates three classes of short-term rentals in residential areas and establishes stratified regulations based on how a given rental property is designated.[105] In the Austin code, Type 1 short-term rentals include all owner-occupied rental properties or those "associated with owner-occupied principal residential units," regardless of what residential zone they are in.[106] By contrast, neither Type 2 nor Type 3 short-term rentals are owner occupied; rather, Type 2 and Type 3 rental properties are nonowner-occupied short-term rentals in single-family and multifamily or commercial residential zones, respectively.[107] Distinguishing in the municipal code

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[103] *See* Baldwin, *supra* note 41 and accompanying text.

[104] *See infra* note 152 and accompanying text.

[105] *See* AUSTIN, TEX., CODE OF ORDINANCES §§ 25-2-788 to -790 (2020) (defining Type 1, Type 2, and Type 3 short-term rentals).

[106] *Id.* § 25-2-788(A)(2).

[107] *See id.* §§ 25-2-789, 25-2-790. While in § 25-2-790(A)(2), on Type 3 short-term rentals, the Austin ordinance defines Type 3 properties as "part of a multifamily residential use," the code implies elsewhere that Type 3 rentals may also include short-term rentals in

whether nonowner-occupied short-term transient accommodations lie in single-family versus multifamily residential zones allows Austin to then regulate them differently.[108]

First, there are amplified density controls applied to Type 2 (single-family) but not Type 3 (multifamily) short-term rentals: the Austin ordinance establishes a minimum distance of 1000 feet between permitted Type 2 short-term rentals.[109] Further, and with arguably greater consequence for potential owner-operators in single-family residential zones, the Austin code proscribes the issuance of short-term rental operating licenses for any individual or entity whose application was received subsequent to November 12, 2015, signifying the city's intent to limit and eventually phase out this sort of transient accommodation entirely.[110]

Enacting enhanced regulations for single-family residential zones likely addresses the concern of many anti-development or NIMBY individuals and groups by serving to exclude most or, by the ordinance's ultimate aim, all short-term rental activity from single-family zones.[111] While some research in political science suggests that NIMBY attitudes extend not only to homeowners but also to renters in municipalities with a high cost of living, fervent opposition to development in close proximity to residential neighborhoods is most closely associated with single-family residential

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commercial zoning districts. *See id.* § 25-2-791(D)(5).

[108] *See id.* §§ 25-2-788, 25-2-789, 25-2-790.

[109] *See id.* § 25-2-789(D). The Austin code makes limited exceptions to the density control for those Type 2 short-term rentals whose licenses were issued prior to November 23, 2015. *Id.* § 25-2-789(D). There are additional density controls articulated separately in the Austin code that apply to both Type 2 and Type 3 short-term rentals: for Type 2 (single-family) units, no more than three percent of other single-family, detached units in the same census tract may be used as short-term rentals. *Id.* § 25-2-791(C)(3). For Type 3 units, the maxima differ based on a further distinction in the designated use: for Type 3 units in multifamily residential zones, no more than three percent of the total dwelling units at the property may be used as short-term accommodations, whereas for Type 3 units in *commercial* zones, the maximum percentage of short-term rental units at the property is twenty-five percent. *Id.* §§ 25-2-791(D)(4)–(5). The responsibility for calculating short-term rental density lies with the director of Austin's Watershed Protection and Development Review Department pursuant to terms set out separately in the city code. *Id.* §§ 25-1-21(31), 25-2-793(A).

[110] *See id.* § 25-2-791(G). Austin's aspiration to phase Type 2 short-term rentals out entirely is made explicit in subsequent city ordinances. *Id.* § 25-2-950. This regulation, however, along with a separate provision in the Austin code establishing maximum occupancy for short-term rentals, was declared void by a state appellate court in late 2019 for violating provisions in the Texas Constitution related to retroactive legislation, property rights, and the freedom of assembly. Zaatari v. City of Austin, No. 03-17-00812-CV, 2019 WL 6336186, at *18 (Tex. App. Nov. 27, 2019).

[111] *See* AUSTIN, TEX., CODE OF ORDINANCES § 25-2-950 (2020).

zoning.[112] By establishing additional statutory mimina related to the geographic density of Type 2 (single-family) but not Type 3 (multifamily) short-term units, as well as instituting a scheme for the gradual elimination of Type 2 rentals altogether, the Austin code much more aggressively targets the encroachment of transient accommodation into single-family zoned neighborhoods.[113] As a matter of policy customization, the differential regulation of single-family versus multifamily residential zones may prove sensible as it recognizes the distinct needs in each type of neighborhood as well as the unique priorities of residents in each.[114] More forcefully curtailing this particular land use in single-family neighborhoods, however, may ultimately serve to perpetuate a number of social and economic inequities associated with single-family residential zones since their establishment.[115]

II. Advertising Bans

One notable alternative, or supplement, to exerting control over short-term rental activity via land use regulations is to prevent owner-operators of short-term rentals from making potential guests aware that such units are available as transient accommodations. To that end, a handful of municipalities have enacted bans on the advertisement of short-term rental activity within their borders. For example, the Arcadia, California, Code of Ordinances makes it an infraction punishable by administrative citation for any owner, tenant, or person with control over residential property "to cause to be posted, published, circulated, or broadcasted any advertisement for a short-term rental or home sharing of the residential property."[116] While such regulations surely constrain owner-operators' ability to market their rentals freely, local governments have broad authority to place encumbrances on commercial advertising practices.[117] Presumably, then,

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[112] *See* Hankinson, *supra* note 40, at 473–75.

[113] *See* AUSTIN, TEX., CODE OF ORDINANCES §§ 25-2-789(D), 25-2-790, 25-2-791(G), 25-2-950 (2020).

[114] *Cf.* Theodore M. Crone, *Elements of an Economic Justification for Municipal Zoning*, 14 J. URB. ECON 168, 180 (1983) (suggesting that residents of single-family and multifamily residential zones have distinct needs).

[115] *See* Michael Manville et al., *It's Time to End Single-Family Zoning*, 86 J. AM. PLAN. ASS'N 106 (2020) (outlining the exclusionary consequences and social harms associated with single-family residential zoning, such as exacerbating urban housing shortages and impeding social mobility).

[116] ARCADIA, CAL., CODE OF ORDINANCES § 9104.02.300(B)–(C) (2020).

[117] *See, e.g.*, City Council of L.A. v. Tax Payers for Vincent, 466 U.S. 789, 804–05 (1984) (holding that a Los Angeles city ordinance prohibiting the posting of signage on utility poles was not a first amendment violation). While traditionally cities are granted

though it has not been litigated to our knowledge, advertising bans like the one in Arcadia do not infringe on owner-operators' First Amendment rights.[118]

Prohibitions on advertising short-term rentals may serve two purposes. First, and most obviously, these restrictions diminish the likelihood that a short-term rental operation will be successful, provided the owner-operator complies with the advertising ban. Simply put, if the public is not made aware that a short-term rental unit is available, they will be less likely to rent it. Second, and more peripherally, advertising bans may be enacted as part of a broader campaign of civic beautification that considers advertisements such as billboards to be visual pollution.[119] It is relatively improbable, though, that a campaign against visual pollution would specifically target short-term rental advertisements as a class, as absent some peculiar exceptions these are unlikely to make up more than a small fraction of advertising activity in a given city. In all likelihood, advertising bans function most efficaciously when enacted in tandem with other regulatory mechanisms, as advertisements provide a visual record for city officials to track short-term rental activity by which they might hold individuals operating short-term rentals accountable.[120]

III. TALES FROM THREE CITIES: APPROACHES TO REGULATING SHORT-TERM RENTALS

While it is important to understand the form and function of each regulatory mechanism included in our typology presented in Part II, considering the entire regulatory apparatus governing short-term rental activity in residential zones allows for a more complete understanding of how and why there is so much variation in municipal approaches to developing land use regulations that address changing economic

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broad latitude to regulate commercial speech, regulations are nevertheless subjected to strict scrutiny if they engage in content-based discrimination. Reed v. Town of Gilbert, 576 U.S. 155 (2015).

[118] *See* ARCADIA, CAL., CODE OF ORDINANCES § 9104.02.300(B)–(C) (2020).

[119] Regulations of advertisement as a manner of promoting a geography's aesthetic value have been upheld as a permissible exercise of state authority because "the preservation of scenic beauty and places of historical interest would be a sufficient support for" the regulation of advertising activity. Gen. Outdoor Advert. Co. v. Dep't of Pub. Works, 193 N.E. 799, 816 (Mass. 1935).

[120] This is precisely the case in Arcadia, where the advertising ban was enacted based on a legislative finding that although short-term rental activity was already illegal in the city pursuant to special use regulations in the zoning code, short-term rentals nevertheless seemed to be proliferating there. *See* ARCADIA, CAL., CODE OF ORDINANCES § 9104.02.300(A)(1) (2020).

circumstances but remain consistent with the community's goals. Here, we present case studies in which we investigate the regulatory decisions made by officials in three cities from our sample whose approaches to incorporating short-term rentals into the regulated economy differ appreciably. Considering each city's regulatory framework holistically, along with the social, economic, and political antecedents that informed local policymakers making regulatory decisions in each case, grounds these policy choices in their appropriate analytic context, and permits us to draw some tentative inferences regarding what may drive variations in municipal approaches to regulating short-term rentals in residential zones.

A. Miami Beach, Florida: Hostility and Hospitalities

One of the cities engaged in the most protracted and contentious efforts to regulate short-term rental activity is Miami Beach, Florida.[121] Miami Beach bans the rental of all single-family homes and virtually all units in multifamily dwellings for periods less than six months and one day.[122] As enacted, the Miami Beach code imposes draconian penalties for violation of the city's short-term rental regulations: the relevant ordinance establishes fines on a graduated scale based on the frequency of the offense.[123] For an offender's first violation, the code calls for a $20,000 fine, with the fine increasing by an additional $20,000 for each subsequent violation within an eighteen-month period, culminating in a $100,000 fine and, if applicable, revocation or suspension of the owner-operator's certificate of use for the fifth offense in an eighteen-month span.[124] Additionally, enhanced penalties of $25,000 are imposed if a second offense occurs in a building or dwelling

[121] *See* Kyra Gurney & Taylor Dolven, *Huge Fines, Midnight Busts: Inside Miami Beach's War on Short-Term Rentals*, MIAMI HERALD (March 11, 2019), https://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article226269295.html.

[122] MIAMI BEACH, FLA., CODE OF ORDINANCES § 142-905(b)(5) (2020) (limiting rental of single-family homes to periods longer than six months in duration); *id.* § 142-1111(a)(1) (prohibiting the rental of units in multifamily dwellings in almost all residential zones for periods shorter than six months and one day in duration). Miami Beach grants certain exceptions that allow short-term rental activity on an extremely limited basis: short-term rentals are permitted in the Collins Waterfront Architectural District and along Harding Avenue in the North Shore National Register Historic District if they are classified as "contributing" in the city's historic properties database, and can be grandfathered in as lawful in the Flamingo Park and Espanola Way Historic Districts if owner-operators can "demonstrate a current and consistent history of short-term renting, and that such short-term rentals are the primary source of income derived from that unit or building." *Id.* § 142-1111(b)(1), (b)(3), (d).

[123] *Id.* §§ 142-905(b)(5)(a), 142-1111(c).

[124] *Id.* §§ 142-905(b)(5)(a)(1), 142-1111(c)(1).

that exceeds 5,000 square feet in size.[125] In 2019, however, a Florida court held in *Nichols v. City of Miami Beach* that the fine structure in the Miami Beach code was impermissible as a matter of preemption by Florida's Local Government Code Enforcement Boards Act.[126] Because the Act's excessive fines clause provides that counties in the state may not impose administrative fines in excess of $1,000 per day per violation for an initial violation, $5,000 for a repeated violation, or $15,000 in the event of an irreparable or irreversible violation, a Miami-Dade County judge determined that the Miami Beach fine structure violated the caps on administrative fines set by the state's legislature.[127]

The *Nichols* decision was the culmination point ending a tumultuous period of regulatory uncertainty for owner-operators of short-term rentals in Miami Beach. Due to the city's prohibition on short-term rentals and associated stringent penalty scheme, owner-operators had been engaged in a game of cat-and-mouse with Miami Beach Code Compliance officers, who routinely patrolled the popular tourist area to try and ferret out illegal short-term rental activity.[128] A spokesperson for the city even suggested in 2019 that owner-operators who provide fraudulent licensure information to list a short-term accommodation in Miami Beach may face jail time.[129] Despite the city's strict regulations, however, journalistic accounts of the situation suggested that even prior to the *Nichols* litigation there were at least 3,500 illegal Airbnb listings operating in Miami Beach.[130] Assuming the *Nichols* decision is not subsequently overturned, it will likely prove difficult for Miami Beach to enact modified restrictions on short-term rental activity as Florida law preempts new local regulations by maintaining that "[a] local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of" vacation rentals, excepting those regulations that existed prior to June 1, 2011.[131]

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[125] *Id.* §§ 142-905(b)(5)(b)(1)(B), 142-1111(c)(5)(A)(2).

[126] No. 2018-21933-CA-22, order at 20–25 (Fla. 11th Cir. Ct. Oct. 7, 2019); FLA. STAT. § 162.09 (2020).

[127] FLA. STAT. § 162.09(2)(d) (2020); Order at 20–25, Nichols v. City of Miami Beach, No. 2018-21933 ca (22) (Fla. Cir. Ct. Oct. 7, 2019).

[128] Gurney & Dolven, *supra* note 121.

[129] Taylor Dolven, *The Punishment for Running an Illegal Airbnb in Miami Beach is Likely to Get a Lot Worse*, MIAMI HERALD (Aug. 2, 2019), https://www.miamiherald.com/news/business/tourism-cruises/article233436012.html.

[130] Taylor Dolven & Martin Vassolo, *Miami Beach's $20,000 fines for illegal Airbnbs struck down in court*, MIAMI HERALD (Oct. 8, 2019), https://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article235904707.html.

[131] FLA. STAT. § 509.032(7)(b) (2019).

The Miami Beach City Commission's 2018 efforts to amend its city code to tighten the reins on short-term rental activity suggest that both local business interests and resident opinions were important factors in the commission's decision to strictly regulate transient accommodation in residential zones there.[132] In September 2018, the city commission unanimously voted to create a new section of the city code imposing liability not only on owner-operators of short-term rentals (i.e., individual property owners or managers) but also on hosting platforms—like Airbnb or Vrbo—that publish listings for transient accommodation in Miami Beach without displaying the requisite licensure information for short-term rentals obtained from the city.[133] At the initial reading of these amendments in July 2018, Miami Beach Deputy City Attorney Aleksandr Boksner stated that the explicit purpose of the new regulations was "to increase the fine [for illegally listing an unlicensed short-term rental] to make sure that it is not something that is [the] cost of doing business."[134] Miami Beach Mayor Dan Gelber underscored that point by emphasizing—correctly, it would turn out—that enacting more stringent regulations on short-term rentals would likely draw the ire of platform giants like Airbnb in the form of litigation.[135]

What, then, would lead city officials in Miami Beach to enact such strict regulations despite the threat of litigation? We contend that the combination of regulatory choices made in Miami Beach—to generally ban short-term rental activity in residential zones, then to require taxes from the relatively low number allowed—originates in pressure from both NIMBY residents unhappy with short-term rental activity in residential zones as well as the local hospitality industry.[136] It is clear from commissioners' comments

[132] *See* MIAMI BEACH CITY COMMISSION, MEETING ON AMENDING CHAPTER 102 OF THE CODE OF THE CITY OF MIAMI BEACH ENTITLED "TAXATION" 1, 79–82 (Sept. 12, 2018), https://miamibeach.novusagenda.com/agendapublic//DisplayAgendaPDF.ashx?MinutesMeetingID=425 (demonstrating Miami Beach Mayor Dan Gelber's belief regarding residents' expectations that certain areas—namely, residential neighborhoods—should not contain commercial activity, and where a representative from the Greater Miami and the Beaches Hotel Association, a fierce opponent of Airbnb and other digital platform short-term rental outfits, expressed the association's support for updating the city code to be less tolerant of short-term rentals in residential zones).

[133] *Id.* at 79; MIAMI BEACH, FLA., CODE OF ORDINANCES § 102-387(a)(2) (2020). The Miami Beach code requires that legally permitted short-term rentals obtain a business tax receipt and resort tax registration certificate from the city. *Id.* § 102-387(a)(1).

[134] *See* MIAMI BEACH CITY COMMISSION MEETING, *supra* note 132, at 60.

[135] *Id.*

[136] *See id.*; *see also* Chabeli Herrera, *How $20,000 Fines Have Made Miami Beach an Airbnb Battleground*, MIAMI HERALD (Nov. 27, 2016), https://www.miamiherald.com/news/business/biz-monday/article117332773.html (detailing support for regulation and taxation of digital platform short-term rentals by the Greater Miami and the Beaches Hotel Association based on comments from their president, Wendy

during public meetings that many residents dislike the encroachment of rental activity into residential zones.[137] Further, as a global tourist destination whose economy benefits greatly from recreational visitors—the city's own website even prominently displays that the city boasts 23,138 hotel rooms in a municipality of 91,562 residents—the local government has an interest in protecting the economic vitality of its core economic sector.[138] By substantially limiting the spread of short-term rental activity as well as extending business tax receipt and resort tax registration certificate requirements to digital platform short-term rentals, theoretically the city manages the dual goals of preventing excessive intrusion by dwellings offering transient accommodation into residential zones and recouping some of the tax revenue that would otherwise be lost to unlicensed short-term rental stays. The unique constellation of interests in Miami Beach—in particular, the political influence of the local hospitality sector via its advocacy arm, the Greater Miami and the Beaches Hotel Association—likely motivated its especially strict regulations on short-term rental activity in residential zones.[139]

B. Arlington, Texas: Calculation and Compromise

Rather than banning short-term rentals in residential zones altogether, the municipal government of Arlington, Texas, has taken a more balanced approach to regulating transient accommodations in residential areas. The Arlington code utilizes a combination of features presented in the regulatory typology in Part II to limit, but not eliminate, short-term rental activity within its city limits.[140] Arlington imposes a maximum occupancy limit,[141] parking requirements,[142] and limits activity to nonsingle-family

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Kallergis). The GMBHA's local advocacy coincided with efforts by an analogous national group, the American Hotel and Lodging Association, to lobby for increased regulation of short-term rentals in American municipalities. Kia Kokalitcheva, *The Hotel Industry has a Multi-Million Dollar Plan to Stop Airbnb*, AXIOS (Apr. 17, 2017), https://www.axios.com/the-hotel-industry-has-a-multi-million-dollar-plan-to-stop-airbnb-1513301641-198cd2c4-cae9-44ac-ab04-c9c6fbdb9a52.html.

[137] MIAMI BEACH CITY COMMISSION MEETING, *supra* note 132, at 81.

[138] *Welcome to Miami Beach*, CITY OF MIAMI BEACH, https://www.miamibeachfl.gov/ (last visited Sept. 20, 2020); MIAMI BEACH CITY COMMISSION MEETING, *supra* note 132, at 82.

[139] *See id.* Indeed, Jessica Fernandez of the Greater Miami and the Beaches Hotel Association was the only member of the public to offer commentary on the new regulations at the public hearing. *Id.*

[140] ARLINGTON, TEX., CODE OF ORDINANCES, SHORT-TERM RENTALS (2019).

[141] *Id.* § 3.12.

[142] *Id.* § 3.13.

residential zones and a specific short-term rental district.[143] The city also requires hosts to obtain a short-term rental permit[144] and pay hotel occupancy taxes.[145] Situated between the two major cities of the Dallas and Fort Worth ("DFW") metroplex, Arlington boasts a population of almost 400,000 people,[146] and the city's entertainment district features numerous attractions like stadiums for the NFL's Dallas Cowboys and the MLB's Texas Rangers, Texas Live!, a social hub featuring live music, bars, restaurants, and shops, and amusement parks, including Six Flags Over Texas.[147] In recent years, Arlington has become a popular tourist destination in North Texas, resulting unsurprisingly in the emergence of digital platform short-term rentals in the area.[148] Here, we analyze proceedings of the Arlington City Council in order to further investigate the considerations that bear on municipal officials deciding whether and how to regulate short-term rentals.

As with any attempt to revise law or public policy, the first obstacle for cities seeking to regulate their short-term rental market is to ensure potential regulatory measures are included on policymakers' agenda.[149] In April 2013, the Arlington City Council voted to remove a proposed short-term rental ordinance from the agenda, putting regulatory action on hold for the time being.[150] Any proposed regulation remained off the council's agenda until June 2016, when councilmember Charlie Parker made a

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[143] ARLINGTON, TEX., CODE OF ORDINANCES, UNIFIED DEVELOPMENT CODE § 3.4.5(E) (2020).

[144] ARLINGTON, TEXAS, CODE OF ORDINANCES, SHORT TERM-RENTALS § 3.03 (2019).

[145] *Id.* § 3.10.

[146] *Arlington City, Texas*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/arlingtoncitytexas (last visited Aug. 6, 2020).

[147] Arlington Convention & Visitors' Bureau, *Things to Do in Arlington, Texas*, ARLINGTON.ORG, https://www.arlington.org/things-to-do/ (last visited Aug. 6, 2020).

[148] Alanna Autler, *Short-Term Rental Market Exploding In Metroplex, Roiling Some Cities*, CBS DFW (Feb. 7, 2020), https://dfw.cbslocal.com/2020/02/07/short-term-rental-market-exploding-metroplex/.

[149] *See* Xinsheng Liu et al., *Understanding Local Policymaking: Policy Elites' Perceptions of Local Agenda Setting and Alternative Policy Selection*, 38 POL'Y STUD. J. 69, 70–72 (2010) (emphasizing the importance of setting the agenda for local officials seeking to achieve policy revision).

[150] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL REGULAR SESSION – EVENING MEETING (Apr. 2, 2013), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=1331&meta_id=155771 ("Councilmember C. Parker made a motion to remove from the table final reading of an ordinance amending the 'Miscellaneous Offenses' Chapter of the Code of the City of Arlington, Texas, by the addition of a new Section 1.17 related to short-term rental of residential property. Seconded by Councilmember R. Rivera, the motion carried with 9 ayes and 0 nays.").

request to consider the issue of short-term rentals again as a response to the growth of Arlington's entertainment district and the growth of digital short-term rental platforms nationwide.[151] The mayor subsequently assigned the task of reviewing the city's short-term rental policy to the council's Municipal Policy Committee.[152] Members of this committee considered approaches to transient accommodation taken in other cities such as Austin and San Antonio, Texas, and created a list of policy objectives based on their perceptions of the community's needs, such as the preservation of neighborhood character and maintaining hotel occupancy tax revenues.[153]

Despite this early action by the Municipal Policy Committee, the possibility of the Texas State Legislature preempting local action on short-term rentals considerably delayed due the city council's regulatory process.[154] The Arlington City Council postponed discussions of short-term rentals from January 2017 to June 2017 while the Texas State Legislature considered proposed legislation that would prohibit cities in Texas from completely banning short-term rentals.[155] The bill passed the Texas State Senate in April 2017, but failed to make it past the committee stage in the House of Representatives, leaving cities in Texas responsible for their own short-term rental regulations.[156]

The Arlington City Council resumed the process of developing regulations by gauging public interest on short-term rentals through town halls for citizens and by releasing a survey that asked questions about the experiences of both owner-operators and their neighbors.[157] The results

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[151] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL REGULAR SESSION – AFTERNOON MEETING (June 28, 2016), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2118&meta_id=240123.

[152] *Id.*

[153] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL SPECIAL SESSION, Video: Presentation and Policy Objective Consideration (Sept. 5, 2017), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2474&meta_id=276772 (last visited August 6, 2020).

[154] Alex Samuels, *Texas Senate Approves Bill Curbing Regulation of Short-Term Home Rentals*, TEX. TRIB. (Apr. 18, 2017), https://www.texastribune.org/2017/04/18/texas-senate-approves-bill-regulate-short-term-home-rentals/.

[155] S.B. 451, 85th Leg., Reg. Sess. (Tex. 2017).

[156] *See id.*; *see also SB 451*, TEX. LEG. ONLINE: HIST., https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB451 (last visited August 6, 2020).

[157] HOST COMPLIANCE LLC, CITY OF ARLINGTON SHORT-TERM RENTAL SURVEY (2018), https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/157309/STR_Survey_Data.pdf. Examples of survey questions include, "What statement best describes your reason for hosting a short-term rental?" and "Would you like to share any particular positive or

revealed that hosts saw short-term rentals as a way to maximize the allocative efficiency of their property, while neighbors expressed concern about the "party house" stereotype, increased traffic and noise, and unfamiliarity with who was staying next to them.[158] This information was consistent with the council's stated policy objectives including the preservation of neighborhood quality and hotel occupancy tax revenues.[159] At the same time, the Arlington Code Compliance Services administrator began working with the council to draft a policy that accomplishes the previously established objectives.[160] The Code Compliance administrator presented the council with three options: 1) apply preexisting provisions from the city code related to nuisance or traffic to short-term rentals; 2) add short-term rentals as a regulated category to the existing code chapter on transient accommodations generally; 3) or develop an entirely new chapter of the code to regulate short-term rentals.[161] The council ultimately chose the last option.[162] In developing a draft ordinance for the council, the Code Compliance administrator created a short-term rental policy objective consideration checklist containing many components of the regulatory typology presented in Part II, including guest occupancy maxima, provisions for establishing a registration process, and minimum parking requirements.[163]

The Arlington council's attempts to regulate proceeded slowly, if not always deliberately. For instance, even when close to enactment, some councilmembers were still hesitant to allow short-term rentals in residential zones because of a suspicion that offering short-term accommodations

negative experiences you have had with short-term renters or hosts in your neighborhood?" *Id.*

[158] *Id.* at 2, 4.

[159] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL SPECIAL SESSION – AFTERNOON MEETING (Apr. 24, 2018), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2728&meta_id=300914.

[160] *Id.*

[161] *Id.*

[162] *See* ARLINGTON, TEX., CODE OF ORDINANCES, SHORT-TERM RENTALS.

[163] *See* ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL SPECIAL SESSION — AFTERNOON MEETING (May 8, 2018), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2740&meta_id=302319; *see also* ARLINGTON CITY COUNCIL, *Short-Term Rental of Residential Property Policy Objective Considerations*, https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/184794/STR_Checklist_5_8_18.pdf (detailing the various regulatory provisions proposed by the Arlington Code Compliance administrator in the draft ordinance).

might realistically be considered analogous to commercial activity.[164] Likewise, the council remained uncertain whether to distinguish between owner-occupied and nonowner-occupied transient accommodations.[165] By the time they approved the first reading of Code Compliance Services' proposed short-term rental ordinance in October 2018, the Arlington City Council had already spent over two years debating the regulation of short-term rentals.[166] Even so, there remained internal division within the council, as some members still maintained that short-term rentals "have no place in residential neighborhoods."[167]

The Arlington Planning and Development Services ("PDS") office was influential in both developing an implementation plan for the city's short-term rental ordinance as well as facilitating cooperation between parties affected by the new regulations. The short-term rental policy eventually adopted by the Arlington City Council is implemented via a revocable special use permit issued by PDS.[168] Further, in an attempt to avoid litigation over the established short-term rental standards, PDS facilitated meetings between relevant advocacy organizations in the community such as the Arlington Short-Term Rental Alliance, homeowner groups, and the Arlington Board of Realtors regarding the specific features of the short-term rental ordinance.[169] Likewise, the PDS office developed a complaint process that relied on the Arlington Police Department reporting any infractions at short-term rentals to Code Compliance, who could then

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[164] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL SPECIAL SESSION – AFTERNOON MEETING (June 19, 2018), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2776&meta_id=306812.

[165] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL SPECIAL SESSION – AFTERNOON MEETING (May 22, 2018), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2756&meta_id=303989.

[166] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL SPECIAL SESSION – AFTERNOON MEETING (Oct. 16, 2018), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2883&meta_id=318672.

[167] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL SPECIAL SESSION – AFTERNOON MEETING (Oct. 30, 2018), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2890&meta_id=319581.

[168] *Id.*

[169] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL SPECIAL SESSION – AFTERNOON MEETING, (Nov. 27, 2018), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2908&meta_id=322235.

identify habitual offenders, potentially resulting in revocation of their license to operate.[170]

The final step in the regulatory process was to define the geographic scope of short-term rental activity in Arlington. It was not until February 19, 2019, that the council decided on a specific short-term rental zone establishing the area in which a short-term rental can operate in a district zoned for single-family housing.[171] In April 2019, the council established a zone extending approximately one mile outward from the center of the entertainment district in which short-term rentals would be permitted.[172] Finally, on April 29, 2019, the Arlington City Council passed Ordinance 19-022, officially creating a short-term rental chapter in the city code, and Ordinance 19-014, which designated land use definitions and created the short-term rental zone in the unified development code, nearly three years after initial discussions on the subject began.[173]

C. Santa Ana, California: Apprehension and Acceptance

Despite the variety of regulatory approaches described in the preceding subsections of this Article, not all municipalities in regions with substantial tourism sectors have elected to bring down the proverbial hammer on short-term rental activity. For instance, the California cities of Santa Ana and Anaheim—the two most populous cities in Orange County, home to popular theme parks Disneyland and Knott's Berry Farm—both issued fourty-five-day moratoria on short-term rental activity in September 2015.[174] Anaheim ultimately updated its municipal code to disallow most

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[170] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL SPECIAL SESSION – AFTERNOON MEETING (Jan. 29, 2019), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2949&meta_id=327608.

[171] ARLINGTON CITY COUNCIL, MINUTES OF CITY COUNCIL SPECIAL SESSION – AFTERNOON MEETING (Feb. 19, 2019), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=2985&meta_id=330688.

[172] Short-Term Accommodations for Residents and Tourism, *Arlington, TX – STR Regulations*, START, https://www.startmovement.org/Regulations (last visited Aug. 6, 2020). The council chose to establish a special overlay zone in which short-term rentals were permitted in single-family zones rather than making wholesale changes to the zoning code based on flexibility, as the boundaries of the overlay zone can be revised during future sessions. MINUTES OF CITY COUNCIL SPECIAL SESSION – EVENING MEETING (Apr. 23, 2019), https://arlingtontx.granicus.com/MediaPlayer.php?view_id=9&clip_id=3055&meta_id=336743.

[173] *Id.*

[174] Adam Elmahrek & Nick Gerda, *Anaheim, Santa Ana Pass Moratoriums on Short-Term Rentals*, VOICE OC (Sept. 17, 2015), https://voiceofoc.org/2015/09/anaheim-santa-ana-

short-term rentals in residential zones and to create a licensure scheme for those transient accommodations in residential zones grandfathered in by the amended ordinance.[175] The Santa Ana City Council, on the other hand, voted unanimously to end the moratorium in October 2015, only a month after it began, and never instituted further regulations on short-term accommodations after the initial, temporary cessation of rental activity.[176]

Unlike elected municipal leaders in Miami Beach or Arlington, when debating whether to extend the short-term rental moratorium councilmembers in Santa Ana emphasized their support for the sharing economy.[177] Further, the only members of the public who testified at the October 2015 meeting in Santa Ana opposed regulation of short-term rentals.[178] While isolated interest groups in the Southern California region—such as the local hospitality workers union UNITE HERE! Local 11[179] and the organization Orange County Communities Organized for Responsible Development[180]—supported stricter regulation of short-term rentals in Orange County municipalities generally, no representatives from those groups voiced discontent at the October 2015 Santa Ana City Council meeting during which city officials voted to allow the moratorium on short-term rental activity to expire.[181] The Santa Ana City Council's explicit

pass-moratoriums-on-short-term-rentals/.

[175] *See* ANAHEIM, CAL., MUN. CODE § 4.05.020(A)–(B) (2020). The Anaheim code establishes that short-term rentals as a general rule are not permitted in residential zones in the city unless owners operated a dwelling as a short-term rental prior to the September 15, 2015 moratorium. *Id.*

[176] Art Marroquin & Jessica Kwong, *Santa Ana Surprisingly Ends Ban on Short-Term Home Rentals — Anaheim Extends Moratorium on them*, ORANGE CNTY. REG. (Oct. 21, 2015), https://www.ocregister.com/2015/10/21/santa-ana-surprisingly-ends-ban-on-short-term-home-rentals-anaheim-extends-moratorium-on-them/.

[177] SANTA ANA CITY COUNCIL, MINUTES OF CITY COUNCIL REGULAR MEETING 21–22 (Oct. 20, 2015) https://santaana.granicus.com/DocumentViewer.php?file=santaana_25f05f01e2103a7b20c4db22a8152dc4.pdf&view=1.

[178] *Id.*

[179] UNITE HERE! LOCAL 11, http://www.unitehere11.org/contact (last visited Nov. 21, 2020) (describing UNITE HERE! Local 11 as "a progressive, movement-based labor union working to improve labor standards in the hospitality sector").

[180] OCCORD, ABOUT US, http://www.occord.org/about (last visited Nov. 21, 2020) (indicating that OCCORD is a community-labor alliance that "combines community organizing, civic participation, strategic research, and advocacy to engages residents, workers, and stakeholders in local government decisions that impact economic opportunity, community health, and overall quality of life").

[181] Adam Elmahrek, *Resident Anger at Short-Term Rentals Has Reached Boiling Point in Anaheim*, VOICE OC (Oct. 21, 2015), https://voiceofoc.org/2015/10/resident-anger-at-short-term-rentals-has-reached-boiling-point-in-anaheim/; Michael Bates, *Santa Ana, California Lawmakers Allow Airbnb Ban to Expire*, HEARTLAND INST. (Dec. 5, 2015),

support for integrating the sharing economy into the civic culture, unmet by any public opposition at either of the relevant meetings on the subject, suggests that officials there consider the potential economic benefits of stimulating tourism via increases in short-term rental market activity greater than the potential costs, emphasized in other jurisdictions, to neighborhoods, workers, and travelers.[182]

IV. CONCLUSION: TOWARD A FAIR (HOME)SHARE?

This Article offers a comprehensive examination of local ordinances governing the operation of short-term rental accommodations in residential zones across major American municipalities. By presenting a typology of regulatory mechanisms in city ordinances and analyzing the manner in which each regulatory provision differentially allocates burdens and benefits across interested populations, this research may inform future inquiries by scholars of land use policy and public officials alike in considering the proper scope of laws ordering municipal short-term rental markets. Further, by providing additional context for an array of policy decisions made by local regulators in Miami Beach, Arlington, and Santa Ana, our case studies in regulatory processes allow us to draw some inferences about how and why local governments adopt one policy or another. The case studies in Part III suggest that the distribution of relevant local interests—whether organizations from the traditional hospitality sector, anti-development community groups, or affordable housing activists—serves as a significant constraint on the politically acceptable range of alternatives municipal officials might find before them. To the extent that responsiveness to local demands signifies policy effectiveness, then, our analysis implies that local policymakers are following best practices through their sensitivity to the expressed interests of citizens and groups in their communities.[183]

The wide variety of approaches to regulating short-term rentals in residential zones encountered in our data reflects the geographic

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https://www.heartland.org/news-opinion/news/santa-ana-california-lawmakers-allow-airbnb-ban-to-expire?source=policybot.

[182] *See* SANTA ANA CITY COUNCIL, MINUTES OF CITY COUNCIL REGULAR MEETING 11 (Sept. 15, 2015), https://santaana.granicus.com/DocumentViewer.php?file=santaana_a3f330dafa6ad07c29232cefdd9f6cc5.pdf&view=1; MINUTES OF CITY COUNCIL SPECIAL SESSION (Feb. 19, 2019), *supra* note 171.

[183] *See* Christine Kelleher Palus, *Responsiveness in American Local Governments*, 42 STATE AND LOCAL GOV'T REV. 133, 133–34 (2010) (concluding that the preferences of citizens in a municipality are reflected in fiscal choices by local officials).

heterogeneity of the American state. To that end, we contend that what constitutes an effective short-term rental policy necessarily varies depending on social and economic characteristics in a given municipality. Local governments should have the freedom to choose—and should be mindful in choosing—what arrangement of regulations best serves the interests of their population. This recommendation echoes Fischel's contention that land use regulations "are not single-valued constraints."[184] For instance, in an area where the economy depends heavily on tourism—not only as a means to generate income for hotel owners, but also as a source of employment opportunities for the proximate community that frequently encourages consumption at nonrecreational establishments—it may be prudent for local governments to rein in short-term rental activity in residential zones, although tourists who elect to book short-term accommodations in traditionally residential areas might nonetheless provide a comparable radiating benefit to local businesses. Contrarily, for cities without a historical reputation for attracting recreational visitors, allowing short-term rental activity to proceed unfettered by regulatory measures may prove more sensible. In any event, it remains possible that the traditional hospitality sector and short-term rentals in residential zones can peaceably coexist based on research that suggests differences in the utility function for travelers who seek accommodations via digital short-term rental platforms versus those who intend to stay in hotels.[185] The interests of NIMBY residents and short-term rental hosts, however, may prove less reconcilable. As a further complication, regardless of the local economy's characteristics, public opinion within any given municipality is by no means uniform, and it stands to reason that almost every community contains single-family residential zones whose occupants are prone to oppose the provision of transient accommodations in their neighborhood, though they may be more likely to prevail numerically in some communities than others. We maintain, however, that as the needs of socially and economically distinct communities will undoubtedly differ, municipal governments should be permitted to operate unshackled by preemption statutes that amount to overhead political control by the state to foreclose the adoption of local regulatory measures for short-term rentals.

Future scholars would do well to extend our research on several dimensions. First, as our analysis is limited to the terms of short-term rental ordinances in the principal cities of major metropolitan statistical areas, we are unable to consider how local governments in less populous locales adapt their land use policy in light of technological advancements related to

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[184] FISCHEL, ZONING RULES!, *supra* note 6, at 30.

[185] *See* Belarmino et al., *supra* note 33.

short-term rentals. Legal developments in small communities with tourism-driven economies might be of particular interest as the economic stakes for local officials considering regulatory alterations are proportionately, if not absolutely, higher. Second, the implementation phase of the policy process remains a blind spot: our research does not allow us to consider the viability of enforcement procedures in municipal short-term rental regulations. Though we provide a comprehensive overview of land use policy related to short-term rentals across major American cities in form, we nevertheless cannot with any certainty declare whether a given community's policy aims are being vigorously pursued in function. Last, it may be that the conceptual predicates for permitting or proscribing short-term rental activity in residential zones vary across regions, states, or cities. In other words, the legal or political tradition in some jurisdictions may favor an expansive notion of property rights unwilling to tolerate any intrusion on the privileges of ownership, while courts and policymakers in other regions might prioritize the advancement of collective or community interests instead. As a first step toward better understanding what constitutes reasonable policy regarding the provision of transient accommodations in residential areas, this Article catalogues and analyzes regulatory provisions governing short-term rentals in major American cities and suggests that a judicious approach to such regulation trusts local governments to decide how to craft rules that meet the social, political, and economic demands of their constituents.

A Voice for the Waters of East Maui

By Hiʻilani Thomas[1*]

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"[B]efore these priceless bits of Americana . . . are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of existing beneficiaries of these environmental wonders should be heard."[2]

I. INTRODUCTION

Kuaʻāina is defined as "[c]ountry (as distinct from the city), countryside; person from the country, rustic, backwoodsman."[3] Professor Davianna

* Authored By Hiʻilani Thomas. Staff Writer at the University of Hawaiʻi at Manoa William S. Richardson School of Law Law Review. Edited and revised by the Volume 43 members of the Law Review.

[2] Sierra Club v. Morton, 405 U.S. 727, 750 (1972) (Douglas, J., dissenting).

[3] Definition of *Kuaʻāina*, NA PUKE WEHEWEHE ʻŌLELO HAWAIʻI, http://wehewehe.org

Pōmaikaʻi McGregor begins Chapter 1 of *Nā Kuaʻāina: Living Hawaiian Culture* by acknowledging that at a time, it was "demeaning" to be considered a kuaʻāina because the word often denoted an "awkward and rough country person."[4] But over time, the word kuaʻāina was reinvigorated.[5] A kuaʻāina became less associated with negative connotations and increasingly revered as one "who embodied the backbone of the land."[6] Till this day, nā kuaʻāina (the plural version of kuaʻāina) reside in the rural regions of Hawaiʻi and are the "keepers" of the land and all its natural resources.[7]

In rural East Maui, nā kuaʻāina are the keepers of the water. To understand their role as keepers, it is of utmost import to listen to the story of nā kuaʻāina of East Maui ("nā kuaʻāina")— one which begins with an abundance of water and wealth that existed with its presence and evolves into the struggle for the restoration thereof.

The story of nā kuaʻāina opens with a recollection of the water that once infused each crevice and narrow valley of East Maui.[8] Just envision—rain was plentiful, water flowed in streams from ma uka ("inland") to ma kai ("ocean"), and "along coastal areas of the drier sections . . . springs percolated up through the rocky shore or in shallow waters of the bays."[9] Most important to the story of nā kuaʻāina, however, is the immeasurable wealth that was generated with the presence of water. This wealth included culture, welfare, and autonomy.[10]

Upon the arrival of colonialists, the story of nā kuaʻāina shifts. With the advent of colonization[11] and particularly as a result of the sugar industry,

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(enter *Kuaʻāina* into search bar; search using "e huli" button).

[4] DAVIANNA POMAIKAʻI MCGREGOR, NA KUAʻAINA: LIVING HAWAIIAN CULTURE 2 (2007).

[5] *See id.* at 2, 4 ("[I]n the context of the Native Hawaiian cultural renaissance of the late twentieth century, the word kuaʻaina gained a new and fascinating significance.").

[6] *See id.* ("I can remember a time when it was demeaning to be called *kuaʻāina*, for it meant that one was an awkard and rough country person. . . . [Eventually a] kuaʻaina came to be looked upon as someone who embodied the backbone of the land.").

[7] *Id.* at 2, 6.

[8] *See id.* at 90–91 (illustrating the water that permeated throughout East Maui).

[9] *Id.*

[10] See Pauahi Hoʻokano, *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 220, 220–21 (Noelani Goodyear-Kaʻopua, Ikaika Hussey, & Erin Kahunawaikaʻala eds., 2014) for a discussion on how Native Hawaiian autonomy attended the flow of water; *see* MCGREGOR, *supra* note 4, at 131–32, 137, 141 (illustrating how water was beneficial for the culture and welfare of na kuaʻaina).

[11] In 1778, Westerners arrived on the shores of Hawaiʻi, marking a turning point in Hawaiʻi's history. *See* D. Kapuaʻala Sproat, *Wai Through Kānāwai: Water for Hawaiʻi's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 173–74 (2011)

the entire landscape of East Maui was transformed.[12] The valleys of East Maui were developed to accommodate ditch systems to divert massive amounts of water for sugar production.[13] Consequentially, the massive water diversions deprived nā kuaʻāina of the life force that powered their culture, welfare, and autonomy.[14] Nevertheless, nā kuaʻāina advocated zealously over generations for the return of East Maui's most invaluable resource, an objective that has yet to come into fruition.[15]

Across the ocean, the Whanganui Iwi of New Zealand share a similar story. The story of the Whanganui River, however, begins with the waters that flow through the Whanganui River.[16] Parallel to the wealth generated by the waters of East Maui, the Whanganui River generated wealth for the Whanganui Iwi because the river was the force that flowed through every

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[hereinafter Sproat, *Wai Through Kānāwai*] ("In the context of Kanaka Maoli, for example, the documented arrival of Westerners in Hawai'i, beginning in 1778 led to physical and cultural genocide, as was the case with Indigenous Peoples the world over."). Notably, colonists "introduced diseases," "displace[d] . . . [Native Hawaiians] from their homelands," and overthrew the Hawaiian Kingdom. *Id.* at 174–75.

[12] *See generally* Memorandum in Support of Motion for Partial Summary Judgment at 3–4, Carmichael v. Bd. of Land & Nat. Res., No. 1CC15-1-0650 (Haw. Oct. 21, 2015) [hereinafter Memorandum in Support] (noting the changes that occurred following colonization); Ho'okano, *supra* note 10, at 222 (describing the history of the sugar industry and the subsequent establishment of massive water diversion systems throughout East Maui); Anita Hofschneider, *This Native Hawaiian Taro Farmer Has Been Fighting A&B For Decades*, HONOLULU CIVIL BEAT (May 2, 2019), https://www.civilbeat.org/2019/05/this-native-hawaiian-taro-farmer-has-been-fighting-ab-for-decades/ (summarizing of the impacts of the sugar industry).

[13] *See* Ho'okano, *supra* note 10, at 222 ("In 1876, Samuel Thomas Alexander and Henry Perrine Baldwin entered into an agreement with the Hawaiian Kingdom to lease lands on the east side of Maui and to build a system of irrigation ditches and tunnels to transport water to Maui's central plain to irrigate sugarcane fields."); *see generally* CAROL WILCOX, SUGAR WATER: HAWAII'S PLANTATION DITCHES 114–18 (1996) (providing background information on the various ditch systems that were established in East Maui).

[14] When the water was diverted, the "diversions . . . impacted stream habitats and cultural resources on which Plaintiffs rel[ied]." Memorandum in Support, *supra* note 12, at 3. Kalo cultivation became difficult, native stream life decreased, and "invasive plant species [took] over those areas below the diversions where water [was unable to] flow freely and where native species used to thrive." *Id.* at 3–4. Some kua'aina struggled to survive because sustaining themselves under the new conditions were difficult. Hofschneider, *supra* note 12.

[15] *See* Ho'okano, *supra* note 10, at 224–31 (summarizing na kua'aina's legal challenges and noting that actions "have resulted in only partial restoration to the streams, leaving the taro farmers with a continued lack of adequate water" and "more legal challenges are underway").

[16] *See generally* Tia Rowe, Comment, *The Fight for Ancestral Rivers: A Study of the Māori and the Legal Personhood Status of the Whanganui River and Whether Māori Strategies Can Be Used to Preserve the Menominee River*, 27 MICH. ST. INT'L L. REV. 593, 596–609 (2019) (providing an overview of the history of the Whanganui Iwi).

sector of life.[17] Analogous to the story of nā kuaʻāina, where colonization adversely transformed East Maui, the Whanganui River was also subjected to appropriation in order to advance colonialist ideologies.[18] Yet the story of the Whanganui Iwi diverges from that of nā kuaʻāina in the battle for post-colonial restoration. Contrary to nā kuaʻāina's unsuccessful attempts towards full restoration of East Maui water flow, the Whanganui Iwi yielded a promising result that materialized after advocacy for a new legal mechanism—the rights of nature.[19]

Christopher Stone—the architect accreddited for the rights of nature—proposes that under this legal mechanism, nature would become a holder of rights.[20] As a holder of rights, nature would be placed in a more advantageous position as it pertains to accessing judicial relief.[21] In light of the legal mechanism's potential, various individuals and groups, beyond the Whanganui Iwi, embraced Stone's renowned proposal.[22] So perhaps, it is

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[17] *See* Elaine C. Hsiao, *Whanganui River Agreement - Indigenous Rights and Rights of Nature*, 42 ENV'T. POL'Y & L. 371, 371 (2012) (explaining that the Whanganui River generated health, sustenance, and life for the Whanganui Iwi).

[18] *See* Kennedy Warne, *A Voice for Nature*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.com/culture/2019/04/maori-river-in-new-zealand-is-a-legal-person/ (last visited Aug. 13, 2019) (describing how the Whanganui River was appropriated).

[19] Rowe, *supra* note 16, at 609 ("The Maori, specifically the Whanganui Tribes, fought a long, but ultimately successful battle to regain rights to the Whanganui River, which is considered to be inseparable from themselves and part of their ancestral history. After over 100 years of social awareness campaigns, petitioning, and filing complaints, the Whanganui River was finally given the respect the Maori had fought so hard to obtain. The Whanganui River is officially recognized as Te Awa Tupua, is being cared for by Te Pou Tupua, and has $30,000,000, plus continuing payments, in a fund for its care.") (footnotes omitted).

[20] *See* Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456, 458 (1972) (proposing the rights to nature theory and explaining what that proposal entails).

[21] *See id.* at 481–82 ("Natural objects would have standing in their own right, through a guardian; damage to and through them would be ascertained and considered as an independent factor; and they would be the beneficiaries of legal awards.").

[22] *See, e.g.*, Matthew Miller, Note, *Environmental Personhood and Standing for Nature: Examining the Colorado River Case*, 17 U. N.H. L. REV. 355, 356–57 (2019) (examining the lawsuit that sought to recognize rights for the Colorado River); Kaitlin Sheber, Article, *Legal Rights for Nature: How the Idea of Recognizing Nature as a Legal Entity Can Spread and Make a Difference Globally*, 26 HASTINGS ENV'T. L. J. 147, 152–57 (2020) (exploring various places that advocated for the rights of nature, including New Zealand, India, and Ecuador); Hannah White, Comment, *Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States*, 43 AM. INDIAN L. REV. 129, 140–64 (2018) (exploring various places that advocated for the rights of nature, including Ecuador, Bolivia, Belize, New Zealand, India, Pennsylvania, and Colorado); Madeleine Sheehan Perkins, *How Pittsburgh Embraced a Radical Environmental Movement Popping Up In Conservative Towns Across America*, BUS. INSIDER (July 9, 2017, 8:00 AM),

time for nā kua'āina to do the same to combat the ongoing impacts of colonization.

This article aims to propose a rights of nature solution that could be adopted as an alternative solution for nā kua'āina to achieve justice. To establish an effective rights of nature solution, this article will deploy Professor D. Kapua'ala Sproat's modified contextual legal framework—an approach that integrates indigenous peoples into the traditional contextual legal inquiry.[23] Generally, a contextual legal framework is premised on the idea that decisions or actions are "not necessarily 'objectively determined.'"[24] Rather, in reality, decisions or actions are subjective.[25] Thus, the primary goal of a contextual legal framework is to reveal the true intention driving decisions or actions by assessing various questions.[26] Under Professor Sproat's modified contextual legal framework—a framework tailored to assess decisions or actions impacting indigenous peoples—the inquiry is narrow.[27] Specifically, the inquiry focuses on an assessment of the "four realms": cultural integrity, lands and natural resources, social welfare and development, and self-government.[28] Such an inquiry is particularly important for indigenous peoples because it integrates their unique history and objectives into the assessment.[29] Applied here, Professor Sproat's modified contextual legal framework serves as a guide for developing a rights of nature solution for nā kua'āina of East Maui—a solution that accounts for the unique story of nā kua'āina and their restorative objectives.

Before proposing the solution, Part II explores the story of nā kua'āina. It begins by delineating the wealth of nā kua'āina and then examining how the sugar industry adversely impacted that wealth. Part II concludes by providing an overview of two legal challenges by nā kua'āina for the restoration of water. Part III then dissects the rights of nature and the growing movement that ensued, particularly focusing on the Whanganui

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https://www.businessinsider.com/rights-for-nature-preventing-fracking-pittsburgh-pennsylvania-2017-7 (examining the successful implementation of the rights of nature in Pittsburgh).

[23] *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 172–73 (explaining that "this evolving framework embraces unique feautures to discern what justice looks like for Indigenous Peoples").

[24] *Id.* at 170.

[25] *See id.* at 168–69 (explaining that decisions are actually influenced by a variety of factors).

[26] *Id.* at 171.

[27] *See id.* at 173 (noting that the modified contextual legal framework focuses on assessing only four areas).

[28] *Id.*

[29] *Id.* at 172–73.

Iwi. Part IV explains the contextual legal framework and introduces Professor Sproat's modified approach. Finally, Part V of this article (1) proposes a rights of nature solution comprised of a selection of provisions from the existing Whanganui Iwi legislation and (2) assesses the solution using Professor Sproat's modified contextual legal framework.

II. THE STORY OF NĀ KUA'ĀINA[30]

Nā kua'āina share an authentic story, where water flows through every chapter. At the beginning, nā kua'āina share about the wealth that accompanied the rain, the springs, and the streams of East Maui. The story then shifts when nā kua'āina chronicle the history of colonization, which in the end deprived them of the water that once flowed profusely. But the next generation of nā kua'āina also share about the current fight for restoration, inspired by their kūpuna ("elders") who fought zealously for decades.

A. Chapter 1: The Wealth of East Maui

On the eastern slopes of Haleakalā, water in the form of rain, springs, and streams, permeated throughout the valleys of rural East Maui, providing an abundance of wealth for nā kua'āina of this region.[31] But the use of the word wealth, as deployed here, is not defined based on traditional Western understandings. Rather, to understand wealth in the context of nā kua'āina, it is imperative to temporarily set aside traditional Western notions and embrace those of Native Hawaiians,[32] whereby water and life are intimately intertwined.[33] It is only in this context that wealth, as used here, can be adequately defined. Against this backdrop, water was wealth for nā kua'āina of East Maui because it is what flowed through their culture, welfare, and autonomy.[34]

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[30] See MCGREGOR, *supra* note 4, at 83–142, for a more comprehensive narration of the story of na kua'aina of East Maui.

[31] See id. at 90–92, 109, 112, for a descriptive narration of the water that flowed through East Maui.

[32] Native Hawaiian "refers to the Indigenous population inhabiting Hawai'i at the time of Western contact in the late 1700s." Sproat, *Wai Through Kānāwai*, *supra* note 11, at 127 n.3.

[33] *See* D. Kapua'ala Sproat, *From Wai to Kānāwai: Water Law in Hawai'i*, *in* NATIVE HAWAIIAN LAW: A TREATISE 522, 526 (2015) [hereinafter Sproat, *Water Law in Hawai'i*] ("Before the first documented arrival of Westerners in 1778, water was recognized as the source of all life in Hawai'i.").

[34] For a general overview of how water and autonomy coexisted, see Ho'okano, *supra* note 10, at 220–21; for illustrations on how water was beneficial for the culture and welfare of na kua'aina, see MCGREGOR, *supra* note 4, at 131–32, 137, 141.

To understand how water and culture intersect, one must internalize the centrality of subsistence practices for nā kuaʻāina. If you rewind to the days of early settlement, subsistence lifestyles encapsulated the essence of nā kuaʻāina of East Maui because the terrain lent itself to subsistence practices.[35] Along the coast and the streams, nā kuaʻāina "harvested fish, shellfish, and seaweed."[36] Ma uka, nā kuaʻāina cultivated "sweet potatoes, yams, and bananas for food, wauke for bark cloth, olonā for cordage, ʻawa for a relaxant drink, and other edible and useful native plants."[37] But the two subsistence practices that were prominent in East Maui were farming kalo ("taro")[38] and gathering native species from East Maui streams.[39] Given the abundance of water that flowed within this region, East Maui provided the ideal conditions for the foregoing subsistence practices to thrive.[40]

First, water was essential to farming kalo.[41] "[W]ater was taken from streams and put into ʻauwai, irrigation ditches, that fed [kalo] patches. The water then went from patch to patch, and upon exiting the final [kalo] patch in the system, the water was returned to the stream so that stream flow was uninterrupted and allowed to flow into the ocean."[42] When stream flow quantities were high, water temperatures were cooler and allowed kalo to thrive.[43] In various districts throughout East Maui, ranging from the valley

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[35] *See* McGregor, *supra* note 4, at 90–94 (explaining how the water-abundant region of East Maui allowed na kuaʻaina to exercise a variety of subsistence practices); *see generally* Memorandum in Support, *supra* note 12, at 2 (referring to the "Keʻanae-Wailuanui region as a 'cultural kipuka,' defined as 'places where Hawaiians have maintained a close relationship to the land through their livelihoods and customs—that play a vital role in the survival of Hawaiian culture as a whole'").

[36] McGregor, *supra* note 4, at 91.

[37] *Id.*

[38] *See* Memorandum in Support, *supra* note 12, at 3 (reporting the significance of taro cultivation).

[39] *See* McGregor, *supra* note 4, at 131–32 (explaining how families gathered native species in East Maui).

[40] *See id.* at 137 ("Fresh water is an integral part of the cultural landscape for taro cultivation, the gathering of aquatic and marine resources, recreation, and domestic use.").

[41] *See* D. Kapuaʻala Sproat, *A Question of Wai: Seeking Justice Through Law For Hawaiʻi's Streams and Communities*, *in* A Nation Rising: Hawaiian Movements for Life, Land, and Sovereignty 199, 201–02 (K. Tsianina Lomawaima et al. eds., 2014) [hereinafter Sproat, *A Question of Wai*] ("We understood that caring for our elder sibling Hāloa by cultivating kalo (taro) required an abundant supply of fresh water to flow through irrigated terraces and back into streams, and that this was necessary to sustain the larger community.").

[42] Hoʻokano, *supra* note 10, at 221.

[43] *See, e.g.*, Petitioners' Opening Statement and Brief at 9, Petition to Amend Interim Instream Flow Standards for Honopou, etc., Haw. Dep't of Land & Nat. Res. Comm'n on Water Res. Mgmt. (No. CCH-MA13-01) (Dec. 30, 2014).

of Honomanū to Nuaʻailua, Wailuanui, and Keʻanae, the landscape was terraced with kalo patches and intricate ʻauwai systems that provided irrigation.[44]

Second, water also enabled conditions for the practice of gathering native species to thrive.[45] For one, the streams were the habitat for many native species, including ʻōpae ("shrimp"), hīhīwai ("limpet"), and ʻoʻopu ("gobbi fish").[46] Two, the abundant and unhindered stream flow of East Maui streams supported diadromous native species—species that depended on both fresh water streams and salt water oceans during their lifecycles.[47]

Against this backdrop, one can understand how water and culture intersect. Nā kuaʻāina's dependence on subsistence practices was an important facet of their culture and that dependence demanded consistent water flow. It was not only necessary for present interests, but was imperative for cultural survival because water was the bond that connected the past and the present.[48] When the water was abundant, kūpuna were able to pass on their knowledge to emerging generations of nā kuaʻāina.[49] Such knowledge included deep understandings of natural factors and their interplay in subsistence practices.[50] As a result, "[a]s the [kūpuna] grew old, their children and grandchildren carried on the work."[51] So long as the

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http://files.hawaii.gov/dlnr/cwrm/cch/cchma1301/CCHMA1301-20141230-NHLC-OSB.pdf [hereinafter Petitioners' Opening Statement and Brief] (noting that "'water quantity and quality in terms of temperature' – conditions eroded by the diversions – are absolutely critical to perpetuate wetland taro farming practices in this historic taro-growing area"); Hoʻokano, *supra* note 10, at 224 ("In order for taro in wetland loʻi to thrive, it needs cool, flowing water.").

[44] *See* McGREGOR, *supra* note 4, at 91 (describing some of the areas in East Maui where kalo was cultivated).

[45] *See id.* at 137 (adding that "fresh water" was "integral" for "the gathering of aquatic and marine resources").

[46] *Id.* at 131–32.

[47] *See* Sproat, *Water Law in Hawaiʻi*, *supra* note 33, at 526 ("Continuous ma uka to ma kai (from the mountains to the ocean) stream flow was critical to . . . maintaining a travel corridor through which native stream animals could migrate between the streams and ocean to complete their life cycles.").

[48] *See* McGREGOR, *supra* note 4, at 18 ("The time spent engaged in subsistence [enabled]. . . . [k]uaʻaina [to] reinforce their knowledge about the landscape, place-names and meanings, ancient sites, and areas where rare and endangered species of flora and fauna exist. This knowledge is critical to the preservation of natural and cultural landscapes because they provide a critical link between the past and the present.").

[49] *See id.* ("Older family members teach younger ones how to engage in subsistence and prepare the food, thus passing on ancestral knowledge, experience, and skill.").

[50] *See id.* at 130, 132 (describing how na kuaʻaina's subsistence practices depended on a multitude of factors including the weather, the moon and the stars).

[51] *Id.* at 141.

water remained flowing, the link between the past and the present remained unbroken.[52]

Inasmuch as water intertwined with culture, the presence of water directly correlated to the welfare of nā kua'āina because ongoing flow ensued sustenance and stability.[53] As discussed above, water enabled conditions that allowed the exercise of subsistence practices.[54] As a result, subsistence practices—namely kalo farming and gathering native species—generated abundant yields that sustained nā kua'āina.[55] One kua'āina, Terrance P.K. Akuna shared that he "gather[ed] and fish[ed] to feed his family."[56] Akuna further explained: "Our streams [were] our iceboxes."[57] Mary Ka'auamo, another kua'āina, added: "Wailuanui they [had] everything. They [had] the taro patch, they [had] the fishing ground, they [had] the 'ōpae, they [had] the 'o'opu, they [had] the shell in the patch, you know, *they [had] everything . . . you want[ed]*."[58] Together, both Akuna and Ka'auamo, as well as countless other kua'āina, recollected the capacity of East Maui to provide sustenance for generations of families.[59] Importantly, water played an integral role in shaping those shared attitudes and the overall welfare for nā kua'āina.

Beyond water's ability to provide sustenance for nā kua'āina, water was the root of the economy.[60] When water generated abundant yields, those yields helped nā kua'āina establish an economy based on either the sale or exchange of those resources, the result of which provided stability for nā kua'āina.[61] For example, some kua'āina relied on 'ōpae for income.[62] These kua'āina further elaborated that the sale of 'ōpae was an important source of income for them when they were younger because their "parents and

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[52] *See id.* at 18–19 ("However, visiting such places and sites while engaged in subsistence provides a continuity that is critical to the survival and perpetuation of the knowledge of these cultural places.").

[53] *See id.* at 129–32 (describing how water created conditions that positively impacted the welfare of na kua'aina).

[54] *See supra* text accompanying notes 31–47.

[55] *See* McGREGOR, *supra* note 4, at 129–30 (delineating numerous testimonies of na kua'aina who share about the abundance of water that provided sustenance).

[56] Petitioners' Opening Statement and Brief, *supra* note 43, at 11.

[57] *Id.*

[58] McGREGOR, *supra* note 4, at 129 (emphasis added).

[59] Petitioners' Opening Statement and Brief, *supra* note 43, at 11–12.

[60] *See* McGREGOR, *supra* note 4, at 114, 131–32 (explaining how water enabled conditions where income could be generated for na kua'aina).

[61] *See id.* (explaining how cultivating kalo and gathering native specied helped establish the economy that existed in East Maui).

[62] *See id.* at 131 ("The kupuna explained that when they were growing up, the gathering of 'opae for sale was an importance source of income for their parents and grandparents who did not hold full-time jobs.").

grandparents . . . did not hold full-time jobs."[63] Other reports shared the importance of kalo for the economy.[64] "The Ke'anae kua'āina . . . had a system of barter and exchanged with Kona and Moloka'i. Taro in the form of pa'i'ai would be exchanged for 'ōpelu or akule from Kona and squid from Moloka'i."[65] The accounts recollecting how resources provided stability were copious, but such stability was possible because of the water that flowed through this region.

Finally, autonomy attended the flow of water—an autonomy that was not possessed by nā kua'āina but rather by Native Hawaiians as a whole. Historically, autonomy and water coexisted because water was regulated by Native Hawaiians, in accordance with Native Hawaiian laws.[66] First, managerial authority over water rested traditionally with Native Hawaiian chiefs known as konohiki.[67] Second, "traditional Hawaiian law, or kānāwai" reigned as the law of the water.[68] For example, "no 'auwai was permitted to take more water than continued to flow in the stream below the dam."[69] Additionally, stream users were not permitted to divert "more than half the flow of a stream to . . . any one 'auwai."[70] The overarching goal "was to secure equal rights to all."[71] The biggest takeaway here is that autonomy accompanied the flow of water because water regulation was an

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[63] *Id.*

[64] *See id.* at 114, 141 (sharing how kalo was a "profitable" item on the market and was often exchanged for other items).

[65] *Id.* at 114.

[66] *See* Ho'okano, *supra* note 10, at 220–21 (explaining how Native Hawaiian chiefs governed); *see also* Antonio Perry, *Hawaiian Water Rights* 23 YALE L.J. 437, 438–43 (1914) (describing the traditional Native Hawaiian governing system and its corresponding laws); *see generally* MCGREGOR, *supra* note 4, at 29 ("From 1650 to 1795, the time of the Proto-Historic period, just prior to the arrival and settlement of Europeans, Hawaiian society was highly stratified under ruling chiefs who controlled whole islands and groups of islands and vied for control as a paramount chief.").

[67] *See* Ho'okano, *supra* note 10, at 220–21 ("Traditionally, water was considered sacred, and its use was regimented and regulated by the konohiki, or chief, of an ahupua'a, a pie-shaped wedge of land that ran from the mountains down to the ocean.").

[68] *See* Sproat, *Water Law in Hawai'i*, *supra* note 33, at 526 ("Given the critical role that water played in Hawaiian society, traditional Hawaiian law, or kanawai, developed around the management and use of fresh water.").

[69] *Id.* at 527.

[70] *Id.* at 528; HAROLD ANDERSEN WADSWORTH, A HISTORICAL SUMMARY OF IRRIGATION IN HAWAII 21 (1933); *accord* Perry, *supra* note 65, at 441 ("No dam was permitted to divert more than one-half of the water flowing in the stream at the point of diversion and the quantity taken was generally less."); *see* Emma Metcalf Nakuina, *Ancient Hawaiian Water Rights*, *in* HAWAIIAN ALMANAC AND ANNUAL FOR 1894 79, 82 (Thomas G. Thrum ed., 1893).

[71] Perry, *supra* note 66, at 442.

internal affair that fell within the province of Native Hawaiian control and was guided by Native Hawaiians values.[72]

Together, nā kua'āina held an abundance of wealth derived from the water that flowed through East Maui. When the water was flowing, there was a strong sense of culture, welfare, and autonomy. By internalizing these understandings, one can grasp the extent to which the emerging sugar industry impacted nā kua'āina. The following section provides a broad overview of the sugar industry and examines how the sugar industry adversely impacted the culture, welfare, and autonomy of nā kua'āina.

B. Chapter 2: The Sugar Industry

The emerging sugar industry was one of many changes that altered the socio-political and geographical landscape of Hawai'i and is significant in nā kua'āina's story. First, political affairs, namely the Hawaiian Kingdom's endorsement of the sugar industry[73] and the subsequent ratification of the Reciprocity Treaty of 1876 ("Reciprocity Treaty") played a critical role in advancing sugar to the forefront of Hawai'i's economy.[74] Second, and perhaps of equal importance, was the physical landscape of Hawai'i, which had an abundance of sunlight, land, and water—everything the sugar industry needed to grow and prosper.[75] Together, the political affairs and the physical landscape and climate were the prelude to an influx of interested sugar planters and water companies.[76]

In 1876, Samuel Alexander and Henry Baldwin, founders of Alexander & Baldwin ("A&B"), "were the first to establish a private water company"—previously known as the Hāmākua Ditch Company and subsequently known as the East Maui Irrigation Company ("EMI").[77] The purpose of EMI was to "develop and administer the surface water for all the

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[72] *See* Ho'okano, *supra* note 10, at 220–21 (explaining that Native Hawaiian chiefs known as konohiki managed the water); *see also* Perry, *supra* note 66, at 438–43 (describing the Native Hawaiian laws that governed and the system that existed).

[73] WILCOX, *supra* note 13, at 15 ("The Hawaiian monarchy supported the sugar industry. Indeed, for years it directed major diplomatic efforts toward reducing or removing the import taxes from sugar and other products sent to the United States from Hawaii. King Kamehameha III was personally aware of the obstacles facing sugar planters, having had his own problems at his sugar plantation in Wailuku, Maui.").

[74] The Reciprocity Treaty enabled "tax-free trade for most products between Hawaii and the United States." *Id.* at 16.

[75] *Id.* at 1.

[76] *See id.* at 16 ("Upon the adoption of the Reciprocity Treaty, prospective sugar planters began at once to invest in the development of both surface and groundwater.").

[77] *Id.* at 17–18.

plantations owned, controlled, or managed by [A&B]."[78] At the time EMI succeeded the Hāmākua Ditch Company, partners Samuel Alexander and Henry Baldwin had already completed the development of the Lowrie Ditch[79] and the Koolau Ditch[80]—both of which diverted water from East Maui streams. Following its establishment in 1908, EMI continued to build ditches and water development tunnels.[81]

In total, EMI's "collection system had 388 separate intakes, 24 miles of ditch, 50 miles of tunnels, and twelve inverted siphons as well as numerous small feeders, dams, intakes, pipes, and flumes. Supporting infrastructure included 62 miles of private roads and 15 miles of telephone lines."[82] In its entirety, this system diverted water "from a total watershed area of 56,000 acres" located in East Maui.[83] A recent report indicated that water diversions totaled 165 million gallons of water per day.[84]

Slowly, the massive diversions diminished the cultural wealth that once existed with an abundance of water.[85] First, the massive diversions impacted ongoing interests in perpetuating culture.[86] For example, farming kalo was one of many subsistence cultural practices that struggled to survive.[87] Cultivating kalo required between 100,000 to 300,000 gallons per acre, per day, and zero water flow created a serious issue.[88] Kalo cultivation was equally challenging where streams experienced diminished flow. Reduced water quantities resulted in warmer stream temperatures that created an unsuitable environment for kalo to thrive.[89] The decline in stream flow was considered "particularly oppressive for wetland taro farmers, who require[d] certain minimum volumes and temperatures of

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78 *Id.* at 117.

79 *Id.* at 114.

80 *Id.* at 116.

81 *Id.* at 117.

82 *Id.* at 117–18.

83 *Id.* at 118.

84 Petitioners' Opening Statement and Brief, *supra* note 43, at 13.

85 *See* Memorandum in Support, *supra* note 12, at 3–4 (explaining the water diversions' impact on na kua'aina's culture).

86 *See id.* ("The lack of streamflow threatens the survival of Hawaiian traditional and customary practices and is particularly oppressive for wetland taro farmers. . . . The lack of streamflow has also caused the decline of 'o'opu, hihiwai, and 'opae populations in the streams as well as fish populations and varieties off the coast, which impacts Plaintiffs's traditional and customary gathering and fishing rights.").

87 *See id.* at 3 (explaining how the diversions negatively impacted kalo cultivation).

88 Petitioners' Opening Statement and Brief, *supra* note 43, at 8.

89 *See* Ho'okano, *supra* note 10, at 224 ("In order for taro in wetland lo'i to thrive, it needs cool, flowing water. Otherwise, pythium rot, also known as pocket rot, sets in, stunting or destroying the crop.").

water to ensure the health and vitality of their crops."[90] Some kua'āina tried to rectify the effects of the lack of water by journeying ma uka to manually retrieve water for their kalo patches.[91] Nonetheless, Jerome Kekiwi Jr., one kua'āina, shared that "thousands" of kalo still died.[92]

Moreover, the diminished water quantities similarly impacted nā kua'āina's ability to gather native species from East Maui streams.[93] Where streams experienced diminished water flows or entire deprivations, those streams became an unsuitable habitat for native species.[94] Resultingly, nā kua'āina were unable to carry out their traditional subsistence practices.[95] "Moreover, invasive plant species [took] over those areas below the diversions where water [was unable to] flow freely and where native species used to thrive."[96]

Various testimonies shared similar heartaches regarding the sugar industry's impact on nā kua'āina's cultural survival. Ed Wendt, one kua'āina, considered the events that transpired to be a "cultural genocide."[97] Wendt further elaborated, "We lost decades, two decades of teaching our own children to farm."[98] Earl Smith Sr., another kua'āina, explained, "[t]he lack of stream flow [was] a problem for me because my grandkids [did not] have the experience or resources to gather what they need[ed] from the land and water."[99] 'Awapuhi Carmichael, another kua'āina, similarly shared: "[t]he lack of stream flow [was] a problem for me because we need water so future generations can continue our traditions."[100] The testimonies were numerous, but the sentiments were the same: when the water was taken, so was the culture of nā kua'āina.

As the sugar industry eroded the cultural wealth that flowed with an abundance of water, the welfare of nā kua'āina experienced a similar decline. 'Awapuhi Carmichael recollected that when she was growing up,

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[90] Memorandum in Support, *supra* note 12, at 3.

[91] Hofschneider, *supra* note 12.

[92] *Id.*

[93] *See* Memorandum in Support, *supra* note 12, at 3–4 (noting the impacts of diminished water quantities on 'o'opu, hihiwai, and 'opae).

[94] *See id.* (describing how 'o'opu, hihiwai, and 'opae declined).

[95] *Id.*

[96] *Id.* at 4.

[97] Hofschneider, *supra* note 12.

[98] *Id.*

[99] Declaration of Earl Smith, Sr. at 2, State of Hawai'i, Dep't of Land & Nat. Res. Comm'n on Water Res. Mgmt. (2014) (No. CCH-MA13-01), http://files.hawaii.gov/dlnr/cwrm/cch/cchma1301/CCHMA1301-20141230-NHLC-DE.pdf.

[100] Declaration of 'Awapuhi Carmichael at 3, State of Hawaii, Dep't of Land & Nat. Res. Comm'n on Water Res. Mgmt. (2014) (No. CCH-MA13-01), http://files.hawaii.gov/dlnr/cwrm/cch/cchma1301/CCHMA1301-20141230-NHLC-DE.pdf.

the resources were abundant.[101] But as the resources declined, many nā kuaʻāina who were once reliant upon abundant yields of resources felt the impacts the most.[102] For example, those that relied upon kalo for their income were no longer able to generate sufficient yields.[103] Norman "Bush" Martin Jr., one kuaʻāina, shared that he was "unable to pull taro from his patch to send to Aloha Poi for over two months [and] . . . [h]is patches became dry and cracked, resulting in a potential loss of his crop, the income of which supplement[ed] what he [made] at his day job."[104] Some kuaʻāina were even forced to close down their kalo patches because the new conditions could not sustain cultivation.[105] A handful of kuaʻāina were also forced to relocate from East Maui.[106] "Of course people have to move away," Ed Wendt, one kuaʻāina, acknowledged, "[t]hey have no food, they have no job."[107]

In terms of autonomy, the water diversions revealed a new reality where water and autonomy no longer coexisted. Water for the benefit of all—an essential tenet of traditional Native Hawaiian water laws—no longer prevailed over the state of affairs.[108] Nā kuaʻāina even pleaded to the commissioners of Crown Lands: "We request your kindness. Do not allow any water rights of the *Crown Lands* of Honomanu, Keʻanae, and Wailua to be lost to the millionaire Claus Spreckels[.]"[109] Opposition then persisted in February 1902.[110] That year, nā kuaʻāina of Nāhiku protested the water leases.[111] Then "[i]n 1985, the Keʻanae-Wailuanui Community Association submitted comments regarding proposed interim instream flow standards."[112] Yet irrespective of nā kuaʻāina's pleas and the water diversion's incompatibility with Native Hawaiian laws, the appropriations continued and it became evident that any sense of independence that once existed no longer accompanied the flow of water.[113]

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[101] *See id.* at 1 (explaining that food was plentiful when she was growing up).

[102] *See, e.g.*, Hofschneider, *supra* note 12; Hoʻokano, *supra* note 10, at 224.

[103] *See, e.g.*, Hofschneider, *supra* note 12; Hoʻokano, *supra* note 10, at 224.

[104] Hoʻokano, *supra* note 10, at 224.

[105] Hofschneider, *supra* note 12.

[106] *See id.* (sharing that the lack of food and jobs required some kuaʻaina to move away).

[107] *Id.*

[108] *See* Hoʻokano, *supra* note 10, at 221, 224 (describing how kalo patches went dry even though traditionally "one could not completely dewater the river" because many kuaʻaina relied on the water).

[109] *Id.* at 222.

[110] *Id.* at 223.

[111] *Id.*

[112] *Id.*

[113] *See* Sproat, *Water Law in Hawaiʻi*, *supra* note 33, at 533 ("Although both the commissions and the courts were directed 'to declare and to protect these rights as they existed, under the ancient Hawaiian customs and regulations,' the ability to respond to

For decades, the sugar industry's demand for water diverted East Maui's most invaluable resource, consequentially eroding the wealth of the region. Yet although the culture, welfare, and autonomy diminished, nā kua'āina refused to relinquish their position as the keepers of the water. As such, culminating from decades of appropriation, nā kua'āina challenged private entities, the State of Hawai'i and its affiliates, and the County of Maui in various actions to address the issues deriving from the long-standing water diversions.[114]

C. Chapter 3: The Fight

"Anything that separates [nā kua'āina] from the land or water that are essential to their identity as native peoples, I think we have to do whatever we can to protect it."[115]

From the massive water diversions that appropriated nā kua'āina's most invaluable resource, two major challenges arose.[116] The first challenged the flow standards of East Maui streams.[117] The second challenged the long-term and short-term permits authorizing water diversions from East Maui streams.[118]

1. Instream flow standards challenge

One of the mechanisms designed to "protect the public interest in the waters of the State"[119] and the basis for nā kua'āina's first challenge is the designation of Instream Flow Standards ("IFSs").[120] Pursuant to Hawai'i Revised Statutes ("HRS") Chapter 174C (collectively, the "Water Code"),

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individual cases and reapportion water was constrained, as decisions and practices increasingly reflected Western notions of *ownership* as opposed to *management*.").

[114] *See* Maui Tomorrow v. Bd. of Land and Nat. Res., 110 Hawai'i 234, 234-46, 131 P.3d 517, 517–29 (2006); Carmichael v. Bd. of Land & Nat. Res., No. CAAP-16-0000071, 2019 WL 2511192, at *1–9 (Haw. Ct. App. June 18, 2019); *In re* Interim Instream Flow Standards for Waikamoi, No. CAAP-10-0000161, 2012 WL 5990241, at *1–4 (Haw. Ct. App. Nov. 30, 2012).

[115] Hofschneider, *supra* note 12.

[116] *See* Maui Tomorrow, 110 Hawai'i at 236–46, 131 P.3d at 519–29; Carmichael, 2019 WL 2511192, at *1–9; *In re* Interim Instream Flow Standards for Waikamoi, 2012 WL 5990241, at *1–4.

[117] *See infra* Part II.C.1.

[118] *See infra* Part II.C.2.

[119] *Instream Flow Standards*, STATE OF HAWAI'I, DEP'T OF LAND & NAT. RES. COMM'N ON WATER RES. MGMT., https://dlnr.hawaii.gov/cwrm/surfacewater/ifs/ (last visited Sept. 20, 2020).

[120] *See In re* Interim Instream Flow Standards for Waikamoi, 2012 WL 5990241, at *1–4.

the State of Hawai'i, Department of Land and Natural Resources' Commission on Water Resource Management (collectively, the "Water Commission")[121] is responsible for, *inter alia*, establishing IFSs and Interim Instream Flow Standards ("IIFSs")—flow standards that regulate the minimum amount of water required to remain in a stream.[122] Both IFSs and IIFSs necessitate identical balancing tests.[123] IFSs, however, are permanent whereas IIFSs are temporary stream flow standards.[124]

Despite the legal requirements for establishing IFSs and IIFSs, in 1988, the Water Commission simply adopted "status quo" IIFSs for East Maui streams.[125] Those status quo IIFSs adopted "whatever water, if any, happened to be in Hawai'i's streams on a particular date."[126] Yet the "status quo" IIFSs failed to assure a minimum water flow that "protect[ed] the public trust and community uses."[127]

On May 24, 2001, Nā Moku 'Aupuni 'o Ko'olaui Hui ("Nā Moku")[128]—"a nonprofit corporation organized by native Hawaiian residents of East Maui ahupua'a"—petitioned the Water Commission to amend the IIFSs for 27 East Maui streams (collectively, "2001 Petition to Amend").[129] While

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[121] The idea of the Water Commission was proposed in 1978 at the State of Hawai'i Constitutional Convention. *Laws & Regulations*, STATE OF HAWAI'I, DEP'T OF LAND & NAT. RES. COMM'N ON WATER RES. MGMT., https://dlnr.hawaii.gov/cwrm/aboutus/regulations/ (last visited Sept. 20, 2020). The Water Commission, however, was officially established in 1987 after the enactment of the Water Code. *See id.* The Water Commission is responsible for administering the Water Code, which was designed to (1) recognize the importance of preserving Hawai'i's water resources for the benefit of the people and (2) establish a water plan to protect Hawai'i's water resources. *See id.*

[122] HAW. REV. STAT. § 174C (2019); *see, e.g.*, Sproat, *Water Law in Hawai'i*, *supra* note 33, at 549; Sproat, *Wai Through Kānāwai*, *supra* note 11, at 151.

[123] *See* HAW. REV. STAT. § 174C-71 (2019).

[124] *See* HAW. REV. STAT. § 174C-3 (2019) (defining IFSs and IIFSs).

[125] Sproat, *Water Law in Hawai'i*, *supra* note 33, at 551.

[126] *Id.*

[127] *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 151.

[128] Na Moku was founded by Edward Wendt. Ho'okano, *supra* note 10, at 225. "Edward Wendt comes from Wailuanui, where his family, like most of the Hawaiian families in the region, practiced taro farming since time immemorial. When he founded Na Moku 'Aupuni o Ko'olau Hui, it was 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 scholarships." *Id.*

[129] *In re* Interim Instream Flow Standards for Waikamoi, No. CAAP-10-0000161, 2012 WL 5990241, at *1 (Haw. Ct. App. Nov. 30, 2012). Na Moku petitioned to amend the following streams: Honopou, Hanehoi/ Puoloa (Huelo), Waikamoi, Alo, Wahinepe'e, Puohokamoa, Ha'ipua'ena, Punalau/ Kolea, Honomanu, Nua'ailua, Piinaau, Palauhulu, Ohia (Waianu), Waiokamilo, Kualani (Hamau), Wailuanui, Waikani, West Wailuaiki, East Wailuaiki, Kopiliula, Pua'aka'a, Waiohue, Pa'akea, Waiaaka, Kapaula, Hanawi, and Makapipi. *Findings of Fact, Conclusions of Law, & Decision and Order*, State of Hawai'i.

the "[Water] Commission held an open meeting to reach a decision on the IIFSs amendment for nineteen of the streams," the Water Commission restored flow to only six of them—"two on an annual basis and four on a seasonal basis."[130]

Nā Moku subsequently petitioned the Water Commission for a contested case hearing, which was denied on October 18, 2010 ("2010 Contested Case Hearing denial").[131] Following the 2010 Contested Case Hearing denial, Nā Moku appealed, asserting two points of error: (1) the Water Commission erred in denying Nā Moku's request for a contested case hearing and (2) the Water Commission erroneously reached a decision on the nineteen streams at issue.[132] On November 30, 2012, the Intermediate Court of Appeals of Hawai'i ("ICA") issued their decision vacating the Water Commission's 2010 Contested Case Hearing denial.[133]

After the ICA issued its decision, the Water Commission held a contested case hearing and subsequently issued its "Findings of Fact, Conclusions of Law, and Decision and Order," filed June 20, 2018[134]—a decision that restored water flow to ten East Maui streams.[135]

2. *Permits challenge*

Alternative provisions designed to protect the environment and serve as the basis for nā kua'āina's second challenge are HRS sections 171-55,[136] 171-58,[137] and 343-5.[138] Pursuant to the foregoing statutes, permit

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Dep't of Land & Nat. Res. Comm'n on Water Res. Mgmt. (June 20, 2018), http://files.hawaii.gov/dlnr/cwrm/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf.

[130] *In re* Interim Instream Flow Standards for Waikamoi, 2012 WL 5990241, at *1.

[131] *Id.*

[132] *Id.*

[133] *Id.* at *4.

[134] *Findings of Fact, Conclusions of Law, & Decision and Order*, *supra* note 136.

[135] *Landmark Decision Restores Flow in 10 Maui Streams After More Than a Century*, KHON2 (June 20, 2018), https://www.khon2.com/news/landmark-decision-restores-flow-in-10-maui-streams-after-more-than-a-century/.

[136] HRS § 171-55 provides in relevant part: "[T]he 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 . . . under conditions and rent which will serve the best interests of the State." HAW. REV. STAT. § 171-55 (2020).

[137] HRS § 171-58 provides in relevant part: "*Disposition of water rights* may be made by lease at public auction as provided in this chapter or by permit for temporary use on a month-to-month basis under those condition which will best serve the interests of the State and subject to a maximum term of one year." HAW. REV. STAT. § 171-58 (2020) (emphasis added).

[138] HRS § 343-5 provides in relevant part that environmental assessment[s] ("EAs") "shall be required for" certain actions. HAW. REV. STAT. §343-5 (2020).

dispositions are subject to limitations and certain actions require the preparation of an Environmental Assessment ("EA").[139] Thus, following A&B's and EMI's request for long-term and short-term permits for four areas located in East Maui,[140] two sub-challenges followed in protest to those permit dispositions.[141] The challenges asserted that the Board of Land and Natural Resources ("BLNR") failed to (1) prepare an EA pursuant to HRS section 343-5 and (2) comply with HRS section 171-58(c) and (g).[142]

On May 23, 2001, Nā Moku and Maui Tomorrow "objected to the long-term disposition of water rights proposed in the Lease Application and requested a contested case hearing."[143] After BLNR granted Nā Moku and Maui Tomorrow's contested case hearing request, they subsequently questioned, *inter alia*, "[w]hether [BLNR] . . . complied with the requirements set forth in" HRS section 171-58(c) and (g) and whether BLNR was required to comport with HRS section 343-5(b).[144] After review, BLNR released its "Findings of Facts and Conclusions of Law and Order" and its "First Amended Findings of Facts and Conclusions of Law and Order" finding that, *inter alia*, BLNR was not required to generate an EA before it granted the thirty-year lease.[145] Nā Moku and Maui Tomorrow subsequently appealed the order.[146]

On appeal, the Honorable Eden Elizabeth Hifo of the Circuit Court of the First Circuit entered an "Order Affirming in Part and Reversing in Part State of Hawaii [BLNR]'s Findings of Fact and Conclusions of Law and Order."[147] On the issue of whether BLNR complied with HRS section 171-58(c) and (g), Judge Hifo concluded that BLNR did not comport with the statute because it could not determine if an action was in the "best interest

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[139] *See* HAW. REV. STAT. § 171-55 (2020); HAW. REV. STAT. § 171-58 (2020); HAW. REV. STAT. § 343-5 (2020).

[140] On July 1, 2000, the Department of Land and Natural Resources ("DLNR") issued revocable permits pursuant to HRS section 171-58 for Honomanu, Huelo, Ke'anae, and Nahiku—all located in East Maui. *See* Carmichael v. Bd. of Land and Nat. Res., No. CAAP-16-0000071, 2019 WL 2511192, at *1 (Haw. Ct. App. June 18, 2019). The following year, A&B and EMI applied for a thirty-year lease for Honomanu, Huelo, Ke'anae, and Nahiku. *See id.* In the meantime, A&B and EMI requested temporary year-to-year revocable permits pending the issuance of the 30-year lease. *See id.*

[141] *See* Maui Tomorrow v. Bd. of Land and Nat. Res., 110 Hawai'i 234, 236–46, 131 P.3d 517, 519–29 (2006).

[142] Maui Tomorrow, 110 Hawai'i at 237, 131 P.3d at 520; Carmichael, No. CAAP-16-0000071, 2019 WL 2511192, at *3.

[143] *Carmichael*, 2019 WL 2511192, at *1.

[144] *Maui Tomorrow*, 110 Hawai'i at 237, 131 P.3d at 520.

[145] *Id.* at 238, 131 P.3d at 521.

[146] *Id.*

[147] *Id.* at 240, 131 P.3d at 523.

of the state" without first deciding what was "excess"[148]—namely "the amount beyond what was needed to support appurtenant water rights and traditional and customary Native Hawaiian practices."[149] As to the second issue, Judge Hifo determined that BLNR was required to prepare an EA.[150]

To challenge BLNR's disposition of short-term year-to-year revocable permits, Healoha Carmichael, Lezley Jacintho, and Nā Moku (collectively, "*Carmichael* Plaintiffs") initiated an action on April 10, 2015 alleging, *inter alia*, that BLNR was required to prepare an EA pursuant to HRS chapter 343.[151] The Honorable Rhonda Nishimura of the Circuit Court of the First Circuit concluded that an EA was not required because BLNR's decision to continue issuing the revocable permits was not an "action" under HRS chapter 343 that required the preparation of an EA.[152] Although the *Carmichael* Plaintiffs did not allege violations of HRS chapter 171, Judge Nishimura determined *sua sponte* that "A&B's continuous uninterrupted use of these public lands on a holdover basis for the last 13 years [was] not the 'temporary' use that HRS Chapter 171 envision[ed]."[153]

On appeal, the ICA vacated and remanded Judge Nishimura's decision.[154] The ICA determined that there were genuine issues of material fact as to whether BLNR's decision to continue issuing the short-term year-to-year revocable permits would "serve the best interests of the State" in accordance with HRS section 171-55.[155] The ICA, however, agreed with Judge Nishimura's decision that an EA did not have to be prepared.[156] The *Carmichael* Plaintiffs subsequently appealed the ICA's decision. Currently, the matters remain unresolved and are under review by the Hawai'i Supreme Court.[157]

For decades, nā kua'āina fought relentlessly for the restoration of the waters of East Maui, utilizing various legal mechanisms designed to protect and preserve Hawai'i's water resources.[158] Yet in reality, the process has

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[148] *Id.*

[149] Sproat, *Water Law in Hawai'i*, *supra* note 33, at 568.

[150] *Maui Tomorrow*, 110 Hawai'i at 241, 131 P.3d at 524.

[151] Carmichael v. Bd. of Land & Nat. Res., No. CAAP-16-0000071, 2019 WL 2511192, at *3 (Haw. Ct. App. June 18, 2019).

[152] *Id.*

[153] *Id.* at *4.

[154] *Id.* at *9.

[155] *Id.* at *8.

[156] *Id.* at *8–9.

[157] Oral arguments for *Carmichael v. Board of Land & Natural Resources* were held on May 5, 2020 and a decision remains pending.

[158] *See* Maui Tomorrow v. Bd. of Land and Nat. Res., 110 Hawai'i 234, 236–46, 131 P.3d 517, 519–29 (2006); *Carmichael*, 2019 WL 2511192, at *1–9; *In re* Interim Instream Flow Standards for Waikamoi, No. CAAP-10-0000161, 2012 WL 5990241, at *1–4 (Haw.

been slow and unavailing. Therefore, perhaps it is time for nā kuaʻāina to take heed from a growing movement—one advocating for a new legal mechanism.[159]

III. THE RIGHTS OF NATURE

The rights of nature legal framework in its simplest form is the idea that nature should be afforded rights, including "the *right to exist, persist, maintain, and regenerate its vital cycles*."[160] Many scholars credit the development of the rights of nature to the contributions of Christopher D. Stone in his renowned article, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*. Momentously, his proposal is the focal point of a global movement advocating for the rights of nature for various natural objects.[161]

A. *The Genesis of the Rights of Nature*

In his article, Stone articulates that traditional Western attitudes view man as central and superior, and nature as subordinate.[162] Stone adds that nature was reduced to an "object[] for man to conquer and master and use. . . . [e]ven where special measures [were] taken to conserve [nature], as by seasons on game and limits on timber cutting, the dominant motive [was] to conserve them *for us*—for the greatest good of the greatest number of human beings."[163]

As history indicates, however, nature was not the only one subjected to subordination. Rather, groups, including African Americans, women, and children, were also once right-less "*thing*[s] for the use of 'us'—those who [were] holding rights at the time."[164] Moreover, any suggestion that those "things" should be granted legal rights were all met with either opposition or laughter at the thought of how "unthinkable" those notions truly were.[165]

Ct. App. Nov. 30, 2012).

[159] *See generally* Miller, *supra* note 22, at 356; Sheber, *supra* note 22, at 147; White, *supra* note 22, at 144; Perkins, *supra* note 22.

[160] *What is Rights of Nature?*, GLOB. ALL. FOR THE RIGHTS OF NATURE, https://therightsofnature.org/what-is-rights-of-nature/ (last visited Sept. 12, 2020) (emphasis in original).

[161] *See infra* Part III.B–D.

[162] *See* Stone, *supra* note 20, at 463 (explaining that nature was typically regarded as an "object").

[163] *Id.*

[164] *Id.* at 450–51, 455.

[165] *See id.* at 455 ("The fact is, that each time there is a movement to confer rights onto some new 'entity,' the proposal is bound to sound odd or frightening or laughable.").

Yet the difference between nature and African Americans, women, and children is that the former remains right-less while the latter were vested with legal rights after advocacy, acceptance, and recognition of "nontraditional" notions of legal persons. Fast forward to today, the law is now infused with both "nontraditional" rights holders—such as African Americans, women, and children[166]—and "inanimate right-holders" such as ships, joint ventures, trusts, nation-states, corporations, and municipalities.[167] So how "unthinkable" is it for nature to be granted a similar legal status? Following those remarks, Stone proposes the idea that "we give legal rights to forests, oceans, rivers and other so-called 'natural objects' in the environment—indeed, to the natural environment as a whole."[168]

Stone prefaces his rights of nature proposal by recognizing the disadvantages experienced by nature as it pertains to attaining legal remedies.[169] First, Stone points out that nature lacks legal standing.[170] Even if a third-party is conferred legal standing to bring suit on nature's behalf, additional issues arise. For example, the third-party "may simply not care" enough to seek judicial relief.[171] In the alternative, if a third-party is interested in seeking judicial relief, nature's "unique damages [would not be] count[ed] in determining [the] outcome" and nature would not be the "beneficiaries" of the judicial relief.[172] "So long as the natural environment itself is rightless, these are not matters for judicial cognizance."[173]

To reconcile these disadvantages, Stone argues that nature should become a holder of rights.[174] As a holder of rights, "[n]atural objects would have standing in their own right, through a guardian; damage to and through them would be ascertained and considered as an independent factor; and they would be the beneficiaries of legal awards."[175] Additionally, nature would be granted substantive rights, identical to one's right to life, liberty, and property.[176]

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[166] *Id.* at 451.

[167] *Id.* at 452.

[168] *Id.* at 456.

[169] *See id.* at 459–64 (explaining in detail three major disadvantages that nature experiences when it comes to attaining legal remedies).

[170] *Id.* at 459.

[171] *See id.* (noting, for example, that stream users capable of bringing suit in court for pollution "may simply not care about the pollution").

[172] *Id.* at 463.

[173] *Id.* at 461.

[174] *Id.* at 481–82.

[175] *Id.*

[176] *See id.* at 482 ("To flesh out the 'rights' of the environment demands that we provide it with a significant body of rights for it to invoke when it gets to court. In this regard, the

Since Stone's initial articulation, many have embraced his idea.[177] Other individuals, such as indigenous peoples, however, have incorporated these understandings since time immemorial.[178] Yet of importance to this article is the way by which Stone's idea prompted a growing movement. With increasing access to the world's natural resources, nature "succumb[ed] to overuse" and groups, both domestically and internationally, have pressured governments to legally recognize nature as a person.[179]

B. Domestic Advocacy

Within the United States, Pennsylvania and Colorado are two of many examples of domestic advocacy for the rights of nature.[180] In September 2006, Tamaqua, Pennsylvania successfully implemented the rights of nature into a "community bill of rights,"[181] making it the "first U.S. municipality to recognize legal rights for nature."[182] Under Tamaqua's version of the rights of nature, nature is accorded civil rights, thereby making it unlawful

lawyer is constantly aware that a right is not, as the layman may think, some strange substance that one either has or has not. One's life, one's right to vote, one's property, can all be taken away. But those who would infring on them must go through certain procedures to do so; these procedures are a measure of what we value as a society.").

[177] *See* Sierra Club v. Morton, 405 U.S. 727, 742, 749–51 (1972) (Douglas, J., dissenting) (citing Stone's article, *supra* note 20, and proposing that "before these priceless bits of Americana are forever lost or are so transformed to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard"); David R. Boyd, *Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution*, NAT. RES. & ENV'T, Spring 2018 at 17 ("Recognizing and respecting nature's rights will not put an end to all human activities but would require eliminating or modifying those that inflict suffering on animals, threaten the survival of species, or undermine the ecological systems upon which all life depends on. Propelled by the global environmental crisis, the rights of nature movement has the potential to create a world where people live in genuine harmony with nature.").

[178] *See What is Rights of Nature?*, *supra* note 160 ("For indigenous cultures around the world recognizing rights of nature is simply what is so and consistent with their traditions of living in harmony with nature.").

[179] Emilie Blake, Note, *Are Water Body Personhood Rights the Future of Water Management in the United States*, 47 TEX. ENV'T. L. J. 197, 209–214 (2017).

[180] *See* Miller, *supra* note 22, at 356 (explaining how "the Colorado River Ecosystem filed a lawsuit . . . [and if] the action had been successful, it could have opened the door to rivers, forests, mountains, and other natural entities claiming legal rights in federal court"); Perkins, *supra* note 22 (describing how two cities in Pennsylvania embraced the rights of nature).

[181] Perkins, *supra* note 22.

[182] Kate Beale, *Rights for Nature: In PA's Coal Region, A Radical Approach to Conservation Takes Root*, HUFF POST (May 25, 2011), search "Kate Beale Rights for Nature," then follow first "huffpost.com" link.

for corporations to impede its existence and infringe upon its right to flourish.[183] This municipality embraced the rights of nature to prevent companies from "dumping sewage sludge and dredged minerals from the Hudson and Delaware rivers into open pit mines."[184]

Later in 2010, Pittsburgh, Pennsylvania also embraced the rights of nature, which recognizes that nature has a "right to clean air, water, and soil[.]"[185] Advocacy here was driven by the "fracking boom" that was prevalent in the United States.[186] With increased concerns over the impact of fracking in Pittsburgh, "the ordinance banning fracking and awarding rights to nature won a unanimous vote, and has been law since November 2010."[187]

Across the country, advocates for the Colorado River watershed attempted to advance the proposal of the rights of nature for the Colorado River.[188] Individuals advocated for the rights of nature for the Colorado River because the river "[bore] the burden of 'overallocation, over-use, and more than a century of manipulation.'"[189] In 2017, the Colorado River was even ranked number one on *America's Most-Endangered River Report*.[190] Yet unlike Tamaqua's and Pittsburgh's implementation of the rights of nature, advocacy for the Colorado River was unsuccessful.[191]

C. *International Advocacy*

In addition to the movement domestically, the rights of nature movement entered the global arena and generated promising results for the future of Ecuador,[192] but fell short for Bolivia.[193] In 2008, Ecuador became the "first

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[183] Perkins, *supra* note 22.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] Miller, *supra* note 22, at 356.
[189] Caroline McDonough, *Will the River Ever Get a Chance to Speak? Standing Up for the Legal Rights of Nature*, 31 VILL. ENV'T. L. J. 143, 145 (2019) (quoting Nicholas Bilof, *The Right to Flourish, Regenerate, and Evolve: Towards Judicial Personhood for an Ecosystem*, 10 GOLDEN GATE U. ENT'T L. J. 111, 126 (2018).
[190] *Id.*
[191] "In the end, the plaintiffs withdrew from federal district court under threat of sanctions from the Colorado Attorney General. The Colorado Attorney General was 'seeking sanctions against [the plaintiffs' attorney] under Rule 11 of the Federal Rules of Civil Procedure, which allows U.S. District Courts to punish lawyers for pleadings with improper purpose or frivolous arguments.'" *Id.* at 147 (alternation in original).
[192] *See* Sheber, *supra* note 22, at 155 (explaining how "Ecuador amended its constitution . . . to constitutionally recognize the 'Rights of Nature'").
[193] *See* White, *supra* note 22, at 145 (noting that despite the goals of a rights of nature

country in the world to constitutionally recognize the 'Rights of Nature.'"[194] After various political movements and applied pressures by indigenous peoples who wanted "control over natural resources and land," a constitutional referendum recognized the substantive rights of nature.[195] These rights included "the right to integral respect for [nature's] existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."[196] Most noteworthy, however, is the fact that these rights were successfully utilized in a suit on behalf of the Vilcabamba River, which was polluted by a road construction contractor.[197] At the close of the case, "the judge ruled that nature's right 'to exist, to be maintained and to the regeneration of its vital cycles, structures and functions' [was] violated by the contractor's actions."[198] This challenge has been considered "revolutionary because it was the first time that a court recognized the rights of nature."[199]

Following Ecuador's success, Bolivia subsequently passed a law in 2012 that established a framework for the rights of nature.[200] The law specified that nature was entitled to "the right to life, diversity, water, clean air, equilibrium, restoration, and pollution-free living."[201] However, contrary to Ecuador's successful adjudication using their rights of nature, the results in Bolivia have been unavailing.[202] Industries have continued to grow absent any regulation by Bolivia's rights of nature.[203]

Of all the efforts both domestically and internationally, the Whanganui Iwi serves as a helpful reference for determining how the rights of nature should look for nā kua'āina. First, the Whanganui Iwi shares identical sentiments towards the waters of the Whanganui River as nā kua'āina with the waters of East Maui.[204] And almost identically as a result of colonization, both of their water sources were appropriated, which adversely impacted both nā kua'āina and the Whanganui Iwi. Yet the Whanganui Iwi was able to reconcile a long history of oppression, which took the form of a binding agreement between the Crown and the

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legislation in Bolivia,"it has proven difficult to turn this noble ideology into action").

[194] Sheber, *supra* note 22, at 155.

[195] *Id.*

[196] White, *supra* note 22, at 140.

[197] Sheber, *supra* note 22, at 157.

[198] *Id.*

[199] *Id.*

[200] White, *supra* note 22, at 144.

[201] *Id.*

[202] *See id.* at 145 (describing how industries continued to grow absent enforcement of the rights of nature).

[203] *Id.*

[204] *Compare supra* Part II.A. *with infra* Part III.D.

Whanganui: the Te Awa Tupua Act of 2017 ("Te Awa Tupua Act"); this binding agreement formally recognizes the Whanganui River as a legal person.[205] Given the various overlaps between nā kuaʻāina and the Whanganui Iwi, the following section expands upon the history of and dissects the Te Awa Tupua Act—the legislation that will provide guidance as to how the rights of nature should look if implemented in East Maui.

D. The Whanganui Iwi

Just as nā kuaʻāina's wealth derived from the water that flowed through East Maui, the wealth of the Whanganui Iwi emanated from the waters of the Whanganui River—"the longest navigable river in Aotearoa/New Zealand."[206] "Swelled by myriad tributaries, it twists like an eel through mountainous country—part of it a national park—on its 180-mile journey to the sea."[207] For over 700 years, this river was "the provider of transport, sustenance, water, energy and enjoyment" for the Whanganui Iwi.[208]

As with nā kuaʻāina, the mid-1800s brought the advent of colonization, which dominated the landscape at the expense of both the Whanganui Iwi and the Whanganui River.[209] "Its [sic] rapids were dynamited to create easier passage for tourist paddle steamers. Its gravel was extracted for railway ballast and road metal, damaging the river's bed and harming its fisheries. Its mouth became a drain for a city's effluent."[210] Consequentially, the wealth provided by the Whanganui River experienced a decline identical to the wealth of nā kuaʻāina's.[211] Then parallel to nā kuaʻāina's long-standing legal battles, the Whanganui Iwi fought vigorously for restoration of the Whanganui River.[212] This battle is considered the "longest-standing legal battle in New Zealand's history."[213]

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[205] *See* Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, pt 2 (N.Z.).

[206] *See* Hsiao, *supra* note 17, at 371 ("The Whanganui River is the . . . provider of transport, sustenance, water, energy, and enjoyment.").

[207] Warne, *supra* note 18.

[208] Hsiao, *supra* note 17, at 371.

[209] *See* Warne, *supra* note 18 (explaining the degradation of the Whanganui River).

[210] *Id.*

[211] *See id.* (considering the acts that transpired to be, *inter alia*, "a deep cultural affront").

[212] "In 1873, the Whanganui Iwi petitioned Parliament against the Timber Floating Bill and again throughout the 1880s for eel weirs that were destroyed to allow for steamer traffic on the River. In 1895, the Whanganui Iwi finally brought a claim to the Supreme Court of New Zealand asserting customary fishing rights . . . In 1903, the Whanganui Iwi petitioned the Aotea Maori Land Court to stop the Crown from taking riparian lands, which the crown justified under the Scenic Reserves Act . . . In 1959 and 1962, they objected repeatedly to the diversion of Whanganui headwaters." Hsiao, *supra* note 17, at 372.

[213] *Id.*

To reconcile the longstanding injustices, the Whanganui Iwi and the Crown entered into successive agreements, including the 2011 Record of Understanding,[214] the 2012 Tūtohu Whakatupua,[215] and the two-part Ruruku Whakatupua, Deed of Settlement,[216] which together culminated into one binding agreement—the Te Awa Tupua Act.[217] The Te Awa Tupua Act, *inter alia*: (1) sets forth the new status of the Whanganui River; (2) establishes various groups; and (3) creates an "[e]xisting rights saved" provision.[218]

First, the Te Awa Tupua Act formally sets forth the new status of the Whanganui River.[219] Pursuant to the Te Awa Tupua Act, the Whanganui River "is a legal person and has all the rights, powers, duties, and liabilities of a legal person."[220] Essentially, this provision confers the Whanganui River with legal standing.[221]

Next, the Te Awa Tupua Act establishes various groups that work in conjunction with each other and on behalf of the Whanganui River.[222] The first critical group established by the Te Awa Tupua Act is the Te Pou Tupua.[223] The Te Pou Tupua is the guardian or the "human face" of the Whanganui River.[224] The Te Pou Tupua is responsible for, "act[ing] and speak[ing] for and on behalf of," and "promot[ing] and protect[ing] the health and well-being of" the Whanganui River.[225] The second group established by the Te Awa Tupua Act is the Te Karewao.[226] The Te Karewao is the "advisory group" that lends support to the Te Pou Tupua.[227] As with the Te Pou Tupua, the Te Karewao acts in the interest of the Whanganui River.[228] The third group established under the Te Awa Tupua Act is the Te Kōpuka.[229] The Te Kōpuka is the "strategy group" responsible for "act[ing] collaboratively to advance the health and well-being" of the

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[214] Record of Understanding in relation to Whanganui River Settlement 2011 (N.Z.).
[215] Tutohu Whakatupua 2012 (N.Z.).
[216] Ruruku Whakatupua Te Mana o Te Awa Tupua 2014 (N.Z.).
[217] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.).
[218] *See id.* ss 14, 18, 27, 29, 80.
[219] *See id.* s 14 (declaring that the Whanganui River is a "legal person").
[220] *Id.* s 14(1).
[221] Rowe, *supra* note 15, at 606.
[222] *See* Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, ss 18, 27, 29 (N.Z.).
[223] *Id.* s 18.
[224] *Id.* s 18(2).
[225] *Id.* s 19(1)(a), (c).
[226] *Id.* s 27.
[227] *Id.* s 27(1).
[228] *Id.* s 27(2).
[229] *Id.* s 29.

Whanganui River.[230] This group is comprised of "representatives of persons and organisations with interests in the Whanganui River, including iwi, relevant local authorities, departments of state, commercial and recreational users, and environmental groups."[231]

Finally, the Te Awa Tupua Act includes an "[e]xisting rights saved" provision.[232] Pursuant to this provision, the Whanganui Iwi and "any other iwi with interests in the Whanganui River" are not precluded from carrying out their traditional and customary activities.[233] The pressing question that follows is: "[W]ill nature be able to sue humans for the damage they inflict?"[234] Kennedy Warne, in her article, *A Voice For Nature*, responds: "No one knows."[235] In the absence of lawsuits, it is too speculative to say with certainty whether the Te Awa Tupua Act is more than a theoretical binding agreement.[236] Nonetheless, the Te Awa Tupua Act is a useful guide for ascertaining a rights of nature solution for East Maui, which will be discussed *infra* in Part V. But before this article proposes a rights of nature solution, Part IV will begin by explaining the legal framework that will guide the discussions that proceed in Part V.

IV. THE ANALYTICAL FRAMEWORK

In *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, Professor D. Kapua'ala Sproat acknowledges that assessing decisions or actions relating to indigenous peoples necessitates a modified contextual legal framework.[237] This modified approach adopts the general scheme of a contextual legal framework but tailors the inquiry to fit the context of native peoples.[238]

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[230] *Id.* s 29(1), (3).

[231] *Id.* s 29(2).

[232] *Id.* s 80.

[233] *Id.*

[234] Warne, *supra* note 18.

[235] *Id.*

[236] *See* Sheber, *supra* note 22, at 157 ("While there has not been litigation yet that incorporates the Whanganui River as a legal entity, future lawsuits will shed light on the extent of the river's rights.").

[237] *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 172 (explaining that "this evolving framework embraces unique features to discern what justice looks like for Indigenous Peoples").

[238] *See id.* at 172–73 (describing how this framework "employs the analytical tools of contextual legal analysis" and "tailor[s] this contextual legal framework for Native Peoples").

A. *The Contextual Legal Framework*

The objective of deploying a contextual legal framework is to expose the realities of decisions.[239] Yet to appreciate the objective served by deploying a contextual legal framework, one must internalize that although decisions, in theory, are supposed to remain objective, they are in fact influenced by a series of factors—including "ideological influence," "political and economic perspectives," and "personal philosophies."[240] The critical questions that follow, which underpin the objectives of a contextual legal framework, are: "what is really going on[?]" and "what the decision really means[?]"[241] Professor Sproat proposes that to answer the foregoing questions, one should inquire into the following:

What values and interests are being furthered by the rule and according to what policy preference? What values and interests are being disserved? How would the selection of a competing "choice" serve values and interests differently? How do history and current cultural and economic conditions and larger policy concerns shed light on whether a decision was appropriate or inappropriate (especially when measured against other available choices)?[242]

By assessing various questions, such as those proposed above, one may expose the reality of decisions or actions that are often obscured by a "cloak of inevitable neutrality and objectivity."[243]

Yet to sufficiently expose the reality of decisions or actions impacting indigenous peoples, Professor Sproat proposes a "refine[d]" contextual legal framework.[244] This modified approach retains the ultimate objectives of a contextual legal framework but deviates from the traditional inquiry by mandating an assessment of a unique set of questions, distinct from those set forth above.[245] Rather, Professor Sproat proposes a modified contextual legal framework that conducts a narrow assessment into the "four realms," discussed further below.[246]

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[239] *See id.* at 170–71 (explaining that the framework reveals, *inter alia*, the true impact of a decision).

[240] *Id.* at 169–70. "A recent study of the Supreme Court found 'strong evidence that legal principles are influential.' But it cannot be denied that the ideological views of justices have some impact on their decisions." *Id.* at 168.

[241] *Id.* at 171.

[242] *Id.*

[243] *Id.*

[244] *See id.* at 171–72 (proposing a framework that "integrate[s] Native Peoples' unique history and cultural values into a larger analytical framework").

[245] *See id.* at 173 (noting that the modified contextual legal framework requires an inquiry into four areas).

[246] *Id.* at 173.

B. The Four Realms: A Modified Contextual Legal Framework

Under the modified contextual legal framework, Professor Sproat proposes that assessing the reality of a decision or action impacting indigenous peoples requires attention to four realms: (1) cultural integrity, (2) lands and natural resources, (3) social welfare and development, and (4) self-government.[247] This narrow assessment is important for two reasons. First, the framework encompasses the unique history experienced by indigenous peoples—one where colonization resulted in the diminution of the four realms.[248] Second, the framework integrates the idea of restorative justice for indigenous peoples—an objective that "focuses on mending breaches in the polity by healing persisting wounds of harmed individuals and communities."[249] Against that backdrop, Professor Sproat's modified contextual legal framework seeks to unveil the reality of decisions or actions impacting indigenous peoples by assessing the four realms, all of which will be discussed individually below.[250]

1. Cultural integrity

Cultural integrity is the first realm identified by Professor Sproat[251] and acknowledged by international human rights laws as a principle of restorative justice.[252] For indigenous peoples, cultural integrity is "central" to their identity.[253] But with the emergence of colonization, colonialist

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[247] *Id.* at 173.

[248] *See id.* at 173 (explaining that indigenous peoples were "damaged by the forces of colonialism in each of these four realms").

[249] Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the Insular Cases Should be Taught in Law School*, 21 J. GENDER RACE & JUST. 395, 400 (2018).

[250] Sproat, *Wai Through Kānāwai*, *supra* note 11, at 185.

[251] *Id.* at 177.

[252] International human rights laws have recognized respect for and the right of cultural integrity for indigenous peoples. 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, 342–43 (1994). For example, "[t]he notion of respect for cultural determinism" has been a critical facet of bilateral and multilateral treaties. *Id.* at 343. Of additional importance, article 27 of the United States-ratified International Covenant on Civil and Political Rights "affirms . . . the right of persons belonging to 'ethnic, religious or linguistic minorities . . . *to enjoy their own culture*, to profess and practice their own religion, [and] to use their own language.'" *Id.* at 343 (emphasis added).

[253] *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 178 ("Given this central role, weighing cultural impacts is a necessary starting point for any contextual legal inquiry involving Indigenous Peoples.").

ideologies often dominated at the expense of indigenous peoples' culture.[254] For example, for Native Hawaiians generally, "[r]emaining aspects of Native Hawaiian cultural life [had] trouble breathing, much less flourishing, as Native Hawaiians [were] further subsumed within a majority settler population with its cultural roots elsewhere."[255] Thus to determine the impact of decisions or actions on an indigenous peoples' cultural integrity, Professor Sproat proposes the following question: "whether actions or decisions support and restore cultural integrity as a partial remedy for past harms, or perpetuate conditions that continue to undermine cultural survival."[256]

2. *Lands and natural resources*

Lands and natural resources is the second realm identified by Professor Sproat[257] and recognized as another principle of restorative justice.[258] For indigenous peoples, the lands and natural resources were intimately intertwined with life.[259] Specifically for Native Hawaiians, the lands and natural resources were a source of sustenance[260] and culture.[261] Yet "two centuries of Western encroachment . . . left [Native Hawaiians] virtually landless."[262] Haunani Kay-Trask paints a vivid picture of the impacts of colonization:

> On the ancient burial grounds of our ancestors, glass and steel shopping malls with layered parking lots stretch over what were once the most ingeniously irrigated taro lands, lands that fed millions of our people over thousands of years. Large bays, delicately ringed long ago with well-

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[254] *See id.* at 179 (pointing out that maintaining culture is a struggle because of, *inter alia*, colonization).

[255] Anaya, *supra* note 259, at 318.

[256] Sproat, *Wai Through Kānāwai*, *supra* note 11, at 179.

[257] *Id.* at 180.

[258] "The International Human Rights Covenants . . . affirms: 'In no case may a people be deprived of its own means of subsistence.'" Anaya, *supra* note 259, at 346. Further, ILO Convention No. 169 article 14(1) recognizes:

> The rights of ownership and possession of indigenous peoples over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

Id. at 347.

[259] *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 180 ("The importance of lands and resources to the survival of indigenous cultures is widely acknowledged.").

[260] Anaya, *supra* note 259, at 315.

[261] Sproat, *Wai Through Kānāwai*, *supra* note 11, at 180.

[262] Anaya, *supra* note 259, at 317.

stocked fishponds, are now heavily silted and cluttered with jet skis, windsurfers, and sailboats. Multi-story hotels disgorge over six million tourists a year onto stunningly beautiful (and easily polluted) beaches, closing off access to locals.[263]

In light of the impacts of colonization on the lands and natural resources, Professor Sproat proposes that the second question assess: "whether a particular action perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way."[264]

3. *Social welfare and development*

Social welfare and development is the third realm identified by Professor Sproat[265] and acknowledged by international human rights law as a principle of restorative justice.[266] Historically, as a consequence of the subjugation of lands and natural resources, the social welfare and development of indigenous peoples have declined.[267] For example, the subjugation of Native Hawaiian lands and natural resources "devastated indigenous economies and subsistence life and left indigenous people among the poorest of the poor."[268] Now, "Native Hawaiians comprise the most economically disadvantaged and otherwise ill-ridden sector of the Islands' population."[269] Further, statistics indicate that "Native Hawaiians are overrepresented among the ranks of welfare recipients and prison inmates and are underrepresented among high school and college graduates, professionals, and political officials."[270] As such, to determine how a decision or action will impact the social welfare and development of indigenous peoples, Professor Sproat proposes that the third question should assess: "does a decision have the potential to improve the health, education, and living standards, or not?"[271]

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[263] *Id.* at 318.

[264] Sproat, *Wai Through Kānāwai*, *supra* note 11, at 181.

[265] *Id.*

[266] "[E]ntitlements of social welfare and development . . . [are] grounded in the U.N. Charter and adjoined to the principle of self-determination." Anaya, *supra* note 259, at 350.

[267] *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 182 (pointing out the specific impacts on Native Hawaiians).

[268] *See id.* (citing Anaya, *supra* note 259 at 352).

[269] Anaya, *supra* note 259, at 317.

[270] *Id.*

[271] Sproat, *Wai Through Kānāwai*, *supra* note 11, at 183.

4. Self-government

Self-government is the final realm identified by Professor Sproat[272] and recognized by international human rights law as a principle of restorative justice.[273] "Throughout what is now considered the United States, the systematic dispossession of Indigenous Peoples from their lands and other resources facilitated the loss of political autonomy."[274] For Native Hawaiians, the loss of political autonomy resulted from, *inter alia*, the illegal overthrow of the Hawaiian Kingdom in 1893.[275] Considering that background, Professor Sproat proposes that the final question must assess: "whether a decision perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-governance."[276]

Together, Professor Sproat's modified contextual legal framework will serve as an important means of developing a rights of nature solution. Each question proposed under Professor Sproat's contextual legal framework helps to identify what provisions are necessary to effectuate justice for nā kua'āina and eliminate conditions imposed by colonizers. Part V thus begins by setting forth the proposed rights of nature solution and follows with focused discussions for each of the four realms utilizing Professor Sproat's questions for assessment, as previously identified.

V. THE SOLUTION

An overview of nā kua'āina's history reveals that colonization, namely the sugar industry, was detrimental to the four realms.[277] As discussed above, before colonization water flowed both abundantly and unhindered throughout East Maui.[278] Then with the arrival of colonialists and the eventual domination of the sugar industry, what some described as the "wettest coastal region in all the islands" was subjected to mass appropriations, concomitantly impacting nā kua'āina's culture, welfare, and autonomy.[279]

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[272] *Id.*

[273] "ILO Convention No. 169 upholds the right of indigenous peoples to 'retain their own customs and institutions' . . . Similarly, the 1993 Working Group Draft Declaration states: 'Indigenous peoples have the right to . . . their distinctive juridicial customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.'" Anaya, *supra* note 259, at 355.

[274] Sproat, *Wai Through Kānāwai*, *supra* note 11, at 183.

[275] *See* Anaya, *supra* note 259, at 314.

[276] Sproat, *Wai Through Kānāwai*, *supra* note 11, at 185.

[277] *See supra* Part II.B.

[278] *See supra* Part II.A.

[279] *See supra* Part II.B.

To reconcile the effects of the sugar industry, this article proposes an alternative solution to reconciliation—the rights of nature. With help from both Professor Sproat's modified contextual legal framework and the existing Te Awa Tupua Act, this article proposes that the rights of nature solution should, at a minimum, consist of (1) a provision conferring legal status and substantive rights upon the streams of East Maui, (2) an existing rights saved provision, and (3) a guardian provision. Together these provisions should enable conditions to restore the decline of nā kua'āina's lands and natural resources, cultural integrity, social welfare and development, and self-government.

A. Restoration of Lands and Natural Resources

Professor Sproat first proposes that an action must "attempt[] to redress historical injustices" rather than "perpetuate[] the subjugation of ancestral lands, resources, and rights."[280] In the context of nā kua'āina, Professor Sproat's proposal suggests that the rights of nature solution should attempt to rectify the massive diversions that left nā kua'āina with diminished quantities of their most invaluable resource.[281] To further that objective, the rights of nature solution should, at a minimum, include a provision establishing that the streams of East Maui are legal persons, identical to that under the Te Awa Tupua Act. By establishing the foregoing, the provision would open doors for more judicial redress and produce an important shift.[282]

Conferring legal status upon the streams of East Maui would ideally place those streams in a more advantageous position as it pertains to receiving judicial redress.[283] Drawing from Christopher Stone's article, nature generally, in the absence of legal status, is disadvantaged as it relates to receiving judicial relief.[284] Particularly, the lack of (1) standing, (2)

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[280] *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 181 (proposing that one must assess "whether a particular action perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way").

[281] *Cf. id.*

[282] *Cf.* Sheber, *supra* note 22, at 151 (explaining that affording nature legal rights would, *inter alia*, increase judicial redress and "shift away from the western idea that nature exists only as property for humans").

[283] *See* Sheber, *supra* note 22, at 165 ("In the end, granting legal rights to nature can help protect the environment in a greater capacity by allowing more lawsuits to be brought to protect the earth and redressing damage to natural entities themselves, rather than attenuated human harms."); *see generally* Stone, *supra* note 20, at 458 (explaining what it means to be a holder of legal rights).

[284] *See* Stone, *supra* note 20, at 463 ("They have no standing in their own right; their unique damages do not count in determining the outcome; and they are not the beneficiaries

judicial consideration of nature's individual injuries, and (3) beneficiary status hinders the case by which nature may attain remedies and the amount of remedies it may receive.[285] Yet vesting nature, and in this case the streams of East Maui, with legal status, would generate three benefits.[286] First, the streams of East Maui could bring suit on their own behalf.[287] Second, courts could take the streams' individualized injuries into consideration.[288] Finally, those streams would be able to serve as beneficiaries of any judicial relief.[289] When considering the foregoing benefits against the history of massive diversions, legal status would "attempt . . . to redress [those] historical injustices"[290] by abrogating judicial impediments and instituting a system where the streams of East Maui have easier access to justice.

Additionally, conferring legal status upon the streams of East Maui would result in an important shift.[291] To understand how legal status would produce such a result, it is important to recollect traditional Western notions:

Originally each man had regard only for himself and those of a very narrow circle about him; later, he came to regard more and more "not only the welfare, but the happiness of all his fellow-men"; then "his sympathies became more tender and widely diffused, extending to men of all races, to the imbecile, maimed, and other useless members of society, and finally to the lower animals[.][292]

These developments were mirrored with man and child, man and women, and the alike.[293] Then, when the "things" were conferred with legal status, man's perception shifted.[294] Soon after, there was "value" in these "things"

of awards.").

[285] *See id.* at 459–63 (providing a more in-depth explanation of how those disadvantages hinders availability of and access to remedies for nature).

[286] *See id.* at 481–82 (explaining the three benefits).

[287] *See id.* at 481–82 (noting that "[n]atural objects would have standing in their own right").

[288] *See id.* at 482 (stating that "damage to and through them would be ascertained and considered as an independent factor").

[289] *See id.* (point out that "they would be beneficiaries of legal awards").

[290] Sproat, *Wai Through Kānāwai*, *supra* note 11, at 181.

[291] *See supra* note 289 and accompanying text.

[292] Stone, *supra* note 20, at 450; *see generally* Sheber, *supra* note 22, at 151 (recognizing that in terms of nature, the "[W]estern idea" focused primarily on nature "as property for humans").

[293] Stone, *supra* note 20, at 450–51.

[294] *See id.* at 455–56 ("The fact is, that each time there is a movement to confer rights onto some new 'entity,' the proposal is bound to sound odd or frightening or laughable. . . .

far beyond being a "*thing* for the use" of man.[295] If these developments are any indication, a similar shift is due upon the conferral of status to the streams of East Maui. Against the ultimate objective of "redress[ing] historical injustices,"[296] conferral of legal status would optimistically shift the value of the streams of East Maui towards one that transcends their benefits for man. Ideally, this shift would allow those beyond nā kua'āina to value nature as they do—an indispensable facet of life.

B. Restoration of Cultural Integrity

Second, Professor Sproat proposes that an action must "support and restore cultural integrity" rather than "perpetuate conditions that continue to undermine cultural survival."[297] For nā kua'āina, Professor Sproat's proposal suggests that the rights of nature solution should restore their ability to exercise their subsistence cultural practices.[298] To accomplish the foregoing objective, the rights of nature solution should, at a minimum, contain: (1) a provision confering legal status upon the streams of East Maui with enumerated substantive rights and (2) an existing rights saved provision similar to that in the Te Awa Tupua Act.

To achieve the ultimate objective of supporting and restoring cultural integrity, the rights of nature solution should contain a provision that confers legal status upon the streams of East Maui together with the enumerated rights to health and well-being. To understand how such a provision would accomplish that primary objective, it is important to internalize two pieces of information: (1) the cultural integrity of nā kua'āina is contingent upon the health and well-being of East Maui streams, and (2) the health and well-being of East Maui streams is contingent upon an abundant and unhindered stream flow.[299] Each subset is deeply intertwined with the others, so much so that historically, the deprivation of one resulted in the other's decline.[300] Thus, to reconcile the historical decline of culture that followed the water diversions, it is most important to

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There is something of a seamless web involved: there will be resistance to giving the thing 'rights' until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it 'rights'—which is almost inevitably going to sound inconceivable to a large group of people.").

[295] *Id.* at 455–56.

[296] Sproat, *Wai Through Kānāwai*, *supra* note 11, at 181.

[297] *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 179 (proposing that one must assess "whether actions or decisions support and restore cultural integrity as a partial remedy for past harms, or perpetuate conditions that continue to undermine cultural survival").

[298] *Cf. id.*

[299] *See supra* Part II.A.

[300] *See supra* Part II.B.

protect that which nā kua'āina's culture depends on—the health and well-being of East Maui streams. By vesting the streams of East Maui with the rights of health and well-being, the protective powers of the law can intervene in any matter infringing on those rights culture is so dependent upon.[301]

To better fashion a rights of nature solution capable of supporting and restoring the loss of cultural integrity, the rights of nature solution should additionally incorporate an existing rights saved provision identical to that adopted in the Te Awa Tupua Act. First, the provision would legally protect the exercise of nā kua'āina's subsistence cultural practices. As a result of those judicial protections, the provision would enable conditions that allow for its revival and restoration. Second, such a provision would change the dialogue as it relates to nā kua'āina's culture. Historically, when the water was divested from the streams of East Maui, the culture of nā kua'āina was treated with indifference.[302] Essentially it did not matter how the water diversions impacted nā kua'āina.[303] Rather, all that mattered was that the sugar industry obtained the resources it needed to thrive.[304] Perhaps incorporating an existing rights saved provision would generate new attitudes.[305] Again, if Stone's observations are any indication, legal recognition of nā kua'āina's right to exercise traditional and cultural practices may allow individuals to give "value" to those practices that were once disregarded.[306]

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[301] *Cf.* Lidia Cano Pecharroman, *Rights of Nature: Rivers That Can Stand in Court*, RESOURCES, Feb. 14, 2018, at 7, https://www.mdpi.com/2079-9276/7/1/13 (acknowledging that the judge adjudicating a rights of nature claim for the Vilcabamba River determined that the river's rights to "exist, to be maintained and to the regeneration of its vital cycles, structures, and function" were violated); Sheber, *supra* note 22, at 157 ("The lawsuit brought on behalf of the Vilcabamba River in Ecuador was a success story . . . Ultimately, the judge ruled that nature's right 'to exist, to be maintained and to the regeneration of its vital cycles, structures, and functions' had been violated by the contractor's actions.").

[302] *See supra* Part II.B.

[303] *See id.*

[304] *See id.*

[305] *Cf.* Sheber, *supra* note 22, at 151 ("Finally, if natural objects are afforded legal status, there can be a shift away from the western idea that nature exists only as property for humans."); Stone, *supra* note 20, at 456 ("There is something of a seamless web involved: there will be resistance to giving the things 'rights' until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it 'rights'—which is almost inevitably going to sound inconceivable to a large group of people.").

[306] *See* Stone, *supra* note 20, at 456 (explaining how various objects and groups are valued after they are given legal rights).

C. Restoration of Social Welfare and Development

Next, Professor Sproat proposes that an action should have the "potential to improve health, education, and living standards[.]"[307] Applied to nā kua'āina, Professor Sproat's proposal suggests that the rights of nature solution should remedy the loss of their home, livelihood, and income resulting from the mass water diversions.[308] To sufficiently accomplish these objectives, the rights of nature solution should incorporate an existing rights saved provision, which would allow nā kua'āina to exercise their traditional and cultural practices again.

To understand how the provision would generate an improvement in the welfare of nā kua'āina, it is necessary to recall the relationship shared between culture and welfare. Historically, as a result of exercising traditional and customary practices, nā kua'āina had stability.[309] Yet when conditions prevented the exercise of the former, the result was the decline of the latter.[310] Thus to improve the welfare of nā kua'āina, it is important to focus on the root of the welfare and protect that which allows it to thrive—the exercise of traditional and customary practices. Through a provision that enables the exercise of traditional and customary practices, such a provision will consequentially enable conditions that would rectify nā kua'āina's loss of their home, livelihood, and income.

D. Restoration of Self-Government

Finally, Professor Sproat proposes that an action must have the effect of "redress[ing] the loss of self-governance" rather than "perpetuat[ing] historical conditions imposed by colonizers."[311] For nā kua'āina, this suggests that the rights of nature solution should redress the loss of Native Hawaiian autonomy.[312] To accomplish that objective, it is important that the rights of nature solution contain a guardian provision identical to that under the Te Awa Tupua Act.

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[307] *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 183 (proposing that one must assess whether "a decisions [has] the potential to improve health, education, and living standards, or not").

[308] *Cf. id.*

[309] *See supra* Part II.A.

[310] *See supra* Part II.B.

[311] *See* Sproat, *Wai Through Kānāwai*, *supra* note 11, at 185 (proposing that one must assess "whether a decision perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-governance").

[312] *Cf. id.*

Pursuant to the guardian provision, nā kua'āina would be appointed as the voice for the streams of East Maui. This appointment would enable nā kua'āina to bring an action on behalf of any East Maui stream whose substantive rights have been violated.[313] It is important to note that establishing this provision will not give nā kua'āina absolute autonomy. The final decision will likely rest with the judiciary. Optimistically, however, this provision will give nā kua'āina a choice and a voice. One, they are allowed to observe the health of the East Maui streams and choose whether they want to pursue an action on behalf of the relevant streams. Two, they will be given the opportunity to speak on behalf of the streams if they decide to exercise their powers under this provision. Considered against the historical loss of self-governance, a guardian provision should empower nā kua'āina with a redefined sense of autonomy.[314]

VI. CONCLUSION

Why should nature be denied legal recognition under the law? Since the American legal system embraced inanimate and nontraditional rights holders such as corporations, perhaps it is ready to embrace a new "unthinkable" notion—one where nature is a "holder of rights."[315] After all, certain groups domestically have already successfully implemented this idea in existing legal systems.[316]

Yet if Tamaqua, Pittsburgh, Colorado, Ecuador, Bolivia, New Zealand, and the like are any indication, the rights of nature is a radical notion where success is contingent upon three critical steps: advocacy, acceptance, and recognition.[317] Advocacy is necessary to bring the notion to the forefront and drive the proposal.[318] Acceptance is equally critical. Acceptance in this context, however, does not refer to individuals *agreeing* with the rights of nature. Rather, acceptance refers to implementation of the notion as a part of an existing legal system. Finally, and perhaps of most importance, is

[313] *Cf.* Pecharroman, *supra* note 308 (explaining that plaintiffs, on behalf of the Vilcabamba River, sued pursuant to "Article 71 of the constitution, which establishes that every citizen or nation's right to demand the authorities the compliance with the rights of nature"); Sheber, *supra* note 22, at 148 (stating that "a court found that anyone may bring a lawsuit on behalf of a river").

[314] *Cf.* Pecharroman, *supra* note 308; Sheber, *supra* note 22, at 148.

[315] *See* Stone, *supra* note 20, at 453–57 (describing American history and the various "things" that were vested with legal rights).

[316] *See supra* Part III.B.

[317] *See supra* Part III.B–D.

[318] *See, e.g.*, Sheber, *supra* note 22, at 155–56 (examining the people of Ecuador and their consistent advocacy for change).

recognition, without which advocacy and acceptance would be naught. This recognition refers to the legal effectuation of the rights of nature.[319]

To synthesize, the rights of nature *can* be a promising solution for nā kua'āina if there are, at a minimum, provisions that (1) recognize East Maui streams as a legal person with substantive rights, (2) reserve traditional and customary rights, and (3) establish a guardian. The downfall, however, is that successful implementation hinges on nā kua'āina overcoming three major hurdles: advocacy, acceptance, and recognition. Until then, the rights of nature will remain an unthinkable notion. But if the story of nā kua'āina is any telling, they, the keepers of East Maui, will never stop fighting. So, perhaps, the notion will not remain unthinkable for long.

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[319] *Cf.* White, *supra* note 22, at 145 ("There has been a wave of industrial growth [in Ecuador] since the law was enacted and what appears to be little to no implementation of the law.").

David v. Goliath: Due Process Hearings and the Uphill Battle Parents of Disabled Students Face

Donald Stone*

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I. INTRODUCTION

My law school teaching began in 1984 at the University of Richmond School of Law, directing the Youth Advocacy Clinic, and continued at the University of Baltimore School of Law in 1989 as Director of Clinical Education. As I conclude my law school teaching in 2021, I have come full circle—my first law review article addressed disability law and my twenty-second and final law review article as a law professor now also addresses disability law. It is time to close the book and say thank you.

It was 1978, fresh out of Temple University School of Law and ready to conquer the world. I found myself in Richmond, Virginia, serving as a staff attorney for the Virginia Developmental Disabilities Protection and

* Donald H. Stone, Professor of Law, University of Baltimore School of Law; J.D., Temple University School of Law; B.A., Rutgers University. I gratefully acknowledge my research assistant, Kelsey Lear, a 2021 graduate of the University of Baltimore School of Law, for her outstanding legal research in the preparation of this article.

Advocacy Office. A far cry from law school in Philadelphia and very early in my legal career, I represented a child with learning disabilities from Northern Virginia. The parents were unhappy with the public educational program offered to their elementary school-age son and sought a private special education school setting. It was not a mainstream setting and was extremely costly for the school system. The final outcome is less relevant than what I recall—a private practice attorney handpicked from a list by the school division to serve as the hearing officer. During the proceedings, the hearing officer relied heavily on the school experts, and the school was represented by an experienced attorney. Additionally, I did not believe this hearing officer was unbiased and neutral. The outcome favored the school system and the parents paid out-of-pocket for their child's education. From that experience, I realized how important it was to have an attorney advocating for the child's interest yet the bias I felt in the hearing officer, who seemed perplexed by the notion of the parents even questioning the educational program offered by the school.

Students with disabilities and their parents have struggled mightily to obtain an adequate education from their school divisions, often resorting to attorneys and the adversarial process to address their concerns. Disputes involving the provision of a free and appropriate education, including issues of identification and evaluation of the child's disability, educational services, and school placement were front and center early on in the education arena.

In the early 1970s, parents and advocates of children with disabilities undertook the legal struggle to assert the constitutional basis for public education. Two groundbreaking decisions, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*[1] and *Mills v. Board of Education of the District of Columbia*,[2] provided that states could not deny students with disabilities access to a free public education. These two U.S. District Court decisions provided the impetus for the passage of the Education for All Handicapped Children Act,[3] the predecessor of the Individuals with Disabilities Education Act ("IDEA").[4]

[1] 343 F. Supp. 279, 302–03 (E.D. Pa. 1972) (enjoining the state from denying intellectually disabled children access to public education).

[2] 348 F. Supp. 866 (D.D.C. 1972). The court held no disabled children should be excluded from public education unless provided adequate alternative education. The court also delineated certain due process protections, including hearing rights, and addressed provisions of evaluation and placement, access to records, and parental notice at significant stages of evaluation and placement. *Id.* at 878.

[3] Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (amended 2004).

[4] Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended in scattered sections of 20 U.S.C.).

The IDEA ensures children with disabilities access to a free appropriate public education ("FAPE"), and improves educational results for children with disabilities.[5] A guiding principle is the IDEA's mandate to ensure access to the general education curriculum taught in the regular classroom to the maximum extent possible.[6]

This article explores and analyzes the successes and failures of attempts to provide children with a disability, including children with intellectual disabilities, serious emotional disturbance, autism, learning disabilities, and other health impairments,[7] with a free appropriate public education. Finding a suitable educational placement with the essential services is an ongoing struggle for many parents of disabled children.

What types of conflicts are raised with school systems? Are there certain disabilities that are frequently the source of legal contention? What are the outcomes of disputes that reach the level of legal resolution? Are school systems disproportionally advantaged in the outcomes? What, if any, improvements should be made to level the playing field between disabled children and school divisions?

This article will explore how disputes surrounding the identification, evaluation, educational placement, and the provision of a free appropriate public education for the children[8] are resolved. Parts II through IV will discuss the disabled children affected by the IDEA, the mainstreaming concept, and the courts' applications of the IDEA mandates.[9] Part V will examine the due process hearings, including related trends, issues, and state-by-state comparisons of hearing outcomes.[10] Part VI will make recommendations for rectifying and improving due process hearing procedures and for improving the dispute process for all concerned parties.[11]

II. The Disabled Children

The federal mandate to provide educational services for children with disabilities grew from a recognition that prior to its enactment, the educational needs of millions of children with disabilities were not being fully met.[12] This was due to a number of reasons, including children not

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[5] 20 U.S.C. § 1400(c)(3).
[6] *See id.* § 1400(c)(5)(A).
[7] *See id.* § 1401(3)(A).
[8] *See id.* § 1415(b)(3)(B).
[9] *See infra* Parts II–IV.
[10] *See infra* Part V.
[11] *See infra* Part VI.
[12] 20 U.S.C. § 1400(c)(2).

receiving appropriate educational services, exclusion from the public school system, undiagnosed disabilities, and a lack of adequate resources.[13] Recently, new federal data reflects that there are more children in special education, accounting for a greater percentage of public school students across the country.[14] Between the 2011–12 and 2017–18 school years, the number of students served under the IDEA increased from 6.4 million to 7 million students. Of the total number of students served in the 2017–18 school year, the largest disability group comprised children with specific learning disabilities at 33%. Students with autism accounted for 11% in addition to 7% of students with developmental delay, 6% with an intellectual disability, and 15% having other health impairments.[15] It should be noted that most students with a disability ages six to twenty-one spent at least 80% of the school day in general education classrooms. Although those students mainstreamed varied by disability type, 65% of students with developmental delay were in a regular classroom most of the time, compared to only 17% of students with an intellectual disability.[16] This type of student placement is a recognition, at least as viewed through the eyes of school officials or parents of disabled children, that inclusion into the regular classroom may not be appropriate for all types of disabilities.

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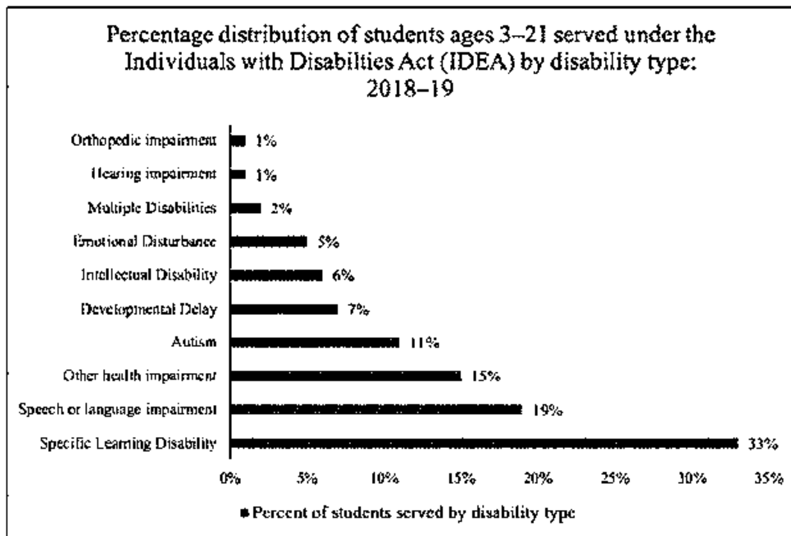
[13] *Id.*

[14] *See* NAT'L CTR. FOR EDUC. STAT., THE CONDITION OF EDUCATION 2019, at 60 (2019), https://nces.ed.gov/pubs2019/2019144.pdf.

[15] *Id.* For an interesting discussion on Attention Deficit Hyper-Activity Disorder qualifying as other health impairment, see W.H. *ex rel.* B.H. v. Clovis Unified Sch. Dist., No. CV F 08-0374 LJO DLB, 2009 WL 1605356 (E.D. Cal. June 8, 2009).

[16] NAT'L CTR. FOR EDUC. STAT., *supra* note 14, at 62.



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[17] U.S. DEP'T OF EDUC., OFF. OF SPECIAL EDUC. PROGRAMS, IDEA SECTION 618 DATA PRODUCTS: STATIC TABLES, last visited Feb. 20, 2020, https://www2.ed.gov/programs/osepidea/618-data/static-tables/index.html ; *see* NATIONAL CENTER FOR EDUCATION STATISTICS, *DIG. OF EDUC. STAT. 2019* tbl. 204.30. Other health impairments include having limited strength, vitality, or alertness due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes. Note: Data are for the 50 states and the District of Columbia only. The data includes 2015–16 data for 3- to 21-year-olds in Wisconsin due to the unavailability of more recent data for children served in Wisconsin. Visual impairment, traumatic brain injury, and deaf-blindness are not shown because they each account for less than 0.5% of students served under the IDEA. Due to categories not shown, detail does not sum to 100%. Although the rounded numbers are displayed, the figures are based on unrounded data.

III. MAINSTREAMING: THE LEAST RESTRICTIVE ENVIRONMENT IN EDUCATION

The bedrock doctrine of disability law—the least restrictive environment ("LRE")—has been found in legislation and court decisions for over half a century.[18] The LRE has been described in several ways; however, its origins can be directly traced to due process concerns as found by the U.S. Supreme Court in *Shelton v. Tucker* in 1960.[19] The *Shelton* Court illuminated:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of the *less drastic means* for achieving the same basic purpose.[20]

The LRE's guiding principle in the education context can be found initially in the Education for All Handicapped Children Act of 1975,[21] renamed the Individuals with Disabilities Education Act in 2004.[22] The IDEA describes the least restrictive environment concept as:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[23]

The IDEA's findings affirm that education of children with disabilities are made more beneficial by ensuring access to education in the regular classroom to the maximum extent possible. This overwhelming focus on education provided in the regular classroom as a default principle will be challenged in this Article, exploring different options in the conversation between school personnel and the parents of disabled children.

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[18] *See* Brown v. Bd. of Ed. of Topeka, 347 U.S. 483 (1954). While addressing racial equality, *Brown* impacted disability rights and "led the way to a growing understanding that all people, regardless of race, gender or disability, have a right to a public education." Kelli J. Esteves & Shaila Rao, *The Evolution of Special Education*, PRINCIPAL, Jan. 1, 2008, at 1.

[19] 364 U.S. 479 (1960).

[20] *Id.* at 488 (emphasis added) (footnote omitted).

[21] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

[22] Individuals with Disabilities Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended in scattered sections of 20 U.S.C.).

[23] 20 U.S.C. § 1412(a)(5)(A).

IV. The Courts' Approach

Courts have illuminated the LRE in disputes including the notable case of *Board of Education v. Rachel H. ex rel. Holland*, where the U.S. Court of Appeals for the Ninth Circuit addressed parents' demands for regular classroom placement for a child with intellectual disabilities.[24] The court acknowledged the IDEA's priority for placement of students with disabilities in the regular classroom with their peers.[25] The court announced that the proper test in determining compliance with the IDEA's mainstream mandate was a four-factor balancing test:

> (1) [T]he educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the child with the disability] had on the teacher and children in the regular class; and (4) the cost of mainstreaming [the child with the disability].[26]

These four criteria must be considered by the school division when evaluating the appropriateness of a disabled child's school placement.[27]

The struggles over the educational setting were encountered by the U.S. Court of Appeals for the Fifth Circuit in *Daniel R.R. v. State Board of Education*, in which the court explained that the dialogue must shift to requiring schools to offer a "continuum of alternative placements."[28] In evaluating the mainstreaming edict, the *Daniel R. R.* court determined that compliance with federal law did not contemplate an all-or-nothing educational placement in the regular or special education setting but rather a continuum of services.[29] The importance of offering a continuum of alternatives recognizes that "one size does not fit" each disabled child. A heavy dose of mainstreaming or exclusive mainstreaming on one end may be appropriate for one child, and a separate special education school with specialized instruction and smaller class size may be suitable for another disabled child with different educational goals. The educational placement of a child should be evaluated on the basis of the unique qualities of each particular child. A one-size-fits-all approach is the antithesis of the IDEA.

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[24] 14 F.3d 1398 (9th Cir. 1994) (discussing the child's proposed placement, where the school's plan provided for moving the child at least six times each day between special education class and the regular classroom).

[25] *Id.* at 1403.

[26] *Id.* at 1404; *see* Murray v. Montrose Cnty. Sch. Dist., 51 F.3d 921, 929 (10th Cir. 1995) (requiring a continuum of services between the regular classroom and special education classroom).

[27] *Sacramento City Unified Sch. Dist.*, 14 F.3d at 1404.

[28] *See* 874 F.2d 1036, 1043 (5th Cir. 1989).

[29] *Id.* at 1050 (recognizing that the "appropriate mix will vary from child to child").

Recognizing the Fifth Circuit's reasoning of the mainstream concept, the U.S. District Court of Appeals for the Third Circuit in *Oberti ex rel. Oberti v. Board of Education* offered a set of three factors in evaluating the appropriateness of educational placement.[30] The first factor requires determining if the school district has made reasonable efforts to accommodate the child in a regular classroom with supplemental aids and services.[31] The second factor requires comparing the educational benefits the child will receive in the regular classroom with those in the special education class.[32] The third factor requires evaluating the "possible negative effect the child's inclusion may have on the education of the other children in the regular classroom."[33] Subsequent to considering these factors, if the court decides that the school district was warranted in removing the student from the regular classroom and delivering education in a segregated special education class, the court is required to determine "whether the school has included the child in programs with nondisabled children to the maximum extent appropriate."[34] The IDEA would mandate that schools provide a continuum of alternative placements to meet the needs of the disabled child.[35]

In contrast, other courts have queried the strong preference for education in the regular classroom. In *M.A. ex rel. G.A. v. Voorhees Township Board of Education*, the placement of a student with autism in an out-of-district setting was determined to be the least restrictive environment, which ran contrary to the strong emphasis on education in the regular classroom.[36] The school system persuaded the court that the student's out-of-district placement was the least restrictive environment to receive a free and appropriate education.[37] The student's current mainstreamed education in

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[30] 995 F.2d 1204, 1217–18 (3d Cir. 1993) (involving an eight-year-old with Downs Syndrome whose educational placement was changed from the regular classroom to a segregated special education classroom).

[31] *Id.* at 1215–16.

[32] *Id.* at 1216–17 (referring to the special education class as "segregated," implying a less than desirable placement option).

[33] *Id.* at 1217.

[34] *Id.* at 1218 (holding that the appropriate mix between regular and special education settings "will vary from child to child and . . . from school year to school year as the child develops" (quoting *Daniel R. R.*, 874 F.2d at 1050 (5th Cir. 1989))).

[35] *Id.*; *see* S.H. v. State-Operated Sch. Dist. of Newark, 336 F. 3d 260, 272 (3d Cir. 2003) (adopting a two-prong test to determine whether the school district satisfied the mainstreaming requirement: 1) can the school educate the child in the "regular classroom with the use of supplementary aids and services," and 2) if not, has "the school mainstream[ed] the child to the maximum extent possible" (citing *Oberti*, 995 F.2d at 1215)).

[36] 202 F. Supp. 2d 345, 369–70, (D.N.J. 2002).

[37] *Id.* at 370.

homeroom, art, gym, and lunch offered minimal to no interaction with peers, something one would expect in the regular classroom.[38] The court recognized that the child was not receiving a meaningful educational benefit, that the education at the out-of-district school for students with special needs comports with the IDEA, and that the child would receive a free appropriate education in the LRE through the out-of-district placement.[39] The court cared deeply about the provision of a free appropriate public education, although such an education may not always be provided in the LRE.[40] School divisions, in making educational placement decisions, must keep an open mind in acknowledging that each child is different, presenting distinctive educational needs and a varied skill set.

In *Hartmann ex rel. Hartmann v. Loudoun County Board of Education*, the parents of an eleven-year-old child with autism demanded education in the regular classroom and contested evidence of no academic progress in the regular classroom.[41] The Fourth Circuit acknowledged the IDEA's preference for mainstreaming as a flexible federal mandate and recognized that students with a disability are to be educated with nondisabled children to the maximum extent appropriate.[42] This pliable standard, inherent in the IDEA school placement requirement, is driven by financial considerations and often misused to inappropriately pigeonhole students with disabilities into regular classrooms.

School systems accountable for educating disabled students should fully examine the array of placement alternatives prior to uniformly settling to provide education for a disabled child in the regular classroom. There must be a more sophisticated examination prior to blindly following the IDEA encouragement for mainstreaming disabled children. A fresh look at this concept occurred recently in 2017, as acknowledged by the U.S. Supreme Court in an attempt to reach clear guidance for the meaning of an appropriate education.[43] In *Endrew F. ex rel. Joseph F. v. Douglas County*

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[38] *Id.* at 367.

[39] *Id.* at 368–70; *see* Roncker *ex rel.* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (discussing a preference in favor of mainstreaming).

[40] *See M.A. ex rel. G.A.*, 202 F. Supp. 2d at 361–62.

[41] 118 F.3d 996, 1000 (4th Cir. 1997) (explaining that the school recommended placement in a class of five autistic students, a teacher, and an aid in a regular elementary school that would allow for mainstreaming in art, music, gym, literacy, and recess).

[42] *Id.* at 1001; *see* 20 U.S.C. § 1412(a)(5)(A).

[43] Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017); *see* Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982) (interpreting the IDEA and holding that a deaf student was not entitled to a sign language interpreter because the child was advancing from grade to grade, and this was evidence that she was receiving the most appropriate form of education).

School District RE-1, the parents sought private school funding for their child with autism because the school offered specialized education for students with autism.[44] The Court assessed the appropriateness of the student's education, announcing in explicit terms that to fulfill the mandate under the IDEA, a school "must offer an [individualized education program] reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances."[45] Accordingly, the IDEA mandates more than "de minimis" progress from year to year.[46] This forward-thinking and optimistic approach will hopefully encourage school divisions to take into account more than the cheapest and easiest outcome in educating children with disabilities, which avoids children being lost and forgotten.

Parents and disability advocates should be cautiously optimistic that the new *Endrew F.* standard will result in a shift in examining the educational placement of students by requiring more than the previous standard of "some educational benefit" as established in *Board of Education of the Hendrick Hudson School District v. Rowley*.[47] Now, a more comprehensive and significant educational benefit for disabled students is attainable. *Endrew F.* has offered real hope that equal educational opportunities for disabled students is on the horizon.[48] The door has been opened a bit wider for parents and advocates to ensure a free appropriate education will become a reality for all disabled students.

Since the enactment of the Education for All Handicapped Children Act of 1975, students with disabilities have come out of the darkness and received their education in a more integrated and mainstreamed setting. This shift has raised various challenges and unanswered questions. Should our presumption of providing education for students with disabilities in the regular classroom remain the first placement choice? Why not consider the middle option within the range of alternatives (i.e. school placement in the regular classroom as a mainstream option for part of each day and placement in a special education class for the remainder of the day)? When placement decisions begin here first, the shift to a less or more restrictive setting is based on the individualized educational program meeting culminating in the appropriate placement.

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[44] *Endrew F.*, 137 S. Ct. at 996–97.

[45] *Id.* at 999.

[46] *Id.* at 1001; *see* C.D. *ex rel.* M.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 629 (1st Cir. 2019) (citing *Endrew F.* to determine whether the child was making meaningful progress).

[47] 458 U.S. at 200 (1982).

[48] *See* 137 S. Ct. 988 (2017).

The IDEA requires that school systems ensure a continuum of alternative placement options designed to meet the unique needs of each child.[49] This cascading model of alternative special education settings ranges "from the least restrictive placement in the regular classroom to the most restrictive placement in a hospital or institutional setting."[50] First established by Evelyn Deno in 1970, this blueprint delivers seven levels with regular classroom placement viewed as the "primary and optimal setting," moving into a more restrictive setting for compelling educational reasons.[51] The settings are as follows:

> Level 1: Children in regular classes . . . with or without medical or counseling supportive therapies.
>
> Level 2: Regular class attendance plus supplementary instructional services
>
> Level 3: Part-time special class
>
> Level 4: Full-time special class
>
> Level 5: Special stations
>
> Level 6: Homebound
>
> Level 7: Instruction in hospital or domiciled setting [in-patient programs][52]

A few noteworthy administrative hearings highlight the continuum options. In a New Jersey case, *M.T. ex rel. J.R. v. Middletown Township Board of Education*, the court described a continuum of placement options, ranging from mainstreaming in a regular public-school setting as the least restrictive setting to enrollment in a residential private school as the most restrictive.[53] In a Maryland administrative due process hearing where the parents unsuccessfully sought reimbursement for private school placement, the Administrative Law Judge ("ALJ") held that the Montgomery County Public Schools' educational placement in the least restrictive environment was appropriate.[54] The ALJ acknowledged that including children with disabilities in regular school programs may not be appropriate for every disabled child; the IDEA requires a continuum of alternative placements

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[49] 34 C.F.R. § 300.115(a) (2019).

[50] ENCYCLOPEDIA OF SPECIAL EDUCATION: A REFERENCE FOR THE EDUCATION OF CHILDREN, ADOLESCENTS, AND ADULTS WITH DISABILITIES AND OTHER EXCEPTIONAL INDIVIDUALS 362–63 (Cecil R. Reynolds & Elaine Fletcher-Janzen eds., 3d ed. 2007).

[51] *Id.* at 362 (quoting Evelyn Deno, *Special Education as Developmental Capital*, 37 EXCEPTIONAL CHILD. 229, 235 (1970)).

[52] Deno, *supra* note 51, at 235.

[53] No. 15728-17, 2018 WL 5620779, at *32 (N.J. Adm. Aug. 27, 2018). The parents unsuccessfully sought an out-of-district placement. *Id.*

[54] Student v. Montgomery Cnty. Pub. Schs., No. MSDE-Mont-07-17-22806, at 64 (OAH Feb. 15, 2018) (Maryland Public Schools).

that meet the child's needs.[55] The judge noted that the continuum must include instruction in the regular classroom, special classes, special schools, home instruction, and instruction in hospitals and institutions.[56] Acknowledging removal from the regular classroom may be necessary when the nature and severity of the child's disability is such that education in a regular classroom cannot be achieved.[57] Mandating the continuum of alternative placements treats each child as unique and determines educational placement in the appropriate setting based on the child's circumstances and educational needs.

Initiating conversations regarding student placement at Level 3 would result in a more varied educational setting offered for all students with disabilities. While a Level 1 regular classroom may offer social rewards to the disabled child[58] and a less costly alternative to Levels 3 and 4,[59] placing disabled students into a regular classroom environment as a default without consideration of their unique situation may result in a disservice since special education classes offer a dramatically reduced class size for students with disabilities in addition to having teachers who are well-trained in special education curriculum.[60]

The special education teaching community is among the voices of discontent against the default mainstream option.[61] Assigning disabled children to the regular classroom as the first option may cause roadblocks for other more creative and unique initiatives. The IDEA recognizes the importance of challenging expectations established for all children.[62] What

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[55] *Id.* at 28.

[56] *Id.* at 28; 34 C.F.R. § 300.115 (2019).

[57] *Student*, No. MSDE-Mont-07-17-22806 at 28. A free and appropriate education might necessitate placement in a private school setting, funded by the school district. *Id.*

[58] CAROL A. KOCHHAR ET AL., SUCCESSFUL INCLUSION: PRACTICAL STRATEGIES FOR A SHARED RESPONSIBILITY (2d ed. 1999).

[59] Lori Garrett-Hatfield, *The Cost of Mainstreaming Vs. Special Education Classes*, CAREER TREND, https://careertrend.com/the-cost-of-mainstreaming-vs-special-education-classes-12067245.htm (last updated July 21, 2017). Educating a student with disabilities on average costs almost twice as much as educating a typical nondisabled student. Jay G. Chambers et al., *What Are We Spending On Special Education Services in the United States, 1999-2000?*, SPECIAL EDUC. EXPENDITURE PROJECT (last updated June 2004), https://www.air.org/sites/default/files/SEEP1-What-Are-We-Spending-On.pdf.

[60] Rebecca A. Hines, *Inclusion in Middle Schools*, ERIC CLEARINGHOUSE ELEMENTARY & EARLY CHILDHOOD EDUC. CHAMPAGNE ILL. (Dec. 2001), at 4–5, http s://files.eric.ed.gov/fulltext/ED459000.pdf.

[61] Steven W. Simpson, *Special Education: The Myth of the Least Restrictive Environment*, BRIDGES4KIDS (Nov. 1, 2005), https://www.bridges4kids.org/articles/2005/11-05/Simpson11-1-05.html (discussing how reducing the class size to 15 rather than 30 is a monetary problem).

[62] 20 U.S.C. § 1400(c)(5)(A)(i).

better way to accomplish this goal than by rethinking various placement options for disabled students? The IDEA should be guided by the principle that each child has value and that all children can benefit from our education services.

Other critics of the LRE for special education placement express grave concerns about race and class inequalities. Under-resourced schools invest less in special education staffing and services as compared to schools with more resources.[63] In situations where only limited services are available, "an availability inquiry may find that the student needs a more restrictive placement simply because the lower-achieving school has not made needed services available."[64] The result may be that low-income students are being pigeonholed into ill-suited placements and lost within the system for the duration of their education.[65] To make matters worse, children of these low-income school districts are also disproportionately students of color.[66]

Parents of disabled students do not universally suggest the mainstream edict. Again and again, "parents run in the opposite direction" of the LRE, "seeking education for their children in specialized programs."[67] Integration for integration's sake, once seen as a valid concern to combat rampant discrimination, is no longer perceived as a pressing one.[68]

Unfortunately, integration is often illusory, entailing "only token interaction at a distance" with respect to general students and disabled students.[69] The *Endrew F.* directive has resulted in educational personnel having to evaluate programs that are reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances.[70] This higher standard of educational progress is greater than the "merely more than *de minimis*" test of the past.[71] Today, students and their parents expect and insist on educational programs that provide every opportunity to fulfill the student's potential.

Students with disabilities benefit from inclusion by demonstrating more appropriate social behavior, greater levels of achievement, and the

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[63] Cari Carson, *Rethinking Special Education's "Least Restrictive Environment" Requirement*, 113 MICH. L. REV. 1397, 1408–09 (2015).

[64] *Id.* at 1409.

[65] *Id.*

[66] *Id.* at 1408.

[67] Bonnie Spiro Schinagle & Marilyn J. Bartlett, *The Strained Dynamic of the Least Restrictive Environment Concept in the IDEA*, 35 CHILD.'S LEGAL RTS. J. 229, 230 (2015).

[68] *Id.* at 249.

[69] *Id.* at 247; *see, e.g.*, Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 844 (2006).

[70] Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

[71] *Id.* at 1000.

improved ability of students and teachers to adapt to different teaching and learning styles.[72] Researchers have, however, noted that removing the barriers to inclusion requires smaller teacher-student ratios with properly trained teachers.[73] Nonetheless, criticism of the inclusion model persists, such as concerns of "low self-esteem of students with disabilities" to poor academic grades.[74] The critiques of mainstreaming include prejudice toward disabled students, apparent neglect of nondisabled students, and lack of teacher preparedness.[75]

The stress experienced by parents who are lost in the shuffle and students not receiving appropriate educational benefits continues to be a prominent concern.[76] Insufficient funding expenditures from educational programs are also a reality. Without equitable and enhanced funding in all local communities, the IDEA's promise of a free appropriate education is, unfortunately, illusory.

The mixed educational setting may very well offer even greater academic success without sacrificing the social and emotional benefits an inclusive setting can deliver. This educational model should be considered prior to disabled children being placed full-time in a mainstream setting that may not meet their needs. The placement alternative of a mixed classroom setting, as the starting point of the discussion, permits movement along the continuum as appropriate. The placement options along the cascade system would facilitate easier movement to a less restrictive or more restrictive setting based on the unique needs of the disabled child.

V. THE DUE PROCESS HEARING

The IDEA affords parents of a disabled child an opportunity to present a complaint "with respect to any manner relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education. . . ."[77] The adversarial proceeding, known as a due process hearing,[78] must be conducted in an impartial and fair manner in

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[72] KOCHHAR ET AL., *supra* note 58.

[73] Hines, *supra* note 60, at 5.

[74] *Id.*

[75] Kriste Lauren Trilfolis, *LRE Under the IDEA: Has Mainstreaming Gone Too Far?*, SETON HALL L. SCH. STUDENT SCHOLARSHIP, May 1, 2014, at 7–8; *see also* Allison F. Gilmour, *Has Inclusion Gone Too Far?*, 18 EDUCATION NEXT 4 (2018) (citing general education teachers' lack of training to meet academic and behavior needs of disabled students).

[76] *See* Schinagle & Bartlett, *supra* note 67, at 230.

[77] 20 U.S.C. § 1415(b)(6)(A).

[78] *Id.* § 1415(f)(1)(A). The hearing officer shall be impartial and knowledgeable of the law. *Id.* § 1415(f)(3)(A).

accordance with appropriate standard legal practice.[79] Several safeguards are outlined in the IDEA, including the right to counsel, the right to present evidence and cross-examine witnesses, and the right to written findings and decisions.[80] This proceeding, aimed at resolving disputes between school divisions and parents, has developed over the years into a costly, time-consuming adversarial battle.

Examining the due process hearing outcome, the issues raised, the child's disability presented, and a comparison of outcomes contingent on whether the child's parent is represented by an attorney or proceeds pro se is extremely enlightening. Additionally, this article reports on data to highlight which states dominate due process hearings. This article further offers recommendations to improve the system of reducing due process complaints in order to level the playing field between school districts and parents.

Four states, New York, California, New Jersey, and Pennsylvania, along with the District of Columbia, account for approximately 85% of due process hearings.[81] Why is this the case? Are there more disability lawyers available at low cost in these states? Are the judges presiding over these disputes more inclined to find in favor of the disabled student compared to other states? Do residents of these states possess a higher income and thus are more capable of funding costly litigation? These and other important issues will be addressed and interpreted.

One explanation for the large number of hearings in certain states may be a result of the difference in cost when comparing the one-tier or two-tier system. At the same time, certain parts of the United States are highly litigious. There is also a movement toward more formal due process hearings, possibly necessitating legal representation even more.[82] Undoubtedly, a due process hearing is a highly charged adversarial undertaking, fraught with bureaucratic hurdles and compounded by high financial costs.

With the enactment of the 2004 amendment of the IDEA, several alternatives to the adversarial due process hearing were encouraged,[83] including mediation as well as preliminary meetings aimed at resolving the educational disputes.[84] These alternatives, as well as a two-year statute of

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[79] *Id.* § 1415(f)(3)(A)(iv).

[80] *Id.* § 1415(h)(1), (2), (4). Upon completion of the administrative due process hearing, any aggrieved party has the right to appeal to state or federal courts. *Id.* § 1415(i)(2).

[81] Perry A. Zirkel & Gina Scala, *Due Process Hearing System Under the IDEA: A State by State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 5 (2010).

[82] *See id.* at 6–7.

[83] 20 U.S.C. § 1415(e)(1) (2002); 34 C.F.R. § 300.506(a) (2012).

[84] 20 U.S.C. § 1415(f)(1)(B) (2012); 34 C.F.R. § 300.510 (2012).

limitations,[85] have resulted in a national decline in due process hearings.[86] The mediation option may be, theoretically, a suitable alternative in resolving issues in a nonconfrontational setting. However, the uneven bargaining position for parents vis-a-vis school officials causes parents to cling to the hope that an outcome directed by an impartial hearing officer may result in a more suitable outcome.

Resolution through due process hearings appears to be driven in large part by the ability of parents to obtain legal representation. The importance of legal representation is critical to strive toward a more balanced outcome. In analyzing decisions between 1978 and 2012,[87] Professor Perry Zirkel noted that parents won 58% of cases when represented by legal counsel, but only 14% when parents were pro se.[88] For one, due process hearing proceedings are highly adversarial; maneuvering through the educational dispute may entail lining up expert witnesses and strategizing throughout the conflict with school officials, a skill an attorney is much more equipped to pursue. In a more limited analysis of due process hearings in Illinois, a similar outcome is noted: representation by an attorney is the single most important predictor in determining whether parents will win or lose a due process hearing.[89] The data reveals that 50.4% of parents with attorney representation were successful at the due process hearing, compared to only 16.8% of those without legal representation.[90]

Clearly, the benefits to legal representation for parents cannot be overstated. Although not plentiful, protection and advocacy organizations, legal aid services, and pro bono efforts by bar associations offer some hope for specialized training to represent parents in due process hearings. The provision of attorney's fees to the prevailing party[91] may also increase legal representation in IDEA disputes. Importantly, this calculation contemplates

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[85] 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.511(c).

[86] Perry A. Zirkel, *Longitudinal Trends in Impartial Hearings Under the IDEA*, WEST'S EDUC. L. REP. 1, 7–8 (2014).

[87] Perry A. Zirkel & Cathy A Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions Under the IDEA: An Empirical Analysis*, OHIO STATE J. ON DISP. RESOL. 525, 538–40 (2014).

[88] Perry A. Zirkel, *Are the Outcomes of Hearing (and Review) Officer Decisions Different for Pro Se and Represented Parents*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 263, 273 (2014). It is noted that parents who can afford to hire counsel also have the resources to hire experts. *Id.*

[89] MELANIE ARCHER, ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS 1997-2002 7 (2002), ftp://help.isbe.net/webapps/Spec_ed/ARCHER%20REPORT.pdf.

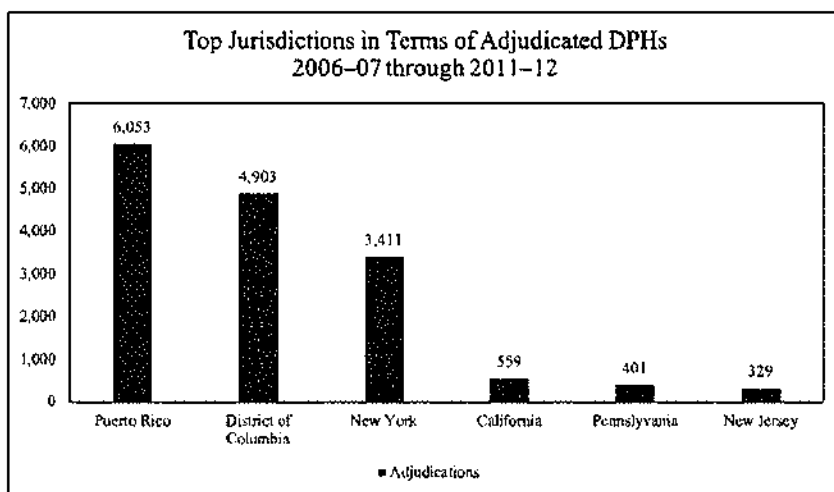
[90] *Id.*

[91] 20 U.S.C. § 1415(i)(3)(B). Attorneys' fees may be awarded to the parent, or to the school if the school files a frivolous complaint. *Id.*

the higher possibility that parents may be able to work with well-trained attorneys who understand the legal mandates contained in the IDEA.

A closer look at due process hearings in specific states, such as Pennsylvania, Texas, Massachusetts, and Maryland, provides insight on the issues addressed at these hearings, students' disabilities, and factors, including legal representation, that could result in a favorable decision. Due process hearings are complicated undertakings where the outcome relies heavily on expert witness testimony. In addition, comprehensive knowledge of the procedural requirements of the IDEA as well as a thorough understanding of substantive special education law are indispensable skills for a party to have. Consequently, a skilled attorney is necessary to represent the interests of the disabled child and to ensure a successful outcome.

In the academic years between 2006–07 through 2011–12, the top jurisdictions that led the nation in due process adjudications are as follows:[92]



Additional data includes the state comparison of due process hearings held between 1991 and 2005.[93] During this 15-year period, there were a total of 37,069 hearings, which is an average of 741 hearings held per state.[94] Two states, New York (16,064) and New Jersey (4,687), dominated the field, accounting for over half the hearings nationwide.[95]

[92] Zirkel, *Longitudinal Trends*, *supra* note 86, at 5.

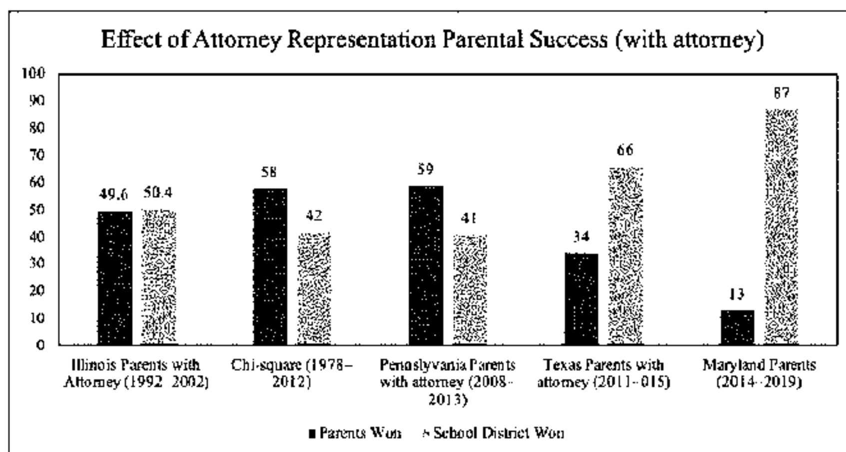
[93] Perry A. Zirkel & Karen L. Gischlar, *Due Process Hearings Under the IDEA: A Longitudinal Frequency Analysis*, J. OF SPECIAL EDUC. LEADERSHIP, Mar. 2008, 22, 25–27 .

[94] *Id.* at 25.

[95] *Id.* at 25, 31.

The statutes provide an explicit right to legal representation at due process hearings.[96] The successful outcome of a due process hearing is directly correlated to whether the parent(s) of the disabled child have legal representation at the due process hearing. Representation by an attorney is the single most important predictor in determining parental success at the due process hearing.[97] Simply put, the significance of having an attorney represent the disabled student and parents at the due process hearing cannot be emphasized enough. Each state's disability rights organization, legal aid program, bar association service, and law school clinic can offer legal representation in select cases to supplement the private bar.

Statistics from Illinois, Pennsylvania, Texas, and Maryland demonstrate the impact on parental success with an attorney[98] compared to without:[99]

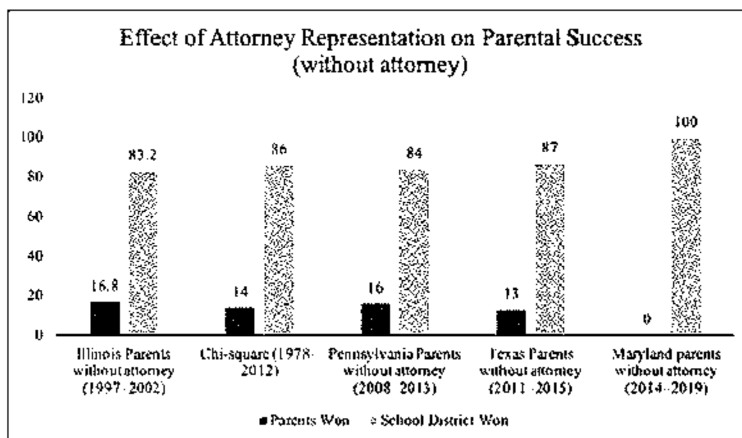


[96] 20 U.S.C. § 1415(h)(1).

[97] ARCHER, *supra* note 89, at 7.

[98] *Id.* at 18 (revealing that in 278 due process hearings, school districts were represented in 94% of the cases); Kevin Hoagland-Hanson, *Getting Their Due (Process): Parents and Lawyers in Special Education Due Process Hearings in Pennsylvania*, 163 U. PA. L. REV. 1805, 1822 (2015) (noting that in Pennsylvania, a large majority of counsel representing parents were from the private bar and not from nonprofit or legal aid organizations); G. Thomas Schanding et al., *Analysis of Special Education Due Process Hearings in Texas*, SAGE OPEN, (June 14, 2017); Talia Richman, *'Why Would We Even Try?' Parents of Disabled Students Almost Never Win in Fights Against Maryland Districts*, BALT. SUN (May 2, 2019; 11:40 AM) (citing Project HEAL report, which analyzed 105 due process hearings in Maryland from fiscal year 2014 to the second half of fiscal year 2019).

[99] ARCHER, *supra* note 89, at 18; Hoagland-Hanson, *supra* note 98; Schanding et al., *supra* note 98; Richman, *supra* note 98.



The school system has counsel representing its interest in nearly all proceedings. The hearings are lengthy, complicated, and require the skills offered by licensed attorneys. Furthermore, a significant percentage of cases are settled through negotiation, a skill that an attorney can provide during the settlement discussions.[100] Attorneys can also guide parents through the mediation process designed to reduce disputes prior to undertaking the complicated and lengthy due process avenue.[101]

In an analysis of Maryland's due process hearings outcomes, no parents were successful when they represented themselves, and only prevailed in 13% of the cases when represented by an attorney.[102] Following the U.S. Supreme Court's favorable interpretation of the educational benefit concept in *Endrew F. v. Douglas County School District*,[103] perhaps there will be an improvement in outcomes at the due process hearings that are more equitable for parents. The IDEA's enactment led most parents to believe that an education system designed specifically for their disabled child was finally attainable. Let us not allow the current due process hearing system to derail these parents' hopes.

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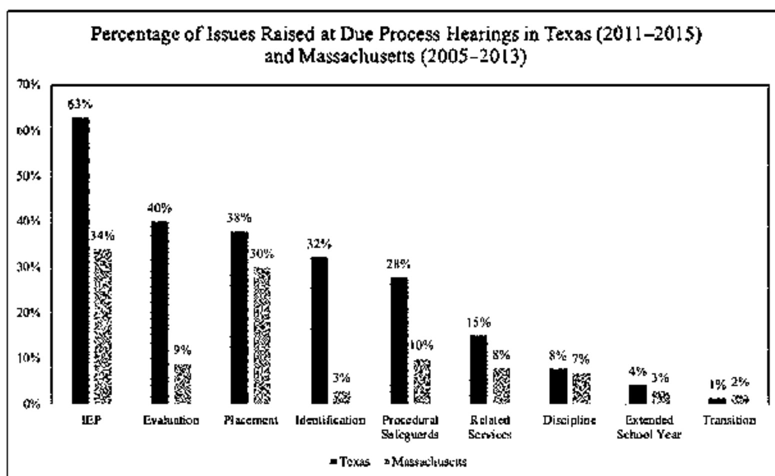
[100] *See* Hoagland-Hanson, *supra* note 98, at 1824. Estimates of settled cases range from 70%–90%. *Id.*

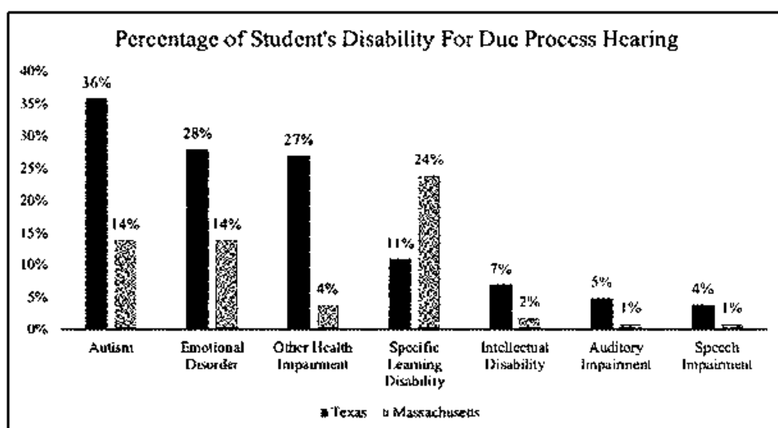
[101] 20 U.S.C. § 1415(e).

[102] *See* Richman, *supra* note 98 (noting that only parents prevailed in only 14 out of 105 cases and that "[n]o parents won if they represented themselves").

[103] Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) (elevating the *Rowley* standard of merely more than a *de minimis* standard to "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"); *see* Richman, *supra* note 98 (noting that parents prevailed in only 14 out of 105 cases and that "[n]o parents won if they represented themselves").



[104]



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[104] Schanding, *supra* note 98; William H. Blackwell & Vivian V. Blackwell, *A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation and Student Characteristics*, SAGE OPEN, Jan.–Mar. 2015, at 1, 4–5. An individualized education program ("IEP") is a document that contains the statement of the child's present level of academic achievements and functioning performance, a statement of annual measurable goals, a description of how the child's progress will be measured, a statement of the special education and related services, an explanation of the extent to which the child will participate with nondisabled children, relevant projected start dates and frequency of services, and location and duration of services. *See* U.S.C. § 1414(d)(1)(A).

[105] Schanding, *supra* note 98; Blackwell & Blackwell, *supra* note 104.

VI. RECOMMENDATIONS/FINAL THOUGHTS

Parents of disabled children who advocate for educational services often face insurmountable obstacles such as attaining appropriate educational curriculum designed to meet their children's unique needs, financial constraints, bureaucratic challenges, and a lack of trained legal advocates. The following are recommendations to guide state legislatures, school officials, policymakers, and everyday individuals in developing, implementing, and fully participating in educational services in their communities. These principles seek to level the playing field between school officials and parents.

A. Burden of Proof

At due process hearings, administrative law judges should place the burden of proof on school districts and require the school to demonstrate that its recommended programs are appropriate to meet the unique needs of the child, regardless of which party requests the hearing. Justice Ginsburg's dissent in *Schaffer ex rel. Schaffer v. Weast* encouraged the burden of persuasion to be placed on the school district to demonstrate that its plan fulfills the free and appropriate public education mandate. This will strengthen school officials' resolve to choose a course genuinely tailored to the child's individual needs.[106] Since school officials possess significantly more resources than parents, and school board attorneys are a common fixture with ready access to school-employed experts, placing the burden of proof on the school to explain and justify the education program it recommends appears only right.

B. Attorneys' Fees

Procedures should award attorneys' fees to parents of disabled students if the parents are the prevailing party at the due process hearing on issues

[106] Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 65 (2005) (Ginsburg, J., dissenting) (arguing that the burden of persuasion is with the party seeking relief at the due process hearing); *see* Joanne Karger, *A New Perspective on Schaffer v. Weast: Using a Social Relations Approach to Determine the Allocation of the Burden of Proof in Special Education Due Process Hearings*, 12 U.C. DAVIS J. JUVENILE L. & POL'Y, 133 (2008) (offering an in-depth discussion of burden allocation of production and persuasion based on Martin Minow's theoretical framework for the legal treatment of difference based on a social-relations approach). In his dissent, Justice Breyer encourages the state ALJ, guided by the state administrative law, to determine the burden of persuasion. Schaffer, 546 U.S. at 71 (Breyer, J., dissenting).

relating to the identification, evaluation, educational placement of the child, or the free appropriate public education provision.[107] The costly undertaking to secure counsel for parents becomes more equitably handled by the imposition of attorneys' fees when the parents prevail at the due process hearing level, rather than the current system of only awarding attorneys' fees when successful in court.[108]

C. Expert Witness Fees

Procedures should award expert witness fees to parents of disabled children if such witnesses offered testimony at the due process hearing and were relevant and necessary in determining the judgement of the ALJ dispute. School officials have in-house experts, including school psychologists, speech pathologists, educational consultants, reading specialists, and special education directors, to name a few. Hearing from independent experts who offer an alternative approach should be encouraged. Voices from independent experts may render opinions on the appropriateness of the education program offered and result in a more balanced analysis when determining the correct education for each student.

D. Educational Consultants

Mechanisms should be in place to expand access to educational consultants at reasonable costs to parents. These experts will offer alternative ways to design education settings for disabled children that are not currently available in the school offerings. Many children will benefit from the independent opinions of educational consultants who are not tied to the school system.

E. Legal Services

Programs should be in place to expand access to well-trained, free and low-cost legal services to parents. Law school clinics as well as expansion of pro bono bar programs and training for private attorneys to become familiar with special education law could serve as valuable resources. For example, Maryland recently became the second state to create a "Special Education Ombuds[person.]"[109] New Jersey created a similar special

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[107] *See* S.B. 783, 2020 Gen. Assemb., 441st Sess. (Md. 2020) (authorizing attorneys' fees and expert witness fees to parents of disabled child).

[108] 20 U.S.C. § 1415(i)(3)(B).

[109] *See* MD. CODE, STATE GOV'T § 6-502 (2020).

education position in January 2016.[110] The goals of the ombudsperson include explaining to parents how to avail themselves of their rights and to work neutrally and objectively with all persons to ensure that the special education system function as intended.[111] The purpose of a state special education ombudsperson is to serve as a resource and attempt to redress the uneven bargaining position parents face in negotiating and contesting disputes with school officials. An additional benefit of this position is the ability to steer parents toward qualified legal advocates.

F. Funding

Legislatures should expand state-supported educational funding of special education services.[112] Although parents are permitted to obtain an independent educational evaluation of their child as an alternative opinion to the school officials' recommendations,[113] securing an independent evaluation is very difficult for parents with limited financial resources.[114] Additionally, lawyers in the IDEA cases play a crucial role in understanding the IDEA requirements. Without skilled attorneys to counter the expertise within school systems, parents are at a distinct disadvantage.[115] Providing free and low-cost attorneys in the IDEA disputes at due process hearings is a necessary component to making free and appropriate education for all disabled children a reality.

School superintendents, critical of the current due process system that devotes school districts' precious time and resources to fighting the legal actions of a single parent, suggest reconsidering the current due process framework.[116] The American Association of School Administrators

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[110] *See* N.J. STAT. § 18A:46-2.4 (2015).

[111] *See* MD. CODE, STATE GOV'T § 6-504 (2020).

[112] *See* MARYLAND COMM'N ON INNOVATION AND EXCELLENCE IN EDUCATION, PRELIMINARY REPORT 23–24 (2018), http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2018-Preliminary-Report-of-the-Commission.pdf (recommending increases in state funding for Maryland schools, including increases in funding for special education programs).

[113] 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (2019).

[114] Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontline of Special Education*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 107, 127 (2011).

[115] *Id.* at 141; *see also* Tracy Gershwin Mueller, *Litigation and Special Education: The Past, Present and Future Direction for Resolving Conflict Between Parents and School Districts*, 26 J. DISABILITY POL'Y STUD. 1, 5–6 (2014) (discussing alternative dispute resolution suggestions).

[116] SASHA PUDELSKI, AM. ASS'N OF SCH. ADM'R, RETHINKING SPECIAL EDUCATION DUE PROCESS 15 (2016), https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Specia

(AASA) recommends eliminating the due process hearing structure.[117] The high cost of due process hearings is a particular concern to school districts. The AASA takes a rather cynical approach, claiming due process hearings are unable to provide relief for the feelings of hostility and anger that parents experience during heated disputes with school districts.[118]

The AASA's view, however, is misguided because it fails to recognize that school disputes over special education services are not addressed on a level playing field. School districts possess access to many experts, including teachers, principals, administrators, school psychologists, social workers, and school reading specialists, available to testify at pending due process hearings. Further, hiring legal representation serves as a financial roadblock to most parents. School districts frequently also have access to legal services to represent their interests. Schools have time on their side as well; time-consuming due process disputes are lengthy and during this time, the student remains in the contested education program until all proceedings have been completed.[119] Moreover, school systems make placement decisions based in large part on financial considerations, and thus assign children in placements with less costly mainstream options, especially those placements that currently exist within the school system. The ALJ's authority to order placement options based on the child's individual needs is often a costly undertaking, yet it ensures that an array of services will benefit not only the student in the relevant dispute but many other unnamed disabled children in similar situations.

Potential alternative dispute resolution solutions such as the AASA proposal to replace the current due process system with individualized educational program facilitation and mediation should be considered as additional options rather than a complete substitute to the adversarial, but often necessary, due process hearing system.[120] With expanded access to free and low-cost disability rights attorneys and experts as well as a shift in the burden of proof onto the school officials, the due process learning structure is worthy of survival.

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l_Education/AASARethinkingSpecialEdDueProcess.pdf.

[116] *Id.* at 8.

[117] *Id.*

[118] *Id.* at 8 ("The hearings are ill-suited to satisfy parents searching for a resolution for the tension with a school district.").

[119] 20 U.S.C. § 1415(j).

[120] *See* U.S.C. § 1414(d)(1)(A).

G. Training for ALJs

While maintaining the current structure of due process hearings overseen by impartial ALJs, ALJs should receive enhanced training to better understand both special education programs as well as the characteristics of children with various mental and physical disabilities.[121] Likewise, because current due process hearings rely heavily on educational experts, ALJs should receive training to better understand the educational needs of disabled children, the scope of placement options, and the benefits of various educational programs.

H. Placement Decisions

With respect to special education placement decisions, options could commence with placement primarily in the regular classroom for the majority of the day paired with placement in a specialized class for another portion of the day. Movement to a more or less restrictive setting along the cascade system of options is dependent on the outcome of the IEP conference. It is imperative that varied options are available in any discussion involving placement decisions.

I. Deaf or "Hard of Hearing" Children

In deciding educational placement for a student who is deaf or hard of hearing, the primary consideration should be offering significant opportunities for an appropriate education with other students who are deaf or hard of hearing, and such placement should receive priority over education in the regular classroom with hearing-abled students. Including deaf or hard of hearing children in a classroom setting with primarily other deaf or hard of hearing children will permit greater opportunities for social interactions.

J. Federal Funding

The federal government should expand school funding to equalize local school expenditures regardless of the locality's ability to fund educational programs. In a scathing report addressing federal funding for children with disabilities, the National Council on Disability highlighted the particular

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[121] *See* H.B. 1275, 2019 Gen. Assemb., 439th Sess. (Md. 2019) (requiring a training course on special education law for ALJs but withdrawn after an unfavorable report).

vulnerability of funding shortfalls.[122] The report acknowledged that students with disabilities were particularly vulnerable to the adverse effects of funding issues, including delays in evaluations, rejection of requests for independent educational evaluations, inappropriate placement changes, and a failure to properly implement IEPs.[123] Inadequate federal funding for educational services for disabled students has forced state and local school districts to shoulder the burden to find fiscal resources required to meet their IDEA obligations.[124] It is unrealistic to expect localities to fully fund this deficiency, especially when local education funding relies on local property taxes, which inadvertently reward wealthier localities and punish lower income localities. It is time to design and develop an appropriate education for all disabled children, regardless of their zip code.

VII. CONCLUSION

The provision of a free and appropriate education in the least restrictive environment for students with disabilities is a societal promise here to stay. The goal of integrating disabled students into the mainstream of society is a guiding principle of the IDEA. The methods and processes for inclusion, from educational settings to services provided to address disputes in administrative and legal settings, continue to be a struggle for parents of disabled children even when isolation and exclusion have hopefully been replaced by acceptance and understanding.

Schools and parents should never become resigned to the provision of educational services simply out of convenience based on the least expensive option. The cascade model of alternatives in educational placement must be the guiding principle. Allowing disputes to be resolved in a fair and equitable manner requires adjustment and replenishment. As the last resort, the due process hearing needs a more equitable approach that allows the educational landscape to be level, which in turn enables families with meritorious claims and justice to prevail. It is time to end the notion that parents who question and dispute the education program offered to their disabled child is akin to David battling Goliath. Let us all work toward a level playing field in both the classroom and the hearing room.

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[122] NAT'L COUNCIL ON DISABILITY, BROKEN PROMISES: THE UNDERFUNDING OF IDEA, (2018), https://www.ncd.gov/sites/default/files/NCD_BrokenPromises_508.pdf. This independent federal agency generated the report, making recommendations to the President and Congress. *See id.* at 1–2.

[123] *Id.* at 1.

[124] *Id.* at 9. The federal funding should be 40% of the average per pupil expenditure, a level Congress has never met. *Id.*

Half-Baked: Remedying the Confusion Between State Medical Cannabis Protections and Federal Laws on Drug Testing for Federal Contractors

Ben Sheppard*

I. INTRODUCTION

In January 2020, Hawai'i Senators Rosalyn Baker (D) and Brian Taniguchi (D) introduced legislation that would grant medical cannabis[1] users employment protections.[2] This proposed legislation forbids employers from taking an adverse employment action solely because of an individual's status as a medical cannabis cardholder or for a positive drug test for cannabis.[3] The legislation carves out two exceptions. First, an employer may take adverse action if the individual is impaired at work.[4] Second,

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* JD candidate, anticipated 2021, George Washington University Law School. The author received his undergraduate degree in History & Political Science from Dietrich School of Arts and Sciences at the University of Pittsburgh. The author would like to thank Ana Hautanen, Michael Capuano, and Professor Peter Meyers, Collin Swan, and Annie Willett for their guidance in drafting this note. The author would also like to thank Sarah Yerger and Professor Joshua Schwartz for introducing them to the fields of employment law and government contracts respectively. Finally, the author would like to thank Jim Sheppard and Rick Maffett for providing him with positive role models for what lawyers should be. The author may be contacted at bsheppard@law.gwu.edu.

[1] In this comment, I use the term "cannabis" as much as possible, both because of the racist origins of "marijuana" in prohibition campaigns and the more positive connotation "cannabis" has compared to marijuana. Konstantia Koutouki & Katherine Lofts, *Cannabis, Reconciliation, and the Rights of Indigenous Peoples: Prospects and Challenges for Cannabis Legalization in Canada*, 56 ALBERTA L. REV. 709, 710 n.3 (2019); Francis J. Mootz III, *Ethical Cannabis Lawyering in California*, 9 ST. MARY'S J. LEGAL MAL. & ETHICS 6, n.1 (2018); Alex Halperin, *Marijuana: Is It Time to Stop Using a Word with Racist Roots?*, THE GUARDIAN (Jan. 29, 2018), https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism. Where context requires, I use the terms "Marijuana" or "Marihuana" and they should be considered synonymous with "cannabis".

[2] S.B. No. 2543, 30th Leg., Reg. Sess. (Haw. 2020); Addison Herron-Wheeler, *Hawaii Legislature Considers Protecting Employees Who Use Medical Cannabis*, HIGH TIMES (Jan. 3, 2020), https://hightimes.com/news/hawaii-legislature-considers-protecting-employees-who-use-medical-cannabis/.

[3] S.B. No. 2543, 30th Leg., Reg. Sess. (Haw. 2020).

[4] *Id.* A positive drug test is not considered present impairment. *Id.* Other states define impairment broadly including symptoms such as negligence, unusual odor, carelessness, or

certain employers of "dangerous" occupations are exempt from compliance.[5] This legislation passed the Senate unanimously and now awaits action from the House and Governor David Y. Ige (D).[6] If enacted, Hawai'i would join the growing list of sixteen states that provide varying employment protections for medical cannabis users.[7]

With the uptick in state employment protections for medical cannabis users, employers and their employees face an often self-contradictory plethora of federal and state laws regarding medical cannabis use.[8] All employers must comply with the federal Controlled Substances Act ("CSA") which makes it illegal to possess cannabis for any purpose.[9] The CSA classifies cannabis as a Schedule I drug, meaning the federal government deems it has no medicinal value and any kind of use is illegal.[10] Federal contractors must also comply with the Drug Free Workplace Act ("DFWA"), which requires contractors to make a good faith effort to eliminate illegal drug use in their workplaces.[11] Noncompliance with the DFWA carries a variety of sanctions, including suspension and debarment.[12] In 2014, contractors in Hawai'i were awarded over two billion

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unusual movement. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-493(7) (2020).

[5] S.B. No. 2543, 30th Leg., Reg. Sess. (Haw. 2020). Dangerous occupations include law enforcement, firefighters, water safety officers, employees authorized to use firearms on the job, employees who administer controlled substances to others, employees who work with children or the elderly, civil defense emergency management personnel, or operators of certain motor vehicles. *See id.*

[6] *See* Kyle Jaeger, *Hawaii Senate Approves Drug Defelonization Bill*, MARIJUANA MOMENT (Mar. 3, 2020), https://www.marijuanamoment.net/hawaii-senate-approves-drug-defelonization-bill/.

[7] *See* John I. Winn, *When the Going Gets Weird, The Weird Turn Pro: Management Best Practices in the Age of Medicinal Marijuana*, 25 ROGER WILLIAMS U. L. REV. 60, 61 n.5 (2020); *see also* Jennifer L. Mora, *Hawaii Legislature Considers Bill Providing Employment Protections to Medical Cannabis Users*, SEYFARTH (Jun. 1, 2020), https://www.blunttruthlaw.com/2020/06/hawaii-legislature-considers-bill-providing-employment-protections-to-medical-cannabis-users/.

[8] *See* Anastasia Hautanen, *Seeing Through the Haze: Navigating Veteran Employment Rights in Government Contracting, Medical Marijuana, and the Drug-Free Workplace Act of 1988*, 49 PUB. CONT. L.J. 371, 397–98 (2020); *see also*, Candice Norwood, *Can Medical Marijuana Get You Fired? Depends on the State*, GOVERNING (May 15, 2019), https://www.governing.com/topics/mgmt/gov-medical-marijuana-legalization-workplace-policies.html.

[9] Controlled Substances Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1247, 1249 (codified as amended at 21 U.S.C. § 812(c), Schedule I(c)(17) (2018)); Hager v. M&K Constr., 225 A.3d 137 (N.J. Super. Ct. 2020) (holding that an employer must not possess, manufacture, or distribute cannabis in order to comply with the CSA).

[10] 21 U.S.C. § 812 (2018).

[11] *See* FAR 52.223-6(b)(7) (2019).

[12] *See* FAR 52.223-6(d) (2019); *see also* FAR 9.406-2(b)(1) (2019). Debarred

dollars in federal contracts.[13] Given this large amount of contracts and the harsh penalties for non-compliance,[14] federal contractors often implement workplace drug testing[15] despite no requirement for drug testing by the DFWA[16] and only require the prohibition of on-site drug use.[17]

The uptick in state employment protections for medical cannabis users places contractors in a difficult situation regarding the CSA and DFWA. This corresponds with increasing public support for medical cannabis and growing recognition of its medicinal benefits.[18] An estimated three and a half million Americans use medical cannabis.[19] Meanwhile, support for legalization of medical cannabis has reached an all-time-high, with over 80% of Americans supporting medical cannabis.[20] Medical cannabis has been used as a treatment for anxiety, depression, post-traumatic stress disorder, chronic pain, cancer, sleep-deprivation, and as an alternative to prescription opioids.[21]

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contractors are excluded from receiving federal contracts for up to 3 years. Federal agencies may not solicit from debarred contractors unless a compelling reason exists. FAR 9.405(a) (2019).

[13] *Most Profitable States for Government Contractors*, FEDERAL SCHEDULES (Jan. 24, 2015), https://gsa.federalschedules.com/resources/most-profitable-states-for-government-contractors/.

[14] *See* Stacy Hickox, *It's Time to Rein in Employer Drug Testing*, 11 HARV. L. & POL'Y REV. 419, 433–34 (2017).

[15] *See* Jeremy Kidd, *The Economics of Workplace Drug Testing*, 50 U.C. DAVIS L. REV. 707, 727 (2016).

[16] *See* Mares v. Conagra Poultry Co., 773 F. Supp. 248, 254–55 (D. Colo. 1991) ("Nowhere in [the DFWA] does it require [federal contractors] to engage in drug testing of employees."), *aff'd*, 971 F.2d 492(10th Cir. 1992); H. Michael Bagley et al., Survey, *Workers' Compensation*, 49 MERCER L. REV. 383, 385 n.14 (1997) ("The main thrust of the [DFWA] is awareness and education rather than actual testing."); FRED E. INBAU, ET AL., PROTECTIVE SECURITY LAW 82 (2d. ed. 1996).

[17] *See* FAR 52.223-6 (2019); *cf.* Figueroa v. Fajardo, 1 F. Supp. 2d 117, 123 (D.P.R. 1998) ("[The DFWA is] circumscribed to work-related problems caused by drug use.").

[18] Hautanen, *supra* note 8, at 373. Cannabis has shown successful therapeutic benefits in increasing appetite, motor control, and pain relief. Carolynn Conron, *Canada's Marijuana Medical Access Regulations: Up in Smoke*, 6 ALB. GOV'T L. REV. 259, 261, 292 (2013). Peer-reviewed medical studies also support cannabis as a treatment for glaucoma, Crohn's disease, and Parkinson's. Ritika Singh, *A Game Played on Grass, Not Cannabis: National Football League's Substance Abuse Policy Burdening the Players' Health and Performance*, 26 SPORTS LAW. J. 1, 18 (2019).

[19] *Number of Legal Medical Marijuana Patients*, BRITANNICA PROCON.ORG (May 18, 2018), https://medicalmarijuana.procon.org/number-of-legal-medical-marijuana-patients/#9.

[20] *See* Matthew Sheffield, *84 Percent in New Survey Say Marijuana Use Should Be Legal*, THE HILL (Apr. 16, 2019), https://thehill.com/hilltv/what-americas-thinking/439104-84-percent-in-new-survey-say-marijuana-use-should-be-legal.

[21] Hautanen, *supra* note 8, at 6, 373.

Despite increasing state acceptance of medical cannabis, many contractors still utilize a zero-tolerance policy to comply with the DFWA.[22] Under a zero-tolerance drug policy to certify compliance with the DFWA, federal contractors are prevented from employing individuals who use medical cannabis.[23] This action is problematic because 16 states, with Hawai'i possibly joining the count, provide employment protections for medical cannabis users.[24] As a result, a federal contractor who terminates an employee solely for their medical cannabis use may risk penalty under state law.[25]

Since few courts have considered the potential conflicts between state laws protecting the employment of medical cannabis users and the CSA and DFWA, federal contractors find themselves with little guidance.[26] Courts considering this conflict have reached different conclusions on whether state employment protections for medical cannabis users are preempted by federal laws.[27]

This Comment considers a federal contractor's challenge in complying with both the CSA and the DFWA and state employment protections for medical cannabis users. It also considers the potential impact of S.B. No. 2543 on federal contractors in Hawai'i. Part II analyzes the history of drug testing in the United States and both federal and state regulations associated with cannabis and drug testing in order to understand the proliferation of employment drug testing. Part III examines the issues of preemption and statutory interpretation associated with federal and state laws regarding medical cannabis and employee drug testing, determining neither the CSA

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[22] *Id.* at 8, 375.

[23] *See generally* Jennan A. Phillips et. al., *Marijuana in the Workplace: Guidance for Occupational Health Professionals and Employers*, 63 WORKPLACE HEALTH & SAFETY 139, 140, 143 (2015).

[24] Winn, *supra* note 7 at n.5; *see also* Judy Greenwald, *Medical Marijuana Trend Means Growing Discrimination Exposures*, BUS. INS. (Dec. 10, 2019), https://www.businessinsurance.com/article/20191210/NEWS06/912332111/Medical-marijuana-trend-means-growing-discrimination-exposures#.

[25] *See, e.g.*, Noffsinger v. SSC Niantic Operating Co. (*Noffsinger II*), 338 F. Supp. 3d 78 (D. Conn. 2018).

[26] *See* Mason Marks, *Psychedelic Medicine for Mental Illness and Substance Use Disorders: Overcoming Social and Legal Obstacles*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 69, 132–33 (2018); *see also* Matthew K. Curtin et al., *In the First Case of its Kind, Court Rules Federal Law Does Not Trump Employee Protections under State Medical Marijuana Law*, LITTLER, (Aug. 16, 2017), https://www.littler.com/publication-press/publication/first-case-its-kind-court-rules-federal-law-does-not-trump-employee.

[27] *See, e.g.*, Noffsinger v. SSC Niantic Operating Co. (*Noffsinger I*), 273 F. Supp. 3d 326 (D. Conn. 2017); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518 (Or. 2010).

nor DFWA are likely to preempt state employment protections for medical cannabis users. Therefore, federal contractors operating in states with employment protections for medical cannabis users are likely subject to civil liability for taking adverse action against a medical cannabis user solely because of their cannabis use. Part IV proposes two different solutions that Congress or individual contractors could implement to comply with both state employment protections for medical cannabis users and federal laws. First, Congress should pass a law that provides employment protections for employees where a state has passed medical cannabis employment protections. Second, federal contractors should implement a system that follows a state-by-state analysis of the varying employment protections for medical cannabis users while they await congressional clarification.

II. REEFER MADNESS: HISTORY OF DRUG TESTING COUPLED WITH FEDERAL AND STATE LAW

A. The History of Drug Testing in the United States

Drug testing in the United States first began in the 1920s when police began blood and breath testing automobile drivers suspected of drunk driving.[28] In the 1960s, large-scale urinalysis drug testing became widely available but was limited to medical applications and did not include the employment context.[29] The federal government also began mass drug testing during the 1960s and 1970s for certain groups.[30] Veterans seeking to return home from the Vietnam War were one of the first groups required to pass a drug test.[31] These tests were implemented over fears that Vietnam War veterans were addicted to opium or heroin.[32] A positive drug test prevented a soldier from returning home from Vietnam.[33]

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[28] Finn Makela, *The Drug Testing Virus* 43 REVUE JURIDIQUE THEMIS 651, 663–64 (2009).

[29] *Id.* at 664.

[30] KENNETH D. TUNNELL, PISSING ON DEMAND: WORKPLACE DRUG TESTING AND THE RISE OF THE DETOX INDUSTRY 14 (2009).

[31] Makela, *supra* note 28, at 664.

[32] *Id.*

[33] *See* Pamela L. Simmons, Comment, *Solving the Nation's Drug Problem: Drug Courts Signal a Move Toward Therapeutic Jurisprudence*, 35 GONZ. L. REV. 237, 247 (2000); *see also* Sanjay Gupta, *Vietnam, Heroin and the Lesson of Disrupting Any Addiction*, CNN HEALTH (Dec. 22, 2015), https://www.cnn.com/2015/12/21/health/vietnam-heroin-disrupting-addiction/index.html.

Drug testing eventually extended beyond Vietnam War veterans to a larger number of Americans.[34] Two events sparked this change. First, the development of the Enzyme-Mediated Immunoassay Test in 1980 provided employers an inexpensive, easy to use, on-site drug test with a short turnaround time.[35] Second, a 1981 jet crash occurred aboard the *U.S.S. Nimitz*, killing a pilot and several crewmembers.[36] A postmortem toxicology report showed the crash victims were under the influence of illegal drugs at the time of the accident.[37] In response to the *U.S.S. Nimitz* incident, the United States Navy implemented a wide-scale urinalysis drug testing policy for all active duty personnel.[38] These newly-created drug tests were random, and any evidence obtained from a drug test could be used in disciplinary or separation proceedings.[39]

Following the Navy's implementation of wide scale drug testing, other private industries followed suit. The Greyhound Corporation, for example, was one of the earliest major corporations to implement drug testing of its bus drivers in 1983.[40] By August 1985, a quarter of Fortune 500 companies drug tested job applicants.[41] This trend soon followed to mid-sized private sector employers,[42] and by 1986, a majority of full-time American workers supported drug testing for federal employees.[43]

Drug testing remains a feature of American society. Today, some estimates indicate that 50% of American employers drug test their employees.[44] In 2015, Quest Diagnostics, a major drug testing provider, estimated that it conducted roughly 6.6 million urine drug tests for

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[34] *See* TUNNELL, *supra* note 30, at 14-16; *see also* Daniel Engber, *Why Do Employers Still Routinely Drug-Test Workers?*, SLATE (Dec. 27, 2015), http://www.slate.com/articles/health_and_science/cover_story/2015/12/workplace_drug_testing_is_widespread_but_ineffective.html.

[35] *See* Stephen M. Fogel et al., *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 563 (1988).

[36] Williams v. Sec'y of Navy, 787 F.2d 552, 554 (Fed. Cir. 1986).

[37] *Id.*; TUNNELL, *supra* note 30, at 15.

[38] Williams, 787 F.2d at 554–55; *see also* Jason P. Lemons, *For Any Reason or No Reason at All: Reconciling Employment-at-Will with the Rights of Texas Workers after Mission Petroleum Carriers, Inc. v. Solomon*, 35 ST. MARY'S L.J. 741, 748 n.37 (2004).

[39] Williams, 787 F.2d at 555.

[40] *See* LAURA L. FINLEY, HAWKING HITS ON THE INFORMATION HIGHWAY: THE CHALLENGE OF ONLINE DRUG SALES FOR LAW ENFORCEMENT 100 (2008); *see also* TUNNELL, *supra* note 30, at 15.

[41] *See* Patricia A. Hunter, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?*, 19 LOY. L.A. L. REV. 1451, 1451 (1986).

[42] TUNNELL, *supra* note 30, at 16.

[43] *Id.*

[44] *See* Jacob Sullum, *The Puzzling Persistence of Pee Tests*, REASON (Dec. 29, 2019) https://reason.com/2015/12/29/the-puzzling-persistence-of-pee-tests/.

employers.[45] Drug testing carries both costs and benefits for employers.[46] The costs of drug testing include diminished employee satisfaction and loss of privacy.[47] However, employers also receive benefits from drug testing such as decreased absenteeism,[48] increased productivity,[49] and decreased tort liability.[50]

Compliance with federal law is another major motivation for employers to drug test.[51] Under the U.S. Department of Transportation ("DOT") rules, employers of commercial motor vehicle operators must test employees for both alcohol and controlled substances.[52] Federal law requires that tests be administered randomly, before employment, under reasonable suspicion of impairment, and after accidents.[53] Exceptions are not granted for medical cannabis users.[54] Likewise, the Federal Railroad Administration ("FRA")

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[45] *Illicit Drug Positivity Rate Increases Sharply in Workplace Testing, Finds Quest Diagnostics Drug Testing Index Analysis*, QUEST DIAGNOSTICS (Jun. 9, 2015), https://newsroom.questdiagnostics.com/2015-06-09-Illicit-Drug-Positivity-Rate-Increases-Sharply-in-Workplace-Testing-Finds-Quest-Diagnostics-Drug-Testing-Index-Analysis.

[46] Kidd, *supra* note 15, at 712.

[47] *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 680–81 (1989) (Scalia, J., dissenting); *see also*, Rena Sultany, Pre-Employment Drug Screening: Costs and Benefits 24, 35 (Dec. 2013) (unpublished thesis, University of Nevada Las Vegas), https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=3047&context=thesesdissertations.

[48] Andrew J. Field, *Jar Wars in the Green Mountain State: Vermont's Drug Use Testing Act Has the Potential to Be the Best in the Nation*, 13 VT. L. REV. 593, 595 (1989); Anne M. Rector, Comment, *Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 EMORY L.J. 1011, 1011 (1986). Employee absenteeism may increase from drug use because of excessive drug use making it difficult to attend work or possibly because the drug use caused the employee to suffer legal detention. Kidd, *supra* note 15, at 714 n.15.

[49] *See* David A. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 202 (1986). Potential sources of decreased productivity include worker recklessness or negligence, difficulty concentrating, or increased levels of anxiety caused by drugs' effects on an employee's mental state. Kidd, *supra* note 15, at 713, n.14.

[50] *See* Winn, *supra* note 7, at 64–65. Impaired employees may even subject their employer to civil liability even when employee is normally outside their scope of employment. George Fitting, *Careless Conflicts: Medical Marijuana Implications for Employer Liability in the Wake of* Vialpando v. Ben's Automotive Services, 102 IOWA L. REV. 259, 271 (2018).

[51] Kathleen Harvey, *Protecting Marijuana Users in the Workplace*, 66 CASE W. RES. L. REV. 209, 216 (2015).

[52] 49 U.S.C. § 31306(b) (2018).

[53] *Id.*

[54] *See* DEP'T OF TRANSP., OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE NOTICE, DOT 'MEDICAL' MARIJUANA NOTICE (Feb. 13, 2015), http://www.transportation.gov/odapc/medicalmarijuana-notice.

mandates that employers drug test, train, and signal employees.[55] All uses of Schedule I substances, including medical cannabis, are prohibited under FRA regulations.[56] Finally, the DFWA mandates that all federal contractors promote a drug-free workplace.[57]

B. Federal Law

1. Groundwork for the DFWA: The Controlled Substances Act of 1970

Understanding the enactment of the DFWA and the explosion of drug testing precipitated by the Controlled Substances Act of 1970 is critical to understanding federal drug regulations as a whole. Prior to the CSA, the 1937 Marihuana Tax Act was the federal government's first significant regulation of cannabis.[58] The Marihuana Tax Act did not make cannabis illegal. Instead, the Act imposed registration and reporting requirements for the sale, import, or production of cannabis and a hefty tax.[59] The tax was so financially burdensome it effectively eliminated all types of cannabis sales.[60] Noncompliance also carried the risk of prosecution under state drug laws.[61]

After the Marihuana Tax Act, the most sweeping change in federal cannabis legislation came at the urging of President Richard Nixon and his implementation of a program known as the "War on Drugs".[62] In 1971,

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[55] 49 C.F.R. § 219.601 (2019).

[56] *Id.* ("No regulated employee may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103.").

[57] Drug-Free Workplace Requirements for Federal Contractors, 41 U.S.C. § 8102 (2019); Univ. of Haw. Prof'l Assembly v. Tomasu, 900 P.2d 161, 163 (Haw. 1995) ("The DFWA requires employers who are the recipients of federal grants or contracts to maintain drug-free workplaces by establishing policies on drug awareness and implementing them in the workforce.").

[58] Elizabeth Hurwitz, Comment, *Out of the Shadows, into the Light: Preventing Workplace Discrimination Against Medical Marijuana Users*, 46 U. S.F. L. REV. 249, 265 (2011).

[59] Gonzales v. Raich, 545 U.S. 1, 11 (2005) (quoting Leary v. United States, 395 U.S. 6, 14–16 (1969)); Christine A. Kolosov, Comment, *Evaluating the Public Interest: Regulation of Industrial Hemp Under the Controlled Substances Act*, 57 UCLA L. REV. 237, 245 (2009).

[60] Seeley v. State, 940 P.2d 604, 614 n.10 (Wash. 1997) (Sanders J., dissenting); *see also* Kevin S. Toll, *The Ninth Amendment and America's Unconstitutional War on Drugs*, 84 U. DETROIT MERCY L. REV. 417, 428 (2007).

[61] *Gonzales*, 545 U.S. at 11 (citing Leary v. United States, 395 U.S. 6, 19 (1969)). The Marihuana Tax Act was eventually found unconstitutional because it violated the Fifth Amendment's guarantee against self-incrimination. *See Leary*, 395 U.S. at 37.

[62] *See* David Schlussel, Note, *"The Mellow Pot-Smoker": White Individualism in*

President Nixon stated, "America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive."[63] The War on Drugs led to the enactment of the CSA.[64] The CSA classifies controlled substances into five "schedules" based on two factors: the substance's potential for abuse and its potential for medicinal uses.[65] Cannabis is classified as a Schedule I drug, the most severe classification, along with heroin and LSD.[66] By statutory definition, cannabis has a high risk for abuse with no recognized medical use.[67] Additionally, as a Schedule I substance, the possession, cultivation, or use of cannabis for any purpose is illegal under federal law.[68] One explanation for the continued Schedule I classification of cannabis is the federal government's near exclusive control over research-grade cannabis.[69] This exclusive control makes it difficult for large-scale clinical trials that are necessary to warrant rescheduling of cannabis as a Schedule I substance.[70] Nonetheless, small-scale studies have repeatedly shown that the potential medical benefits of cannabis contributes to the increased state-level legalization of medical cannabis.[71]

Despite the federal government's criminalization of the use or possession of medical cannabis under federal law,[72] the CSA does not regulate employment procedures.[73] Similar to the DFWA, the CSA does not make it

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Marijuana Legalization Campaigns, 105 CAL. L. REV. 885, 888–89 (2017).

[63] President Richard M. Nixon, *Remarks About an Intensified Program for Drug Abuse Prevention and Control*, (Jun. 17, 1971), AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control.

[64] *See* Spencer A. Stone, Note, *Federal Drug Sentencing — What Was Congress Smoking? The Uncertain Distinction Between "Cocaine" and "Cocaine Base" in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297, 309–10 (2007).

[65] 21 U.S.C. § 812.

[66] *Id.*

[67] *Id.*

[68] *Id.* § 844(a).

[69] Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 707 (2009).

[70] *See* Jenna Hardisty Bishop, Note, *Weeding the Garden of Pesticide Regulation: When the Marijuana Industry Goes Unchecked*, 65 DRAKE L. REV. 223, 236–37 (2017).

[71] Hautanen, *supra* note 8, at 373–74.

[72] *See* Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding Congress may regulate intrastate and interstate medical cannabis use under the Commerce Clause); *but see* Printz v. United States, 521 U.S. 898, 935 (1997) (holding that Congress may not compel state officials to enforce a federal law); *see also* New York v. United States, 505 U.S. 144, 162 (1992) (holding that Congress may not compel states to participate in a federal regulation).

[73] *See* Stephanie Speirs, Note, *Will the Smoke Blow Over? Employers' Concerns as States Expand Protections for Medical Marijuana Users*, 36 HOFSTRA LAB. & EMP. L.J. 481, 490 (2019).

illegal for an employer to employ a medical cannabis user.[74] The lack of explicit statutory language on this particular issue in the CSA leaves federal contractors without guidance in resolving the conflict between federal and state laws regarding the employment of medical cannabis users.[75]

2. The Drug Free Workplace Act

The road to enactment of the DFWA began in March 1986, when the Commission on Organized Crime recommended all employees of federal contractors be subjected to random drug testing.[76] In response to this recommendation, President Ronald Reagan issued Executive Order 12564 calling for mandatory random drug testing for all agencies within the Executive Branch.[77]

Congress followed President Reagan's Executive Order by enacting the Drug Free Workplace Act of 1988,[78] which applies to employers with federal contracts worth at least $100,000.[79] To comply with the DFWA, a federal contractor must meet five requirements: (1) the contractor must establish and educate their employees on drug-free awareness programs;[80] (2) the contractor must alert their employees that this drug-use policy is conditioned on their employment;[81] (3) the contractor must make good-faith efforts to maintain their drug-free awareness program;[82] (4) the contractor must agree it will not manufacture, distribute, dispense, possess, or use a controlled substance defined by the CSA during the contract's

[74] Washburn v. Columbia Forest Prod., Inc., 104 P.3d 609, 614–15 (Or. Ct. App. 2005), *rev'd on other grounds*, 134 P.3d 161 (Or. 2006) (finding employer did not violate the DFWA by employing a medical cannabis user); *see also* Chance v. Kraft Heinz Foods Co., C.A. No. K18C-01-056 NEP, 2018 WL 6655670, at *3 (Del. Super. Ct. Dec. 17, 2018).

[75] *See* Speirs, *supra* note 73, at 491.

[76] *See* Alan E. Denenburg, *Corporate Drug Testing: Private Employers' Right to Test*, 12 DEL. J. CORP. L. 951, 951 (1987).

[77] Exec. Order No. 12,564, 3 C.F.R. § 5 (1986 Comp.); Kevin C. Miller, *Mandatory Drug Testing For Federal Employees And Private Employees In Government Regulated Industries: Is Drug Testing Without Probable Cause Unconstitutional?*, 44 WASH. & LEE L. REV. 1443, 1443 n.1 (1987).

[78] *See* Lesley Benware, *But See Guiney: Revisiting Mandatory Random Suspicionless Drug Testing of Massachusetts Public-Sector Safety-Sensitive Employees in Light of House Bill 2210*, 44 SUFFOLK U. L. REV. 477, 481 (2011).

[79] Dion Y. Kohler et al., *A Guide to Labor and Employment Obligations for Federal Contractors*, JACKSON LEWIS (Feb. 7, 2020), https://www.jacksonlewis.com/publication/guide-labor-and-employment-obligations-federal-contractors.

[80] FAR 52.223-6(b)(2) (2019).

[81] *Id.* 6(b)(4).

[82] *Id.* 6(b)(7).

performance;[83] and (5) the contractor must agree that the use, possession, or distribution of drugs is forbidden at the workplace.[84] The contractor's employees also agree that in the event of a conviction under a criminal drug statute at the worksite, they will notify the contracting officer.[85]

The DFWA represented the federal government's attempt to prevent drug use in federally contracted worksites.[86] Supporters of the DFWA argued the law increased productivity, prevented drug abuse in the workplace, prevented defective products, and increased workplace safety.[87] The DFWA was intended to educate employees about the dangers of drug-abuse and encourage rehabilitative resources for drug users.[88] The primary sponsor of the DFWA, Representative Jack Brooks, made clear the DFWA did not require drug testing, stating: "[T]his bill does not require drug testing. This is a highly controversial issue, which is currently being examined in litigation before the Supreme Court, and the committee did not believe that such tests or searches should be incorporated as a requirement in this bill."[89] In addition, the bill solely governs drug use at a contractor's worksite and is silent as to an employee's drug use off-site.[90]

Despite no requirement for drug testing, no prohibition on the employment of medical cannabis users, or penalty for off-site drug use by the DFWA, risk averse contractors nevertheless utilize drug testing because noncompliance carries harsh penalties.[91] A contractor that does not meet

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[83] *Id.* 6(c). This requirement does not impact contracted employees. *Id.* 6(a).

[84] *See id.* 6(b)(1); *See also*, Ross v. Raging Wire Telecomm., Inc., 174 P.3d 200, 213 (Cal. 2008) (Kennard, J. concurring in part and dissenting in part) ("Both the state and federal drug-free workplace laws are concerned only with conduct at the jobsite . . . ."); Jeffrey J. Olsen, *A Comprehensive Review of Private Sector Drug Testing Law*, 8 HOFSTRA LAB. L.J. 223, 226 (1991) ("[T]he DFWA does not expressly prohibit reporting to work 'under the influence' . . . .Thus, an employee may 'beat the system' under the [DFWA] by 'getting high' prior to work or during lunch breaks.").

[85] FAR 52.223-6(b)(5) (2019).

[86] Drug-Free Workplace Act of 1988, H.R. REP. NO. 100-829, at 5 (1988).

[87] *Id.*

[88] *See id.* at 6; *see also* Figueroa v. Fajardo, 1 F. Supp. 2d 117, 123 (D.P.R. 1998) ("[The DFWA] aims at reducing the use of drugs by employees of federal contractors or federal grant recipients by conditioning the flow of funds [on] the establishment of drug awareness programs as well as rehabilitation assistance for the employees.")); Cullen v. E.H. Friedrich Co., 910 F. Supp. 815, 821 (D. Mass. 1995) ("[The DFWA] is intended to encourage employers to educate employees about the dangers of drugs.").

[89] Omnibus Drug Initiative Act of 1988, 134 CONG. REC. H7074 (daily ed. Sep. 7, 1988) (statement of Rep. Brooks); Rudy Yandrick, *The Anti-Drug Abuse Act Becomes Law*, THE ALMACAN, Dec. 1988, at 11.

[90] *See* Lucia Moran, *Emerging from the Smoke: Does an Employer Have a Duty to Accommodate Employee's Medical Marijuana After Garcia v. Tractor Supply Company?*, 48 N.M. L. REV. 194, 208 (2018).

[91] Reinhart Boerner Van Deuren, *Tips For Navigating Cannabis Legalization as a*

these standards faces sanctions, termination, suspension, and debarment.[92] Given the billions of dollars of government contracts procured each year, many federal contractors feel compelled to ensure compliance with the DFWA by implementing a zero-tolerance drug testing scheme.[93]

C. State Laws Regarding Medical Cannabis

Despite all cannabis use considered illegal under federal law, medical cannabis is legal in a majority of states.[94] This trend began in 1996, when California and Arizona legalized medical cannabis.[95] Thirty-three states and the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, have legalized medical cannabis.[96] Several of these states have gone further to provide statutory employment protections for medical cannabis users.[97] Sixteen states provide medical cannabis users with some form of statutory employment protections.[98] However, medical cannabis users enjoy different

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Federal Contractor or Grant Recipient, MILWAUKEE BUS. J. (Feb. 1, 2020), https://www.bizjournals.com/milwaukee/news/2020/02/01/tips-for-navigating-cannabis-legalization-as-a.html.

[92] FAR 52.223-6(d) (2019).

[93] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-244SP, CONTRACTING DATA ANALYSIS: ASSESSMENT OF GOVERNMENT-WIDE TRENDS 3 (2017); *see also* Kidd, *supra* note 15, at 727.

[94] Natalie Fertig, *The Great American Cannabis Experiment*, POLITICO (Oct. 14, 2019), https://www.politico.com/agenda/story/2019/10/14/cannabis-legal-states-001031/.

[95] Pearson v. McCaffrey, 139 F. Supp. 2d 113, 116 n.1 (D.D.C. 2001) ("Arizona and California voters approved medical marijuana laws in 1996."). The Arizona medical cannabis act would later be declared invalid on a language technicality within the statute. *See* Lewis A. Grossman, *Life, Liberty, [and the Pursuit of Happiness]: Medical Marijuana Regulation in Historical Context*, 74 FOOD & DRUG L.J. 280, 308 (2019).

[96] *See* Katherine Berger, Note, *ABC's and CBD: Why Children with Treatment-Resistant Conditions Should Be Able to Take Physician-Recommended Medical Marijuana at School*, 80 OHIO ST. L.J. 309, 312 (2019).

[97] *See* Brennan T. Barger, *Into the Weeds of the Newest Field in Employment Law: The Oklahoma Medical Marijuana Act*, 72 OKLA. L. REV. 373, 385 (2020). Besides Hawai'i, the states of California, Colorado, and Florida are also considering statutory employment protections for medical cannabis users. Jennifer L. Mora, *California Assembly (Again) Considers Bill Requiring Employers to Accommodate Medical Cannabis Use*, SEYFARTH: THE BLUNT TRUTH (Apr. 8, 2020), https://www.blunttruthlaw.com/2020/04/california-assembly-again-considers-bill-requiring-employers-to-accommodate-medical-cannabis-use/; Patrick J. McMahon, *Zero Tolerance for Zero Tolerance Marijuana Policies?*, FOLEY: LABOR & EMP. L. PERSPECTIVES (Feb. 10, 2020), https://www.foley.com/en/insights/publications/2020/02/zero-tolerance-zero-tolerance-marijuana-policies.

[98] ARIZ. REV. STAT. § 36-2813(B) (2020); ARK. CONST. amend. 98, §7; CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (West 2020); DEL. CODE ANN. tit. 16, § 4905A(a)(3) (2020); 410 ILL. COMP. STAT. ANN. 130/40(a)(1) (West 2019); ME. REV. STAT. ANN. tit. 22 § 2430-

levels of employment protections in these various jurisdictions.[99] State protections addressing employment protections can be classified into three categories: (1) jurisdictions requiring an employer to make a reasonable accommodation for an employee's medical cannabis use, (2) jurisdictions in which the statute protects both the employee's status as a medical cannabis cardholder and their use of medical cannabis, and (3) jurisdictions where only an employee's status as a medical cannabis cardholder is protected.[100] The remaining states that have legalized medical cannabis do not provide users explicit employment protections.[101] Courts in these states are hesitant to create employment protections for medical cannabis users without explicit statutory authorization.[102]

1. Reasonable Accommodations Framework

Nevada is the only jurisdiction that utilizes a statutory reasonable accommodation framework.[103] Under Nevada law, an employer must make a reasonable accommodation for an employee's medical cannabis use so

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C(3) (2019); MINN. STAT. ANN. § 152.32(3)(c) (West 2020); Assemb. B. 132, 2019 Leg., 80th Sess. (Nev. 2019); N.J. STAT. ANN. § 24:6I-6.1 (West 2019); N.M. STAT. ANN. § 26-2B-9; N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2019); 63 OKLA. STAT. ANN. § 427.8(H)(1) (West 2019); 63 OKLA. STAT. ANN. § 425(B)(1) (West 2020); 35 PA. STAT. AND CONS. STAT. § 10231.2103(b) (West 2016); 21 R.I. GEN. LAWS ANN. § 21-28.6-4(d) (West 2019); W. VA. CODE § 16A-15-4 (West 2017). These states are Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, West Virginia.

[99] Barger, *supra* note 97, at 385.

[100] *See generally* Hautanen, *supra* note 8, at 382–83; Harvey, *supra* note 51, at 225; *see also* John McCreary Jr., *Reprise of Employment Law Issues in Pa.'s Medical Marijuana Act*, LAW.COM: THE LEGAL INTELLIGENCER (Mar. 21, 2019), https://www.law.com/thelegalintelligencer/2019/03/21/reprise-of-employment-law-issues-in-pa-s-medical-marijuana-act/?slreturn=20200723085151.

[101] *See* Winn, *supra* note 7, at 61 n.5.

[102] *See, e.g.*, Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d. 914, 924 (W.D. Mich. 2011) ("Michigan voters could not have intended to enact private employment regulation implicitly, through a negative inference, when the rights of employees are never mentioned anywhere else in the statute."), *aff'd*, 695 F.3d 428 (6th Cir. 2012); Roe v. Teletech Customer Care Mgmt. LLC, 257 P.3d 586, 591–92 (Wash. 2011) ("The language of the law is unambiguous it does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use."); Ross v. Raging Wire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008) (denying employment protections for California medical cannabis user because state medical cannabis statute contained no employment protections for medical cannabis users without any legislative history supporting employment protections).

[103] *See* Shahabudeen K. Khan, *Employers Beware: What Are Employers' Obligations and Rights Given New Marijuana Legislations?*, 6 BELMONT L. REV. 74, 82 (2019).

long as the accommodation would not (1) pose a threat of harm or danger to persons or property; (2) impose undue hardship on the employer; and (3) prohibit the employee from fulfilling their job's responsibilities.[104] Nevada's reasonable accommodation framework does not require an employer to permit an employee's on-site cannabis use.[105]

Nevada's reasonable accommodation framework is unique in two ways. First, this framework provides medical cannabis users explicit employment protections.[106] The statute's narrow language requires employers to show that the employee's medical cannabis use posed a "threat" to the workplace.[107] Under other statutes using the term "impairment," an employer is justified in firing an employee that merely shows signs of impairment, such as distinct smell or odd movements, without showing the employee's cannabis use posed a threat.[108] Second, Nevada's statute does not contain an explicit exception for federal contracting or compliance with federal law. Perhaps this conflict could be addressed under the "undue hardship" section.[109] A federal contractor could argue that it would be an "undue hardship" to lose their federal contracts if they tolerated an employee's medical cannabis use.[110] Beyond federal contracting, an "undue hardship" could also mean an accommodation that is of significant difficulty or expense.[111] Unfortunately, the statute does not provide any clarification for what an "undue hardship" is, inviting ambiguity and the potential for litigation.[112] The Nevada courts have not yet interpreted the "undue hardship" provision.[113]

2. Employee's Status and Drug Test Protected

Arizona, Arkansas, Delaware, Minnesota, New Mexico, New York, and Oklahoma provide employment protections for medical cannabis users

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[104] Assemb. B. 533, 2019 Leg., 80th Sess. § 170(3)(a)–(b) (Nev. 2019)

[105] *Id.* § 170(2).

[106] Hautanen, *supra* note 8, at 382; Khan, *supra* note 103, at 82.

[107] Harvey, *supra* note 51, at 227.

[108] *E.g.*, ARIZ. REV. STAT. § § 23-493(7) (2020).

[109] Harvey, *supra* note 51, at 227; Jacquelyn Leleu, *Dazed and Confused An Employer's Perspective On The Not-Entirely-Cut-And-Dried Rules of Medical Marijuana In The Workplace*, 22 NEVADA LAWYER 6, 9 (2014).

[110] Leleu, *supra* note 109, at 9.

[111] *See* John Henry Wright, *Medical Marijuana in The Workplace*, THE WRIGHT LAW GROUP, https://wrightlawgroupnv.com/medical-marijuana-in-the-workplace/.

[112] Harvey, *supra* note 51, at 227.

[113] Emilee Sutton, *Marijuana and Employment Law: An Ever-Changing Legal Landscape*, THIS IS RENO (July 26, 2019) https://thisisreno.com/2019/07/marijuana-and-employment-law-an-ever-changing-legal-landscape/.

based on their status as cardholders and protection from a positive drug test.[114] If passed, Hawai'i's proposed legislation would fall under this category.[115] These protections are subject to a couple of exceptions. First, employers who would lose federal contracting funding are exempt from compliance.[116] Second, employees that use medical cannabis or are impaired at work do not qualify for employment protections.[117] Arizona has the only statute that provides a definition of impairment.[118] Arizona's statute contains certain symptoms that are not necessarily indicators of impairment such as smell and odor.[119]

Greater clarity as to what qualifies as "impairment" would be useful in the other statutes. It is clear, however, that all of these statutes protect medical cannabis users from termination solely because of a positive drug test.[120] The same cannot be said about attempts by other states to protect medical cannabis users in the employment context.

3. Employee's Status is Protected

Connecticut, Illinois, Maine, New Jersey, Pennsylvania, Rhode Island, and West Virginia protect an employee from discrimination based on their status as a medical cannabis cardholder.[121] Like the previously discussed

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[114] *See generally* Harvey, *supra* note 51.

[115] S.B. No. 2543, 30th Leg., Reg. Sess. (Haw. 2020).

[116] ARIZ. REV. STAT. § 36-2813(B) (2020); ARK. CONST. amend. 98, §7; DEL. CODE ANN. tit. 16, § 4905A(a)(3) (2020); MINN. STAT. ANN. § 152.32(3)(c) (West 2020); N.M. STAT. ANN. § 26-2B-9 (2020); N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2019); 63 OKLA. STAT. ANN. § 427.8(H)(1) (West 2019); 63 OKLA. STAT. ANN. § 425(B)(1) (West 2020). Hawai'i would provide an exception for employers who would lose federal contract funding if they tolerated the individual's medical cannabis use. S.B. No. 2543, 30th Leg., Reg. Sess. (Haw. 2020). Some commentators have suggested that this exception is meaningless because the DFWA does not require drug testing or an adverse employment action because a federal contactor's employee tests positive for cannabis that was used off-site. *See* Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pot Hole for Employers?*, 5 PHOENIX L. REV. 415, 441 (2012).

[117] Harvey, *supra* note 51, at 225.

[118] ARIZ. REV. STAT. § 36-2813(B) (2020); ARK. CONST. amend. XCVIII, §3, CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (West 2019); DEL. CODE ANN. tit. 16, § 4905A(a)(3) (2020); MINN. STAT. ANN. § 152.32(3)(c) (West 2019); N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2019); 63 OKL. ST. ANN. § 427.8(H)(1) (West 2019); 63 OKL. STAT. ANN. § 425(B)(1) (West 2020).

[119] ARIZ. REV. STAT. ANN. § 23-493(7) (2020). Other symptoms of impairment may include negligence, carelessness, or unusual movement. Harvey, *supra* note 51, at 227.

[120] ARIZ. REV. STAT. ANN. § 23-493(7) (2020).

[121] §7, CONN. GEN. STAT. ANN. § 21a-408p(b)(3) (West 2019); 410 ILL. COMP. STAT. ANN. 130/40(a)(1) (West 2019); ME. REV. STAT. ANN. tit. 22 § 2430-C(3) (2017); N.J. STAT. § 24:6I-6.1 (2019); N.M. STAT. ANN. § 26-2B-9 (2019); 35 PA. STAT. AND CONS. STAT.

category, these statutes contain exceptions for federal funding and impairment at work.[122] These laws allow an employer to fire an employee because of a positive test for cannabis.[123] In fact, Illinois' statute explicitly allows an employer to enforce zero-tolerance drug policies provided they are not administered in a discriminatory manner.[124] Commentators interpreted these statutes within this category to only provide employment protections for the fact that the employee is a medical cannabis cardholder, not the employee's underlying use of cannabis.[125] Therefore, according to these commentators, an employer could terminate a medical cannabis user solely because of a positive drug test without facing an employment discrimination claim.[126]

Several court decisions have disagreed with this interpretation, holding that both an individual's status as a medical cannabis cardholder and their underlying drug use is protected.[127] Instead, these courts hold that these state statutes not only protect the medical cannabis user's status as a cardholder, but also protect the user from discrimination because of a positive drug test.[128] These courts uphold the statutory intent of protecting an individual's right to use medical cannabis without fear of retaliation.[129] The remaining jurisdictions solely protecting a medical cannabis user's status as a cardholder from employment discrimination have not considered which interpretation they find more persuasive.[130]

ANN. § 10231.2103(b) (West 2019); 21 R.I. GEN. LAWS ANN. § 21-28.6-4(d) (West 2019); W. VA. CODE § 16A-15-4 (2017).

[122] Harvey, *supra* note 51, at 225.

[123] *Id.*

[124] 410 ILL. COMP. STAT. 130/50(b)–(c) (2014).

[125] Harvey, *supra* note 51, at 225 (2015); McCreary, *supra* note 100.

[126] Harvey, *supra* note 51, at 225 (2015); McCreary, *supra* note 100.

[127] *Noffsinger II*, 338 F. Supp. 3d 78, 84–85 (D. Conn. 2018); Smith v. Jensen Fabricating Eng'rs, Inc., No. HHDCV186086419, 2019 Conn. Super. LEXIS 439, at *4 (Conn. Super. Ct. Mar. 4, 2019); Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 R.I. Super. LEXIS 88, at *16 (R.I. Super. Ct. May 23, 2017).

[128] *Noffsinger II*, 338 F. Supp. 3d at 84–85; *Smith*, No. HHDCV186086419, 2019 Conn. Super. LEXIS 439, at *3; *Callaghan*, No. PC-2014-5680, 2017 R.I. Super. LEXIS 88, at *16.

[129] *Callaghan*, NO. PC-2014-5680, R.I. Super. LEXIS 88 at *16.

[130] *E.g.*, McCreary, *supra* note 100.

III. BETWEEN A ROCK AND A HIGH PLACE: CONFLICTING CONCLUSIONS ON PREEMPTION AND STATUTORY INTERPRETATION REGARDING BOTH THE CSA AND DFWA

The advent of increased state laws mandating employment protections for medical cannabis users places federal contractors in a difficult position when attempting to comply with both state and federal law.[131] A contractor who terminates a medical cannabis user solely because of off-site drug use may be subjected to a state-level employment discrimination claim.[132] This section argues that neither the CSA nor the DFWA likely preempt state employment protections for medical cannabis users. As a matter of statutory interpretation, the DFWA only forbids on-site drug use by employees and does not require adverse action against an employee for off-site drug use.[133]

A. Preemption and Statutory Interpretation of State Employment Protections Under the CSA

Federal law is "the supreme Law of the land" under the United States Constitution's Supremacy Clause.[134] Under the Supremacy Clause, state law that conflicts with federal law is "preempted," and thereby without effect and void.[135] The Supreme Court has recognized four types of preemption: express, field, conflict, and obstacle.[136] First, express preemption occurs when a federal law contains an explicit provision forbidding state legislation.[137] Second, field preemption exists when it is implied Congress has intended to occupy an entire field and state law may not interfere with federal law.[138] Third, conflict preemption occurs when it is impossible to comply with both federal and state law.[139] Fourth, obstacle

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[131] *See* Chris Selman & Alex Thrasher, *Cannabis and the Contractor: Effective Drug Testing Policy and Compliance*, CONSTRUCTION AND PROCUREMENT LAW NEWS, 3 (Apr. 2019), https://www.bradley.com/insights/publications/2019/04/cannabis-and-the-contractor-effective-drug-testing-policy-and-compliance.

[132] *See Noffsinger II*, 338 F. Supp. 3d at 88; *see also* Moberly & Hartsig, *supra* note 116, at 434, 439.

[133] *Noffsinger II*, 338 F. Supp. 3d at 88; Carlson v. Charter Commc'ns, No. CV 16-86-H-SEH, 2017 WL 3473316 (D. Mont. Aug. 11, 2017); Moberly & Hartsig, *supra* note 116, at 441–42.

[134] U.S. CONST. art. VI, cl. 2.

[135] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540–53 (2001).

[136] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000).

[137] *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008).

[138] *See* R. J. Reynolds Tobacco Co. v. Durham Cty., 479 U.S. 130, 140 (1986).

[139] *See* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

preemption exists where compliance with state law frustrates the purposes and execution of federal law.[140] According to these categories, potential preemption issues between federal and state laws regarding medical cannabis hinge on either conflict or obstacle preemption.[141]

No provision within the CSA preempts state laws.[142] Therefore, express preemption does not apply to state cannabis laws.[143] Section 903 of the CSA states, "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field."[144] Therefore, both express and field preemption are inapplicable.

Conflict preemption only occurs if compliance with both federal and state law is impossible.[145] Conflict preemption is an exceedingly rare type of preemption[146] and occurs when, "[The] conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together."[147] A few courts have considered conflict preemption in the medical cannabis context. In *People v. Crouse*, found conflict preemption where a state law mandated officials return unlawfully seized cannabis because the law required the distribution of cannabis which is illegal under the CSA.[148] Courts have reached conflicting holdings on conflict preemption and cannabis regarding workers' compensation. In *Burgoin v. Twin Rivers Paper Co.*, the Maine Supreme Court held that an employer did not need to pay for an employee's medical cannabis because doing so would violate the CSA by distributing illegal drugs.[149] By contrast, the New Jersey Superior Court in *Hager v. M & K Construction*, found no conflict preemption where an employer was required to reimburse an employee's medical cannabis because the employer did not directly distribute cannabis.[150] Neither state-level decriminalization of medical cannabis nor employment protections for

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[140] *See* Mich. Canners & Freezers Ass'n. v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984).

[141] Robert J. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 15–17 (2013).

[142] Connor P. Burns, *I Was Gonna Get a Job, But Then I Got High: An Examination of Cannabis and Employment in the Post-Barbuto Regime*, 99 B.U. L. REV. 643, 652 (2019).

[143] *See* White Mountain Health Ctr., Inc. v. Maricopa Cty., 386 P.3d 416, 426 (Ariz. Ct. App. 2016); *id.*, at 652.

[144] 21 U.S.C. § 903 (2020).

[145] *See* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); *see also* Stacey Allen Carroll, Note, *Federal Preemption of State Products Liability Claims: Adding Clarity and Respect for State Sovereignty to the Analysis of Federal Preemption Defenses*, 36 GA. L. REV. 797, 800 (2002).

[146] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000).

[147] Kelly v. Washington, 302 U.S. 1, 10 (1937) (internal quotation marks omitted).

[148] 388 P.3d 39, 41 (Co. 2017).

[149] 187 A.3d 10, 12 (Me. 2018).

[150] 225 A.3d 137, 140 (NJ. Super. Ct. 2020).

medical cannabis users conflict with the CSA because such laws do not mandate the possession of cannabis but rather only allow it.[151]

State law permitting medical use of cannabis may also be unenforceable due to obstacle preemption under the CSA.[152] Whether obstacle preemption exists with state employment protections depends on how the state law is construed.[153] State laws creating employment protections for medical cannabis users could be interpreted as encouraging cannabis use because they provide employment protections that make the consequences of cannabis use less severe.[154] This interpretation would frustrate the intent of the CSA to "conquer drug abuse".[155] By contrast, interpreting statutory protection of a medical user's employment to merely allow the employment of a medical cannabis user and without authorizing use of cannabis in the workplace would not frustrate the CSA's intent.[156] This viewpoint is bolstered by the presumption against finding preemption in areas where states have traditionally occupied.[157]

Employment law, according to the Supreme Court, is an area in which the states "possess broad authority under their policy powers to regulate."[158] Nonetheless, state and federal courts have reached conflicting conclusions whether employment protections for medical cannabis users are preempted. The next section will discuss relevant case law and argues that cases finding no preemption present the stronger argument. Therefore, a contractor who terminates a medical cannabis user solely because of a positive drug test could likely be subjected to a successful employment discrimination claim in some states.

1. The Preemption Outlier: Emerald Steel

Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries is a landmark case[159] from the Oregon Supreme Court finding that a state law regulating medical cannabis was preempted by the CSA under an obstacle preemption analysis.[160] In *Emerald Steel*, a temporary employee used

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[151] Burns, *supra* note 142, at 652.

[152] Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L.J. 845, 880 (2017).

[153] Burns, *supra* note 142, at 652–55.

[154] *See generally* Mikos, *supra* note 141, at 37.

[155] Gonzales v. Raich, 545 U.S. 1, 12 (2005).

[156] *See* Harvey, *supra* note 51, at 222.

[157] Wyeth v. Levine, 555 U.S. 555, 565 (2009); Robert R. Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 PEPP. L. REV. 25, 35 (2005).

[158] Arizona v. United States, 567 U.S. 387, 404 (2012) (quoting De Canas v. Bica, 424 U.S. 351, 356 (1976)) (internal quotation marks omitted).

[159] Burns, *supra* note 142, at 656.

[160] 230 P.3d 518 (Or. 2010).

medical cannabis to treat anxiety, severe stomach cramps, panic attacks, and nausea.[161] The employee's ailments qualified as a "debilitating medical condition" under Oregon law and allowed for approved usage of medical cannabis.[162] The employee approached his employer for full-time employment and told his employer he was an approved medical cannabis user.[163] In response, the employer terminated the employee on the basis of his cannabis use.[164] After his termination, the employee filed a complaint with the Oregon Bureau of Labor and Industries alleging employment discrimination under Oregon's Employment Discrimination law prohibiting discrimination against an otherwise qualified person on the basis of a disability.[165] Oregon's Employment Discrimination statute requires that an employer make "reasonable accommodation" for an employee's disability.[166] The Oregon Bureau of Labor and Industries investigated the employee's complaint and filed formal charges against the employer.[167]

The Oregon Supreme Court upheld the employee's termination, finding ORS 659A.112 void under obstacle preemption because the statutory authorization of cannabis use frustrated the purpose of the CSA. The court found ORS 659A.112 was voided by the CSA on the grounds of obstacle preemption because ORS 659A.112 authorized cannabis use and frustrated the purpose of the CSA.[168] The court reached this opinion by relying on section 659.124 of the Oregon Revised Statutes, which stated that state anti-discrimination protections in employment do not apply for "the illegal use of drugs".[169] The court also found the CSA classified cannabis as a Schedule I substance and outlawed all uses of cannabis including for medical purposes.[170] Interpreting ORS 659A.112 to forbid the termination of a medical cannabis user would amount to the positive authorization of cannabis and serve as an obstacle of the fulfillment of federal law according to the Oregon Supreme Court.[171]

Emerald Steel is the only state supreme court decision finding that the CSA preempts state employment protections for medical cannabis users.[172]

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[161] *Id.* at 520.
[162] *Id.*
[163] *Id.* at 520–21.
[164] *Id.* at 521.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] OR. REV. STAT § 659A.124(1) (2010).
[170] *Emerald Steel Fabricators, Inc.*, 230 P.3d at 537.
[171] *See id.* at 529.
[172] Catherine Briley, *Missing the Forest for the Weeds: Filling the Holes in Louisiana's*

Courts and commentators alike have criticized *Emerald Steel* for a variety of reasons.[173] The *Emerald Steel* court failed to consider the long-held presumption against finding preemption, particularly in areas that states traditionally occupy like employment law.[174] This presumption burdens the party arguing for preemption to prove conflict between state and federal law and requires courts to narrowly apply preemption to the degree necessary to dispose of the conflicting statute.[175] The presumption against preemption that *Emerald Steel* failed to consider has guided other courts to hold that obstacle preemption does not apply to state laws regulating medical cannabis.[176]

Most importantly, *Emerald Steel* is distinguishable from other cases discussing preemption of state protections for medical cannabis use because Oregon law did not contain explicit statutory employment protections for medical cannabis users.[177] This distinction has led other courts to disregard *Emerald Steel* as immaterial in deciding the preemption issue in states with statutory protection for medical cannabis use.[178]

2. *Finding State Employment Protections for Medical Cannabis Users Were Not Preempted by the CSA*

Prior to the summer of 2017, there was no case law reporting a successful claim of employment discrimination against an employee who was terminated because of the employee's state-permitted medical cannabis

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Medical Marijuana Statutes to Protect Employees, 79 LA. L. REV. 874, 888 (2019); Taylor Oyaas, *Reefer Madness: How Tennessee Can Provide Cannabis Oil Patients Protection from Workplace Discrimination*, 47 UNIV. MEM. L. REV. 935, 949 (2017).

[173] *See* White Mountain Health Ctr., Inc. v. Maricopa Cty., 386 P.3d 416, 430 (Ariz. Ct. App. 2016) ("[*Emerald Steel's*] authorization/decriminalization distinction itself seems to be primarily semantic and ultimately results in a circular analysis."); Ter Beek v. City of Wyoming, 846 N.W.2d 531, 540 n.6 (Mich. 2014) ("Furthermore, we have misgivings, mildly put, about Emerald Steel's reasoning."); Briley, *supra* note 172, at 888 (arguing *Emerald Steel's* finding of obstacle preemption occurred because the Oregon Supreme Court failed to consider the presumption against preemption).

[174] *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009).

[175] *Id.*

[176] *White Mountain Health Ctr., Inc.*, 386 P.3d at 430 (holding obstacle preemption did not preempt Arizona's medical cannabis act); *Kirby v. Cty. of Fresno*, 195 Cal. Rptr. 3d 815, 831–32 (Ct. App. 2015) (same result for California's medical cannabis laws); *Noffsinger I*, 273 F. Supp. 3d 326 (D. Conn. 2017) (holding obstacle preemption did not preempt state employment protections for medical cannabis users); *Ter Beek*, 846 N.W.2d at 538 (finding no obstacle preemption under Michigan's medical cannabis law).

[177] *Noffsinger I*, 338 F. Supp. 3d at 335.

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

use.[179] That changed in *Noffsinger v. SSC Niantic Operating Company, L.L.C.* (*Noffsinger I*), which allowed an employee to state a claim of employment discrimination on the basis of their medical cannabis use.[180]

In two cases, the U.S. District Court of Connecticut considered federal preemption issues raised in claims raised by the termination of an employee using medical cannabis with statutory permission. The first case, *Noffsinger I*, considered preemption issues between the CSA and a Connecticut law, that offers employment protections for individuals based on their status as medical cannabis cardholders.[181]

Noffsinger was hired for work on a federal contract contingent on Noffsinger passing a drug test.[182] Noffsinger alerted the contractor that she was a registered medical cannabis user and used cannabis to treat post-traumatic stress disorder.[183] After Noffsinger's drug test came back positive for cannabis, the contractor rescinded Noffsinger's job offer.[184] In response, Noffsinger filed a complaint in federal court, alleging the federal contractor violated Connecticut's Palliative Use of Marijuana Act ("PUMA").[185] PUMA prohibits adverse employment actions based solely on an employee's status as a medical cannabis cardholder.[186]

The U.S. District Court of Connecticut found the CSA did not preempt PUMA for several reasons. The court rejected the defendant's argument that PUMA served as an obstacle to the fulfilment of the CSA because the CSA does not contain language regulating employment practices in any manner.[187] Therefore, the CSA did not prevent the employment of a medical cannabis user.[188] The *Noffsinger I* court also held that there is a presumption against preemption and that as a general principle, courts should not extend a state law further than necessary to create a conflict that leads to the state law being preempted.[189] *Emerald Steel* is distinguishable from *Noffsinger I* because the plaintiff in *Emerald Steel* lacked an explicit state employment protection for their medical cannabis use.[190] By contrast, the plaintiff in *Noffsinger I* was explicitly protected by state law.[191] Similar

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[179] Briley, *supra* note 172, at 890.
[180] *Id.*; Winn, *supra* note 7, at 70–71.
[181] *Noffsinger I*, 273 F. Supp. 3d at 326.
[182] *Noffsinger II*, 338 F. Supp. 3d 78, 81 (D. Conn. 2018).
[183] *Id.*
[184] *Id.* at 82.
[185] *Id.* at 81.
[186] CONN. GEN. STAT. § 21a-408p(b)(3) (2019).
[187] *Noffsinger I*, 273 F. Supp. 3d 326, 334 (D. Conn. 2017).
[188] *Id.*
[189] *Id.* (quoting Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996)).
[190] *Id.* at 334–35.
[191] *Id.* at 335.

employment protections for medical cannabis users have been upheld by four other courts.[192] State employment protections for medical cannabis users are likely not preempted by the CSA unless a court characterizes the employment protection as explicitly authorizing the use of cannabis.[193]

B. Statutory Interpretation and Preemption Applied to the DFWA

While the CSA does not likely preempt state employment protections for medical cannabis users, these protections must also be considered as a matter of statutory interpretation and for preemption with the DFWA. To determine whether federal contractors face state penalties for taking adverse employment action against medical cannabis users, both statutory interpretation and preemption must be considered. As a matter of statutory interpretation, the DFWA does not require drug testing for compliance.[194] The legislative history supports this view as well. The primary sponsor of the bill, Representative Jack Brooks, stated on the House floor that the DFWA did not require drug testing.[195] Courts across the country considering the statutory interpretation of DFWA have correctly concluded it does not require drug testing.[196]

In 2018, the U.S. District Court of Connecticut considered statutory interpretation issues between the DFWA and a state employment protection

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[192] *See* Smith v. Jensen Fabricating Eng'r, Inc., No. HHDCV186086419, 2019 Conn. Super. LEXIS 439 at *4 (Conn. Super. Ct. Mar. 4, 2019) (upholding PUMA in Connecticut state court); Whitmire v. Wal-Mart Stores, 359 F. Supp. 3d 761 (D. Ariz. 2019) (upholding similar Arizona statute); Chance v. Kraft Heinz Foods Co., C.A. No. K18C-01-056 NEP, 2018 WL 6655670, at *9–18 (Del. Super. Ct. Dec. 17, 2018) (upholding similar Delaware statute); Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181, at *8 (R.I. Super. Ct. May 23, 2017) (upholding similar Rhode Island statute).

[193] Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518 (Or. 2010).

[194] *See* Kenneth Falcon, *A Lesson in Legalization: Successes and Failures of California's Proposition 19*, 9 GEO. J.L. & PUB. POL'Y 463, 476 (2011).

[195] Omnibus Drug Initiative Act of 1988, *supra* note 89 (statement of Rep. Brooks).

[196] Mares v. Conagra Poultry Co., 773 F. Supp. 248, 254–55 (D. Colo. 1991) ("Nowhere in [the DFWA] does it require entities to engage in drug testing of employees"), *aff'd*, 971 F.2d 492 (10th Cir. 1992); Kamakeeaina v. Armstrong Produce, Ltd., No. 18-cv-00480-DKW-RT, 2019 U.S. Dist. LEXIS 50863, at *27 (D. Haw. Mar. 22, 2019); *Noffsinger II*, 338 F. Supp. 3d 78, 84 (D. Conn. 2018) ("The DFWA does not require drug testing."); Harris v. Aerospace Testing Alliance, No. 1:07-cv-94, 2008 U.S. Dist. LEXIS 1185 at *12 (E.D. Tenn. Jan. 7, 2008) ("[T]he Drug-Free Workplace Act does not require or regulate drug screening."); Santiago v. Greyhound Lines, Inc., 956 F. Supp. 144, 152 (N.D.N.Y. 1997) ("the [DFWA] does not mandate drug screening"); Parker v. Atlanta Gas Light Co., 818 F. Supp. 345, 347 (S.D. GA. 1993) ("The [DFWA] establishes no requirement for drug testing.").

for medical cannabis users.[197] *Noffsinger II* follows the same fact pattern as *Noffsinger I* but considered statutory interpretation issues between the DFWA and state employment protections for medical cannabis users. In *Noffsinger II* the defendant, a federal contractor, argued the DFWA forbade the hiring of the plaintiff (a licensed medical cannabis user) because the defendant's company had adopted a zero-tolerance drug-testing policy to comply with the DFWA.[198] The *Noffsinger II* court dismissed the defendant's argument, holding that as a matter of statutory interpretation the DFWA did not require drug testing.[199] The court held that the DFWA did not forbid the hiring of a licensed medical cannabis user who uses cannabis off-site.[200] Therefore, because the DFWA did not require the termination of the plaintiff, the defendant violated PUMA by terminating the plaintiff solely based on her status as a medical cannabis user.[201]

Noffsinger II did not consider potential preemption problems between the DFWA and state employment protections for medical cannabis users. Only one court has considered preemption issues regarding the DFWA and state medical cannabis laws.[202] In *Carlson v. Charter Communications*, the U.S. District Court of Montana found direct conflict preemption where the Montana Medical Marijuana Act allowed the possession of one ounce of cannabis without any restrictions regarding time or place.[203] The *Carlson* court held that the Montana Medical Marijuana Act's provision was preempted by the DFWA as it allowed the possession of cannabis at a federal contractor's worksite.[204] The Montana Medical Marijuana Act stated that no employment protections were afforded to medical cannabis users.[205] Therefore, the plaintiff's employer could terminate the plaintiff solely for their state-approved medical cannabis use that occurred off-site.[206] This decision highlights that the DFWA preempts state laws to the extent that those state laws protect the on-site use or possession of cannabis at a contractor's work-site.

Language contained in *Kamakeeaina v. Armstrong Produce, Ltd.* from the U.S. District Court of Hawai'i could serve as a basis for obstacle preemption under the DFWA. The *Kamakeeaina* court held that as a matter

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197 *Noffsinger II*, 338 F. Supp. 3d at 78.
198 *Id.* at 82–84.
199 *Id.* at 84 (quoting *Harris*, 2008 WL 111979, at *4).
200 *Id.*
201 *Id.* at 86.
202 *See generally* Barger, *supra* note 97, at 395.
203 No. CV 16-86-H-SEH, 2017 WL 3473316 *1, at *2 (D. Mont. Aug. 11, 2017).
204 *Id.* at *3.
205 *Id.* (quoting MONT. CODE ANN. § 50-46-320 (2017)).
206 *Id.*

of statutory interpretation, the DFWA does not prevent a contractor from doing more to ensure a drug-free workplace, such as drug testing employees.[207] This finding supports an argument for an obstacle preemption claim as state laws providing employment protections to medical cannabis users would frustrate a contractor's purpose of doing more to ensure a drug-free workplace in accordance with federal law. This would likely be unpersuasive, however, as obstacle preemption requires the conflict to be a "sharp one" and would prevent the objectives and purposes of federal laws so much so that the state and federal law cannot stand together.[208] The intent and objective of the DFWA are to prevent on-site use or possession of drugs at a contractor's worksite,[209] educate employees about the dangers of drug use, and encourage rehabilitative measures for drug abuse.[210] A contractor can comply with the DFWA and simultaneously not take adverse employment action against a medical cannabis user who uses cannabis off-site.[211] Because state laws providing employment protections for medical cannabis users are likely not preempted by the DFWA, a contractor must comply with them or be subjected to a state employment discrimination claim.

IV. TAKING ANOTHER HIT: REMEDYING THE TENSION BETWEEN THE DFWA AND STATE ANTI-DISCRIMINATION LAWS FOR MEDICAL CANNABIS USERS

State employment protections for medical cannabis users are likely not preempted by either the CSA or DFWA. As a matter of statutory interpretation, the DFWA does not require a contractor drug test nor does it punish off-site medical cannabis use.[212] Most courts have concluded that neither the CSA nor the DFWA preempt state employment protections for medical cannabis users.[213] The *Emerald Steel* court disagreed, holding that

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[207] Kamakeeaina v. Armstrong Produce, Ltd., No. 18-cv-00480-DKW-RT 2019 U.S. Dist. LEXIS 50863 *1, at *27 n.8.

[208] *See* Kelly v. Washington, 302 U.S. 1, 10 (1937).

[209] 41 U.S.C. § 8101(a)(5)(B) (2020).

[210] *See* Drug-Free Workplace Act of 1988, H.R. Rep. No. 100-829, at 6 (1988); Cullen v. E.H. Friedrich Co., 910 F. Supp. 815, 821 (D. Mass. 1995).

[211] *See* Washburn v. Columbia Forest Prod., Inc., 104 P.3d 609, 614–15 (Or. Ct. App. 2005) (finding employer did not violate the DFWA by employing employee who used medical cannabis off-site), *rev'd on other grounds*, 134 P.3d 161 (Or. 2006).

[212] *See* Moberly & Hartsig, *supra* note 116, at 441; Deanna J. Mouser, *Combating Employee Drug Use Under a Narrow Public Policy Exception*, 12 INDUS. REL. L.J. 184, 190 ("the Drug Free Workplace Act does not require that employers fire employees who use drugs . . . .").

[213] *See, e.g.*, Smith v. Jensen Fabricating Eng'r, Inc., No. HHDCV186086419, 2019

state employment protections for medical cannabis users are preempted by the CSA allowing an employer to terminate a medical cannabis user solely for off-site drug use.[214] Either Congress or federal contractors must act to remedy this split between courts with regards to state employment protections for medical cannabis users.

This Comment proposes two solutions for federal contractors to comply with state laws proving employment protections for medical cannabis users. One potential solution is Congressional action. This option could be accomplished through the passage of a modified version of the Fairness Act, which would prohibit the termination of a federal employee or federal contracting employee solely for off-site use of medical cannabis use.[215] However, contractors should not wait for Congressional action but should instead establish guidelines to simultaneously comply with federal and state laws regarding cannabis using a case-by-case evaluation based on the relevant state law.

A. Fairness Act

The Fairness Act is a bill before the 116th Congress that could remedy issues between federal cannabis laws and state medical cannabis laws.[216] The primary sponsor is Representative Charlie Crist (D-FL.).[217] The bill creates clear guidance for employers regarding federal laws and state laws regarding medical cannabis usage.[218] Under this Act, all federal employees

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Conn. Super. LEXIS 439 at *4 (Conn. Super. Ct. Mar. 4, 2019) (upholding PUMA in Connecticut state court); Whitmire v. Wal-Mart Stores, 359 F. Supp. 3d 761 (D. Ariz. 2019) (upholding Arizona medical cannabis employment protection statute); Chance v. Kraft Heinz Foods Co., C.A. No. K18C-01-056 NEP, 2018 WL 6655670, at *9–18 (Del. Super. Ct. Dec. 17, 2018) (upholding similar Delaware statute); Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181, at *8 (R.I. Super. Ct. May 23, 2017) (upholding similar Rhode Island statute.

[214] Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 536 (Or. 2010).

[215] *See generally*, Fairness in Federal Drug Testing Under State Laws Act, H.R. 1687, 116th Cong. (2019), https://www.govtrack.us/congress/bills/116/hr1687 (Fairness Act). According to Representative Crist, veterans represent about a third of the U.S. federal workforce, and many veterans use medical cannabis as treatment for chronic pain and post-traumatic stress disorder. Claire Hansen, *Bipartisan Bill Seeks to Protect Federal Employees Who Use State-Legal Marijuana*, U.S. NEWS AND WORLD REPORT (Mar. 15, 2019), https://www.usnews.com/news/national-news/articles/2019-03-15/bipartisan-bill-seeks-to-protect-federal-employees-who-use-state-legal-marijuana.

[216] Fairness Act, H.R. 1687, 116th Cong. (2019).

[217] *Id.*

[218] Meghana D. Shah, *2 New Efforts To Clarify Employee Cannabis Drug Testing*, LAW360 (May 3, 2019), https://www.law360.com/articles/1154098/2-new-efforts-to-clarify-

are protected from adverse employment action from a positive drug test for cannabis if the following conditions are met: (1) the use occurred off-site; (2) the employee is not impaired on the job; (3) the employee does not have a top-secret clearance; and (4) the employee's use of medical cannabis is legal under state law.[219] This law would allow employers to follow the language of federal laws regarding cannabis without fear of a violation, as it requires a employers to permit an employee's medical cannabis use so long as the use is legal under state law.[220] A federal employer in a state where medical cannabis is legal would not be able to take adverse action solely because of a positive drug test. While this bill is a step in the right direction for clearing the haze, it requires some refinements.

The Fairness Act requires refinements to address issues of federalism and conflicting legislation. The Fairness Act should be amended to include the employees of federal contractors to provide explicit statutory guidance for contractors on drug testing procedures. On federalism grounds, the Fairness Act greatly extends employment protections for the employees of federal contractors past what some states had anticipated. For example, the Montana Medical Marijuana Act states the law does not "permit a cause of action for wrongful discharge" because of the individual's medical cannabis use.[221] Other courts have held that if states intend for employment protections to exist for medical cannabis users, those protections must be enacted by the legislature or by voters.[222] The Fairness Act should be amended to protect medical cannabis users only in states that provide employment protections for medical cannabis users. Finally, the Fairness Act presents ambiguity problems. The plain language of the law appears to exempt employers from complying with FRA and DOT regulations, both of which mandate drug testing in certain situations.[223] This language should be clarified to state that employers still must drug test and take adverse employment action if they are governed by these specific regulations.

These points aside, the Fairness Act appears unlikely to pass. Senate Majority Leader Mitch McConnell (R-KY.) has shunned previous bills that would reform federal cannabis laws preventing them from being considered

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employee-cannabis-drug-testing.

[219] Fairness Act, H.R. 1687, 116th Cong. (2019).

[220] *Id.*

[221] Mont. Code Ann. § 50-46-320 (2019).

[222] *See, e.g.*, Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d. 914, 924 (W.D. Mich. 2011), *aff'd*, 695 F.3d 428 (6th Cir. 2012); Roe v. Teletech Customer Care Mgmt. LLC, 257 P.3d 586, 591–92 (Wash. 2011); Ross v. Raging Wire Telecomms., Inc., 174 P.3d 200, 202 (Cal. 2008).

[223] 49 C.F.R. § 219.102 (2014); 49 U.S.C. § 31306(b) (2012).

on the Senate floor.[224] The Senate's composition itself makes the Fairness Act's passage seem unlikely as the Senate is currently controlled by Republicans who historically are adverse to cannabis reforms.[225] These factors caused legislative predictor Skopos Labs to predict that the bill has a 2% chance of becoming law.[226] This low chance of success shows contractors must take the initiative to implement a system which takes into account relevant state laws regarding employment protections for medical cannabis users.

B. Contractors Can Create A System to Comply with Different Categories of Employment Protections

Contractors should not wait for unlikely Congressional action to comply with state employment protections for medical cannabis users; instead, contractors can look to relevant controlling federal law and then engage in a state-by-state analysis. If an employee tests positive for medical cannabis, a federal contractor should commence a state-by-state analysis of the various employment protections for medical cannabis users.[227] Within every category of jurisdiction, the contractor must forbid the possession, distribution, or use of cannabis at their worksite as this is strictly prohibited by the DFWA.[228] In the following sections, contractors are given guidance regarding the different approaches states take in employment protections for medical cannabis users.

1. States Without Employment Protections for Medical Cannabis Users

In states that do not afford medical cannabis users employment protections, federal contractors may continue to drug test employees and take adverse actions following positive drug tests.[229] The contractor may

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[224] Paul Demko & Natalie Fertig, *Why the most pro-marijuana Congress ever won't deal with weed*, POLITICO (Sep. 9, 2019), https://www.politico.com/story/2019/09/09/marijuana-congress-1712973.

[225] Sean Williams, *Sorry, the MORE Act Has No Chance of Becoming Law*, THE MOTLEY FOOL (Nov. 30, 2019), https://www.fool.com/investing/2019/11/30/sorry-the-more-act-has-no-chance-of-becoming-law.aspx.

[226] Ed Weinberg, *Using CBD Could Get NASA Employees Fired*, CANNABISMD (Sep. 22, 2019), https://cannabismd.com/news/trending-business/using-cbd-could-get-nasa-employees-fired/.

[227] This analysis does not apply for contractors subject to DOT or FRA regulations.

[228] FAR 52.223-6(a), (b)(1) (2001).

[229] Carlson v. Charter Commc'n, No. CV 16-86-H-SEH, 2017 WL 3473316 *1, at *3 (D. Mont. Aug. 11, 2017).

also discipline an employee for any sign of impairment on the job.[230] The contractor, of course, cannot discipline the employee for an underlying disability which the employee is using cannabis as a treatment.[231]

2. States That Only Protect Status

In states protecting medical cannabis users based solely on their status as medical cannabis cardholders, the contractor may discipline employees for a positive drug test for cannabis, impairment, and on-site use.[232] Contractors should be aware of the split between states in interpreting the scope these laws.[233] Illinois, for example, explicitly allows contractors to take adverse action against a medical cannabis user in the event that an employee tests positive after a non-discriminatory drug test.[234] By contrast, Connecticut and Rhode Island have interpreted this language as a means to protect medical cannabis users from adverse employment action after a positive drug test for cannabis.[235] The latter interpretation is more in line with the next level of employment protections that protect a medical cannabis user's status and protect the user from termination after a positive drug test.[236]

3. States That Protect Status and Positive Drug Test

The next category of jurisdictions provide medical cannabis users with stronger employment protections.[237] These jurisdictions protect a medical cannabis user from adverse action based solely on the user's status as a medical cannabis user after a positive drug test.[238] If S.B. No. 2543 passes, Hawai'i's federal contractors would join this group of jurisdictions.[239] In these jurisdictions, a contractor may not take adverse action solely because

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[230] *See* Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914 (W.D. Mich. 2011) (noting positive drug test for cannabis was a sign of impairment).

[231] *E.g.*, Coles v. Harris Teeter, LLC, 217 F. Supp. 3d 185, 187–89 (D.D.C. 2016).

[232] *See generally* Harvey, *supra* note 51, at 225.

[233] *Noffsinger II*, 338 F. Supp. 3d 78, 84–85 (D. Conn. 2018); Smith v. Jensen Fabricating Eng'rs, No. HHDCV186086419, 2019 Conn. Super. LEXIS 439, at *4 (Conn. Super. Ct. Mar. 4, 2019); Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 R.I. Super. LEXIS 88, at *16 (R.I. Super. Ct. May 23, 2017); Harvey, *supra* note 51, at 225.

[234] 410 ILL. COMP. STAT. ANN. 130/50(b)–(c) (2020).

[235] *Noffsinger II*, 338 F. Supp. 3d at 84–85; *Smith*, No. HHDCV186086419, 2019 Conn. Super. LEXIS 439, at *4; *Callaghan*, No. PC-2014-5680, 2017 R.I. Super. LEXIS 88, at *16.

[236] *E.g.*, ARIZ. REV. STAT. § 36-2813(B) (2020).

[237] Harvey, *supra* note 51, at 227.

[238] *Id.* at 225.

[239] S.B. No. 2543, 30th Leg., Reg. Sess. (Haw. 2020).

of a positive drug test for cannabis.[240] An employee is exempt from this protection if the employee shows signs of impairment at work. An employer may determine an employee is impaired at work based on odor, carelessness, unusual behavior, or other signs.[241] The impairment exception is the key distinction between this category of jurisdiction and reasonable accommodation jurisdictions, that provide the strongest employment protections for medical cannabis users.

4. States That Make Reasonable Accommodation

Nevada is the only reasonable accommodation jurisdiction where a contractor may not discipline the employee for the employee's status as a medical cannabis user, a positive drug test, or signs of impairment.[242] The key distinction within this category is that the employer may not discipline an employee who is impaired by medical cannabis from off-site use.[243] Mere signs of impairment such as red eyes or a distinct odor are not enough for a contractor to take adverse action against an employee.[244] The contractor must show that the employee poses a "threat" from their cannabis use.[245] However, the contractor may take adverse action if the medical cannabis user uses or consumes cannabis on the contractor's worksite because the DFWA strictly forbids on-site drug use.[246]

5. Hawai'i Law

Hawai'i's proposed legislation falls within the category of jurisdictions that protect an individual from adverse employment action solely because of a positive test for medical cannabis or because of an individual's status as medical cannabis cardholder.[247] All jurisdictions within this category contain an exception for compliance with federal funding.[248] Because these

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[240] *E.g.*, Whitmire v. Wal-Mart Stores Inc., No. CV-17-08108-PCT-JAT, 2018 WL 6110937, at *1 (D. Ariz. Nov. 21, 2018).

[241] ARIZ. REV. STAT. ANN. § 23-493(7) (2020).

[242] Hautanen, *supra* note 8, at 382.

[243] A.B. 533, 2019 Leg., 80th Sess. (Nev. 2019).

[244] The DFWA only prohibits the unlawful use or possession of drugs like cannabis in the worksite. The Act does not expressly prohibit reporting to work under the influence of drugs. *See, e.g.*, Olsen *supra* note 84, at 227.

[245] A.B. 533, 2019 Leg., 80th Sess. (Nev. 2019).

[246] *See* 48 C.F.R. § 52.223-6(a) 2020.

[247] S.B. No. 2543, 30th Leg., Reg. Sess. (Haw. 2020).

[248] ARIZ. REV. STAT. § 36-2813(B) (2020); ARK. CONST. amend. 98, §7; DEL. CODE ANN. tit. 16, § 4905A(a)(3) (2020); MINN. STAT. ANN. § 152.32(3)(c) (West 2020); N.M. STAT. ANN. § 26-2B-9 (2020); N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2019); 63 OKLA.

employment protections for medical cannabis users are likely not preempted by the CSA[249] or DFWA,[250] this exception is applicable to only a narrow range of jobs that must comply with DOT and FRA regulations.[251]

These jurisdictions do diverge on the matter of safety-sensitive positions. The states of Arizona, Arkansas, New Mexico and Oklahoma contain an exception for safety-sensitive positions.[252] Hawai'i's legislation also contains an exception for certain safety-sensitive positions.[253] Like Arizona and Oklahoma,[254] Hawai'i's legislation defines occupations that are considered safety-sensitive.[255] By contrast, the states of Delaware, Minnesota, and New York do not contain an exception for safety-sensitive positions.[256]

As previously discussed, Hawai'i's proposed employment protections for medical cannabis users are likely not preempted by either the CSA or DFWA.[257] The vast majority of courts considering these statutes for non-federal-contracting employees have held that the CSA does not preempt state employment protections for medical cannabis users.[258] Therefore, employers in Hawai'i should update their drug testing policies in the event S.B. No. 2543 is enacted.

V. CONCLUSION

Contractors who use drug testing to certify compliance with the DFWA likely cannot take adverse employment action in states that provide employment protections for medical cannabis users. Confusing and vague laws place contractors in a difficult situation of trying to comply with seemingly contradictory federal and state laws regarding an employee's

STAT. ANN. § 427.8(H)(1) (West 2019); 63 OKLA. STAT. ANN. § 425(B)(1) (West 2020).

[249] *Noffsinger I*, 273 F. Supp. 3d at 335.

[250] *Noffsinger II*, 338 F. Supp. 3d at 78.

[251] 49 U.S.C. § 31306(b) (2018); 49 C.F.R. § 219.601 (2019).

[252] ARIZ. REV. STAT. § 36-2813(B) (2020); ARK. CONST. amend. 98, §7; N.M. STAT. ANN. § 26-2B-9 (2020);63 OKLA. STAT. ANN. § 427.8(H)(1) (West 2019); 63 OKLA. STAT. ANN. § 425(B)(1) (West 2020).

[253] S.B. No. 2543, 30th Leg., Reg. Sess. (Haw. 2020).

[254] ARIZ. REV. STAT. § 23-493(9) (2020); 63 OKLA. STAT. § 427.8(K)(1) (2020)

[255] S.B. No. 2543, 30th Leg., Reg. Sess. (Haw. 2020).

[256] DEL. CODE ANN. tit. 16, § 4905A(a)(3) (2020); MINN. STAT. ANN. § 152.32(3)(c) (West 2020); N.Y. PUB. HEALTH LAW § 3369(2) (McKinney 2019).

[257] *See Noffsinger I*, 273 F. Supp. 3d at 335; *Noffsinger II*, 338 F. Supp. 3d at 78.

[258] *See* Smith v. Jensen Fabricating Eng'r, Inc., No. HHDCV186086419, 2019 Conn. Super. LEXIS 439 at *4 (Conn. Super. Ct. Mar. 4, 2019); Whitmire v. Wal-Mart Stores, 359 F. Supp. 3d 761 (D. Ariz. 2019); Chance v. Kraft Heinz Foods Co., C.A. No. K18C-01-056 NEP, 2018 WL 6655670, at *9–18 (Del. Super. Ct. Dec. 17, 2018); Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181, at *8 (R.I. Super. Ct. May 23, 2017).

medical cannabis use. Congress and contractors can remedy this contradiction. The Congressional solution fully brings to fruition the intent of the DFWA to prohibit on-site usage and clarifies for contractors when they can take adverse employment action for medical cannabis use. For this solution to succeed, Congress must deem this issue pressing and act on it. Contractors need not wait for Congressional action and can instead apply my proposed framework to comply with both the DFWA and state laws regarding medical cannabis use. Nevertheless, regardless of which solution is chosen, both allow for the DFWA's intent of prohibiting on-site drug use and promoting education about drug use.

Appendix A

Medical Cannabis User Protections Under State Laws[259]

Reasonable Accommodation	Medical Cannabis User's Status and Drug Test Protected	Medical Cannabis User's Status Protected	No Protections for Medical Cannabis Users
Nevada	Arizona	Connecticut**	Alaska
	Arkansas	Illinois	California
	Delaware	Maine	Colorado
	Hawai'i *	New Jersey	District of Colombia
	Minnesota	Pennsylvania	Florida
	New Mexico	Rhode Island**	Georgia
	New York	West Virginia	*Hawai'i**
	Oklahoma		Michigan
			Montana
			New Hampshire
			North Dakota
			Ohio
			Oregon
			Vermont
			Washington

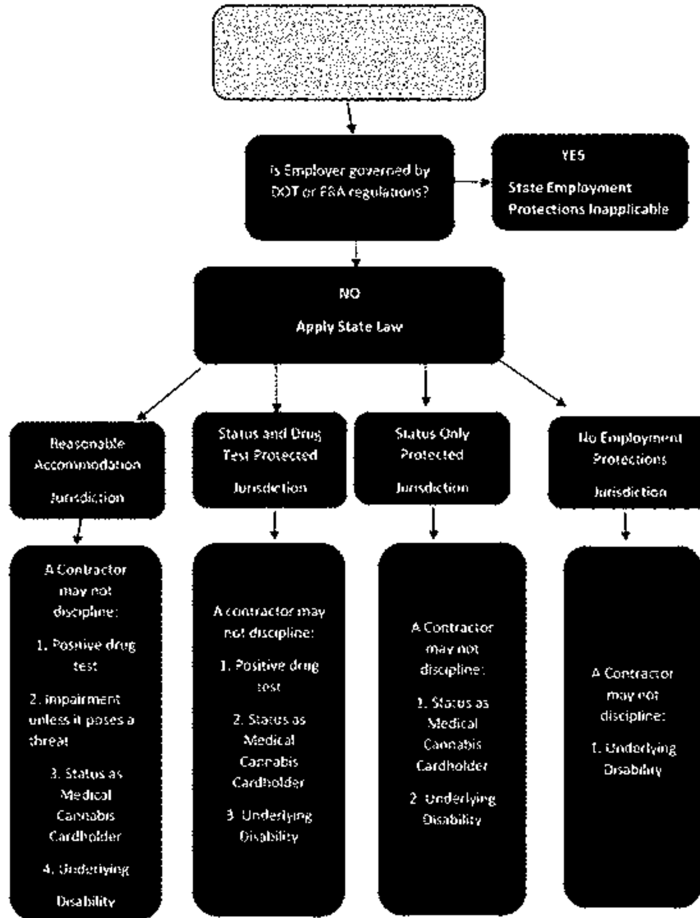
* Proposed legislation that passed the Hawai'i State Senate.

**Jurisdiction contains case law suggesting Status and Positive Drug Test protected

[259] *See* Winn, *supra* note 7, at 61 n.5; S.B. No. 2543, 30th Leg., Reg. Sess. (Haw. 2020).

Appendix B

A Contractor's State Employment Protections Flow Chart



A Reckoning for "Rational" Discrimination: Rethinking Federal Welfare Benefits in United States-Occupied Islands

Staff *

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I. INTRODUCTION

Two twins were separated, not at birth, but by the United States' discriminatory administration of its territories. Leslie Schaller and her twin sister, Katrina Schaller, are both American citizens who suffer from myotonic dystrophy, a debilitating hereditary medical condition.[2] Only Leslie, however, is eligible for benefits under the Supplemental Security Income ("SSI") Program of the Social Security Act ("SSA") because she

* The Editorial Board thanks Sarah Kelly, MJ McDonald, Patrícia Sendão, and Olivia Staubus for their fine research and preparation of this comment.

[2] Schaller v. U.S. Soc. Sec. Admin., No. 18-00044, slip op. at 2–4 (D. Guam June 19, 2020).

resides in one of the fifty states.[3] Katrina is ineligible because the SSI Program does not extend to residents of Guam.[4]

In *Schaller v. United States Social Security Administration*, Katrina challenged the constitutionality of the SSI Program on the ground that it discriminated against residents of Guam.[5] On June 19th, 2020, the District Court of Guam found that the "discriminatory provisions of the SSI statute and any related implementing regulations that discriminate on the basis of status as a resident of Guam violate the Constitution and Organic Act's guarantees of equal protection."[6] If *Schaller* is upheld on appeal, the case will potentially open the door for more U.S. citizens residing in territories and associated states to challenge denials of federal benefits under the Equal Protection Clauses of the Fifth and Fourteenth Amendments.[7]

If *Schaller* were the only case of its kind, perhaps the status quo could rest easy, but *Schaller* is just one in a series of recent cases arguing against the discriminatory practice of denying federal benefits to territorial residents as well as the disparate treatment of people under U.S. jurisdiction.[8] This comment reflects on how and why *Schaller* and similar cases addressing the discriminatory exclusion of residents of U.S. territories and associated states from federal welfare benefits may change this rarely examined aspect of federal law.[9] Part II of this comment situates *Schaller* within the historical circumstances of territorial acquisition, provides the legal framework for territorial administration, and details the discriminatory federal welfare schemes applied to the territories and associated states as a result of these historical and legal contexts. Part III examines precedential cases that upheld the exclusion of territorial residents from federal welfare programs, the recent trend of cases that rejected this discriminatory tradition, and the *Schaller* court's sidestepping of Supreme Court precedent.

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[3] *Id.*

[4] *Id.* at 3–4.

[5] *Id.*

[6] *Id.* at 20.

[7] An appeal was filed by the Commissioner of Social Security and Social Security Administration. Schaller v. U.S. Soc. Sec. Admin., No. 18-00044 (D. Guam June 19, 2020), *appeal filed*, (9th Cir. Aug. 19, 2020).

[8] *See* Peña Martínez v. U.S. Dep't of Health & Hum. Serv., No. 18-01206-WGY, 2020 WL 4437859 (D.P.R. Aug. 3, 2020); United States v. Vaello-Madero, 956 F.3d 12 (1st Cir. 2020).

[9] *See* Peña Martínez, No. 18-01206-WGY, 2020 WL 4437859; Vaello-Madero, 956 F.3d 12; Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the Insular Cases Should be Taught in Law School*, 21 J. GENDER, RACE & JUST. 395, 456 (2018) ("The modern-day legal controversies impacting four million territorial people . . . are nearly invisible to most Americans--and to most law students. The insular cases that dictate the results in those controversies are rarely considered, except in a few limited circumstances.").

Finally, Part IV extends *Schaller*'s reasoning to all U.S. territories and associated states in arguing that federal welfare program eligibility should be extended to residents of all the territories and that traditional justifications for barring Micronesian migrants from federal welfare programs should be reconsidered.

II. TERRITORIAL ACQUISITION AND ADMINISTRATION

A. *Historical Context of Territorial Acquisition*

The United States acquired most of its insular areas[10] during a sixty-year period spanning from the late nineteenth to mid-twentieth centuries. For example, the Kingdom of Hawai'i became a U.S. Territory in 1898 after the illegal overthrow of 1893.[11] At the end of the Spanish-American War, the United States acquired Guam, Puerto Rico, and the Philippines through the Treaty of Paris of 1898.[12] One year later, the United States obtained American Sāmoa in the 1899 Tripartite Convention,[13] and following World War I, the Danish sold the southern Virgin Islands to the United States.[14] Throughout the Second World War, the United States wanted command of the Micronesian region[15] because of its strategic location near Japan.[16]

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[10] "Insular area" is the U.S. government's organizational term for jurisdictions that are not part of the fifty U.S. states or the District of Columbia. Off. of Insular Affs., *Definitions of Insular Area Political Organizations*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/oia/islands/politicatypes (last visited Dec. 13, 2020). Insular areas include all of the U.S. territories and the freely associated states. *Id.*

[11] NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 129–30, 160 (2004).

[12] Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., art. II–III, Dec. 10, 1898; SASHA DAVIS, EMPIRES' EDGE: MILITARIZATION, RESISTANCE, AND TRANSCENDING HEGEMONY IN THE PACIFIC 79 (2015).

[13] Convention to Adjust the Question Between the United States, Germany, and Great Britain in Respect to the Samoan Islands art. 2, Dec. 2, 1899, 31 Stat. 1875, *reprinted in* 2 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1776–1909, at 1596 (William M. Malloy ed., 1910).

[14] Convention for the Cession to the United States of the Danish West Indies art. 1, Aug. 4, 1916, 39 Stat. 1706, *reprinted in* 3 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1776–1909, at 2558–63 (William M. Malloy ed., 1910).

[15] The term "Micronesia" can refer to both the region in the Pacific Ocean and the Federated States of Micronesia. *Being Micronesian in Hawaii*, NATIVESTORIES.ORG, at 14:52 (Jan. 31, 2019), https://nativestories.org/being-micronesian-in-hawaii/ [hereinafter *Native Stories Podcast*]. For clarity, this paper refers to the region in the Pacific as the "Micronesian Region" and the Federated States of Micronesia as "Micronesia."

[16] DAVIS, *supra* note 12.

Today, the Micronesian region includes the Commonwealth of the Northern Mariana Islands ("CNMI"), as well as the "quasi-colonies" of the Republic of the Marshall Islands ("Marshall Islands"), the Federated States of Micronesia ("Micronesia"), and Palau,[17] collectively known as the "Freely Associated States."[18] At the end of World War II, the Micronesian region was placed under United States' authority as part of the United Nations' International Trusteeship System.[19] Under the trust, the United States gained exclusive military use of and control over the islands.[20]

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[17] *Id.*

[18] *Federated States of Micronesia, Republic of the Marshall Islands, and Palau*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/i-9-central/complete-correct-form-i-9/federated-states-of-micronesia-republic-of-the-marshall-islands-and-palau (last updated May 6, 2020).

[19] S.C. Res. 21, ¶ 8 (Apr. 2, 1947). For more information on the unprecedented nature of this "strategic" trusteeship, *see* Larry Wentworth, *The International Status and Personality of Micronesian Political Entities*, 16 ILSA J. INT'L L. 1, 4–10 (1993).

[20] S.C. Res. 21, *supra* note 19, ¶¶ 9, 11, 12.

Table 1. U.S. Political Relationships with Current and Former Insular Possessions

Self-Governing Nations	*Incorporated Territories*	*Unincorporated Territories*	
Philippines	Palmyra Atoll	American Sāmoa	Midway Atoll
U.S. States		Baker Island	Navassa Island
Hawai'i		Guam	CNMI
Associated States		Howland Island	Puerto Rico
Marshall Islands		Jarvis Island	Virgin Islands
Micronesia		Johnston Atoll	Wake Island
Palau		Kingman Reef	

Today, the United States claims fourteen territories and three associated states.[21] All of these non-sovereign places are islands in the Pacific Ocean or Caribbean Sea.[22] The locations of these insular possessions, near places of economic or strategic value, are a driving force behind the historical and modern colonialism, imperialism, and militarization of these islands.[23] Table 1[24] lists former and current insular areas of the United States and their political statuses.

Although the political relationships between the United States and each island differ, the federal government effectively relegates all the associated states and territories to the same second-tier status,[25] and the treatment of these insular possessions does not substantially differ.[26] For example, the

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[21] *How are U.S. States, Territories, and Commonwealths Designated in the Geographic Names Information System?*, U.S. GEOLOGICAL SURVEY, https://www.usgs.gov/faqs/how-are-us-states-territories-and-commonwealths-designated-geographic-names-information-system?qt-news_science_products=0#qt-news_science_products (last visited Oct. 24, 2020).

[22] *Id.*

[23] DAVIS, *supra* note 12, at 71 ("The United States in the late 1800s had no need or ability to colonize the Asian mainland, only the need and ability to ensure access to it. So colonies were made of Hawai'i, American Samoa, Guam, and the Philippines. The latter two were wrested from the Spanish in the 1898 war when the United States also 'freed' Cuba and gained Puerto Rico as a military colony to guard the approaches to Central America and the future Panama Canal. These new colonies were not substantially resource-rich colonies, but rather strategic locations that enabled a coal-using U.S. Navy to maintain a presence in the western Pacific, guard the route across the Pacific to Asian resources and markets, and deny other nations the same access.").

[24] U.S. GOV'T ACCOUNTABILITY, OFF., OGC-98-5, APPLICATION OF THE CONSTITUTION TO U.S. INSULAR AREAS (1997); Phillipine Independence Acts, 22 U.S.C. §§ 1391, 1393–95.

[25] For example, residents of Puerto Rico, American Samoa, Guam, the CNMI, the U.S. Virgin Islands, Micronesia, the Marshall Islands, and Palau, as well as the Compacts of Free Association ("COFA") Citizens living in the United States, do not have the right to vote. Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 440 (2002).

[26] *See generally id.* at 482–520 (explaining how the United States creates illusions of sovereignty for all of the inhabited territories and freely associated states, but retains varying degrees of colonial control over the islands for strategic defense purposes).

federal government fostered economic dependence[27] in all of these non-sovereign islands[28] and continues to use the islands for military purposes.[29] The strategic location of the islands enables the United States to project global hegemonic power.[30] Imperialism and militarization, however, often cause economic changes, environmental degradation, and "local, everyday violences" against residents.[31] These issues are compounded by a lack of

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[27] *Id.* at 477–83; *see also Native Stories Podcast*, *supra* note 15, at 20:00 (detailing how the United States sought to "give the Micronesian region so much support in terms of building [its] infrastructure and building up the people that [the region had] no choice but to continue relying on [the United States]."). Hawai'i is also dependent on the U.S. armed forces as defense spending is the second largest sector of the state's economy. *Economic Impact of Defense Spending*, HAW. DEF. ECON., http://defenseeconomy.hawaii.gov/economic-impact/#countyspending (last visited Oct. 19, 2020).

[28] Román & Simmons, *supra* note 25, at 482–87.

[29] For example, every branch of the U.S. armed forces is present in Hawai'i. Anne Keala Kelly, *Military Occupied Areas in Hawai'i*, NOHO HEWA, https://nohohewa.com/occupied-areas/ (last visited Sept. 29, 2020). Fifty-six percent of the occupied land used by U.S. forces is seized Hawaiian national lands. *Id.*; *see* Noelani Goodyear-Ka'opua, *Hawai'i: An Occupied Territory*, 35 HARVARD INT'L REV., no. 3, 2014, at 58, 59. Military use has had a profound impact on Kanaka 'Ōiwi, who have been systematically evicted from their indigenous lands to make way for military use. Kalamaoka'aina Niheu, *Pu'uhonua: Sanctuary and Struggle at Mākua*, *in* A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 161, 170–71 (Noelani Goodyear-Ka'opua, Ikaika Hussey & Erin Kahunawaika'ala Wright eds., 2014). Similarly, in Guam, military bases cover nearly thirty percent of the island. Alexandra Ossola, *Guam's Ecological Fate is in the Hands of the U.S. Military*, NAT'L GEOGRAPHIC (Dec. 27, 2018), https://www.nationalgeographic.com/environment/2018/12/guam-endangered-species-ecology-threatened-us-military-base-expansion/. For the last decade, the U.S. military presence in Guam has rapidly expanded as tensions persist between the United States, China, and North Korea. *Military Build-Up on Guam: Hearing Before the S. Comm. om Energy & Nat. Res.*, 110th Cong. (2008) 1–6 (statement of Jeff Bingaman, U.S. Sen. from N.M.) ("The Defense Department's global restructuring of forces calls for a substantial expansion in Guam. . . . This growth [will result in] perhaps as much as a 50% increase in population for Guam."); CONG. RSCH. SERV., RS22570, GUAM: U.S. DEFENSE DEPLOYMENTS 1 (2015) ("As the Defense Department faced increased tension on the Korean peninsula, the Pacific Command (PACOM) based in Honolulu began in 2000 to build up air and naval forces on Guam to boost U.S. deterrence and power projection in Asia. . . . Guam is critical to enhancing the forward presence, strengthening alliances, and shaping China's rise. . . . [Former Defense Secretary Robert Gates] highlighted the South China Sea as an area of growing concern. He also stated that the defense buildup on Guam is part of a shift in the U.S. defense posture in Asia, a shift to be more geographically distributed, operationally resilient, and politically sustainable."). Unfortunately, there are too many examples to list here. For case studies on U.S. militarization in the Pacific, *see* DAVIS, *supra* note 12.

[30] DAVIS, *supra* note 12, at 22.

[31] *Id.* at 46–47. The murder of Jennifer Laude and the arrest, trial, conviction, and subsequent pardon of Joseph Scott Pemberton, a member of the U.S. Marine Corp who

constitutional protections, resulting from the Insular Cases—a series of cases that tied the application of the Constitution to Congress's classification of each insular possession.[32]

B. Legal Framework for Administration of Insular Possessions

The administration of the territories is largely determined by the Territory Clause of the U.S. Constitution, which grants Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[33]

The Insular Cases affirm U.S. sovereignty over the territories while restricting full constitutional protections for the people residing within the territories because these islands are considered possessions of the United States rather than part of the nation.[34] These cases were decided between 1901 and 1922 and established the Doctrine of Territorial Incorporation, which splits territories into two categories: incorporated and unincorporated territories.[35]

When a territory incorporates, it takes an important step "leading to statehood" and its residents become entitled to full constitutional protections.[36] Before being admitted to the union, Hawai'i was classified as an incorporated territory. Oddly, Palmyra Atoll, a small, low-lying atoll with no permanent population, is also considered an incorporated territory despite the fact that the island will never become a state because it cannot support the six thousand population requirement for statehood eligibility.[37]

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killed Laude, a Filipina trans woman, in 2014 while stationed in the Philippines under a Visiting Forces Agreement, is just one poignant example of the violence and injustice enacted upon communities living near U.S. military bases. CALL HER GANDA (PJ Raval 2018).

[32] Serrano, *supra* note 9, at 404–08.

[33] U.S. CONST. art. IV, § 3, cl. 2. In contrast, administration of the Freely Associated States is largely dictated by lopsided agreements between the U.S. federal government and the quasi-sovereign governments of Micronesia, Palau, and the Marshall Islands. *See infra* part III.

[34] *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922); Porto Rico v. Rosaly y Castillo, 227 U.S. 270 (1913); Hawai'i v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901).

[35] *Downes*, 182 U.S. at 294–95 (White, J., concurring); Serrano, *supra* note 9, at 406. Table 1 highlights current designations of U.S. insular areas.

[36] *See, e.g.*, *Balzac*, 258 U.S. at 309.

[37] There are various theories as to why Palmyra Atoll was explicitly excluded from the boundaries of Hawai'i when the islands were annexed by the United States in 1898 but is considered an incorporated territory. For one theory, *see* Williamson Chang, *Darkness over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress* 16 ASIAN PAC. L. & POL'Y J. 70, 104–07 (2015) (discussing that Palmyra was excluded from the description of

On the other hand, unincorporated territories are not in line for statehood and their residents are only afforded constitutional protections for fundamental personal rights.[38] Currently, Guam, Puerto Rico, and the U.S. Virgin Islands are categorized as unincorporated territories.[39] Although American citizenship is extended to persons born in these unincorporated territories, this citizenship is qualified and restricted in several important ways, including the inability to vote in presidential elections.[40] With such dramatic differences in the rights extended to them, the distinction between incorporated and unincorporated territories borders on absurdity. Why should full constitutional protections be afforded to a small island with no permanent population like Palmyra, but be determinedly barred to citizens of Guam?

The Supreme Court provided its reasoning for the Doctrine of Territorial Incorporation in the Insular Cases, beginning in 1901 with *Downes v. Bidwell*,[41] where the Court outlined the circumstances justifying the creation of these distinctions:

> [G]rave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.[42]

Similarly, the discussion leading to Guam's Organic Act betrayed the United States' perception of Guam, Puerto Rico, and the U.S. Virgin Islands in the 1950s as mere possessions. As unincorporated territories, these islands were "not integral parts of the United States and no promise of statehood or a status approaching statehood is held out to them."[43] These distinctions, built on a shaky hundred-year foundation set by the Insular Cases, led to the current irrational scheme of federal benefit programs in the unincorporated territories.

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the state of Hawai'i largely because the United States did not want to appear a moral hypocrite after criticizing similarly questionable Soviet intervention in Eastern European nations).

[38] *Downes*, 182 U.S. at 291 ("[T]here may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.").

[39] Serrano, *supra* note 9, at 402.

[40] Att'y Gen. of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984).

[41] *See* 182 U.S. at 282. For an examination of the flaws in Justice Brown's reasoning in *Downes*, *see* Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L. Q. 71, 99–103 (2013).

[42] *Downes*, 182 U.S. at 282.

[43] H.R. REP. NO. 81-1365, at 12 (1949).

C. *Federal Benefits in Territories and Associated States*

There are over ninety federal welfare programs available in the fifty states and the District of Columbia to assist people in need.[44] Most of these programs, however, are not available to residents of the territories and associated states. Table 2 outlines the availability of five major federal welfare programs (SSI;[45] Aid to the Aged, Blind, or Disabled;[46] Temporary Assistance for Needy Families;[47] Medicaid;[48] and the Supplemental Nutrition Assistance Program[49]) in the territories and Freely Associated States.

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[44] GENE FALK ET AL., CONG. RSCH. SERV., R45097, FEDERAL SPENDING ON BENEFITS AND SERVICES FOR PEOPLE WITH LOW INCOME: IN BRIEF 6–10 (2018).

[45] The Supplemental Security Income ("SSI") program provides financial assistance to persons who are over the age of sixty-five, blind, or disabled. 42 U.S.C. § 1381. The statute originally limited eligibility for SSI benefits to people residing in the "United States," which was defined as "the 50 states and the District of Columbia." *Id.* § 1382c(e). Territorial residents were excluded. Congress, however, extended SSI benefits to residents of the CNMI in that 1976 joint resolution that approved CNMI's territorial status. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 502(A)(1), 90 Stat. 263, 268 (1976). Congress has not made the other territories and associated states eligible for SSI.

[46] The Aid to the Aged, Blind, or Disabled ("AABD") program is a federal grant-matching program that provides cash assistance to individuals who are elderly, blind, or disabled in Puerto Rico, Guam, and the Virgin Islands. 42 U.S.C. § 1381–83(f). AABD was historically available to all fifty states and the District of Columbia, but the SSI program replaced AABD. WILLIAM R. MORTON, CONG. RSCH. SERV., 7-9453, CASH ASSISTANCE FOR THE AGED, BLIND, AND DISABLED IN PUERTO RICO 4–6 (2016). AABD is not available in American Samoa. *Id.* at 4.

[47] The Temporary Assistance for Needy Families ("TANF") program gives block grants to states and eligible territories to provide cash assistance and other benefits to low-income families to promote marriage and "prevent and reduce the incidence of out-of-wedlock pregnancies. . . ." 42 U.S.C. § 601(a)(2)–(3). All fifty states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands participate in TANF. APPENDIX A: SOCIAL WELFARE PROGRAMS IN THE TERRITORIES, H. COMM. ON WAYS & MEANS GREENBOOK (2018), https://greenbook-waysandmeans.house.gov/2018-green-book/appendix-a-social-welfare-programs-in-the-territories. American Samoa is eligible to participate in TANF, but it does not. *Id.* The CNMI and associated states are ineligible for the program. *Id.*

[48] Medicaid is a federal funds-matching program that provides healthcare to low-income or disabled individuals. 42 U.S.C. § 1396-1; *Eligibility*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/eligibility/index.html (last visited Sept. 26, 2020).

[49] The Supplemental Nutrition Assistance Program ("SNAP") provides cash-like benefits to low-income people that can be exchanged for food products at authorized retailers. 7 U.S.C.A § 2011. SNAP is available in the fifty states, the District of Columbia, Guam, and the Virgin Islands. 7 U.S.C. § 2012(r).

Table 2. Eligibility for Selected Federal Programs

Program	American Samoa	Guam	CNMI	Puerto Rico	U.S. Virgin Islands	Associated States
SSI	No	No	Yes	No	No	No
AABD	No	Yes	No	Yes	Yes	No
TANF	No	Yes	No	Yes	Yes	No
Medicaid	Partial	Partial	Partial	Partial	Partial	No
SNAP	No	Yes	No	No	Yes	No

As shown in Table 2, many federal programs that support residents of the fifty states and the District of Columbia are not available to residents of the territories or associated states. Even when programs are available to Insular Area residents, the programs are often only partially funded.[50] For example, the federal government reimburses the local government for Medicaid costs according to a matching rate, called the Federal Medical Assistance Percentage ("FMAP").[51] The fifty states and the District of Columbia's FMAPs are based on per capita income and adjusted annually.[52] States with higher per capita incomes have lower FMAPs and thus receive less federal funds, while conversely, states with lower per capita incomes have higher FMAPs and receive more federal funds.[53] For example, the FMAPs of the ten states with the highest per capita incomes[54] in 2019 were all set at fifty-

[50] The programs are underfunded in part due to the programs' block grant funding structure. For information about problems with federal block grants, see CARA BRUMFIELD ET AL., GEO. L. CTR. ON POVERTY & INEQ., STRUCTURALLY UNSOUND: THE IMPACT OF USING BLOCK GRANTS TO FUND ECONOMIC SECURITY PROGRAMS 3–4 (2019). The programs are also underfunded due to arbitrarily set reimbursement rates. *See* LARA MERLING & JAKE JOHNSTON, CTR. FOR ECON. & POL'Y RSCH., MORE TROUBLE AHEAD: PUERTO RICO'S IMPENDING MEDICAID CRISIS 5–6 (2017).

[51] *Matching Rates*, MEDICAID & CHIP PAYMENT & ACCESS COMM'N, https://www.macpac.gov/subtopic/matching-rates/ (last visited Nov. 11, 2020) ("The federal share for most health care services is determined by the FMAP).

[52] 42 U.S.C. § 1396d(b); MEDICAID & CHIP PAYMENT & ACCESS COMM'N, EXHIBIT 6. FEDERAL MEDICAL ASSISTANCE PERCENTAGES AND ENHANCED FEDERAL MEDICAL ASSISTANCE PERCENTAGES BY STATE, FYS 2018–2021, at 2 (2020), https://www.macpac.gov/wp-content/uploads/2018/04/EXHIBIT-6.-Federal-Medical-Assistance-Percentages-and-Enhanced-Federal-Medical-Assistance-Percentages-by-State-FYs-2018%E2%80%932021.pdf ("FMAPs for Medicaid are generally calculated based on a formula that compares each state's per capita income to U.S. per capita income and provides a higher federal match for states with lower per capita incomes. . . . The general formula for a given state is: FMAP = 1 – [(state per capita income squared ÷ U.S. per capita income squared) × 0.45].").

[53] MEDICAID & CHIP PAYMENT & ACCESS COMM'N, *supra* note 52.

[54] Connecticut ($77,289); Massachusetts ($74,187); New York ($71,717); New Jersey ($70,471); California ($66,619); Washington ($64,758); Maryland ($64,640); New Hampshire ($63,502); Alaska ($62, 806); and Wyoming ($62,189). *SAINC1 Personal*

percent, the statutory minimum,[55] and eight of the ten states[56] with the lowest per capita income in the same year had FMAPs over seventy-percent.[57] Yet despite having per capita incomes up to $27,000 below the poorest state,[58] the territories' FMAPs are statutorily set at fifty-five percent[59] and their governments can only be reimbursed up to a certain amount each year.[60] Given their limited budgets, territories deny coverage to specific groups, such as impoverished children and pregnant women, that would be mandatorily covered in the fifty states and District of Columbia.[61]

The lack of benefits in the territories creates dangerous conditions[62] and makes little sense when considering the comparatively high level of need in

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Income Summary: Personal Income, Population, Per Capita Personal Income, BUREAU OF ECON. ANALYSIS, https://apps.bea.gov/itable/drilldown.cfm?reqid=70&stepnum=40&Major_Area=3&State=0&Area=XX&TableId=21&Statistic=3&Year=2019&YearBegin=-1&Year_End=-1&Unit_Of_Measure=Levels&Rank=1&Drill=1&nRange=5 (last updated Sept. 24, 2020) [hereinafter *Personal Income Summary*].

[55] MEDICAID & CHIP PAYMENT & ACCESS COMM'N, *supra* note 52, at 1–2.

[56] Idaho ($45,968); South Carolina ($45,438); Arkansas ($44,629); Alabama ($44,145); Kentucky ($43,770); New Mexico $43,326); West Virginia ($42,315); and Mississippi ($38,914). *Personal Income Summary*, *supra* note 54.

[57] MEDICAID & CHIP PAYMENT & ACCESS COMM'N, *supra* note 52, at 1–2.

[58] The per capita income of the poorest state, Mississippi, was $38,914 in fiscal year 2019. *Personal Income Summary*, *supra* note 54. In 2018, the five inhabited U.S. territories had the following per capita income: Virgin Islands ($35,938); Guam ($35,712); Puerto Rico ($32,873); CNMI ($23,259); American Samoa ($11,467). *GDP per capita (current LCU) All Countries and Economies*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.PCAP.CN (last visited Nov. 11, 2020).

[59] 42 U.S.C. § 1396d(b).

[60] *See* § 1308(c)(1)–(2).

[61] *See* MEDICAID & CHIP PAYMENT & ACCESS COMM'N, MEDICAID AND CHIP IN THE TERRITORIES 2–3 (2020), https://www.macpac.gov/wp-content/uploads/2019/07/Medicaid-and-CHIP-in-the-Territories.pdf.

[62] For example, Hurricane Maria left low-income residents without food and water in Puerto Rico and the Virgin Islands in 2017. David Elliot, *Why Nutrition Assistance in Puerto Rico Needs an Overhaul*, COAL. ON HUM. NEEDS (Jan. 17, 2020), https://www.chn.org/voices/why-nutrition-assistance-in-puerto-rico-needs-an-overhaul/. Because of the differences between SNAP and NAP, residents of the Virgin Islands received emergency food benefits within six weeks while residents of Puerto Rico waited for six months. *Id.* While SNAP funding can expand when need arises, NAP is a capped block grant, and Congress must approve any increased funding. *See id.* This requirement significantly slowed the process of benefit disbursement and created dangerous conditions in the aftermath of the hurricane. *See id.* This issue played out again during the Covid-19 pandemic, when emergency increases in P-EBT benefits were not extended to residents of Puerto Rico, American Samoa, and CNMI, causing nearly 300,000 children to go hungry. *See* Kelsey Boone & Etienne Melcher Philbin, *Congress Must Renew and Expand Pandemic EBT to Feed Hungry Kids*, FOOD RSCH. ACTION CTR. (Sept. 14, 2020), https://frac.org/blog/congress-must-renew-and-expand-pandemic-ebt-to-feed-hungry-kids.

the territories and associated states. In 2019, about ten percent of U.S. residents lived in poverty,[63] compared with nearly forty-four percent of residents of Puerto Rico.[64] American Sāmoa is estimated to have a poverty rate of sixty-five percent.[65] Given the immense need and lack of adequate programs, territorial residents have repeatedly challenged the constitutionality of federal welfare schemes.[66]

III. HISTORICAL CHALLENGES TO FEDERAL BENEFIT SCHEMES

Forty years ago, territorial residents began challenging the U.S. government's discriminatory federal welfare schemes in federal court. In 1978, in *Califano v. Gautier Torres*, and again in *Harris v. Rosario* in 1980, the Supreme Court blocked judicial oversight of Congress' authority to administer the territories.[67] Recently, in *United States v. Vaello-Madero*,[68] *Schaller v. U.S. Social Security Administration*,[69] and *Peña Martinez v. U.S. Department of Health & Human Services*,[70] federal courts began to dismantle these roadblocks.

A. *Califano v. Gautier Torres*

In *Gautier Torres*, the U.S. Supreme Court reversed a lower court decision finding that the denial of SSI benefits to residents of Puerto Rico unconstitutionally interfered with the plaintiff's rights to travel without justification.[71] The Court reasoned that laws providing for governmental payments of monetary benefits are "entitled to a strong presumption of constitutionality,"[72] and "[s]o long as its judgments are rational, and not

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[63] *QuickFacts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/IPE120219 (last visited Sept. 29, 2020).

[64] *QuickFacts: Puerto Rico*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/PR (last visited Sept. 29, 2020).

[65] *American Samoa Governor Says Small Economies 'Cannot Afford Any Reduction in Medicaid'*, PAC. ISLANDS REP. (Mar. 2, 2017, 2:31 PM), http://www.pireport.org/articles/2017/03/02/american-samoa-governor-says-small-economies-cannot-afford-any-reduction.

[66] *See infra* Part III.

[67] *See* Harris v. Rosario, 446 U.S. 651, 651–52 (1980); Califano v. Gautier Torres, 435 U.S. 1, 3 n.4, 4–5 (1978).

[68] 956 F.3d 12, 18–32 (1st Cir. 2020).

[69] No. 18-00044, slip. op. at *7–20 (D. Guam June 19, 2020).

[70] Peña Martinez v. U.S. Dep't of Health & Hum. Servs., No. 18-01206-WGY, 2020 WL 4437859 (D.P.R., Aug. 3, 2020). In the interest of brevity, *Peña Martinez* is covered in Part V.

[71] 435 U.S. at 2–5 n.7.

[72] *Id.* at 5 (quoting Mathews v. De Castro, 429 U. S. 181, 185 (1976)).

invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket."[73] Applying this standard, the Court noted that the federal government had advanced three reasons to explain the exclusion of Puerto Rico: (1) the Territory's unique tax status (i.e. the residents of Puerto Rico do not contribute to the public treasury); (2) the high cost of including residents in SSI, which is roughly $300 million per year; and (3) disruption to Puerto Rico's economy from the influx of cash assistance.[74]

Although *Gautier Torres* "primarily addressed the right to travel claim[,]"[75] the Court noted that the plaintiff had also initially raised an equal protection claim under the Fifth Amendment. However, the Court reasoned that Congress had the power to treat Puerto Rico differently than the states in regard to federal benefits[76] because Puerto Rico's relationship with the United States "has no parallel in our history."[77]

B. Harris v. Rosario

Two years later in *Harris*, the Court relied on *Gautier Torres* to adjudicate a class action suit challenging the constitutionality of the Aid to Families with Dependent Children ("AFDC") program,[78] which provided lower levels of financial assistance to families residing in Puerto Rico than those residing in one of the fifty states or the District of Columbia.[79] Although the District Court of Puerto Rico held the lower level of assistance violated the equal protection guarantee of the Fifth Amendment, the Supreme Court disagreed. The Court reasoned that Congress was

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[73] *Id.* (quoting Jefferson v. Hackney, 406 U.S. 535, 546 (1972)).

[74] *Id.* at n.7 (citing DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, REPORT OF THE UNDERSECRETARY'S ADVISORY GROUP ON PUERTO RICO, GUAM, AND THE VIRGIN ISLANDS 6 (1976)).

[75] *Schaller*, slip op. at 7 (citing *Gautier Torres*, 435 U.S. 1); *see also* Harris v. Rosario, 446 U.S. 651, 654–55 (1980) (Marshall, J., dissenting) (arguing that the precedential value of *Gautier Torres* for *Harris* was weak because no equal protection claim was before the Court in *Gautier Torres*, since the District Court had decided the issue entirely based upon the right to travel claim).

[76] *Gautier Torres*, 435 U.S. at 3 n.4.

[77] *Id.* (quoting Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 596 (1976)).

[78] AFDC is a federal program that provides "financial assistance to States and Territories to aid families with needy dependent children." Harris, 446 U.S. at 651 (citing 42 U.S.C. § 601). Its purposes include: (1) enabling families to care for children in their own homes; (2) ending the dependence of parents on government benefits; (3) reducing out of wedlock pregnancies; and (4) "encouraging the formation and maintenance of two-parent families." 42 U.S.C. § 601.

[79] *Harris*, 446 U.S. at 651 (first citing 42 U.S.C. § 1308(a)(1), then citing § 1396d(b)).

"empowered under the Territory Clause of the Constitution . . . to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States'" and thus, "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."[80] The Court then found that the same three factors applied in *Gautier Torres*—tax status, cost, and the potential for economic disruption—were similarly sufficient to justify treating Puerto Rico differently than the fifty states and the District of Columbia in regards to the AFDC program.[81]

But the *Schaller* court relied upon a strong dissent by Justice Thurgood Marshall in *Harris*, in which he argued that the precedential value of *Gautier Torres* for *Harris* was weak because no equal protection claim was before the Court in *Gautier Torres*, since the District Court had decided the issue entirely based upon the right to travel claim.[82] Rather, *Gautier Torres* had merely mentioned the equal protection claim in a footnote.[83] Justice Marshall believed the majority's reliance on the economic disruption rationale had "troubling overtones."[84] He pointed out that benefit programs were specifically designed to help the poor, yet the majority's rationale "suggest[ed] [that these] programs . . . should be less fully applied in those areas where the need may be the greatest, simply because otherwise, the relative poverty of recipients compared to other persons in the same geographic area will somehow be upset."[85] For Justice Marshall, *Harris* raised serious constitutional issues regarding the rights of U.S. citizens residing in Puerto Rico and thus, deserved closer attention.[86]

C. *United States v. Vaello-Madero*

Around four decades later, a new challenge to the exclusion of residents of territories from federal welfare benefits was brought in the District Court

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80 *Id.* at 651–52.

81 *Id.* at 652.

82 *Id.* at 652–56 (Marshall, J., dissenting); *see* Schaller v. U.S. Soc. Sec. Admin., No. 18-00044, slip op. at 16–17 (D. Guam June 19, 2020).

83 *Harris*, 446 U.S. at 655 (citing Califano v. Gautier Torres, 435 U.S. 1, 3 n.4 (1978)).

84 *Id.*

85 *Id.* at 655–56.

86 *Id.* at 656 ("Ultimately this case raises the serious issue of the relationship of Puerto Rico, and the United States citizens who reside there, to the Constitution. An issue of this magnitude deserves far more careful attention than it has received in *Califano v. Torres* and in the present case. I would note probable jurisdiction and set the case for oral argument.").

of Puerto Rico.[87] This time, however, the District Court's finding that the exclusion was unconstitutional was upheld by the First Circuit.[88]

In *Vaello-Madero*, the federal government sued an SSI recipient for overpayment of SSI benefits in the amount of $28,081 made after the defendant moved from New York to Puerto Rico, and thus allegedly became ineligible for SSI benefits.[89] In a sharp turn from *Gautier Torres* and *Harris*, the First Circuit upheld the District Court of Puerto Rico's finding that the exclusion of U.S. citizens residing in Puerto Rico from SSI eligibility violated the Fifth Amendment's equal protection guarantee.[90] The court clearly distinguished this issue as a matter of first impression because *Gautier Torres* was decided on right to travel grounds, not equal protection grounds, and *Harris* considered a challenge to block grants under the AFDC program, not direct aid under the SSI program.[91]

Applying the rational basis standard, the court then explicitly rejected the government's justifications for the exclusion of Puerto Rico from the SSI program based on the territory's income tax status and the cost of including its residents in the SSI program.[92] Finally, the court noted that since Congress had already extended SSI benefits to individuals residing in the CNMI, a territory whose "otherwise SSI-qualifying residents" have all "the legally-relevant characteristics in common" with residents of Puerto Rico, there was no rational basis for Congress to differentiate between U.S. citizens in the CNMI and Puerto Rico in determining SSI eligibility.[93] *Vaello-Madero II*'s reasoning was essential to setting up the subsequent challenge in *Schaller v. U.S. Social Security Administration*.[94]

D. Schaller v. U.S. Social Security Administration

Building on the *Vaello-Madero II* decision, *Schaller* challenged the constitutionality of the federal welfare benefit scheme in Guam.[95] The plaintiff, Katrina Schaller, was raised in Pennsylvania along with her twin

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[87] *See* United States v. Vaello-Madero (*Vaello-Madero II*), 956 F.3d 12, 14–16 (1st Cir. 2020), *petition for cert. filed*, (U.S. Sep. 4, 2020) (No. 20-303).

[88] *See Vaello-Madero II*, 956 F.3d at 32.

[89] *Id.* at 16.

[90] *See id.* at 32; *Harris*, 446 U.S. 651 (1980); Califano v. Gautier Torres, 435 U.S. 1 (1978).

[91] *Vaello-Madero II*, 956 F.3d at 21 (citing *Harris*, 446 U.S. 651; *Gautier Torres*, 435 U.S. 1).

[92] *Id.* at 23–30.

[93] *Id.* at 30–31.

[94] *See id.* at 23–32; Schaller v. U.S. Soc. Sec. Admin., No. 18-00044, slip op. at 10–20 (D. Guam Jun. 19, 2020).

[95] *Schaller*, slip op. at 1.

sister, Leslie.[96] The sisters both suffer from "myotonic dystrophy, a debilitating, degenerative genetic disorder affecting muscle function and mental processing."[97] Katrina began receiving SSI benefits on August 28, 2001, but the SSA stopped her benefits in 2007 after she moved to Guam temporarily.[98] In 2008, Katrina returned to Pennsylvania for a short period and her benefits resumed; however, she permanently moved back to Guam later that year and her benefits were again terminated.[99] Leslie, on the other hand, remained in Pennsylvania and continued to receive SSI benefits of about $755 per month.[100] The benefits allowed Leslie to lead a "full, independent life," whereas Katrina, deprived of federal benefits while living in Guam, was unable to earn a steady income.[101] Katrina sued the SSA[102] after the agency terminated her SSI benefits.[103]

Katrina challenged the constitutionality of the SSI program on the ground that it impermissibly discriminated against residents of Guam in violation of the equal protection guarantees of the Fifth and Fourteenth Amendments to the U.S. Constitution and the Organic Act of Guam.[104] The Fifth and Fourteenth Amendments[105] guarantee equal protection of the law to any person within its jurisdiction.[106] The purpose of the Equal Protection Clause is to protect all persons "against intentional and arbitrary discrimination[.]"[107] Katrina alleged that the SSA violated the Equal

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[96] *Id.* at 2.

[97] *Id.* at 3.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] Katrina also sued Andrew M. Saul in his official capacity as Commissioner of SSA. *Id.* at 1, 3.

[103] *Id.* at 3.

[104] *Id.* at 1.

[105] Although the Equal Protection Clause of the Fourteenth Amendment applies to the states, not the federal government, equal protection guarantees are implicit in the due process guarantees of the Fifth Amendment, which binds the federal government. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The analysis of equal protection claims under the Due Process Clause of the Fifth Amendment is the same as those under the Equal Protection Clause of the Fourteenth Amendment. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). The Fourteenth Amendment in relevant part provides: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Fifth Amendment, in relevant part, provides that "no person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V.

[106] Residents of Guam are subject to the equal protection guarantee by either the Fifth or the Fourteenth Amendments. *See* Harris v. Rosario, 446 U.S. 651, 653 (1980) (Marhall, J., dissenting) (citing Examining Bd. v. Flores de Otero, 426 U.S. 572, 599–601 (1976)).

[107] Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (quoting Sioux City Bridge

Protection Clauses of the Fifth and Fourteenth Amendments by terminating her SSI benefits based solely on her residency in Guam, since similarly situated U.S. citizens residing in the CNMI are afforded SSI benefits.[108]

The SSA argued that the differences in extension of federal benefits to residents of the territories compared with the fifty states and the District of Columbia referenced in *Gautier Torres* and *Harris* applied with equal force to Katrina's claim.[109] The SSA mirrored the arguments made by the government in both *Gautier Torres* and *Harris* and claimed that a rational basis for excluding Guam's residents from public benefits existed. The SSA alleged the same three reasons advanced in *Gautier Torres* and *Harris* for depriving territorial residents of federal benefits: (1) Guam's unique tax status; (2) the high cost of including residents in SSI; and (3) economic disruption from the influx of cash assistance.[110]

Finally, the SSA forwarded a "new" rationale, that had only been briefly mentioned in a footnote of *Gautier Torres*: that "historical distinctions justify the difference in treatment between Guam and the CNMI."[111] When the SSI program was enacted, Guam was a U.S. Territory, whereas the CNMI was part of the United Nations' Trusteeship system.[112] Thus, extending SSI eligibility to residents of the CNMI "rationally relate[d] to the government's interest in complying with its treaty obligations" to the CNMI; in contrast, since the United States was a sovereign over Guam, not a trustee, it did not have the same obligations to Guam.[113]

The court, however, sided with Katrina on each of these issues.[114] First, the court determined that even if Guam's unique tax status is a rational basis to differentiate between residents of Guam and the fifty states and the District of Columbia, Guam's unique tax status was not a rational basis for different treatment between Guam and the CNMI because Guam's tax status is no different than the CNMI's tax status.[115] Thus, the court determined the SSA's rationale for treating Guam differently than the CNMI was "illogical and irrational."[116]

Relying on *Vaello-Madero II*, the court reasoned that because SSI benefits are not dependent on an individual's contributions, it was irrational

Co. v. Dakota Cnty., 260 U.S. 441, 445 (1923)).

[108] *Schaller*, slip op., at 3–4.

[109] *Id.* at 10–13.

[110] *Id.* at 13.

[111] *Id.* at 18 (citing Besinga v. United States, 14 F.3d 1356 (9th Cir. 1994)); *see* Califano v. Gautier Torres, 435 U.S. 1 (1978).

[112] *Schaller*, slip op., at 18.

[113] *Id.* (quoting Defendant's Reply at 15, *Schaller*, No. 18-00044, slip op.).

[114] *Id.* at 11–20.

[115] *Id.* at 11.

[116] *Id.*

for Congress to exclude residents who are exempt from paying federal income taxes.[117] The court reemphasized the irony of the SSA's argument: since means-tested federal benefit programs "by [their] very terms" make eligible only low-income individuals who "almost by definition earn[] too little to be paying federal income taxes . . . the idea that one needs to earn their eligibility by the payment of federal income tax is antithetical to the entire premise of the program."[118]

Second, the court held that the high cost of including Guam residents in the SSI program was not a rational basis for the difference in SSI eligibility between residents of Guam and the CNMI because although "'protecting the fiscal integrity of Government programs, and of the Government as a whole' is a legitimate concern," cost-savings alone do not justify a discriminatory law, particularly where the cost of including Guam residents in the SSI program would increase the overall program budget by only 0.03% to 0.3%.[119]

Third, the court determined that the potential for disrupting Guam's economy was not a rational basis for excluding Guam from the SSI program.[120] The court determined that although *Gautier Torres* and *Harris* found that the inclusion of Puerto Rican residents "might seriously disrupt the Puerto Rican economy," these cases were decided in 1978 and 1980, respectively, and the court may take into account present-day economic

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[117] *See id.*

[118] *Id.* (citing *Vaello-Madero II*, 956 F.3d 12, 26–27 (1st Cir. 2020)) (distinguishing means-tested programs from federal insurance programs, such as Social Security Disability Insurance, "which may legitimately tie the amount of benefits awarded to the individual's contributions").

[119] *Id.* at 12–13 (citing Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implemented Workers of Am., 485 U.S. 360, 373 (1988)); SOC. SEC. ADMIN., SSI ANNUAL STATISTICAL REPORT, 2017, at 16 (2017), https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2017/ssi_asr17.pdf. The court relied on two different figures provided by the SSA to calculate the estimated range of the overall program budget increase. *Schaller*, slip op., at 12–13. The first figure relied on a 1987 Government Accountability Office Report that "estimated that if Guam residents were eligible for SSI benefits, annual federal spending would increase by $7.8 million, which is equivalent to $17 million in 2019 dollars." *Id.* at 12. The second figure presumed that "a monthly SSI benefits rate would be similar to that of residents of the CNMI," and thus calculated a total increase in cost of $175 million by multiplying $608.57 a month per resident times twelve months times 24,000 eligible residents. *Id.* Since SSI's total program budget in 2017 was $54.5 billion dollars, "based on the [SSA's] range of $17 million to $175 million, including Guam residents in the SSI program would increase the overall budget by a mere 0.03% to 0.3%." *Id.* at 12–13 (citing SOC. SEC. ADMIN., *supra*).

[120] *Schaller*, slip op. at 17 ("[T]here is no evidence to suggest that the influx of these federal funds have negatively impacted Guam's economy.").

circumstances.[121] Present-day circumstances revealed that federal benefits Guam received since the 1970s, including Supplemental Nutrition Assistance Program ("SNAP") and Medicaid, benefitted, not harmed, Guam's economy; additionally, the CNMI's economy was not disrupted by its residents' eligibility for SSI benefits.[122] Thus, extending SSI eligibility to Guam was not likely to disrupt its economy either.[123] In its reasoning, the court further rebutted *Gautier Torres* and *Harris*, noting that the U.S. Supreme Court relied upon the 1976 Department of Health, Education, and Welfare Report of the Undersecretary's Advisory Group on Puerto Rico, Guam, and the Virgin Islands in finding that extending public benefits would disrupt Puerto Rico's economy, but that this report specifically recommended extending SSI benefits to residents of Guam.[124] Taking its rebuttal one step further, similar to Justice Marshall's dissent in *Harris v. Rosario*, the court noted that the economic disruption rationale was inherently problematic because it implied that programs designed to assist needy people should be least applied in the poorest areas, since the "relative poverty of recipients compared to other persons in the same geographic area will somehow be upset."[125]

Rejecting the SSA's final argument, the court determined that historical distinctions between Guam and the CNMI are not rational bases for different treatment in extension of SSI benefits.[126] The CNMI's legal rights and obligations as established in the Commonwealth's originating documents are notably similar to those of Guam.[127] The court reasoned that because some residents of Guam and the CNMI have the same legally-relevant characteristics, including that they are: "(1) low-income and low-resourced[;] (2) elderly, disabled, or blind[;] and (3) generally exempted from paying federal income tax[,]"[128] there is no legally-significant historical distinction between them.[129]

The court ultimately held that there was no rational basis to exclude Katrina from SSI "based solely on her residency in Guam."[130] Therefore, the court held that the provisions of the SSI statute that discriminated on the

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[121] *Id.* at 13, 15.

[122] *Id.* at 17.

[123] *Id.*

[124] *Id.* at 16.

[125] *Id.* (quoting 446 U.S. 651, 655 (1980) (Marshall, J., dissenting)).

[126] *Id.* at 20.

[127] *Id.* at 19 (citing S. Rep. No. 94-433, at 15 (1975); Saipan Stevedore Co. Inc. v. Dir., Office of Workers' Comp. Programs, 133 F.3d 717, 721 (9th Cir. 1998)).

[128] *Id.* at 20 (quoting *Vaello-Madero II*, 956 F.3d 12, 30 (1st Cir. 2020)).

[129] *Id.*

[130] *Id.*

basis of residency in Guam violated the equal protection guarantees of the Constitution and the Organic Act of Guam.[131]

IV. *SCHALLER*'S IMPLICATIONS FOR TERRITORIES AND COFA CITIZENS

Given the strength of the plaintiff's arguments in *Schaller* and the changed circumstances that have followed in the hundred years since the Insular Cases were decided, we argue that federal welfare program eligibility should be extended to residents of all the territories and that this same reasoning can be used to challenge the traditional justifications for barring COFA citizens and migrants from the Micronesian region from receiving benefits.

A. Extension of Benefits to All Territories and the Tenuous Future of the Insular Cases

Schaller and *Vaello-Madero* have deftly sidestepped confronting Supreme Court precedent set by *Harris* and *Gautier Torres*, in which the Supreme Court held that Congress may limit eligibility for federal welfare programs to the residents of the fifty states and the District of Columbia.[132] The *Schaller* court determined that it did not need to adhere to the holdings of *Harris* and *Gautier Torres* because those cases compared disparate treatment between the territories and the fifty states and the District of Columbia, while *Schaller* compared disparate treatment between two territories.[133] But *Vaello-Madero* provides another way of distinguishing these cases from controlling Supreme Court precedent.[134] The *Vaello-Madero* court chose to disregard these two cases, noting that:

This Court, however, cannot simply bind itself to the legal status quo of 1980, and ignore important subsequent developments in the constitutional landscape. If so, cases like *Plessy*, *Baker v. Nelson* and *Korematsu* would still be good law.[135]

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[131] *Id.*

[132] *See Schaller*, slip op. at 9; *Vaello-Madero II*, 956 F.3d at 23; Harris v. Rosario, 446 U.S. 651, 651–52 (1980); Califano v. Gautier Torres, 435 U.S. 1, 5 (1978).

[133] *See Schaller*, slip op. at 9.

[134] *See* United States v. Vaello-Madero (*Vaello-Madero I*), 356 F. Supp.3d 208, 215 n.7 (D.P.R. 2019), *aff'd*, 956 F.3d 12 (1st Cir. 2020).

[135] *Id.* The cases mentioned by the *Vaello-Madero I* court are all infamous examples of judicially-sanctioned discrimination. *Plessy v. Ferguson* affirmed the constitutionality of racial segregation. *See* 163 U.S. 537 (1896). *Plessy* was functionally overruled fifty-eight years later by *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954). In *Baker v. Nelson*, the court held that limiting marriage licenses to only opposite-sex partnerships "[did] not offend the . . . United States Constitution." 191 N.W.2d 185, 187 (1971). In 2015,

The *Vaello-Madero II* court explained that these cases have "suffered erosion by the passage of time and these changed circumstances,"[136] arguably decreasing their relevance and precedential value. The court in *Vaello-Madero I* reasoned that the exclusion of Puerto Rico residents from SSI benefits was "by no means rational."[137] Though the First Circuit of the U.S. Court of Appeals declined to follow the district court's analysis in *Vaello-Madero I*, it arrived at a similar conclusion: *Vaello-Madero* was simply not bound by *Harris* and *Gautier Torres*.[138] The court was "relieved" that one of the underlying factors in *Harris* and *Gautier Torres* were no longer required in its analysis.[139]

But embedded even within *Harris* and *Gautier Torres* is the proverbial precedential elephant in the room, that is, the standard of federal administration of the territories dictated by the Insular Cases since 1901. Just as *Schaller* and *Vaello-Madero* question the validity of *Harris* and *Gautier Torres* presently, *Harris* and *Gautier Torres* introduced doubts on the validity of the Insular Cases in the 1980s. In *Gautier Torres*, the Court, citing several of the Insular Cases, noted that "the District Court apparently acknowledged that Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it."[140] Had the plaintiff's Due Process claim been recognized, however, the Court acknowledged that it would have "meant that all otherwise qualified persons in Puerto Rico are entitled to SSI benefits, not just those who received such benefits before moving to Puerto Rico."[141]

Later in *Harris*, Justice Marshall's dissent stated that "[w]hile some early opinions of this Court suggested that various protections of the Constitution do not apply to Puerto Rico, the present validity of those decisions is questionable."[142] In this dissent, Justice Marshall bolstered his argument by

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the Supreme Court overruled this bigoted precedent in *Obergefell v. Hodges*, 576 U.S. 644, 647 (2015). Finally, *Korematsu v. United States* maintained that the arbitrary internment of Japanese Americans during World War II was a proper exercise of the United States' war powers. 323 U.S. 214, 223–24 (1944). *Korematsu* was recently functionally overruled by *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018).

[136] *Vaello-Madero II*, 956 F.3d at 17 (referring to the district court's decision).

[137] *Vaello-Madero I*, 356 F.Supp.3d at 214.

[138] *See Vaello-Madero II*, 956 F.3d at 17–18.

[139] *Id.* at 23.

[140] Califano v. Gautier Torres, 435 U.S. 1, 3 n.4 (1978) (citing Examining Board v. Flores de Otero, 426 U.S. 572, 596 (1976)).

[141] *Id.* at 3 n.4.

[142] Harris v. Rosario, 446 U.S. 651, 653 (1980) (Marshall, J., dissenting) (citing Brennan, J., concurring in judgment in Torres v. Puerto Rico, 442 U.S. 465, 475–76 (1979))(citations omitted). There are no accidents of history, and there is some poetic justice that it was Thurgood Marshall who casted doubt on the validity of the Insular Cases, specifically on *Downes v. Bidwell*, authored by Justice Brown. Justice Marshall famously and successfully

pointing to a concurrence issued in an earlier case by Justice William Brennan, who wrote:

> Whatever the validity of the old cases such as *Downes v. Bidwell* [], *Dorr v. United States* [], and *Balzac v. Porto Rico* [], in the particular hostorical [sic] context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's [sic].[143]

As discussed in *Schaller*, *Vaello-Madero*, *Harris*, and *Gautier Torres*, circumstances have changed significantly since 1901 that it is dubious whether case law reasoning that "differences of race, habits, laws, and customs of the people"[144] of the territories remain so unchanged as to warrant continual withholding of constitutional protections from those citizens. Perhaps it is time for the Insular Cases to be relegated to the same precedential value as *Plessy v. Ferguson*.

For now though, while the Supreme Court has upheld reasoning to justify discriminatory actions toward U.S. citizens residing in territories, the court's decision in *Schaller* offers a way to circumvent the Court's argument in both *Gautier Torres* and *Harris* for excluding territories from receiving SSI.[145] With SSI now potentially extended to both CNMI and Guam, *Schaller* provides some grounds for potential claimants in American Sāmoa and the U.S. Virgin Islands to further extend other means-tested federal benefit programs to these remaining territories.[146]

B. Reconsider Denial of Benefits for COFA Citizens

The paradigmatic shift ushered in by *Vaello-Madero* and *Schaller* prompts a reconsideration of the traditional justifications for barring COFA citizens and people from the Freely Associated States of the Marshall Islands, Micronesia, and Palau from most federal welfare programs in the United States. COFA citizens can live, work, and travel in the United States indefinitely as nonimmigrants, pursuant to agreements between their governments and the United States.[147] In 2020, an estimated 94,000 COFA

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argued on behalf of the plaintiffs in *Brown v. Board of Education*, and thus partially overturned *Plessy v. Ferguson*, another infamous case written by Justice Brown.

[143] *Torres*, 442 U.S. at 475–76 (Brennan, J., concurring).

[144] *Downes*, 182 U.S. at 282.

[145] *See* Schaller v. U.S. Soc. Sec. Admin., No. 18-00044, slip op. at 20 (D. Guam June 19, 2020).

[146] *See id.*

[147] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-491, COMPACTS OF FREE ASSOCIATION 5–8 (2020) [hereinafter GAO REPORT].

citizens lived in the United States and its territories,[148] with about twenty-six percent residing in Hawai'i.[149] Although COFA citizens pay federal and state taxes, the federal government and the state of Hawai'i deny them access to most welfare programs.

The *Schaller* court's refusal to validate the U.S. government's arguments that cost and tax status are legitimate bases to exclude similarly situated residents from federal benefits, however, invites a reconsideration of the reasons offered by Hawai'i state officials to justify barring COFA citizens from Medicaid. In particular, *Schaller* suggests that federal and state officials' justifications for excluding COFA citizens from Medicaid based on tax status and program costs may not be rational. The relationship between COFA citizens and the United States is essential to understanding why program costs and tax status justifications for barring COFA citizens from Medicaid are inherently suspect. Subsection 1 situates the colonial relationship between the United States and COFA citizens in its historical context. Subsection 2 details how and why COFA citizens were denied Medicaid benefits. Finally, subsection 3 argues that under *Schaller*, tax status and program costs are illegitimate bases for discrimination and questions whether more nefarious motivations drive the denial of benefits.

1. Historical Context

The relationship between COFA citizens and the United States is rooted in military imperialism.[150] The U.S. armed forces have used the Micronesian region for testing, training, and monitoring activities since the United States was given administering authority[151] over the region

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[148] *Id.* at 13. This estimate does have a range of error because the Census Bureau included COFA citizens' U.S.-born children and grandchildren under the age of eighteen in its counts of COFA migrants. *Id.* at 14 n.32. The Census Bureau estimated that the number of COFA citizens ranged from 89,171 to 99,627 people from 2013 to 2017. *Id.*

[149] *Id.* at 15–16.

[150] *See* Román & Simmons, *supra* note 25, at 482–87, 500–20; *see also* Marie Rios-Martinez, Comment, *Congressional Colonialism in the Pacific: The Case of the Northern Mariana Islands and its Covenant with the United States*, 3 SCHOLAR 41, 47 (2000) (explaining that President Harry Truman wanted the Marshall Islands, Micronesia, Palau, and the CNMI "because of the Islands' advantageous location in the Pacific").

[151] Under the trusteeship, nations considered to be trust territories were run by U.N. member-nations called "administering authorities." U.N. Charter art. 81. Among other objectives, the administering authority was supposed to "promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence . . . [and] encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. . . ." U.N. Charter art. 76(b)–(c).

following World War II.[152] Most egregiously, between 1946 and 1958, the U.S. government conducted nuclear testing in the Marshall Islands.[153] As part of the Nuclear Testing Program, the U.S. Department of Energy ("DOE")[154] conducted sixty-seven nuclear tests, including bomb-dropping, on the Marshall Islands.[155] One of the bombs, codenamed Castle Bravo, was the largest bomb the United States ever detonated, weighing fifteen megatons, and about one-thousand times more powerful than the bombs dropped on Hiroshima and Nagasaki.[156] The bomb "completely vaporized three islands on Bikini Atoll and left a mile-wide crater through the reef."[157] The Marshallese suffered burns and diseases associated with radiation exposure[158] because the blast spewed "deadly levels of radioactive fallout across the inhabited northern Marshall Islands."[159] The amount of radioactive energy the Marshallese were exposed to was "rough[ly] equivalent [to] 1.7 Hiroshima [blasts] every day for 12 years."[160]

In the months and years following the Nuclear Testing Program, the DOE studied the environmental and health-related effects of nuclear exposure.[161] The federal government noted that Micronesian women repeatedly gave birth to jellyfish babies and thyroid cancer rates increased considerably.[162] While U.S. officials maintain that the purpose of the

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[152] For a discussion of U.S. armed forces' historical and present use and abuse of the Micronesian region, see DAVIS, *supra* note 12.

[153] *Marshall Islands*, ATOMIC HERITAGE FOUND., https://www.atomicheritage.org/location/marshall-islands, (last visited Oct. 2, 2020).

[154] The DOE is an amalgamation of six historical programs, one of which was the Atomic Energy Commission ("AEC"). *The Institutional Origins of the Department of Energy*, U.S. DEP'T OF ENERGY, https://www.energy.gov/sites/prod/files/Origins-of-the-Department-of-Energy.pdf (last visited Oct. 2, 2020). The AEC led the Nuclear Testing Program, but the DOE subsequently took over the monitoring and evaluation when the department was established in 1977. *A Brief History of the Department of Energy*, OFFICE OF LEGACY MANAGEMENT, https://www.energy.gov/node/%20362173 (last visited Oct. 25, 2020). For clarity, this paper refers to both programs as the DOE.

[155] HAW. ADVISORY COMM., U.S. COMM'N. ON CIVIL RIGHTS, MICRONESIANS IN HAWAII: MIGRANT GROUP FACES BARRIERS TO EQUAL PROTECTION 10 (2019), https://www.usccr.gov/pubs/2019/08-13-Hawaii-Micronesian-Report.pdf; JULIAN AGUON, WHAT WE BURY AT NIGHT 19 (2008).

[156] DAVIS, *supra* note 12, at 53 ("Another indicator of the size of the Bravo bomb is that if a bomb of similar size were detonated over Washington, D.C., and the winds were blowing from the southwest, 90 percent of the populations of the District of Columbia, Baltimore, Philadelphia, and New York City would perish within three days.").

[157] *Id.*

[158] *Marshall Islands*, *supra* note 153.

[159] DAVIS, *supra* note 12, at 53.

[160] AGUON, *supra* note 155, at 19.

[161] *Id.* at 20–21, 23, 26; *Marshall Islands*, *supra* note 153.

[162] Seiji Yamada, *Cancer, Reproductive Abnormalities and Diabetes in Micronesia: the*

Nuclear Testing Program was to develop nuclear technology,[163] some Marshallese believe that they were used as "guinea pigs."[164] In an interview with attorney and scholar-activist Julian Aguon, the Mayor of Rongelap, an atoll in the Marshall Islands, confirmed that people believed "they were being used as subjects, like guinea pigs to be studied on [because] . . . [they] found out that some of [them] who were not part of the exposed population . . . were injected with chromium . . . [and] used as a comparison group with" those that had been exposed to radiation.[165] Many of the DOE's documents relating to the Nuclear Testing Program were destroyed in suspicious fires and blasts.[166]

Unsurprisingly, Micronesians sought a post-colonial future, and between 1978 and 1981, the people of the Marshall Islands, Micronesia, and Palau established constitutional governments.[167] The United States, however, refused to relinquish authority in the region.[168] Thus, in 1986 and 1994, the United States entered into the Compacts of Free Association ("Compacts")

Effect of Nuclear Testing, 11 PAC. HEALTH DIALOGUE, no. 2, 2014, at 216, 218 ("Marshallese women reported giving birth to many deformed fetuses. A type of abnormal birth, probably representing hydatidiform moles, are called 'jellyfish babies' and described by Marshallese women as looking like a mass of grapes."); *NCI Dose Estimation and Predicted Cancer Risk for Residents of the Marshall Islands Exposed to Radioactive Fallout from U.S. Nuclear Weapons Testing at Bikini and Enewetak*, NAT'L CANCER INST., https://dceg.cancer.gov/research/how-we-study/exposure-assessment/nci-dose-estimation-predicted-cancer-risk-residents-marshall-islands, (last visited Oct. 2, 2020).

[163] *See Marshall Islands*, *supra* note 152.

[164] AGUON, *supra* note 155, at 20, 23, 31.

[165] *Id.* at 26.

[166] A Marshallese Senator explained these convenient accidents:

If you ask for hard copy records of initial [DOE] records on the Marshalls, you'll find out that at least half a dozen fires are associated with these records . . . [T]hree fires on Majuro just happened to blow up DOE records, hospital records, and other records of the government pertaining to the [Nuclear Testing Program].

Id. at 37–38. The United States admits that there are medical records and NTP-related documents, but officials refuse to release them, citing national security concerns. *Id.*

[167] GAO REPORT, *supra* note 147, at 4. It must be noted that this was not a smooth process. Micronesians, Palauans, and the Marshallese faced significant obstacles, and the United States repeatedly stalled the process. Jon Hinck, Comment, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association*, 78 CALIF. L. REV. 915, 919–24 (1990).

[168] HAW. ADVISORY COMM., *supra* note 155, at 5–6. One of many sticking points for the U.S. government was that Palauans advocated for a nuclear-free constitution, and the United States opposed article XIII, section 7, which prevented foreign countries from benefiting from the Palauan government's eminent domain power. Hinck, *supra* note 167, at 924–25. The U.S. government also fought a provision that required seventy-five percent of Palauan voters to approve of international agreements that would allow nuclear weapons and other hazardous substances to be brought to Palau. *Id.*

with the Marshall Islands, Micronesia, and Palau.[169] The Compacts created a new type of quasi-colonial territory: the associated state.[170] While the Marshall Islands, Micronesia, and Palau are considered independent nations under the Compacts, the associated states' economies are dependent on U.S. aid and military spending. The United States also has exclusive military use of the islands,[171] and Marshallese, Micronesians, and Palauans can live, work, and travel in the United States and its territories indefinitely with nonimmigrant status.[172]

Given the health effects of the Nuclear Testing Programs, an underlying purpose of the Compacts was to ensure that people of the Marshall Islands, Micronesia, and Palau had access to quality health care.[173] Initially, COFA

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[169] In 1986, the Marshall Islands and Micronesia signed the first Compact with the United States. Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (codified as amended at 48 U.S.C. §§ 1901–1912, 2001–2004). Later in 1986, Palau also signed the second Compact with the United States. Compact of Free Association Act of 1986, Pub. L. No. 99-658, 100 Stat. 3672 (codified as amended at 48 U.S.C. § 1931). In 2003, the Compacts were amended and consolidated into one Compact (Compact II). Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720 (codified in 48 U.S.C. § 1921(a)–(h)).

[170] Román & Simmons, *supra* note 25, at 482 ("The United States further fostered its dominion over the territories and at the same time eluded the label of colonizer by creating the illusion of sovereignty and thus freedom for the territories' residents. The United States achieved its goal by using the hegemonic tool that is described here as the euphemisms for sovereignty through terms such as 'commonwealth,' 'freely associated state,' 'republic,' and 'autonomous territory.' . . . [T]hese terms are used to grant the illusion to the international community of self-determination. The reality is often quite different. . . . Even members of Congress have noted, from time to time, that Puerto Rico and other United States territories remain in the firm grip of United States colonialism despite their new status.") (footnotes omitted); *Native Stories Podcast*, *supra* note 15, at 19:16 ("[W]e became a U.S. colony, but of course the United States isn't supposed to have colonies. . . . In the sixties, the United Nations put out Resolution 1514 which says, 'you can't have colonies anymore give them back to the people,' so that's when they started developing the idea of freely associated states like we can't . . . colonize you, but we can get you to kind of self-colonize and choose to follow us. And that's when things like the Solomon Report . . . were written. That was commissioned by President JFK and written by Anthony Solomon and it's a blueprint for how to essentially give the Micronesian region so much support in terms of building our infrastructure and building up the people that we have no choice but to continue relying on you.").

[171] GAO REPORT, *supra* note 147, at 1.

[172] *Id.* at 4–8. The initial Compacts and Compact II also required the United States to provide economic assistance to the Marshall Islands, Micronesia, and Palau until 2023. *Id.* at 5. The 1986 COFAs provided $2.6 billion to the Marshall Islands and FSM from 1987 to 2003, and $574 million to Palau from 1995 to 2005. *Id.*

[173] Kevin Morris, Comment, *Navigating the Compact of Free Association: Three Decades of Supervised Self-Governance*, 41 U. HAW. L. REV. 384, 403–04 (2019) (citing Keola K. Diaz, The Compact of Free Association (COFA): A History of Failures 40 (M.A.

citizens were eligible for Medicaid in the fifty states and the District of Columbia because they "permanently resid[ed] under color of law" in the United States.[174] During Compact negotiations, however, U.S. negotiators misled Marshallese, Micronesian, and Palauan negotiators about the contents of the "the final document, leading to the denial of [COFA citizens'] implied rights in the [United States], including medical care."[175] Instead of explicitly codifying COFA citizens' healthcare access, the Compacts tied COFA citizens' healthcare to their nonimmigrant status.[176] This designation had dire consequences in 1996 when Congress slashed federal welfare programs with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act.[177]

2. *Post-1996 Access to Federal Welfare Benefits*

Under the 1996 Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), COFA citizens lost automatic access to most federal welfare benefits, including Medicaid, because they are considered nonimmigrants.[178] However, PRWORA allows states to

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Portfolio Project, University of Hawai'i at Manoa) (on file with the Hamilton Library, University of Hawai'i at Manoa).

[174] HAW. ADVISORY COMM., *supra* note 155, at 22 (quoting Personal Responsibility and Work Opportunity Act (PRWORA) of 1996, Pub. L. No. 104-193); *see also* Gregory T.W. Rosenberg, Article, *Alienating Aliens: Equal Protection Violations in the Structures of State Public-Benefit Schemes*, 16 U. PA. J. CONST. L. 1417, 1424 n.37 (2014) (providing that permanently residing under color of law "originated as a category in a 1972 amendment to the Social Security Act" and that "[t]he term generally refers to asylees, persons paroled into the United States, 'and miscellaneous others who remain in the United States with the knowledge and permission of the federal government and whom the federal government does not intend to remove'") (internal brackets and citations omitted).

[175] Morris, *supra* note 173.

[176] *See id.*

[177] 8 U.S.C. § 1611.

[178] PRWORA divided welfare into two categories: federal public benefits and state public benefits. Rosenberg, *supra* note 174, at 1425–26. Medicaid is considered a federal public benefit. *Id.* PRWORA also classified aliens into three groups: "(1) 'qualified aliens'; (2) 'nonimmigrants'; and (3) . . . 'undocumented aliens'[]." *Id.* at 1426. PRWORA defines a "qualified alien" as an alien who is lawfully admitted under various provisions of the Immigration and Nationality Act and the Refugee Education Assistance Act. 8 U.S.C. § 1641(b). A "nonimmigrant" under the PRWORA is someone who meets the definition of a nonimmigrant under the Immigration and Nationality Act. 8 U.S.C. § 1621(a)(2); *see also* Rosenberg, *supra* note 174, at 1427 n.57 ("This definition covers a wide range [of] aliens who are present in the United States under color of law, generally on a temporary basis.") (first citing 8 U.S.C. § 1101(a)(15) (2012); then citing 8 C.F.R. § 214.1(a)(2)). Finally, "[u]ndocumented aliens, the third category of aliens under PRWORA, lack a recognized legal status by the federal government and thus do not meet the definition of either qualified

determine the eligibility of nonimmigrants for certain programs, including Medicaid, as long as the state fully funds the nonimmigrants' benefits.[179] Hawai'i initially chose to provide state-funded Medicaid programs to nonimmigrants through this provision.[180] In Hawai'i, COFA citizens were eligible for the same Medicaid benefits as U.S. citizens under the state's healthcare coverage programs, such as QUEST, QExA, QUEST-Net, QUEST-ACE, fee-for-service, and SHOTT programs.[181]

But, in the wake of the 2008 financial crisis, COFA citizens were transferred to Basic Health Hawai'i ("BHH"),[182] a subpar medical program that provided only limited care.[183] In response, severely ill COFA citizens sued the Hawai'i Department of Human Services ("HDHS").[184] In *Korab v. Koller*, the plaintiffs argued that BHH violated the Equal Protection Clause of the Fourteenth Amendment because the program provided fewer medical benefits than the state's Medicaid program for U.S. citizens and qualified aliens.[185] The plaintiffs later sought to enjoin HDHS from excluding COFA citizens under the state Medicaid program.[186] Applying strict scrutiny review, the U.S. District Court for the District of Hawai'i agreed and granted the preliminary injunction.[187]

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aliens or nonimmigrants." *Id.* at 1427.

[179] 8 U.S.C. § 1622(a).

[180] Korab v. Fink, 797 F.3d 572, 574 (9th Cir. 2014).

[181] Korab v. Koller, No. 10-00483, 2010 WL 4688824, at *2 (D. Haw. Nov. 10, 2010).

[182] *Hawaii noncitizens get new insurance plan*, PAC. BUS. NEWS (July 28, 2009, 12:26 PM), https://www.bizjournals.com/pacific/stories/2009/07/27/daily20.html.

[183] *Korab*, 2010 WL 4688824, at *2 ("Under BHH, transportation services are excluded and patients can receive no more than ten days of medically necessary inpatient hospital care per year, twelve outpatient visits per year, and a maximum of four medication prescriptions per calendar month. Further, BHH covers dialysis treatments as an emergency medical service only, and the approximate ten to twelve prescription medications dialysis patients take per month are not fully covered. BHH also does not provide a comprehensive program for cancer treatments, causing cancer patients to exhaust their allotted doctors' visits within two to three months. Finally, COFA Residents in need of an organ transplant were removed from SHOTT (the State's organ and tissue transplant program), and COFA Residents may not enroll in programs covering long-term care services.") (citations omitted)).

[184] *Id.* at *1.

[185] *Id.* The term "person," as used in the Fourteenth Amendment, includes both lawfully admitted immigrants and U.S. citizens. Matthews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.").

[186] Korab v. Koller, No. 10-0048 JMS/KSC, 2010 WL 5158883 (D. Haw. Dec. 13, 2010), *vacated*, 797 F.3d 572 (2014).

[187] *Id.* at *4-5.

On appeal, the Ninth Circuit was split, with each judge filing a separate opinion,[188] and the majority vacated the District Court's judgment.[189] Applying rational basis review, the majority found that Hawai'i did not have to provide COFA citizens with the same Medicaid plan as U.S. citizens because the state was following the distinction set forth by Congress, and Congress' plenary power enables it to "creat[e] legitimate distinctions either between citizens and aliens or among categories of aliens and allocat[e] benefits on that basis."[190] The majority, however, did not discuss, analyze, or justify these distinctions between COFA citizens, other immigrants, and U.S. citizens. The dissent felt that the majority opinion "[ran] afoul of bedrock equal protection doctrine dating back at least to *Brown v. Board of Education*."[191]

3. Rational Bases for Discrimination?

Today, COFA citizens in Hawai'i and across the nation remain without equal access to health care.[192] However, neither Congress nor the courts have answered the question left open in *Korab v. Fink*: what is the rational basis for barring COFA citizens from Medicaid?[193] Hawai'i government officials have cited cost and tax status as reasons for disenrolling COFA citizens from Medicaid programs. But are these really rational bases to discriminate? *Schaller* invites us to question the pragmatic legitimacy of the tax status and program cost justifications.

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[188] Judge Margaret McKeown wrote the majority opinion, Judge Jay Bybee concurred, and Judge Richard Clifton dissented. Korab v. Fink, 797 F.3d 572, 572 (9th Cir. 2014).

[189] *Id.* at 584.

[190] *Id.* at 579, 583–84.

[191] *Id.* at 599–600 (Clifton, J., dissenting).

[192] *Health Care for COFA Citizens*, ASIAN PAC. ISLANDER AM. HEALTH F., 1 (Aug. 2019), https://www.apiahf.org/wp-content/uploads/2016/01/2018.08.02_Health-Care-for-COFA-Citizens_Factsheet-V.4.pdf.

[193] Another issue that has not been settled is whether to apply strict scrutiny or rational basis review. Alienage classifications are inherently suspect. Rosenberg, *supra* note 174, at 1421. Thus, in *Korab*, the U.S. District Court applied strict scrutiny, requiring the state to show that "their classification 'advance[s] a compelling state interest by the least restrictive means available.'" *Korab*, No. 10–00483, 2010 WL 4688824, at *12 (D. Haw. Nov. 10, 2010) (citing Bernal v. Fainter, 467 U.S. 216, 219 (1984)). On appeal, the Ninth Circuit panel applied rational basis review in line with *Mathews v. Diaz*, 426 U.S. 67 (1976). The debate over the proper standard of review is, however, beyond the scope of this note. *Korab*, 797 F.3d at 578. For a discussion of the standard of review dispute, see Rosenberg, *supra* note 174, at 1420–23.

a) *Tax Status*

Hawaiʻi officials have touted tax status as a legitimate reason to withhold benefits from COFA citizens.[194] However, COFA citizens do pay federal, state, and local taxes.[195] In *Schaller*, the court found it illogical and irrational for benefits to be given to CNMI residents but withheld from Guam residents when neither pay federal taxes.[196] It follows that it is similarly irrational to withhold benefits from COFA citizens but give benefits to U.S. citizens, when both groups pay taxes.

b) *Program Costs*

High program costs were cited as another reason to bar COFA citizens from Hawaiʻi's Medicaid programs. After the 2008 financial crisis, the state government decided to disenroll an estimated 7,500 COFA citizens from Medicaid and transfer them to a subpar program.[197] When announcing the disenrollment, HDHS Director Lillian Koller explained that the state expected to save $15 million annually by removing COFA citizens from Medicaid.[198] She also argued that Congressional inaction, not state policymakers, was to blame for the disenrollment.[199]

Koller's critique of the federal government was not entirely off-base. Twenty-seven bills that would have reinstated COFA citizens' eligibility

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[194] Former Hawaiʻi Governor Neil Abercrombie stated that "[COFA citizens] come here, they have no job, they don't even have to have a job, they don't have to pay any taxes, if they get enough to get airfare they can go from the airport to Queen's Hospital" and that he had a "fiduciary responsibility" to taxpayers to appeal the *Korab* injunction. Seiji Yamada, *Hawaii's Elite Excluded Micronesians From Medicaid*, HONOLULU CIVIL BEAT (Apr. 17, 2019), https://www.civilbeat.org/2019/04/hawaiis-elite-excluded-micronesians-from-medicaid/#:~:text=Abercrombie%2C%20worked%20to%20reinstate%20COFA,Former%20Gov.&text=The%20state%2C%20however%2C%20appealed%20to,exclude%20COFA%20migrants%20from%20Medicaid.

[195] GAO REPORT, *supra* note 147, at 39; *see also* Susan K. Serrano, *The Human Costs of "Free Association": Socio-Cultural Narratives and the Legal Battle for Micronesian Health in Hawaiʻi*, 47 J. MARSHALL L. REV. 1377, 1378–79 (2014) (noting that PRWORA made COFA residents ineligible for many federal benefits "as 'unqualified aliens,' even though their tax dollars were supporting these programs").

[196] Schaller v. U.S. Soc. Sec. Admin., No. 18-00044, slip op. at 11 (D. Guam June 19, 2020).

[197] PAC. BUS. NEWS, *supra* note 182.

[198] *Id.*

[199] *New Program to Offer Health Coverage for Non-Citizen Residents*, THE GARDEN ISLAND (Dec. 23, 2009), https://www.thegardenisland.com/2009/12/23/hawaii-news/new-program-to-offer-health-coverage-for-non-citizen-residents/.

for Medicaid died in Congress.[200] Moreover, in recognition of the financial strain that the Compacts placed on state economies, the federal government has provided $30 million per year since 2003 in Compact Impact Aid to be shared among states that COFA citizens reside in, and up to $3 million in discretionary funding to be split among Guam, Hawai'i, the CNMI, and American Sāmoa.[201] Hawai'i also receives $11 to $13.9 million in Compact Impact Aid and $36.6 million from COFA citizens' taxes and fees annually.[202] Nevertheless, Hawai'i spends $246 million per year to provide health care, education, and other public services for COFA citizens.[203] The state would need an additional $196 million from the federal government to close this gap.[204] This contradicts the U.S. government's arguments in *Vaello-Madero* and *Schaller* that an influx of Medicaid funds would substantially disrupt Hawai'i's economy. On the contrary, Hawai'i's economy is suffering because of the absence of these funds.

Thus, *Schaller* prompts a reconsideration of cost as a legitimate reason to effectively condemn a group of terminally ill people to death.[205] While recognizing that the government has a legitimate interest in protecting the "fiscal integrity" of its programs, the *Schaller* court refused to accept that saving money alone justified discrimination.[206] The court then assessed the cost of benefits in comparison with the program budget, and found an overall budget increase of 0.3% to be "minimal" and not a justification for "unequal treatment."[207]

Under *Schaller*'s reasoning, the cost of covering COFA citizens is similarly negligible. The federal government spent about $360 billion on

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[200] *See, e.g.*, Covering our FAS Allies Act, S. 1391, 115th Cong. (2017); Restoring Medicaid for Compact of Free Association Migrants Act of 2015, S. 1301, 114th Cong. (2015); Medicaid Restoration for Citizens of Freely Associated States Act of 2011, S. 1504, 112th Cong. (2011).

[201] *See* 48 U.S.C. § 1921c(e)(10); HAW. ADVISORY COMM., *supra* note 155, at 12–13.

[202] DEP'T OF BUS., ECON. DEV., & TOURISM, RSCH. & ECON. ANALYSIS DIV., COFA MIGRANTS IN HAWAII 4 (2020), https://files.hawaii.gov/dbedt/economic/reports/COFA_Migrants_in_Hawaii_Final.pdf [hereinafter DBEDT REPORT]; HAW. ADVISORY COMM., *supra* note 155, at 12–13.

[203] *Id.*

[204] *Id.*

[205] Mortality rates of COFA citizens increased by twenty-one percent after the state of Hawai'i barred them from Medicaid. Timothy Halliday, *The Impact of the Medicaid Expiration on COFA Migrants and COVID19*, UHERO BLOG (July 27, 2020), https://uhero.hawaii.edu/the-impact-of-the-medicaid-expiration-on-cofa-migrants-and-covid19/.

[206] Schaller v. U.S. Soc. Sec. Admin., No. 18-00044, slip op. at 12 (D. Guam June 19, 2020).

[207] *Id.* at 13.

Medicaid expenditures,[208] and Hawai'i spent over $2.3 billion on the program in 2017.[209] If the federal government covered the costs HDHS sought to save by cutting Medicaid coverage for COFA migrants in Hawai'i, its annual budget would have increased by only 0.004%.[210] Similarly, if Hawai'i had covered the costs, its total program budget would have increased by only 0.65%.[211] It is irrational to think that these negligible increases would have impacted the state's fiscal integrity.

Moreover, Congress anticipated the high economic costs associated with the U.N. Trusteeship program and the Compacts. In a 1947 hearing, Senator Bourke Hickenlopper questioned whether the government was prepared to take on these costs in the future:

> [In] 20 or 25 years the population of those islands is going to be a tremendous factor; and, personally, I think we are going to have to be prepared to meet it, and probably should be thinking about it now because they are going around with health measures . . . I think it is one of the practical problems we are going to have to meet, although not now. I hope we are thinking about meeting it eventually. . . . [W]e look at the fine benefits which we get from security, but there are some human problems we are going to have to take on, and they will be sizable 20 years from now.[212]

The "human problems" Senator Hickenlooper alludes to are likely in reference to the health effects of the Nuclear Testing Program in the Micronesian region.[213] The federal government plausibly knew that

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[208] *National Health Expenditures by Type of Service and Source Funds CY 1960-2018*, CTRS. FOR MEDICARE & MEDICAID SERVS. (2018), https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical [hereinafter *National Health Expenditures*].

[209] *Total Annual Medicaid & CHIP Expenditures by State or Territory*, MEDICAID.GOV (2017), https://www.medicaid.gov/state-overviews/scorecard/annual-medicaid-chip-expenditures/index.html [hereinafter *Medicaid Expenditures*].

[210] HDHS' estimated annual savings ($15,000,000) divided by the Federal government's total budget ($360,000,000,000) = 0.0041667%. *Id.*; PAC. BUS. NEWS, *supra* note 182; *National Health Expenditures*, *supra* note 208.

[211] HDHS' estimated annual savings ($15,000,000) divided by Hawai'i's total Medicaid budget ($2,300,000,000) = 0.6521739%. PAC. BUS. NEWS, *supra* note 182; *Medicaid Expenditures*, *supra* note 209.

[212] *Trusteeship Agreement for the Territory of the Pacific Islands: Hearing on S.J. Res. 143 Before the S. Comm. on Foreign Rels.*, 80th Cong. 9–11 (1947).

[213] The hearing transcript records the senators talking in coded terms, but the conversation centers around the breadth of the United States' liberty to use the islands for military purposes and the effects of diet changes for indigenous people in the Micronesian region. *Id.* The Nuclear Testing Program obliterated local agriculture because the soil was, and still is, contaminated with nuclear radiation. *See* Laura Geggel, *The Marshall Islands Are 10 Times More 'Radioactive' than Chernobyl*, LIVE SCIENCE (July 16, 2019),

exposing people to radiation would have long-term health impacts, evidenced by the fact that the DOE studied exposed communities for years, even after they left the Micronesian region, under the guise of providing health care[214] through a special medical program.[215] Although the federal government denies it,[216] there are multiple allegations that these programs are continuations of human research studies.[217] A Rongelapese woman

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https://www.livescience.com/65949-marshall-islands-more-radioactivity-chernobyl.html. Diet change in the Micronesian region was a direct effect of the Nuclear Testing Program. DBEDT REPORT, *supra* note 202, at 8–9. Thus, the senators' questions about military use and diet change cogently refer to the nuclear experiments. *See Trusteeship Agreement for the Territory of the Pacific Islands*, *supra* note 212.

[214] *See* AGUON, *supra* note 155, at 27–30. One Rongelapese man recalled receiving medical attention from the DOE every year, and DOE doctors even tracked him down while he was attending college in New Mexico and took him to the Brookhaven National Laboratory in New York to run tests on him. *Id.* at 28–29.

[215] *The Legacy of U.S. Nuclear Testing and Radiation Exposure in the Marshall Islands*, U.S. EMBASSY IN THE REPUBLIC OF THE MARSHALL ISLANDS (Sept. 15, 2012), https://mh.usembassy.gov/the-legacy-of-u-s-nuclear-testing-and-radiation-exposure-in-the-marshall-islands/.

[216] *See* Off. of Env't. Health, Safety & Sec., *International Health Studies and Activities*, U.S. DEP'T OF ENERGY, https://www.energy.gov/ehss/services/worker-health-and-safety/international-health-studies-and-activities (last visited Nov. 17, 2020).

[217] *Id.* President Clinton established the Advisory Committee on Human Radiation Experiment ("ACHRE") to address allegations that the United States purposefully conducted nuclear research on humans. RUTH R. FADEN, ET AL., ADVISORY COMM. ON HUM. RADIATION EXPERIMENTS, ADVISORY COMMITTEE ON HUMAN RADIATION EXPERIMENTS: FINAL REPORT 5–6 (1995) [hereinafter ACHRE FINAL REPORT]. The report found that U.S. officials saw the Marshall Islands as the "ideal site[] for the government's primary missions—mining uranium and detonating atomic and hydrogen bombs" and that the Marshall Islands "became laboratories for studying radiation damage to humans." *Id.* at 563. The ACHRE was able to identify "nearly 4,000 human radiation experiments sponsored by the federal government between 1944 and 1974[,]" and there was "little evidence" that the government informed or obtained the consent of these test subjects. *Advisory Committee on Human Radiation Experiments - Executive Summary*, BIOETHICS ARCHIVE, GEO. UNIV., https://bioethicsarchive.georgetown.edu/achre/final/summary.html (last visited Oct. 12, 2020) [hereinafter *ACHRE Executive Summary*]. ACHRE also found that human test subjects might have had "unrealistic expectations . . . of direct medical benefit from participating in research." *Id.* ACHRE recommended that the federal government personally apologize and financially compensate people subjected to radiation experiments, or their families, in cases where the government hid information to avoid legal liability, as well as cases where there was no direct medical benefit from the experiments and people were harmed. *Id.* Although these findings are damning, ACHRE may have merely uncovered the tip of the proverbial iceberg because the Committee only had limited access to records and was short on time. *See id.* The Committee was not able to access all the records of human radiation experiments because "records . . . had been irretrievably lost or simply could not be located. The Department of Energy told the Committee that all the records of the . . . Atomic Energy Commission [] had been destroyed--mainly during the 1970s, but in some cases as

expressed her frustration with the special medical care offered by the federal government:

> Till now, they use us as guinea pigs. . . . They fly us [to Hawai'i] just for the thyroid. Other cancers, no. They get us to physically exam but not treat us . . . They knew that inside there was a problem but still they had to let the cancer grow so they know how many years we have to live with the cancer, but they don't treat . . . They knew how long we had to live and then watched us die. So they get educated from learning, from using us as guinea pigs.[218]

In addition to this special medical program for gravely ill Marshallese, the United States has also paid for land restoration and health care through the Nuclear Claims Tribunal and a Tort Claims Settlement Agreement[219] and funds an agriculture program in the Marshall Islands[220] despite the land's radioactivity.[221] Since the United States has committed substantial funding to treating people for the anticipated effects of nuclear exposure, it seems irrational for COFA citizens in Hawai'i to be denied much needed health care based on a 0.004% budget increase.

Thus, we return to our original question: what are the legitimate distinctions that Congress drew between COFA citizens and U.S. citizens, or between COFA citizens and people born in U.S. insular possessions who

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late as 1989." ACHRE FINAL REPORT, *supra*, at 8. This supports the Marshallese Senator's allegation that the United States intentionally destroyed records of nuclear testing. *See* AGUON, *supra* note 155, at 37–38. ACHRE further noted that "only fragmentary data was locatable" for most human experiments, so "the identity of subjects and the specific radiation exposures involved were typically unavailable." *ACHRE Executive Summary*, *supra*. Finally, ACHRE had only fifteen months to complete the study, so "it was impossible for the Committee to review all these experiments, nor could [it] evaluate the experiences of countless individual subjects." *Id.*

[218] AGUON, *supra* note 155, at 30.

[219] The first Compact set up the Marshall Islands Nuclear Claims Tribunal ("NCT") to pay for medical care associated with nuclear exposure in the Marshall Islands. Compact of Free Association Act of 1985, Pub. L. No. 99-239; Davor Pevec, *The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewatak People*, 35 DENVER J. OF INT'L L. & POL'Y 221, 231–239 (2006). The second Compact ("Compact II") contained a settlement agreement for nuclear-related tort claims against the U.S. government. *The Legacy of U.S. Nuclear Testing and Radiation Exposure in the Marshall Islands*, U.S. EMBASSY IN THE REPUBLIC OF THE MARSHALL ISLANDS (Sept. 15, 2012), https://mh.usembassy.gov/the-legacy-of-u-s-nuclear-testing-and-radiation-exposure-in-the-marshall-islands/. The NCT, however, was exhausted in 2009, and Compact II significantly reduced aid money to the Marshall Islands, Micronesia, and Palau. *Id.*

[220] Press Release, Tanya Harris Joshua, U.S. Dep't of the Interior, Interior Announces $550,000 in Grant Assistance for Enewetak Atoll Food and Agriculture Program (last updated June 17, 2020), https://www.doi.gov/oia/Interior-Announces-$550,000-in-Grant-Assistance-for-Enewetak-Atoll-Food-and-Agriculture-Program.

[221] DAVIS, *supra* note 12, at 89.

reside in the United States? *Schaller* suggests that tax status and program cost arguments are illegitimate.[222] Is it that Congress and the State of Hawai'i, like former Secretary of State and National Security Advisor Henry Kissinger, just do not "give[] a damn?"[223] Are the interests of the U.S. armed forces served by barring COFA citizens from lifesaving treatments? We suggest that they are. These illegitimate distinctions are essential to excluding people from medical care that may expose the human costs of American imperialism.

V. CONCLUSION

Schaller represents a long overdue shift in an under-examined area of federal law and a framework for pushing back on discriminatory state law in Hawai'i. The Insular Cases are discriminatory and should be relegated to the past. It is time for the United States to stop treating the territories and associated states as playgrounds for its armed forces.

Since the District Court of Guam ruled in *Schaller*, two steps forward have been taken to urge the United States to reconsider and restructure its treatment of residents in the territories. First, on August 3, 2020, another federal judge held that denial of federal means-tested benefits solely because of residency in a U.S. territory—in this case, denial of SSI, SNAP, and Medicare Part D Low-Income Subsidy to residents of Puerto Rico—violated the plaintiffs' due process rights to equal protection.[224] An appeal was subsequently filed before the First Circuit on October 2, 2020. News coverage of *Peña-Martínez* reported that, if the appeal was unsuccessful, the U.S. government is expected "to take it as far as the U.S. Supreme Court given the millions of dollars at stake."[225]

The truth of this speculation was eventually realized on September 9, 2020, when the United States filed for a petition for a writ of certiorari to the Supreme Court, contesting the First Circuit's decision in *Vaello-*

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[222] *See* Schaller v. U.S. Soc. Sec. Admin., No. 18-00044, slip op. at 11–12 (D. Guam June 19, 2020).

[223] Former U.S. Secretary of the Interior Walter Hickel reported that U.S. Secretary of State and former National Security Advisor Henry Kissinger stated that "[t]here are only 90,000 people out there. Who gives a damn?" in reference to the exposure and displacement of Marshallese as a result of the nuclear testing. AGUON, *supra* note 155, at 21 (citing WALTER J. HICKEL, WHO OWNS AMERICA? (1971)).

[224] *Peña Martínez v. U.S. Dep't of Health & Hum. Servs.*, No. 18-01206-WGY, 2020 WL 4437859, at *23 (D.P.R. Aug. 3, 2020).

[225] Dánica Coto, *Judge: 'Discriminatory' to Deny Puerto Rico Access to US Aid*, ASSOCIATED PRESS (Aug. 3, 2020), https://apnews.com/article/puerto-rico-caribbean-u-s-news-courts-latin-america-bee8ae96cb6a466f966a2a3a229cf9f0.

Madero. As of December 20, 2020, the Court has not yet ruled on the *Vaello-Madero* petition. With *Schaller's* appeal in the Ninth Circuit, the *Peña-Martinez* appeal in the First Circuit, and the *Vaello-Madero* petition before the Supreme Court, it is quite possible that these diligent challenges will finally bring this long overdue discussion to the forefront of American jurisprudence.

Curating the Future of Street Art: A Closer Look into the Implications of *Castillo v. G&M Realty, Limited Partnership* in Hawai'i

Staff*

I. INTRODUCTION

On the corner of South King and Kaheka Street in downtown Honolulu sits a two-story white building with a metal awning. As of early June 2020, the seemingly mundane building has been transformed into an eye-catching canvas as murals adorn the makai-facing and 'Ewa-facing walls of BAIT, one of the building's storefronts.[1] A tribute to the Black Lives Matter movement,[2] the 'Ewa-side mural depicts a series of fists raised in the air while the makai-facing spread features portraits of Malcom X and Dr. Martin Luther King Jr. surrounded by the words "END RACiSM!"[3] Nicky James is among the group of artists who curated and executed the artwork in solidarity with the movement.[4] James, known to many as Olboy Melon or Melon James,[5] is a Chicago native and a self-proclaimed "graffiti

* The Editorial Board thanks Kelly Kwan, Tyler Simpson, and Joe Udell for their fine research and preparation of this note.

[1] BAIT Honolulu (@bait.honolulu), INSTAGRAM, https://www.instagram.com/bait.honolulu/ (last visited Sept. 2, 2020).

[2] It is a difficult task to try to incorporate all the complexities of the Black Lives Matter movement into a single footnote. "#BlackLivesMatter was founded in 2013 in response to the acquittal of Trayvon Martin's murderer. Black Lives Matter Global Network Foundation, Inc. is a global organization in the US, UK, and Canada, whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes. By combating and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy, we are winning immediate improvements in our lives." *About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ (last visited Oct. 24, 2020). As many were witness to the larger protest movement in response to the unjustified killing of George Floyd in May 2020, the BAIT mural was a form of such protest. The systemic racism that permeates our nation and contributes to the lack of accountability seen in a long series of heinous crimes against African-Americans and Indigenous people of color must be disrupted. The authors of this note encourage readers to continue staying educated and speaking out against behavior that perpetuates this injustice.

[3] BAIT, *supra* note 1.

[4] The other artists included Jack Soren (@jacksoren), Mark Visaya (@dev.vision), Dropdeadgrace (@dropdead.grace), and Rayden (@_rydyr). *Id.*

[5] MelonJames (@olboy_melon), INSTAGRAM, https://www.instagram.com/olboy_melon/ (last visited September 2, 2020).

writer"[6] who moved to Hawai'i in 2001 with the Navy.[7] The recent Black Lives Matter tribute and murals created for the Pow! Wow! Hawai'i series, an annual art and music festival in Kaka'ako,[8] contribute to urban Honolulu's growing identification as a center for art, much of which is found on commercial and residential buildings. While events like Pow! Wow! give artists like James the space to create without formally owning their canvases (the buildings upon which they are painted), legal recourse for artists if their work is destroyed has long-been nonexistent.

The Visual Artists Rights Act of 1990 (VARA) recognizes the "moral rights" of artists and protects visual art of "recognized stature" from destruction.[9] Until recently, the protective strength of VARA had not been tested in courts by virtue of it being a rarely litigated section of copyright law.[10] In early 2020, however, the range of available remedies for James and other Hawai'i artists if their work is destroyed may have suddenly expanded with the recent Court of Appeals for the Second Circuit decision in *Castillo v. G&M Realty, Limited Partnership*.[11]

In *Castillo*, the issue before the court was whether destruction of aerosol artwork constituted a violation of VARA.[12] The District Court for the Eastern District of New York awarded the plaintiffs $6.75 million in damages.[13] The Second Circuit affirmed the award and found no error in the determination that the defendant, a real estate developer, acted out of "pure pique and revenge" after whitewashing the plaintiffs' murals on the walls of a warehouse.[14]

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[6] *See* Dimitri Ehrlich & Gregor Ehrlich, *Graffiti in its Own Words*, N.Y. MAG. (June 22, 2006), https://nymag.com/guides/summer/17406/; *The Words: A Graffiti Glossary*, ART CRIMES: THE WRITING ON THE WALL, https://www.graffiti.org/faq/graffiti.glossary.html (last visited Nov. 13, 2020) (noting that a "writer" is a [p]ractitioner in the art of graffiti"); Kathy with a K, *Melon James Olboy Melon Chicago Hawaii Street Art Graffiti (2020)*, YOUTUBE at 2:05 (May 7, 2020), https://www.youtube.com/watch?v=ACHInlOPjy0.

[7] Kathy with a K, *supra* note 6 at 2:40.

[8] Pow! Wow! Hawai'i, http://www.powwowworldwide.com/festivals/hawaii (last visited September 2, 2020).

[9] *See* Castillo v. G&M Realty, L.P., 950 F.3d 155, 163 (2d Cir. 2020), *cert. denied*, 2020 U.S. LEXIS 4495 (2020); *see* Visual Artists Rights Act, 17 U.S.C. § 106A.

[10] *See Protest Art Fate Tied to Obscure, Rarely Litigated Copyright Law*, BLOOMBERG LAW (July 15, 2020), https://news.bloomberglaw.com/ip-law/protest-art-fate-tied-to-obscure-rarely-litigated-copyright-law.

[11] *Castillo*, 950 F.3d at 155.

[12] *Id.* at 162.

[13] *See Castillo*, 950 F.3d at 164; Alan Feuer, *Graffiti Artists Awarded $6.7 Million for Destroyed 5Pointz Murals*, N.Y. TIMES (FEB. 12, 2018), https://www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html.

[14] *Castillo*, 950 F.3d at 172.

The purpose of this note is to explore the potential impact of VARA and the decision of *Castillo* for artists in Hawai'i where the decision will be vital persuasive authority in the absence of clear binding authority in the Ninth Circuit. Part II will provide historical context for VARA's establishment through a breakdown of the statute. Part III will examine how VARA has been used to adjudicate cases through analysis of a series of federal trial court decision from New York. Part IV will discuss the implications VARA has on Hawai'i artists and potential litigation as the state has seen a surge in publicly displayed art in recent years.[15] This part also looks into a few local controversies that incorporate Native Hawaiian and Black Lives Matter social justice issues and identifies areas of tension for property owners. Finally, Part V examines disputes over murals in Hawai'i and predicts the future of this section of copyright law as it impacts our state in a time when Hawai'i street art is increasingly obtaining mainstream recognition.[16] In a moment where art is increasingly being used as a vehicle for social engagement, political statements, and to even affect change, using VARA as a legal tool to protect artists is a necessity.[17]

II. WHAT IS VARA?

The Visual Artists Rights Act of 1990 expands traditional copyright law by granting certain personal rights to artists.[18] The Act recognizes that

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[15] *See* Aaron K. Yoshino, *2020 Marks 10 Years of Pow! Wow!, the Now-Global Street-Art Festival That Originated in Hawai'i*, HONOLULU MAG. (Mar. 5, 2020), https://www.honolulumagazine.com/2020-marks-10-years-of-pow-wow-the-now-global-street-art-festival-that-originated-in-hawaii/.

[16] *See e.g.*, Kalena McElroy, *A Guide to Street Art in Hawaii*, CULTURE TRIP (Apr. 30, 2018), https://theculturetrip.com/north-america/usa/hawaii/articles/a-guide-to-street-art-in-hawaii/; MELE MURALS ('Ōiwi TV, Pacific Islanders in Communications & Downtown Community Media Center 2016).

[17] *See e.g.*, Dorany Pineda, *Across L.A., Black Lives Matter Murals Appear Like Billboards for Justice*, L.A. TIMES (Aug. 12, 2020), https://www.latimes.com/california/story/2020-08-12/black-lives-matter-murals-los-angeles; Perry Garfinkel, *Fighting Social Injustice Through Graffiti, and Making a Business of It*, N.Y. TIMES (Nov. 1, 2019), https://www.nytimes.com/2019/11/01/world/americas/colombia-turkey-graffiti-vertigo-marquez.html.

[18] *See* Al Roundtree, *Graffiti Artists "Get Up" in Intellectual Property's Negative Space*, 31 CARDOZO ARTS & ENT. L.J. 959, 967–69 (2013) (discussing the uncertain treatment of graffiti under intellectual property law); Dana L. Burton, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639, 641–50 (1995) (considering the moral rights recognized under VARA). It is important to note that while VARA uses the phrase, "author of a work of visual art," the term "artist" is used interchangeably with "author." *See* Dana L. Burton, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639, 641–50 (1995).

artists maintain certain "moral rights"[19] in their work independent of the artist's copyright in their work.[20] Included in those rights are the right of attribution and the right of integrity.[21] The right of attribution includes the right to prevent an artist's work from being attributed to another and to prevent the use of an artist's name on works created by others.[22] "The right of integrity allows the [artist] to prevent any deforming or mutilating changes to his [or her] work, even after title in the work has been transferred."[23] Further, the statute prevents "any intentional distortion, mutilation, or other modification" of "visual art" that "would be prejudicial to [an artist's] honor or reputation."[24] To do so would violate the artist's rights.[25] VARA recognizes an artist's right "to prevent any destruction of a work of *recognized stature*" and provides that "any intentional or grossly negligent destruction of that work is a violation of that right."[26] While the aforementioned rights are personal to the artist and are not transferrable, they "may be waived if the author expressly agrees to such waiver in a written instrument signed by the author."[27] When a work has achieved "recognized stature," the rights that are bestowed upon it, therein, carry over even after the work has been sold.[28]

In the case of artwork incorporated into a building,[29] or otherwise incorporated "in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work," VARA specifies an artist's rights may be waived only if the artist

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[19] "The term 'moral rights' has its origins in the civil law and is a translation of the French *le droit moral*, which is meant to capture those rights of a spiritual, non-economic and personal nature. The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved." Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995) (citing RALPH E. LEARNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS & ARTISTS 417 (1989)); *see also* Dana L. Burton, *supra* note 18.

[20] 17 U.S.C. § 106A(a); *Carter*, 71 F.3d at 81.

[21] *See Carter*, 71 F.3d at 81.

[22] *Id.*

[23] *Id.*

[24] 17 U.S.C. § 106A(a)(3)(A)–(3)(B); *Carter*, 71 F.3d at 82.

[25] § 106A(a)(3)(A)–(B).

[26] § 106A(a)(3)(B) (emphasis added).

[27] § 106A(e).

[28] § 106A(a)(3)(B).

[29] VARA recognizes that a work of visual art "may be incorporated in or made part of a building," and includes within its protective reach any such work that was created after its enactment on June 1, 1991, unless a written waiver was obtained from the artist. *See* § 113(d)(1); Cohen v. G&M Realty, L.P. (*Cohen I*), 988 F.Supp.2d 212, 215 (E.D.N.Y. 2013).

"consented to the installation of the work in the building . . . in a written instrument."[30] This instrument must include the signatures of the building owner and the artist, and must "specif[y] that the installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal."[31] If there are means by which the installation can be removed without "destruction, distortion, mutilation, or other modification," the artist's rights will prevail.[32] There are two exceptions to this caveat: (1) the building owner must have made a "diligent, good faith attempt without success" to notify the artist of the actions that could affect the installation, or (2) the building owner has provided written notice and the artist has failed, "within 90 days after receiving such notice, either to remove the work or to pay for its removal."[33] These two exceptions offer an explanation as to how litigation under VARA arises.

Sections 504(b) and (c) of the U.S. Copyright Act state that an artist who establishes a violation of VARA may obtain actual damages and profits or statutory damages, and that an artist can be further compensated if the artist proves that the violation was willful.[34] Statutory damages are fixed between $750 and $30,000 per installation but the statute authorizes damages of up to $150,000 per installation if the artist can prove that the violation was willful.[35]

III. The 5Pointz Cases

A. Background

The legal debate over artists' moral rights and the recognition afforded to graffiti art began in Long Island City, Queens, New York, where an empty industrial complex grew into a hub of graffiti art in the 1990's.[36] In 2002, real estate developer Gerald Wolkoff entered into an oral agreement with graffiti writer Jonathan Cohen, known as "Meres One," [37] to curate his 200,000 square-foot warehouse into a residency and exhibition space for

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[30] § 113(d)(1); Castillo v. G&M Realty, L.P., 950 F.3d 155, 165 (2d Cir. 2020).

[31] *Castillo*, 950 F.3d at 165.

[32] *Id.* (quoting 17 U.S.C. § 113(d)(2)).

[33] *Id.* at 166 (quoting 17 U.S.C. §113(d)(2)).

[34] 17 U.S.C.A. § 504(b)–(c).

[35] 17 U.S.C. § 504(c)(1)–(2); *Castillo*, 950 F.3d at 164.

[36] *See Cohen I*, 988 F. Supp. 2d 212, 217–19 (E.D.N.Y. 2013); Richard Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 COLUM. J.L. & ARTS 583 (2018).

[37] About — Meres One Art, MERES ONE ART, http://www.meresone.com/about (last visited Oct. 24, 2020).

graffiti artists to create art on the walls on a rotating basis.[38] Under Cohen, the site, which was featured in over 150 tour guidebooks as well as the 2013 motion picture *Now You See Me*, "became known as 5Pointz and evolved into a mecca for high-end works by internationally recognized aerosol artists."[39]

In 2013, the owners of 5Pointz decided to tear down the building and construct a luxury apartment development with over a thousand units in its place.[40] In response, Cohen and sixteen other 5Pointz artists filed a temporary restraining order and then a preliminary injunction request that invoked VARA to prevent the complex's destruction.[41] The preliminary injunction proceeding that followed, *Cohen v. G&M Realty, Limited Partnership* (*Cohen I*), marked the first time that a court "had to determine whether the work of an exterior aerosol artist—given its general ephemeral nature—[was] worthy of any protection under the law."[42]

B. Cohen I

Cohen I illustrates the divergent attitudes towards graffiti art and the moral rights of the artists who create it. A central part of the case, which appeared before Judge Frederic Block of the United States District Court for the Eastern District of New York, concerned whether twenty-four of the plaintiffs' aerosol works were of "recognized stature" and, therefore, protected by VARA.[43] Because the term "recognized stature" is not defined under the statute, the court relied on the two-tier test from *Carter v. Helmsley-Spear, Inc.* to make its determination: "(1) that the visual art in question has 'stature,' i.e. is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society."[44]

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[38] *See Cohen I*, 988 F. Supp. 2d 212, 218–20.

[39] *Id.* at 219.

[40] *Id.* at 220.

[41] *See id.* at 214 n.1, 215 n.4. The 5Pointz artists also attempted to preserve the site through New York's Landmark's Preservation Law. *See id.* at 226 n.9. The Landmark Preservation Commission, however, denied the request because the artwork had not been in existence for at least thirty years. *Id.*

[42] *Cohen I*, F. Supp. 2d at 214.

[43] *Id.* at 214–15.

[44] *Id.* at 217 (quoting Carter v. Helmsley-Spear, 861 F. Supp. 303, 325 (S.D.N.Y. 1994)). In *Carter*, Jx3, a group of professional artists and sculptors, brought an action under VARA to prevent the owner and managing agency of a building from altering or removing artwork installed by Jx3 in the building. The owner contracted with Jx3 to create sculptors and other permanent works of art in the lobby and other parts of the building. However, after the managing partners went bankrupt, Jx3's contract was terminated. Jx3 believed that the

Art history professor Erin Thompson, the defendants' expert, argued that recognized stature is drawn from a "consensus of the scholarly community and the art community."[45] For example, the work of internationally famous graffiti artist Banksy[46] would likely have both recognition and stature under this rationale because he had been referenced in roughly 130 dissertations and 1,500 scholarly articles, while one of his recent projects generated over 400,000 Google results after just two weeks.[47] According to Thompson, only one of the plaintiffs' works came close to achieving recognized stature because it "had been mentioned in a dissertation, or a scholarly book or a journal article."[48] The plaintiffs' expert recommended a different measure for "recognized stature," opining stature comes from a work's quality, while recognition is derived from significant public exposure.[49] Under this lens, all twenty-four works met the definition of recognized stature.[50]

Judge Block acknowledged that "at least some" of the works at the heart of the injunction hearing were likely of recognized stature.[51] However, he noted that a proper determination would require a "fuller exploration of the merits" that was not appropriate during the preliminary injunction stage.[52] Despite his initial predictions regarding the works' recognized stature, Judge Block denied the preliminary injunction request because the demolition of 5Pointz would not cause the irreparable harm to the plaintiffs that an injunction requires.[53] This determination was ultimately based on

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artwork in the lobby would be altered or removed, so the group brought suit under VARA to protect the art installations. 861 F. Supp. at 312–13. The Carter court applied a two-tiered test, marking "the first time subsequent to the enactment of VARA that a court attempted to give some content and meaning" to the term "recognized stature." *Cohen I*, 988 F. Supp. 2d at 217. The Carter court awarded Jx3 an injunction that barred the building owner and managing partners from "distorting, mutilating, or modifying," removing, or destroying the art installations. *Carter*, 861 F. Supp. at 329.

[45] *See Cohen I*, 988 F. Supp. 2d at 221.

[46] Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN MAG. (Feb. 2013), https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/; *see generally* ULRICH BLANCHE, BANKSY: URBAN ART IN A MATERIAL WORLD (Rebekah Jones & Ulrich Blanche trans., 2016) (discussing Banksy's relationship with consumer culture).

[47] These figures are estimates made by defendants' expert, Erin Thompson, a lawyer and professor of art history at the John Jay College of Criminal Justice at City University of New York. *Cohen I*, 988 F. Supp. 2d at 221 (citing the trial transcript at 102).

[48] *Id.*

[49] *See id.* at 222.

[50] *See id.* at 222–23.

[51] *Id.* at 226.

[52] *Id.*

[53] *See id.* at 227.

the "transient nature" of the 5Pointz pieces, which were produced on buildings that Cohen knew were eventually "coming down."[54]

C. Cohen II

The saga of 5Pointz did not end with Judge Block denying the plaintiffs' preliminary injunction request. Between the time that decision was made on November 12, 2013 and the release of Judge Block's written opinion eight days later on November 20, Wolkoff whitewashed nearly all of the plaintiffs' artwork from the 5Pointz buildings.[55] *Cohen I* largely ignores this act,[56] but does acknowledge that the works "have now been destroyed" and that the court "wished it had the power to preserve" them.[57] Instead, the opinion concludes with a portentous caveat that the "defendants are exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs' works were of 'recognized stature.'"[58]

That is precisely what prompted *Cohen II*, an amended complaint in which the plaintiffs provided a detailed account of the clandestine whitewashing.[59] Four other artists also joined the lawsuit, which brought the total number of plaintiffs to twenty-one and increased the number of artworks at the center of the case from twenty-four to forty-nine.[60] Adding

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[54] *Id.*; *see also* Bill Donahue, *5Pointz Artists Needed More To Halt Destruction, Judge Says*, LAW360 (Nov. 20, 2013), https://www.law360.com/articles/490366.

[55] Cohen v. G&M Realty, L.P. (Cohen II), 320 F. Supp. 3d 421, 427 (E.D.N.Y. 2018). The artworks were painted over in a "sloppy, half-hearted nature" leaving them "easily visible under thin layers of cheap, white paint, reminding the plaintiffs on a daily basis what had happened." *Cohen II*, 320 F. Supp. 3d at 445. *See also* Cara Buckley & Marc Santora, *Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited out in Queens*, N.Y. TIMES (Nov. 19, 2013), https://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html.

[56] A footnote in the opinion contained the following background information: "In the interim period between the denial of the preliminary injunction and the issuance of this opinion, a letter was filed on November 19, 2013, by plaintiffs' counsel notifying the Court that defendants, 'under cover of darkness' had 'painted over all of the works of visual art at 5Pointz' the prior evening." *Cohen I*, 988 F. Supp. 2d at 214 n.2.

[57] *Id.* at 226.

[58] *Id.* at 227.

[59] Second Amended Complaint, *Cohen II*, 320 F.Supp.3d 421 (E.D.N.Y. 2018) (No. 13-CV-5612). According to the complaint, the whitewashing was done in a "disgracefully crude, unprofessional manner which was clearly calculated to cause maximum indignity and shame"; "White paint was slapped onto the artwork in a haphazard fashion, and some parts of the artwork were left visible (for example, some bodies remained with only faces whitewashed). A smiley face was applied to some of the artwork with the white paint." *Id.*

[60] *Cohen II*, 320 F. Supp. 3d at 427.

another level of intrigue was the fact that *Cohen II* began as a jury trial but, just prior to summation, the plaintiffs—with the consent of the defendants—waived their jury rights.[61] Instead of dismissing the jury, Judge Block, presiding over the case again, converted it to an advisory jury.[62] He then determined that all but four of the art pieces were of recognized stature[63] and awarded the plaintiffs the maximum amount of statutory damages: $150,000 for each of the forty-five works for a total of $6.75 million.[64]

In addition to the astonishing figure awarded to the plaintiffs—which was more than ten times the amount recommended by the advisory jury[65]—*Cohen II* is notable for Judge Block's defense of temporary works of art under VARA, even though the statute does not explicitly offer such protection.[66] Judge Block held, "VARA draws no distinction between temporary and non-temporary works on the side of a building, particularly when all that makes a work temporary is the building owner's expressed intention to remove or destroy it."[67] This position differs markedly from his stance on transient art in *Cohen I*[68] and importantly extends VARA protections to aerosol art, which was described by Judge Block on two occasions as "ephemeral" by nature.[69]

Cohen II also establishes a roadmap for graffiti pieces to achieve recognized stature. First, the court rejected the defense's narrow methodology, which "used an unduly restrictive interpretation of recognized stature that was more akin to a masterpiece standard."[70] Judge Block then called for simple "common sense" in conjunction with the

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[61] *Id.*

[62] *Id.* Unlike juries that issue verdicts in court proceedings, advisory juries give judges non-binding recommendations. See Fed. R. Civ. P. 39(c)(1).

[63] The jury did not find recognized stature for four of the artworks because they were either not part of the curated 5Pointz collection and didn't attract significant third-party attention (Jonathan Cohen's *Drunken Bulbs*, Akiko Miyakami's *Japanese Irish Girl*, Carlos Game's *Faces on Hut*), or were created just before the whitewash and did not attract any third party recognition (Rodrigo Henter de Rezende's *Halloween Pumpkins*). *Cohen II*, 320 F. Supp. 3d at 439–40.

[64] *Id.* at 447.

[65] *See id.* at 431. The advisory jury awarded a total of $545,750 in actual damages and $651,750 in statutory damages. *Id.*

[66] *Id.* at 435–36.

[67] *Id.* at 436.

[68] Cohen I, 988 F. Supp. 2d 212, 227 (E.D.N.Y. 2013).

[69] *See id.* at 214; *Cohen II*, 320 F. Supp. 3d at 427.

[70] *Cohen II*, 320 F. Supp. 3d at 439. Under defense expert witness Erin Thompson's criteria, which relied heavily on social media and academic databases, the court found it difficult to imagine any work of art that would qualify for recognized stature, "short of a Caravaggio or Rembrandt." *Id.*

Carter test and gave great deference to Jonathan Cohen's curatorial taste; the plaintiffs' exhibits, which highlighted the acclaim their works had received in television, film, newspaper articles, blogs, social media, and online videos; and expert testimony that spoke to the "skill and craftsmanship" of the 5Pointz products.[71]

D. Castillo v. G&M Realty, Limited Partnership

The defendants appealed the judgment of the United States District Court for the Eastern District of New York, arguing that the 5Pointz art were not works of "recognized stature," and thus, should not be provided protection under VARA.[72] This review by the Second Circuit Court of Appeals is crucial in forming legal precedent in protecting aerosol art under VARA, as many of the issues raised in that case were issues of first impression.[73] The court carefully analyzed various issues on appeal, reviewing the district court's decision for clear error.[74]

Perhaps the most important issue in dispute there was whether the works at 5Pointz were works of "recognized stature," and thus, protected under VARA.[75] The Second Circuit plainly stated, "a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community."[76] Essential to the determination of when art qualifies as "recognized stature" is expert testimony, which the plaintiffs relied on to successfully persuade the court.[77] Including this requirement ensures that VARA accomplishes its purpose in protecting "the public interest in preserving [the] nation's culture."[78] In the alternative, the court remembered Justice Oliver Wendell Holmes's astute observation that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [visual art]."[79]

Wolkoff attempted to dispute the "recognized stature" determination through various theories.[80] He unsuccessfully asserted the theory that because most of the works were temporary, they could not meet the

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[71] *See id.* 438–39.
[72] Castillo v. G&M Realty, L.P., 950 F.3d. 155, 162, 166 (2nd Cir. 2020).
[73] *See id.* at 165.
[74] *Id.*
[75] *Id.* at 166.
[76] *Id.*
[77] *Id.* at 166–67.
[78] *Id.* at 166 (quoting Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995)).
[79] *Id.* (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)).
[80] *See id.* at 167–69.

recognized stature requirement.[81] The court declined to accept the argument that VARA only protects "permanent" pieces of art, explaining that including an additional requirement not enacted by congress would upset the balance achieved by the legislature.[82] The court also recognized that temporary street art in its various mediums has surged in popularity in recent years.[83] In many parts, this niche type of art has "become high art."[84] Additionally, the court went as far as offering an intriguing hypothetical, explaining that a Banksy work at 5Pointz would be of recognized stature "even if it were temporary."[85]

VARA contains a durational limit which evinces Congress' intent to extend protection under the act to certain types of artworks.[86] The statute states that protection is provided only to works that are "sufficiently permanent . . . to be perceived . . . for a period of more than transitory duration."[87] The court addresses precisely what is considered transitory duration as a matter of law under VARA.[88] The court relied on their previous decision in *Cartoon Network v. CSC Holdings, Inc.*, where the court held that a work existing for only 1.2 seconds is "merely transitory duration," while a work existing for "at least several minutes" satisfies the "more than transitory duration."[89] Because it was undisputed that the street art at 5Pointz survived much longer than "several minutes," the court held that the art easily satisfied VARA's minimum durational requirement.[90]

Next, Wolkoff disputed the district court's award for damages.[91] The district court did not award the plaintiffs actual damages due to the fact that it could not quantify the market value of the 5Pointz artwork.[92] However,

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[81] *Id.* at 167.

[82] *Id.*

[83] *Id.*

[84] Chused, *supra* note 36 at 583.

[85] *Castillo*, 950 F.3d at 168.

[86] *See id.*

[87] *Id.*; 17 U.S.C. § 101 (2018).

[88] See *Castillo*, 950 F.3d at 168.

[89] 536 F.3d 121, 127–28 (2d Cir. 2008); *see Castillo*, 950 F.3d at 168. Cablevision, an operator of television systems created a Remote Storage DVR System (RS-DVR) which allowed its customers to record cable programing on hard drives Cablevision maintained at a remote location. Cartoon Network sued Cablevision alleging that Cablevision's operation of RS-DVR would directly infringe on their exclusive rights to both reproduce and public perform their copyrighted works. *Cartoon Network*, 536 F.3d at 123–26.

[90] *Castillo*, 950 F.3d at 168.

[91] *Id.* at 170. Again, it is worth noting that the Second Circuit court is reviewing the findings of the court below for "clear error." *See id.*

[92] *Id.*

because the destruction of the art was willful, plaintiffs were awarded $6.75 million, which was the maximum amount allowed in the case.[93]

Again, the Second Circuit found no clear error in the district court's finding of willfulness.[94] The district court used six factors based on trademark law to make their decision of statutory damages and the Second Circuit reviewed each factor for clear "error of law."[95] The six factors relevant to this determination were "(1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties."[96]

First, the court found Wolkoff's state of mind was clearly displayed by his willful actions against the plaintiffs.[97] The district court concluded Wolkoff's actions constituted "pure pique and revenge" towards the artists.[98] Wolkoff had his workers go in the "dark of night, using the cheapest paint available" to whitewash the artists' work.[99] The court was also persuaded by the fact that the artists were subjected to humiliation and constantly reminded of their destroyed artworks for over a year as the case progressed.[100] With this abundant evidence of willfulness, the Second Circuit concluded that the state of mind factor clearly cut in the artists' favor.[101]

Second, the court evaluated the second factor of lost revenue to which Wolkoff argued that because the district court declined to award actual damages there was no actual loss.[102] The Second Circuit declined to accept that argument because the only reason the artists were not awarded actual damages was because of the difficulty in calculating them, and "[u]nlike actual damages, statutory damages do not require the precise monetary

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[93] *Id.* at 171. "The statute fixes statutory damages between $750 and $30,000 per work but authorizes damages of up to $150,000 per work if a litigant proves that a violation was 'willful.'" Id. at 164 (citing 17 U.S.C. § 504 (2018)). In this case, "plaintiffs were awarded $150,000 for each of the 45 works, for a total of $6.75 million." *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 171–72 (quoting Bryant v. Media Right Prod., Inc., 603 F.3d 135, 144 (2d Cir. 2010)).

[97] *See id.* at 172.

[98] *Id.*

[99] *Id.*

[100] *See id.*

[101] *Id.*

[102] *Id.*

quantification of injury."[103] The court determined that the lost revenue factor also balanced in the artists' favor.[104]

Third, the court found that the deterrent effect on would-be transgressors supported awarding the maximum amount of statutory damages as decided by the district court.[105] During trial, Wolkoff stated that he had no remorse for his actions and "would make the same decision today."[106] The court reasons that a maximum statutory award may help in deterring Wolkoff from violating VARA in the future as well as encouraging other business owners to abide by the 90 day provision set forth in the act.[107]

Fourth, the court concluded that the conduct and attitude of the parties led the court to favor the maximum statutory award.[108] The court looked at the conduct of both parties in making this decision.[109] The court scrutinized Wolkoff's inconsistent testimony that he would have suffered financial loss if he did not start demolition on the site.[110] Later in trial, he admitted that he suffered no loss for the delay, which the district court described as "conscious material misrepresentations."[111] The artists, however, cooperated with the defendants and the court throughout the litigation.[112] The district court judge found the artists "conducted themselves with dignity, maturity, respect, and at all times within the law."[113] With these findings, the Second Circuit concluded that Wolkoff's challenge to the amount of statutory damages awarded was insufficient and affirmed the judgment of the district court.[114]

IV. DISCUSSION

As much as *Castillo* represents a victory for the rights of graffiti artists and their works, it also has significant implications for artists and property owners thousands of miles away in Hawai'i. As one copyrights scholar pointed out in the wake of *Cohen II*:

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[103] *Id.*

[104] *Id.* (holding that although the exact monetary amount of lost revenue for the artists was difficult to quantify, it was clear that the destruction of the artists' works was a blow to future opportunities and acclaim).

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* at 172–73.

[110] *Id.*

[111] *Id.* at 173.

[112] *See id.*

[113] *Id.*

[114] *Id.*

> [B]uilding owners who allow graffiti to be painted on their walls now face legal and financial risks. If artists hold rights under VARA to resist the mutilation or destruction of their work, building owners wishing to preserve control over their property will have to hire lawyers to draft agreements in which artists waive their VARA rights.[115]

That tension is only magnified by the *Castillo* decision. Thus, if a work of art is created on a building in Hawai'i with the permission of the owner but without a VARA waiver, the artist could then hold rights similar to the plaintiffs in the *5Pointz* cases.[116]

The Ninth Circuit has not examined VARA as a main element of any case and has only discussed the statute in a few instances.[117] Of these cases, *Cheffins v. Stewart* provides the best look at the kind of art that falls under the protection of VARA, even if it falls short of addressing the complete application of the statute.[118] In *Cheffins*, the plaintiffs used a school bus to build a replica of a sixteenth-century Spanish galleon to use at the Burning Man Festival.[119] The creation, named La Contessa, was about sixty feet wide and sixteen feet long with a mast that was over fifty feet tall.[120] The owners used La Contessa for parades, weddings, and other community activities.[121] During a period of non-use, La Contessa was burned for scrap metal by the owner of the property that was housing the bus.[122] The district court granted summary judgment in favor of the landowner because La Contessa was "applied art" and, thus, was not granted protection under VARA.[123]

On appeal, the Ninth Circuit decided the issue of what is "applied art."[124] The court held "that an object constitutes a piece of 'applied art'—as opposed to a 'work of visual art'—where the object initially served a utilitarian function and the object continues to serve such a function after the artist made embellishments or alterations to it."[125] Because the bus and the finished project served as transportation and retained a "largely practical

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115 *See* Chused, *supra* note 36, at 589.

116 *See id.*

117 *See* Cheffins v. Stewart, 825 F.3d 588 (9th Cir. 2016); Cort v. St. Paul Fire and Marine Ins. Companies, Inc., 311 F.3d 979 (9th Cir. 2002) (limiting discussion on VARA to the breach of contract and bad faith claims brought against an insurance company).

118 *See Cheffins*, 825 F.3d at 592.

119 *Id.* at 591.

120 *Id.*

121 *Id.*

122 *Id.*

123 Although Magistrate Judge Robert McQuaid dismissed the VARA claim, the plaintiff's other claim for conversion went on to trial. *Id.* at 592.

124 *Id.* at 593.

125 The court relied on Second Circuit precedent in their analysis. *Id.* at 594.

function," the court affirmed the district court's ruling that La Contessa was applied art and did not fall under the protections of VARA.[126]

Because of the lack of relevant Ninth Circuit precedent, *Castillo* will likely represent substantial persuasive authority for courts in Hawai'i and the rest of the Ninth Circuit until there is binding authority for VARA claims related to graffiti art.[127] The *Castillo* decision is particularly relevant to Hawai'i, where VARA has been invoked by artists as a way to protect the integrity of their works in several high-profile incidents.[128] While these conflicts did not result in litigation, they highlight the likelihood of future VARA claims in Hawai'i, which would certainly rely on *Castillo* for persuasive authority.

For example, in 2017, Wyland, an internationally famous marine life artist,[129] found himself in a conflict with Hawaiian Airlines after the company purchased an office building adorned with two of the artist's 35,000-square-foot murals.[130] Wyland refused Hawaiian Airlines' initial requests to restore the murals, arguing that the liability agreement would strip him of his rights to the murals and only agreed to restore the paintings after his rights to the murals were secured.[131]

Complicating matters is the fact that, because VARA suits are rarely litigated, property owners simply do not know about the statute and the potential legal ramifications that arise when rights ascribed to artwork conflicts with traditional notions of real property. Many property owners "[fall] out of their chairs" when they learn that artwork on buildings without VARA waivers is "effectively a lien on the property as long as the artist is alive."[132] Kahuku Medical Center was one such facility that nearly entered into a messy legal battle because it was unaware of the protections provided

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[126] *Id.* at 595.

[127] *See* Castillo v. G&M Realty, L.P., 950 F.3d. 155 (2d Cir. 2020); *Cheffins*, 825 F.3d. 588. It is important to note that when faced with a lack of precedent in *Cheffins*, the Ninth Circuit turned to a Second Circuit case to assist their analysis of the issue of applied art. *Cheffins*, 825 F.3d. at 594.

[128] *See* discussion *infra*.

[129] The Artist, WYLAND.COM, https://www.wyland.com/the-artist/ (last visited Oct. 16, 2020).

[130] Katie Murar, *Wyland Reaches Agreement with Hawaiian Airlines, Will Start Restoring Whale Mural This Weekend*, PAC. BUS. NEWS (Aug. 22, 2017, 5:58 PM), https://www.bizjournals.com/pacific/news/2017/08/22/wyland-reaches-agreement-with-hawaiian-airlines.html.

[131] *See id.*

[132] *See* Dan Nakaso, *2 Disputes Over Isle Murals Show Potential Legal and PR Pitfalls*, HONOLULU STAR-ADVERTISER (Sept. 25, 2017), https://www.staradvertiser.com/2017/09/25/hawaii-news/2-disputes-over-isle-murals-show-potential-legal-and-pr-pitfalls/.

by VARA.[133] In 2015, the hospital announced that it was going to paint over a mural by deceased artist Ron Artis and his children, which depicted the town's plantation history and was created for free after the hospital had come out of bankruptcy.[134] That news was poorly received by Artis's widow[135] who underscored VARA's challenge to traditional property ownership by calling the removal of the mural a "devastation and a destruction to personal property[.]"[136]

While there initially appeared to be little legal recourse under VARA because the statute only protects works during an artist's lifetime, the fact that Artis's surviving children helped paint the Kahuku Medical Center mural leaves the door open for future litigation.[137] The Attorney General's office touched on this statutory nuance in a 2016 "advisory letter" to state Senator Gil Riviere (D, He'eia-Lā'ie-Waialua): "[T]o the extent that Mr. Artis's widow is claiming these rights on behalf of the estate, we do not believe that such a claim would succeed under VARA. However, if members of Mr. Artis's family were 'collaborating artists' on this project, the family members may have rights under VARA."[138]

VARA claims can also be fueled by cultural concerns over art. In 2013, the Hawai'i Tourism Authority placed a heavy black cloth over a ten-by-twenty five foot mural at the Hawai'i Convention Center that had been hailed by the governor for enhancing "appreciation of the rich cultural heritage of the islands" sixteen years earlier.[139] The decision to abruptly cover the mural, titled "Forgotten Inheritance," in the middle of the night came after complaints from the Native Hawaiian community over its "offensive" depiction of *iwi*, or bones, "exposed to the elements" in the sand.[140] However, to the mural's creator, Los Angeles native Hans Ladislaus, the shrouding represented an alteration of his work and a violation of his rights under VARA.[141] The fabric over "Forgotten

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[133] *See id.*

[134] *See id.*

[135] *See id.*

[136] Jobeth Devera, *Painted over mural in Kahuku upsets artist's family, community*, HAWAII NEWS NOW (Sep. 17, 2017), https://www.hawaiinewsnow.com/story/36387893/painted-over-mural-in-kahuku-upsets-artists-family-community/.

[137] *See* Nakaso, *supra* note 132.

[138] *See id.*

[139] Susan Essoyan, *Rights Clash Amid Dispute over Mural*, HONOLULU STAR-ADVERTISER (Sept. 16, 2013), https://www.staradvertiser.com/2013/09/16/hawaii-news/rights-clash-amid-dispute-over-mural/.

[140] *See id.*

[141] *See id.*

Inheritance" was eventually removed,[142] but not until more than two weeks had passed, which included numerous meetings with the involved parties and a planned march demanding the uncovering of the mural.[143]

These disputes illustrate the complex dynamics surrounding potential VARA claims in Hawai'i. While property owners can seemingly protect themselves through the use of waivers and good-faith communication with the relevant artists, in reality this is not always so simple. Because most property owners who allow artwork on their buildings are unaware of their exposure to liability, a VARA claim could theoretically be triggered by anything from a fresh coat of paint to the transfer of title to a well-intentioned response to community concerns.[144] Moreover, as Hawai'i's status as an international hub of aerosol artwork—as seen by the global acclaim of the Pow! Wow! Hawai'i series[145] and the use of street art as an urban beautification tool[146]—continues to grow, there will undoubtedly be more art on walls and, accordingly, more opportunities for VARA related suits to arise.

As disruptive as the *Castillo* decision may be to Hawai'i property owners, for artists, protecting their works goes beyond mere potential economic opportunities.[147] Providing such rights is an important matter of historical, cultural, and community preservation, as well as a general respect for human creativity.[148] In the *5Pointz* litigation preliminary injunction opinion, "[Judge Block] misunderstood the basic notion that the graffiti artists' primary concern was about the inherent creative value of the work to the culture at large, not about the market value of the work to a potential purchaser."[149] In *Castillo*, "Wolkoff's whitewashing of the graffiti was not about destroying works with market values, but about negating

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[142] Susan Essoyan, *Convention center will remove shroud from controversial mural*, HONOLULU STAR-ADVERTISER, (Sept. 19, 2013), https://www.staradvertiser.com/2013/09/19/breaking-news/convention-center-will-remove-shroud-from-controversial-mural/.

[143] *March Planned to Demand Controversial Mural be Uncovered*, CIVIL BEAT (Sept. 19, 2013), https://www.civilbeat.org/2013/09/march-planned-to-demand-controversial-mural-be/.

[144] *See* Nakaso, *supra* note 132.

[145] Buckett Mufson, *Honolulu's 'Graffitification' Problem Can't Stop the POW! WOW! Art Festival*, VICE (Feb. 8, 2016), https://www.vice.com/en/article/jpvmmb/graffitification-street-art-festival-honolulu.

[146] James Charisma, *Local Artists Paint Honolulu's Streets With Surprising Hawai'i-Inspired Art*, HONOLULU MAG. (Oct. 21, 2019), http://www.honolulumagazine.com/Honolulu-Magazine/June-2019/Local-Artists-Paint-Honolulus-Streets-With-Surprising-Hawaii-Inspired-Art/.

[147] *See* Chused, *supra* note 36, at 622 (providing that art has inherent creative value).

[148] *See id.* at 620, 635.

[149] *Id.* at 622.

their cultural significance . . . The [artists'] . . . felt their cultural legitimacy was subverted."[150] At the center of arguments for the preservation and affording of artists' rights regarding the Wyland, Kahuku Medical Center, and Hawai'i Convention Center disputes, is the importance of the work to the surrounding community and culture.[151] Wyland's whale mural, dedicated by Pat Morita, most famously known for his portrayal of Mr. Miyagi in *Karate Kid*, has a special connection to Hawai'i as thousands of humpback whales migrate to the islands' warm waters every winter.[152] The Artis' mural at the Kahuku Medical Center was curated "for the community" as it told a story of Kahuku's plantation history.[153] Artis's wife further emphasized the importance of protecting the mural as a way to preserve her late husband's legacy.[154] Finally, Ladislaus asserted that his piece at the Hawai'i Convention Center was meant "simply [as] a reminder to all inhabitants of the Islands to respect and care for the fragile ecosystem and traditions, which have been placed in our hands[.]"[155] The significance of these works go beyond any surface-level value such as monetary gain.[156] Affording such praised pieces protective moral rights because of their "inherent creative value and historic importance" is finally a step in the right direction in favor of artists.[157]

V. CONCLUSION

The future of this section of copyright law and its impacts on Hawai'i remain uncertain. The Supreme Court's denial of certiorari over *Castillo* marks finality of the damage award, but any affirmation on the law is merely implicit, and not certain and explicit. However, on its list for consideration for its first conference of the October 2020 Term were three copyright protection cases involving graphically depicted characters.

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[150] *Id.* at 623.

[151] See Katie Murar, *Hawaiian Airlines, Artist Wyland in Dispute Over Whale Mural Near Honolulu Airport*, PAC. BUS. NEWS (Aug. 17, 2017, 11:55 AM), https://www.bizjournals.com/pacific/news/2017/08/17/hawaiian-airlines-artist-wyland-in-dispute-over.html; Devera, *supra* note 136; Essoyan, *supra* note 139.

[152] *See Wyland to Repaint Massive Waikiki Whale Mural in One Day*, HAW. NEWS NOW (Aug. 8, 2018), https://www.hawaiinewsnow.com/story/38836672/wyland-to-repaint-massive-waikiki-whale-mural-in-one-day/; *Hawaiian Islands Humpback Whale National Marine Sanctuary*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, https://hawaiihumpbackwhale.noaa.gov (last visited Oct., 17 2020).

[153] *See* Devera, *supra* note 136.

[154] *Id.*

[155] Essoyan, *supra* note 139.

[156] *See* Chused, *supra* note 36, at 622.

[157] *See id.*

musical compositions, and visual art, represented by *Castillo*.[158] The presence of multiple copyright suits involving a "variety of forms of art and expression"[159] may indicate a growing number of these cases petitioning for writs of certiorari in the future. This could result in significant repercussions for artists in the Ninth Circuit, including here in Hawaiʻi.

For James, whose murals can be found all over the island, there is personal and communal value in each of his pieces. Each stroke and every line are intentional and can require months of planning. The shapes he creates and the colors he uses are inspired by people he meets and stories he hears. His pieces have been topics of conversation from how it made someone feel that day to how someone was feeling about the state of the world. These aspects of his craft surpass any monetary significance and inspire him to continue creating. To give artists like James protection and moral rights would be one of the highest displays of respect to the individuals who continue to create beautiful and meaningful spaces for the people who inhabit them.

[158] Lewis R. Clayton & Eric Alan Stone, *Supreme Court to Consider Three Petitions in Three Copyright Cases*, LAW.COM (Sept. 8, 2020), https://www.law.com/newyorklawjournal/2020/09/08/supreme-court-to-consider-petitions-in-three-copyright-cases/.

[159] *Id.*

Predicting Use of the "Good Cause" Standard for Rule 55(c) Motions Under *Chen v. Mah* Using the Identical Factors for Rule 41(b)(2) Motions

Staff*

I. INTRODUCTION

Default judgments are recognized as one of the most unwelcome legal challenges.[1] At first blush, default judgment appears to be an uncontested victory.[2] Before such a default judgment is rendered, however, litigants may move to set aside an entry of default—the precursor to a default judgment—under Rule 55(c) of the Hawai'i Rules of Civil Procedure ("HRCP") "for good cause shown[.]"[3] If default judgment has been entered, a responding party may likewise move to set it aside under HRCP Rule 60(b).[4] This article will refer to motions to set aside entry of default as "Rule 55(c) motions" and motions to set aside default judgment as "Rule 60(b) Motions." Despite similarities between the HRCP and the Federal Rules of Civil Procedure ("FRCP") regarding entry of default and default judgments, Hawai'i courts have long recognized their ability to forge their own interpretation of any rule within the HRCP.[5]

In *Chen v. Mah*, the Hawai'i Supreme Court affirmed the lower court's decision, finding that the defendant failed to establish that the entry of

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[1] Julia F. Pendery et al., *Dealing with Default Judgments*, 35 ST. MARY'S L.J. 1, 4 (2003) (discussing the methods available to a defendant to attack a default judgment due to: 1) failure to answer after being served; or 2) a post-answer failure to appear at a scheduled hearing or trial setting).

[2] Motions need not be filed for a default judgment. Failure to file an answer or make an appearance constitutes an admission of all facts in a petition, and often the petitioner is not required to notify the opposing party of the default judgement. *See id.* at 6; *see also* Gonsalves v. Nissan Motor Corp. in Hawaii, 100 Hawai'i 149, 159, 58 P.3d 1196, 1206 (2002) ("A complaint (or third party complaint, counterclaim, or cross-claim) is served and the party who is served must either plead, "otherwise defend," or suffer a default.") (citations omitted).

[3] HAW. R. CIV. P. 55(C) (2020).

[4] HAW. R. CIV. P. 60(b).

[5] *See* Chen v. Mah, 146 Hawai'i 157, 176, 457 P.3d 796, 815 (2020) (citing Kawamata Farms v. United Agri Prods., 86 Hawai'i 214, 256, 948 P.2d 1055, 1097 (1997)).

default against him was not the result of inexcusable neglect or willful act.[6] Writing for the three-justice majority, Justice Sabrina McKenna announced a new rule relaxing the standard for Rule 55(c) motions to "good cause," as explicitly stated in the rule, abandoning Hawai'i's long-established three-prong test.[7] Consequently, the "good cause" standard for Rule 55(c) motions is now the same as the standard for setting aside an involuntary dismissal under Rule 41(b)(2).[8]

This note examines the new standard for Rule 55(c) motions as prospectively decided by *Chen v. Mah*. Part II summarizes the history and primary policy concerns for entries of default and default judgments. Part III surveys the standard to set aside entries of default in other jurisdictions. Part IV discusses the facts and decision in *Chen* and analyzes the court's rationale in setting the new standard for evaluating Rule 55(c) motions. Finally, Part V reviews the new rule in light of existing literature and comments on the implications of *Chen* for both practitioners and courts.

II. FEDERAL AND HAWAI'I RULES FOR ENTRY OF DEFAULT AND DEFAULT JUDGMENT

A. *Entry of Default and Default Judgment Under the FRCP*

An entry of default is the procedural precursor to a default judgment.[9] Entry of default occurs "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . ."[10] For example, if a defendant fails to submit an answer within the mandated timeframe, "the clerk must enter the [defendant]'s default."[11] After entry of

[6] *Id.* at 175, 457 P.3d at 814 (affirming the circuit court's "ruling [that] Defendants failed to show that their default 'was not the result of inexcusable neglect or a willful act'").

[7] *Id.* at 176–77, 457 P.3d at 815–16 (stating that "the discussions regarding HRCP Rule 55(c) in this opinion persuade us to overrule our precedent to the contrary").

[8] *Id.* at 178–79, 457 P.3d at 817–18. HRCP Rule 41(b)(2) provides, in relevant part, that an involuntary dismissal "[f]or failure to prosecute or to comply with these rules or any order of the court . . . may be set aside and the action or claim reinstated by order of the court for good cause shown upon motion duly filed not later than 10 days from the date of the order of dismissal." HAW. R. CIV. P. 41(b)(2).

[9] *See* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. §2682 (4th ed. 2020) [hereinafter WRIGHT, MILLER, & KANE] ("Prior to obtaining a default judgment under either Rule 55(b)(1) or Rule 55(b)(2), there must be an entry of default as provided by Rule 55(a)."); Adam Owen Glist, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 FORDHAM L. REV. 757, 763 (2000) (stating that "obtaining a default judgment is a two-step process that begins with an entry of default").

[10] FED. R. CIV. P. 55(a).

[11] *Id.*

default, a party can obtain a default judgment in either of two ways: (1) by the clerk if the claim is for a specific or discernible amount; or (2) by the court in all other cases.[12]

The concept of default judgment predates the adoption of the FRCP, which merged courts of law and equity.[13] Default judgment took the form of *nil dicit* decrees in courts of law and *pro confesso* decrees in courts of equity upon a defendant's failure to answer.[14] The threat of default served as a deterrent to parties who strategically delayed pleading or appearing in court at the expense of the court's interests in cost-effectiveness and timeliness.[15] These early mechanisms influenced the current law on default judgments.[16]

During the overhaul of the FRCP in 2007, changes to Rule 55 "reflect[ed] a policy of relaxing the harshness of defaults" and a preference for rendering judgments based on a case's merits.[17] Because of this preference, "[d]efault judgments are seen as 'a weapon of last . . . resort. . . .'"[18] In 2015, FRCP Rule 55(c) was further amended "to

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[12] FED. R. CIV. P. 55(b); *see generally* WRIGHT, MILLER, & KANE, *supra* note 9, § 2683 (information on default judgments by the clerk); *id.* § 2684 (information on default judgments by the court).

[13] *Federal Rules of Civil Procedure Merge Equity and Common Law*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/federal-rules-civil-procedure-merge-equity-and-common-law (last visited Oct. 24, 2020).

[14] Jessica Ruoff, *Rule 55: Why Broadly Interpreting "Otherwise Defend" Protects a Diligent Party's Rights and Encourages an Orderly and Efficient Judicial System*, 88 ST. JOHN'S L. REV. 467, 469 (2014) ("Once the decree was entered, a defendant was barred from alleging anything in opposition to the decree or questioning correctness on appeal, unless the defendant could show that the bill was erroneously and improperly granted."); *see also* WRIGHT, MILLER, & KANE, *supra* note 9, § 2681; FRCP 55 advisory committee's note to 1937 adoption.

[15] *See* Ruoff, *supra* note 14, at 471 (citing H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970) ("Furthermore, the possibility of a default is a deterrent to those parties who choose delay as part of their litigative strategy.").

[16] Ruoff, *supra* note 14, at 469; see also FRCP 55 advisory committee's note to 1937 adoption.

[17] *See* WRIGHT, MILLER, & KANE, *supra* note 9, § 2681; *see generally id.* § 2693 (elaborating on the preference for rendering judgments on the merits and providing a list of supporting case law from a variety of jurisdictions). In 2007, FRCP Rule 55 was amended to remove part of the text that read "as provided by these rules." The Advisory Committee explained, "[a]cts that show an intent to defend have frequently prevented a default even though not connected to any rule." The change broadened the scope of acts intended to "defend" as specified in FRCP Rule 55(a) by removing any suggestion that such an act must be attributed to a certain rule. FED. R. CIV. P. 55 (advisory committee's note to 2007 amendment).

[18] Glist, *supra* note 9, at 766 (citing Davis v. Musler, 713 F.2d 907, 916 (2d Cir. 1983)). Although a Hawai'i court has yet to define a Rule 55 default judgment as a last resort, Hawai'i courts have recognized default judgments pursuant to Rule 37 as such. *See In re*

state explicitly that the court may set aside a 'final' default judgment under [FRCP] Rule 60(b)."[19] According to the Advisory Committee, the 2015 Amendment "make[s] plain the interplay between [FRCP] Rules 54(b), 55(c), and 60(b) . . . . The demanding standards set by [FRCP] Rule 60(b) apply *only* in seeking relief from a final judgment."[20] In relevant part, FRCP Rule 55 currently reads:

> **(a) Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.
>
> . . . .
>
> **(c) Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).[21]

Federal courts have interpreted good cause in consideration of three "disjunctive" factors, "such that a finding that any one of these factors is true is sufficient reason . . . to refuse to set aside the default[:]" "(1) whether the party seeking to set aside the default engaged in culpable conduct that led to the default; (2) whether it had no meritorious defense; or (3) whether reopening the default judgment would prejudice the other party."[22]

B. Entry of Default and Default Judgment Under the HRCP

Before *Chen v. Mah*, Rule 55(c) motions under the HRCP and as interpreted by the Hawai'i Supreme Court were substantially the same as their federal counterpart. The language of FRCP Rule 55 is materially embraced by HRCP Rule 55:

TW, 124 Hawai'i 468, 472–73, 248 P.3d 234, 238–39 (Haw. Ct. App. 2011) (citing Long v. Long, 101 Hawai'i 400, 405, 69 P.3d 528, 534 (Haw. Ct. App. 2003)) ("In view of the strong policy favoring resolution of cases on their merits, and since the magnitude of due process concerns grows with the severity of the sanction, courts uniformly have held that *orders dismissing the action or granting judgments on default as sanctions for violating discovery orders are generally deemed appropriate only as a last resort, or when less drastic sanctions would not ensure compliance with a court's orders*.")).

[19] WRIGHT, MILLER, & KANE, *supra* note 9, § 2681.

[20] FED. R. CIV. P. 55(c) (advisory committee's note to 2015 amendment) (emphasis added).

[21] FED. R. CIV. P. 55.

[22] United States v. Signed Personal Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010).

> **(a) Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.
>
> . . . .
>
> **(c) Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).[23]

In its per curiam decision from *BDM, Inc. v. Sageco, Inc.*, the Hawai'i Supreme Court adopted a three-prong test for setting aside an entry of default:

> In general, a motion to set aside a default entry or a default judgment may and should be granted whenever the court finds (1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, *and* (3) that the default was not the result of inexcusable neglect or a willful act.[24]

These factors mirror the factors for an entry of default under the FRCP. The *BDM* court recognized that the good cause standard for a Rule 55(c) motion is a lower standard than that of a Rule 60(b) motion despite "the elements . . . be[ing] the same whether relief is sought from a default entry or from a default judgment."[25] Further, the court found it "difficult . . . to imagine a case in which 'good cause' might be found for setting aside an entry of default and yet 'excusable neglect' for the failure to file the answer, which failure occasioned the entry of the default, should not also be found."[26]

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[23] HAW. R. CIV. P. 55 (2020). Note, however, the 2015 Amendment to FRCP Rule 55—which added "final" before "default judgment under Rule 60(b)" in order to emphasize that "[t]he demanding standards set by [FRCP] Rule 60(b) apply only in seeking relief from a final judgment"—is not reflected in the current HRCP Rule 55. *See* FED. R. CIV. P. 55 (advisory committee's notes to the 2015 amendment).

[24] 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976) (emphasis added) (citing Montez v. Tonkawa Vill. Apartments, 215 Kan. 59, 523 P.3d 351 (1974); Schartner v. Copeland, 59 F.R.D. 653 (M.D. Pa. 1973); Butner v. Neustadter, 324 F.2d 783 (9th Cir. 1963)). The Hawai'i Intermediate Court of Appeals has held that "all three prongs must be satisfied for a trial court to grant a motion to set aside entry of default." Chen v. Mah, 146 Hawai'i 157, 174, 457 P.3d 796, 813 (2020).

[25] *BDM*, 57 Haw. at 76, 549 P.2d at 1150.

[26] *Id.* at 76, 549 P.2d at 1149 (discussing "excusable neglect" under HRCP Rule 6(b)); *see* HAW. R. CIV. P. 6 (2020) (providing rules for enlarging a time period "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) 52(b), 59(b), (d), (e) and 60(b) of these rules and Rule 4(a) of the Hawai'i

Because the same elemental test is used for both Rule 55(c) and Rule 60(b) motions, *BDM* provides little guidance to distinguish the lower standard from the higher; the question is essentially one of degree.[27] Granting a Rule 55(c) motion is generally subject to the trial court's discretion, and case law does not provide concrete instruction on what constitutes good cause.[28] Nevertheless, a plain reading of HRCP Rules 55 and 60 leaves little doubt that different standards are meant to apply when a court is evaluating both types of motions.

III. ENTRIES OF DEFAULT IN OTHER JURISDICTIONS

The *BDM* factors—used for both Rule 55(c) and Rule 60(b) motions—follow the approach used by a majority of jurisdictions.[29] Some jurisdictions, while conforming to the *BDM* factors, have also expanded

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Rules of Appellate Procedure, except to the extent and under the conditions stated in them"); *see also* WRIGHT, MILLER, & KANE, *supra* note 9, § 2696 ("Any of the reasons sufficient to justify the vacation of a default judgment under Rule 60(b) normally will justify relief from a default entry and in various situations a default entry may be set aside for reasons that would not be enough to open a default judgment."); *but see* Chen v. Mah, 146 Hawai'i 157, 177, 457 P.3d 796, 816 (2020) ("HRCP Rule 60(b) motions require a showing of a lack of 'excusable neglect,' yet HRCP Rule 55(c) motions only require 'good cause,' which is a much lower standard under Hawai'i law . . . yet we have held that ignorance of the rules or law cannot be 'excusable neglect.' Thus, even if a movant seeking to set aside an entry of default pursuant to HRCP Rule 55(c) can establish 'good cause,' the movant might not be able to meet the lack of 'excusable neglect' requirement for HRCP Rule 60(b) motions.") (citation omitted).

[27] *See BDM*, 57 Haw. at 76, 549 P.2d at 1150.

[28] *See* WRIGHT, MILLER, & KANE, *supra* note 9, § 2693 ("For this reason, and because the setting aside of a default ordinarily is not appealable, examples of them being reversed are difficult to find."); *id.* § 2696 ("Because a motion under Rule 55(c) is addressed to the trial court's discretion, which is exercised in light of all the circumstances of the individual situation, the decided cases provide only some general insight into the attitudes of the courts toward motions under the rule."); *but see* County of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 424, 235 P.3d 1103, 1136 (2010) (providing case examples to show that "the circumstances here are dissimilar from those [cases] in which relief from default is typically denied" and ultimately holding that the trial court erred in failing to set aside the entry of default), *abrogated on other grounds by* Tax Found. of Haw. v. State, 144 Hawai'i 175, 439 P.3d 127 (2019).

[29] William H. Danne, Jr., Annotation, *What constitutes "good cause" allowing federal court to relieve party of his default under Rule 55(c) of Federal Rules of Civil Procedure*, 29 A.L.R. FED. 7 (2020) [hereinafter Danne]; *see e.g.*, *BDM*, 57 Haw. 73, 549 P.2d 1147; Johnson v. Leonard, 929 F.3d 569 (8th Cir. 2019); Guggenheim Cap., LLC v. Birnbaum, 722 F.3d 444 (2d. Cir. 2013); Burrell v. Henderson, 434 F.3d 826 (6th Cir. 2006); *In re* EMM, 414 P.3d 1157, 1159–60 (Wyo. 2018); Hoff v. Lake Cnty. Abstract & Title Co., 255 P.3d 137 (Mt. 1011).

them by treating a finding of good cause as a prudential standard.[30] In applying a prudential standard, the jurisdictions emphasize the policy of speedy determinations of litigation and the significance of an entry of default as a mechanism for enforcing compliance with the rules of civil procedure.[31] For example, although Rule 55(c) does not specify a time period within which relief from an entry of default must be requested, several courts have additionally required a finding of "reasonable promptness" in requesting relief from an entry of default.[32] At times, courts have made the consideration of timeliness clear by emphasizing that a defaulting party has shown prompt curative action.[33]

Another factor courts have considered is the "monetary substantiality of the particular lawsuit."[34] The policy motivating use of this factor is to consider the likelihood of damage to a defaulting party if a matter involves large amounts of money.[35] Thus, courts have avoided entries of default in cases that would result in judgment for substantial awards.[36]

South Carolina provides another example of a more forgiving framework, established in *Wham v. Shearson Lehman Brothers*, that considers only: "(1) the timing of [defendant's] motion for relief [after the entry of default]; (2) whether [defendant] has a meritorious defense; and (3) the degree of prejudice to [the nondefaulting party] if relief is granted."[37] The *Wham* factors eliminated the consideration of reason, justification, or excuse for the default, rejecting the Rule 60(b) requirement of "mistake, inadvertence, surprise, or excusable neglect" and effectively lowered the

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[30] *See e.g.*, Edes v. Freson, 344 F. Supp. 2d 209 (D. Me. 2004) (factors considered include whether the default was willful, whether setting it aside would prejudice the adversary, whether a meritorious defense is presented, the nature of the defendant's explanation for the default, the good faith of the parties, the amount of money involved, and the timing of the motion to set aside entry of default); United Parcel Serv. Am. v. Net, Inc., 185 F. Supp. 2d 274 (E.D.N.Y. 2002) (factors considered were willfulness of default, potential prejudice to adversary, presentation of meritorious defense, defaulting party's good faith, and fairness of result).

[31] *See* WRIGHT, MILLER, & KANE, *supra* note 9, § 2693.

[32] *See e.g.*, Payne v. Brake, 439 F.3d 198 (4th Cir. 2006); Currie v. Wood, 112 F.R.D. 408 (E.D.N.C. 1986); Titus v. Smith, 51 F.R.D. 224 (E.D. Pa. 1970).

[33] *See e.g.*, Broder v. Charles Pfizer & Co., 54 F.R.D. 583 (S.D.N.Y. 1971); Johnson v. Harper, 66 F.R.D. 103 (E.D. Tenn. 1975).

[34] *See e.g.*, Hutton v. Fisher, 359 F.2d 913 (3rd. Cir. 1966); Maine Nat'l Bank v. F/V Cecily B, 116 F.R.D 66 (D. Me. 1987); Eisler v. Stritzler, 45 F.R.D. 27 (D.P.R. 1968).

[35] DANNE, supra note 29, at *2.

[36] *See e.g.*, *Hutton*, 359 F.2d 913, 916–17 (3d Cir. 1966) (one reason for opening default entry was because the amount involved in the case was "substantial"); Rooks v. Am. Brass Co., 263 F.2d 166, 169 (6th Cir. 1959) (setting aside a default entry in part because the complaint sought a judgment in the amount of $60,000).

[37] 381 S.E.2d 499 (S.C. Ct. App. 1989).

bar for relief.[38] South Carolina courts, however, have inconsistently applied this standard for granting relief from an entry of default.[39]

IV. THE *CHEN V. MAH* RULE: A PROSPECTIVE REINTERPRETATION OF GOOD CAUSE

A. *Facts and Procedural Background*

The underlying dispute in *Chen v. Mah* arose from an oral compensation agreement between the parties allegedly formed in 2008.[40] The plaintiff, Chen, claimed the parties agreed that the defendant's dental corporation would retain her professional services as an independent contractor associate dentist.[41] The agreement included specifications about Chen's compensation for her services.[42] Chen claimed that after November 5, 2011, she stopped receiving supporting documentation or compensation according to the pre-determined formula and that "her compensation payments became erratic and changed to rounded lump sums," contrary to how she had been compensated previously.[43]

Prior to filing her complaint, Chen's attorney sent a demand letter to Mah on September 10, 2012 to recover the compensation and supporting documentation before September 15, 2012.[44] Though the parties attempted to resolve the dispute on several occasions, Mah failed to provide the requested compensation and documentation.[45] On October 3, 2012, the parties had a telephone conversation after which Chen's lawyer emailed Mah stating that Mah should retain counsel and that Chen would be pursuing litigation to force Mah to produce the accounting documents for compensation.[46] Mah was served on October 8, 2012 and Chen obtained an

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[38] *See id.*

[39] *See* Eli A. Poliakoff, Comment, *Setting Aside Entries of Default: South Carolina Should Require a Reason*, 54 S.C. L. REV. 477 (2002); *see e.g.*, Hill v. Dotts, 547 S.E.2d 894 (S.C. Ct. App. 2001) (requiring a consideration reason for an entry of default); Wham, 381 S.E.2d at 499.

[40] Chen v. Mah, 146 Hawai'i 157, 160, 457 P.3d 796, 799 (2020).

[41] *Id.* at 160, 457 P.3d at 799.

[42] *Id.* at 160–61, 457 P.3d at 799–800.

[43] *Id.* at 161, 457 P.3d at 800.

[44] *Id.* at 162, 457 P.3d at 801 ("The demand letter stated: 'If I do not receive the above payment and these records on or before 5 PM on Saturday, September 15, 2012, I have been instructed to immediately file suit against you and your company to recover these amounts and any other amounts owed to Dr. Chen after obtaining your documents and performing a full accounting of your delinquent payments based on the claims, among others, described below.'").

[45] *Id.* at 162–63, 457 P.3d at 801–02.

[46] *Id.* at 163, 457 P.3d at 802.

entry of default on October 31, 2012 after Mah failed to reply.[47] The hearing for Chen's motion for default judgment was scheduled for July 9, 2013.[48]

On June 20, 2013, Mah filed a Rule 55(c) motion claiming that he was misled by Chen's counsel's early efforts to informally resolve the dispute and only "recently" became aware that default had been entered against him.[49] At the hearing, the trial court applied the three-factor test from *BDM*.[50] Mah failed to prove two of the *BDM* factors: that a meritorious defense to liability existed, and that default was entered as a result of defendant's excusable neglect.[51] Mah's motion was subsequently denied,[52] but he was allowed to continue to litigate the question of damages.[53] After a bench trial limited to the issue of damages, the trial court found in favor of Chen on two of the four counts presented.[54] Mah's subsequent "motion for reconsideration and/or for new trial" was denied.[55] On appeal, the Intermediate Court of Appeals ("ICA") affirmed the trial court's judgment, rejecting Mah's argument that the denial of his Rule 55(c) motion was in error.[56]

In his application for certiorari to the Hawai'i Supreme Court, Mah argued that the ICA erred in failing to set aside the trial court's entry of default.[57] The Supreme Court granted certiorari and asked the parties to

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[47] *Id.*

[48] *Id.*

[49] *Id.* at 163–64, 457 P.3d at 802–03.

[50] *Id.* at 164, 457 P.3d at 803; *see* BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976).

[51] *Chen*, 146 Hawai'i at 164, 457 P.3d at 803.

[52] *Id.* at 166, 457 P.3d at 805.

[53] *Id.* at 166–67, 457 P.3d at 805–06.

[54] Out of the claims originally stated in the complaint, the trial court only evaluated "Count IV (conversion), Count V (fraud), Count VI (intentional/negligent misrepresentation), and Count XI (constructive trust/equitable lien)." *See id.* at 168, 457 P.3d at 807. The trial judge found in favor of Chen on Counts V and VI. *Id.* at 168, 457 P.3d at 807.

[55] *Id.* at 169, 457 P.3d at 808.

[56] *See id.* In full, Defendant's first point on appeal to the Intermediate Court of Appeals read, "The circuit court violated the public policy favoring resolution of cases on the merits and failed to properly apply the Hawaii [sic] Supreme Court's test regarding setting aside an entry of default. The record shows that, although Dr. Mah and the Company did not timely file an Answer to the Complaint, Dr. Mah did engage in months of informal discovery with Appellee's counsel, providing documents and information requested by Appellee and her counsel. This process went for approximately seven months before Appellee filed a Motion for Default Judgment." *Id.*

[57] The salient question posed to the Hawai'i Supreme Court in Defendant's application for writ of certiorari read as follows: "Did the ICA gravely err in failing to set aside the circuit court's entry of default, where (1) the record shows the circuit court failed to analyze

submit supplemental briefs answering whether *BDM, Inc. v. Sageco, Inc.* was the established rule for setting aside an entry of default.[58]

B. Prospective New Standard: Analogizing Rule 55(c) to Rule 41(b)(2)

The Hawai'i Supreme Court first affirmed the circuit court's refusal to set aside entry of default on the grounds that it properly followed the three-prong standard under *BDM*.[59] The court then went a step further and announced a new rule allowing entry of default to be set aside upon a finding of good cause, thereby abrogating the *BDM* factors for prospective cases.[60] The decision of *Chen v. Mah* thus departs from most other federal and state interpretations of HRCP Rule 55(c) and sets forth a new standard for granting relief for an entry of default in Hawai'i.[61] Under the newly-formed good cause standard, the Hawai'i Supreme Court adopted a plain language reading of HRCP Rule 55(c), determining that motions to set aside entry of default are governed by the "standard explicitly stated in the rule, and [] movants seeking to set aside an entry of default pursuant to HRCP 55(c) need not satisfy the three-prong test applicable to HRCP 60(b) motions to set aside default judgments."[62]

The *Chen* majority justified the departure from the old standard in two ways.[63] First, a motion to set aside an entry of default under Rule 55(c) is submitted during pending litigation in which judgment has yet to be entered and no official ruling has yet to be given to the public.[64] In contrast, a motion to set aside a default judgment under Rule 60(b) seeks to set aside a judgment on which members of the public may have already relied.[65] Second, the HRCP Rule 60(b) requirement of "excusable neglect" violates the plain language of HRCP Rule 55(c) because it requires an additional

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all twelve causes of action in the complaint regarding meritorious defenses and the record contains substantial evidence of a meritorious defense to one or more causes of action; and (2) the circuit court failed to consider the lulling of a pro se party into inaction by engaging in months of discovery and communications before and *after* obtaining an entry of default, then using a long delay to help justify a purported failure to defend the case." *Id.* at 171, 457 P.3d at 810.

[58] *Id.* at 171 n.14, 457 P.3d at 810 n.14.

[59] *Id.* at 172–76, 457 P.3d at 811–14.

[60] *See id.* at 177–80, 457 P.3d at 816–19.

[61] *See id.* at 180, 457 P.3d at 819 (2020); discussed *infra* Section III.

[62] *Id.* at 177, 457 P.3d at 816. The *Chen* majority recognized that under the old rule, the burden was on the defendant to prove the *BDM* factors. *Id.* at 174, 457 P.3d at 813. The new rule only articulates a change in the factors to be considered and does not explicitly address the burden. *Id.* at 176, 457 P.3d at 815.

[63] *See id.* at 177, 457 P.3d at 816.

[64] *Id.*

[65] *Id.* at 179, 457 P.3d at 818.

showing of a lack of "excusable neglect."[66] Thus, under the old standard, even if a movant can establish good cause, a party may still be unable to set aside an entry of default because of the additional requirement.[67] Lastly, the lower bar for setting aside defaults reflects Hawai'i courts' express policy of disfavoring defaults and of resolving any doubt in favor of the party seeking relief.[68]

In fleshing out this new standard, the court compared the good cause language pertaining to entry of default in HRCP Rule 55(c) to that of HRCP Rule 41(b)(2), the rule for an involuntary dismissal.[69] Similar to HRCP Rule 55(c) entries of default, "involuntary dismissals of a complaint with prejudice [under HRCP Rule 41(b)(2)] are not favored, and should be ordered only in extreme circumstances."[70] Two cases, *Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture*[71] and *In re Blaisdell*,[72] considered dismissal of a complaint and illustrated Hawai'i courts' "preference for giving parties an opportunity to litigate claims or defenses on the merits" and "secure counsel before permitting an entry of default against the [party.]"[73] The court determined that the analogous good cause language in both rules supports a similar rationale under Rule 55(c).[74]

Thus, the new HRCP Rule 55(c) standard, based on the standard delineated for HRCP Rule 41(b)(2) in *Shasteen* and *Blaisdell*, merely requires a showing of good cause through one of two analytical prongs. Good cause exists to set aside an entry of default if: "(1) the defendant did not deliberately fail to plead or otherwise defend or engage in contumacious

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[66] *See id.*

[67] *See id.*

[68] *See id.*

[69] An entry of default is the consequence of a *defendant's* failure to plead in a timely manner while an involuntary dismissal is the consequence of a *plaintiff's* failure to prosecute its case in a timely manner. *See id.* at 178–79, 457 P.3d at 817–18; *see also* HAW. R. CIV. P. 41(b)(2).

[70] *Id.* at 179, 457 P.3d at 818 (brackets omitted) (quoting *Blaisdell*, 125 Hawai'i at 49, 252 P.3d at 68) .

[71] Shasteen, Inc. v. Hilton Hawaiian Vill. Joint Venture, 79 Hawai'i 103, 109, 899 P.2d 386, 392 (1995)

[72] *In re* Blaisdell (Blaisdell), 125 Hawai'i 44, 49–51, 252 P.3d 63, 68–70.

[73] *Chen*, 146 Hawai'i at 179, 457 P.3d at 818 (quoting Shasteen, Inc. v. Hilton Hawaiian Vill. Joint Venture, 79 Hawai'i 103, 109, 899 P.2d 386, 392 (1995)).

[74] Although neither *Shasteen* nor *Blaisdell* specifically stated that a showing of good cause required a dismissal under Rule 41(b)(2), both cases were relied on in *Ryan v. Palmer*, 130 Hawai'i 213, 310 P.3d 1022 (Haw. Ct. App. 2013), which held exactly that. Therefore, the court, through *Ryan*, analogized the similar good cause language in Rules 41(b)(2) and 55(c), thereby applying the *Shasteen* and *Blaisdell* framework. *See Chen*, 146 Hawai'i at 179–80, 457 P.3d at 818–19 (citing *Ryan*, 130 Hawai'i 213, 310 P.3d 1022 (Haw. Ct. App. 2013)).

conduct; or ([2]) if the defendant did deliberately fail to plead or otherwise defend or engage in contumacious conduct, there is no actual prejudice to the plaintiff that cannot be addressed through lesser sanctions."[75]

i. No record of deliberate failure to plead or "contumacious conduct"

Under the first prong to set aside entry of default for good cause under HRCP Rule 55(c), the record must clearly show that the moving party's delay was not deliberate or that the moving party's actions did not rise to the level of contumacious conduct.[76] The court relied on *Ryan v. Palmer* where the ICA held that a plaintiff's failure to file a pretrial statement within eight months after the complaint, alone, was not sufficient to prove a delay of litigation or contumacious conduct.[77] The ICA then vacated an order of involuntary dismissal via HRCP Rule 41(b)(2), stemming from the plaintiff's aforementioned failure to file a pretrial statement on time.[78] The ICA considered the plaintiff's active and diligent prosecution of his case, participation in discovery, and filing of motions before holding that the trial court abused its discretion because the record did not show that the plaintiff deliberately attempted to delay litigation.[79] Although *Ryan* concerned involuntary dismissal, the court used *Ryan* as guidance for interpreting Rule 55(c) motions.[80]

The first prong also specifies that in evaluating a Rule 55(c) motion, courts will examine whether the moving party engaged in "contumacious conduct."[81] Hawai'i courts define "contumacious conduct" as "willfully stubborn and disobedient conduct."[82] In order to prove a party's actions did not rise to contumacious conduct, the record must be void of any willful resistance to authority.[83] Inadvertent noncompliance with court orders or rules of procedure is insufficient to find contumacious conduct.[84]

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[75] *Chen*, 146 Hawai'i at 180, 457 P.3d at 819 (footnotes omitted); *see id.* at nn.26–29.

[76] *Id.* at 180, 457 P.3d at 819.

[77] *Id.* at 179, 457 P.3d at 818 (citing 130 Hawai'i 321, 322, 310 P.3d 1022, 1023 (Haw. Ct. App. 2013)).

[78] *Ryan*, 130 Hawai'i 321, 322, 310 P.3d 1022, 1023 (Haw. Ct. App. 2013).

[79] *Id.* at 322, 310 P.3d at 1023.

[80] *Chen*, 146 Hawai'i at 179–80, 457 P.3d at 818–19.

[81] *Id.* at 180, 457 P.3d at 819.

[82] *Blaisdell*, 125 Hawai'i at 50, 252 P.3d at 69 (brackets omitted) (quoting *Shasteen*, 79 Hawai'i at 107 n.7, 899 P.2d at 390 n.7).

[83] *See Chen*, 146 Hawai'i at 180, 457 P.3d at 818–19; Erum v. Llego, 147 Hawai'i 368, 387, 465 P.3d 815, 834 (2020).

[84] *See Erum*, 147 Hawai'i at 387, 465 P.3d at 834 (finding that instances of noncompliance with court orders or rules of procedure as a result of Erum's advanced age,

ii. Actual prejudice that cannot be addressed through lesser sanctions

The second method by which a HRCP Rule 55(c) entry of default may be set aside under the good cause standard is if there is actual prejudice that cannot be addressed through lesser sanctions.[85] Actual prejudice is defined as "[d]amage or detriment to one's legal rights or claims."[86] To make this determination, the circuit court is required to consider and explain in detail why a lesser sanction than entry of default could not adequately address the actual prejudice caused by the a party's conduct.[87] The inclusion of the additional language in the requirement—"that cannot be addressed through lesser sanctions"—illustrates that entry of default should be a last resort.[88]

C. Chief Justice Recktenwald's Concern About Analogizing Entry of Default to Involuntary Dismissal

In *Chen*, Chief Justice Mark E. Recktenwald, joined by Justice Paula A. Nakayama, concurred and dissented in part and concurred in the judgment.[89] They rejected the majority's departure from the over forty-year-old test established in *BDM*, which they recognized adequately advanced the finality and resolution of cases on the merits.[90] The dissent first acknowledged that the *BDM* factors were sufficient and then critiqued

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lapses in memory, and medical condition were not findings of fact that Erum engaged in contumacious conduct).

[85] *Chen*, 146 Hawai'i at 180, 457 P.3d at 819.

[86] *Prejudice*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Erum*, 147 Hawai'i at 387, 465 P.3d at 834 ("Actual prejudice in this context does not mean mere inconvenience, hardship or expenditure imposed upon the defendant.").

[87] *Chen*, 146 Hawai'i at 180, 457 P.3d at 819; *see Erum*, 147 Hawai'i at 386–87, 465 P.3d at 833–34 (finding that the circuit court should have addressed the possibility of a less severe sanction or state a reason why lesser sanctions could not address any prejudice Llego may have suffered in its Dismissal Order); *Blaisdell*, 125 Hawai'i at 50–51, 252 P.3d at 69–70 ("Absent these circumstances, the circuit court should have considered and explained why a lesser sanction, such as a dismissal without prejudice, was insufficient to serve the interests of justice.").

[88] *Chen*, 146 Hawai'i at 179–80, 457 P.3d at 818–19.

[89] *Id.* At 180, 457 p.3d at 819.

[90] *Id.* at 181, 457 P.3d at 820 (Recktenwald, C.J., concurring in part and dissenting in part) ("Respectfully, I believe this comparison is inapt, and that a wholesome departure from our established test is unwarranted.") (citing BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976) ("It is sensible to look to the same factors for setting aside both entry of default and entry of default judgment, since the same competing considerations of promoting finality and resolving cases on their merits apply in both contexts.")).

the majority's analogy of HRCP Rule 55(c) to HRCP Rule 41(b) as flawed.[91]

The dissent observed that the *BDM* factors sufficiently balance the Court's desire to resolve claims on the merits while promoting final resolution of claims and judicial economy.[92] The dissent acknowledged that an application of the *BDM* factors in a good cause analysis was much more forgiving to a defendant than that of a default judgment.[93] Although the majority characterized the plain language of Rule 55(c) and Rule 60(b) as textually and functionally incompatible, the dissent did not address this analysis.[94] Instead, the dissent drew upon numerous federal and state courts' adoptions of a version of the three-factor test and subsequently identified the test as flexible and sufficient to distinguish between setting aside entry of default or default judgment.[95] Despite Chief Justice Recktenwald's desire to maintain an approach consistent with other jurisdictions, there still remains a question as to how one could reconcile the plain language of two separate rules governed by the same test when there is agreement that the "good cause" standard is already more lenient than the standard of "excusable neglect" between setting aside entry of default and default judgment.[96] Justice McKenna's approach, a direct reading of the rule, is a logical resolution that offers discernable consistency: a different rule has a different applicable test.[97]

The dissent believed the majority's comparison of "good cause" between HRCP Rule 41(b) and HRCP Rule 55(c) to be inapt because the rules differ in the context with which "good cause" is invoked.[98] The dissent disagreed with the majority's proposition that Rule 41(b) is "the closest analogue" to Rule 55(c). The dissent found the analogy between the two rules to be "unhelpful" because entries of default, which are granted after reviewing of a Rule 55(c) motion, provide opposing parties with notice and an opportunity to respond while Rule 41(b)(2) sua sponte dismissals do not."[99]

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[91] *Chen*, 146 Hawai'i at 181–82, 457 P.3d at 820–21.

[92] *Id.*

[93] *Id.*

[94] *See id.*

[95] *Id.* at 181–82, P.3d at 820–21.

[96] *See id.*

[97] *See supra* Part I(B)(ii).

[98] *See Chen*, 146 Hawai'i at 182, P.3d at 821.

[99] *Id.* On this point, Chief Justice Recktenwald's concurrence in part notes that "[i]t is significant that subsection (1) of Rule 41(b), which deals with dismissal *on defendant's motion*, does *not* allow the plaintiff to set aside the dismissal of his or her claims upon a showing of good cause." *Id.* Despite these underlying differences, the same standard appears to apply to either subsection under Rule 41(b): "The review of a dismissal under HRCP Rule 41(b) is for abuse of discretion, and absent deliberate delay, contumacious conduct or actual

Furthermore, the dissent was skeptical of the majority's reliance on *In re Blaisdell*[100] and *Shasteen*[101] because those cases described the circumstances to dismiss based on prejudice, not good cause.[102]

V. ANALYSIS AND IMPLICATIONS OF THE PROSPECTIVE RULE

A. Does the Prospective Rule Comport with the Underlying Structure of Rule 55?

As discussed in Part II, default judgments are regarded as sanctions of last resort due to the courts' preferences for deciding cases based on the merits.[103] The *Chen* court applied the same reasoning to describe Rule 41(b)(2) involuntary dismissals: "Our case law informs us that the sanction of dismissal of a complaint with prejudice is one of *last resort* where lesser sanctions would not serve the interest of justice. . . ."[104] Like default judgments, involuntary dismissals run contrary to the Hawai'i Supreme Court's "policy of affording litigants the opportunity to have their cases heard on the merits. . . ."[105] In that way, Rule 55 default judgments and Rule 41(b)(2) involuntary dismissals are similarly situated as extraordinarily severe sanctions.[106]

The court in *Chen* concluded that good cause under Rule 55(c) and good cause under Rule 41(b)(2) are "most analogous" because both sanctions were "not favored" in light of the Court's policy of deciding cases on their merits.[107] Despite those compelling similarities, Hawai'i case law has

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prejudice, an order of dismissal cannot be affirmed. The sanction of dismissal of a complaint with prejudice is one of last resort where lesser sanctions would not serve the interest of justice." Rapoza v. Soares, 146 Hawai'i 115, 115, 456 P.3d 188, 188 (Haw. Ct. App. 2020) (brackets omitted) (quoting *In re* Blaisdell (Blaisdell), 125 Hawai'i 44, 48–49, 252 P.3d 63, 67–67 (2011)) (evaluating a dismissal with prejudice under Rule 41(b)(1) in a summary disposition order).

[100] 125 Hawai'i at 49–50, 252 P.3d at 68–69.

[101] 79 Hawai'i 103, 109, 899 P.2d 386, 392 (1995).

[102] *Chen*, 146 Hawai'i at 179, 457 P.3d at 818.

[103] *See* Glist, *supra* note 9 and accompanying text.

[104] *Chen*, 146 Hawai'i at 179, 457 P.3d at 818 (brackets omitted) (emphasis added) (quoting *Blaisdell*, 125 Hawai'i at 49, 252 P.3d at 68).

[105] *Blaisdell*, 125 Hawai'i at 51, 252 P.3d at 70 (quoting Hous. Fin. & Dev. Corp. v. Ferguson, 91 Hawai'i 81, 85–86, 979 P.2d 1107, 1111–12 (1999)).

[106] *See id.*; Glist, *supra* note 9 and accompanying text; *see Blaisdell*, 125 Hawai'i at 51, 252 P.3d at 70.

[107] *Chen*, 146 Hawai'i at 176, 178–79, 457 P.3d at 815, 817–18 (citations omitted) ("Our cases have also expressed our policy of disfavoring defaults and default judgments and of resolving any doubt in favor of the party seeking relief, so that, in the interests of justice, there can be a full trial on the merits. . . . Just as we have stated 'defaults and default

clearly established that the standard for setting aside an entry of default should be lower than the standard for setting aside a default judgment.[108] Further, the *Chen* court accepted that premise in its critique of the *BDM* standard.[109] However, applying the standard for a last resort sanction such as an involuntary dismissal imputes the same level of severity to an entry of default. Evaluating both entries of default and default judgments at the same level of severity conflicts with the premise that entries of default are set aside at a lower standard than default judgments.[110] Whether the prospective rule actually conflates the severity of an entry of default with the severity of a last resort sanction can be seen in the practical application of the rule, discussed in the next subsection.

B. Implementing the Prospective Rule in Practice

To date, there have been very few published decisions on motions to set aside entries of default utilizing the new standard established in *Chen*.[111] Inferences can be made, however, about how the prospective rule will affect civil practice. Notwithstanding the concerns set forth in the preceding

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judgments are not favored and that any doubt should be resolved in favor of the party seeking relief,' we have also stated that '[i]nvoluntary dismissals of a complaint with prejudice are not favored, and should be ordered only in extreme circumstances.' Also, in the context of an appeal of a HRCP Rule 41(b) dismissal and the denial of a motion for reconsideration of that dismissal, we also stated that 'a corporation should be allowed an opportunity to secure counsel before permitting an entry of default against the corporation or, as in this case, dismissing the action, recognizing a 'preference for giving parties an opportunity to litigate claims or defenses on the merits[.]'")

[108] *See* WRIGHT, MILLER, & KANE, *supra* note 9, § 2696; *Chen*, 146 Hawai'i at 176, 457 P.3d at 815.

[109] *Chen*, 146 Hawai'i at 176, 457 P.3d at 815 ("And we have specifically noted that a motion to set aside a default entry, which may be granted under HRCP Rule 55(c) 'for good cause shown,' gives the trial court greater freedom in granting relief than is available on a motion to set aside a default judgment where the requirements of HRCP Rule 60(b) must be satisfied. Yet, after this court's 1976 per curiam opinion in *BDM*, our appellate opinions have held that motions to set aside entries of default under HRCP Rule 55(c) must satisfy the three-prong test for HRCP Rule 60(b) motions.").

[110] WRIGHT, MILLER, & KANE, *supra* note 9, § 2696; *see supra* notes 108–09 and accompanying text.

[111] *See, e.g.*, Eckard Brandes, Inc. v. Dep't. of Lab. & Indus. Rels., 146 Hawai'i 354, 363, 463 P.3d 1011, 1020 (2020) (citing Chen v. Mah, 146 Hawai'i 157, 457 P.3d 796, for purposes of clarifying definitions of good cause and excusable neglect under Hawai'i Rules of Appellate Procedure Rule 4(a)(4)(A) and (B)); In *re* AA, No. CAAP-19-0000711, 2020 WL 5796177, slip op. at *7 (Haw. Ct. App. Sept. 29, 2020) (addressing whether setting aside entry of default was appropriate where "[a]t the time, a party seeking to set aside an entry of default was required to satisfy the three-prong test set forth in BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 549 P.2d 1147 (1976). . . .").

subsection, the practical application of the new rule is likely to lower the burden for the party seeking to set aside an entry of default. The two most obvious differences from the old standard as reflected in the new one are: (1) the absence of a need to present a meritorious defense, and (2) an additional requirement that lesser sanctions be considered and deemed unable to address the prejudice to the party seeking relief.

The omission of presenting a meritorious defense lowers the burden on the defaulting party. At the very least, not having to present a defense, much less a meritorious one, lessens the showing required by defaulting parties in order to set aside the entry of default. Previously, the defaulting party had a burden to proffer evidence or arguments against the claims brought by the opposing party to prove the "possibility that the outcome . . . after a full trial [would] be contrary to the result achieved by the default."[112] Following the *Chen* decision, the defaulting party no longer has the stringent burden to prove a valid defense to plaintiff's claims.[113] As a result, if the court decides to set aside the entry of default, the parties may then present substantive defenses in a full trial with ample opportunity to utilize discovery and develop arguments, rather than on a simple pre-trial motion.[114] Thus, *Chen* succeeds in satisfying the Court's objective, in the interest of justice, to resolve cases based on their factual and legal merits.[115] On the other hand, the countervailing effect of the change could be a loss of

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[112] WRIGHT, MILLER, & KANE, *supra* note 9, § 2697; *see* Ledcor-U.S Pacific Constr., LLC v. Joslin, No. CAAP-12-0000041, 2014 WL 5905077, at *10 (Haw. Ct. App. Nov. 13, 2014) (requiring evidence or argument "directly relevant to Ledcor's misrepresentation claims against Joslin" that leaves the court with a "firm conviction" of a valid counterclaim); Great Am. Hotels & Resorts, Inc. v. Cabral, No. CAAP-11-0000660, 2014 WL 4166954, at *2 (Haw. Ct. App. Aug. 22, 2014) (finding that Defendant Cabral had failed to show a meritorious defense in a property rights action because she "did not provide any meaningful showing that . . . her claims to the property [were] superior to GAHR's claim to the property").

[113] *See Chen*, 146 Hawai'i at 176–80, 457 P.3d at 815–19.

[114] *See, e.g.*, Jessica L. O'Neill, *Show Me The Money: McClurg v. Deaton and the Introduction of a Defense as to Damages Only for Default Judgments in South Carolina*, 63 S.C. L. REV. 799, 817 (2012) (proposing that lessening the meritorious defense requirement is "in favor of granting parties more opportunity to utilize discovery" and allows for defendants to "formulate a defense").

[115] *See Chen*, 146 Hawai'i at 176, 457 P.3d at 815 ("Our cases have also expressed our policy of disfavoring defaults and default judgments and of resolving any doubt in favor of the party seeking relief, so that, in the interests of justice, there can be a full trial on the merits.") (first citing BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976), then citing County of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 423, 235 P.3d 1103, 1135 (2010)); *see generally*, Jay Tidmarsh, *Resolving Cases "On the Merits"*, 87 DENV. U. L. REV. 407, 408 (2010) (resolving cases on the merits "promises to resolve each claim and each issue on its factual and legal merit, without letting procedural technicalities or traps derail the decision").

judicial efficiency by increasing the amount of litigation and potential for waste of resources.[116]

Based on previous Hawai'i case law regarding Rule 41 motions, there is a substantial probability that a court's justification for denying a Rule 55(c) motion will also change as a result of the prospective rule.[117] As acknowledged in *Chen*, both motions require good cause to set aside or reinstate a plaintiff's claims or a defendant's defenses.[118] However, even though *Chen* did not require a court to cite lesser sanctions and show why those would be inadequate, the Court makes such a consideration when deciding Rule 41 motions where there is a potential for prejudice caused by a party's deliberate delay or contumacious conduct.[119] In *Erum v. Llego*, the Hawai'i Supreme Court, while reviewing a decision on a motion to dismiss, stated that:

> [W]henever a case is involuntarily dismissed with prejudice, the trial court must state essential findings on the record or make written findings as to deliberate delay or contumacious conduct and actual prejudice and explain why a lesser sanction than dismissal with prejudice is insufficient to serve the interests of justice.[120]

Although *Erum* did not explicitly extend to disputes regarding Rule 55(c) motions, it is not an unreasonable leap to apply its holding to defaults given that the standard from HRCP Rule 41 was adopted for entries of default in *Chen*.[121] Consistent with the Court's desire to resolve matters on the merits

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[116] *See* Tidmarsh, *supra* note 116, at 408 ("Like any aspiration, resolving cases 'on the merits' is never perfectly achievable. Nevertheless, this paradigm has continued to battle all other policy objectives–such as achieving efficiency. . . ."); O'Neill, *supra* note 113, at 817 ("[J]udicial efficiency is an important goal of the meritorious defense requirement, and granting defendants relief . . . without requiring that they show any indication of controversy would . . . directly oppose that goal.").

[117] *See* Erum v. Llego, 147 Hawai'i 368, 465 P.3d 815 (2020); *see also* Eckard Brandes, Inc. v. Dep't of Lab. & Indus. Rels., 146 Hawai'i 354, 364 n.14, 463, P.3d 1011, 1021 n.14 (2020) ("In *Chen* . . . [w]e also construed our cases interpreting HRCP Rule 41(b)(2), which requires "good cause" to set aside a dismissal, as holding by implication that "good cause" exists to set aside a dismissal under HRCP Rule 41(b)(2) if there is no (1) deliberate delay and/or contumacious conduct; or (2) if deliberate delay or contumacious conduct exist, there is no actual prejudice that cannot be addressed through lesser sanctions.") (citations omitted).

[118] 147 Hawai'i at 179, 465 P.3d 818.

[119] *See* Erum 147 Hawai'i at 390, 465 P.3d at 837 (citing *Chen*, 146 Hawai'i at 179–80, 457 P.3d at 818–19).

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

[121] Just as the Hawai'i Supreme Court adopted the standard in *Blaisdell* for Rule 55 motions, the Court has similarly relied on the *Blaisdell* standard for other rules. *See id.* 147 Hawai'i at 383, 465 P.3d at 830 (acknowledging that "[t]he Blaisdell court did not limit the standard it articulated to dismissals pursuant to HRCP Rule 41(b). . . ."). The court has also

and in the interest of justice, involuntary dismissal of a complaint with prejudice is recognized as a "severe sanction that [] 'should be ordered *only in extreme circumstances*.'"[122] Just as the Court stated that defaults are "generally disfavored,"[123] the Court has similarly stated that involuntary dismissals of a complaint "are not favored."[124] Explanations of the inadequacy of lesser sanctions require courts to evaluate whether circumstances are so extreme that they must take an action inconsistent with their policy interests, which have been recognized in both Rule 41(b) motions and Rule 55(c) motions.[125]

VI. CONCLUSION

The three-person-majority ruling in *Chen* changed Hawai'i's standard for Rule 55(c) motions that had previously been in place since 1976. In supplanting the factors considered under Rule 60(b) motions with those considered for Rule 41(b)(2) motions, the *Chen* court departed from the prevailing federal standard that has been adopted by many other states. Despite a concern with how the prospective rule affects the settled hierarchy between Rule 55(c) motions and Rule 60(b) motions, this article theorizes that the prospective rule, at least in practice, remains more lenient on litigants than the standard imposed on litigants for Rule 60(b) motions.

"applied the *Blaisdell* standard to cases dismissed with prejudice pursuant to Rule 12 of the Rules of the Circuit Courts of the State of Hawai'i (RCCH)." *Id.* Furthermore, the Court warns that "limiting the application of the *Blaisdell* factors only to those dismissal orders entered under HRCP Rule 41(b) would produce an inconsistent application of our court rules. . . . [a]pplying different legal standards to similar conduct—based on different rules—when the rules impose the same sanction of dismissal with prejudice undermines the equitable application of the law, complicates appellate review, and produces outcomes that turn not on the merits but on the litigants' skill in procedural navigation." *Id.* at 383–84, 465 P.3d at 830–31 (citations and footnotes omitted).

[122] *See id.* at 382, 465 P.3d at 829 (quoting *Blaisdell*, 125 Hawai'i at 49, 252 P.3d at 68).

[123] *See Chen*, 146 Hawai'i at 173, 457 P.3d at 812 (quoting County of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 423, 235 P.3d 1103, 1135 (2010)).

[124] *See Erum*, 147 Hawai'i at 388, 465 P.3d at 835.

[125] *See Blaisdell*, 125 Hawai'i at 51, 252 P.3d at 70 ("[A] dismissal with prejudice is inconsistent with this court's 'policy of affording litigants the opportunity to have their cases heard on the merits, where possible.'") (brackets omitted); *see also Chen*, 146 Hawai'i at 173, 457 P.3d at 812. ("Our cases have also expressed our policy of disfavoring defaults and default judgments and of resolving any doubt in favor of the party seeking relief, so that, in the interests of justice, there can be a full trial on the merits.").