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IN DEFENSE OF CONSERVATION EASEMENTS: A RESPONSE TO *THE END OF PERPETUITY*

*Nancy A. McLaughlin and W. William Weeks**

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* Nancy A. McLaughlin (J.D. University of Virginia) is the Robert W. Swenson Professor of Law at the University of Utah SJ Quinney College of Law. Professor McLaughlin is a member of the American Law Institute and a fellow of The American College of Trust and Estate Counsel. She was consulted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") regarding amendments to the comments to the Uniform Conservation Easement Act and serves as an Observer to NCCUSL's Drafting Committee for its Regulation of Charities project. She served as a member of the Land Trust Alliance's Conservation Easement Amendment Policy Group, which assisted with the drafting of the Alliance's recently published report on conservation easement amendments, and she is a member of the Alliance's Conservation Defense Advisory Council. She also serves on the advisory boards of Utah Open Lands and Vital Ground, and as a member of the Habitat Protection Advisory Committee of the Wildlife Land Trust.

W. William Weeks (J.D. Indiana University School of Law-Bloomington) is President of the Conservation Law Center; Director of Indiana University School of Law's Conservation Law Clinic; former Vice President, Chief Operating Officer, and Executive Vice President of The Nature Conservancy; and author of BEYOND THE ARK (Island Press, 1996). He is also a member of the Board of Directors of the Sycamore Land Trust and counsel to The Nature Conservancy as prospective amicus curiae in *Salzburg v. Dowd*.

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I. INTRODUCTION

A. *Introduction to the Issue and the Law*

Charitable gifts made to government entities and charitable organizations can be either restricted or unrestricted. An unrestricted charitable gift is a contribution of money or property that the donor makes without attaching any conditions on its use by the recipient entity or organization. An entity or organization in receipt of an unrestricted charitable gift is free to use that gift as it sees fit in accomplishing its general public or charitable mission.[1] A restricted charitable

[1] The typical unrestricted charitable gift is the $50 check written to a favorite charity at the end of the calendar year or the $20 bill dropped in the church collection plate on Sunday, both of which the donor intends will be used by the recipient organization as it sees fit in accomplishing its general charitable mission.

gift, in contrast, is a contribution of money or property that the donor makes to a government entity or charitable organization to be used for a specific charitable purpose and often according to carefully negotiated terms. As explained in more detail below, under state law a restricted charitable gift creates a charitable trust or its functional equivalent, and the recipient entity is obligated to administer the gift in accordance with the terms and purpose specified by the donor (such terms and purpose are typically set forth in the donative instrument).[2]

Many conservation easements are conveyed to government entities or charitable conservation organizations (referred to as "land trusts") in whole or in part as charitable gifts, and the primary issue addressed in this article is whether such easements constitute restricted or unrestricted charitable gifts for state law purposes. In *Hicks v. Dowd:*[3] *The End of Perpetuity?* (hereinafter, *The End of*

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[2] *See, e.g.,* Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation's Mission and Unrestricted Assets*, 80 CHI.-KENT. L. REV. 689, 701–02 (2005) ("[T]he law imposes more restrictions on a charitable corporation's use of restricted gifts (i.e., gifts that expressly limit their use to specific purposes) than unrestricted gifts (i.e., outright gifts with no express restrictions on their use). A restricted gift creates a charitable trust or its functional equivalent, and the donee is obliged to honor these restrictions. . . . By contrast, an unrestricted gift does not create a formal 'trust' within the meaning of trust law, and the donee can use it for any charitable purpose set forth in its articles of incorporation."); John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around,* 76 FORDHAM L. REV. 693, 698, 708–09 (2007) (explaining that restricted charitable gifts give rise to trust or trust-like duties, in particular the duty to abide by the terms of the gift, and that "[c]ontemporary donor-charity dealings at the negotiation/documentation stage of a contribution . . . more and more frequently result in 'some really hairy gift agreements' . . . specify[ing] in detail the terms upon which the donor's gift is to be employed by the recipient organization").

[3] Hicks v. Dowd, 157 P.3d 914, 2007 WY 74 (2007). *Hicks* involved Johnson County, Wyoming's attempted termination of a perpetual conservation easement encumbering an approximately 1,043 acre ranch located in the County. The Lowham Limited Partnership had donated the conservation easement as a charitable gift to the Board of County Commissioners of Johnson County ("the Board of Commissioners") in 1993 for the purpose of preserving and protecting the conservation values of the ranch in perpetuity. *Id.* at 916. The easement, which prohibits subdivision and other inconsistent uses of the ranch, was estimated to have reduced the ranch's value by more than a million dollars, and the Lowhams claimed a federal charitable income tax deduction based on that amount. *See* Conservation Easements, www.shifting-ground.com/conservation_easements.html (last visited Nov. 20, 2008). In 2002, at the request of the new owners of the ranch ("the Dowds"), who had purchased the ranch subject to the perpetual easement, the Board of Commissioners executed a deed transferring the easement to the Dowds, intending to thereby terminate the easement. *Hicks*, 157 P.3d at 916–17. The Board of Commissioners did not obtain court approval of the transfer and apparently did not request or receive compensation in exchange for the transfer. *Id.* at 917. A resident of Johnson County ("Hicks") filed suit alleging, *inter alia*, that the conservation easement was held in trust for the benefit of the public, the Board of Commissioners could not terminate the easement without receiving court approval in a *cy pres* proceeding, and the purpose of the easement had not become impossible or impracticable as required under the *cy pres* doctrine to terminate the easement. *See, e.g.,* Mem. in Opp'n to Defs'. Mot. for Summ. J. and in Supp. of Pls'. Mot. for Summ. J. at 5–14, Hicks v. Dowd, No. 2003-0057 (Wyo. Dist. Ct. Oct. 27, 2003). On May 9, 2007, the Wyoming Supreme Court dismissed the case on the ground that Hicks did not have standing to sue to enforce a charitable trust, but the Court invited the Wyoming

Perpetuity), C. Timothy Lindstrom asserts that government entities and land trusts have the right to modify and terminate the perpetual conservation easements they hold "on their own" and as they "see fit," subject only to the agreement of the owner of the encumbered land and the general constraints imposed by federal tax law on the operations of charitable organizations.[4] In other words, *The End of Perpetuity* asserts that perpetual conservation easements donated to government entities or land trusts are unrestricted charitable gifts, and, thus, that the holders of such easements are not obligated under state law to administer the easements in accordance with their stated terms or purposes.[5]

The End of Perpetuity defines "improper" terminations or modifications of conservation easements as "those terminations or modifications that confer a net financial benefit on a private person or entity and/or fail to meaningfully advance land conservation on the protected property or some other property in

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Attorney General, as supervisor of charitable trusts in the state of Wyoming, "to reassess his position" with regard to the case. *Hicks,* 157 P.3d at 921. In July of 2008, the Wyoming Attorney General filed a complaint in District Court requesting that the deed transferring the conservation easement to the Dowds be cancelled and declared null and void. *See* Salzburg v. Dowd, Compl. for Declaratory J. Charitable Trust, Mandamus Relief, Breach of Fiduciary Duties, Violation of Constitutional Provisions 13 (July 8, 2008). In the complaint, the Attorney General alleges, *inter alia*, that the Board of Commissioners (i) violated its fiduciary duty to assure the Ranch's protection and preservation, (ii) had a contractual and mandatory obligation to have a judicial determination made of the impossibility of the continuation of the easement before terminating the easement, and (iii) violated its fiduciary duty and Wyoming's constitution by transferring the easement to the Dowds for less than market value. *Id.* at 7–13.

[4] C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity*?, 8 WYO. L. REV. 25, 62 (2008) [hereinafter *The End of Perpetuity*] (asserting that holders have the right to terminate or modify conservation easements "on their own"); *id*. at 67 (asserting that holders have the authority to modify or terminate conservation easements as they "see fit," taking into account the constraints on such decisions imposed by the common law of real property and federal tax law). Under the common law of real property, the owner of an easement can unilaterally release the easement, in whole or in part, and can agree with the owner of the burdened land to modify or terminate the easement. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 7.1, 7.3 (2000) [hereinafter RESTATEMENT OF PROPERTY]. Accordingly, such law does not place any meaningful constraint on a holder's decision to modify or terminate a conservation easement. *See also infra* Part II.H (explaining that federal tax law does not ensure that government entities and charitable organizations comply with their fiduciary obligations under state law to administer charitable gifts in accordance with their stated terms and purposes, and that state attorneys general and state courts, rather than the Internal Revenue Service ("IRS"), are the proper enforcers of such state law fiduciary obligations).

[5] Although *The End of Perpetuity* draws no distinction, the analysis in this article focuses on conservation easements conveyed in whole or in part as charitable gifts to land trusts or state or local government entities, as was the case with the conservation easement at issue in *Hicks*. The rules governing the administration of conservation easements conveyed to agencies of the federal government are beyond the scope of this article, as are the rules governing the administration of conservation easements purchased for their full value with general (unrestricted) funds, exacted as part of development approval processes, or acquired in the context of mitigation. *Cf.* Part II.J. (explaining that the fact that some conservation easements are not conveyed as charitable gifts is not a justification for permitting government or land trust holders to avoid their fiduciary obligations with regard to those that are).

the vicinity of the protected property."[6] Pursuant to this definition, the holder of a conservation easement could properly agree with the owner of the encumbered land to extinguish the easement, or amend it to permit the subdivision and development of the land, provided the holder received appropriate compensation (and therefore did not confer a net financial benefit on a private person or entity), and used that compensation to "meaningfully advance land conservation on . . . some other property in the vicinity." In other words, the quoted definition would permit governmental and nonprofit holders to liquidate conservation easements in whole or in part to fund, for example, the purchase of different easements encumbering other property in the vicinity, the purchase of fee title to other property in the vicinity, or even increases in a holder's operating budget or stewardship endowment, all of which would arguably "meaningfully advance land conservation . . . in the vicinity." Moreover, if the only restrictions on the administration of donated conservation easements were those alleged in *The End of Perpetuity,* governmental and nonprofit holders of easements would actually have far greater discretion. As with any unrestricted charitable gift, the holder of a conservation easement could agree to sell, trade, release, extinguish, or otherwise dispose of the easement, in whole or in part, and use the compensation received in any manner consistent with its general public or charitable mission.[7] In other words, despite their detailed terms and purposes, conservation easements would be fungible or liquid assets in the hands of their government and land trust holders.

The *End of Perpetuity's* implicit assertion that donated conservation easements are unrestricted charitable gifts is not supportable. Conservation easements are not donated to government entities and land trusts to be sold, traded, released, extinguished, or otherwise used or disposed of, in whole or in part, by such entities as they may see fit from time to time in the accomplishment of their general public or charitable missions. Rather, conservation easements are donated to government entities and land trusts to be used for a specific charitable purpose—the protection of the particular land encumbered by the easement for the conservation purposes specified in the deed of conveyance, generally in perpetuity. The conservation easement at issue in *Hicks v. Dowd* is a case in point, having been donated to Johnson County, Wyoming, for the express purpose of preserving and protecting the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Meadowood Ranch in perpetuity.[8]

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[6] *The End of Perpetuity*, *supra* note 4, at 25, n. 1.

[7] *See supra* notes 4 and 5 accompanying text. *See also supra* note 2.

[8] Deed of Conservation Easement between the Lowham Limited Partnership, Grantor, and the Board of County Commissioners of Johnson County, Wyoming, Grantee 2 (Dec. 29, 1993) [hereinafter Lowham Easement]. The Board of Commissioners apparently later transferred the Lowham Easement to the Scenic Preserve Trust, a charitable organization created by the Board of Commissioners for the purpose of preserving and enhancing the scenic resources of Johnson County. *See Hicks*, 157 P.3d at 915–18. The Scenic Preserve Trust is governed by a Board of Trustees, the members of which are the same as the members of the Board of Commissioners. *Id.* at 916.

Because conservation easements are donated to government entities and land trusts to be used for a specific charitable purpose, their donation should create a charitable trust or its functional equivalent under state law, even though the deeds of conveyance typically do not contain the words "trust" or "trustee,"[9] and even though many easement donors may not know that the intended relationship is called a trust.[10] As explained in the Restatement (Third) of Trusts:

> An outright devise or donation to a . . . charitable institution, expressly or impliedly to be used for its general purposes, is charitable but does not create a trust . . . . A disposition to such an institution for a specific purpose, however, such as to support medical research, perhaps on a particular disease, or to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee . . . .[11]

In some jurisdictions courts refer to gifts made to government entities or charitable organizations to be used for specific charitable purposes, not as charitable trusts, but as implied trusts, quasi-trusts, restricted charitable gifts, or public trusts. Regardless of how such gifts are characterized, however, the substantive rules governing the administration of charitable trusts generally apply.[12] Accordingly, as

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[9] *See infra* note 66 and accompanying text (explaining that no magical incantation is necessary to create a charitable trust).

[10] *See infra* notes 67–76 and accompanying text (explaining that all that is required to create a trust is an intention to create a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another, and that it is immaterial whether or not the settlor knows that the intended relationship is called a trust). *See also infra* note 98 and accompanying text (explaining that the status of a conservation easement as a partial interest in real property does not prevent it from being held in trust).

[11] RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a. (2003) [hereinafter RESTATEMENT (THIRD) OF TRUSTS]. These principles also generally apply to charitable gifts made to state and local government entities. *See, e.g.,* In re Estate of Heil v. Nevada, 259 Cal. Rptr. 28 (Cal. Ct. App. 1989) (devise of residue of decedent's estate to the state of Nevada to be used for the preservation of wild horses created a charitable trust); Tinkham v. Town of Mattapoisett, 22 Mass. L. Rep. 635 (2007) (gift of land to a town to be used for conservation purposes created a charitable trust); State v. Rand, 366 A.2d. 183 (Me. 1976) (gift of land to a city to be forever held and maintained as a public park created a charitable trust); Lancaster v. City of Columbus, 333 F. Supp. 1012, 1024 (N.D. Miss. 1971) ("It is settled state law that lands taken and held by a municipality as a gift for a specific purpose are subject to the law of trusts, and any use inconsistent with that intended by the dedicator constitutes a breach of trust.").

[12] *See* RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1959) [hereinafter RESTATEMENT (SECOND) OF TRUSTS] ("Property may be devoted to charitable purposes not only by transferring it to individual trustees to hold it for such purposes, but also by transferring it to a charitable corporation. . . . Where property is given to a charitable corporation, particularly where restrictions are imposed by the donor, it is sometimes said by the courts that a charitable trust is created and that the corporation is a trustee. It is sometimes said, however, that a charitable trust is not created. This is a mere matter of terminology. . . . Ordinarily the principles and rules applicable to charitable trusts are applicable to charitable corporations . . . ."); *id.* Reporter's Notes cmt. f ("Where restricted

with other gifts conveyed to government entities or charitable organizations to be used for a specific charitable purpose, the holder of a conservation easement should not be permitted to use the easement for a purpose other than that for which it was granted without receiving judicial approval in a *cy pres* proceeding. Thus, the holder of a conservation easement should not be permitted to release, extinguish, or otherwise terminate the easement (which would clearly be contrary to its stated purpose), or amend the easement in manners contrary to its stated purpose (such as to permit the subdivision and development of the land), without receiving judicial approval in a *cy pres* proceeding. The holder could, however, agree to amendments that are consistent with the purpose of the easement pursuant to the holder's express or implied power to agree to such amendments or, in the absence of such powers, with judicial approval obtained in a more flexible administrative (or equitable) deviation proceeding.[13]

A variety of authoritative sources support the application of charitable trust principles to conservation easements, including the Uniform Conservation

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gifts are made to charitable corporations, the restrictions are enforceable at the suit of the Attorney General."); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS, § 348.1 (4th ed. 1989) ("Certainly many of the principles applicable to charitable trusts are applicable to charitable corporations. In both cases the Attorney General can maintain a suit to prevent a diversion of the property to purposes other than those for which it was given; and in both cases the doctrine of cy pres is applicable."). *See also, e.g.,* Blumenthal v. White, 683 A.2d 410, 412–13 (Conn. 1996) (applying charitable trust principles to a gift of land to a city with instructions that the land be used as a public park and explaining that, while the conveyance did not create a trust "in strict sense, it may be so regarded," and the city held the land as a "quasi-trustee"); Carl J. Herzog Found. v. University of Bridgeport, 699 A.2d 995, 998 n. 2 (Conn. App. Ct. 1997) (explaining that the law governing the enforcement of charitable gifts is derived from the law of charitable trusts and "'The theory underlying the power of the attorney general to enforce gifts for a stated purpose is that a donor who attaches conditions to his gift has a right to have his intention enforced'" (citing Lefkowitz v. Lebensfeld, 417 N.Y.S.2d 715, 720 (N.Y. App. Div. 1979))); *Tinkham*, 22 Mass. L. Rep. at 635 (applying charitable trust principles to a gift of land to a town to be used for conservation purposes and describing the gift as having created both a public trust and a charitable trust); Town of Cody v. Buffalo Bill Memorial Ass'n, 196 P.2d 369, 377 (Wyo. 1948) (applying charitable trust principles to a gift of land to a charitable association to be used to memorialize the memory of William F. "Buffalo Bill" Cody and explaining, "Grants made to a charitable corporation may, of course, be of various kinds. They may be absolute or, on the other hand, proper terms, conditions and directions may be annexed thereto. In the latter case, the terms, conditions and directions annexed must be carried out"). For law review commentators, see, for example, Katz, *supra* note 2; Eason, *supra* note 2. A few of the procedural rules applicable to trusts do not apply in the case of charitable gifts made for specific purposes. *See, e.g.,* SCOTT & FRATCHER, *supra,* § 348.1 ("The circumstances under which and the proceedings by which creditors can reach the property are different . . . ."); Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing,* 41 GA. L. REV. 1183, 1209 (2007) ("[A] restricted gift . . . does not impose on the corporate charity the trust law procedural requirements for providing information to beneficiaries (although the charity would have to respond to a request for information from the attorney general) and for judicial accounting.").

[13] *See infra* Part II.D. (explaining the legal principles governing the administration of charitable trusts and how those principles should apply to conservation easements).

Easement Act (adopted by Wyoming in 2005),[14] the Uniform Trust Code (adopted by Wyoming in 2003),[15] the Restatement (Third) of Property: Servitudes,[16] and federal tax law,[17] all of which are discussed in more detail below.[18] In addition, state attorneys general in a growing number of states are recognizing both their right and their obligation, as supervisors of charitable trusts, to protect the public interest and investment in conservation easements.[19]

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[14] Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Conservation Easement Act § 3 cmt. (2007), *available at* http://www.law.upenn.edu/bll/ulc/ucea/2007_final.htm (last visited Nov. 20, 2008) [hereinafter UCEA] ("[B]ecause conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose . . . the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements."). Wyoming's version of the UCEA can be found at WYO. STAT. ANN. §§ 34-1-201 to -207 (2008).

[15] Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Trust Code § 414 cmt. (2005), *available at* http://www.law.upenn.edu/bll/ulc/uta/2005final.htm (last visited Nov. 20, 2008) [hereinafter UTC] (explaining that the creation of a conservation easement will frequently create a charitable trust and the organization to which the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement). Wyoming's version of the UTC can be found at WYO. STAT. ANN. §§ 4-10-101 to -1103.

[16] RESTATEMENT OF PROPERTY, *supra* note 4, § 7.11 (providing that the substantial modification or termination of conservation easements held by government entities and charitable organizations is governed, not by the real property law doctrine of changed conditions, but by a special set of rules modeled on the charitable trust doctrine of *cy pres*).

[17] *See infra* notes 302–306 and accompanying text (explaining that tax-deductible conservation easements must be, *inter alia,* transferable by their holders only to other government entities or charitable organizations that agree to continue to enforce the easements, and extinguishable by their holders only in what essentially is a *cy pres* proceeding).

[18] *See also* Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L. Q. 673 (2007) [hereinafter *Perpetuity and Beyond*] (discussing the support for applying charitable trust principles to conservation easements, including case activity on the issue to date).

[19] *See, e.g., supra* note 3 (discussing the complaint filed by the Wyoming Attorney General seeking to enforce the conservation easement at issue in *Hicks* on behalf of the public); *infra* notes 131–143 and accompanying text (describing a case in which the Maryland Attorney General sought to enforce a perpetual conservation easement on behalf of the public on the ground that the gift of the easement had created a charitable trust); Windham Land Trust v. Jeffords, Order on State's Motion to Intervene (Cumberland Sup. Ct. Jan. 2, 2008) (granting the Maine Attorney General's motion to intervene in a case involving the enforcement of a conservation easement, which motion was requested in part based on the attorney general's right to enforce gifts made to charities); Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy,* 40 U. RICH. L. REV. 1031, 1069–70 [hereinafter *Amending Perpetual Conservation Easements*] (noting that state attorneys general in a number of states, including Maryland, California, Pennsylvania, Maine, Connecticut, and Massachusetts are beginning to recognize that they have the right and the obligation to enforce conservation easements on behalf of the public, and quoting, for example, Belinda J. Johns, Senior Assistant Attorney General in the California Attorney General's Office, as stating "It is our position that conservation easements are donor-restricted charitable assets and that modification would be governed by the cy pres doctrine," and Larry Barth, Senior Deputy Attorney General for the State of Pennsylvania, as stating that "we regard [conservation easements] as we would any other charitable trust . . . under Common Law and those of our statutes that give the AG authority over charities and charitable trusts"). The New Hampshire Attorney General has

B. *Land Trust Practices*

The End of Perpetuity's assertion that government entities and land trusts are free to amend or terminate the conservation easements they hold "on their own" and as they may "see fit" is also inconsistent with (i) the representations the Land Trust Alliance and individual land trusts make to easement grantors, funders, and the general public regarding the perpetual nature of conservation easements, (ii) the guidelines promulgated by the Land Trust Alliance for the responsible operation of land trusts, and (iii) the manner in which land trusts generally account for the easements they acquire on their financial books. The Land Trust Alliance is a nonprofit umbrella organization that provides training and education to, and develops policies and standards for, the over 1,700 local, state, and regional land trusts operating in the United States.[20]

1. *Representations Made*

The promise of permanent protection of the specific land encumbered by a conservation easement has always been, and continues to be, a key selling point for land trusts soliciting conservation easement donations. The Land Trust Alliance, in conjunction with the Trust for Public Land, first published the Conservation Easement Handbook in 1988 ("the 1988 Handbook").[21] One purpose of the 1988 Handbook was to provide land trust and public agency personnel with detailed guidance for operating successful conservation easement acquisition programs.[22] The 1988 Handbook lists the ability to promise permanent protection of the encumbered land as one of the "Four Key Selling Points" of a conservation easement

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likewise taken the position that conservation easements are charitable trusts enforceable by the Attorney General. Personal Communication between Terry Knowles, past President of the National Association of State Charity Officials and Assistant Director of the Charitable Trusts Unit of the New Hampshire Attorney General's Office, and Nancy A. McLaughlin on September 5, 2008. The New Hampshire Attorney General is working with land trusts in New Hampshire to develop guidelines regarding Attorney General and court oversight of conservation easement modifications and terminations. *Id.* The New Hampshire Attorney General has also participated in two minor cases involving *cy pres* petitions filed with the court to correct problems in conservation easement deeds, and both cases were resolved "quickly and efficiently." *Id.*

[20] *See* Land Trust Alliance, www.lta.org/about-us (last visited Nov. 20, 2008). The charitable mission of the Alliance is "[t]o save the places people love by strengthening land conservation across America." Land Trust Alliance, Who We Are, www.lta.org/about-us/who-we-are (last visited Nov. 20, 2008).

[21] CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS (Janet Diehl & Thomas S. Barrett eds., 1988) [hereinafter 1988 CONSERVATION EASEMENT HANDBOOK]. The Trust for Public Land is a national nonprofit land conservation organization that "conserves land for people to enjoy as parks, community gardens, historic sites, rural lands, and other natural places, ensuring livable communities for generations to come." The Trust For Public Land, www.tpl.org/tier2_sa.cfm?folder_id=170 (last visited Nov. 20, 2008).

[22] 1988 CONSERVATION EASEMENT HANDBOOK *supra* note 21, at xi.

program.[23] The 1988 Handbook also cautions that program administrators not get so involved in describing the technicalities of conservation easements that they "forget to emphasize the main reason why people grant them: to protect *their* property *forever*."[24]

In answer to the question "*How Long Does an Easement Last?*" the 1988 Handbook explains "[a]n easement can be written so that it lasts forever. This is known as a perpetual easement," and "[a]n easement runs with the land—that is, the original owner and all subsequent owners are bound by the [easement's] restrictions . . . ."[25] And in discussing an easement holder's responsibilities, the 1988 Handbook provides "[t]he grantee organization or agency is responsible for enforcing the restrictions that the easement document spells out."[26] These representations were carried forward in only slightly modified form to the most recent edition of the Conservation Easement Handbook, published in 2005 ("the 2005 Handbook"), which explains, in part, "[w]hen the easement holder accepts an easement, it accepts responsibility for enforcing the restrictions set forth in the easement document, typically in perpetuity."[27] The 2005 Handbook also opens with the following statement by Rand Wentworth, President of the Land Trust Alliance, "For many people who love their land, [a conservation easement] is the best way to ensure that it will be preserved for all time." [28]

In a recently published brochure detailing its philosophy, the Land Trust Alliance similarly defines a conservation easement as

> a legal agreement between a landowner and a land trust (or other eligible entity) that restricts future activities on the land to protect its conservation values. When people donate a conservation easement to a land trust, they give up some of the rights associated with the land. For example, they might give up

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[23] *Id.* at 37.

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

[25] *Id.* at 7 (emphasis in original).

[26] *Id.* More than 15,000 copies of the 1988 Handbook were sold and it served "as a critical source of information that led to the drafting of thousands of conservation easements, protecting millions of acres." ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK ix (2d ed. 2005) [hereinafter 2005 CONSERVATION EASEMENT HANDBOOK].

[27] 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 22. In answer to the question "*How Long Does an Easement Last?*" the 2005 Handbook similarly explains "[c]onservation easements are usually intended to last forever—these are known as perpetual easements" and "[a] perpetual easement runs with the land—that is, the original owner and all subsequent owners are bound by its restrictions." *Id.* at 21 (emphasis in original).

[28] *Id.* at 7. The 2005 Handbook goes on to describe an easement donor who "expressed sentiments about his land that are similar to those of other landowners across the country: 'I placed an easement on [my farm] because 52 years ago I found it to be a beautiful piece of property and wanted it to remain so forever.'" *Id.*

> the right to build additional structures, while retaining the right to live on the land and grow crops. *Future owners of the property will be bound by the easement's terms. The land trust is responsible for making sure the easement's terms are followed in perpetuity.*[29]

And in its 2007 Annual Report, under the heading "*Ensuring the Permanence of Conservation,*" the Land Trust Alliance noted that its recently launched conservation defense program will help land trusts "make sure that conserved land stays protected forever."[30] The Report explains that this new program "will give land trust staff, volunteers and board members the legal backup they need to assure the public that we do have the resources, knowledge and capability to defend conserved land forever."[31]

Similar representations regarding the nature of a perpetual conservation easement can be found in the solicitation materials of virtually every land trust operating in this country. To provide just a few examples, in describing conservation easements on its website, The Nature Conservancy[32] explains:

> Most easements "run with the land," remaining with the property even if it is sold or passed on to heirs, thus binding in perpetuity the original owner and all subsequent owners to the easement's restrictions. The organization or agency that holds the conservation easement is responsible for making sure the easement's terms are followed into the future. . . . Often landowners have no intention of subdividing their properties for development. But a conservation easement is still attractive to them because it reaches beyond their own lifetimes to ensure the conservation purposes are met forever. An easement binds heirs and other future landowners to comply with the easement's terms. . . . It can give peace-of-mind to current landowners worried about the future of a beloved property, whether forest or ranch, stretch of river or family farm.[33]

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[29] PHILOSOPHY OF THE LAND TRUST ALLIANCE 4 (Land Trust Alliance), *available at* www.lta.org/about-us/who-we-are/alliance-philosophy.pdf/view (last visited Nov. 20, 2008) (emphasis added).

[30] LAND TRUST ALLIANCE 2007 ANNUAL REPORT 20, *available at* www.lta.org/about-us/who-we-are/annual-report-2007.pdf (last visited Nov. 20, 2008)

[31] *Id.*

[32] The Nature Conservancy is a land trust that operates on a national and international level and its charitable mission is "to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive." The Nature Conservancy, How We Work, www.nature.org/aboutus/howwework/?src=t2 (last visited Nov. 20, 2008).

[33] The Nature Conservancy, How We Work, Conservation Easements—All About Conservation Easements, http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/about/allabout.html (last visited Nov. 20, 2008).

In explaining "Easement Basics" to prospective easement grantors, funders, and other members of the public on its website, the Jackson Hole Land Trust[34] (which has employed the author of *The End of Perpetuity* as its Director of Protection and Staff Attorney since 2000[35]), provides:

> A conservation easement is a voluntary contract between a landowner and a land trust, government agency, or another qualified organization in which the owner places permanent restrictions on the future uses of some or all of their [sic] property to protect scenic, wildlife, or agricultural resources. . . . *The easement is donated by the landowner to the land trust, which then has the authority and obligation to enforce the terms of the easement in perpetuity.* The landowner still owns the property and can use it, sell it, or leave it to heirs, but *the restrictions of the easement stay with the land forever*.[36]

And in defining conservation easements on its website, the Teton Regional Land Trust[37] similarly provides:

> A conservation easement is a voluntary agreement a willing landowner makes to permanently restrict the type and amount of development that may take place on his or her property in the future. . . . The landowner continues to own the property; he or she may sell it, live on it, use it, or leave it to heirs, but *the agreed-upon restrictions remain with the land forever*. The Land

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[34] The Jackson Hole Land Trust is a local land trust and its charitable mission is "to preserve open space and the scenic, ranching and wildlife values of Jackson Hole by assisting landowners who wish to protect *their* land *in perpetuity*." Jackson Hole Land Trust, www.jhlandtrust.org (last visited Nov. 20, 2008) (emphasis added).

[35] *See* Jackson Hole Land Trust, Our Board & Staff, http://jhlandtrust.org/about/ctimothylindstrom.htm (last visited Nov. 20, 2008).

[36] Jackson Hole Land Trust, Easement Basics, http://jhlandtrust.org/protection/easement.htm (last visited Nov. 20, 2008) (emphasis added). Jean Hocker, past President of the Land Trust Alliance and a founder of the Jackson Hole Land Trust, similarly describes perpetual conservation easements as follows:

> Questions often arise regarding the concept of "perpetual." The terms of an easement, of course, stay in place even when the land is sold, no matter how many times it is sold. An easement is attached to the deed, and the property's subsequent buyers are well aware of an easement's terms and limitations.

Jean Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 NAT. RESOURCES & ENV'T 244, 245 (2001).

[37] The Teton Regional Land Trust is a regional land trust and its charitable mission is "to conserve agricultural and natural lands and to encourage land stewardship in the Upper Snake River Watershed for the benefit of today's communities and as a legacy for future generations." Teton Regional Land Trust, Mission & Values, www.tetonlandtrust.org/about_mission.htm (last visited Nov. 20, 2008).

> Trust accepts the responsibility for the regulation of the easement agreement. . . . While the tax benefits are helpful, *many people have found the greatest satisfaction in working with Land Trusts is the assurance that the land they cherish will always be protected*.[38]

These representations regarding the perpetual nature of conservation easements are also often memorialized in the deeds of conveyance. For example, the easement at issue in *Hicks v. Dowd* provides

> The Grantee . . . intends, by acceptance of the grant made hereby, forever to honor the intentions of the Grantor stated herein to preserve and protect in perpetuity the natural elements

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[38] Teton Regional Land Trust, Easements Defined, www.tetonlandtrust.org/easement_defined.htm (last visited Nov. 20, 2008) (emphasis added). Additional examples abound. For example, the Montana Land Reliance ("MLR"), a well-respected state-wide land trust, explains on its website

> A conservation easement is the legal glue that binds a property owner's good intentions to the land in perpetuity. . . . A conservation easement runs with the title to the property regardless of changes in future ownership . . . .
>
> MLR only takes conservation easements in perpetuity, which gives the donor the comfort of knowing that their property will remain as they describe in the conservation easement document.

Montana Land Reliance, An Introduction to Conservation Easements, www.mtlandreliance.org/easment.htm (last visited Nov. 20, 2008); Montana Land Reliance, FAQs, www.mtlandreliance.org/faq.htm (last visited Nov. 20, 2008).

And in its "Landowner Information Series," the Vermont Land Trust ("VLT"), another well-respected state-wide land trust, explains

> A donation of a conservation easement protects your land from development for all future generations. The land continues to be privately owned but it carries with it protective restrictions that limit some future uses. These protections are forever upheld by the Vermont Land Trust through its stewardship staff . . . .
>
> Conservation easements offer several advantages to landowners. . . . Easements are permanent. Conservation easements remain in force even after the land changes hands. Unlike deed restrictions, a conservation easement is forever upheld by VLT as an interested party whose goal is to protect the easement . . . .
>
> [U]nanticipated future uses that are inconsistent with the original owner's conservation goals are prohibited. This ensures that VLT has the ability to carry out the original landowner's intent in perpetuity.

Vermont Land Trust, VLT Landowner Information Series, Conservation Easement Donations, *available at* www.vlt.org/Conservation_Easement_Donations.pdf (last visited Nov. 20, 2008). *See also* 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 143 (in which Darby Bradley, then President of the Vermont Land Trust, explains "[a]fter the deal is done, the ribbon cut, and the celebration is over, the marathon begins. *We've promised to look after the land forever, and that promise outlives us*") (emphasis added). The perpetual nature of conservation easements is similarly described in the popular press. *See, e.g.,* Christopher West Davis, *Pushing the Sprawl Back: Landowners Turn to Trusts,* N.Y. TIMES, Oct. 23, 2003, at 14WC, p.1 ("[C]onservation easements allow landowners to keep their raw land but donate its development rights to a neutral land trust that will keep it locked up forever."); C. Woodrow Irvin, *Land Trust Touts Success in Preserving Virginia Properties,* WASH. POST, Jan. 23, 2005, at T11 ("Conservation easements are agreements between landowners and governments to limit development on the land in perpetuity, no matter who the owner is.").

> and ecological and aesthetic values of the Ranch, and further intends to enforce the terms of this instrument . . . .[39]
>
> . . . .
>
> This Easement shall be a burden upon and shall run with the Ranch in perpetuity and shall bind the Grantor [and] its successors and assigns forever[40]

There is no mention in any of these representations of the donee's reserved right to later agree to amend or terminate the perpetual conservation easements it holds "on its own" and as it may "see fit." Rather, the representations are directly to the contrary. Accordingly, as with any other property donated to a government entity or charitable organization to be used for a specific charitable purpose, a landowner who donates a conservation easement quite reasonably expects that the donee entity or organization will enforce the easement in accordance with its stated purpose and carefully negotiated terms.

An excerpt from a posting on the Land Trust listserv eloquently illustrates the perspective of many easement grantors:

> I know donors (and am myself such a donor) whose purpose in the donation is the ultimate protection of beloved land. If I were to see a casual attitude toward amendments, I would be inclined not to donate to the land trust in question or, perhaps, to any land trust because the [conservation easement] or fee donation would not achieve my purpose. For example, one restriction I have used in my donations is that no living standing redwoods may be cut. A future board could conclude that it could safely log and sell every fifth redwood tree because the board decides the harm to my preserve would be relatively small and the dollar value of the cut trees would be enormous and could be used to preserve other land or to do other good work. I can see how someone who was not passionate about my land could think cutting "just a few" trees would be ok given the "greater good" to be achieved.
>
> I don't care. I am the one making the donation and giving up the more comfortable life the sale price could bring me, and I

[39] Lowham Easement, *supra* note 8, at 2.

[40] *Id.* at 9.

> get to decide. If the land trust can amend away the protections I placed on my land, then I might as well sell the land and have a more comfortable life.[41]

These same sentiments are reflected in surveys of easement donors, which indicate that many landowners are willing to donate conservation easements in large part because of a personal attachment to the particular land encumbered by the easement and a desire to see *that* land permanently preserved.[42] In an interview with a New York Times reporter, Stephen J. Small, a Boston-based attorney who specializes in conservation easement transactions and was a principal drafter of the Treasury Regulations interpreting § 170(h) of the Internal Revenue Code (which authorizes a charitable income tax deduction for the donation of a conservation easement), "summed it up: 'Most people who donate conservation easements do so for three reasons: they love their land; they love their land; they love their land.'"[43]

Many in the land trust community are cognizant of the fiduciary duties land trusts owe to easement donors. For example, in its recently published research report on amendments to conservation easements ("the Amendment Report"), the Land Trust Alliance cautions land trusts about the dangers of fraudulent

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[41] E-mail to Land Trust Listserv from Ann Taylor Schwing, Land Trust Accreditation Commissioner, Past President of The Land Trust of Napa County, Trustee of the American Inns of Court Foundation, and a principal drafter of the Land Trust Alliance's recently published report on conservation easement amendments (Nov. 13, 2006, 1:13pm MST) (on file with authors). For similar sentiments expressed by the daughter of a deceased easement donor, see *infra* note 134 and accompanying text.

[42] *See, e.g.,* Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach,* 31 ECOLOGY L.Q. 1, 45 (2004) [hereinafter *Tax Incentives*] ("[T]he surveys indicate that for most easement donors, a strong personal attachment to and concern about the long-term stewardship of their land is the primary factor motivating their donations, while tax incentives generally play a subsidiary or supplemental role."); Darby Bradley, President, Vermont Land Trust, *Land Conservation: The Case for Perpetual Easements* (Jan. 2003) (noting, with regard to easements granted to the Vermont Land Trust, "[a]lthough the tax and financial benefits were usually important considerations, the owner's primary motivation for conserving the property was to ensure that the land would be protected and cared for, even after their own ownership ends"), *available at* www.vlt.org/perpetual_easements.html (last visited Nov. 20, 2008). *See also Tax Incentives, supra,* at 45 (noting that the survey results "are not surprising given that the federal tax incentives compensate the typical easement donor for only a modest percentage of the reduction in the value of his or her land resulting from an easement donation. Any charitable donation that requires a significant financial sacrifice must be motivated by factors other than, or in addition to, the anticipated tax savings").

[43] Christopher West Davis, *Pushing the Sprawl Back: Landowners Turn to Trusts,* N.Y. TIMES, Oct. 23, 2003, 14WC, p. 1. *See also, e.g.,* Lorna Thackery, *Landowners seek security: Agreements usually ban surface mining, subdivisions,* THE BILLINGS GAZETTE, Feb. 26, 2006 ("Preservation of much-loved landscapes ranks high among the motivating factors for increasingly popular conservation easements.").

solicitation,[44] and explains that land trusts are both legally and ethically bound by the representations they make to donors.[45] All land trusts would do well to heed these warnings. In a 2003 case, *Madigan v. Telemarketing Associates*, the United States Supreme Court sided with the Attorney General of Illinois in holding "States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used."[46] Although *Madigan* involved solicitations for donations of money, the same principles should apply to land trusts that make false or misleading representations that deceive landowners about how their conservation easement donations will be used (e.g., representing that "the restrictions of the easement stay with the land forever" and the land trust has the "obligation to enforce the terms of the easement in perpetuity," when the land trust intends or believes it is free to amend or terminate the easement on its own and as it may see fit from time to time).[47]

2. *Legal and Ethical Guidelines*

The End of Perpetuity's assertion that government entities and land trusts are free to amend or terminate the conservation easements they hold "on their own" and as they may "see fit" is also inconsistent with the Land Trust Alliance's legal and ethical guidelines for the responsible operation of land trusts ("the Standards and Practices"),[48] the Conservation Easement Handbook, and the Alliance's Amendment Report. The Standards and Practices, which must be adopted by all of the Alliance's member land trusts, provide, in relevant part, that "amendments [to

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[44] *See Amending Conservation Easements, Evolving Practices and Legal Principles*, RESEARCH REPT. (Land Trust Alliance, Wash. D.C.), Aug. 2007, at 30 [hereinafter, *LTA Amendment Report*] (noting that "a land trust that publicly describes its conservation easements as perpetual while occasionally granting amendments that diminish easement protections of conservation values risks running afoul of fraudulent solicitation or other provisions").

[45] *Id.* at 33. ("Whether a donor gives money or an interest in land, representations by the land trust upon soliciting funds and accepting gifts are binding, both legally and ethically.").

[46] Madigan v. Telemarketing Associates, 538 U.S. 600, 624 (2003). *See also Principles for Good Governance and Ethical Practice, A Guide for Charities and Foundations, Reference Edition* (Panel on the Nonprofit Sector), October 2007, at 28, *available at* http://www.nonprofitpanel.org/report/principles/Principles_Reference.pdf (last visited Nov. 22, 2008) ("An organization's communications while it is soliciting contributions may also create a legally binding restriction that can be enforced under state and federal fraudulent solicitation prohibitions.").

[47] *See supra* note 36 and accompanying text (quoting the representations made by the Jackson Hole Land Trust to prospective easement grantors, funders, and the general public).

[48] *Land Trust Standards and Practices* (Land Trust Alliance, Wash. D.C.), revised 2004, *available at* www.lta.org/learning/sp/lt-standards-practices07.pdf (last visited Nov. 20, 2008) [hereinafter *LTA Standards and Practices*]. *See also* Land Trust Alliance, Land Trust Standards and Practices, www.lta.org/learning/sp (last visited Nov. 20, 2008) (describing the Standards and Practices as "guidelines for the responsible operation of a land trust, which is run legally, ethically and in the public interest and conducts a sound program of land transactions and stewardship").

conservation easements] are not routine, but can serve to strengthen an easement or improve its enforceability" and "all amendments [must] result in either a positive or not less than neutral conservation outcome . . . ."[49] In commentary explaining this practice, the Alliance warns that "[a] land trust that accepts and holds conservation easements commits itself to their annual stewardship in perpetuity, [and to] enforcement of their terms,"[50] and "[s]tate laws governing conservation easements, charitable trust law, contract law, nonprofit corporation law and public trust law, and federal and state tax laws all might have something to say about if and how amendments are permitted."[51]

The Conservation Easement Handbook similarly recommends a conservative approach to amendments. Both the 1988 and 2005 editions of the Handbook provide that a conservation easement amendment should change the easement for the better (i.e., strengthen the protective terms of the easement document), or at least be neutral, and that an amendment must never result in net degradation of the conservation values of the land the easement is designed to protect.[52] The 2005 Handbook also warns that "[a]ll applicable state laws, charitable trust law, contract laws, nonprofit corporation laws, public trust laws, and federal tax laws must be followed when amendments are made."[53]

In addition, the Land Trust Alliance's recently published Amendment Report provides, as two of its "seven definitive principles that should guide all easement amendment decisions,"[54] that any amendment should be "consistent with the conservation purpose(s) and intent of the easement,"[55] and "consistent with

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[49] *LTA Standards and Practices*, *supra* note 48, at 14 (Practice 11I. Amendments). *See also* Land Trust Alliance, Adoption Requirements, www.lta.org/learning/sp/adoption-requirements/?searchterm=None (last visited Nov. 20, 2008) ("The Land Trust Alliance requires that all member land trusts adopt *Land Trust Standards and Practices* as the guiding principles for their operations.").

[50] *Background to the 2004 revisions of Land Trust Standards and Practices* (Land Trust Alliance, Wash. D.C.), 2004, at 21.

[51] *Commentary on Land Trust Alliance Standards and Practices 2004, Standard 11: Conservation Easement Stewardship, Practice 11I: Amendments* (Land Trust Alliance, Wash. D.C.), available from the Land Trust Alliance and on file with authors [hereinafter *Commentary on Practice 11I*].

[52] 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 122; 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 184.

[53] 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 188.

[54] *LTA Amendment Report*, *supra* note 44, at 7. The Amendment Report further provides, "[n]o amendment policy should be more permissive than these Principles allow, but some land trusts may choose to adopt more conservative amendment guidelines." *Id.* at 17.

[55] *Id.* at 32. This principle requires that a land trust "ensure that an amendment will not erode the overarching purposes and intent of the original easement." *Id.* at 33.

the documented intent of the donor . . . and any direct funding source."[56] The Amendment Report lists a litany of potential legal constraints on amendments, including federal tax law, state and federal laws governing the administration of restricted gifts and charitable trusts, and state laws on fraudulent solicitation and misrepresentation to donors.[57] And, although the purpose of the Amendment Report is to provide guidance on easement amendments, and not easement terminations, the report instructs that tax-deductible conservation easements can be extinguished by the holder only through a judicial proceeding and upon a finding that continued use of the encumbered land for conservation purposes has become "impossible or impractical," and to the extent an amendment amounts to an extinguishment, the land trust must satisfy these requirements.[58] Accordingly, the aggressive approach to the amendment and termination of conservation easements advocated in *The End of Perpetuity* is inconsistent not only with the law governing restricted charitable gifts, but also with the land trust community's longstanding position with regard to amendments and terminations.

3. *Accounting Practices*

The End of Perpetuity's assertion that government entities and land trusts are free to amend or terminate the conservation easements they hold "on their own" and as they may "see fit" is also inconsistent with the manner in which many land trusts account for the easements they acquire. Many land trusts record the easements they acquire on their books as having a "zero value" because they recognize that they are not free to sell, trade, release, extinguish, or otherwise dispose of such easements in whole or in part (except for transfers made to a government entity or land trust that agrees to continue to enforce the easement).[59] Indeed, most land trusts view the conservation easements they acquire as net liabilities due to the costs associated with monitoring and enforcing the easements in perpetuity. As one commentator notes

> the typical conservation easement . . . furnish[es] little or no measurable benefit to the donee. . . . [I]ndeed, most nonprofit easement managers are all too aware that monitoring and

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[56] *Id.* at 32. This principle "protects the land trust against claims of fraudulent solicitation and violation of the terms of the donation of the easement or funds to acquire the easement." *Id.* at 33. The Amendment Report warns "[l]and trusts become bound by obligations to easement donors, grantors, and funders as part of the donation process." *Id.* at 43.

[57] *Id.* at 23.

[58] *Id.* at 24 and n. 7 (explaining that "[s]ignificant amendments may be viewed as partial extinguishments"). *See also infra* notes 302–306 and accompanying text (explaining the requirements that must be met to qualify for a federal charitable income deduction upon the donation of a conservation easement).

[59] *See, e.g.,* 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 67 ("Since a typical conservation easement . . . has no measurable value to the holder, many nonprofits use the 'zero-value' approach when recording the easement on their books.").

> enforcement of easement obligations create net balance sheet liabilities. . . . From the donee's perspective, then, the donated silk purse is transformed, at the moment of conveyance, into a sow's ear destined for perpetual care.[60]

This zero value phenomenon is, of course, not particular to conservation easements. Any property donated to a government entity or charitable organization to be used be used for a specific public or charitable purpose (i.e., as a restricted charitable gift) has a reduced or perhaps even zero value from the holder's perspective because it cannot be freely sold or exchanged.[61]

The End of Perpetuity ultimately acknowledges that "there is likely to be sufficient legal basis" for applying charitable trust principles to conservation easements conveyed as charitable gifts.[62] The article nonetheless suggests that courts create a special judicial exemption from the application of charitable trust principles for this particular form of restricted charitable gift. The arguments offered in support of this suggestion are, however, unconvincing and based on an incorrect analysis of both the relevant facts and the relevant law. To set the record straight, and to help ensure that the development of the law and policy in this area is not influenced by an incorrect analysis of the facts or the law, Part II explains the flaws in each of *The End of Perpetuity's* arguments. Part II also examines the policies underlying the well-settled role of state attorneys general and the courts in supervising the administration of restricted charitable gifts and charitable trusts, and explains how such supervision can and should operate to protect the public interest and investment in conservation easements. Part III takes a short detour to discuss the problems with proposals to change state law to permit politically-appointed state boards to authorize the substantial modification or termination of conservation easements. Part IV then provides a brief summary and conclusion.

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[60] William T. Hutton, *Easements as Public Support: The "Zero-Value" Approach*, in 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 135–36.

[61] For example, land donated to a government entity or charitable organization to be used as a public park or nature preserve has a reduced value from the holder's perspective because it cannot be freely sold or exchanged and it must be maintained. This phenomenon is discussed in Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation,* 41 U.C. DAVIS. L. REV. 1897, 1939–42 (2008) [hereinafter *Condemning Conservation Easements*]. The article explains that, when such land is condemned so that it can be put to a different public use, the entity or organization holding the land on behalf of the public is generally entitled to compensation based on the value of the land as if it were not subject to the use restriction (i.e., based on its unrestricted value), but that such value lies dormant and inaccessible by the entity or organization until the restriction is lifted in the context of a condemnation or *cy pres* proceeding. The article also explains that the entity or organization must generally use the compensation to accomplish similar charitable purposes in some other manner or location.

[62] *The End of Perpetuity*, *supra* note 4, at 62. *See also infra* note 312 and accompanying text.

II. ADDRESSING THE ARGUMENTS IN *THE END OF PERPETUITY*

A. Intention to Create a Charitable Trust

The End of Perpetuity asserts that a "hurdle to finding that the conveyance of a conservation easement creates a charitable trust is the requirement that for a trust to exist there must be a clear intention on the part of the putative settlor to create a trust."[63] The article cites to the Uniform Trust Code (sometimes referred to hereinafter as the UTC), which provides that a trust is created only if "[t]he settlor indicates an intention to create the trust."[64] The article then concludes "[t]he notion that the conservation easement that they have negotiated with a specific land trust constitutes a trust the beneficiaries of which are the general public would be startling to many easement donors."[65] As discussed below, *The End of Perpetuity's* analysis of this issue is inconsistent with the law governing the creation of charitable trusts, the facts surrounding the creation of conservation easements, and the specific language of conservation easement deeds. Landowners who convey conservation easements to government entities and land trusts as charitable gifts clearly manifest the intent needed to create a charitable trust or its functional equivalent.

It is well-settled that no magical incantation, such as use of the word "trust" or "trustee," is required to create a trust.[66] Indeed, the settlor need not even understand precisely what a trust is. All that is required to create a trust is an

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[63] *Id.* at 60. Another "hurdle" to which *The End of Perpetuity* refers is the requirement that the court determine that the donor had a general charitable intent. *Id.* at 59–60. Characterizing the requirement of general charitable intent as a hurdle to the creation of a charitable trust is improper. A charitable trust can be created whether the donor has a specific or a general charitable intent. *See, e.g.,* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 478–80 (2005) [hereinafter *Rethinking the Perpetual Nature of Conservation Easements*] (explaining that the donor of a restricted charitable gift or charitable trust can have either a specific or a general charitable intent, and that such intent is relevant only when applying the doctrine of *cy pres* and only in some jurisdictions). *See also infra* Part II.D.1.c.(2) (discussing the doctrine of *cy pres*).

[64] *The End of Perpetuity*, *supra* note 4, at 61 (citing UTC § 402(a)(2) and WYO. STAT. ANN. § 4-10-403(a)(2) (2007)). The UTC was approved by NCCUSL in 2000 and has since been adopted in twenty-one states, including Wyoming. *See* Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Trust Code, www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp (last visited Nov. 20, 2008) (listing the following as having adopted the UTC: Alabama, Arizona, Arkansas, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, Wyoming, and the District of Columbia).

[65] *The End of Perpetuity, supra* note 4, at 61.

[66] Tinkham v. Town of Mattapoisett, 22 Mass. L. Rep. 635 (2007). *See also* SCOTT & FRATCHER, *supra* note 12, § 351 ("The settlor need not . . . use any particular language in showing his intention to create a charitable trust; he need not use the word 'trust' or 'trustee.'"); JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 498 (7th ed. 2005) ("No particular form of words is necessary to create a trust. The words *trust* or *trustee* need not be used.") (emphasis in original).

intention to create a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another.[67] As explained in a leading treatise on trust law

> an express trust may arise even though the parties in their own minds did not intend to create a trust. . . . An express trust may be created even though the parties do not call it a trust, and even though they do not understand precisely what a trust is; it is sufficient if what they appear to have in mind is in its essentials what the courts mean when they speak of a trust.[68]
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> . . . .
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> . . . The question in each case is whether the settlor manifested an intention to create the kind of relationship that to lawyers is known as a trust, that is to say, whether the settlor manifested an intention to impose upon himself or upon a transferee of the property equitable duties to deal with the property for the benefit of another person.[69]

In explaining § 402(a)(2) of the Uniform Trust Code, which provides that a trust is created only if "the settlor indicates an intention to create the trust," the drafters of the UTC refer to § 23 of the Restatement (Second) of Trusts (1959) and § 13 of the Restatement (Third) of Trusts (Tentative Draft No. 1, approved 1996), both of which incorporate the foregoing well-settled understanding of the intent needed to create a trust.[70]

Section 23 of the Restatement (Second) of Trusts provides "[a] trust is created only if the settlor properly manifests an intention to create a trust,"[71] and the

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[67] GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 1 (West 2007); *see also* Scotti's Drive In Restaurants, Inc. v. Mile High-Dart In Corp., 526 P.2d 1193, 1196 (Wyo. 1974).

[68] SCOTT & FRATCHER, *supra* note 12, § 2.8.

[69] *Id.* § 24. *See also, e.g.,* King v. Richardson, 136 F.2d 849, 857 (4th Cir. 1943) ("We attach no importance to the fact that technical language creating a trust was not used. . . . Technical language is not required. A trust arises when property is given to one with the direction that it be used and applied for the benefit of another."); Chattowah Open Land Trust v. Jones, 636 S.E.2d 523, 524–26 (Ga. 2006) (holding that the devise of decedent's home and surrounding acreage to a land trust for the purpose of maintaining the property in perpetuity exclusively for conservation purposes within the meaning of Internal Revenue Code § 170(h) "unambiguously created a charitable trust" and the decedent's failure to use the terms "trust" and "trustee" did not alter the outcome because the strict use of those terms is not required to establish a trust); Lux v. Lux, 288 A.2d 701, 704 (R.I. 1972) ("It is an elementary proposition of law that a trust is created when legal title to property is held by one person for the benefit of another.").

[70] *See* UTC, *supra* note 15, § 402 cmt.

[71] RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 23.

comments to that section explain "[i]t is immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not he knows the precise characteristics of the relationship which is called a trust."[72] With regard to the intention needed to create a charitable trust in particular, § 351 of the Restatement (Second) of Trusts provides that the rule is the same as that applicable to private trusts in § 23[73] and adds "No particular form of words or conduct is necessary for the manifestation of intention to create a charitable trust. . . . A charitable trust may be created although the settlor does not use the word 'trust' or 'trustee.'"[74]

Section 13 of the Restatement (Third) of Trusts (Tentative Draft No. 1, approved 1996) similarly provides "[a] trust is created only if the settlor properly manifests an intention to create a trust relationship,"[75] and the comments to that section explain "[i]t is immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not the settlor knows the precise characteristics of a trust relationship."[76] Moreover, the comments to § 28 of the Restatement (Third) of Trusts (2003) provide specific guidance on the type of conveyance that creates a charitable trust. As noted in the Introduction, the Restatement explains that, while an outright devise or donation to a charitable institution to be used for its general purposes is charitable but does not create a trust, a disposition to such an institution for a specific charitable purpose, such as to support medical research on a particular disease or establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee.[77]

Moreover, the drafters of the Uniform Trust Code specifically contemplated that the conveyance of a conservation easement "will frequently create a charitable trust." The UTC and Wyoming's version of the UTC both provide that the section of the UTC that allows for the modification or termination of certain uneconomic trusts "does not apply to an easement for conservation or preservation"—thereby implying that other UTC sections do apply to such easements in appropriate circumstances.[78] In their commentary, the UTC drafters confirm this interpretation, explaining:

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[72] *Id.* § 23 cmt. a.

[73] *Id.* § 351 cmt. a.

[74] *Id.* § 351 cmt. b.

[75] RESTATEMENT (THIRD) OF TRUSTS § 13 (Tentative Draft No. 1, April 5, 1996). This same language is included in the final version of the Restatement (Third) of Trusts. RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 13.

[76] RESTATEMENT (THIRD) OF TRUSTS § 13 cmt. a (Tentative Draft No. 1 1996). This same language is included in the final version of the Restatement (Third) of Trusts. RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 13 cmt. a.

[77] RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 28 cmt. a.

[78] *See* UTC, *supra* note 15, § 414(d); WYO. STAT. ANN. § 4-10-415(c) (2008).

> Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust.[79]

As with the comments to any Uniform Act, these comments to the UTC should be relied upon as a guide in interpreting the act so as to achieve uniformity among the states that enact it.[80]

Accordingly, the question of whether the conveyance of a conservation easement creates a charitable trust does not turn on the presence or absence of the word "trust" or "trustee" in the deed of conveyance (most conservation easement deeds do not contain those words). Also irrelevant is the fact that the easement donor may not have known that the intended relationship is called a trust. All that is required is what is present in any charitable donation of a perpetual conservation easement: the donation of property (the easement) to a government entity or charitable organization to be used, not for that entity's or organization's general

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[79] UTC, *supra* note 15, § 414 cmt. By providing that the conveyance of a conservation easement will "frequently" create a charitable trust, the drafters of the UTC were leaving open the question of whether perpetual conservation easements not acquired as charitable gifts (i.e., those purchased with general (unrestricted) funds, exacted as part of development approval processes, or acquired in the context of mitigation) should be governed by similar equitable principles. E-mail to Nancy A. McLaughlin from K. King Burnett, member and past president of NCCUSL (Aug. 17, 2008, 10:51am MST) (on file with authors). For a brief discussion of conservation easements acquired in such nondonative contexts, see *infra* Part II.J.

[80] *See* UTC, *supra* note 15, § 1101 ("In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it."). As explained by the Connecticut Supreme Court:

> Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved. . . . Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws.

Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993). *See also* UTC, *supra* note 15, § 106 cmt. (explaining that the statutory text of the UTC is supplemented by the Comments thereto, "which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation"). Wyoming's version of the UTC is similarly intended to be applied and construed so as to make the law uniform among that states that adopt it. *See* WYO. STAT. ANN. § 4-10-1101 (2007) ("In applying and construing this act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."); *see also* WYO. STAT. ANN. § 8-1-103(a)(vii) (2008) ("Any uniform act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states which enact it.").

purposes, but for a specific charitable purpose—the protection of the particular land encumbered by the easement for the conservation purposes specified in the deed of conveyance in perpetuity. As explained in the Restatement (Third) of Trusts, the Uniform Trust Code, and the Uniform Conservation Easement Act (discussed in Part II.B below), this type of conveyance creates a charitable trust of which the holder of the easement should be deemed to be acting as trustee. And even in those jurisdictions where such gifts are not technically referred to as charitable trusts, the substantive principles governing the administration of charitable trusts, including the doctrine of *cy pres*, should nonetheless apply.[81]

The End of Perpetuity's assertion that conservation easement donors would be "startled" to learn that their easements are effectively held in trust for the benefit of the public is also unsupportable. First, it can be assumed that landowners donating conservation easements to government entities or land trusts in exchange for sizable federal and state charitable income tax deductions understand that they are making charitable gifts intended to benefit the public. Most conservation easement deeds expressly state that the conveyance of the easement is intended to benefit the public,[82] and it can be assumed that easement donors understand that the generous tax benefits they receive are in exchange for the benefits their easements are intended to provide to the public. In fact, in a later section of the article, *The End of Perpetuity* acknowledges "Clearly, the grantor of [a conservation easement] intends that the [easement] be used . . . for the benefit of the public (if any intent to gain tax benefits is part of the donor's motivation)."[83]

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[81] *See supra* note 12 and accompanying text (explaining that, regardless of how gifts made to government entities or charitable organizations to be used for specific charitable purposes are characterized—as charitable trusts, implied trusts, quasi-trusts, restricted charitable gifts, or public trusts—the substantive rules governing the administration of charitable trusts generally apply). The analysis in this section is not limited to, or dependent upon, a conservation easement being granted in perpetuity. A landowner who makes a charitable gift of a conservation easement to a government entity or land trust for the purpose of protecting the particular land encumbered by the easement for a specified term, such as thirty years, should also be viewed as having created a charitable trust or the functional equivalent thereof. In such case, there similarly would be a donation of property (the term easement) to a government entity or charitable organization to be used, not for that entity's or organization's general purposes, but for a specific charitable purpose. Accordingly, in such case the holder should be deemed to be acting as trustee of the easement for the specified term, and should be required to administer and enforce the easement in accordance with its stated terms and purpose for the duration of the term.

[82] For example, the conservation easement involved in *Hicks* provides:

> The Ranch contains substantial ranching, agricultural, natural, wildlife, wildlife habitat, ecological, scenic, aesthetics, and recreational values . . . of great importance to the residents, guests, ranch guests, and visitors of Johnson County, and the people of Wyoming, and its protection will yield a significant public benefit.

Lowham Easement, *supra* note 8, at 1.

[83] *The End of Perpetuity, supra* note 4, at 73–74. Even absent the receipt of tax benefits it can be assumed that a landowner who donates a conservation easement to a charitable organization or government entity understands that the easement will be held and enforced for the benefit of the

It can also be assumed that a landowner who donates a conservation easement for the express purpose of protecting a particular parcel of land from development and other environmentally harmful uses believes that the donee will administer the easement in accordance with its stated purpose and other carefully negotiated terms.[84] This belief is reinforced by the representations made to easement grantors regarding the nature of a perpetual conservation easement (e.g., "the restrictions of the easement stay with the land forever," "the land trust has the obligation to enforce the terms of the easement in perpetuity," and a conservation easement assures that cherished land "will always be protected").[85] Even *The End of Perpetuity* acknowledges "Clearly, the grantor of [a conservation easement] intends that the [easement] be used in a certain way (i.e., according to the typically elaborate provisions of the easement document) . . . ."[86] Accordingly, what would be startling to conservation easement donors is not that the donee government entity or land trust effectively holds the easements it acquires in trust for the benefit of the public and, thus, may agree to terminate such easements only with court approval obtained in a *cy pres* proceeding—as is contemplated by federal tax law[87] and set forth in many conservation easement deeds in any event.[88] Rather, what would be

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public. *See, e.g.,* Town of Cody v. Buffalo Bill Memorial Ass'n, 196 P.2d 369, 377 (Wyo. 1948) (noting that "the very nature of a charitable corporation indicates that its property is intended to be administered for the benefit of others than the corporation itself. It is of its essence to do so for the benefit of the public or a part thereof"). The same can be said of government entities, which exist to serve the public. It can also be assumed that a landowner who sells a conservation easement to a government entity or charitable organization understands that the easement is being purchased with public or charitable funds by such entity or organization because the easement is intended to provide benefits to the public.

[84] Karin F. Marchetti, co-author of the 2005 edition of the Conservation Easement Handbook and General Counsel of the Maine Coast Heritage Trust, explains

> it is unlikely that a conservation easement was granted with the expectation that the land trust might at its pleasure dispose of the easement and apply the proceeds to its general conservation purposes, as with trade lands. It is implicit in a *perpetual* easement that the purposes of the gift, *the preservation of that particular parcel of land,* will be honored barring unforeseeable or extremely improbable circumstances.

Karin F. Marchetti, *Planning and Managing Conservation Easements: The Legal Perspective* 37 (Oct. 20, 2000) (on file with authors) (second emphasis added).

[85] *See supra* notes 36 & 38 and accompanying text. *See also generally supra* Part I.B.1 (discussing the representations made to easement grantors regarding the nature of perpetual conservation easements).

[86] *The End of Perpetuity, supra* note 4, at 73–74.

[87] *See infra* note 304 and accompanying text.

[88] *See, e.g.,* Lowham Easement, *supra* note 8, at 9 (providing "[t]he Grantor wishes to express again its intent that this Easement be maintained in perpetuity for the purposes expressed herein. However, if . . . a final binding non-appealable judicial determination is made that continuation of this Easement is impossible . . . then Grantor and Grantee, with the approval of the Court, may agree to transfer their respective interests in the Ranch . . ."); 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 160 (providing, in its Model Conservation Easement, "[i]f circumstances arise in the future such as render the purpose of this Easement impossible to accomplish, this Easement can

startling is that the donee might later take the position that it is free to agree with subsequent owners of the land to liquidate such easements, in whole or in part, as it may see fit to fund other land protection activities or add to its operating budget or stewardship endowment. In other words, what would be startling to easement donors is that a government entity or land trust might take the position that the perpetual conservation easements it holds are fungible or liquid assets.

Whether a conservation easement is interpreted using the rules of construction applicable to charitable trusts, to deeds, to contracts, or (as would be appropriate) a combination thereof, the universal rule is that the parties' intent must generally be ascertained from the language of the instrument itself[89]—and virtually all conservation easement deeds manifest a clear intent to protect the particular land encumbered by the easement for the conservation purposes specified in the deed, generally in perpetuity. The stated purpose of a conservation easement,[90] as well as

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only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction . . ."); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 375 (providing, in its sample conservation easement provisions, "should [this Conservation Easement] be extinguished, which may be accomplished only by judicial proceedings . . .").

[89] Many conservation easement deeds contain an "integration clause," providing that the deed sets forth the entire agreement of the parties and supersedes all prior discussions, negotiations, understandings or agreements relating to the easement. *See, e.g.,* 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 162 (including an integration clause in its Model Conservation Easement); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 379 (including an integration clause in its sample conservation easement provisions); *see also, e.g.,* Rock Springs & Timber, Inc., v. Lore, 75 P.3d 614, 619–20 (Wyo. 2003) ("'The rules of construction of a trust agreement are simple. A trust agreement is governed by the plain meaning contained in the four corners of the document.' . . . The courts strive to ascertain and effect the intent of the settlor, but parole evidence may not be considered 'where there is no ambiguity and the language of a declaration of trust is clear and plainly susceptible to only one construction . . . .'"); Kerper v. Kerper, 780 P.2d 923, 934 (Wyo. 1989) (explaining that, pursuant to "[e]stablished contract law of Wyoming . . . [t]he intent of the parties to a clear and unambiguous written agreement will be derived from the entire writing and determined as a matter of law. . . . Extrinsic evidence will not be used to contradict the plain meaning of a clear and unambiguous written agreement"); First Nat'l Bank & Trust Co. v. Brimmer, 504 P.2d 1367, 1369 (Wyo. 1973) ("In construing a trust agreement the intention of the settlor must govern and if possible be ascertained from the trust instrument. Every word is to be given effect if it does not defeat the general purpose.").

[90] *See, e.g.,* Lowham Easement, *supra* note 8, at 2 ("It is the purpose of this Easement to preserve and protect in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch."); 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 157 (providing, in its Model Conservation Easement, "[i]t is the purpose of this Easement to assure that the Property will be retained forever [predominantly] in its [*e.g., natural, scenic, historic, agricultural, forested, and/or open space*] condition and to prevent any use of the Property that will significantly impair or interfere with the conservation values of the Property.") (second and third alterations and emphasis in original); 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 318–19 (providing, as the Purpose Statement to be included in conservation easement deeds, "[t]he purpose of this Conservation Easement is to forever conserve the Protected Property for the following conservation purposes: . . . [and] Grantor and Holder intend that this Conservation Easement will confine the use of the Protected Property to activities that are consistent

the detailed provisions specifying the conservation values of the encumbered land and the activities permitted and prohibited on that land,[91] provide compelling evidence of the parties' intent to protect *that* land, and not to provide the holder with a fungible or liquid asset. When such intent is clearly expressed in a document, evidence purporting to show a contrary intent should not be admissible. Thus, a donee, years after the donor has died or sold the encumbered land, should not be heard to say that the donor did not actually intend to protect the land as specified in the easement deed, and instead intended to grant the donee a fungible or liquid asset.[92]

Government entities and land trusts could, of course, negotiate for freely terminable conservation easements, which would grant them the discretion to agree to modify or terminate the easements, in whole or in part, as they may see fit from time to time in the accomplishment of their general public or charitable missions.[93] The donation of such an easement would not create a charitable trust because it would constitute an "outright . . . donation to a . . . charitable institution . . . to be used for its general purposes . . . ."[94] Whether Congress would be willing to grant tax incentives for the donation of such freely terminable easements,[95]

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with the Purposes of this Conservation Easement and will prohibit and prevent any use of the Protected Property that will materially impair or interfere with the Protected Conservation Values of the Protected Property").

[91] For examples of the detailed provisions included in conservation easement deeds, see, e.g., Lowham Easement *supra* note 8, at 1–10; 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 156–63; 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 317–84.

[92] The Land Trust Alliance's Amendment Report provides the following guidance to land trusts "[w]ith a well-drafted easement, there is no need to look beyond the easement itself and the clear import of its words. At the time the easement is signed, the intent of all parties *including the land trust* should be expressed fully and clearly in the written easement." *LTA Amendment Report, supra* note 44, at 43 (emphasis added).

[93] Such terminable easements would be valid and enforceable property interests under most easement-enabling statutes because most such statutes do not require that conservation easements be perpetual. *See, e.g.,* UCEA *supra* note 14, § 2(c) ("[A] conservation easement is unlimited in duration unless the instrument creating it otherwise provides."); WYO. STAT. ANN. § 34-1-202(c) (2008) (same). *See also Perpetuity and Beyond, supra* note 18, at 707–12 (discussing terminable conservation easements). Even in the few jurisdictions where the easement-enabling statute validates only perpetual conservation easements, terminable conservation easements could be created if they were held appurtenant to a small anchor parcel or recognized under the common law. *See id.* at 707 n.117.

[94] *See* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 28 cmt. a. *Cf. Perpetuity and Beyond, supra* note 18, at 711–12 (explaining that, similar to the deaccessioning of unrestricted gifts of artwork from a museum's collection, the substantial modification or termination of a terminable conservation easement that is providing significant benefits to the public could be controversial).

[95] *See infra* notes 347 and 348 and accompanying text (explaining that Congress intended to subsidize the acquisition of conservation easements only if such easements protect unique or otherwise significant land areas or structures in perpetuity, and Congress anticipated that the need to substantially modify or terminate such easements would be rare).

and whether landowners would be willing to donate such easements, are open questions. Congress's decision to limit federal tax incentives to the donation of expressly perpetual conservation easements was not irrational, however, given that a system that would allow government and nonprofit holders to substantially modify or terminate tax-deductible easements as they might see fit from time to time would be vulnerable to manipulation, error, and abuse.[96] It is also doubtful that conservation easement donors would be willing to grant government or land trust holders such broad modification and termination discretion.[97]

In sum, the notion that land trusts or government entities are free to substantially modify or terminate the perpetual conservation easements they hold "on their own" and as they may "see fit" is contrary to state law governing the administration of charitable gifts conveyed for specific charitable purposes. All entities and organizations that solicit and accept such gifts are required to administer them in accordance with their stated terms and purposes pursuant to charitable trust or similar equitable principles, and there is nothing about the particular character or condition of conservation easements or land trusts that suggests that either should be exempted from these principles. The status of a conservation easement as a partial interest in real property does not prevent it from being held in trust for the benefit of the public.[98] Moreover, any charitable

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[96] *Hicks v. Dowd* illustrates the manipulation, error, and abuse that could occur if government and nonprofit holders of tax-deductible conservation easements were permitted to simply agree with the owners of the encumbered land to substantially modify or terminate those easements (i.e., without oversight by those charged with protecting the public interest and investment in charitable assets). *See supra* note 3. For other examples see *infra* notes 131–143 and accompanying text (describing the Myrtle Grove controversy) and *infra* note 237 (describing the Wal-Mart controversy). *See also infra* note 310, in which one of the principal authors of the Treasury Regulations interpreting Internal Revenue Code § 170(h) explains "the decision to terminate [a conservation easement] should not be made solely by interested parties. With the decision-making process pushed into a court of law, the legal tension created by such judicial review will generally tend to create a fair result."

[97] *See supra* Part I.B.1 (explaining that many landowners donate conservation easements in large part because of a personal attachment to the particular land encumbered by the easement and a desire to see *that* land permanently preserved). Even in the purchase context it is not clear that landowners would be willing to grant holders such broad modification or termination discretion. *See* 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 15–17 ("A landowner survey conducted in three northern California counties—where many easements are purchased—found that landowners participating in easement programs appreciated not only the cash infusion, but also that their land would be preserved for continuing farming and open space use.").

[98] *See* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 40 ("[A] trustee may hold in trust *any* interest in *any* type of property.") (emphasis added); *id.* § 40 cmt. b. ("Subject to requirements of lawful purpose and administration . . . , no policy of the trust law restricts the types of property interests a trustee may hold in that fiduciary capacity."). Interests in real property for life or for a term of years, reversionary interests, executory interests, remainders (whether contingent, vested, or vested subject to being divested), interests held in co-ownership, and even a right to enforce a restrictive covenant can be the subject matter of a trust. *See id.*; GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 112 (West 2008). The status of a conservation easement as a partial

organization could make the same complaints about the application of charitable trust principles as are made on behalf of land trusts in *The End of Perpetuity*—that the doctrines of administrative deviation and *cy pres*, as well as attorney general and court oversight, are inconvenient, costly, and time consuming.[99] Indeed, many museums, universities, and social welfare, religious, or other charitable organizations might prefer to be able to solicit large donations by promising to abide by the stated terms and purposes of the gifts in perpetuity, but then have the freedom to later alter the terms and purposes of the gifts as they see fit, and without regard to the intent of the donor or the inconvenience of state attorney general or court oversight. Such is not the law, however, nor should it be, as it would likely result in a significant decline in charitable giving to the detriment of the public. As explained by the forty-five states that filed an *amici* brief in *Madigan*, the fraudulent solicitation case:[100]

> Charitable contributions represent a significant public resource. They promote a wide range of important initiatives in areas such as medical and scientific research, social services, public health, education, the environment, civil rights, and legal aid. Yet these initiatives cannot succeed without popular support, and such support will come only where the public trusts that its donations will be used for purposes that donors intend to sponsor and are led to believe their donations will in fact sponsor.[101]

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interest in real property does mean that the owner of the encumbered land would be a necessary party to any administrative deviation or *cy pres* action. However, while this complicates, it should not negate the application of charitable trust principles to donated easements since all manner of partial interests in property can be held in trust despite the possibility of similar complications.

[99] *See The End of Perpetuity, supra* note 4, at 66 (complaining that application of the doctrine of *cy pres* to conservation easements "will complicate the enforcement of easements because enforcement may involve multiple parties and the attendant increase in the time and cost of litigation"); *id.* at 81 (complaining that litigation is "costly and time consuming"). As explained in Part II.D, *infra,* due to a misunderstanding of the law, *The End of Perpetuity* significantly overstates the extent to which holders of conservation easements would be required to seek court approval to amend easements in manners consistent with their stated purposes.

[100] *See supra* note 46 and accompanying text (discussing *Madigan*).

[101] Amici Brief of Fla. Attorney Gen. et al., Madigan v. Telemarketing Assocs., 2001 U.S. Briefs 1806, 2002 U.S. S. Ct. Briefs LEXIS 734, at 2 (Dec. 24, 2002). According to a recent nationwide survey by Zogby International, (i) 97 percent of the respondents said they consider it a "very" or "somewhat" serious matter if charities are spending money donated to them on unauthorized projects, while 78.7 percent said they would "definitely" or "probably" stop giving to any nonprofit organization that accepts contributions for one purpose and uses the money for another, (ii) 72.4 percent said that, when a nonprofit organization uses money "for a purpose other than the one for which it was given," the managers of the recipient organization "should be held legally or criminally liable for acting in a fraudulent manner," and (iii) 97.4 percent said that respecting a donor's wishes was "very" or "somewhat" important to the "ethical governance" of a nonprofit. *Public will Punish Nonprofits that Misuse Designated Grants, New Zogby Survey Finds* 1 (Dec. 15, 2005) (on file with authors) (explaining the results of the survey commissioned by the plaintiffs in

B. *Charitable Trust Law, Property Law, and the Myth of the Two-Party Contract*

In support of its suggestion that charitable gifts of conservation easements be exempted from the rules that apply to all other charitable gifts made for specific purposes, *The End of Perpetuity* asserts "the doctrine of *cy pres* applies to the law governing charitable trusts, which makes the doctrine part of the law of trusts. Conservation easements are governed by the law pertaining to easements, which is property law."[102] This assertion is not grounded on a careful analysis of the law. First, as previously discussed, charitable trust principles (including the doctrine of *cy pres*) apply to gifts made to government entities and charitable organizations to be used for specific charitable purposes as well as to formally designated charitable trusts.[103] Second, fee title to land, being the quintessential form of property and, thus, obviously governed by property law, is not thereby removed from the overlapping law governing charitable trusts. Rather, gifts of fee title to land to a government entity or charitable organization to be used for a specific charitable purpose (such as the site of a hospital, library, public park, or memorial) are subject to both property law *and* charitable trust law, and the case law applying charitable trust principles to the administration of such gifts is voluminous.[104] In one recent example, the Georgia Supreme Court held that

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the Robertson v. Princeton University case). *See also* John Hechinger, *Big-Money Donors Move to Curb Colleges' Discretion to Spend Gifts*, WALL ST. J., Sept. 18, 2007, at B1 (explaining that, upset by the apparent disregard for donor intent on the part of many colleges and universities, several philanthropists—including the billionaire founder of Home Depot Inc.—are launching a nonprofit that will advise donors on how to attach legally enforceable restrictions to their gifts).

[102] *The End of Perpetuity, supra* note 4, at 59.

[103] *See supra* notes 11 and 12 and accompanying text.

[104] *See, e.g.,* Estate of Zahn, 93 Cal. Rptr. 810 (Cal. Ct. App. 1971) (applying the doctrine of *cy pres* to bequests of real property to be used for specific charitable purposes when neither of the parcels was suitable for carrying out the testatrix's declared intention at her death); Blumenthal v. White, 683 A.2d 410 (Conn. 1996) (applying charitable trust principles to a city's proposed transfer of land that had been donated to the city to be used as a public park); Village of Hinsdale v. Chicago City Missionary Soc'y, 30 N.E.2d 657 (Ill. 1940) (applying charitable trust principles to a village's sale of lots that had been donated to the village for the purpose of constructing a library); Cohen v. City of Lynn, 598 N.E.2d 682 (Mass. App. Ct. 1992) (applying charitable trust principles to declare null and void a city's conveyance to a developer of land that had been conveyed to the city to be used forever for park purposes); Tinkham v. Town of Mattapoisett, 22 Mass. L. Rptr. 635 (2007) (applying charitable trust principles to invalidate a town's attempt to convey property received as a gift to be used for conservation purposes to a developer in exchange for other property); State v. Rand, 366 A.2d 183 (Me. 1976) (applying charitable trust principles to a city's use of the proceeds from the condemnation of land that had been donated to the city to be used as public park); *In re* Neher, 18 N.E.2d 625 (N.Y. 1939) (applying charitable trust principles to a village's proposed use of a homestead that had been devised to the village to be used as a hospital and as a memorial to the textratix's husband); Town of Cody v. Buffalo Bill Mem'l Ass'n, 196 P.2d 369 (Wyo. 1948) (applying charitable trust principles to void a charitable association's transfer of land that had been donated to the association to be used to memorialize the memory of Buffalo Bill).

a devise of a testator's residence and surrounding acreage to a land trust for the purpose of maintaining the property in perpetuity exclusively for conservation purposes within the meaning of Internal Revenue Code § 170(h) "unambiguously created a charitable trust," and the land trust was therefore not entitled to receive the property outright as it "vociferously contended."[105]

As Professor McLaughlin explained in a previous article:

> Those who argue that donated perpetual conservation easements can be modified or terminated in the same manner as other easements—i.e., by agreement of the holder of the easement and the owner of the encumbered land . . . —are viewing such easements solely through a real property law prism, and ignoring the fact that such easements are also charitable gifts made for a specific charitable purpose. Whenever any interest in real property, whether it be fee title to land or a conservation easement, is donated to a municipality or charity for a specific charitable purpose, both state real property law and state charitable trust law should apply. State real property law prescribes the procedural mechanisms by which real property interests can be transferred and, in the case of easements, modified or terminated. State charitable trust law governs a donee's use and disposition of property conveyed to it for a specific charitable purpose. In other words, although state real property law may provide that a conservation easement can be modified or terminated by agreement of the holder of the easement and the owner of the encumbered land . . . , the holder of a perpetual conservation easement, in its capacity as trustee, may not agree to modify or terminate the easement in contravention of its stated purpose without first obtaining court approval in a *cy pres* proceeding.[106]

The End of Perpetuity also asserts that "as easements, conservation easements have been seen primarily as two-party contracts," and cites to an article written by Mary Ann King and Sally K. Fairfax in support of this assertion.[107] *The End*

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[105] Chattowah Open Land Trust v. Jones, 636 S.E.2d 523, 525–26 (Ga. 2006). *See also infra* note 302 and accompanying text (discussing Internal Revenue Code § 170(h)).

[106] *Perpetuity and Beyond, supra* note 18, at 683. As discussed in detail in Part II.D, *infra*, holders of conservation easements treated as charitable trusts (or the functional equivalent thereof) would not be required to obtain court approval in a *cy pres* proceeding for amendments that are consistent with the purpose of a conservation easement. Rather, a holder could agree to such amendments pursuant to its express or implied power to amend, or with court approval obtained in a more flexible administrative deviation proceeding.

[107] *The End of Perpetuity, supra* note 4, at 67 (citing Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates,* 46 NAT. RESOURCES J. 65 (2006)).

of Perpetuity's reliance on the King and Fairfax article as support for its argument that land trusts should be deemed to have the right to modify and terminate the easements they hold on their own and as they may see fit is ironic given that the thrust of the King and Fairfax article is a call for greater accountability on the part of the land trusts. King and Fairfax specifically provide:

> We argue that [conservation easements ("CEs")] are much more public than either the [Uniform Conservation Easement Act ("UCEA")] or land trusts often frame them and that the public nature of CEs warrants more explicit attention to public accountability than the private ordering system prescribed by the UCEA.[108]
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> . . . .
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> Clearly the public interest in CEs is sufficient to justify efforts to constrain easement and fee holders from modifying the terms of the agreement at will.[109]

Moreover, although expressing concern about the manner in which charitable trust principles might apply to conservation easements,[110] King and Fairfax note that commentators "present compelling arguments that application of the charitable

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[108] Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates,* 46 NAT. RESOURCES J. 65, 67 (2006).

[109] *Id.* at 109.

[110] In their discussion of charitable trust law, Mary Ann King (a Ph.D. student in the Department of Environmental Science, Policy and Management at the University of California, Berkeley) and Sally K. Fairfax (Henry J. Vaux Distinguished Professor of Forest Policy in that department) make a number of assumptions about the application of charitable trust principles to conservation easements that are incorrect. They mistakenly assume that charitable trust principles would require holders of conservation easements to "disclose fully to the beneficiary [in this context, the public] about transactions." *Id.* at 107. That is not the case. *See* Brody, *supra* note 12 (explaining that a restricted gift does not impose on a corporate charity the trust law procedural requirements for providing information to beneficiaries, although the charity would have to respond to a request for information from the attorney general). They also mistakenly assume that the doctrine of *cy pres* would apply to all amendments to conservation easements, including those that are consistent with the purpose of an easement. *See* King & Fairfax, *supra* note 108, at 108–09. That also is not the case. *See infra* Part II.D (discussing a holder's express and implied powers and the more flexible doctrine of administrative deviation). In addition, King and Fairfax do not discuss the interests of conservation easement donors or the reasons underlying the deference accorded to donor intent under charitable trust law—namely, a deeply rooted tradition of respecting an individual's right to control the use and disposition of his or her property and a concern that failing to honor the wishes of charitable donors would chill future charitable donations. *See supra* note 101 and accompanying text (discussing the consequences of disregarding donor intent). They also do not acknowledge that the Treasury Department has already determined that court oversight in what essentially is a *cy pres* proceeding is the appropriate oversight mechanism for the termination, presumably in whole or

trust doctrine may be the best and even perhaps the only available viable option for existing easements."[111] They also quote one of the NCCUSL commissioners who participated in the drafting of the Uniform Conservation Easement Act (sometimes referred to hereinafter as the UCEA), who stated:

> The intent . . . was to include principles involving trust and cy-pres . . . and because under Section 1 a charitable type of relationship is invoked . . . any court which is going to be confronted with a modification or termination problem has got to consider not only the law of easements with respect to modification and termination, but also trust implications, such as cy-pres.[112]

The UCEA was approved by NCCUSL in 1981 and has since been adopted in whole or in substantial part by twenty-four states, including Wyoming.[113] Although the application of charitable trust principles to conservation easements was not directly addressed in the UCEA, the act has always contemplated that conservation easements are more than simply two-party contracts or property arrangements. While the UCEA provides that a conservation easement may be modified or terminated "in the same manner as other easements"[114] (i.e., by agreement of the holder of the easement and the owner of the encumbered land), it also confirms that "[t]his Act does not affect the power of a court to modify

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in part, of tax-deductible conservation easements. *See supra* notes 303 and 309 and accompanying text (discussing the federal tax law extinguishment requirement). King and Fairfax further note that "[a]n understaffed attorney general's office cannot be counted on to provide the kind of oversight that land trusts and conservation easements require." King & Fairfax, *supra* note 108, at 110. As discussed in Part II.F, *infra*, however, repeated law suits by state attorneys general may be unnecessary because a credible threat of enforcement alone may both discourage holders from agreeing to inappropriate modifications or terminations and reduce the incidence of landowner violations and requests to substantially modify or terminate easements in manners contrary to donor intent and the public interest. In the end, if correctly interpreted and applied in the conservation easement context, charitable trust principles will provide precisely the kind of accountability to the public on the part of land trusts that King and Fairfax desire.

[111] King & Fairfax, *supra* note 108, at 110 n.196.

[112] *Id.* at 108 (citing Proceedings in Comm. of the Whole, Uniform Conservation Easement Act of the NCCUSL, 32 (Aug. 4–5, 1981) (remarks of Bullivant)).

[113] *See generally* UCEA, *supra* note 14; *see also* Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Conservation Easement Act, www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucea.asp (last visited Nov. 20, 2008) (listing the following as having adopted the UCEA: Alabama, Alaska, Arizona, Arkansas, Delaware, Idaho, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nevada, New Mexico, Oregon, South Carolina, South Dakota, Texas, Virginia, West Virginia, Wisconsin, and Wyoming, as well as the District of Columbia and the U.S. Virgin Islands). Georgia and Oklahoma have also effectively adopted the UCEA. *See* GA. CODE ANN. §§ 44-10-1 to 44-10-5 (West 2008); 60 OKL. STAT. ANN. tit. 60, §§ 49.1 to 49.7 (West 2008).

[114] UCEA *supra* note 14, § 2(a); WYO. STAT. ANN. § 34-1-202(a) (2008).

or terminate a conservation easement in accordance with the principles of law and equity."[115] In the original comments to the UCEA the drafters explained "[t]he Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements *and* the enforcement of charitable trusts" and "independently of the Act, the Attorney General could have standing [to enforce a conservation easement] in his capacity as supervisor of charitable trusts . . . ."[116] In other words, the UCEA does not and was never intended to abrogate the well-settled principles that apply when property, such as a conservation easement, is conveyed as a charitable gift to a government entity or charitable organization to be used for a specific charitable purpose.[117]

To address any lingering confusion on this point, on February 3, 2007, NCCUSL approved amendments to the comments to the UCEA to clarify its intention that conservation easements be enforced as charitable trusts in appropriate circumstances. The amended comment to section 3 of the UCEA explains:

> The Act does not directly address the application of charitable trust principles to conservation easements because (i) the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement's validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee's charge, and (ii) the Act is intended to be placed in the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes. *However, because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements*.[118]

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[115] UCEA *supra* note 14, § 3(b); WYO. STAT. ANN. § 34-1-203(b).

[116] UCEA *supra* note 14, § 3 cmt. (emphasis added).

[117] As previously discussed, conservation easements could be created and conveyed in a manner that does not create a charitable trust relationship. *See supra* notes 93 and 94 and accompanying text (discussing freely terminable conservation easements).

[118] UCEA *supra* note 14, § 3 cmt. (emphasis added).

The amended comment to section 3 of the UCEA concludes

> while Section 2(a) [of the Act] provides that a conservation easement may be modified or terminated "in the same manner as other easements," the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.[119]

As with the comments to the Uniform Trust Code, these comments should be relied upon as a guide in interpreting the UCEA so as to achieve uniformity among the states that have enacted it.[120]

The Uniform Trust Code, federal tax law, and the Restatement (Third) of Property: Servitudes ("Restatement of Property") also treat conservation easements as more than two-party contracts or property arrangements that can be modified or terminated at the will of the parties. As previously noted, the Uniform Trust Code explains that the creation and transfer of a conservation easement will frequently create a charitable trust with the holder of the easement acting as trustee of what will ostensibly appear to be a contractual or property arrangement.[121] The Treasury Regulations provide, *inter alia*, that tax-deductible conservation easements can be (i) transferred by their holders only to other government entities or charitable organizations that agree to continue to enforce the easements and (ii) extinguished by their holders only in what essentially is a judicial *cy pres* proceeding.[122] And the Restatement of Property provides that the substantial modification or termination of conservation easements held by

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[119] *Id.* By providing that a holder "may" be prohibited from agreeing to terminate an easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding, NCCUSL was leaving open the question of whether conservation easements not acquired as charitable gifts (i.e., purchased with general (unrestricted) funds, exacted as part of development approval processes, or acquired in the context of mitigation) should be governed by similar equitable principles. E-mail to Nancy A. McLaughlin from K. King Burnett, member and past president of NCCUSL (Aug. 17, 2008, 10:51am MST) (on file with authors). For a brief discussion of conservation easements acquired in such nondonative contexts, see *infra* Part II.J.

[120] *See supra* note 80 (explaining that uniformity can be achieved only if the intent of the drafters of a uniform act becomes the intent of the state legislatures in adopting it); *see also* UCEA, *supra* note 14, § 6 ("This Act shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it."); WYO. STAT. ANN. § 34-1-206 (2008) (same); WYO. STAT. ANN. § 8-1-103(a)(vii) (2008) (providing that any uniform act shall be interpreted and construed to make uniform the law of the states that enact it). As of August 2008, thirty-four states and the District of Columbia had adopted either the UTC or the UCEA, or both.

[121] *See supra* note 79 and accompanying text.

[122] *See infra* notes 303 and 304 and accompanying text.

governmental bodies or charitable organizations is governed, not by the real property law doctrine of changed conditions, but by a special set of rules based on the charitable trust doctrine of *cy pres*.[123] In their commentary, the drafters of the Restatement of Property explain "[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes . . . ."[124] Accordingly, contrary to the assertions made in *The End of Perpetuity*, conservation easements have not been seen as two-party contracts or as governed solely by property law. Rather, the various sources of law and legal analysis discussed above specifically contemplate the application of charitable trust principles to conservation easements.

C. Charitable Trust Principles Are Not a New Control

The End of Perpetuity asserts that the application of charitable trust principles to conservation easements would constitute a new and unanticipated control or burden on easement modification and termination.[125] This assertion also is not supportable.

The Uniform Conservation Easement Act has contemplated the application of charitable trust principles to conservation easements since 1981, the year in which it was approved by NCCUSL;[126] the Treasury Regulations have contemplated the application of charitable trust principles to tax-deductible conservation easements since 1986;[127] the Restatement of Property has, since 2000, recommended that the modification and termination of conservation easements be governed by a special set of rules based on the charitable trust doctrine of *cy pres;*[128] and the Uniform Trust Code has, since 2000, explained that creation and transfer of a conservation easement will frequently create a charitable trust.[129] Accordingly, the prospect that

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[123] *See* RESTATEMENT OF PROPERTY, *supra* note 4, § 7.11.

[124] *Id.* § 7.11 cmt. a.

[125] *See The End of Perpetuity, supra* note 4, at 56, 79.

[126] *See supra* notes 113–119 and accompanying text.

[127] *See supra* note 122 and accompanying text; *see also Tax Incentives, supra* note 42, at 15 (explaining that the Treasury published final regulations interpreting Internal Revenue Code §170(h) in 1986 and those regulations provide substantial guidance with regard to the meaning of many of the concepts introduced into the Code by §170(h)).

[128] *See supra* notes 123 and 124 and accompanying text.

[129] *See supra* note 79 and accompanying text. *See also* Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions,* 40 HASTINGS L.J. 1187, 1216–17 (1989) (explaining the "distinctly public nature" of conservation easements and arguing that "when a conservation easement can no longer serve its intended purpose, a court should apply the doctrine [of *cy pres*] and reform the grant to support the general goal of conservation"); Alexander R. Arpad, Note, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts,* 37 REAL PROP. PROB. & TR. J. 91 (2002) (discussing the application of charitable trust principles to conservation easements and some of the

conservation easements may be subject to charitable trust principles is not a new concept. It has been a part of the legal landscape for over a quarter of a century, roughly coterminous with the widespread use of conservation easements as a land protection tool.[130]

It is also clear that the land trust community has been aware that charitable trust principles may apply to conservation easements and has asserted this to its advantage. For example, in the mid-1990's a controversy arose when the National Trust for Historic Preservation ("the National Trust") approved a landowner's request to substantially amend a perpetual conservation easement without adherence to charitable trust principles ("the Myrtle Grove controversy").[131] The easement in question encumbered a 160-acre historic tobacco plantation located on the Maryland Eastern Shore, and the amendment, which was requested by a subsequent owner of the land after the easement-donor's death, would have permitted a seven-lot upscale subdivision on the property, complete with a single-family residence and ancillary structures, such as a pool, pool house, and tennis courts, on each of the lots.[132]

The National Trust's approval of the amendment request touched off a storm of protest from conservation groups, the donor's heirs, and the local and national media.[133] In objecting to the proposed amendment, the deceased donor's daughter explained her "sense of outrage and betrayal" at the proposed subdivision of the protected property:

> The distinction the [National] Trust now makes between a "historic core" and the rest of the property would have made no sense to [my mother] and makes no sense to my sister and me. Had [my mother] been primarily preoccupied with

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implications); Jeffrey Tapick, Note, *Threats to the Continued Existence of Conservation Easements,* 27 COLUM. J. ENVTL. L. 257, 287–89 (2002) (discussing the factors that "strongly suggest" a statutory conservation easement functions as a charitable trust, and noting that "the argument that a conservation easement is a 'charitable trust' could be an effective defense against opportunistic or ill-conceived efforts to destroy an easement").

[130] *See Tax Incentives, supra* note 42 at 20–21 (explaining the conservation easements began to be used on a widespread basis in the mid-1980s).

[131] For a detailed discussion of this controversy, see *Amending Perpetual Conservation Easements, supra* note 19, at 1041–63. *See also id.* at 1035 n. 12 (explaining that the National Trust is a congressionally-chartered private, nonprofit membership organization dedicated to saving historic places and revitalizing America's communities).

[132] *Id.* at 1041–42, 1046–50. At the time of the proposed amendment the easement-encumbered land was owned by a prominent Washington D.C. developer. *See id.* at 1044–45. The donor's heirs had sold the encumbered land to the developer after the donor's death, but only after receiving assurances from the National Trust that the restrictions on development and use in the easement would run with the land and bind all future owners. *See id.*

[133] *Id.* at 1050–52.

> architecture—with the eighteenth century buildings at Myrtle Grove—she could have kept the right to sell some of the farmlands and thus insured herself a much easier old age than she had. She was not a rich woman but chose to deny herself in order to preserve the land.
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> . . . .
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> Those who have given easements to the Trust or are thinking of doing so will surely be horrified to find out about the transfer of development rights[,] which a preservationist like my mother sacrificed for herself and her heirs[,] to the next and current owner of Myrtle Grove. Under the proposed amendment, the family of a Washington real estate developer will reap the profits from sale of two-thirds of the farm, a profit which my mother had denied to her own family for the sake of historic preservation. I doubt that such a transfer of development rights is what Congress and the American taxpayer think they are supporting in their appropriations to the Trust.[134]

The National Trust soon acknowledged it had made a mistake and withdrew its approval to amend the conservation easement, and the developer sued the National Trust for breach of contract.[135] The National Trust then sought the assistance of the Maryland Attorney General in defending the conservation easement on charitable trust grounds.[136] In July of 1998, the Maryland Attorney General filed suit objecting to the amendment and asserting that, because the donation of the easement created a charitable trust for the benefit of the people of Maryland, the easement could not be amended as proposed without receiving court approval in a *cy pres* proceeding.[137]

In October 1998, the Land Trust Alliance and a number of other conservation and historic preservation organizations filed an amici brief in support of the Maryland Attorney General's position that conveyance of the conservation

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[134] *Id.* at 1051.

[135] *Id.* at 1054–55.

[136] *Id.* at 1056.

[137] *Id.* at 1056–59. The Attorney General asserted that, although in general an easement is an agreement that may be modified with the consent of the holder of the easement and the owner of the encumbered land, "Myrtle Grove is not a mere conservation agreement but a gift in perpetuity to a charitable corporation for the benefit of the people of Maryland" and "[a]s such, it is subject to a charitable trust." *Id.* at 1057. The Attorney General also pointed out that, even though the Maryland easement-enabling statute provides that a conservation easement may be extinguished or released, in whole or in part, in the same manner as other easements, nothing in the statute or its legislative history indicates that the legislature intended to abrogate the application of well-settled charitable principles when a conservation easement is gifted to a charitable corporation. *Id.*

easement had created a charitable trust.[138] They pointed out that the Uniform Conservation Easement Act "specifically recognizes the validity of existing charitable trust principles and specifically declines to abrogate existing state law concerning the enforcement of charitable trusts."[139] They also cautioned that the court's decision on the charitable trust issue would have consequences reaching far beyond the controversy at issue and that "[o]nly by providing potential and existing [conservation easement] donors with assurance that the protection they place on their land will be, as they intend, permanent can a voluntary conservation program succeed."[140]

A month later The Nature Conservancy and the Eastern Shore Land Conservancy filed a motion to intervene in the case, asserting that the easement clearly created a charitable trust, and that "[t]he charitable trust doctrine has as its underpinning not only the desire to further charitable and public purposes by being certain that the gift itself is dedicated to those purposes, but it also serves the purpose of encouraging others to make similar gifts based on the assurance that their wishes will be carried out."[141] They warned that the case would establish "extremely important precedent" because, if conservation easements are not enforced according to their terms, it would chill future easement donations and adversely affect the activities of all land trusts.[142]

The Myrtle Grove controversy was settled in December of 1998, with the National Trust agreeing to pay the developer $225,000, and the parties agreeing that (i) subdivision of the property is prohibited; (ii) any action contrary to the express terms and stated purposes of the easement is prohibited; and (iii) amending, releasing (in whole or in part), or extinguishing the easement without the express written consent of the Maryland Attorney General is prohibited, except that prior written approval of the attorney general is not required for approvals carried out pursuant to the ordinary administration of the easement in accordance with its terms.[143]

A year later, in 1999, the Land Trust Alliance published an article on conservation easement amendments in its quarterly professional journal.[144]

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[138] *Id.* at 1060–61.

[139] *Id.* at 1061 n.131.

[140] *Id.* at 1061.

[141] *Id.* at 1061–62. The Eastern Shore Land Conservancy is a regional land trust that works in six Maryland counties "to sustain the Eastern Shore's rich landscapes through strategic land conservation and sound land use planning." Eastern Shore Land Conservancy, http://www.eslc.org (last visited Nov. 20, 2008).

[142] *Amending Perpetual Conservation Easements, supra* note 19, at 1062.

[143] *Id.* at 1062–63.

[144] William P. O'Connor, *Amending Conservation Easements: Legal and Policy Considerations,* EXCHANGE: J. LAND TRUST ALLIANCE, Spring 1999, at 8. One of the benefits provided to land trust

The article first describes the donation of a conservation easement by Alice, a widowed physician approaching eighty years of age, who was a "knowledgeable and committed conservationist," spent "several months developing the easement," and for whom, like many easement donors, permanent protection of her land was the "transcendent goal."[145] After noting that land trusts can expect to face increasing requests to amend conservation easements as protected lands change hands, the article discusses four potential legal constraints on amendments, one of which is charitable trust law.[146] The article explains:

> Amendments to conservation easements may . . . be limited by charitable trust law. Generally speaking, charitable trust law aims to ensure that the public benefits of charitable contributions are enforced to accomplish their intended purposes. A court may terminate a conservation easement restriction only where its particular purpose becomes impracticable and (in that case) only upon payment of appropriate damages to compensate for the loss of the public benefits involved. . . .
>
> State attorneys general may have standing to participate in a conservation easement case based on their capacity as supervisors of charitable trusts. Under that authority, an attorney general could challenge an amendment to a conservation easement he or she determined to violate the state's charitable trust law.[147]

The article concludes "[a]s the use of conservation easements becomes mainstream, land trusts should expect requests for amendments to become more common. With so much at stake, many easement amendment issues will probably be resolved by the courts."[148]

Finally, as discussed in Part I.B. above, the Land Trust Alliance's Standards and Practices, the 2005 Conservation Easement Handbook, and the Alliance's Amendment Report all discuss charitable trust law as a potential legal constraint

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members of the Alliance is a subscription to this journal. *See* Land Trust Alliance, Benefits for Land Trust Membership, http://www.landtrustalliance.org/get-involved/membership/land-trust/benefits (last visited Nov. 20, 2008).

[145] O'Connor, *supra* note 144, at 8.

[146] *Id.* at 8–10. The other three constraints discussed in the article are (i) state easement-enabling statutes, (ii) federal tax law, and (iii) the provisions of the easement deed (i.e., the typical amendment provision included in a conservation easement deed that grants the holder the discretion to agree only to amendments that are "consistent with the purposes of the easement"). *Id.* at 9–10. For a discussion of amendment provisions included in conservation easement deeds, see *infra* Part II.D.1.a.

[147] O'Connor, *supra* note 144, at 10.

[148] *Id.* at 31.

on conservation easement amendments.[149] Accordingly, *The End of Perpetuity's* characterization of the application of charitable trust principles to conservation easements as a new or unanticipated control or burden is not supportable. What is new is *The End of Perpetuity's* assertion that perpetual conservation easements should be treated as fungible or liquid assets in the hands of their governmental and nonprofit holders.

D. Charitable Trust Principles Do Not Preclude Amendments

In support of its suggestion that charitable gifts of conservation easements be specially exempted from the application of charitable trust principles, *The End of Perpetuity* asserts that such principles (i) deny easement holders the right to amend or terminate conservation easements "on their own,"[150] (ii) require judicial approval of every amendment in a *cy pres* proceeding,[151] and (iii) preclude most typical, salutary, and reasonable amendments even with judicial review.[152] None of these assertions is correct. As a threshold matter, and as explained in the foregoing Parts, holders of conservation easements should not be viewed as having the right to substantially modify or terminate the conservation easements they hold "on their own" and as they may "see fit" (as was attempted, for example, in the Myrtle Grove controversy and *Hicks v. Dowd*). In addition, charitable trust principles neither require judicial approval of every amendment in a *cy pres* proceeding, nor preclude typical, salutary, or reasonable amendments. As explained in the following subparts, such principles are much more flexible and nuanced than *The End of Perpetuity* claims, and they apply to conservation easements in a manner that is consistent with both the Land Trust Alliance's legal and ethical guidelines and federal tax law requirements.

1. Legal Principles Governing Administration of Restricted Charitable Gifts and Charitable Trusts

The legal principles governing the administration and, in particular, the modification or termination of restricted charitable gifts and charitable trusts are fairly straightforward. When a gift is made to a charitable organization to be used

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[149] *See supra* notes 51, 53, and 57 and accompanying text.

[150] *The End of Perpetuity, supra* note 4, at 62. This same assertion is repeated in similar form throughout the article. *See id.* at 69, 78.

[151] *Id.* at 79 ("**Every** modification . . . will be subject to the [*cy pres*] process because no . . . modification that has not been judicially sanctioned will be valid.") (emphasis in original).

[152] *See id.* at 68 (asserting that "few, typical conservation easement amendments" could meet the criteria for the application of the doctrines of administrative deviation or *cy pres*, and, thus, the application of such doctrines would "preclude most of these amendments," even with judicial review); *id.* at 69 (asserting that applying the doctrine of *cy pres* to conservation easements would preclude "most of the easement amendments that are typical today"); *id.* at 81 (asserting that applying the doctrine of *cy pres* to easement modifications "could preclude many salutary and reasonable easement modifications, even after a judicial review . . .").

for a specific charitable purpose, except to the extent granted the discretion either expressly or impliedly in the instrument of conveyance, the organization (i) may not deviate from the administrative terms of the gift without receiving judicial approval pursuant to the doctrine of administrative (or equitable) deviation and (ii) may not deviate from the charitable purpose of the gift without receiving judicial approval pursuant to the doctrine of *cy pres*.[153] Similar principles generally apply to gifts made for specific charitable purposes to states as well as cities, counties, park districts, and other local government bodies.[154]

The powers of a charitable trustee can be divided into four basic categories: express powers, implied powers, powers exercisable pursuant to the doctrine of administrative deviation, and powers exercisable pursuant to the doctrine of *cy pres*. These powers and the manner in which they should apply to the modification and termination of conservation easements are described below.

a. Express Powers

Express powers are discretionary powers conferred on a charitable trustee by the terms of the trust or by statute.[155] These powers enable trustees to administer trusts efficiently, and courts do not interfere with a trustee's exercise of such powers unless the trustee has clearly abused its discretion. As explained in the Restatement (Third) of Trusts:

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[153] *See, e.g.,* SCOTT & FRATCHER, *supra* note 12, § 380 ("The trustees of a charitable trust, like the trustees of a private trust, have such powers as are conferred on them in specific words by the terms of the trust [express powers] or are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust [implied powers]."); *id.* § 381 (discussing the doctrine of administrative deviation and noting that "[t]he power of a court of equity to permit or direct a deviation from the terms of the trust is at least as extensive in the case of charitable trusts as it is in the case of private trusts"); *id.* § 399 (discussing the doctrine of *cy pres* generally); *id.* § 399.2 ("Where property is given in trust for a particular charitable purpose, and it is impossible or impracticable to carry out that purpose, the trust does not fail if the testator has a more general intention to devote the property to charitable purposes. In such a case the property will be applied under the direction of the court to some charitable purpose falling within the general intention of the testator."). *See also* Brody, *supra* note 12, at 1237 ("To deal with unanticipated circumstances, the law protects charitable trusts by the equitable saving devices of deviation and cy pres. These venerable doctrines allow courts to modify restrictions that can no longer be carried out or that impede the purposes of the trust; courts apply similar principles to restricted gifts made to corporate charities.").

[154] *See, e.g.,* cases cited in *supra* notes 11, 12, & 104; *see also* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 33 cmt. d ("The powers of a municipal corporation may be limited by the express provision of statutes. Otherwise, a municipal corporation may act as trustee for purposes that fall within the scope of permitted activities of municipalities. Ordinarily these include such charitable purposes as promotion of health and education, relief of poverty, construction and maintenance of public parks, buildings and works, and the like . . . .").

[155] *See* UTC, *supra* note 15, § 815(a)(1), (2)(C) (providing that a trustee, without authorization by the court, may exercise (1) powers conferred by the terms of the trust and (2) except as limited by the terms of the trust, any other powers conferred by the UTC); WYO. STAT. ANN. § 4-10-815(a)

> When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion.[156]
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> . . . .
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> . . . A court will not interfere with a trustee's exercise of a discretionary power (or decision not to exercise the power) when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties. . . . Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.[157]

This rule has important ramifications in the conservation easement context. Land trusts and government entities that negotiate for the inclusion of an amendment provision in the easement deeds they acquire—as many do—have the express power to agree with the current and any subsequent owners of the easement-encumbered land to amend the easements in manners authorized by the provision. Moreover, courts will not interfere with a holder's exercise of this amendment discretion unless there has been a clear abuse.

Although there are variations, the typical amendment provision grants the holder of a conservation easement the power to agree to amendments that further, or are not inconsistent with, the purpose of the easement.[158] It is also generally

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(i), (ii)(C) (2008) (same). *See also* SCOTT & FRATCHER, *supra* note 12, § 380 (discussing a trustee's express powers). For powers conferred by statute, see UTC, *supra* note 15, § 414 (modification or termination of uneconomic trusts), § 417 (combination and division of trusts), § 807 (delegation to agent), and § 816 (specific statutory powers, such as power to settle a claim by or against the trust); WYO. STAT. ANN. §§ 4-10-415, -418, -807, -816 (same); *see also* SCOTT & FRATCHER, *supra* note 12, § 186 (discussing the Uniform Trustees' Powers Act).

[156] RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 87.

[157] *Id.* § 87 cmt. b; *see also* UTC, *supra* note 15, § 814(a) ("[T]he trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."); WYO. STAT. ANN. § 4-10-814(a) (same); MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 145 (2004) (noting that trust instruments often confer broad discretionary powers on the trustee, and "[c]ourts do not interfere with exercises of discretion unless it can be clearly shown that the exercise was not within the bounds of reasonable judgment. The duty of the court is not to substitute its own judgment for that of the trustee but to consider whether [the trustee] has acted in good faith, from proper motivation, and within the bounds of [reasonable] judgment . . .").

[158] The 2005 edition of the Conservation Easement Handbook provides the following as a sample amendment provision:

> Grantor and Holder recognize that circumstances could arise which justify amendment of certain of the terms, covenants, or restrictions contained in this Conservation Easement, and that some activities may require the discretionary

assumed that this type of amendment provision is permissible under federal tax law, which requires that the conservation purpose of a tax-deductible conservation easement be "protected in perpetuity."[159]

Although there is no data on the prevalence of the use of amendment provisions, the Conservation Easement Handbook has discussed the wisdom of including an amendment provision in conservation easement deeds since its first publication in 1988.[160] The 2005 edition of the Handbook provides that "[m]any

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> consent of Holder. To this end, Grantor and Holder have the right to agree to amendments and discretionary consents to this Easement without prior notice to any other party, provided that in the sole and exclusive judgment of the Holder, such amendment or discretionary consent *furthers or is not inconsistent with the purpose of this grant*.

2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 377 (emphasis added); *id.* at 317 (defining Grantor to include the original grantor of the easement and any successors in interest to the property). For prior iterations of the typical amendment provision, see 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 164 (authorizing amendments that are "consistent with the purpose of [the] Easement"); Thomas S. Barrett & Stefan Nagel, MODEL CONSERVATION EASEMENT AND HISTORIC PRESERVATION EASEMENT, 1996: REVISED EASEMENTS AND COMMENTARY FROM "THE CONSERVATION EASEMENT HANDBOOK" 22 (1996) [hereinafter 1996 MODEL CONSERVATION EASEMENT] (authorizing amendments that are "consistent with the purpose of [the] Easement").

[159] *See* I.R.C. § 170(h)(5)(A). The requirement that the conservation purpose of a tax-deductible easement be "protected in perpetuity" should establish the basic parameters for a permissible grant of amendment discretion to the holder of the easement. The conservation purpose of an easement would not be protected in perpetuity if the easement could be amended in manners that adversely impact or change such purpose. Alternatively, the conservation purpose of an easement is not jeopardized if the holder of the easement is given the discretion to agree to only those amendments that further, or are consistent with, such purpose. Whether the typical amendment provision should be interpreted to grant the holder the discretion to agree to "trade-off" amendments (i.e., amendments that both negatively impact and further the conservation purpose of an easement, but the net effect of which could be considered to be neutral with respect to or further such purpose) is an open question. The IRS has yet to take a formal position on the extent to which it believes tax-deductible conservation easements may be permissibly amended. In a report on The Nature Conservancy issued in 2005, the Staff of the Senate Finance Committee explained that "[m]odifications to an easement held by a conservation organization may diminish or negate the intended conservation benefits, and violate the present law requirements that a conservation restriction remain in perpetuity." STAFF OF S. COMM. ON FINANCE, 109th Cong., REPORT ON THE NATURE CONSERVANCY, Executive Summary 9 (2005), mircoformed on CIS No. 2005-5362-27 (Cong. Info. Serv.), *available at* http://www.senate.gov/~finance/sitepages/TNC%20Report.htm (last visited Nov. 20, 2008) [hereinafter 2005 SENATE FINANCE COMMITTEE REPORT]. The Staff noted that "[m]odifications made to correct ministerial or administrative errors are permitted under present law [sic] Federal tax law." *Id.* at 9 n. 20. But the Staff expressed concern with regard to trade-off amendments, such as an amendment to an easement that would permit the owner of the encumbered land to construct a larger home on the land in exchange for more limited use of the property for agricultural purposes. *See id.* at Pt. II 5. The Staff explained that trade-off amendments "may be difficult to measure from a conservation perspective," and that the "weighing of increases and decreases [in conservation benefits] is difficult to perform by TNC and to assess by the IRS." *Id.*

[160] *See* 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 205–06 ("Because easements are perpetual, there are bound to be changed circumstances over time that require amendment . . . and many consider it prudent to set the ground rules ahead of time . . . ."); 1996 MODEL

easement drafters . . . consider it prudent to set the rules governing amendments, both to provide the power to amend and to impose appropriate limitations on that power to prevent abuses,"[161] and "[a]mendment provisions are becoming more common to assure and limit the Holder's power to modify."[162] And in its recently published Amendment Report, the Land Trust Alliance instructs

> land trusts should negotiate with easement grantors for the desired level of amendment discretion and include an amendment provision in easement deeds expressly granting them such discretion so there is no confusion or misunderstanding regarding the land trust's ability to agree to amendments in the stated circumstances.[163]

Given the courts' hands-off approach to a trustee's exercise of its express powers, the typical amendment provision grants the holder of a conservation easement considerable discretion to agree to amendments "on its own" and as it may "see fit" (i.e., without obtaining attorney general or court approval), provided such amendments are consistent with or further the purpose of the easement. In some cases, of course, an easement grantor may not wish to grant the holder such broad amendment discretion. For example, the grantor may wish to provide that the holder's amendment discretion does not extend to amendments that would increase the level of subdivision or development permitted on the encumbered land (the 2005 edition of the Conservation Easement Handbook offers this as an option for an amendment provision).[164] Alternatively, the grantor may wish to grant the holder the discretion to agree to amendments that are consistent with the purpose of an easement during the grantor's lifetime, but prohibit amendments after the grantor's death (a well-respected land trust operating on the West Coast

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CONSERVATION EASEMENT, *supra* note 158, at 82 (same). Both the 1988 edition of the Conservation Easement Handbook and the 1996 Model Conservation Easement, which were published eight years apart, confusingly note that "[u]ntil quite recently, most conservation easements have been silent regarding amendments." *See* 1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 205; 1996 MODEL CONSERVATION EASEMENT, *supra* note 158, at 82. The 1996 Model Conservation Easement further notes that this silence was "at least in part to avoid encouraging the notion that [easement] terms can be easily changed." 1996 MODEL CONSERVATION EASEMENT, *supra* note 158, at 82.

[161] 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 468.

[162] *Id.* at 377 (emphasis in original omitted).

[163] *LTA Amendment Report*, *supra* note 44, at 31 (providing also "[t]ransparency of intent is an ethical obligation; if land trusts wish to modify a conservation easement in certain circumstances, land trusts should put their donors, grantors, landowners, members, funding sources and the general public on notice that amendments may occur").

[164] *See* 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 377 ("Notwithstanding the foregoing, the Holder and Grantor have no right or power to consent to any action or agree to any amendment that would . . . increase the level of residential development permitted by the express terms of this Conservation Easement . . . .").

offers this as an option to its easement grantors).[165] And some grantors may not wish to grant the holder *any* discretion to amend the carefully negotiated terms of a conservation easement deed. As in all other charitable contexts, however, the government entities and land trusts acquiring conservation easements should decline to accept easements if the grantor refuses to grant them an appropriate level of discretion with regard to the administration of the easement over the long term.[166]

Indeed, the experience of government entities and land trusts with regard to gifts of conservation easements is somewhat analogous to the experience of museums with regard to gifts of artwork. In a 1994 book, Professor Malaro, a leading commentator on museum governance issues, explained that, while in the past museums were willing to accept gifts of artwork subject to all manner of restrictions (such as restrictions requiring permanent display or permanent retention), "with [the] growing interest in the role of museums, their obligations to the public, and the collateral responsibilities of museum trustees, a more thoughtful stand is being taken by some museums on the issue of restricted gifts."[167] Professor Malaro offered, as an example of this more thoughtful stand, the 1986 International Council of Museums' Code of Professional Ethics, which provides "[o]ffers [of gifts] that are subject to special conditions may have to be rejected if the conditions proposed are judged to be contrary to the long-term interest of the museum and its public."[168]

Importantly, although recognizing that restrictions placed on a museum's use of artwork could lead to less than optimal deployment of its assets over time, neither Professor Malaro nor the museums argued that museums and the

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[165] The Land Trust of Napa County provides the following amendment provision as an option to its easement grantors:

> 11.5. *Permitted Amendment by Original Granting Owner Only*. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, the original Granting Owner and the Trust may jointly amend this Easement; provided, however, that (i) no amendment or modification shall be allowed that will adversely affect the qualification of this Easement or the status of the Trust under any applicable laws . . . , (ii) any amendment or modification shall not harm Conservation Values, shall be consistent with the purposes of this Easement, and shall not affect its perpetual duration, (iii) the original Granting Owner must consent to the amendment, whether or not that original Granting Owner continues to own the __Easement Area/Property__, and (iv) no amendment is permitted once the original Granting Owner is deceased.

Land Trust of Napa County Model Conservation Easement Form (January 2008 draft) (on file with authors).

[166] *See, e.g.,* Brody, *supra* note 12, at 1233 (noting that "[p]hilanthropic institutions are under constant pressures to obtain funds and to yield to donor demands in doing so, but charities have the obligation to accept restrictions carefully").

[167] MARIE C. MALARO, MUSEUM GOVERNANCE 79–80 (1994).

[168] *Id.*

gifts or artwork they accept should be exempted from the rules that govern the administration of all other forms of restricted charitable gifts. Rather, museums developed institutional policies regarding the acceptance of restricted gifts and began to refuse gifts subject to use restrictions that might conflict with their basic education goals.[169] The Land Trust Alliance's strong recommendation in its recently published Amendment Report that land trusts negotiate for the flexibility to amend conservation easements consistent with their stated purposes reflects a similar evolution; a recognition that land trusts should not bind themselves to enforcing restrictions in a conservation easement deed that might, over time, conflict with the conservation purpose of the easement and the land trust's basic conservation goals.[170]

b. Implied Powers

Charitable trustees are also deemed to have certain "implied powers" to do what is "necessary or appropriate" to carry out the purposes of a trust and not forbidden by the terms of the trust.[171] The Uniform Trust Code and Wyoming's version of the Uniform Trust Code provide that, without authorization by the court and except as limited by the terms of the trust, a trustee may exercise (i) "all powers over the trust property which an unmarried competent owner has over individually owned property" and (ii) "any other powers appropriate to achieve the proper . . . management . . . of the trust property."[172] In their commentary, the drafters of the Uniform Trust Code explain that this section is "intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust."[173]

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[169] *Id.* at 80–81, 106.

[170] Government entities and land trusts also have a responsibility to consider *ex ante* when it is (and is not) appropriate to protect land in perpetuity with a conservation easement. In appropriate circumstances, land protection tools that are more easily modifiable and terminable, such as leases or management agreements, should be employed. *See Perpetuity and Beyond, supra* note 18, at 704–07 (discussing the circumstances in which it may (and may not) be appropriate to acquire perpetual conservation easements).

[171] *See* SCOTT & FRATCHER, *supra* note 12, § 186; GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 551 (West 2008) ("*Implied* powers are those which are not clearly and directly given by the settlor or a court or by statute but which equity believes the creator of the trust or a court granting express powers intended should exist. They are implied or inferred from the terms and purposes of the trust. If a settlor has directed the trustee to accomplish a certain objective, he must be deemed to have intended that the trustee use the ordinary and natural means for obtaining that result.") (emphasis in original). For an example of implied powers of a charitable trustee, see Wilstach Estate, 1 Pa. D. & C.2d 197 (1954) (holding that the trustees of an art collection had the implied power to sell items out of the collection where such items were deemed to be making no contribution to the collection as a whole).

[172] UTC, *supra* note 15, § 815(a)(2)(A), (B); WYO. STAT. ANN. § 4-10-815(a)(ii)(A), (B) (2008).

[173] UTC, *supra* note 15, § 815, cmt.

One of the duties of a trustee is to administer the trust in accordance with its terms and purposes.[174] Accordingly, even in the absence of an amendment provision, the holder of a conservation easement could be deemed to have the implied power to agree to amendments that further the purpose and proper management of the easement and are not inconsistent with its terms.[175]

Despite the Uniform Trust Code's broad grant of power to a trustee to manage trust property, courts traditionally have been reluctant to find that a trustee has powers not expressly granted in the trust instrument.[176] The boundaries of a holder's implied power to agree to amendments that are consistent with the purpose of a conservation easement are therefore uncertain. To increase clarity and reduce litigation, government entities and land trusts should, at the time of the acquisition of a conservation easement, negotiate for the express power to agree to amendments that are consistent with the purpose of the easement and memorialize that grant of discretion in the conservation easement deed (as recommended by the Land Trust Alliance).[177] And with regard to existing conservation easements that do not contain an amendment provision, judicial or legislative clarification of the extent of a holder's power to simply agree to such amendments may be desirable.[178]

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[174] *See id.* § 801; WYO. STAT. ANN. § 4-10-801.

[175] *See also Amending Perpetual Conservation Easements, supra* note 19, at 1075–77 (explaining that conservation easements could be interpreted to grant their holders the implied power to agree to amendments that are clearly neutral with respect to or enhance the charitable purposes of the easements, and that such an interpretation would be consistent with the goals underlying the charitable trust rules).

[176] *See* SCOTT & FRATCHER, *supra* note 12, § 186 (noting that, as a result, it is customary in well-drawn instruments to make provisions in express words conferring upon the trustee powers that are or may become necessary or appropriate for the efficient administration of the trust).

[177] Some land trusts reportedly do not negotiate for the inclusion of an amendment provision in the conservation easement deeds they accept because they want to avoid giving easement grantors, subsequent landowners, and the public the impression that conservation easements can be amended. If a land trust intends to amend the easements it holds, it should negotiate for the discretion to do so in good faith at the time it acquires easements and memorialize that grant of discretion in the easement deeds. To do otherwise raises serious questions about the extent of the land trust's legal power to simply agree to amendments and potentially exposes the land trust to claims of fraudulent solicitation. *See also supra* note 163 (noting the Land Trust Alliance's admonition in its Amendment Report that transparency of intent is also an ethical obligation).

[178] *See, e.g.,* UTC, *supra* note 15, § 201(c) (providing that a judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights); WYO. STAT. ANN. § 4-10-201(c) (same). The comments to the UTC provide in relevant part:

> The jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to . . . provide a trustee with instructions even in the absence of an actual dispute. . . . Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties.

Formal amendments may also be unnecessary in some cases. Letters of interpretation from the holder are occasionally used in lieu of amendments to clarify points of confusion or ambiguity.[179] Strengthening the development or use restrictions in an existing easement or adding land to an existing easement should be viewed as an additional charitable gift (as opposed to an amendment to the terms of an existing gift), and such an additional gift can be accomplished through a separate instrument rather than an amendment in any event. Moreover, as noted in the Land Trust Alliance's recently published Amendment Report, "[m]any future amendment requests can be avoided by careful drafting of easements in the first instance."[180]

c. Doctrines of Administrative Deviation and Cy Pres

To the extent changed circumstances necessitate amendments to a conservation easement that exceed the holder's express or implied powers, the holder can seek judicial approval of such amendments pursuant to the doctrine of administrative deviation or the doctrine of *cy pres*, as the case may be. These doctrines are distinct. The doctrine of administrative deviation applies to the modification of an administrative term (but not the purpose) of a trust, and is sometimes described as permitting a court to modify the means by which the purpose is to be accomplished.[181] The doctrine of *cy pres*, on the other hand, applies to the modification of the charitable purpose of a trust.[182]

UTC, *supra* note 15, § 201 cmt. *See also* Uniform Management of Institutional Funds Act (1972) and Uniform Prudent Management of Institutional Funds Act (2006), both of which allow for the removal of restrictions placed by donors on the use of institutional funds outside of a court proceeding in carefully prescribed circumstances. *See* Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Management of Institutional Funds Act (1972), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1970s/umifa72.htm (last visited Nov. 20, 2008); Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Prudent Management of Institutional Funds Act (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/umoifa/2006final_act.htm (last visited Nov. 20, 2008) [hereinafter UPMIFA]. *Cf.* Part III *infra*, (explaining that there are constitutional limits on the ability of state legislatures to control the administration of restricted charitable gifts and charitable trusts).

[179] *See* Sheila McGrory-Klyza, *An Ounce of Prevention, Head Off Future Violations With An Interpretation Letter,* 27 SAVING LAND: J. LAND TRUST ALLIANCE, Spring 2008, at 26 (discussing the use of interpretation letters in lieu of amendments); *see also* O'Connor, *supra* note 144, at 9 ("Sometimes amendment of the easement is necessary to clarify points of confusion, although letters of understanding between the easement holder and landowner should suffice in many cases.").

[180] *LTA Amendment Report*, *supra* note 44, at 19.

[181] *See, e.g.,* FREMONT-SMITH, *supra* note 157, at 182–84 (describing the doctrine of administrative deviation and noting it is a complement to the doctrine of *cy pres*); RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 67 cmt. a (describing the doctrine of administrative deviation as allowing courts, in certain circumstances, to modify the means of accomplishing a trust purpose).

[182] *See, e.g.,* FREMONT-SMITH, *supra* note 157, at 173–82 (describing the doctrine of *cy pres*); *id.* at 183 ("The power of the courts to permit deviations [from the terms of a trust] should not be confused with the cy pres power. The latter is applicable when the purposes are no longer capable of

Courts have traditionally been more willing to permit trustees to deviate from the administrative terms (as opposed to the charitable purpose) of a trust.[183] This is presumably because courts recognize that charitable donors are less likely to be wedded to the administrative terms of their trusts, particularly if altering administrative terms will better accomplish the donor's overall charitable purpose. In other words, courts presumably recognize that altering the administrative terms of a trust is less likely to chill future charitable donations than altering the donor's specified charitable purpose.[184]

(1) *Administrative Deviation*

To the extent a holder wishes to amend the means by which the conservation purpose of an easement is pursued, but the holder has neither the express nor implied power to agree to the amendment, the holder should seek court approval of the amendment pursuant to the doctrine of administrative deviation. Under the traditional formulation of the doctrine of administrative deviation, a court could authorize a trustee to deviate from an administrative term only if, owing to circumstances not known to the settlor and not anticipated by him, compliance with the term would defeat or substantially impair the accomplishment of the purposes of the trust.[185] The modern tendency, however, has been to permit a trustee to deviate from an administrative term in situations where continued compliance with the term is deemed to be undesirable, inexpedient, or inappropriate, and regardless of whether the settlor had foreseen the circumstances.[186]

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being accomplished. The power to permit deviations does not usually extend to the purposes of the trust, but is confined to matters relating solely to administration.").

[183] *See, e.g.,* Brody, *supra* note 12, at 1237 n. 171 ("If the restriction relates to the donor's charitable purpose, the courts apply the doctrine of cy pres. . . . By contrast, when the restriction is merely administrative, the courts apply the more flexible trust doctrine of equitable deviation.").

[184] *See, e.g.,* BOGERT ET AL., *supra* note 171, § 561 ("The terms of the trust having to do with the manner in which the trustee should act in order to obtain the primary objectives are not on the same level of importance but are rather minor and auxiliary. The jurisdiction of equity to enforce trusts should and does include the power to vary the details of administration which the settlor has prescribed in order to secure the more important result of obtaining for the beneficiaries the advantages which the settlor stated he wished them to have.").

[185] RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 167. *In re* Pulitzer, 249 N.Y.S. 87 (N.Y. Surr. Ct. 1931), *aff'd mem.*, 260 N.Y.S. 975 (N.Y. App. Div. 1932), is a classic example of the application of the doctrine of administrative deviation. Mr. Pulitzer created a trust for the benefit of his descendants, funded it with stock in a corporation that published a newspaper to which he had devoted his life, and expressly forbade the trustees from selling the stock. When the newspaper later became unprofitable and the prohibition on the sale of the stock threatened the trust corpus, the trustees sought and received judicial approval to sell the stock. In approving the deviation from the "no sale of stock" administrative term, the court explained "[t]he dominant purpose of Mr. Pulitzer must have been the maintenance of a fair income for his children and the ultimate reception of the unimpaired corpus by the remaindermen." *Id.* at 94.

[186] *See Amending Perpetual Conservation Easements, supra* note 19, at 1039; S.C. Dep't of Mental Health v. McMaster, 642 S.E.2d 552, 557 (S.C. 2007) (applying the doctrine of administrative

Under the UTC and Wyoming's version of the UTC, the standard for administrative deviation is similarly liberal while not being unbridled. Both first provide that a court may modify the administrative terms of a trust if, because of circumstances not anticipated by the settlor, modification will further the purposes of the trust.[187] The comments to the UTC explain that the purpose of this provision "is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes."[188] Both the UTC and Wyoming's version of the UTC also provide that a court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.[189] The comments to the UTC explain that this provision "broadens the court's ability to modify the administrative terms of a trust" and "is an application of the requirement . . . that a trust and its terms must be for the benefit of its beneficiaries," which, in the conservation easement context, is the public.[190] The comments further explain that, "[a]lthough the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property."[191] The UTC and Wyoming's version of the UTC also specifically authorize a court to (i) modify a trust to achieve the settlor's tax objectives, provided the modification is not contrary to the settlor's probable intention,[192] and (ii) reform a trust to correct mistakes of fact or law.[193]

As the foregoing discussion indicates, courts in both common law and UTC jurisdictions have fairly broad discretion to authorize a deviation from the terms of a conservation easement, provided such deviation is consistent with the easement's overall purpose.

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deviation to alter an administrative term of a charitable trust and explaining "[c]onsiderable flexibility will always be allowed in the details of the execution of a trust, so as to adapt it to the changed conditions").

[187] UTC, *supra* note 15, § 412(a); WYO. STAT. ANN. § 4-10-413(a) (2008).

[188] UTC, *supra* note 15, § 412 cmt. (noting also that, while it is necessary that there be circumstances not anticipated by the settlor, the circumstances may have been in existence when the trust was created).

[189] *Id.* § 412(b); WYO. STAT. ANN. § 4-10-413(b).

[190] *See* UTC, *supra* note 15, § 412 cmt.

[191] *Id. See also* David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 169 (2002) ("The UTC provides for this increased flexibility but without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent. The result is a liberalizing nudge, but one founded in traditional doctrine.").

[192] UTC, *supra* note 15, § 416; WYO. STAT. ANN. § 4-10-417.

[193] UTC, *supra* note 15, § 415; WYO. STAT. ANN. § 4-10-416.

(2) Cy Pres

To the extent a holder wishes to amend a conservation easement in a manner contrary to its purpose (such as to permit subdivision and development of the land),[194] or to terminate the easement (which would clearly be contrary to its purpose),[195] the holder should be required to obtain court approval pursuant to the doctrine of *cy pres*. Under the traditional formulation of the doctrine of *cy pres*, if (i) the charitable purpose of a gift or trust becomes illegal, impossible, or impracticable, and (ii) the donor is determined to have had a general charitable intent, then (iii) a court can formulate a substitute plan for the use of the gift or trust assets for a charitable purpose that is as near as possible to the purpose specified by the donor.[196]

Courts and legislatures have made some modest changes to the traditional formulation of the doctrine of *cy pres*.[197] In states that have adopted the UTC, the doctrine can now be applied if the charitable purpose of a trust becomes unlawful, impossible, impracticable, or wasteful.[198] The requirement of general charitable intent is also generally no longer a barrier to the application of the doctrine. Courts almost invariably find that a donor had a general charitable intent if the gift or trust fails after it has been in existence for some period of time, the UTC

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[194] *See supra* notes 131–143 and accompanying text (discussing the Myrtle Grove controversy).

[195] As previously noted, the purpose of a conservation easement generally is the protection of the particular land encumbered by the easement for the conservation purposes specified in the deed of conveyance in perpetuity.

[196] *See, e.g.,* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 399 ("If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."); RONALD CHESTER, GEORGE GLEASON BOGERT, & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 431 (3d ed. 2005) (explaining that the words "cy pres" are Norman French for "as near," and the phrase when expanded to its full implication was "cy pres comme possible," which meant "as near as possible"). Jackson v. Phillips, 96 Mass. 539 (1867), is perhaps the most famous example of the application of the doctrine of *cy pres*. That case involved a charitable trust created to promote the abolition of slavery. When the purpose of the trust became "impossible or impracticable" as a result of the adoption of the Thirteenth Amendment to the Constitution, the court applied the doctrine of *cy pres* and instructed the trustees to use the trust assets to aid former slaves and assist necessitous persons of African descent.

[197] Changes have been modest because of the principle of *stare decisis* and constitutional limits on the ability of state legislatures to encroach upon the judicial *cy pres* power. *See infra* notes 331–341 and accompanying text.

[198] UTC, *supra* note 15, § 413(a); WYO. STAT. ANN. § 4-10-414 (2008). *See also infra* note 281 (explaining that the wasteful standard was added to the UTC primarily to deal with the problem of surplus funds and such standard should not be applied to authorize the termination of conservation easements when purportedly "better" conservation opportunities present themselves).

and the Restatement (Third) of Trusts apply a presumption of general charitable intent, and some states have eliminated the requirement entirely.[199] And courts increasingly have determined that, upon the modification of a trust pursuant to the doctrine of *cy pres*, the substitute charitable purpose need not be the one that is as near as possible to the donor's original purpose, but simply one that is "reasonably similar or close to" such purpose, or "'falling within the general charitable purpose'" of the settlor.[200]

2. The End of Perpetuity's *Incorrect Interpretation of Charitable Trust Principles*

As should, by now, be clear, *The End of Perpetuity's* analysis of the manner in which the foregoing principles affect the amendment and termination of conservation easements is incorrect. The article fails to acknowledge that flexibility to amend conservation easements consistent with their stated purposes can be and often is built into conservation easement deeds through the use of an amendment provision, and that the use of such provisions is strongly recommended by the Land Trust Alliance.[201] The article references implied powers only in passing,

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[199] *See Rethinking the Perpetual Nature of Conservation Easements*, *supra* note 63, at 478–80. *See also* UTC, *supra* note 15, § 413 cmt. ("Subsection (a) . . . modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent . . . ."). Wyoming's version of the UTC similarly presumes the settlor had a general charitable intent. *See* WYO. STAT. ANN. § 4-10-414(a).

[200] RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 67 cmt. d.

[201] *See supra* Part II.D.1.a (discussing amendment provisions). *The End of Perpetuity* refers to an amendment provision only once in a footnote. *See The End of Perpetuity, supra* note 4, at 68, n. 193. This footnote provides in relevant part

> if the easement grantor is well-enough represented to provide an amendment clause in his or her conservation easement, the easement will be exempt from the doctrine of *cy pres*; otherwise not. One has to wonder; if application of the doctrine is so crucial to the proper management of conservation easements [should] having a clever lawyer should [sic] exempt a grantor from its application.

This footnote illustrates the author's misreading of charitable trust principles. As discussed in Part II.D.1.a, *supra*, the typical amendment provision grants the holder of a conservation easement broad discretion to agree to amendments, but only if the amendments are consistent with or further the purpose of the easement. Accordingly, the typical amendment provision does not exempt a conservation easement from the doctrine of *cy pres,* and it would be contrary to the requirements for tax-deductible easements under federal tax law if it did. Rather, the holder of a conservation easement containing a typical amendment provision would still be required to obtain court approval in a *cy pres* proceeding to (i) terminate the easement (which would clearly be contrary to its purpose) or (ii) amend it in a manner that is not consistent with its purpose (such as was attempted in the Myrtle Grove controversy). Also, given the discussion of the wisdom of using amendment provisions in the various iterations of the Conservation Easement Handbook, the Land Trust Alliance's strong recommendation in favor of the use of such provisions in its Amendment Report, and the increasing focus of state attorneys general and the IRS on the issue of amendments (see *supra* note 19 and *infra* notes 295 and 296 and accompanying text), any reasonably well-prepared attorney involved in a conservation easement transaction would consider the issue of amendments to be a key component of the negotiation process.

quickly dismissing them as having little relevance,[202] and conflates the doctrines of administrative deviation and *cy pres*.[203] The article also lumps all amendments together, claiming, incorrectly, that charitable trust principles both require judicial approval of every amendment in a *cy pres* proceeding and preclude most typical, salutary, and reasonable amendments even with judicial review.[204]

As the discussion in the previous subpart indicates, charitable trust principles should apply differently to different types of amendments—namely (i) amendments that are consistent with or further the purpose of an easement and (ii) amendments that are contrary to the purpose of an easement. The holder of a conservation easement should be permitted to agree to amendments that are consistent with or further the purpose of a conservation easement in one of three ways:

- pursuant to an express power granted to the holder in an amendment provision included in the easement deed, the exercise of which should not be second-guessed by a court unless there has been a clear abuse of discretion;[205]
- pursuant to the holder's implied power to do what is necessary or appropriate to carry out the terms of the easement;[206] or
- in the absence of an express or implied power, with court approval obtained pursuant to the doctrine of administrative deviation, which is more flexible than the doctrine of *cy pres*.[207]

On the other hand, the holder of a conservation easement should be permitted to agree to amendments that are contrary to the purpose of the easement (such as those attempted in the Myrtle Grove controversy), or to the outright termination of the easement (which would clearly be contrary to its purpose), only with court approval in a *cy pres* proceeding.[208]

These principles do not unduly constrain the discretion of holders of conservation easements given that (i) the Land Trust Alliance sanctions only amendments that are consistent with or further the purpose of an easement in its Standards and Practices, its Amendment Report, and the Conservation

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[202] *See The End of Perpetuity, supra* note 4, at 68–69.

[203] *See id.* at 68.

[204] *See supra* notes 150–152 and accompanying text.

[205] *See supra* Part II.D.1.a.

[206] *See supra* Part II.D.1.b.

[207] *See supra* Part II.D.1.c.

[208] *See id.*

Easement Handbook,[209] (ii) land trusts that have adopted formal amendment policies generally authorize only such amendments,[210] (iii) it is generally assumed that only such amendments comply with federal tax law requirements,[211] and (iv) government entities and land trusts can and often do negotiate for the inclusion of an amendment provision in conservation easement deeds that expressly grants them the discretion to agree to such amendments.[212] Indeed, most of the "typical" amendments that *The End of Perpetuity* claims would be precluded by the application of charitable trust principles are those that are likely to be consistent with or further the purpose of a conservation easement and, thus, could be agreed to by the holder pursuant to the discretion granted to it in an amendment provision.[213] Moreover, the requirement under state charitable

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[209] *See supra* notes 49–58 and accompanying text.

[210] For example, The Vermont Land Trust's amendment policy provides that amendments that "have a better or at least neutral effect on the resources conserved" may be recommended to the Board for approval, and lists consistency with "the overall purposes of the conservation easement" and "any other written expressions of the original Grantor's intent" as amendment principles. *LTA Amendment Report*, *supra* note 44, at Appendix A-1. The Nature Conservancy's amendment policy provides that, before authorizing an amendment, its staff must "make a determination that the proposed changes would not in any way diminish the overall goals and objectives of the original conservation easement" and "the Conservancy is bound by the conservation purposes as outlined in the original conservation easement." *Id.* at Appendix A-2. The Colorado Open Lands amendment policy provides that "[a]n amendment must have either a beneficial or neutral effect on the conservation values protected by the conservation easement." *Id.* at Appendix A-3. The Marin Agricultural Land Trust's amendment policy provides "[t]he proposed amendment [must] strengthen or have a neutral effect on the Protected Values of the easement. No amendment will be considered that could result in a net degradation of the Protected Values" and "[t]he proposed amendment [must be] consistent with the purpose of the easement." *Id.* at Appendix A-4. The Society for the Protection of New Hampshire Forests's amendment policy provides that an amendment must not be inconsistent with the purposes of the original easement and the policy does not permit modifications "where additional land outside the easement Property is protected in return for modification of the easement." *Id.* at Appendix A-5. The Brandywine Conservancy's amendment policy provides that "an amendment must be consistent with the conservation purposes of the existing easement" and, "if the landowner initiates the amendment, it must provide a net conservation benefit." *Id.* at Appendix A-6.

[211] *See supra* note 159 and accompanying text.

[212] *See supra* Part II.D.1.a.

[213] *The End of Perpetuity* refers to the following as typical amendments, "the correction of technical errors in the easement document; clarification of ambiguities; tightening of restrictions; expansion of the area covered by the easement; relocation or modification of reserved development rights; increase in [a landowner's] reserved rights in exchange for increased conservation on the easement parcel; . . . and modifications to reflect changes in the law, or to improve enforcement and management of the easement." *See The End of Perpetuity, supra* note 4, at 67–68. All such amendments could, in the right circumstances, be consistent with or further the purpose of a conservation easement. The extent to which any of these amendments are "typical," however, is unclear. *See, e.g., infra* notes 231–233 and accompanying text (discussing the low reported rate of amendments agreed to by land trusts); *supra* note 159 (discussing the Senate Finance Committee's concern with "trade-off" amendments due to the difficulty in weighing increases and decreases in conservation benefits).

trust law of court approval in a *cy pres* proceeding for the outright termination of a conservation easement, or for amendments that are contrary to the purpose of an easement, is consistent with federal tax law requirements applicable to tax-deductible conservation easements.[214]

It may, of course, sometimes be unclear whether a proposed amendment is consistent with or contrary to the purpose of a conservation easement. As previously explained, however, courts should not second-guess a holder's exercise of its power to amend a conservation easement pursuant to an amendment provision included in the easement deed absent a clear abuse of that discretion.[215] On the other hand, highly questionable calls should be subject to state attorney general and court oversight to ensure that the public interest and investment in the conservation easement is protected.[216]

To summarize, contrary to the assertions made in *The End of Perpetuity*, applying charitable trust principles to conservation easements would not (i) categorically deny easement holders the right to amend conservation easements "on their own"; (ii) require holders to obtain judicial sanction of every amendment in a *cy pres* proceeding; or (iii) preclude most typical, salutary, and reasonable amendments even with judicial review. Rather, amendments that are consistent with or further the charitable purpose of an easement could be agreed to through the exercise of a holder's express or implied powers, or with court approval obtained in a more flexible administrative deviation proceeding. It is only when a holder wishes to terminate a conservation easement, or modify it in a manner contrary to its stated purpose (as was attempted in the Myrtle Grove controversy), that court approval in a *cy pres* proceeding would be required.

E. Amendments are Not a Relatively Common Occurrence

The End of Perpetuity asserts that "[e]asement modification (amendment) is a relatively common occurrence."[217] This representation is inconsistent with what appears to be both reported and common knowledge in the land trust

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[214] *See supra* note 159 and accompanying text (discussing federal tax law requirements as they relate to amendments); *infra* notes 302–306 and accompanying text (discussing federal tax law requirements generally).

[215] *See supra* Part II.D.1.a.

[216] The Myrtle Grove controversy is a case in point. *See supra* notes 131–143 and accompanying text.

[217] *The End of Perpetuity, supra* note 4, at 26 n.3.

community.[218] While some land trusts have written amendment policies,[219] and, as discussed above, negotiate for the inclusion of an amendment provision in the easement deeds they accept, amendments are, in fact, not a relatively common occurrence.

The Land Trust Alliance's Standards and Practices specifically provide that easement amendments "are not routine,"[220] and the commentary thereto explains that amendments "are not common."[221] The 2005 edition of the Conservation Easement Handbook explains:

> When the terms of an easement are negotiated, both the landowner and the holder should consider those provisions unchangeable. Although altered circumstances and conditions may someday justify an amendment to the document, an organization or landowner should never agree to a conservation easement with the idea that its terms will be changed later.[222]

The Land Trust Alliance's recently published Amendment Report similarly provides that conservation easements should be amended only in "exceptional circumstances."[223] And the Amendment Report concludes by providing the following "key points" to land trusts regarding amendments:

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[218] While adding land to, or strengthening the development and use restrictions in, existing conservation easements may be relatively common and uncontroversial, as noted in Part II.D.1.b, *supra*, those actions should be viewed as the making of additional charitable gifts rather than modifications to the terms or purposes of existing gifts.

[219] *See supra* note 210 (describing a number of land trust amendment policies); Jason B. van Doren, *Summary of the 2004 Conservation Easement Violations & Amendments Study,* EXCHANGE: J. LAND TRUST ALLIANCE, Summer 2005, 24, 25 (noting that forty-five percent of the land trusts surveyed had a written amendment policy).

[220] *LTA Standards and Practices*, *supra* note 48, at 14 (Practice 11I. Amendments).

[221] *Commentary on Practice 11I, supra* note 51.

[222] 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 183. This language was carried forward in only slightly modified form from the 1988 edition of the Conservation Easement Handbook, which provides:

> When the terms of an easement are negotiated, both the grantor and the grantee should consider those provisions unchangeable. Although altered circumstances and conditions *may* someday justify an amendment to the document, amendments should be viewed with extreme caution. No organization or property owner should ever agree to a conservation easement with the idea that its terms will be changed later.

1988 CONSERVATION EASEMENT HANDBOOK, *supra* note 21, at 121 (emphasis in original).

[223] *LTA Amendment Report*, *supra* note 44, at 9 ("Exceptional circumstances sometimes warrant easement amendments . . . ."); *id.* at 32 ("To minimize risks, the land trust's amendment policy and supporting materials should underscore that easements are perpetual, *amended only in exceptional circumstances,* and that all amendments must clearly serve the public interest—not solely the interests of the landowner.") (emphasis added).

> Focus on good initial easement drafting to avoid the need for future amendments to the greatest extent possible. Adopt and use standard easement format and boilerplate provisions that reduce errors and ambiguity.
>
> Discuss the land trust's amendment policy with the easement donor/grantor and any direct funders of the project and include in the easement deed an amendment provision that expressly grants the land trust the desired level of amendment discretion.
>
> Consider amendments with great caution; *amendments should never be viewed as the norm*.[224]

The amendment policies adopted by many land trusts reflect a similarly conservative approach to amendments. In addition to limiting amendments to those that are consistent with or further the purpose of a conservation easement,[225] such policies generally provide that amendments are reserved for exceptional, extraordinary, and very limited, special circumstances. For example, The Nature Conservancy ("TNC"), which held conservation easements encumbering over 2.3 million acres as of 2008,[226] provides in its amendment policy:

> Conservation easements held by the Conservancy should be designed and written so as to avoid the need for an amendment or modification of the easement terms. It is the Conservancy's presumption that a conservation easement will not be amended or modified. In exceptional cases or in unforeseen circumstances, this presumption may be rebutted provided [TNC's amendment procedures, which comply with charitable trust principles, are followed].[227]

The Society for the Protection of New Hampshire Forests ("SPNHF"), a well-respected state-wide land trust, provides in its amendment policy:

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[224] *Id.* at 85 (emphasis added).

[225] *See supra* note 210 and accompanying text.

[226] Conservation Easement Modifications—The Nature Conservancy's Approach and Experience, Philip Tabas, VP/General Counsel, February 15, 2008 (on file with authors).

[227] *LTA Amendment Report*, *supra* note 44, at Appendix A-2. TNC's amendment procedures require that, other than with respect to amendments that are *de minimis*, involve the imposition of additional restrictions on the encumbered property, or are in the nature of a clarification of the terms of an easement rather than a change thereto, the organization must secure the approval of the relevant state authority that provides oversight of charitable organizations in the state where the property is located (generally the state attorney general) and seek court approval when appropriate. *Id.*

> SPNHF's conservation easements are achieved through voluntary agreements with landowners. Once an easement is executed, SPNHF is bound to uphold the terms of the easement as negotiated. SPNHF's record in upholding the terms and purposes of the original easement will determine whether future donors will put their trust in SPNHF.
>
> It is SPNHF's policy to hold and enforce conservation easements as written. Amendments to conservation easements will be authorized only under exceptional circumstances and then only under [SPNHF's amendment guidelines].[228]

The Brandywine Conservancy, a well-respected regional land trust, provides in its amendment policy:

> Amendment is an extraordinary procedure and not available to a landowner as a matter of right, unless the easement itself or Federal, state, or local law mandates that a particular amendment must be adopted.[229]

And the Little Traverse Conservancy, another well-respected regional land trust, provides in its amendment policy:

> The Little Traverse Conservancy acquires and holds conservation easements for the purpose of protecting land for the benefit of current and future generations. Prior to donating or selling their conservation easement, landowners are assured that the easement is permanent. The Conservancy has an obligation to monitor, enforce, and uphold conservation easements to assure that these conservation easements will stand the test of time.
>
> Conservation easement amendments are viewed by the Conservancy as being appropriate in only very limited, special circumstances.[230]

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[228] *Id.* at Appendix A-5. The New Hampshire Attorney General is working with SPNHF to develop guidelines regarding Attorney General and court oversight of conservation easement modifications and terminations pursuant to charitable trust principles. *See supra* note 19.

[229] *LTA Amendment Report*, *supra* note 44, at Appendix A-6. The mission of the Brandywine Conservancy, which is located in Chadds Ford, Pennsylvania, is "to conserve the natural and cultural resources of the Brandywine River watershed and other selected areas with a primary emphasis on conservation of water quantity and quality." Brandywine Conservancy, Environmental Management Center, Our Mission, http://www.brandywineconservancy.org/conserving.html (last visited Nov. 21, 2008).

[230] Little Traverse Conservancy Land Protection Policy: Policy For Amendments to Conservation Easements (on file with authors), *available at* http://learningcenter.lta.org/attached-

Finally, studies conducted by the Land Trust Alliance confirm that conservation easement amendments are relatively rare.[231] The more recent study, which was based on data gathered from the over 1,000 land trusts that responded to the Land Trust Alliance's 2003 National Land Trust Census, reports that "[t]he total number of conservation easement amendments reported . . . [represents] about 2.5 percent of the total 17,847 easements [held by land trusts]."[232] The earlier study, conducted in 1999, found that only "[a]pproximately 4 percent of the more than 7,400 conservation easements held by local and regional land trusts ha[d] been amended . . . ."[233] Accordingly, contrary to the assertion made in *The End of Perpetuity*, amendments to conservation easements are not a "relatively common occurrence." Rather, amendments are the exception rather than the rule, and are reserved for exceptional, extraordinary, and very limited, special circumstances.

F. Standing to Sue

The standing rules that apply in the charitable context are designed to balance the need to protect charitable organizations from nuisance suits with the need for organizational accountability.[234] In the conservation easement context, this balancing can be described as follows. Government and nonprofit holders of conservation easements need the freedom to administer the easements they hold without fear of possible nuisance suits by neighboring landowners or

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files/0/50/5086/12_03.doc (last visited Nov. 20, 2008). The mission of the Little Traverse Conservancy is "to protect the natural diversity and beauty of northern Michigan by preserving significant land and scenic areas, and fostering appreciation and understanding of the environment." Little Traverse Conservancy, About Us, Mission Statement, http://landtrust.org/LTC/aboutusTABLE.htm (last visited Nov. 21, 2008).

[231] *See* van Doren, *supra* note 219; René Wieser, *Conservation Easement Amendments: Results from a Study of Land Trusts,* EXCHANGE: J. LAND TRUST ALLIANCE, Spring 2000, 9.

[232] *See* van Doren, *supra* note 219, at 26.

[233] *See* Wieser, *supra* note 231, at 9 (quoting Jean Hocker, then President of the Land Trust Alliance, as stating "[t]he fact that so few easements have been amended indicates that land trusts have been appropriately cautious about making amendments").

[234] As explained by the Panel on the Nonprofit Sector:

> Courts and state legislatures have been unwilling to subject charitable organizations to the risk of unrestricted claims of breach of trust by members of the public for good reason: the potential for nuisance lawsuits would deter service on charitable boards and the cost of defending such claims would come out of charitable funds. States have addressed the need to balance protection from such lawsuits with organizational accountability by granting standing to sue to a limited number of persons . . . .

Strengthening the Transparency, Governance, and Accountability of Charitable Organizations: A Supplement to the Final Report to Congress and the Nonprofit Sector (Panel on the Nonprofit Sector), April 2006, at 29, *available at* www.nonprofitpanel.org/Report/index.html (last visited Nov. 20, 2008) [hereinafter *Supplement to Nonprofit Report*]. The Panel on the Nonprofit Sector was convened in October 2004 at the encouragement of the leaders of the Senate Finance Committee to consider and recommend actions to strengthen good governance and ethical conduct within public charities and private foundations. *See id.* at 3.

other members of the public because such suits could entail the expenditure of significant public or charitable funds on unwarranted litigation and discourage service on land trust boards. On the other hand, as evidenced by *Hicks v. Dowd*,[235] the Myrtle Grove controversy,[236] and the Wal-Mart controversy,[237] there must be a means by which grantees of conservation easements can be held accountable for actions taken or not taken that are in violation of their fiduciary obligations to both easement grantors and the public. Negligence, malfeasance, and the use of assets for purposes other than those specified by the donor are not unknown in the charitable context,[238] and there is no reason to believe that the government entities and land trusts holding conservation easements will be the first class of entities in history to be immune to such abuses. In fact, a variety of factors would support the view that such entities should be subject to more oversight than the typical holder of charitable assets, rather than less, including (i) the significant public investment in conservation easements and the conservation and historic values they protect,[239] (ii) the enormous economic value inherent in the development and use rights restricted by conservation easements,[240] (iii) the political, financial, and

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[235] *See supra* note 3.

[236] *See supra* notes 131–143 and accompanying text.

[237] In the Wal-Mart controversy, Chattanooga County, Tennessee, which held a perpetual conservation easement, permitted the construction of a four-lane road across the protected land to provide access to a Wal-Mart SuperCenter. *See Perpetuity and Beyond, supra* note 18, at 695–700. Several environmental groups and a citizen filed suit alleging, *inter alia*, that the road violated the terms of the easement. *See id.* at 696–97. The case settled on terms favorable to the public, as beneficiary of the easement, and in accordance with charitable trust principles. *See id.* at 698.

[238] *See* FREMONT-SMITH *supra* note 157, at 19–115 (describing the history of charitable trust law and the need, evident from almost the first emergence of charities as legal entities, for the supervision of those entrusted with charitable assets to help prevent negligence, maladministration, and diversion of such assets to purposes contrary to those specified by the donors). *See also* Marion Fremont-Smith & Andras Kosaras, *Wrongdoing by Officers and Directors of Charities: A Survey of Press Reports 1995-2002*, 42 EXEMPT ORG. TAX REV. 25 (Oct. 2003); Marion R. Fremont-Smith, *Pillaging of Charitable Assets: Embezzlement and Fraud*, 46 EXEMPT ORG. TAX REVIEW 333 (Dec. 2004); Stephanie Strom, *Report Sketches Crime Costing Billions: Theft From Charities,* N.Y. TIMES, March 29, 2008, at A10.

[239] The public investment in conservation easements is substantial and takes many forms, including (i) the generous federal (and, in some cases, state) tax benefits provided to easement donors, (ii) the significant public funds being appropriated for easement purchase programs, (iii) the tax-exempt status of the land trusts acquiring easements, and (iv) public funding of the operations of the government entities acquiring and enforcing easements.

[240] A conservation easement can reduce the fair market value of the land it encumbers by hundreds of thousands or even millions of dollars. *See, e.g., Tax Incentives, supra* note 42, at 25 (noting, in 2004, that in the 17 reported conservation easement valuation cases, courts determined that the easements had reduced the value of land they encumber at the time of their donation by as much as $4.97 million and as little as $20,800, with an average diminution in value of approximately 43%). *See also supra* note 3, noting that the conservation easement at issue in *Hicks v. Dowd* had an estimated value of over $1 million at the time it was donated in 1993. Given the increase in land values and development pressures in Wyoming since 1993, that conservation easement is likely worth considerably more now.

other pressures that may be brought to bear on both governmental and nonprofit holders to substantially modify, release, or terminate conservation easements, and (iv) the increasing importance of land conservation as undeveloped land becomes more scarce.

If the only parties with standing to sue to enforce a conservation easement were the owner of the encumbered land and the holder of the easement, as *The End of Perpetuity* suggests,[241] there would be no party able to call the holder of a conservation easement to account if it breached the fiduciary duties it should be deemed to have accepted when it accepted the easement.[242] While that lack of oversight might suit some of the governmental and land trust holders of conservation easements, it would clearly be contrary to the public interest and investment in such easements. *The End of Perpetuity* objects to the notion that the state attorney general or other representative of the public might have standing to "second guess" the decision of a land trust and landowner to substantially modify or terminate a conservation easement.[243] But in no other charitable context are those entrusted with charitable assets to be used for specific purposes the first, last, and only authority on fundamental matters relating to the management and disposition of such assets. Moreover, for the reasons noted immediately above, it would be unwise (as well as unprecedented) to specially exempt charitable gifts of conservation easements from the principles that govern the administration of all other charitable gifts.

The standing rules in the charitable context are also carefully calibrated to balance the competing needs of administrative efficiency and organizational accountability. Accordingly, it is unlikely that government or nonprofit holders will be subject to nuisance suits as a result of the application of charitable principles to conservation easements. In most cases standing to enforce a restricted charitable gift or charitable trust has been limited to the state attorney general.[244]

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[241] *See The End of Perpetuity, supra* note 4, at 63–67.

[242] Pursuant to the Uniform Conservation Easement Act and Wyoming's version of that act, an entity eligible to be a holder of a conservation easement may be granted a third-party right of enforcement in a conservation easement deed. *See* UCEA, *supra* note 14, §§ 1(3), (3)(a)(3); WYO. STAT. ANN. §§ 34-1-201(b)(iii), -203(a)(iii) (2008). Granting standing to such a third party is optional, however, and the holder must consent to the grant as a party to the easement. Accordingly, such third parties cannot be relied upon to call easement holders to account for breaches of their fiduciary duties.

[243] *See The End of Perpetuity, supra* note 4, at 63–64.

[244] *See* Susan Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law,* 21 U. HAWAII L. REV. 593, 619 (1999) ("[S]tanding to enforce breaches of fiduciary duties in the charitable context is still limited in most cases to the attorney general."); FREMONT-SMITH, *supra* note 157, at 324 ("The common law not only conferred supervisory powers and duties on the attorney general to enforce charitable funds, . . . it largely excluded other members of the general public from so doing.").

This is "based not on a denial of the public's interest, but on the purely practical consideration that it would be impossible to manage charitable funds, or even to find individuals to take on the task, if fiduciaries were to be constantly subject to harassing litigation."[245]

A leading treatise on trust law explains the rationale for granting standing to the state attorney general in the charitable context:

> The public benefits arising from [a] charitable trust justify the selection of some public official for its enforcement. Since the Attorney General protects the rights of the people of the state, he has been chosen as the protector, supervisor, and enforcer of charitable trusts, both in England and in the several states. This is true either because of a specific delegation of that power by statute, by reason of a general statutory statement of his duties, because of judicial decision, or some combination of the above.[246]

The public benefits arising from a conservation easement similarly justify the selection of the Attorney General as the protector, supervisor, and enforcer of the easement. Accordingly, the state attorney general should have standing to sue to enforce a conservation easement on behalf of the public.[247]

In some cases courts have also granted standing to enforce a charitable trust to co-trustees or co-directors of charitable organizations.[248] For example, *Holt v. College of Osteopathic Physicians & Surgeons*, the Supreme Court of California

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[245] FREMONT-SMITH, *supra* note 157, at 324–25.

[246] CHESTER, BOGERT & BOGERT, *supra* note 196, § 411. *See also* Holt v. College of Osteopathic Physicians and Surgeons, 394 P.2d 932, 935 (Cal. 1964) (explaining "[b]eneficiaries of a charitable trust, unlike beneficiaries of a private trust, are ordinarily indefinite and therefore unable to enforce the trust in their own behalf. . . . Since there is usually no one willing to assume the burdens of a legal action, or who could properly represent the interests of the trust or the public, the Attorney General has been empowered to oversee charities as the representative of the public, a practice having its origin in the early common law").

[247] This was recognized by the drafters of the Uniform Conservation Easement Act. The act grants standing to (i) an owner of an interest in the real property burdened by the easement, (ii) a holder of the easement, (iii) a person having a third-party right of enforcement, and (iv) any person authorized by other law. UCEA, *supra* note 14, § 3(a). The comments to the act explain "the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law." *Id.* § 3 cmt. *See also* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 391 cmt. a (noting that, in some states, the local district or county attorney rather than the attorney general is charged with maintaining suits to enforce charitable trusts).

[248] *See* FREMONT-SMITH, *supra* note 157, at 334. *See also* CHESTER, BOGERT & BOGERT, *supra* note 196, § 411 ("A few state statutes permit proceedings to enforce a charitable trust or to remedy

granted standing to a minority of the directors of a charitable corporation to sue to redress alleged breaches of trust by the majority.[249] The court noted that, although the Attorney General has primary responsibility for the enforcement of charitable trusts, the need for adequate enforcement is not wholly fulfilled by the authority given him.[250] The court explained:

> The Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment.[251]

The court pointed out that, because co-trustees and co-directors are both few in number and charged with the duty of managing the charity's affairs, they are unlikely to subject a charity to harassing litigation.[252] They are also in the best position to learn about breaches of trust and bring the relevant facts to a court's attention.[253] This is certainly the case with regard to land trusts, many of which have small boards of directors, operate at the local level, and make decisions with regard to the easements they hold that are not readily apparent to the state attorney general or the public because they relate to privately-owned land to which the public may not have visual or physical access.[254]

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a breach of trust to be commenced by one other than the Attorney General, such as a co-trustee or an officer or director of a charitable corporation.").

[249] *See Holt*, 394 P.2d at 932.

[250] *Id.* at 936.

[251] *Id.* at 935.

[252] *Id.* at 936.

[253] *Id.* (noting also that permitting suits by co-directors and co-trustees does not usurp the responsibility of the Attorney General, since he would be a necessary party to such litigation). *See also Supplement to Nonprofit Report, supra* note 234, at 29 ("States have addressed the need to balance protection from [harassing] lawsuits with organizational accountability by granting standing to sue to a limited number of persons, such as directors and trustees, who are well-positioned to know if the charity is not behaving appropriately and are unlikely to bring frivolous actions.").

[254] Tax-deductible conservation easements protecting habitat or an ecosystem need not grant the public either physical or visual access to the subject property. *See* Treas. Reg. § 170A-14(d)(3)(iii). Physical or visual access to property encumbered by an open-space easement donated pursuant to a "clearly delineated governmental policy" is similarly not required unless the conservation purpose of the donation would be "undermined or frustrated" without public access. *See id.* § 1.170A-14(d)(4)(iii)(C). *See also* STEPHEN J. SMALL, FEDERAL TAX LAW OF CONSERVATION EASEMENTS 5-2 (1997) (explaining that, when Congress was considering revisions to the federal charitable income tax deduction provision for conservation easement donations in 1980, a number of Congressmen and interest groups were strongly opposed to a requirement of public access to easement-encumbered land, claiming that "donors who had to 'open up' their land to the public simply would not be interested in making easement donations").

Courts also occasionally grant standing to private persons who are deemed to have a "special interest" in the enforcement of a charitable trust. To obtain such a grant of standing, however, a person generally must show that she is entitled to receive a benefit under the trust that is not merely the benefit to which members of the public in general are entitled.[255] Premised on the proposition that the attorney general is best suited to represent the interests of the public, courts traditionally have been conservative in granting standing to parties with a special interest (*Hicks v. Dowd* being a case in point).[256] In a review of standing cases involving charitable trusts decided between 1980 and 2001, Marion Fremont-Smith, author of *Governing Nonprofit Organizations*, determined "[t]he overriding factor in almost every one of the cases in which individuals were granted standing was the lack of effective enforcement by the attorney general or another government official."[257] As Professor Susan Gary explains:

> Courts will defer to a determination previously made by the attorney general. That is, if the attorney general has reviewed the case and declined to pursue it, a court is unlikely to grant standing to a private party, especially in a state with a strong record of charitable enforcement by the attorney general. In contrast, if the court perceives lax enforcement efforts or lack of resources or interest on the part of the attorney general, the

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[255] *See, e.g.,* SCOTT & FRATCHER, *supra* note 12, § 391.

[256] In *Hicks v. Dowd,* discussed *supra* note 3, the Wyoming Supreme Court denied standing to sue to enforce a conservation easement to a resident of the county in which the protected land is located, but invited the Wyoming Attorney General to reassess his position with regard to the case. *See also, e.g.,* Rhone v. Adams, 986 So. 2d 374 (Ala. 2007) (holding that a church and a school, which were among numerous entities that could, in the trustees' discretion, receive charitable contributions under a charitable trust, did not have standing to maintain an action for the enforcement of the trust because they were merely potential as opposed to actual beneficiaries of the trust); *In re* Clement Trust, 679 N.W.2d 31 (Iowa 2004) (holding that a local community center did not have standing to maintain an action for the enforcement of a charitable trust because the center was merely a potential beneficiary of the trust); Nixon v. Hutcherson, 96 S.W.3d 81 (Mo. 2003) (holding that parents who were potential beneficiaries of an education trust to benefit needy children did not have standing to maintain an action for the enforcement of the trust because their interest was no greater than the interest of all other members of the putative class); Forest Guardians v. Powell, 24 P.3d 803 (N.M. Ct. App. 2001) (holding that children attending New Mexico public schools did not have standing to maintain an action for the enforcement of a school lands trust created under a state statute, which constituted a charitable trust); *In re* Milton Hershey Sch., 911 A.2d 1258 (Pa. 2006) (holding that the alumni association of the Milton Hershey School did not have standing to question an agreement reached between the board of managers of the school and the Pennsylvania Attorney General regarding the administration of the school, and explaining that the trust agreement did not contemplate the alumni association acting as a "shadow board" with standing to challenge actions taken by the managing board).

[257] FREMONT-SMITH, *supra* note 157, at 331, 333.

> court may be willing to supplement the "official" enforcement and grant standing to a private party with special interests.[258]

On balance, the courts have been appropriately conservative in granting standing to parties with a special interest. Accordingly, treating conservation easements as charitable trusts is unlikely to expose holders of easements to harassment by such parties.

The UTC expands the traditional common law rule regarding who has standing to sue to enforce a charitable trust to include the settlor of a charitable trust.[259] Professor Ronald Chester explains the reason for this expansion:

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[258] *See* Gary, *supra* note 244, at 628. For examples of grants of standing to parties with a special interest, see Hooker v. The Edes Home, 579 A.2d 608 (D.C. 1990) (granting standing to elderly indigent widows eligible for admittance to a charitable home for the aged when the board of trustees proposed to close the home and relocate the residents because the widows were members of a small sharply defined class of potential beneficiaries and were challenging whether the trustees' proposed action was compatible with the settlor's intent rather than the day-to-day management of the trust); Kapiolani Park Pres. Soc'y v. Honolulu, 751 P.2d 1022 (Haw. 1988) (granting standing to members of the public who used a public park to sue to enjoin the lease of a portion of the park for use as a restaurant where the attorney general actively joined in supporting the alleged breach of trust); *In re* Trust of Hill, 509 N.W. 2d 168, 172 (Minn. Ct. App. 1993) (granting standing to sue to enforce a charitable trust to an individual who was both a former trustee of the trust and a descendant of the settlor because such individual was "in a position to understand the purpose and operation of the trust" and the attorney general had elected not to participate in the proceedings); Paterson v. Paterson Gen. Hosp. 235 A.2d 487, 495 (N.J. Super. Ct. Ch. Div. 1967) (granting standing to sue to prevent the relocation of a charitable hospital corporation to a nearby township to the city in which the corporation was located and to two individual residents and taxpayers of the city because "[w]hile public supervision of the administration of charities remains inadequate, a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decidedly in the public interest"). *See also* Edward C. Halbach, Jr., *Standing To Enforce Trusts: Renewing and Expanding Professor Gaubatz's 1984 Discussion of Settlor Enforcement,* 62 U. MIAMI L. REV. 713, 721 (2008) (arguing that, based on "the unusually comprehensive and refined, and fundamentally sound, reasoning" of the court in *Hooker*, "[i]f, as has become common in recent years, a conservation easement is granted to a governmental entity or other nonprofit organization to be held upon charitable trust or the equivalent (usually, for tax reasons, perpetually), owners of adjoining or perhaps nearby land, and in some circumstances others, such as downstream land owners, who benefit more than the public generally should be recognized as having special-interest standing [but only] to compel adherence to the easement's charitable purpose" and not to question the day-to-day management of the easement).

[259] *See* UTC, *supra* note 15, § 405(c) ("The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust."); WYO. STAT. ANN. § 4-10-406(c) (same). The traditional rule regarding who has standing to sue to enforce a charitable trust is summarized in the Restatement (Second) of Trusts:

> A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.

RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 391.

> Charitable trust abuses are not being effectively policed in most jurisdictions because of lax attorney general oversight and restrictive standing rules for "specially interested beneficiaries." More enforcement certainly is needed, which is one reason for the [grant of standing to settlors]. . . . The grantor is a logical source to provide such additional enforcement because of his particular interest in the observance of the terms of the transfer.[260]

Pursuant to the UTC settlor standing provision, which has been adopted in Wyoming, the donor of a conservation easement should have standing to sue to enforce the easement.[261] Of course, easement donors eventually die, and it remains to be seen whether the donor of a conservation easement who has sold or otherwise transferred the encumbered land would have an interest in suing to enforce the easement. Easement donors who have sold or otherwise transferred the encumbered land may be disinclined to expend (or simply may not have) the time and resources required to litigate, or may have other reasons for not wishing to enforce the easement.[262]

The End of Perpetuity misconstrues the manner in which the UTC's grant of standing to the settlor of a charitable trust would apply in the conservation easement context by failing to understand that the "trust" at issue is the restricted grant of the easement rather than the entity holding the easement.[263] As noted above, the "settlor" who should be granted standing to sue to enforce a conservation easement under the UTC is the donor of the easement. The founders of the organization holding the easement, the successors of such founders, the original officers and board members of the organization and their successors, the trustees

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[260] Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?* 37 REAL PROP. PROB. & TRUST J. 611, 628–29 (2003).

[261] Both the UTC and Wyoming's version of the UTC provide that the "settlor" of a "charitable trust" may maintain a proceeding to enforce the trust. *See* UTC, *supra* note 15, § 405(c); WYO. STAT. ANN. § 4-10-406(c). Both define "settlor" to include a person "who creates . . . a trust." *See* UTC, *supra* note 15, § 103(15); WYO. STAT. ANN. § 4-10-103(a)(xviii). The comments to the UTC provide that "the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust." *See* UTC, *supra* note 15, § 414 cmt. Accordingly, the donor of a conservation easement should be viewed as the settlor of a charitable trust and should have standing to sue to enforce the easement on that ground. *See also supra* Parts I.A, II.A, and II.B. (explaining in detail why the donation of a conservation easement to a government entity or charitable organization should be viewed as creating a charitable trust or its functional equivalent).

[262] The Lowhams, through the Lowham Limited Partnership, donated the easement involved in *Hicks v. Dowd* to the Board of Commissioners. *See supra* note 3. Accordingly, the Lowhams, through the partnership, are the "settlors" of the trust created by the conveyance of the easement and should have standing to sue to enforce the easement on that ground. The Lowhams have, however, declined to become involved in the case for undisclosed reasons.

[263] *See supra* note 261.

past, present, and future of the organization, and anyone who contributed cash or other property to the organization are not "settlors" of the trust created by the gift of a conservation easement.[264] One can analogize to a gift of cash to the University of Wyoming to be used for a specific charitable purpose, such as to fund scholarships for students majoring in political science. The donation of the cash to the University should be deemed to create a charitable trust (or its functional equivalent) of which the University should be deemed to be acting as trustee.[265] The University should have a duty to administer the trust in accordance with the donor's specified purpose,[266] and, under the UTC, the trust should be enforceable by the donor as "settlor."[267] However, the myriad of other donors to the University, the University's founders, the successors of such founders, and the past, present, and future officers, board members, or trustees of the University would not be "settlors" of the trust, and would not have standing to sue to enforce the trust on that ground.

In short, granting standing to sue to enforce a conservation easement to the state attorney general, a co-fiduciary, the donor of the easement, and, in certain limited circumstances, a party with a "special interest" is highly unlikely to expose

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[264] *The End of Perpetuity* asserts that such persons could have standing to sue to enforce a conservation easement donated to a land trust as "settlors." *See The End of Perpetuity*, *supra* note 4, at 64–67.

[265] *See* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 28 cmt. a (explaining that a donation to a charitable institution to be used for a specific purpose, such as to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is a trustee). In discussing the high-profile lawsuit between Princeton University and the heirs of the donors of a large charitable gift to the University to be used for a specific charitable purpose, Professor Iris Goodwin explains:

> Then as now, the common law rule is that, whether the charity is formed as a corporation or as a trust, restricted gifts to a charitable entity are governed by the law of trusts. Thus under the common law, a restricted gift to Princeton places Princeton in the role of trustee with respect to those funds, notwithstanding that Princeton is organized as a corporation. Princeton operated under the same constraints with respect to a restricted gift as would the trustees of a trust. Changing the purpose to which Robertson funds might be applied once they were in Princeton's hands was not an option for Princeton under the common law.

Iris J. Goodwin, *Ask Not What Your Charity Can Do For You: Robertson v. Princeton Provides Liberal-Democratic Insights Into Cy Pres Reform,* forthcoming in the Arizona Law Review and available on SSRN.

[266] *See* UTC, *supra* note 15, § 801 (requiring a trustee to administer the trust in good faith and in accordance with its terms and purposes and the interests of the beneficiaries); WYO. STAT. ANN. § 4-10-801 (same); UTC, *supra* note 15, § 801 cmt. ("This section confirms that the primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith."). *See also* American Nat'l Bank v. Miller, 899 P.2d 1337, 1339 (Wyo. 1995) ("A trustee . . . acts on behalf of both the beneficiaries and the grantor of the trust. A fundamental duty of a trustee is to carry out the terms of the trust. . . . 'The clearly expressed intention of the settlor should be zealously guarded . . . .'" (citing First Nat'l Bank & Trust Co. v. Brimmer, 504 P.2d 1367, 1371 (Wyo. 1973))).

[267] *See supra* note 261.

easement holders to harassing litigation. Moreover, such grants of standing are necessary to ensure that holders of conservation easements can be held accountable for breaches of their fiduciary duties. Indeed, if not even the attorney general were granted standing, egregious breaches of trust would go unremedied to the detriment of the public and the charitable sector as a whole.[268] It would also be unprecedented to exempt the holders of a particular subset of charitable gifts made for specific purposes from the standing rules applicable to all other such gifts simply because some of the holders would prefer that their actions not be "second-guessed" by those charged under the law with protecting the public interest and investment in charitable assets.

As a practical matter, many land trusts may be relieved to learn that the state attorney general has standing to sue to enforce conservation easements. Negligence, malfeasance, and the use of conservation easements for purposes other than those specified by the donors on the part of even just a few holders could undermine the credibility of all holders and reduce public confidence in the use of conservation easements as a land protection tool. A credible threat of enforcement by state attorneys general can be expected to deter this type of behavior. Such a threat can also be expected to significantly reduce the incidence of landowner violations of easements, as well as requests by landowners to substantially modify or terminate easements contrary to donor intent and the public interest.

G. Cy Pres *Will Not be a Sword in the Hands of Landowners, Developers, or State Attorneys General*

The End of Perpetuity claims that "[i]n the hands of a well-financed legal team the doctrine of *cy pres* could be stood on its head" and become "a sword in the hands of landowners and developers, not just a shield for conservation interests."[269] Although it is the courts that make the final judgment regarding the application of the doctrine of *cy pres*,[270] *The End of Perpetuity* asserts that "under the guise of *cy pres* a court may assume authority to do a number of things, whether or not they are consistent with the theory of *cy pres*,"[271] and that applying charitable trust principles to conservation easements in a sensible and insightful fashion "assumes a judiciary far more knowledgeable, patient, and sympathetic to nuance . . . than is likely to be the case."[272] *The End of Perpetuity* further asserts that "[w]hether the flexibility thus derived from an equitable proceeding should

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[268] For examples of the important role played by the attorney general in ensuring the enforcement of conservation easements, see *Hicks v. Dowd*, discussed *supra* note 3, and the Myrtle Grove controversy, discussed *supra* notes 131–143.

[269] *The End of Perpetuity*, *supra* note 4, at 82.

[270] *See, e.g.,* CHESTER, BOGERT & BOGERT, *supra* note 196, § 435 (explaining that the *cy pres* power is vested in the courts); *infra* note 286 (same).

[271] *The End of Perpetuity*, *supra* note 4, at 81.

[272] *Id.* at 78 n. 225.

be more a source of comfort than concern will be more dependent upon the judge assigned to the case than the theory of the doctrine itself."[273] These assertions are untoward, unwarranted, and unsupportable.

First, landowners have standing to sue to modify or terminate the conservation easements encumbering their land even in the absence of charitable trust principles.[274] In addition, without the protection of charitable trust principles, owners of easement-encumbered land would have a greater likelihood of persuading courts to modify or terminate conservation easements. The real property law doctrines that would likely apply to conservation easements in the absence of charitable trust principles—the doctrines of changed conditions and relative hardship—were developed in the context of private servitudes and are not designed to recognize or protect the public interest in land use restrictions.[275] Moreover, when such doctrines apply, there is rarely any payment made to the holder of the extinguished land use restrictions, as there should be when a conservation easement is extinguished to avoid unjustly enriching the owner of the encumbered land at the public's expense.[276]

Charitable trust principles, on the other hand, provide significant protection of both the public interest and investment in conservation easements. Charitable gifts are particularly favored by the courts and are construed to uphold the donor's charitable purpose whenever possible.[277] Indeed, it would be a profound departure from settled precedent for courts to authorize the termination of a conservation easement pursuant to the doctrine of *cy pres* if the easement continued to provide significant benefits to the public. For example, in declining to apply the doctrine

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[273] *Id.* at 81.

[274] *See, e.g.,* UCEA, *supra* note 14, § 3(a)(1) (providing that an action affecting a conservation easement may be brought by an owner of an interest in the real property burdened by the easement); WYO. STAT. ANN. § 34-1-203(a)(i) (2008) (same).

[275] *See, e.g.*, RESTATEMENT OF PROPERTY, *supra* note 4, § 7.11 cmt. a (applying a special set of rules based on the doctrine of *cy pres* to the modification and termination of conservation easements and explaining that, "[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes, which are subject to modification and termination under § 7.10 [the property law doctrine of changed conditions]"); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements,* 63 TEX. L. REV. 433, 488 (1984) (noting that the doctrine of relative hardship, which focuses on the conflict between individual landowners, is too narrow to encompass the public interest, which must be considered in the case of conservation servitudes).

[276] *See* RESTATEMENT OF PROPERTY, *supra* note 4, § 7.11 cmt. c ("In other instances where changed conditions lead to termination of servitudes . . . there is seldom an entitlement to damages. The opposite is true with conservation servitudes.").

[277] *See, e.g.,* Crippled Children's Found. v. Cunningham, 346 So. 2d 409, 411 (Ala. 1977) ("[C]haritable gifts are viewed with particular favor and every presumption, consistent with the language of the instrument, should be employed to sustain them."); Harris v. Georgia Military Acad., 146 S.E.2d 913, 915 (Ga. 1966) ("'Gifts or trusts for charitable purposes are favorites of the law and the courts . . . [and] courts of equity, it is said, will go to the length of their judicial

of *cy pres* to create a new class of beneficiaries of a charitable trust, the purpose of which was to provide scholarships to needy students attending the University of Wyoming and Casper Community College, the Wyoming Supreme Court explained:

> We have found no authority which authorizes a court to make any such change merely deemed desirable. . . . The clearly expressed intention of the settlor should be zealously guarded by the courts, particularly when the trust instrument reveals a careful and painstaking expression of the use and purposes to which the settlor's financial accumulations shall be devoted. A settlor must have assurance that his solemn arrangements and instructions will not be subject to the whim or suggested expediency of others after his death.[278]

A leading treatise on trust law similarly explains:

> The line between impossibility and impracticability on the one side, and inconvenience or slight undesirability on the other, may be difficult to draw. Although several of the cy pres statutes use the word "impracticable" (and two "inexpedient") as a basis for cy pres application . . . , the court will not substitute a new scheme merely because it or the trustee believes it would be a better plan than that which the settlor provided.[279]

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power to sustain such gifts.'"); Webb v. Webb, 172 N.E. 730, 735 (Ill. 1930) ("Gifts to charity have always been looked upon with favor by the courts. Every presumption consistent with the language used will be indulged to sustain them."); *In re* Carlson's Estate, 358 P.2d 669, 671–72 (Kan. 1961) ("[C]haritable trusts, being favorites of the law, are to be upheld wherever possible, and instruments providing for their creation will be liberally construed to carry out the beneficent intention of the donor."); *In re* Estate of Homburg, 697 So. 2d 1154, 1158 (Miss. 1997) ("[C]haritable trusts are favored and should be enforced where possible."); Board of Trustees of Univ. of N. C. v. Unknown Heirs, 319 S.E.2d 239, 242 (N.C. 1984) ("It is a well recognized principle that gifts and trusts for charities are highly favored by the courts. Thus, the donor's intentions are effectuated by the most liberal rules of construction permitted."); Mercy Hosp. of Williston v. Stillwell, 358 N.W.2d 506, 509 (N.D. 1984) ("It is well recognized that charitable gifts are favored by the law and by the courts. . . . Courts will give effect to charitable gifts where it is possible to do so consistent with recognized rules of law."); Maxcy v. City of Oshkosh, 128 N.W. 899, 909 (Wis. 1910) ("Courts here, as anciently, look with favor upon all donations to charitable uses, and give effect to them where it is possible to do so consistent with rules of law, and to that end the most liberal rules the nature of the case will admit of, within the limits of ordinary chancery jurisdiction, will be resorted to if necessary."); Bentley v. Whitney, 281 P. 188, 190 (Wyo. 1929) ("The provisions of instruments creating charitable trusts are favorably regarded by the courts and are generally construed with the utmost liberality in order to carry out the laudable purpose of the donor.").

[278] First Nat'l Bank & Trust Co. of Wyoming v. Brimmer, 504 P.2d 1367, 1371 (Wyo. 1973).

[279] CHESTER, BOGERT & BOGERT, *supra* note 196, § 439. *See also, e.g., In re* Estes Estate, 523 N.W.2d 863, 870 (Mich. Ct. App. 1994) ("While we have no doubt that [the trustee's] proposed uses for the funds are benevolent, they contradict [the settlor's] specific purpose for the trust and,

Accordingly, contrary to the assertion in *The End of Perpetuity*, it is extremely unlikely that a court, "under the guise of *cy pres*," would "assume authority to do a number of things," such as bow to the request of a landowner to terminate a conservation easement to allow for the development of the encumbered land. Rather, given the traditional conservatism of the courts in applying the doctrine of *cy pres*, as well as the high stakes involved in the termination of a conservation easement,[280] courts are likely to err on the side of refusing to apply the doctrine absent compelling evidence that the conservation purpose of an easement has become impossible or impracticable.[281] Moreover, in the event circumstances warrant the termination of a conservation easement pursuant to the doctrine of *cy pres*, the public's interest and investment in the easement would be protected. In applying the doctrine the court would require the payment of an appropriate share of the proceeds from the subsequent sale or development of the land to the

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absent compelling evidence that this purpose is obsolete, impracticable, or inappropriate, we will not condone a release."); *In re* Estate of Wilson, 452 N.E.2d 1228, 1233 (N.Y. 1983) ("The court, of course, cannot invoke its cy pres power without first determining that the testator's specific charitable purpose is no longer capable of being performed by the trust.").

[280] The stakes involved in the termination of a conservation easement are high because termination will generally result in the development and more intensive use of the underlying land and, thus, the substantially irreversible destruction of the land's unique ecological, aesthetic, or historic values.

[281] Courts are likely to be conservative in their application of the doctrine of *cy pres* to terminate conservation easements even in jurisdictions that have added "wasteful" to the *cy pres* standard. The wasteful standard was added to the UTC primarily to deal with the problem of surplus funds. *See* English, *supra* note 191, at 179 n.164 ("Cases of waste normally involve situations where the funds allocated to the particular charitable scheme far exceed what is needed."). The Restatement (Third) of Trusts, which also adds wasteful to the *cy pres* standard, explains:

> Another type of case appropriate to the application of cy pres . . . is a situation in which the amount of property held in the trust exceeds what is needed for the particular charitable purpose to such an extent that the continued expenditure of all of the funds for that purpose, although possible to do, would be wasteful. (The term "wasteful" is used here neither in the sense of common-law waste nor to suggest that a lesser standard of merely "better use" will suffice.)

RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 67 cmt. c(1). Given the purpose of adding wasteful to the *cy pres* standard, the traditional conservatism of the courts in applying the doctrine of *cy pres*, the high stakes involved in the termination of a conservation easement, and the deference that should be accorded to the intent of donors so as not to chill future conservation easement donations, courts should not apply the wasteful standard to terminate conservation easements simply because a "better use" could arguably be made of the protected land or the holder's share of the proceeds from extinguishment of the easement. Of course, some government entities and land trusts might prefer to be able to terminate conservation easements when purportedly "better" conservation or other opportunities come along. If that is the case, however, they should not be acquiring perpetual conservation easements. Rather, they should be negotiating in good faith with landowners for short-term contracts, management agreements, terminable easements, or other temporary means of the land protection. *See supra* notes 93 and 94 and accompanying text (discussing terminable conservation easements).

holder of the easement (on behalf of the public) and retain jurisdiction of the matter until the holder reports that the proceeds have been expended toward the accomplishment of similar conservation purposes.[282]

The End of Perpetuity also conjures up the specter of development-minded attorneys general filing suit to modify or terminate easements so that developers can build shopping centers that will strengthen the tax base and reduce unemployment.[283] While one could hypothesize without end about the potential misuse of authority, the actions of state attorneys general to date indicate that their inclination is to defend, rather than attempt to terminate, conservation easements.[284] Moreover, state attorneys general are charged with protecting the public interest in charitable assets and they have fulfilled this role for centuries in all manner of charitable endeavors. They also take seriously their obligation to ensure that the intent of charitable donors is honored because they recognize that disregarding donor intent would chill future charitable donations, which would be contrary to the public interest.[285] Thus, while state attorneys general may not always have the resources needed to assiduously police the substantial modification and termination of conservation easements, there is no credible support for the assertion that they will file suits to modify or terminate conservation easements in favor of development interests and in contravention of donor intent. In addition,

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[282] *See, e.g., Perpetuity and Beyond*, *supra* note 18, at 681–82 (explaining the doctrine of *cy pres* and how it should apply in the conservation easement context).

[283] *See The End of Perpetuity*, *supra* note 4, at 80.

[284] *See supra* note 19 and accompanying text.

[285] *See, e.g., supra* note 101 and accompanying text (describing the amici brief filed in *Madigan* in which forty-five states emphasized the importance of honoring the intent of charitable donors). In a case decided by the Montana Supreme Court in April of 2008, the Montana State Attorney General (appellant in the case) and eleven state attorneys general who filed an amici brief similarly emphasized the importance of honoring donor intent. *See In re* The Charles M. Bair Family Trust, 183 P.3d 61 (Mont. 2008). *Bair* involved a charitable trust created for the primary purpose of establishing and maintaining a family museum. *Id.* at 72. The Montana Supreme Court held that the board of advisors of the trust had breached its fiduciary duty by not using principal and income from the trust necessary to establish and maintain the museum. *Id.* at 74–76. In their amici brief, eleven states acknowledged that state attorneys general are both authorized and obligated under state law to enforce the intent of charitable donors. *In re* The Charles M. Bair Family Trust, Brief of Amici Curiae Michigan et al. 2 (No. DA 06-0586, Dec. 22, 2006). The states explained:

> [A]merican charity law has as its foremost goal the creation and preservation of a climate conducive to robust philanthropic activity for the benefit of the public as a whole. This goal requires the continued confidence of donors that their gifts will be used according to their charitable intentions.

Id. at 3. The states also warned of the "dangerous practical downside to repudiating donors' legitimate expectations"—it would discourage charitable giving to the detriment of the public as a whole. *Id.* at 17–19. *Madigan* and *Bair* and the amici briefs filed in those cases illustrate that state attorneys general view themselves as having a significant role in the regulation of charities and, in particular, in ensuring that charitable organizations and other trustees administer the assets they hold on behalf of the public in accordance with the purposes specified by charitable donors.

even if such a suit were filed, the authority to apply the doctrine of *cy pres* is vested in the courts rather than the attorney general,[286] and for the reasons noted above, it would be a profound departure from settled precedent for a court to authorize the termination of a conservation easement (or the modification of an easement in contravention of its stated purpose, such as to permit the subdivision and development of the land), if the easement continued to provide significant benefits to the public.

In short, *The End of Perpetuity's* assertion that state attorneys general and the courts will profoundly misuse the doctrine of *cy pres* to modify and terminate conservation easements in favor of development interests is both remarkable and unsupported, and such an assertion should clearly not drive the development of the law or policy in this context.

H. Federal Constraints Do Not Deter Improper Modifications or Terminations

The End of Perpetuity argues that, while courts could find sufficient legal basis to apply charitable trust principles to conservation easements, they nonetheless should choose not to because such principles are neither needed nor prudent.[287] It is asserted that the constraints imposed by federal tax law on the operation of nonprofit organizations in general, and on holders of tax-deductible conservation easements in particular, "constitute substantial remedies and disincentives to the improper termination or modification of conservation easements."[288] As explained below, however, federal tax law constraints operate primarily to ensure that charitable organizations use their assets for charitable purposes and refrain from conferring economic benefits on private parties. Those constraints were not intended to and do not ensure that government entities and charitable organizations comply with their fiduciary obligations under state law to (i) administer the charitable gifts they solicit and accept in accordance with the gifts' stated terms and purposes, and (ii) absent express or implied powers, deviate from those stated terms or purposes only with court approval obtained in administrative deviation or *cy pres* proceedings. State attorneys general and state courts are the proper enforcers of such state law fiduciary obligations, not the Internal Revenue Service ("IRS").

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[286] *See* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 11, § 67 cmt. d ("The cy pres power is vested in the court, not in the trustee or the Attorney General, who is, however, a necessary party entitled to notice of the proceeding."); RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 399, Reporter's Notes cmt. d ("In a proceeding for the application of the cy pres doctrine, the Attorney General is a necessary party. But it is for the court and not the Attorney General to determine what application should be made.").

[287] *See The End of Perpetuity*, *supra* note 4, at 62.

[288] *Id.* at 56.

Indeed, *The End of Perpetuity's* claim that the constraints imposed by federal tax law constitute substantial remedies and disincentives to "improper" terminations or modifications is colorable only if one has accepted the article's implicit assertion that conservation easements are unrestricted charitable gifts that can be liquidated in whole or in part by their government or land trust holders to fund other land conservation activities or even increase the holders' operating budgets or stewardship endowments. If one recognizes that government entities and charitable organizations are bound by state law to abide by both the terms and purposes of the charitable gifts they solicit and accept, it is clear that federal tax law constraints cannot be relied upon to ensure that such entities comply with these state law fiduciary obligations.

The federal tax law prohibitions on private benefit and private inurement and the organizational requirements for public charities operate primarily to (i) prohibit charitable organizations from conferring economic benefits on private parties,[289] and (ii) ensure that charitable organizations use their assets for charitable purposes.[290] A land trust that agrees to terminate a perpetual conservation

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[289] The private benefit prohibition addresses transfers of value by charities to non-charities absent receipt in exchange of cash, property, or services of at least equal value. *See* Joint Committee on Taxation, *Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations* 5 (JCX-29-05), April 19, 2005, *available at* http://www.house.gov/jct/x-29-05.pdf (last visited Nov. 20, 2008) [hereinafter *JCT Charities Report*]. Private inurement, a narrower concept, arises when a person in a position to influence the decisions of an exempt organization (an "insider") receives benefits from the organization disproportionate to her contribution to the organization, such as unreasonable compensation. *Id.* at 52–53. Private inurement can be viewed as a subset of private benefit. *Id.* at 53. The private inurement prohibition does not prohibit transactions between a tax-exempt organization and those who have a close relationship to it. *See* BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 486 (8th ed. 2003). Instead, such transactions are tested against a standard of "reasonableness," which calls for a roughly equal exchange of benefits between the parties and looks to how comparable charitable organizations, acting prudently, conduct their affairs. *Id.* Both private inurement and private benefit may occur in many different forms, including, for example, the payment of excessive compensation, the payment of excessive rent, the making of inadequately secured loans, and, important in the conservation easement modification and termination context, the receipt of less than fair market value on the sale or exchange of property. *See JCT Charities Report, supra,* at 53. Historically, the only sanction for a private inurement violation was revocation of the charitable organization's tax exempt status. *Id.* at 38. However, the intermediate sanctions rules enacted in 1996 permit the IRS to instead impose excise taxes on disqualified persons who receive excess benefits and, in certain circumstances, on organization managers who approved the transaction. *Id.* An "excess benefit transaction" is a transaction in which an economic benefit is provided by an applicable tax-exempt organization, directly or indirectly, to or for the use of a disqualified person, and the value of the economic benefit provided by the organization exceeds the value of the consideration (including the performance of services) received for providing such benefit. *See* Internal Revenue Service, 2007 Instructions for Form 990 and Form 990-EZ 16 (2007), *available at* www.irs.gov/pub/irs-pdf/i990-ez.pdf (last visited Nov. 20, 2008).

[290] Under the organizational test, an organization's activities must further exempt purposes and the organization's assets must be dedicated to exempt purposes in perpetuity. *JCT Charities Report, supra* note 289, at 48–49. Satisfaction of the organizational test may be achieved by adopting certain

easement or amend it in a manner that transfers valuable development or use rights to the owner of the encumbered land without receiving cash or other compensation of equivalent value in exchange would presumably violate the private benefit or private inurement prohibition.[291] On the other hand, it is not clear that a land trust would violate the private benefit, private inurement, or organizational requirements if it agreed to terminate a conservation easement, or modify it in a manner contrary to its terms or purpose, provided it received appropriate compensation and used that compensation in a manner consistent with its general charitable mission.[292] Accordingly, even assuming the IRS had sufficient resources to carefully monitor the activities of the over 1,700 land trusts operating across the nation,[293] these federal tax law requirements cannot be relied upon to ensure that land trusts administer the conservation easements they solicit and accept in accordance with the easements' stated terms and purposes. Rather, state attorneys general and state courts are the proper enforcers of such state law fiduciary obligations.[294]

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formal requirements in the founding documents of the organization. *Id.* at 48. For example, an organization must limit its purpose to one or more exempt purposes and must not be permitted to engage in activities that do not further exempt purposes (except to an insubstantial extent). *Id.*

[291] *See supra* note 289 (explaining that private inurement and private benefit can occur when a charitable organization receives less than fair market value on the sale or exchange of its property). *See also LTA Amendment Report*, *supra* note 44, at 25–26 ("[A] land trust cannot participate in an amendment that conveys either a net financial gain (more than in *incidental private benefit*) to any party or any measurable benefit at all to a board or staff member or other land trust 'insider' (other than fair compensation for services). A land trust that does so risks losing its tax-exempt status or suffering intermediate sanctions.") (emphasis in original).

[292] Although private inurement and private benefit can involve noneconomic benefits (*see, e.g.*, Treas. Reg. § 1.501(c)(3)–1(d)(1)(iii), Example 1), the private inurement, private benefit, and organizational requirements were not designed to ensure that charitable organizations abide by their state law fiduciary obligation to administer the charitable gifts they solicit and accept in accordance with the gifts' stated terms and purposes.

[293] *See* Steven T. Miller, Commissioner, Tax Exempt and Government Entities, Internal Revenue Service, Remarks at the Georgetown Law Center Seminar on Representing and Managing Tax-Exempt Organizations (Apr. 24, 2008) (transcript on file with authors), *available at* http://philanthropy.com/documents/v20/i14/gtown2008.pdf (last visited Nov. 20, 2008)) (noting that staffing at the IRS has remained fairly constant while the nonprofit sector has experienced dramatic growth—i.e., in 1998 there were approximately 650,000 § 501(c)(3) organizations with $990 billion in gross receipts, and by early 2008 there were 1.2 million § 501(c)(3) organizations and their gross receipts had more than doubled).

[294] Most state constitutions prohibit government entities from transferring their assets to private persons without adequate consideration. *See, e.g.,* 3 SANDS, LIBONATI & MARTINEZ, LOCAL GOVERNMENT LAW § 21.07, at 21–25 ("Local government property cannot be conveyed to a private party without adequate consideration, for to do so would constitute an improper gift of public property or the granting of a subsidy contrary to state constitutional constraints."). Like the private benefit and private inurement prohibitions, however, these constitutional prohibitions do not ensure that government entities administer the conservation easements they solicit and accept in accordance with the easements' stated terms and purposes. If all government holders were required to do is avoid running afoul of the constitutional prohibition, they would be free to sell, trade, release, extinguish, or otherwise dispose of conservation easements in whole or in part as they might

The requirement that charitable organizations annually report their conservation easement modification or termination activities to the IRS similarly does not ensure that land trusts will comply with their state law fiduciary obligations.[295] This is a reporting requirement; it does not authorize the IRS to prevent or cure a land trust's violation of its state law fiduciary obligations.[296] Moreover, as acknowledged in *The End of Perpetuity*, this reporting requirement, as well as the private benefit, private inurement, and organizational requirements, are not applicable to government entities, and government entities hold thousands of perpetual conservation easements.[297]

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see fit, provided only that they received appropriate compensation and used that compensation consistent with their broad public missions. As with land trusts, the administration of conservation easements in accordance with their stated terms and purposes depends on a government entity's fiduciary obligations under state law.

[295] Charitable organizations are required to file Form 990 (Return of Organization Exempt from Income Tax) with the IRS annually. Since 2006, charitable organizations holding conservation easements have been required to attach a statement to Schedule A of Form 990 containing, *inter alia*, the following information (i) the number of easements modified, sold, transferred, released, or terminated during the year and the acreage of those easements; (ii) the reason for the modification, sale, transfer, release, or termination; and (iii) the identity of the recipient (if any) of the benefit of such modification, sale, transfer, release, or termination, and a statement regarding whether such recipient was a qualified organization as defined in Internal Revenue Code § 170(h)(3) and the related Treasury Regulations at the time of transfer. *See* Internal Revenue Service, 2006 Instructions for Schedule A to Form 990 (2006) (on file with authors).

[296] The effectiveness of this requirement even as an information gathering tool may depend largely on voluntary compliance by the organizations holding conservation easements. This requirement does indicate, however, that the IRS is concerned about the improper modification and termination of tax-deductible conservation easements. *See also supra* note 159 (discussing the Staff of the Senate Finance Committee's concerns regarding improper conservation easement modifications).

[297] *See* 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 8 ("Hundreds of public agencies across the country also hold conservation easements. The total number of easements held by federal, state, and local agencies has not been documented, although a 2004 survey by American Farmland Trust counted 9,453 easements on nearly 1.5 million acres of farmland, held primarily by state and local agencies."). *The End of Perpetuity* recommends changing federal tax law to apply the private benefit, private inurement, and reporting requirements to federal, state, and local government entities. *The End of Perpetuity, supra* note 4, at 83. Even if such changes were determined to be legally permissible, for the reasons previously discussed they would not ensure that government entities comply with their state law fiduciary obligations. *The End of Perpetuity's* alternative recommendation—that the law be changed to eliminate government entities as qualified organizations eligible to receive tax-deductible conservation easements (see *id.*)—is similarly unwise. Such a change would severely curtail the well-respected easement acquisition programs of many government entities, including the Maryland Environmental Trust (see www.dnr.state.md.us/met/ (last visited Nov. 20, 2008)), the Virginia Outdoors Foundation (see www.virginiaoutdoorsfoundation.org/ (last visited Nov. 20, 2008)), and the City of Boulder, Colorado (see http://www.ci.boulder.co.us/index.php?option=com_content&task=view&id=2985&Itemid=1076 (last visited Nov. 20, 2008)). Such a change would also do nothing to ensure that the remaining class of eligible donees of tax-deductible conservation easements—charitable organizations (primarily land trusts)—comply with their state law fiduciary obligations.

Finally, the Treasury Regulation requirement that an "eligible donee" of a tax-deductible conservation easement "have a commitment to protect the conservation purposes of the donation"[298] also does not ensure that holders of conservation easements will comply with their state law fiduciary obligations. The Treasury Regulations specifically provide that a conservation group has the requisite commitment if the group is organized or operated primarily or substantially for one of the conservation purposes enumerated in § 170(h) of the Internal Revenue Code—as virtually all land trusts are.[299] Moreover, even if it were determined that a land trust or government entity did not have the requisite commitment as a result of its amendment or termination activities and, thus, that the entity was no longer an eligible donee, such a determination would not ensure that the entity administered its existing easements in accordance with their stated terms and purposes. Rather, such a determination would merely preclude the entity from acquiring additional tax-deductible conservation easements in the future.[300]

The real check that federal tax law places on the conservation easement amendment and termination activities of both land trusts and government entities depends on state charitable trust law. Congress is free to condition the receipt of federal tax incentives upon the conveyance of a particular form of charitable gift,[301] and in the conservation easement context, the gift must be in the form of a restricted charitable gift or charitable trust. That is, the easement must, *inter alia*, be

> (i) conveyed as a charitable gift to a government entity or charitable organization to be held and enforced for the benefit of the public for a specific charitable purpose—the protection of the particular land encumbered by the easement for one or more of the conservation purposes enumerated in the Internal Revenue Code "in perpetuity";[302]

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[298] Treasury Regulation § 1.170A-14(c)(1).

[299] *See id.*

[300] The Treasury Regulations also ambiguously provide that an eligible donee "must have the resources to enforce the [conservation easement] restrictions" but "need not set aside funds" to do so. *Id.* Again, even if it were determined that a land trust or government entity did not have the requisite resources as a result of its amendment or termination activities, and, thus, was no longer an eligible donee, such a determination would not ensure that the entity administered its existing easements in accordance with their stated terms and purposes.

[301] *See* Gillespie v. Comm'r, 75 T.C. 374, 378–79 (1980) (ruling that whether a particular transfer qualifies for a federal estate tax charitable deduction is a matter of federal concern, and Congress may prescribe requirements for tax-deductible gifts to charity).

[302] *See generally* I.R.C. § 170(h); Treas. Reg. § 1.170A-14. A tax-deductible conservation easement must be "granted in perpetuity" and its conservation purpose must be "protected in perpetuity." *See* I.R.C. §§ 170(h)(1)(C), (2)(C), (5)(A). The conservation purposes enumerated

> (ii) expressly transferable only to another government entity or charitable organization that agrees to continue to enforce the easement;[303] and
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> (iii) extinguishable by the holder only in what essentially is a *cy pres* proceeding—in a judicial proceeding, upon a finding that the continued use of the encumbered land for conservation purposes has become "impossible or impractical," and with the payment of a share of the proceeds from the subsequent sale or development of the land to the holder to be used for similar conservation purposes.[304]

The interest in the property retained by the easement donor must also be subject to legally enforceable restrictions that will prevent any uses of the property that are inconsistent with the conservation purposes of the easement.[305] And, at the time of the donation, the possibility that the conservation easement will be "defeated" by the performance of some act or the happening of some event must be so remote as to be negligible.[306] To satisfy these various requirements, most conservation easement deeds expressly provide, among other things, that the easement is granted in perpetuity and can be transferred or extinguished only in the manner described above.[307]

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in the Internal Revenue Code are (i) protection of open space, including farmland and forestland; (ii) protection of wildlife habitat; (iii) historic preservation; and (iv) protection of land for public recreation or education. *See id* § 170(h)(4). For a history and explanation of Internal Revenue Code § 170(h), see *Tax Incentives, supra* note 42, at 10–17.

[303] *See* Treas. Reg. § 1.170A-14(c)(2) ("A deduction shall be allowed for . . . [the donation of a conservation easement] only if in the instrument of conveyance the donor prohibits the donee from subsequently transferring the easement . . . whether or not for consideration, unless the donee organization, as a condition of the subsequent transfer, requires that the conservation purposes which the contribution was originally intended to advance continue to be carried out. Moreover, subsequent transfers must be restricted to organizations qualifying, at the time of the subsequent transfer, as an eligible donee . . . .").

[304] *See id.* § 1.170A-14(g)(6); *see also* I.R.S. Priv. Lt. Rul. 200836014 (June 3, 2008) (providing that the easement at issue met the requirements of Treas. Reg. § 1.170A-14(g)(6) because it "provides for no means to extinguish the restrictions other than by judicial proceeding and all proceeds received by the Donee are to be used in a manner consistent with the original conservation purposes of the Easement"). For a discussion of how the donee's share of the proceeds should be calculated upon extinguishment of a conservation easement, see *Perpetuity and Beyond, supra* note 18, at 682; *Condemning Conservation Easements, supra* note 61, at 1933–59.

[305] *See* Treas. Reg. § 1.170A-14(g)(1).

[306] *See id.* §§ 1.170-1(e), -14(g)(3).

[307] *See, e.g.,* Lowham Easement, *supra* note 8, at 8 (restriction on transfer provision); *id.* at 9 (extinguishment and perpetuity provisions). *The End of Perpetuity* dismisses the federal tax law requirements as ineffectual. *See The End of Perpetuity, supra* note 4, at 46 ("Of course . . . even though a conservation easement meets all of these requirements, that will not prevent the parties from ignoring these requirements and terminating or modifying an easement as they see fit."). As the Myrtle Grove controversy, the Wal-Mart controversy, and *Hicks v. Dowd* illustrate, however,

It is clear from both the foregoing requirements and the legislative history to Internal Revenue Code § 170(h) that neither Congress nor the Treasury Department intended that government and nonprofit holders would be able to substantially modify or terminate tax-deductible perpetual conservation easements "on their own" and as they might "see fit" from time to time.[308] As previously discussed, however, the authority of the IRS to require that holders enforce conservation easements consistent with their terms and stated purposes over the long term is uncertain.[309] Accordingly, in conditioning deductibility on

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landowners and holders of easements ignore these requirements, which are consistent with state charitable trust law, at their peril. Moreover, to the extent land trusts advocate for an interpretation of state law that would render these federal tax law requirements ineffectual (as does *The End of Perpetuity*), they put at significant risk the federal tax benefits provided to conservation easement donors.

[308] For example, the Senate Report discussing § 170(h) provides:

> By requiring that the conservation purpose be protected in perpetuity, the committee intends that the perpetual restrictions must be enforceable by the donee organization (and successors in interest) against all other parties in interest (including successors in interest) . . . .
>
> . . . The requirement that the conservation purpose be protected in perpetuity also is intended to limit deductible contributions to those transfers which require that the donee (or successor in interest) hold the conservation easement . . . exclusively for conservation purposes (i.e., that [the easement] not be transferable by the donee except to other qualified organizations that also will hold the perpetual restriction . . . exclusively for conservation purposes).

See S. Rep. No. 96-1007, at 605–06 (1980).

[309] Stephen J. Small, one of the principal authors of the Treasury Regulations interpreting Internal Revenue Code § 170(h), published a treatise on the federal tax laws relating to conservation easements in 1986. *See* SMALL, *supra* note 254. In that treatise Small explains that the IRS's authority may not extend far enough to require that at some distant point in the future easements be extinguished only in the context of judicial proceeding, as opposed to by mutual consent of the landowner and the donee organization. *Id.* at 16-4, -5. The IRS's concern, he notes, is whether the gift qualifies for a deduction at the time it is made, and not what tax, civil, or criminal liabilities ought to be imposed if something unexpected happens in two or twenty years. *Id.* at 16-5. If the highest court in a state were to determine that holders of perpetual conservation easements are free to simply agree with the owners of the encumbered land to release, extinguish, or terminate the easements, in whole or in part, regardless of the easements' terms and the state's charitable trust laws, the IRS could take the position that conservation easement donations in the state are no longer eligible for federal tax incentives. In such a case, it would be clear at the time of donation that a conservation easement could not comply with federal tax law requirements regardless of its terms. And if a government entity or land trust agreed to substantially modify or terminate a conservation easement in contravention of the "restriction on transfer," "extinguishment," and other federal tax law requirements, the IRS could take the position that conservation easements donated to that holder are no longer eligible for federal tax incentives because there would be no assurance that the conservation purposes of such easements would be "protected in perpetuity" as is required under Internal Revenue Code § 170(h)(5)(A). Again, however, neither determination would ensure that government entities or land trusts administer their existing easements in accordance with their stated terms and purposes. Rather, such determinations would merely preclude the affected entities from acquiring additional tax-deductible conservation easements in the future.

the eligibility requirements noted above, Congress and the Treasury Department must have been relying on state charitable trust law to ensure that, over time, conservation easements would be enforced in accordance with their stated terms and purposes, and terminated in whole or in part only in judicial *cy pres* proceedings.[310]

Reliance on the states for the enforcement of perpetual conservation easements over the long term is appropriate. As explained by the Panel on Nonprofits in its report to Congress, the regulation of the behavior of charitable fiduciaries is and should remain principally a state, rather than a federal, function because (i) state judges and attorneys general have the greatest expertise in disputes involving corporate and trust governance and fiduciary responsibilities and (ii) it is state courts, rather than the Tax Court or the IRS, that possess the broad range of equitable powers necessary to protect assets dedicated to charitable purposes.[311]

As a final note, it bears comment that the argument made in *The End of Perpetuity* cannot be limited, as a matter of logic, to conservation easements and land trusts. *The End of Perpetuity's* basic argument is that charitable trust rules are inconvenient, costly, and cumbersome and federal tax laws alone impose sufficient constraints on charitable organizations. If that argument were persuasive as to charitable gifts of conservation easements made to land trusts, it would be similarly persuasive as applied to any gift made to any charitable organization to be used for

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[310] In discussing the "restriction on transfer" requirement, Stephen J. Small notes that, "although the law in many states would permit interested parties to step in and sue to prevent a future transfer [of a conservation easement] . . . contrary to the original intent of the donor," requiring that the instrument of conveyance prohibit future transfers except to another government entity or charitable organization that agrees to continue to enforce the easement "provide[s] a better legal basis for any future litigation to prevent impermissible transfers." *See* SMALL, *supra* note 254, at 3–6. And in explaining the "extinguishment" requirement, Small notes that such provision represents a recognition by the IRS that changes in economic and natural conditions may make continuing to protect the encumbered land for conservation purposes impossible or impractical, and that in such circumstance the easement can be extinguished by judicial proceedings, the property sold or exchanged, and the holder's share of the proceeds used for similar conservation purposes. *Id.* at 16-4. He further notes:

> To those who suggest [the judicial proceeding required by the Treasury regulations] may be a cumbersome way to deal with the problem [of extinguishment], I would respond that these restrictions are supposed to be perpetual in the first place, and the decision to terminate them should not be made solely by interested parties. With the decision-making process pushed into a court of law, the legal tension created by such judicial review will generally tend to create a fair result.

Id.

[311] *See Supplement to Nonprofit Report, supra* note 234, at 28–29. The report explains that state courts may order accountings, remove and appoint trustees and directors, dissolve the charitable entity, force fiduciaries to restore losses caused by breach of their duties, and enjoin trustees from further wrongdoing, and that neither the IRS nor the Tax Court possesses the same broad equitable powers over the actions of charitable fiduciaries. *See id.* at 28.

a specific purpose (including gifts of cash, personal property, and fee title to land). That, of course, would render donors' carefully wrought requirements as to how their gifts are to be used unenforceable, and reverse hundreds of years of precedent with regard to the administration of charitable gifts.

I. Donor Motivations

The End of Perpetuity acknowledges that conservation easements are conveyed in the form of charitable trusts, stating

> a court could find that a conservation easement is granted subject to the "restriction" that the terms of the easement be enforced in perpetuity for the benefit of the public. This would seem to be the essence of the requirements of the Code for deductible easements and consistent with the terms of most easements. Such intent also constitutes the essence of what it takes to create a charitable trust.[312]

The article then asserts, however,

> these 'restrictions' are not imposed on the donation unilaterally by the donor. They are required by federal tax law. Accordingly, one can argue about whether the donor really made a classic restricted charitable gift, imposing the donor's own preferences and restrictions on the land trust, or whether the donor simply sought to follow the requirements of the tax code to be eligible to claim a charitable donation.[313]

There is, however, no justification for distinguishing conservation easements from other forms of restricted charitable gifts or charitable trusts on this ground. First, there is no evidence that landowners donate conservation easements designed to protect the particular land encumbered by the easement in perpetuity solely because of the requirements under federal tax law, or that absent such requirements landowners would be willing to donate easements that holders were free to liquidate, in whole or in part, as they might see fit from time to time. In fact, the evidence is to the contrary. As previously noted, surveys indicate that many landowners donate conservation easements in large part because of a personal attachment to the particular land encumbered by the easement and a desire to see *that* land permanently preserved.[314] In addition, the promises of

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[312] *The End of Perpetuity, supra* note 4, at 74.

[313] *Id.*

[314] *See supra* note 42 and accompanying text.

permanent protection of cherished land that land trusts make to prospective easement grantors strongly suggest that such protection is a significant factor motivating easement donations.[315]

More importantly, it is not necessary for courts to engage in the difficult (if not impossible) task of attempting, years after the donation of a conservation easement, to ascertain and weigh the various factors that may have motivated the donation or the form in which it was made. Courts do not attempt to tease out the various factors that motivate the creation of charitable trusts in other contexts, and they should not do so here.[316] Whether the donor of a tax-deductible conservation easement conveyed the easement in a form that created a charitable trust because he wanted tax benefits, because he actually cared about the perpetual protection of the land, because he wanted to create a memorial to himself and his family, or, as is likely in most cases, because he was motivated by some combination of these and other factors, should be irrelevant—the donor's intent to convey the easement in a form that creates a charitable trust is clear from the terms of the easement deed and that is the only evidence that should matter.[317]

Even the hypothetical easement donor who is motivated solely by tax incentives cannot be said to lack the intent to create a charitable trust. Such a donor must summon the requisite intent and express it by conveying his easement in a form that creates a charitable trust to receive the tax benefits he desires. And Congress requires that donors convey tax-deductible easements in this form to ensure that the public interest and investment in such easements will be appropriately protected.

Indeed, followed to its logical extreme, *The End of Perpetuity's* argument would render all conveyances made to comply with federal tax law requirements,

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[315] *See supra* notes 25–40 and accompanying text.

[316] *See, e.g.,* RESTATEMENT (SECOND) OF TRUSTS, *supra* note 12, § 368 cmt. d ("If the purposes to which the property is by the terms of the trust to be devoted are charitable purposes, the motive of the settlor in creating the trust is immaterial. Thus, if a testator leaves property upon trust to establish an educational institution, the trust is charitable although by the terms of the trust the institution is to be called by the name of the testator, and although his motive in creating the charitable trust was to acquire fame for himself rather than to promote education. Even if the motive of the testator in disposing of his property is to spite his heirs, the trust is none the less a charitable trust if the purposes are charitable."); GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 366 (West 2008) ("It is immaterial what state of mind in the settlor induced him to transfer the property. He may have founded the trust solely to satisfy his family pride or for self-glorification, in order to emulate and rival a neighbor's bounty, or to establish a memorial and cause future generations to remember him and his family. The courts are not concerned with these incidental psychic or sentimental advantages to the settlor or his family. They should, and generally do, direct their attention merely to the question whether the net result of the trust in operation will be to advance some substantial public interest.").

[317] *See supra* note 89 and accompanying text (explaining that the parties' intent must generally be ascertained from the language of the instrument itself).

such as those creating charitable remainder trusts or charitable lead trusts,[318] unenforceable under state law. After all, the argument could always be made that the grantors of such trusts did not really intend to make the conveyances in the form that they were made; they just did so to satisfy the requirements of the tax code. That argument is simply untenable. There also is no question that such trusts are enforceable under state law.[319]

J. Purchased and Exacted Conservation Easements

The End of Perpetuity also argues that conservation easements donated as charitable gifts should be exempted from the application of charitable trust principles because some conservation easements are purchased for their full value, some are exacted as part of development approval processes, and some are acquired in the context of mitigation.[320] But the fact that some conservation easements are not conveyed in whole or in part as charitable gifts is not a justification for permitting government or land trust holders to avoid their fiduciary obligations with regard to those that are. Indeed, the same argument could be made with

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[318] In general, a charitable remainder trust is a trust that provides for distributions to one or more noncharitable beneficiaries for life or a term of years, followed by a charitable remainder interest. In a charitable lead trust, the charitable interest precedes the distribution of the remainder to private individuals. The structure and the details of these split-interest trusts are usually determined by the tax objectives of the settlor and the associated requirements of the federal income and transfer tax provisions. *See* Halbach, *supra* note 258, at 732. In fact, the IRS provides numerous sample forms for such trusts. For just a small sampling, see, e.g., Rev. Proc. 2007–45, 2007–29 I.R.B. 89 (inter vivos charitable lead annuity trusts); Rev. Proc. 2007-46, 2007-29 I.R.B. 102 (testamentary charitable lead annuity trusts); Rev. Proc. 2005-53, 2005-34 I.R.B. 339 (inter vivos charitable remainder unitrust for a term of years); Rev. Proc. 2005-54, 2005-34 I.R.B. 353 (inter vivos charitable remainder unitrust with consecutive interests for two measuring lives).

[319] *See, e.g.,* Halbach, *supra* note 258, at 732 (explaining that the charitable and private interests in charitable remainder and charitable lead trusts are not only enforceable under state law, they are also entitled to protection against the adverse effects of trustee misconduct, such as a trustee's breach of its fiduciary duty of impartiality in making investment decisions). As in the charitable remainder and charitable lead trust context, to facilitate compliance, enforcement, and consistency in interpretation, the Treasury Department should develop sample conservation easement provisions that satisfy the requirements of Internal Revenue Code § 170(h) and the Treasury Regulations interpreting that section. Such provisions could address, for example, the circumstances under which a tax-deductible conservation easement can be amended, transferred, or extinguished; the calculation and division of proceeds upon extinguishment; and the holder's use of its share of the proceeds upon extinguishment.

[320] *See The End of Perpetuity*, *supra* note 4, at 82. Even in the purchase context there often is a charitable gift component. Many conservation easements are acquired in "bargain purchase" transactions (in which the landowner is paid some percentage of the value of the easement and makes a charitable donation of the remaining percentage), and others are purchased with funds received or raised specifically for the purpose of acquiring the easement. Charitable trust principles should apply in such cases. *See supra* notes 11 and 12 and accompanying text (discussing the application of charitable trust principles to gifts to charitable organizations to be used for specific charitable purposes, whether cash or property); *supra* notes 44–47 and accompanying text (discussing fraudulent solicitation).

respect to fee title to land, which is sometimes donated to a land trust or government entity to be used for a specific charitable purpose (such as a public park or nature preserve), and other times acquired in an unrestricted fashion through purchase, exaction, in the context of mitigation, or even as a donation with the understanding that the land may be sold at the discretion of the donee and the proceeds used in accordance with the donee's general charitable mission (these latter gifts are generally referred to as "trade lands").[321] Rather than argue that all gifts of land be treated as unrestricted charitable gifts because some land is acquired without restriction as to its future use, government entities and land trusts appear to understand that some of their fee title holdings are legally restricted and some are not, and that they are required by law to administer those assets accordingly.[322] The same should be true with regard to conservation easements.

Moreover, even if uniformity in the rules governing the administration of all conservation easements were the ultimate goal, the solution would not be, as suggested in *The End of Perpetuity*, to treat all conservation easements, regardless of how acquired, as fungible or liquid assets in the hands of their government or nonprofit holders. Such a solution would do violence to the well-settled principles governing the administration of charitable gifts and the expectations of easement grantors. Such a solution would be contrary to the requirements for tax-deductible conservation easements set forth in the Internal Revenue Code and Treasury Regulations. And such a solution would render the administration of conservation easements on behalf of the public even more vulnerable to manipulation, error, and abuse.[323] If uniformity in the rules governing the administration of conservation easements is desired, the proper solution is to apply charitable trust or similar equitable principles to the administration of all perpetual conservation easements, regardless of how acquired, as recommended in the Restatement (Third) of Property: Servitudes.[324]

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[321] *See* Kendall Slee, *Selling Real Estate for Revenues*, EXCHANGE: J. LAND TRUST ALLIANCE, Summer 1999, at 15, 17 (discussing "trade lands" transactions).

[322] For example, the Standards and Practices developed by the Land Trust Alliance provide that a land trust may receive land with the intent of using the proceeds from its sale to advance its mission, but in such a case the land trust must provide clear documentation to the donor of its intent to sell the land before accepting the property. *See LTA Standards and Practices, supra* note 48, at 9 (Practice 8L). There is, of course, no justification for not similarly requiring a land trust to disclose to a conservation easement donor its intent to later amend or terminate the easement as it may "see fit." *See also, e.g.,* Lancaster v. City of Columbus, 333 F. Supp. 1012, 1024 (N.D. Miss. 1971) (explaining that it is settled state law that land received by a municipality as a gift to be used for a specific purpose is subject to the law of trusts).

[323] *See supra* note 96 and accompanying text (discussing the manipulation, error, and abuse that could occur if government and nonprofit holders could substantially modify or terminate conservation easements "on their own" and as they "see fit").

[324] *See* RESTATEMENT OF PROPERTY, *supra* note 4, § 7.11. *See also Perpetuity and Beyond, supra* note 18, at 701–04 (providing additional support for this proposition).

K. Prevalence of Improper Modifications and Terminations

A final argument offered by *The End of Perpetuity* in favor of creating a special judicial exemption from the application of charitable trust principles for donated conservation easements is the "scant evidence of a current serious problem of improper easement termination or modification in the United States today."[325] This argument is also unconvincing. If there are few improper terminations and modifications, the likely explanation is that most holders assume they are not free to terminate conservation easements, or modify them in manners contrary to their stated purposes, "on their own" and as they may "see fit."[326] Moreover, if it were determined that charitable trust principles do not apply to conservation easements and, thus, that holders are free to substantially modify or terminate easements on their own and as they may see fit, the hundreds of government entities and land trusts holding conservation easements across the nation would suddenly find themselves sitting on a treasure trove of valuable development and use rights that, despite the intention of the easement donors, could be liquidated at will. And the temptation on the part of such holders to yield to political, financial, and other pressures to agree to substantially modify and terminate the easements would only increase over time as the encumbered lands change hands and the development and use rights restricted by the easements appreciate in value.[327] Accordingly, the "scant evidence of a current serious problem of improper easement termination or modification in the United States today" is not a justification for exempting conservation easements from the application of charitable trust principles. To the contrary, the prevailing stability is a tribute to the salutary effect of those principles.

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[325] *See The End of Perpetuity*, *supra* note 4, at 62. For a discussion of cases involving the improper termination or substantial modification of conservation easements, see *Perpetuity and Beyond*, *supra* note 18, at 690–93 (discussing the Myrtle Grove controversy); *id.* at 695–700 (discussing the Wal-Mart controversy). *See also Hicks,* 157 P.3d at 914. Whether this evidence is "scant" is a matter of opinion.

[326] *See, e.g.,* 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 26, at 188 (warning that "[a]ll applicable state laws, charitable trust laws, contract laws, nonprofit corporation laws, public trust laws, and federal tax laws must be followed when amendments [and by extension, terminations] are made"); O'Connor, *supra* note 144, at 31 (discussing charitable trust law as one of four potential legal constraints on amendments and providing "[w]ith so much at stake, many easement amendment issues will probably be resolved by the courts"); *supra* notes 302–306 (discussing the federal tax law requirements for tax-deductible conservation easements). It is also possible that some holders of conservation easements have agreed to improper amendments but no party with standing to sue was aware of the amendments or understood that such amendments were improper.

[327] New owners of easement-encumbered land cannot be expected to have the same conservation proclivities as the easement donors. *See, e.g.,* Darla Guenzler, *Creating Collective Easement Defense Resources: Options and Recommendations* (Bay Area Open Space Council), May 6, 2002, at v (on file with authors) (noting that "the conservation community anticipates a wave of litigation as successor landowners assume control of easement-protected properties"). Indeed, individuals and developers might purchase easement-encumbered land for a much reduced price due to the existence of the easement and then pressure the holder to substantially modify or terminate the easement in the hope of receiving an economic windfall.

III. A DETOUR—ATTEMPTING TO DO AWAY WITH THE DOCTRINE OF *CY PRES*

Rather than argue, as does the author of *The End of Perpetuity*, that donated conservation easements should simply be exempted from charitable trust principles, a few members of the land trust community have taken a different tack. These individuals advocate for the enactment of state legislation that would both exempt conservation easements from charitable trust principles and replace those principles with a complex administrative process. Pursuant to this process, a politically-appointed state board would authorize the substantial modification or termination of conservation easements if it deemed such actions to be "in the public interest."[328] These legislative proposals appear to have been inspired by the same misconceptions regarding the application of charitable trust principles to conservation easements as are set forth in *The End of Perpetuity*.[329] These proposals also suffer from a variety of problems, the most important of which are discussed briefly below.

First, the legislative proposals are motivated in part by a supposed dichotomy between the interests of the public and honoring donor intent. But that is a false dichotomy. Honoring donor intent is itself in the public interest because failure to do so would chill future charitable donations and reduce the diversity of projects and programs in the charitable sector. Accordingly, a conservation easement termination procedure that is truly in the public interest would accord considerable deference to the intent of easement donors, as is the case under the doctrine of *cy pres*.[330]

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[328] *See* Darby Bradley, *Amending Perpetual Conservation Easements, Confronting the Dilemmas of Change: A Practitioner's View* 20 (Dec. 2007) (unpublished manuscript, on file with authors) [hereinafter *A Practitioner's View*]; Andrew C. Dana, *Conservation Easement Amendments: A View From the Field* 22 (2006) (unpublished manuscript, on file with authors) [hereinafter *A View From the Field*].

[329] *See A Practitioner's View*, *supra* note 328, at Abstract (asserting, incorrectly, that if conservation easements are charitable trusts, they can only be amended with court approval); *id.* at 7 (asserting, incorrectly, that the doctrine of *cy pres*, with its "impossible or impracticable" standard, would apply to all easement amendments); *A View From the Field*, *supra* note 328, at 14 (asserting, incorrectly, "[i]f charitable trust law is applied . . . land trusts, attorneys general and the judiciary must apply the administrative deviation or cy pres framework to **all** questions pertaining to conservation easement amendment, no matter how trivial") (emphasis in original). As explained in Part II.D.1.a, *supra,* an amendment provision included in a conservation easement deed grants the holder broad discretion to agree to amendments that are consistent with the purpose of the easement *without court approval*, and a court will not second-guess a holder's exercise of such discretion absent a clear abuse. In addition, a *cy pres* proceeding is required only when a holder wishes to terminate a conservation easement, or modify it in a manner contrary to its stated purpose (as was attempted in the Myrtle Grove controversy).

[330] The doctrine of *cy pres* was developed and refined over the centuries to carefully balance respect for donor intent with society's interest in ensuring that assets perpetually devoted to charitable purposes continue to provide an appropriate level of benefit to the public. *See Perpetuity*

Second, the legislative proposals could be vulnerable to challenge on constitutional grounds. In the famous *Dartmouth College v. Woodward* case, the United States Supreme Court held unconstitutional the New Hampshire legislature's attempt to amend Dartmouth College's charter to effectively transfer control of the college to the state.[331] The Court determined that such legislation would impair the implied contracts between the college and its benefactors in contravention of section 10 of Article I of the Constitution of the United States, which provides, in part, that no state shall pass any law impairing the obligation of contracts.[332] In support of the Court's holding, Chief Justice Marshall explained:

> It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these [charitable] gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college . . . believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature.[333]

Following *Dartmouth College*, numerous courts have held that the legislature cannot interfere with charitable trusts either by changing the method of control or administration of such trusts or by providing that the trust property shall be devoted to purposes other than those designated by the donors.[334] Some decisions are based on the states' inability to impair contracts made between charitable donors and their donees.[335] Other decisions are based on the doctrine of separation

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and Beyond, *supra* note 18, at 700. Deference is accorded to the intent of charitable donors under the doctrine because of a deeply rooted tradition of respecting an individual's right to control the use and disposition of his or her property and a concern that failing to honor the wishes of charitable donors would chill future charitable donations. *Id.* According deference to donor intent also facilitates a diversity of projects and programs within the nonprofit sector as well as social and ideological pluralism within the larger liberal polity. Goodwin, *supra* note 265, at 7.

[331] Dartmouth College v. Woodward, 17 U.S. 518 (1819).

[332] *See id.*

[333] *Id.* at 647. With respect to the changes the legislation would have made to the college's charter, Chief Justice Marshall noted:

> This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

Id. at 654.

[334] *See* SCOTT & FRATCHER, *supra* note 12, § 399.5. *See also* BOGERT ET AL., *supra* note 316, § 397 ("[A] legislature has no power to alter the purpose of a charitable trust by statute. It has not succeeded to the prerogative cy pres power vested in the crown in England, even assuming that this type of cy pres is recognized in the United States.").

[335] *See, e.g.,* Kapiolani Park Pres. Soc'y v. Honolulu, 751 P.2d 1022, 1026–27 (Haw. 1988) (ruling that if legislation had the effect of granting the city the power to lease a portion of parkland

of powers and the judiciary's jurisdiction over the administration of charitable trusts.[336]

The constitutionality of statutes that apply to all trusts and are calculated to both increase the efficiency of trust administration and ensure that the public

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held in a charitable trust in derogation of the express terms of the trust, "it would have been beyond the legislature's power and unconstitutional" because "[u]nder Article I, Section 10 of the Constitution of the United States, the states [are] forbidden to enact laws impairing the obligation of contracts" and "it always seems to have been accepted that the limitation on the impairment of contracts extended to the legislature of the Territory of Hawaii"); Salem v. Attorney General, 183 N.E.2d 859, 862 (Mass. 1962) (finding legislation authorizing the city to use as a site for a school building a portion of land that had been conveyed to the city to be used forever as a public park invalid because "acceptance of the grant by the city constituted a contract between the donor and the donee that must be observed and enforced"); Adams v. Plunkett, 175 N.E. 60, 64–65 (Mass. 1931) (finding legislation providing a scheme for the management of a hospital different from that established by the gift creating the hospital invalid because a completed gift for a public charity duly accepted constitutes a contract between the donor and the donee, the sanctity of which is under the protection of the U.S. Constitution, and neither state legislation nor a change to the state's Constitution can impair that contract); Reno v. Goldwater, 558 P.2d 532, 534 (Nev. 1976) (determining legislation authorizing a city to sell park property to be inapplicable to land that had been donated to the city for use as a public park and playground because "[w]hen the City accepted the gift of land . . . a contract was created obligating the City to hold such property in trust for the people of Reno to enjoy as a park and playground. That obligation could not later be impaired by legislative enactment"); Goldstein v. Trustees of Sailors' Snug Harbor, 98 N.Y.S. 2d 544, 556 (N.Y. App. Div. 1950) (finding legislation granting the Governor of the state of New York the power to appoint three additional trustees of a charitable trust invalid because "[t]he Legislature is without the power to alter the directions of a testator or divest vested rights").

[336] *See, e.g.,* Hartford v. Larrabee Fund Assoc., 288 A.2d 71, 74 (Conn. 1971) (finding legislation attempting to change the manner in which a charitable trust was administered invalid under the separation of powers provision of Connecticut's Constitution because "jurisdiction over the administration of charitable trusts rests exclusively in the judicial department"); Opinion of the Justices, 371 N.E.2d 1349, 1355 (Mass. 1978) (opining that legislation that would change the trustees and possibly change the beneficiaries of a charitable trust established under the will of Benjamin Franklin would be invalid under the separation of powers provision of Massachusetts's Constitution, and explaining "[a]lthough the Legislature does possess some authority to alter charitable trusts, this authority is narrowly limited . . .'[i]t is not within the power of the Legislature to terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of cy pres.'"); S.C. Dep't of Mental Health v. McMaster, 642 S.E.2d 552, 566 (S.C. 2007) (holding that the court was the proper entity to authorize the sale of property impressed with a charitable trust and explaining "[p]roperty subject to a charitable trust may not be terminated or altered by the General Assembly, but rather, must be approved by the court). Compare Trustees of New Castle Common v. Gordy, 93 A.2d. 509 (Del. 1952), in which the court held that legislation authorizing the trustees of a charitable trust to sell real estate held in the trust was valid because the "no sale" provision in the trust agreement was an administrative term; the species of property in which the trust corpus could be invested was of secondary importance to the purpose of the trust, which was to benefit the inhabitants of the town; and the sale of the land was not only consistent with the fundamental purpose of the trust but in all likelihood would promote it. The court in *Gordy* was careful to note:

> In this country . . . the powers of the Legislature over charitable trusts is not co-extensive with the prerogative of the Crown. It is limited by principles of American constitutional law. . . . For example, the Legislature may not exercise the

will obtain the benefits prescribed by the donors is not in question.[337] Examples include statutes setting forth the powers and duties of the attorney general with regard to the supervision and enforcement of charities, statutes requiring charities to file reports with the attorney general or a court, and statutes granting the judicial power of *cy pres* and describing the method of its exercise.[338] In addition, a statute intended to increase the efficiency of the administration of a category of charitable trusts, but that respects the judiciary's role and the expressed intentions of the donors, has also been determined to pass constitutional muster.[339] The legislation proposed with regard to conservation easements would, however, go much further. It would alter the substance of the existing contracts between easement donors and donees because most easement deeds expressly provide that the easement is perpetual and can be terminated only in a judicial proceeding. It would remove primary jurisdiction over the administration of a category of charitable gifts from the courts. And it would largely disregard rather than respect the expressed intentions of easement donors—to protect particular parcels of land in perpetuity as specified in the easement deeds—by enabling a politically-appointed state board to authorize the substantial modification or termination

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> power of a Chancellor under the doctrine of *cy pres* and thus divert the corpus of the trust to uses other than those specified. . . . Nor may it terminate a charitable trust or change the methods of its administration.

Id. at 515.

[337] *See* BOGERT ET AL., *supra* note 316, § 397.

[338] *Id.*

[339] *See* Opinion of the Justices, 306 A.2d 55 (N.H. 1973) (opining that the Uniform Management of Institutional Funds Act (see *supra* note 178), which authorizes institutions to invest endowment funds on a total return basis and permits the release of restrictions on the investment and use of institutional funds with the donor's consent, would not constitute an improper encroachment upon the functions of the judicial branch). *Cf.* Opinion of the Justices, 133 A.2d 792, 795–96 (N.H. 1957) (opining that legislation that would permit trustees to use for the general care of cemeteries surplus funds from charitable trusts created for the purpose of maintaining specific cemetery lots would be unconstitutional as it "would be an exercise of what amounts to a legislative power of *cy pres* with respect to all cemetery trusts having surplus income, without regard to established principles of law . . . or the terms of the trusts. . ."). *See also* UPMIFA, *supra* note 178, § 6(d) (permitting institutions to apply *cy pres* to institutional funds without court approval in carefully limited circumstances and with safeguards to ensure fidelity to donor intent). The Reporter for the UPMIFA drafting committee explains that the act permits institutions to exercise the *cy pres* power without court approval only with respect to "small, old funds" (i.e., where significant time has passed since the donation and the cost of a court proceeding would exceed the value of the fund), and only after notification to the attorney general who can intervene if necessary to protect the intent of the donors. *See* Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act,* 41 GA. L. REV. 1277, 1329–31 (2007) (noting that UPMIFA "emphasizes the importance of donor intent"). *See also* John M. Gradwohl & William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 NEB. L. REV. 312 (2003) (discussing constitutional limits on the retroactive application of certain provisions of the Uniform Trust Code).

of easements whenever it deemed such actions to be "in the public interest."[340] Accordingly, the constitutionality of such legislation would be suspect.[341]

State legislation authorizing the substantial modification or termination of conservation easements when a politically-appointed state board deems it to be in the public interest would also be inconsistent with the provisions of federal law authorizing tax benefits for the donation of perpetual conservation easements. As previously noted, at the time of the donation of a tax-deductible conservation easement the possibility that the easement will be defeated by the performance of some act or the happening of some event must be so remote as to be negligible.[342] In addition, the conservation purpose of a tax-deductible conservation easement must be "protected in perpetuity," such an easement must be transferable by its holder only to another government entity or charitable organization that agrees to continue to enforce the easement, and such an easement must be extinguishable by its holder only in what essentially is a judicial *cy pres* proceeding.[343] Accordingly, the proposed legislation would radically alter the expectations of Congress and the Treasury Department with regard to the administration and termination of tax-deductible conservation easements. Such legislation could also render future easement donations in the adopting state ineligible for federal tax incentives, which, in turn, could significantly reduce the number of easement donations in the state.[344]

It has been argued that Congress should simply amend federal tax law to authorize tax benefits for the donation of conservation easements that are terminable through the proposed state administrative process.[345] But Congress would surely hesitate to make such a change. State boards are likely to give greater

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[340] Legislation employing a "public interest" standard would not ensure the fidelity to donor intent that has heretofore been considered necessary for a statute to pass constitutional muster. *See supra* note 339. Although the legislative proposal in *A Practitioner's View* includes donor intent as one of a myriad of factors that the state board would consider in assessing a proposed amendment or termination, the overriding consideration would be whether the change is "in the public's interest." *See A Practitioner's View*, *supra* note 328, at 19–22.

[341] *See also Kapiolani Park*, 751 P.2d at 1027–28 (providing that legislation that would have the effect of granting a city the power to lease a portion of parkland held in a charitable trust in derogation of the express terms of the trust would also "violate[] the basic principles of equity" and, "in effect, defraud the donors").

[342] *See supra* note 306 and accompanying text.

[343] *See supra* notes 302–304, and accompanying text.

[344] In a state adopting the proposed legislation, the possibility that a conservation easement would be defeated by the performance of some act or the happening of some event might not be so remote as to be negligible. In addition, it is not readily apparent how a conservation easement in such a state could be drafted to comply with the "protected in perpetuity," "restriction on transfer," "extinguishment," and other federal tax law requirements.

[345] *See A View From the Field*, *supra* note 328, at 23 n.53.

weight to state and local interests (including economic interests) than to national conservation interests when considering proposals to modify or terminate easements.[346] Moreover, the legislative history to the federal tax incentives indicates that Congress intended to subsidize the acquisition of conservation easements only if they protect "unique or otherwise significant land areas or structures" in perpetuity,[347] and Congress anticipated that the need to substantially modify or terminate such easements due to changed conditions would be rare.[348] In other words, Congress did not intend to subsidize the acquisition of fungible conservation easements. Congress also was and remains concerned about abuse,[349] and changing federal tax law to permit the acquisition of fungible conservation easements would heighten those concerns.[350] Indeed, lobbying for a change in federal tax law to authorize tax benefits for the donation of conservation easements that are terminable through the proposed state administrative process could have unintended consequences; for example, it might lead to more extensive federal

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[346] One has only to read about the controversies surrounding the designation of National Monuments to understand that state and local economic interests are often perceived to be at odds with national conservation interests. *See, e.g.,* Robert B. Keiter, KEEPING FAITH WITH NATURE 184 (2003) (noting that President Clinton's use of his executive power under the Antiquities Act to establish the 1.7 million-acre Grand Staircase-Escalante National Monument in southern Utah provoked angry responses from the state's Republican political leaders, as well as its rural communities where both the president and his secretary of the interior were hung in effigy on the day of the announcement).

[347] *See* S. REP. NO. 96-1007, at 603 (1980).

[348] In deciding to not address the possible future extinguishment of tax-deductible easements in the Internal Revenue Code, Congress was apparently influenced by testimony from representatives of the land trust community. Those representatives maintained that, because of their well-planned easement acquisition programs, few conservation easements were likely to cease to accomplish the conservation purposes for which they were acquired and such an "unlikely" occurrence would be better addressed in the Treasury regulations. *See Minor Tax Bills: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong. 245 (1980) (statement of Samuel W. Morris, President, French and Pickering Creeks Conservation Trust, Inc.); *id.* at 248 (statement of William Sellers, Director, Brandywine Conservancy).

[349] *See generally, e.g.,* S. REP. NO. 96-1007, at 603 (1980) (noting Congressional concern about abuse and measures incorporated into Internal Revenue Code § 170(h) to curb abuse); 2005 SENATE FINANCE COMMITTEE REPORT, *supra* note 159 (recommending reforms to curb abuses in the conservation easement donation context); Staff of the Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures,* at 277–87 (JCS-2-05), Jan. 27, 2005, *available at* http://www.house.gov/jct/s-2-05.pdf (last visited Nov. 20, 2008) (same).

[350] *See, e.g.,* Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND, RESOURCES & ENVTL. L. 47, 52–55 (2006) (describing reports of abuse and recommendations for reform); JEFF PIDOT, LINCOLN INST. OF LAND POL'Y, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM (2005) (on file with authors and available from the Lincoln Institute of Land Policy) (same).

involvement in the donation, administration, and termination of tax-deductible conservation easements, or a narrowing in the type of conservation easements donations eligible for federal tax incentives.[351]

In addition, even if the proposed state legislation were determined to be constitutional and Congress could be convinced to change federal tax law to subsidize the acquisition of fungible conservation easements (i) if applied retroactively, such legislation would likely be viewed as a betrayal of past easement donors, and (ii) if applied prospectively, such legislation would likely significantly decrease future conservation easement donations. Many landowners donate conservation easements because they wish to ensure that *their* land will be protected from development and other harmful uses "in perpetuity"—or for as long as such protection continues to be possible or practicable, as is permitted under existing law. Accordingly, the prospect that a politically-appointed state board could authorize the substantial modification or termination of easements when it deemed such actions to be "in the public interest" would likely anger past easement donors and chill future donations. It could also drive landowners and their legal advisors away from the use of conservation easements and force them to try to utilize other vehicles (perhaps irrevocable trusts or reciprocal covenants) to more permanently protect the conservation and historic values of the subject land.

Finally, the legislative proposals also appear to be driven in part by a concern that the doctrine of *cy pres* is too constraining, permitting, as it does, the termination or substantial modification of conservation easements only if it can be shown that the charitable purpose of the easement has become impossible or impracticable.[352] There appears to be some fear that projects of great importance to the public (such as the construction of highways or electric transmission towers and lines) could be precluded or hindered by the existence of conservation easements and the protection afforded to them by the doctrine of *cy pres.* That fear is unfounded. In circumstances where it is determined that the best place to locate a public works project is on land that has been protected by a conservation easement because it has significant conservation or historic values, the public can simply condemn the easement. None of the conservation easement-enabling statutes precludes condemnation, and half of the statutes expressly provide that easements are subject to condemnation.[353] The real danger is not that conservation easements will endure in the face of more important public needs. Rather, the danger is that,

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[351] Lobbying for legislative changes at the state level could also have unintended consequences. The legislation a state might ultimately enact could be contrary to the interests of land trusts and the use of conservation easements as a land protection tool.

[352] *See generally A Practitioner's View*, *supra* note 328.

[353] *See Condemning Conservation Easements*, *supra* note 61, at 1929.

absent even minimal statutory or judicial safeguards, easement-encumbered land will become the path of least resistance for condemning authorities.[354]

As the foregoing indicates, there are significant problems with attempting to fundamentally redefine the nature of a perpetual conservation easement through state legislation and apply that new definition to either existing or future conservation easements. Moreover, current law, if properly understood and applied to conservation easements, would make the proposed legislation unnecessary. Government entities and land trusts can achieve much of the flexibility they desire by simply (i) negotiating for the discretion to amend conservation easements consistent with their stated purposes at the time of acquisition, as recommended by the Land Trust Alliance, (ii) seeking judicial or legislative clarification of a holder's power to agree to such amendments when an easement deed is silent on the issue, and (iii) acknowledging the need to obtain court approval pursuant to the doctrine of *cy pres* to terminate easements (or modify them in manners inconsistent with their stated purposes), as is contemplated under federal tax law in any event.[355] And in situations where government entities and land trusts desire or anticipate the need for greater flexibility, they should employ more easily modifiable or terminable means of land protection.[356] They should not, however, acquire expressly perpetual conservation easements as charitable gifts and represent that they have the obligation to carry out the donors' intent in perpetuity,[357] and then later attempt to fundamentally change the rules of the game by legislative fiat. They should also take care, with respect to future easements, not to kill the goose that laid the golden egg with new legislative rules that compromise the qualities donors prize most in conservation easements.

IV. CONCLUSION

Applying the equitable principles that govern the administration of charitable trusts to donated conservation easements is consistent with both state law

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[354] *See id.*; *see also Condemning Open Space: Making Way for National Interest Electric Transmission Corridors (Or Not)*, 26 VA. ENVTL. L.J. 399 (2008) (discussing the delegation of federal condemnation authority to public utilities to construct transmission facilities in National Interest Electric Transmission Corridors and its potential impact on easement-encumbered land).

[355] It may be desirable to seek more broad based legislation addressing the amendment and termination of conservation easements. Such legislation could clarify the extent to which holders of conservation easements have the implied power to agree to amendments that are consistent with the easements' stated purposes. Such legislation could also give content to the judicial *cy pres* standard as it is applied in the conservation easement context. Codification of the rules governing amendments and terminations could be expected to increase compliance and accountability on the part of holders and promote uniformity in easement administration.

[356] Such means could include unrestricted fee acquisitions, management agreements, leases, terminable easements, and land use regulation.

[357] *See supra* Part II.B (describing the representations made by land trusts to easement donors, funders, and the public regarding the perpetual nature of conservation easements).

governing the administration of charitable gifts made for specific purposes and federal law authorizing landowners to claim charitable income, gift, and estate tax deductions for the donation of conservation easements. It is also recommended by the drafters of the Uniform Conservation Easement Act, the Uniform Trust Code, and the Restatement (Third) of Property: Servitudes, all of whom recognized that conservation easements should be afforded more stringent protection than privately held servitudes because of the public interest and investment in such easements. Applying charitable trust principles to conservation easements also cannot be said to be a new or unanticipated development, having been recognized as part of the legal landscape for over a quarter of a century and asserted by the land trust community to its benefit in the past. Finally, the application of such principles to conservation easements is also consistent with the legitimate expectations of conservation easement donors, funders, and the general public, none of whom anticipate that conservation easements will be fungible or liquid assets in the hands of their government or nonprofit holders.

Charitable trust principles also do not unduly constrain the discretion of the government and nonprofit holders to engage in the day-to-day management of the easements they hold. Broad flexibility to amend conservation easements in manners consistent with their stated purposes can be and often is built into conservation easement deeds in the form of an amendment provision. In addition, even holders who have failed to negotiate for the inclusion of amendment provisions in the easements they hold are not condemned forever to enforce a portfolio of immutable documents. Rather, such holders may have certain implied powers to agree to amendments that are consistent with an easement's stated purposes. And if the scope of a holder's implied powers to agree to such amendments is not sufficiently clear, the holder can seek judicial or legislative clarification of the extent of its implied powers or court approval of such amendments in an administrative deviation proceeding. It is only when a holder wishes to terminate a conservation easement, or modify it in a manner contrary to its stated purpose (as was attempted in the Myrtle Grove controversy), that court approval in a *cy pres* proceeding would be required.

Government and nonprofit holders of conservation easements also need the flexibility to engage in the day-to-day management of the easements they hold without fear of possible nuisance suits by neighboring landowners or other members of the public. At the same time, as evidenced by *Hicks v. Dowd*, the Myrtle Grove controversy, and the Wal-Mart controversy, there must be a means by which grantees of conservation easements (whether government entities or land trusts) can be held accountable for actions taken or not taken that are in violation of their fiduciary obligations to both easement donors and the public. Charitable trust principles are that means. The standing rules in the charitable context are carefully calibrated to balance the competing needs of administrative efficiency and organizational accountability. They grant standing to a select group of persons best suited to represent the interests of the public, and they exclude all

others so as to protect charities from harassment through litigation. In the end, if understood by easement grantees and applied sensibly, consistently, and with appropriate consideration for the context, charitable trust principles will provide government and nonprofit holders with the flexibility they need to accomplish their public or charitable conservation missions and, at the same time, ensure that such holders are accountable for actions taken or not taken that are in violation of their fiduciary obligations.

As a final note, if some believe that the public interest would be better served if governmental and nonprofit holders could substantially modify or terminate conservation easements "on their own" and as they may "see fit," the appropriate approach is not to argue that charitable gifts of perpetual conservation easements be specially excepted from the rules governing the administration of all other charitable gifts made for specific purposes. Rather, holders that desire this extraordinary level of discretion should negotiate for it up-front and in good faith at the time they acquire conservation easements and memorialize that grant of discretion in the easement deeds. And if these holders wish to continue to receive the subsidy of the federal tax incentives, as they presumably do, they will have to convince Congress to change federal law so that landowners can receive tax benefits for the donation of conservation easements that are fungible or liquid assets. Congress, of course, may not be willing to subsidize the acquisition of such easements, and landowners may not be willing to donate them.

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GEOLOGIC CO_2 SEQUESTRATION: WHO OWNS THE PORE SPACE?

*Owen L. Anderson**

I. INTRODUCTION

As scientific findings supporting global warming are increasingly embraced by society, government officials and carbon-producing industries face the challenge of how to lessen greenhouse-gas emissions. The energy industry, which is often blamed for global warming, offers an innovative potential remedy: geologic carbon-dioxide (CO_2) sequestration—"the injection of CO_2 into deep . . . geologic formations for the explicit purpose of avoiding atmospheric emission of CO_2."[1]

Currently, CO_2 is produced and sold for use in enhanced-oil-recovery projects (EOR). CO_2 is injected into oil-bearing strata to stimulate oil and gas production,[2]

* Eugene Kuntz Chair in Oil, Gas & Natural Resources at the University of Oklahoma College of Law©. This essay was prepared for the 2008 Rudolph Lecture at the University of Wyoming College of Law, April 14, 2008, and has been updated to reflect the decision of the Texas Supreme Court in *Coastal Oil & Gas Corp. v. Garza Energy Trust* on August 29, 2008. Professor Anderson served as the E. George Rudolph Distinguished Visiting Chair of Law at the University of Wyoming College of Law during the spring semester of 2008. Professor Anderson thanks Ashleigh Boggs, second-year law student at The University of Oklahoma College of Law, for her valuable research assistance in preparing this paper. For a related article addressing geologic carbon sequestration in this edition, see Delissa Hayano, *Guarding the Viability of Coal & Coal-Fired Power Plants: A Road Map for Wyoming's Cradle to Grave Regulation of Geologic CO_2 Sequestration*, 9 WYO. L. REV. 139 (2009) [below]. *See also* Philip M. Marston & Patricia A. Moore, *From EOR to CCS: The Evolving Legal and Regulatory Framework for Carbon Capture and Storage*, 29 ENERGY L.J. 421 (2008); Steven Bryant, *Geologic CO_2 Storage—Can the Oil and Gas Industry Help Save the Planet?*, 54 ROCKY MTN. MIN. L. INST. 2-1 (2008); Jerry R. Fish & Thomas R. Wood, *Geologic Carbon Sequestration Property Rights and Regulation*, 54 ROCKY MTN. MIN. L. INST. 3-1 (2008).

[1] Elizabeth J. Wilson & Mark A. de Figueiredo, *Geologic Carbon Dioxide Sequestration: An Analysis of Subsurface Property Law*, 36 ENVTL. L. REP. 10114, 10115 (2006).

[2] *Id.* at 10118.

and the CO_2 that is produced with oil can be reinjected.[3] Incentives encourage the use of CO_2 for EOR purposes, including tax credits in Texas, but no incentives presently exist to sequester CO_2 underground.[4] Nevertheless, because using CO_2 for EOR is an established practice, "[i]t is very likely that initial [geologic sequestration] projects will be linked to EOR projects."[5]

Geologic sequestration as a permanent waste-storage possibility involves injecting CO_2, in either gas or liquid form, into deep subterranean strata or caverns. The technology for geologic sequestration is "already adequate and will steadily improve," but one of the greatest impediments to successful implementation of sequestration is public acceptance, which will develop as the public becomes more aware of its advantages.[6] Also, federal and state governments must agree on a CO_2 sequestration regulatory policy that will encourage CO_2 emitters and entrepreneurs to undertake this expensive endeavor.[7] "There are no technical or physical barriers to [geologic sequestration]. . . . The only thing that stands in the way of progress at the moment is policy."[8] Of course, CO_2 sequestration must also be commercially viable, and commercial viability may, in part, depend on how the property-rights issues are resolved.

As geologic CO_2 sequestration projects gain momentum, property rights and related liability issues will be important concerns, as Texas courts have yet to sort out ownership and liability issues pertaining to the use of subsurface pore spaces for CO_2 sequestration and other uses—regarding both directly targeted tracts and tracts that may suffer CO_2 migration.

Section II of this essay discusses the ownership of subsurface pore space in Texas—an important inquiry to determine which property-interest holder has the sequestration rights. Section III briefly considers property-related liability issues regarding CO_2 injection and sequestration. Then, Section IV draws comparisons and conclusions between the application of these legal principles and CO_2 sequestration. Appendix 1 provides a brief discussion of the ownership of stored CO_2 and the nature of a CO_2-sequestration right. Appendix 2 provides a brief discussion of the laws of some other petroleum-producing jurisdictions.

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[3] THE PETROLEUM ECONOMIST, LTD., FUNDAMENTALS OF CARBON CAPTURE AND STORAGE TECHNOLOGY 38–39 (Tom Nicholls ed. 2007).

[4] *Id.*

[5] Wilson & de Figueiredo, *supra* note 1, at 10118.

[6] THE PETROLEUM ECONOMIST, *supra* note 3, at 8–9.

[7] *Id.*

[8] *Id.* at 16.

II. OWNERSHIP OF THE PORE SPACE

When CO_2 is injected into the subsurface, the injector must either own or have permission from the owner of the subterranean pore space. Under the common-law maxim, *cujus est solum, ejus est usque ad coelum et ad inferos*, a fee-simple owner of land owns the entire tract "from the heavens to the depths." Thus, a fee-simple owner owns the subterranean pore spaces. The question of pore-space ownership arises when the fee-simple interest is severed into a mineral estate and a surface estate. As between the surface owner and mineral owner, most jurisdictions, including Texas, have not specifically determined the ownership of subterranean pore spaces. Because of the lack of a definitive answer to the question of who may grant the right to store CO_2, the Interstate Oil and Gas Compact Commission Task Force on Carbon Capture and Geologic Storage stated in a September 2007 report: "Perhaps the most important aspect of Texas law is that the question of pore space ownership is not clearly settled, highlighting the need for statutory and regulatory clarity."[9]

The lack of consistent Texas case law leads to the inefficient, yet realistic, conclusion that permission from both the surface owner and mineral owner is certainly the cautious approach. Nevertheless, I submit that the most likely "owner" of the pore space is the surface owner. I reach this conclusion based on four general principles:

First, a property right not expressly conveyed is retained, or conversely, a property right not expressly reserved is conveyed.[10]

Second, when a fee-simple owner transfers the mineral estate or transfers the surface estate, reserving minerals, two separate or severed estates in land are created.[11]

Accordingly, if Able, fee-simple owner of Blackacre, conveys the "oil, gas, and other minerals" to Baker, Able would retain, as part of the so-called surface estate, everything not granted by the severance deed—that is, everything but the "mineral estate," which in this case would be any oil, gas, and minerals subsisting in Blackacre. Likewise, if Able conveyed Blackacre to Baker, reserving oil, gas, and minerals, Baker would receive everything not reserved by Able—that is everything

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[9] INTERSTATE OIL AND GAS COMPACT COMM'N TASK FORCE ON CARBON CAPTURE AND GEOLOGIC STORAGE, STORAGE OF CARBON DIOXIDE IN GEOLOGIC STRUCTURES, A LEGAL AND REGULATORY GUIDE FOR STATES AND PROVINCES 17 (2007). The Executive Summary of the report states: "The interest of states in the geologic storage of CO_2 arises because, in addition to conservation, it is among the most immediate and viable strategies available for mitigating the release of CO_2 into the atmosphere." This indicates the public policy rationale for supporting CO_2 geologic storage. *Id.* at 9.

[10] Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878, 880 (Tex. 1940).

[11] Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 299 (Tex. 1923).

but any oil, gas, and minerals subsisting in Blackacre—*i.e.*, the mineral estate.[12] Thus, in either case, the owner of the surface estate would own the subterranean pore space. Of course, a deed or reservation could expressly address ownership of pore spaces, but, typically, does not.[13]

Third, Texas law recognizes the mineral estate as dominant over the surface estate, a concept often overstated. In proper context, "dominant" means that the mineral owner has the right to *use* as much of the airspace, surface, and subsurface as is reasonably necessary to explore for and exploit the minerals belonging to the mineral owner,[14] subject to the limitation of the "accommodation doctrine." The accommodation doctrine requires the mineral owner to accommodate the surface owner's reasonable existing uses to the extent that the mineral owner may reasonably be able to do so while still being able to exercise exploration and exploitation rights.[15]

This third principle has a flip side: the surface owner cannot unreasonably interfere with the interests of the mineral owner.[16] Under Texas law, the meaning of "other minerals" in the granting clause of a mineral deed includes "all valuable substances . . . whether their presence or value was known at the time of conveyance . . . ."[17] Thus, any minerals present in the property may belong to the mineral owner, and the surface owner must reasonably accommodate exploration and exploitation.[18] This broad construction of the term "minerals" implicitly means that the mineral owner has a potentially broad right of reasonable use that the

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[12] Similar reasoning should apply where the severance of oil and gas rights is classified as a profit. The holder of the oil and gas rights would have the right to exploit any oil and gas but the underlying fee owner would retain all other rights—presumably including ownership of pore spaces.

[13] The granting clause of oil and gas leases frequently conveys the right to store hydrocarbons. *See, e.g.*, Ryan Consol. Petroleum Corp. v. Pickens, 285 S.W.2d 201, 203 (Tex. 1955) (lessor "granted, demised, leased and let and by these presents does grant, demise, lease (and) let unto said lessee, with the exclusive right to prospect, . . . operate, produce, *store* and remove therefrom oil, gas, casinghead gas, and all petroleum products . . .") (emphasis added). Of course, the right to store oil, gas, casinghead gas, and all petroleum products does not specifically address CO_2 or "ownership" of the pore space. Moreover, when leasing, a mineral-interest owner cannot confer rights that are greater than what such owner holds.

[14] Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971). *See also* Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133 (Tex. 1967) (discussing excessive use).

[15] *Getty Oil Co.,* 470 S.W.2d at 621–22; Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810–11 (Tex. 1972).

[16] *Ball*, 602 S.W.2d at 523.

[17] Moser v. U.S. Steel Corp., 676 S.W.2d 99, 102 (Tex. 1984).

[18] *Id.* at 103 (citing *Getty Oil Co.*, 470 S.W.2d 618).

mineral owner may affirmatively protect.[19] Accordingly, even though the surface owner may own the pore spaces, the mineral owner has broad rights to penetrate or otherwise use them in connection with mineral exploration and exploitation. Indeed, commercial deposits of oil and gas occupy pore spaces within geologic traps. Thus, the mineral owner may be able to enjoin CO_2 sequestration that prevents, greatly hinders, or endangers the capture of oil and gas. But does the "dominance" of the mineral estate address "ownership" of the pore space? Indirectly, yes.

Texas courts categorize the mineral-owner's right as a right to *use* the surface, subsurface, and airspace to capture oil and gas that is owned by the mineral owner in fee-simple determinable.[20] For example, in *Getty Oil Co. v. Jones*, the court stated: "We now hold *explicitly* that the reasonably necessary limitation extends to the superadjacent airspace as well as to the lateral surface *and subsurface* of the land."[21] This holding indirectly recognizes the surface-owner's title to the subsurface because the court's express reference to the subsurface is in the context of discussing the rights of the mineral owner to *use* that which belongs to the surface owner.[22] However, assuming the surface owner owns the pore spaces, the surface owner must nevertheless reasonably accommodate the mineral-owner's use of the pore spaces in connection with mineral exploration and exploitation operations. Likewise, if the mineral owner owns the pore spaces, then, presumably, the mineral owner must accommodate the surface-owner's use of the subsurface in connection with the surface-owner's retained rights. Thus, in either case, the cautious CO_2 sequestration operator would secure permission from both surface and mineral owners.

Assuming that the surface owner "owns" the pore space, the mineral-estate owner nevertheless has the right to use the pore space to facilitate mineral exploration and exploitation. This right of use would include the right to inject substances, such as CO_2, for purposes of enhanced oil recovery. The fact that CO_2 injection might also result in the long-term sequestration of CO_2 should not, in my opinion, alter the right of the mineral-estate owner to engage in CO_2 injection for enhanced oil recovery. Thus, the mineral-owner's right to inject CO_2 for enhanced oil recovery, including the additional goal of long-term CO_2 sequestration, should fall within the mineral-owner's right of reasonable use even though "ownership" of pore spaces lies with the surface owner.

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[19] *See, e.g.,* Emerald Coal & Coke Co. v. Equitable Gas Co., 107 A.2d 734 (Pa. 1954) (finding that a coal company successfully enjoined subsurface gas storage that was to occur in stratum directly beneath an active coal mine).

[20] In the case of solid minerals, a full mineral interest would be owned in fee-simple absolute and include a similar right to use the surface, subsurface, and airspace.

[21] *Getty Oil Co.*, 470 S.W.2d at 621 (emphasis added).

[22] *Id.*

That CO_2 is also injected for sequestration should be no different than injecting saltwater for EOR. When saltwater is injected, either partially or wholly for EOR or disposal purposes, permanent sequestration of the saltwater is contemplated, although, potentially, the saltwater could be withdrawn for use in another EOR project. The same would hold true with CO_2, but, if one purpose of CO_2 injection is to address concerns about global warming, the objective of permanent sequestration would be a paramount concern, which would necessarily require a robust regulatory system to assure that this objective is achieved. As with water, however, such a regulatory system might not prohibit the later withdrawal, use, and reinjection of CO_2 for another EOR project, as long as the CO_2 was ultimately sequestered. On the other hand, the right to inject CO_2 solely for sequestration, unrelated to enhanced-oil recovery, would most likely be held by the surface owner.

Another indication that the surface owner owns the subsurface after a mineral severance is that the surface owner retains groundwater rights.[23] In *Sun Oil Co. v. Whitaker*, the Texas Supreme Court held that Sun, the oil and gas lessee, acting under a lease from the fee-simple owner who subsequently conveyed the surface estate to Whitaker, had the right to use groundwater to the extent reasonably necessary to produce oil and gas.[24] In other words, Sun's right to *use* groundwater implicitly recognizes surface-owner title to the groundwater. Although surface-owner title to groundwater does not necessarily mean that the surface owner holds title to subsurface pore spaces, the Texas groundwater cases give no hint of another possibility.

Fourth, a regulatory agency with the power to authorize regulated activities, such as the Texas Railroad Commission, authorizing underground gas storage or saltwater disposal, has no authority to determine property rights.[25] Thus, the fact that a regulatory agency has issued a permit to an operator for geologic CO_2 sequestration does not give that operator title to any subsurface pore spaces. However, when considering liability, a permit may be of some relevance if CO_2 migrates beyond the tract where it is injected—an issue addressed in the next section.

Although no Texas case law finally determines the ownership of subterranean pore spaces as between the surface and mineral owner, a handful of cases shed

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[23] Pfluger v. Clack, 897 S.W.2d 956, 959 (Tex. App. 1995), *writ denied*. Texas is perhaps the only remaining state to adhere to the "absolute ownership" theory regarding groundwater. *See* City of Sherman v. Pub. Util. Comm'n, 643 S.W.2d 681, 686 (Tex. 1983) ("The absolute ownership theory regarding groundwater was adopted by this Court in Houston & T.C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).").

[24] 483 S.W.2d 808, 811 (Tex. 1972).

[25] *See, e.g.*, Ryan Consol. Petroleum Corp. v. Pickens, 285 S.W.2d 201, 207 (Tex. 1956); Pan Am. Prod. Co. v. Hollandsworth, 294 S.W.2d 205, 211–12 (Tex. Civ. App. 1956), *writ refused n.r.e.*

some light on the issue. The facts of an unreported case are on point; however, the issues discussed by the appellate court are not. Nevertheless, *Makar Production Co. v. Anderson*[26] illustrates the ownership issue, and the trial court's findings and conclusions are a matter of record. In this case, at the request of the lessor's successor in interest to an oil and gas lease, the trial court permanently enjoined the lessee's successor from bringing saltwater produced from wells located on other tracts onto the leased premises and from injecting the saltwater into subsurface strata beneath the leased premises.[27] The injunction was issued even though the Railroad Commission had issued a permit for the saltwater disposal.[28]

The injunction was granted on the ground that the oil and gas lease did not expressly authorize the lessee or its successors to use the leased premises as a commercial waste-disposal site.[29] Thus, while *Makar* implies that the fee-simple owner could have expressly leased disposal rights, the rights are not leased by implication. In Texas, an oil and gas lease is not a "lease," but a conveyance of any oil and gas in place for the duration of the lease—typically a fee simple determinable.[30] Because a lease conveys a fee simple determinable, this same reasoning should also apply to the severance of minerals by a mineral deed or to a reservation of minerals in a deed that conveys the surface. Thus, while a mineral deed may expressly convey, and a reservation may expressly reserve, underground disposal and storage rights, such rights are not conveyed or reserved by implication. Accordingly, in a typical mineral deed, title to pore spaces is not conveyed by implication. Likewise, in a typical reservation of minerals, title to pore spaces is not reserved by implication.

CO_2 sequestration is somewhat analogous to underground gas storage. Somewhat surprisingly, Texas law does not finally determine whether the owner of the surface or the owner of the mineral rights holds the right to store gas underground. If Texas case law did answer this question, then this same case law would likely determine which owner holds CO_2 sequestration rights. Two contrasting cases illustrate the issue. *Emeny v. United States*, a federal Court of Claims case applying Texas law, held in favor of surface owner's title to storage rights.[31] In contrast, in *Mapco, Inc., v. Carter*, a Texas appellate decision, the mineral owners prevailed on their ownership claim.[32]

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[26] Makar Production Co. v. Anderson, No. 07-99-0050-CV, 1999 WL 1260015 (Tex. App. 1999), *no writ*.

[27] *Id.* at *2.

[28] *Id.* at *1–2.

[29] *Id.* at *2–3.

[30] *See* Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982); Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290, 292 (Tex. 1923).

[31] Emeny v. United States, 412 F.2d 1319 (Ct. Cl. 1969).

[32] Mapco, Inc., v. Carter, 808 S.W.2d 262 (Tex. App. 1991), *rev'd in part on other grounds*, 817 S.W.2d 686 (Tex. 1991).

In *Emeny*, the federal Court of Claims, applying Texas law, concluded that the surface owners retained the gas storage rights.[33] In this case, fee-simple owners leased tracts "for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines . . . to produce, save, and take care of said products."[34] The lessees developed a stratum called the Bush Dome for natural gas. This gas contained small amounts of helium. Due to the strategic nature of helium, the United States acquired these leases by purchase or condemnation and later brought in helium-gas mixtures for storage in pore spaces in the Bush Dome, where some native gas had already been extracted.[35] The court concluded as follows:

> The surface of the leased lands and everything in such lands, except the oil and gas deposits covered by the leases, were still the property of the respective landowners. . . . This included the geological structures beneath the surface, including any such structure that might be suitable for the underground storage of 'foreign' or 'extraneous' gas produced elsewhere.
>
> It necessarily follows that the 1923 oil and gas leases on the lands containing the Bush Dome did not grant to the lessee—or to the defendant as the present holder of gas rights under such leases—any right to use the Bush Dome for the storage of gas produced elsewhere.[36]

In *Humble Oil & Refining Co. v. West*, the Texas Supreme Court cited *Emeny* for the proposition that the surface owner retained "the geological structures beneath the surface, together with any such structure that might be suitable for the underground storage of extraneous gas produced elsewhere."[37] However, Professors Smith and Weaver have observed: ". . . that [this] proposition was hardly crucial to the outcome of the case,"[38] which was an action by royalty owners who asserted rights in the stored gas on the ground that the gas was being commingled with native gas in the reservoir.

An unreported decision of the Court of Appeals for the Third District also supports surface-owner title to pore spaces. In *FPL Farming, Ltd. v. Texas Natural*

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[33] *Emeny*, 412 F.2d at 1323.

[34] *Id.*

[35] *Id.* at 1323.

[36] *Id.*

[37] Humble Oil & Refining Co. v. West, 508 S.W.2d 812, 815 (Tex. 1974) (citing *Emeny*, 412 F.2d 1319).

[38] ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.1.B.3 (Matthew Bender & Co. and LexisNexis Group 2007).

Resources Conservation Commission, the court implicitly accepted the notion that surface owners own the pore spaces.[39] The surface owners of tracts nearby a proposed non-hazardous-waste-disposal site challenged the issuance of the disposal permit, alleging that the agency acted beyond its authority and alleging a taking on the ground that the evidence indicated that, within ten years, the injected waste would likely reach the subsurface stratum beneath their property.[40] The court affirmed the agency order but indicated that "should the waste plume migrate to the subsurface of FPL Farming's property and cause harm, FPL Farming may seek damages from EPS."[41] This statement, which is dicta, suggests that the court believed that the surface owners held title to the subsurface strata, as the court's statement does not say that the "surface" itself must be harmed for FPL to have a cause of action.

In contrast to *Emeny*, the court in *Mapco* held that the mineral owner held title to the subsurface storage space for natural gas.[42] In *Mapco*, owners of certain fractional mineral interests brought a partition action against the surface owner, who also owned a fractional mineral interest and was storing gas underground.[43] The storage reservoir was created by partially leaching salt from a salt dome.[44] Salt is recognized as a "mineral" in Texas.[45] In awarding owelty damages, the court reasoned as follows:

> Texas adopted the view that interest in minerals, such as oil, gas, salt and other minerals are susceptible of ownership in place in the ground prior to production of the minerals at or on the surface. The Texas rule is that this interest in minerals is an interest in real property. Thus, the fee mineral owners retain a property ownership, right and interest after the underground storage facility—here, a cavern—had been created. These same fee mineral owners are vested with ownership rights, including, of course, entitlement to compensation for the use of the cavern. . . . Thus, Texas law would recognize the continuing property ownership interest of the fee mineral estate owners in the cavern . . . .

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[39] FPL Farming, Ltd. v. Tex. Natural Res. Conservation Comm'n, No. 03-02-00477-CV, 2003 WL 247183 (Tex. App. 2003) *no writ*. The court noted that it was "assuming without deciding" that the surface owners had implicit "existing rights" in the deep subsurface beneath their land. *Id.* at *3.

[40] *Id.* at *1 n.3 (stating that the plaintiffs do not own the mineral interests associated with the property).

[41] *Id.* at *5 (citing TEX. WATER CODE ANN. § 27.104 (West 2000)).

[42] Mapco, Inc. v. Carter, 808 S.W.2d 262 (Tex. App. 1991), *rev'd in part on other grounds*, 817 S.W.2d 686 (Tex. 1991).

[43] *Id.* at 264–65.

[44] *Id.* at 274.

[45] *Id.* (citing State v. Parker, 61 Tex. 265, 268 (1884)).

> . . . .
>
> . . . The Appellees [plaintiff mineral-interest owners] . . . owned an undivided, but large majority, interest in the fee title and fee estate to the minerals in place and, as such, they had a fee title interest in the cavern after the minerals were extracted.[46]

Thus, the *Mapco* court, although ultimately reversing on other grounds,[47] concluded that, because the mineral owner had title to the salt, the mineral owner had title to the salt cavern and walls of the cavern.[48]

Query whether the court would have reached the same conclusion if the storage reservoir had been created in a subsurface formation that did not contain "minerals." Arguably, *Mapco* applies only when storage space is created by *partially* excavating a mineral-bearing strata and then using that strata's excavated space for storage. Surface owners may strongly argue that *Mapco* does not support mineral-owner title in generic subsurface strata because the court emphasized the fact that the mineral owner created the storage space by mining a mineral deposit. The storage space was not a naturally occurring pore space, but rather an excavated cavern, and the storage container was itself that same mineral that had been partially extracted. Moreover, the mineral owner would presumably have the right to use the cavern to extract the remainder of the salt.[49]

Concluding Thoughts: Notwithstanding *Mapco*, surface owners have the stronger argument for ownership of pore spaces and hence subsurface CO_2 sequestration rights that are not related to EOR. Nevertheless, mineral owners, as holders of the dominant estate, have the right to explore for and produce oil, gas, and minerals without unreasonable interference from the surface owner. When a surface owner unreasonably interferes with the rights of the mineral owner, the surface owner may be enjoined and liable for damages. In *Ball v. Dillard*, the Texas Supreme Court stated that the rights of surface and mineral owners are "reciprocal and distinct" and that "[n]either party can interfere with the rights of the other."[50] Therefore, a surface owner, by asserting a right of pore-space ownership and by engaging in subsurface CO_2 sequestration may not unreasonably interfere with mineral exploration or exploitation. Furthermore, if the storage reservoir contains naturally occurring and commercially recoverable hydrocarbons, then the mineral owners may be deprived of their right to the native hydrocarbon gas in place. Thus,

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[46] *Mapco*, 808 S.W.2d at 274–75.

[47] Mapco, Inc. v. Carter, 817 S.W.2d 686 (Tex. 1991).

[48] *Mapco*, 808 S.W.2d at 274.

[49] *See* Int'l Salt Co. v. Geostow, 878 F.2d 570 (2d. Cir. 1989) (construing New York law).

[50] Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980) (citing Brown v. Lundall, 344 S.W.2d 863 (Tex. 1961)).

regarding CO_2 sequestration that is not related to EOR, obtaining permission from both the surface and mineral owner is the cautious approach even though I conclude that the storage rights are most likely held by the surface owner. On the other hand, regarding oil and gas development, including CO_2 injection for EOR, only the mineral owner need give permission, such as by executing an oil and gas lease.

If CO_2 sequestration is a goal, whether in addition to, or independent of EOR, then a robust regulatory system is needed to assure that the goal of sequestration is actually achieved. Moreover, a robust regulatory permit process could lessen the likelihood that dissenting surface or mineral owners could launch a successful challenge to a CO_2 sequestration project. If the legislature declares that CO_2 sequestration is in the public interest, if an agency is charged with the duty to regulate and authorize sequestration, if the agency holds a public hearing that meets all due-process requirements, and if the agency issues a permit to inject CO_2 into what the agency finds to be a well-defined and confining stratum after making findings of fact that support the utility of the specific sequestration project, then the likelihood of a successful challenge by dissenting surface or mineral owners is remote.[51] For example, although sequestration may make mineral exploitation below the storage reservoir more expensive, such exploitation is still likely to be possible;[52] thus, a regulatory taking claim is not likely to succeed. Other grounds for reversal of administrative orders can be avoided through the passage of appropriate enabling legislation and through appropriate agency implementation and processes.

Any regulatory regime should explicitly recognize that the recovery of commercial minerals will generally have priority over the use of pore spaces for CO_2 sequestration so as not to interfere with the rights of mineral developers and so as not to cause the underground waste of mineral resources. While priority rules arising under the recordation acts, coupled with the "dominance" of the mineral estate, might be theoretically used to achieve this end, given the prevailing checkerboard pattern of land and mineral ownership, a regulatory regime that gives primacy to commercial mineral development over CO_2 sequestration would

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[51] For a glimpse of what a regulatory law might look like, see H.B. 0090, Enrolled Act No. 25, 59th Wyo. Leg. 2008 Budget Session (effective July 1, 2008). For analogous Texas regulatory law, see TEX. NAT. RES. CODE §§ 91.201–91.207 (regulating underground hydrocarbon storage) and *id.* §§ 91.171–91.184 (regulating underground natural gas storage).

[52] In general, absent proof that the enjoyment of minerals is impossible, courts have not found that a taking has occurred. *See, e.g.*, City of Abilene v. Burk Royalty Co., 470 S.W.2d 643 (Tex. 1971) and Tarrant County Water Control & Improvement Dist. v. Haupt, Inc., 854 S.W.2d 909 (Tex. 1993).

be a more practical and workable approach.[53] In *Storck v. Cities Service Gas Co.*, the Oklahoma Court of Appeals held that, despite contrary provisions in a gas storage lease, the lessors and their mineral lessees had a statutory right to explore for oil and gas in formations other than the one used for storage, subject to the right of the storage lessee to monitor and approve drilling plans and subject to Oklahoma Corporation Commission regulations.[54] Wrongful interference by the storage lessee could give rise to actual damages, such as damages caused by drainage of oil to nearby lands, and possible punitive damages.[55]

Of course, the ultimate answer may be eminent domain—the common means of acquiring gas storage rights in several states[56] and under federal regulatory law.[57] If a party seeking to sequester CO_2 had the power of eminent domain, then no "owner," whether surface or mineral, would be able to prevent a sequestration project. But the question remains: Who is entitled to compensation for the taking? Currently, the safest answer is to compensate both surface and mineral owners. However, I submit that, under the umbrella of a regulatory regime, a reasonably safe answer would be to compensate surface owners on the theory that they own the pore spaces and hence the sequestration rights. In particular circumstances, mineral owners should be compensated where their ability to exploit known commercial mineral reserves would be prevented by the CO_2 sequestration project, although proving prevention may often be a burden that is too hard to meet. However, if a party intended to inject CO_2 into a gas reservoir containing native gas that was being left in the reservoir as "cushion gas" to prevent water encroachment into the pore spaces, the gas owner should be entitled to compensation for that native gas if the owner can prove that the gas could have been economically recovered.[58] Moreover, a regulatory agency might find that producing the cushion gas would result in greater comparative waste if water encroachment would ruin the reservoir for sequestration purposes.

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[53] For an example of a newly enacted regulatory regime, see 2008 Wyo. Sess. Laws ch. 30, principally codified at WYO. STAT. ANN. § 30-11-313 (2008). For analogous law dealing with mineral-development conflicts, such as a conflict between a coal developer and an oil and gas developer, see N.D. CENT. CODE 38-15 (regulatory resolution of conflicts in subsurface mineral production). For an informative article discussing mineral-development conflicts, see Phillip Wm. Lear, *Multiple Mineral Development Conflicts: An Armageddon in Simultaneous Mineral Operations?*, 28 ROCKY MT. MIN. L. INST 79 (1983).

[54] Storck v. Cities Serv. Gas Co., 575 P.2d 1364, 1368 (Okla. 1977), *remanded* to 634 P.2d 1319 (Okla. Civ. App. 1981) (*citing* OKLA. STAT. tit. 52, § 36.1).

[55] *Storck*, 634 P.2d at 1322.

[56] *See* TEXAS NAT. RES. CODE §§ 91.171–.184.

[57] *See* 15 U.S.C. § 717f(c)(1)(A).

[58] *See, e.g.*, ANR Pipeline Co. v. 60 Acres of Land, 418 F. Supp.2d 933, 941–44 (W.D. Mich. 2006); *see also* Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Lease Hold in the Judith River Subterranean Geological Formation, 999 F.2d 546 (9th Cir. 1993) (unpublished, but memorandum opinion is available at 1993 WL 242979).

Another reason favoring eminent domain is the prevalence of co-tenancy title. Co-tenancy title would be of greatest concern if mineral owners held the storage rights because severed mineral interests have become more and more fractionalized.[59] But whether the pore space is owned by co-tenant surface owners or mineral owners and regardless of the nature of the sequestration interest—whether deemed a lease, an easement, or an outright sale of the pore space—each co-tenant must consent to the burdening or sale of her interest for the sequestration interest to be fully effective.[60] Similar consent problems arise with successive interests.[61]

In conclusion, regarding the issue of pore-space ownership, consider the following statement by Professors Smith and Weaver:

> The issue ultimately turns on whether the implied easement to use the surface and subsurface in any way reasonably necessary for exploring, drilling, producing, transporting, and marketing includes the right to store non-native gas. Unlike pressure maintenance and cycling operations, underground injections for storage purposes are not directly related to production. Indeed, they are usually not even associated with initial marketing, but with downstream activities more closely connected to final retail sales. From this perspective, it would seem that the right to store gas produced from a stratum other than the one in question is roughly analogous to the right to open a service station, a right that belongs more properly to the surface estate than the mineral estate.[62]

Thus, absent an EOR-related CO_2 sequestration, this comment would seem to support surface-owner title to the pore space and hence the right to sequester CO_2.

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[59] *See, e.g.,* Ellis v. Ark. La. Gas Co., 450 F. Supp. 412, 422 (E.D. Okla. 1978) (observing that if "it was the mineral interest owner and not the surface owner who had power to grant storage rights, it would typically mean that hundreds of severed mineral interest owners would have to be contacted if those rights were to be obtained privately").

[60] *See, e.g.*, Elliott v. Elliott, 597 S.W.2d 795, 802 (Tex. Civ. App. 1980), *no writ*.

[61] *See, e.g.*, Kemp v. Hughes, 557 S.W.2d 139 (Tex. Civ. App. 1977), *no writ*. Plausibly, however, by analogy to the prevailing law regarding mineral exploitation by less than all co-tenants, each co-tenant may have the right to sequester carbon if they account to other co-tenants for any net profits. *See* Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. 1924). While this approach is theoretically plausible, the notion that multiple co-tenants might engage in simultaneous sequestration operations may not be practical. Moreover, while, under the prevailing view, individual co-tenants can exploit minerals without being liable for waste, courts might not view carbon sequestration as analogous to mineral exploitation.

[62] SMITH & WEAVER, *supra* note 38, § 2.1.B.3.

III. TRESPASS-RELATED ISSUES

The prior section considered pore-space ownership of the tract where the CO_2 sequestration operation directly occurs. This section deals with the thornier question of neighboring tracts. Even if an injecting party holds the appropriate rights regarding the tracts actually used for the sequestration operation, that party may be liable for trespass or related torts if CO_2, whether injected for sequestration or EOR, migrates to neighboring tracts. Because CO_2 sequestration is closely analogous to EOR, wastewater storage, and natural gas storage, case law involving these activities is helpful in assessing the risk of liability to neighboring landowners.

A. Enhanced Oil Recovery Injections and Fracturing Analogies

With EOR, trespass issues arise when the injected substance, commonly water, crosses ownership lines, invading neighboring property and perhaps even displacing oil and gas reserves or making recovery of the reserves more difficult and more expensive. Trespass issues can also arise when fracturing operations create fractures that extend beyond the operator's unit. Once again, Texas case law provides an indefinite answer. Some cases recognize a cause of action for subsurface trespass and other cases avoid any definitive rule on the issue.

As with title issues, regulatory bodies, such as the Railroad Commission, have no general authority to authorize trespasses or other torts. However, two cases suggest that regulatory orders may provide some protection. In *Corzelius v. Railroad Commission*, the commission issued an order authorizing a party, as agent of the commission, to drill a directional well to help extinguish a gas-well blowout and fire that was threatening the surrounding area.[63] The party responsible for the blowout sought to enjoin this operation on the ground that the agent's well bore would directly invade the party's mineral estate.[64] In this emergency, the court concluded that the commission's order shielded the driller from being enjoined.[65] Although a trespass was not enjoined, this case offers little comfort to a party wishing to sequester CO_2 because it deals with an emergency situation.

A case providing more comfort is *Railroad Commission of Texas v. Manziel*.[66] The plaintiff landowners sought to set aside a commission order authorizing the operator of an adjacent tract to drill an exception-location well close to their tract to inject water for EOR.[67] The exception well was authorized under the auspices

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[63] Corzelius v. Railroad Comm'n, 182 S.W.2d 412, 413–14 (Tex. Civ. App. 1944), *no writ*.

[64] *Id.* at 414.

[65] *Id.* at 416–17.

[66] Railroad Comm'n of Tex. v. Manziel, 361 S.W.2d 560 (Tex. 1962).

[67] *Id.* at 561.

of a commission-approved voluntary unitization plan.[68] The landowners sought to set aside the order on the ground that water injected at that location would inevitably cross ownership lines, resulting in a trespass and the early watering out of one of their oil wells.[69]

The court stated that it was presented with the issue of "whether a trespass is committed when secondary recovery waters from an authorized secondary recovery project cross lease lines."[70] After discussing the utility of EOR operations the court stated:

> We conclude that if, in the valid exercise of its authority to prevent waste, protect correlative rights, or in the exercise of other powers within its jurisdiction, the Commission authorizes secondary recovery projects, a trespass does not occur when the injected, secondary recovery forces move across lease lines, and the operations are not subject to an injunction on that basis. *The technical rules of trespass have no place in the consideration of the validity of the orders of the Commission*.[71]

In reaching this conclusion, the court quoted Professors Howard Williams and Charles Meyers:

> What may be called a 'negative rule of capture' appears to be developing. Just as under the rule of capture a landowner may capture such oil or gas as will migrate from adjoining premises to a well bottomed on his own land, so also may he inject into a formation substances which may migrate through the structure to the land of others, even if it thus results in the displacement under such land of more valuable with less valuable substances . . . .[72]

The result in this case would be more comforting if it had been brought against the operator of the injection well, rather than brought as an action to set aside an order of the Railroad Commission. While a consideration of trespass may have "no place" in a proceeding to determine the validity of a commission order, trespass would be pertinent in a private cause of action in tort. Indeed, the court seemed to recognize this distinction, when it stated:

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[68] *Id.* at 566.

[69] *Id.*

[70] *Id.* at 567.

[71] *Manziel*, 361 S.W.2d at 568–69 (emphasis added).

[72] *Id.* at 569 (quoting HOWARD WILLIAMS & CHARLES MEYERS: OIL AND GAS LAW, § 204.5 (1995)).

> [W]e are not confronted with the tort aspects of such practices. Neither is the question raised as to whether the Commission's authorization of such operations throws a protective cloak around the injecting operator who might otherwise be subjected to the risks of liability for actual damages to the adjoining property . . . .[73]

Nevertheless, the court did discuss trespass in some detail and was sympathetic to the view that traditional rules of trespass may not be appropriate for subsurface invasions that are for the greater public good—such as for EOR in this case and, by analogy, perhaps for CO_2 sequestration in a future case. The court's discussion suggests that a regulatory order, issued in the public interest, is necessary if traditional trespass rules are to be avoided.[74] However, this suggestion begs the following question: If a regulatory order is entered, thereby avoiding traditional trespass rules, what "nontraditional" trespass rules will apply? The issuance of

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[73] *Id.* at 566.

[74] For voluntary unitization for enhanced recovery or for the conservation and use of gas, see TEX. NAT. RES. CODE §§ 101.001–101.018. Under § 101.013:

> (a) Agreements for pooled units and cooperative facilities are not legal or effective until the commission finds, after application, notice, and hearing:
>
> (1) that the agreement is necessary to accomplish the purposes specified in Section 101.011 of this code;
>
> (2) that it is in the interest of the public welfare as being reasonably necessary to prevent waste and to promote the conservation of oil or gas or both;
>
> (3) that the rights of the owners of all the interests in the field, whether signers of the unit agreement or not, would be protected under its operation;
>
> (4) that the estimated additional cost, if any, of conducting the operation will not exceed the value of additional oil and gas so recovered, by or on behalf of the several persons affected, including royalty owners, owners of overriding royalties, oil and gas payments, carried interests, lien claimants, and others as well as the lessees;
>
> (5) that other available or existing methods or facilities for secondary recovery operations or for the conservation and utilization of gas in the particular area or field concerned or for both are inadequate for the purposes; and
>
> (6) that the area covered by the unit agreement contains only that part of the field that has reasonably been defined by development, and that the owners of interests in the oil and gas under each tract of land in the area reasonably defined by development are given an opportunity to enter into the unit on the same yardstick basis as the owners of interests in the oil and gas under the other tracts in the unit.
>
> (b) A finding by the commission that the area described in the unit agreement is insufficient or covers more acreage than is necessary to accomplish the purposes of this chapter is grounds for the disapproval of the agreement.

an order, even one that includes a finding of fact that no harm will result to neighboring properties, will not necessarily bar a private action in tort.[75] Perhaps injunctive relief would be denied, limiting a plaintiff to a recovery of proven actual damages resulting from trespass, which could be a difficult burden to meet. Moreover, if a regulatory order is entered, then Texas courts would be unlikely to award punitive damages.

Or perhaps traditional trespass rules would be more fully avoided in favor of a nuisance analysis that would balance the utility of CO_2 sequestration with the gravity of the harm to the plaintiff landowner. This latter approach would treat CO_2 sequestration similarly to the treatment of atmospheric CO_2 emissions—albeit that emitting pollutants into the atmosphere to be carried by prevailing winds through the airspace of neighboring tracts is distinguishable from the intentional injection of pollutants for permanent storage beneath specific tracts. As with trespass, if the sequestration were authorized by a regulatory commission, then injunctive relief to abate a nuisance might be denied and punitive damages might be barred.

In contrast to voluntary unitization for EOR, trespass issues posed by hydraulic fracturing historically did not receive the same favorable treatment that water injection received in *Manziel*. In *Gregg v. Delhi-Taylor Oil Corp.*, the Texas Supreme Court held that courts, not the Railroad Commission, have primary jurisdiction to determine whether a fracturing operation may result in a trespass and whether relief is appropriate.[76] Finding that cracks resulting from fracture treatments crossing property lines are analogous to drill bits that cross property lines, the court concluded that such an intentional and direct invasion could constitute a subsurface trespass.[77]

In *Geo-Viking, Inc. v. Tex-Lee Operating Co.*,[78] however, the Texas Supreme Court retreated from its pronouncements in *Gregg*. In this case, an operator sued a well-service company for improperly fracturing a well.[79] In appealing a damages award, the well-service company argued that the jury should have been instructed to disregard the amount of production obtained from fractures extending beyond

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[75] *See, e.g.*, Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411 (Tex. 1961); *compare* Champlin Exploration, Inc., v. R.R. Comm'n of Tex., 627 S.W.2d 250 (Tex. App. 1982), *writ refused n.r.e. with* Muckelroy v. Richardson Indep. Sch. Dist., 884 S.W.2d 825 (Tex. App. 1994), *writ denied* (distinguishing *Champlin*).

[76] Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411, 415 (Tex. 1961).

[77] *Id.* at 416–17.

[78] Geo-Viking, Inc. v. Tex-Lee Operating Co., 1992 WL 80263 (Tex. 1992), *opinion withdrawn*, 839 S.W.2d 797 (Tex. 1992).

[79] Geo-Viking, Inc. v. Tex-Lee Operating Co., 817 S.W.2d 357, 364 (Tex. App. 1991), *writ denied with per curiam opinion*.

the boundaries of the leased land.[80] The court of appeals rejected this argument,[81] citing the rule of capture, which protects drainage from beneath the land of others.[82] The Texas Supreme Court initially reversed, finding that fracturing the subsurface of another's land is trespass, precluding application of the rule of capture.[83] Subsequently, however, at the request of the parties, the Texas Supreme Court withdrew its opinion and its writ of error, stating that the "application was improvidently granted"[84] and concluding that "we should not be understood as approving or disapproving the opinions of the court of appeals analyzing the rule of capture or trespass as they apply to hydraulic fracturing."[85] This ruling left much confusion about whether fracturing that crosses property lines constitutes trespass.

In *Mission Resources, Inc. v. Garza Energy Trust*, the Court of Appeals for the Thirteenth District held *inter alia* that Texas recognizes a cause of action for trespass from subsurface fracture treatments that cross property boundaries.[86] The court rejected the contradictory holding by the Court of Appeals for the Sixth District in *Geo-Viking*,[87] citing the Texas Supreme Court's holding in *Gregg*.[88] On August 29, 2008, the Texas Supreme Court reversed this portion of the case, holding that subsurface hydraulic fracturing was not an actionable trespass because the drainage of hydrocarbons by this means was protected by the rule of capture.[89] Presumably, the injection of CO_2 for enhanced recovery would be

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[80] *Id.* at 363–64.

[81] *Id.* at 364.

[82] *See, e.g.*, Brown v. Humble Oil & Ref. Co., 83 S.W.2d 935, 940 (Tex. 1935).

[83] *Geo-Viking, Inc.*, 1992 WL 80263.

[84] *Geo-Viking, Inc.*, 839 S.W.2d at 798.

[85] *Id.*

[86] Mission Resources, Inc. v. Garza Energy Trust, 166 S.W.3d 301, 310 (Tex. App. 2005), *pet. granted*.

[87] *Geo-Viking, Inc.*, 817 S.W.3d at 364–64.

[88] *Mission Res., Inc.*, 166 S.W.3d at 311.

[89] Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008) *rehearing denied*. In People's Gas Co. v. Tyner, 31 N.E. 59 (Ind. 1892), the Indiana Supreme Court held that the analogous technique of shooting a well to prime recovery was protected by the rule of capture but also subject to the law of nuisance where the shooting, which was done with nitroglycerin, posed a danger to a densely populated area.

I have suggested that the rule of capture would be an appropriate means of resolving the analogous trespass question when geophysical information is acquired from nearby lands through 3-D or conventional seismic operations that occur on other lands. Owen L. Anderson & Dr. John D. Pigott, *3D Seismic Technology: Its Uses, Limits, & Legal Ramifications*, 42 ROCKY MT MIN. L. INST. 16-1, 16-111–16-117 (1996). I have also suggested that the rule of capture should offer similar protection from trespass in the case of hydraulic fracturing. Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture—An Oil and Gas Perspective*, 35 ENVTL. L. 899, 933–36 (2005).

similarly protected. Some of the reasons cited by the court for its decision would also support protecting CO_2 sequestration from trespass actions.

The court reasoned that trespass requires actual injury and that trespass injury should not be inferred when the physical invasion occurs far below the surface. The court noted that the *ad coelum* maxim "'has no place in the modern world'" and that "the law of trespass need no more be the same two miles below the surface than two miles above."[90] The court also reasoned that it should not usurp the lawful authority of the Texas Railroad Commission to decide to regulate, or not regulate, fracturing, should not allow the litigation process to determine the extent of harm (drainage) that is caused by fracturing, and should not allow an actionable trespass (by changing the rule of capture) when the oil and gas industry does not "want or need the change."[91] Justice Willett, concurring, would have gone further and held that, not only was fracturing not an actionable trespass, it was not a trespass at all.[92] His concurring opinion discussed the necessity of hydraulic fracturing for the recovery of hydrocarbons. As a matter of public policy, as with hydraulic fracturing, Texas courts should find that no trespass occurs if injected CO_2 crosses property lines. Because CO_2 injection, unlike hydraulic fracturing, will be subject to a regulatory permitting regime, the court should have even fewer concerns about CO_2 injection for enhanced recovery or CO_2 sequestration.

B. Gas Storage Analogy

Natural gas is frequently injected into the subsurface for temporary storage. Underground gas storage is closely analogous to CO_2 sequestration, except that CO_2 sequestration is indefinite, not temporary. Trespass issues arising in the gas storage context offer insight about how Texas courts will likely analyze trespass in the CO_2 sequestration context. Of course, CO_2 sequestration and gas storage are factually distinct: gas storage is an ongoing operation, involving a continuous cycle of injections and withdrawals of gas, while CO_2 sequestration involves injection for permanent storage. CO_2 is essentially a waste product, while gas is a valuable commodity. Moreover, at some point, a CO_2 sequestration reservoir would reach its maximum capacity, at which time ongoing CO_2 injection would come to an end, whereas active gas injections and withdrawals could continue indefinitely. These factual distinctions, however, do not seem significant enough to justify ignoring gas storage *law*, which does seem analogous.

In *Hammonds v. Central Kentucky Natural Gas Co.*, an early Kentucky case, the court reasoned that natural gas injected for storage was really released back

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[90] *Coastal Oil*, 268 S.W.3d at 11 (*quoting* United States v. Causby, 328 U.S. 256, 260–61 (1946)).

[91] *Id.* at 14–16.

[92] *Id.* at 29 (Willett, J., concurring).

to nature—in essence, abandoned.[93] Because the gas was abandoned, the gas had no owner.[94] Comparing injected gas to captured wild animals returned to nature, the court found that no trespass occurred when the released gas migrated to neighboring property.[95] However, the court further ruled that when the gas was returned to nature, it became "subject to appropriation by the first person" to capture the gas.[96]

Texas rejected the reasoning of *Hammonds*, finding that injected natural gas is not abandoned but remains the personal property of the injecting party and, as such, is no longer subject to capture by neighboring landowners even if the gas migrates beneath neighboring tracts.[97] However, because the gas is not abandoned, the question of trespass then arises. In *Lone Star Gas Co. v. Murchison*, the gas storage company acquired the right to store natural gas in what was thought to be a well-defined subsurface reservoir.[98] However, unknown to the storage company, the reservoir was connected to other subsurface strata, allowing the injected gas to migrate to neighboring subsurface property.[99] Because the storage company had title to the injected gas as personal property, the court held that the storage company did not lose title to gas that migrated under neighboring land.[100] Neither *Murchison* nor any other Texas case squarely addresses the trespass question—perhaps because of the difficulty of proving actual damages.

Trespass resulting from stored natural gas may be more easily tolerated because its storage is temporary and because it is not a waste product. In contrast, CO_2 might be treated differently because CO_2 is a waste product intended for permanent storage. Nevertheless, if a neighboring landowner suffered actual damages either from CO_2 sequestration or from gas storage, a court would probably award damages on grounds of trespass, nuisance, or negligence, but most likely would not issue an injunction if the sequestration or injection were done under the auspices of a regulatory permit. To avoid a potential damages claim, the cautious approach would be to acquire sequestration or storage rights for the entire reservoir. Moreover, acquiring rights to the entire reservoir, in the case of gas, effectively prevents neighbors from producing stored gas under the guise

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[93] Hammonds v. Central Ky. Natural Gas Co., 75 S.W.2d 204, 205–06 (Ky. Ct. App. 1934).

[94] *Id.*

[95] *Id.* at 206.

[96] *Id. Hammonds* has been greatly limited by Tex. Am. Energy Corp. v. Citizens Fid. Bank & Trust Co., 736 S.W.2d 25 (Ky. 1987).

[97] *See* Humble Oil & Ref. v. West, 508 S.W.2d 812, 817 (Tex. 1974); Lone Star Gas Co. v. Murchison, 353 S.W.2d 870, 880 (Tex. Civ. App. 1962), *no writ* (*citing* Chaffin v. Hall, 210 S.W.2d 191 (Tex. Civ. App. 1948), *no writ*); *see also* White v. N.Y. State Natural Gas Corp., 190 F. Supp. 342 (W.D. Pa. 1960).

[98] *Lone Star Gas Co.*, 353 S.W.2d at 871–72.

[99] *Id.*

[100] *Id.* at 880.

of producing native gas, and, in the case of CO_2, effectively prevents neighbors from drilling into the reservoir in a manner that could result in the escape of CO_2. These risks, however, could be largely ameliorated by a robust regulatory process.

Again, the ultimate answer may be eminent domain. In the case of gas storage, gas utilities in Texas may acquire gas storage rights by eminent domain.[101] In addition, the Natural Gas Act of 1938 allows underground gas storage rights to be obtained by eminent domain.[102] Similar legislation could authorize the acquisition of CO_2 sequestration rights. The Texas Underground Natural Gas Storage and Conservation Act of 1977 provides that "the storer has the right to condemn all of the underground storage area and any surface area required for the use and enjoyment of the storage facility."[103] More specifically, the Act provides as follows:

> After an order of the commission is issued approving a storage facility, a storer may condemn without further attack as to its right to condemn, any subsurface sand, stratum, or formation for the underground storage of natural gas, condemning all mineral and royalty rights as are reasonably necessary for the operation of the storage facility, subject to the limitations of this subchapter, and the storer may condemn any other interests in property that may be required, including interests in the surface estate in the sand, stratum, or formation reasonably necessary to the operation of the storage facility, provided that:
>
> (1) no part of a reservoir is subject to condemnation unless the storer has acquired by option, lease, conveyance, or other negotiated means at least 66- 2/3 percent of the ownership of minerals, including working interests, and 66- 2/3 percent of the

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[101] TEX. NAT. RES. CODE ANN. §§ 91.171–.184 (2007). This act provides that:

> *All natural gas in the stratum condemned* which is not native gas, and which is subsequently injected into storage facilities is personal property and is the property of the injector or its assigns, and in no event is the gas subject to the right of the owner of the surface of the land or of any mineral or royalty owner's interest under which the storage facilities lie, or of any person other than the injector to produce, take, reduce to possession, either by means of the law of capture or otherwise, waste, or otherwise interfere with or exercise any control over a storage facility. Upon failure, neglect, or refusal of the person to comply with this section, the storer has the right to compel compliance by injunction or by other appropriate relief by application to a court of competent jurisdiction.

Id. § 91.182 (emphasis added). Note that, by reason of the emphasized language, this statute does not address the right to injected gas that migrates beyond the stratum condemned.

[102] 15 U.S.C. § 717f (2005).

[103] TEX. NAT. RES. CODE ANN. § 91.180 (2001).

> ownership of the royalty interests, computed in relation to the surface area overlying the part of the reservoir which as found by the commission to be expected to be penetrated by displaced or injected gas;
>
> (2) no dwelling, barn, store, or other building is subject to condemnation; and
>
> (3) the right of condemnation is without prejudice to the rights of the owners or holders of other rights or interests of land to drill through the storage facility under such terms and conditions as the commission may prescribe . . . .[104]

Although the Act seems neutral on the issue of pore-space "ownership," the Act implies that both mineral and surface owners have rights in the storage strata. Under the Act, the storing party is merely authorized, not required, to condemn subsurface strata, including all mineral and royalty rights, as are reasonably necessary for the operation of the storage facility. This provision allows the storing party to protect its storage rights by condemning any rights to exploit the storage strata and its contents; however, all rights to drill through the strata are expressly preserved. Further, the storing party may condemn any rights in the surface estate in the sand, stratum, or formation reasonably necessary to the operation of the storage facility. If mineral owners owned the pore spaces, then there would be no need to condemn surface interests because the storing party could acquire the rights of reasonable use of the airspace, surface, and subsurface from the mineral owner without the need to acquire any further rights from the surface owner. As a whole the statute implies that the storing party may need to condemn the surface rights respecting the land where injection, withdrawal, monitoring, and transportation operations take place and condemn those mineral and royalty interests that may be actually damaged by storage operations.

C. Wastewater Injection Analogy

Another activity closely analogous to CO_2 sequestration is wastewater disposal. Wastewater is often disposed of by injecting it into deep subsurface formations.[105] Wastewater disposal is regulated by the Texas Commission on Environmental Quality,[106] and, in the case of waste disposal from oil and gas operations, by the Texas Railroad Commission.[107]

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[104] *Id.* at § 91.179.

[105] 46 TEX. PRACTICE SERIES, ENVTL. LAW § 26.12 (2007).

[106] TEX. WATER CODE ANN. §§ 27.001–.024 (2008).

[107] *Id.* §§ 27.031–.038. Section 37.038 provides: "The commission has jurisdiction over the injection of carbon dioxide produced by a clean coal project, to the extent authorized by federal law,

In *FPL Farming, Ltd. v. Texas Natural Resources Conservation Commission*, an unreported case, the Court of Appeals for the Third District, discussed in Section II, above, stated in dicta that a landowner who suffers encroachment of wastewater may seek damage if the plaintiff suffers actual intrusion and actual harm.[108] The state regulatory agency granted permits to a disposal company for injection wells to inject non-hazardous waste at depths between 7,350 to 8,200 feet below the surface.[109] The agency required the applicant to project how far and in what directions the waste may migrate over a 30-year period.[110] When neighboring surface owners discovered that the waste was projected to reach their subsurface strata within 10 years of injection,[111] they asserted that the agency was authorizing an impairment of their subsurface rights.[112]

The court "assumed without deciding" that the surface owners had "'existing rights' in the deep subsurface beneath their land," but noted the legal trend that "property owners do not have the right to exclude deep subsurface migration of fluids."[113] Dismissing the argument that "migration alone will impair [their] existing rights," the court held that "some measure of harm must accompany the migration for there to be impairment."[114] "[B]ecause of [the agency's] . . . expertise in the geological effects of subsurface migration of injectates," the court deferred to the agency's finding that, in this case, no existing rights would be impaired by the injection.[115] Nevertheless, at the end of its opinion, the court indicated that, if the waste did migrate and cause some measure of harm, the surface owners could seek damages from the injector.[116] In general, migration and actual harm have been difficult to prove.[117] Similarly, in the context of CO_2 sequestration, the difficulty in proving actual intrusion and actual damages is likely to impede

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into a zone that is below the base of usable quality water and that is not productive of oil, gas, or geothermal resources by a Class II injection well, or by a Class I injection well if required by federal law."

[108] FPL Farming, Ltd. v. Tex. Natural Res. Conservation Comm'n, No. 03-02-00477-CV, 2003 WL 247183, *5 (Tex. App. 2003), *no writ*.

[109] *Id.* at *1.

[110] *Id.*

[111] *Id.*

[112] *Id.* at *4.

[113] *Id.* at *3 (*citing* United States v. Causby, 328 U.S. 256, 260–61 (1946); Raymond v. Union Tex. Petroleum Corp., 697 F. Supp. 270, 274–75 (E.D. La. 1988); Chance v. BP Chems., Inc., 670 N.E.2d 985, 991–92 (Ohio 1996); Railroad Comm'n v. Manziel, 361 S.W.2d 560, 568–69 (Tex. 1962)).

[114] *FPL Farming, Ltd.*, 2003 WL 247183 at *4.

[115] *Id.*

[116] *Id.* at *5.

[117] *See, e.g.,* Mongrue v. Monsanto Co., 249 F.3d 422, 433 (5th Cir. 2001); *Chance*, 670 N.E.2d at 991–92.

trespass actions by neighboring property owners. Though a surface owner may prove ownership of the subsurface strata and perhaps an actual intrusion, proving actual damage may be difficult. In the end, as with conventional waste disposal, public interest may weigh more heavily in favor of protecting CO_2 sequestration from speculative damage claims.

Concluding Thoughts: Regarding neighboring lands, I submit that permission from neighboring landowners should not be necessary, although receiving permission from the owners of all pore spaces invaded by CO_2 would certainly be the cautious approach.[118] My view would be strengthened if Texas were to bolster its CO_2-injection regulatory law with a statute similar to the Texas voluntary unitization law.[119] Nevertheless, the weight of analogous Texas case law strongly suggests that the courts will not entertain trespass actions arising from CO_2 injection or sequestration in the absence of actual injury.

IV. APPLICATION OF LEGAL PRINCIPLES TO CO_2 STORAGE

Because EOR, hydraulic fracturing, natural gas storage, and wastewater disposal are all closely analogous to CO_2 sequestration, Texas courts are likely to issue opinions regarding CO_2 sequestration that rely on existing case law addressing these analogous activities. And because strong public-policy arguments can be made in favor of initiatives that will reduce the human CO_2 footprint, Texas courts are likely to render opinions that will encourage the development of a healthy and vibrant CO_2 sequestration industry.

The question of whether the surface estate or mineral estate owns the property interest in the pore space remains. Although the weight of law supports surface-owner title, absent a robust regulatory program to assure and protect the integrity of subsurface CO_2 reservoirs, prudent CO_2 injectors may also elect to obtain permission from mineral owners. As indicated in the prior section, the need for surface-owner permission should ordinarily be limited to permission from the surface owner of the land where the injection operations are conducted. As a practical matter, the need for mineral-owner permission regarding the lands where the injection operations are conducted, and regarding the lands nearby, depends on the likelihood of conflicting mineral operations and on the existence of a robust regulatory system protecting the integrity of the CO_2 reservoir, while still allowing mineral development to occur in a manner that does not impair that integrity.

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[118] See discussion in prior section. Of course, the operator of a carbon sequestration project might face tort liability for negligent or wasteful operations to injured parties, whether or not such parties gave permission for the operations. *Cf.* Elliff v. Texon Drilling Co., 210 S.W.2d 558, 562–63 (Tex. 1948) (holding producer liable for negligent and wasteful drilling of a gas well).

[119] *See* TEX. NAT. RES. CODE ANN. §§ 101.001–.018 (2001).

A recent adjudication by the Environmental Protection Agency's ("EPA") Environmental Appeals Board underscores why the storage permittee must gain permission to store from the proper interest holder.[120] The EPA administers the Safe Drinking Water Act by issuing permits to inject wastewater and other wastes, including CO_2. The petitioners claimed that the EPA's issuance of a permit to store CO_2 authorized a trespass onto the deep subsurface of their adjacent land.[121] The regional EPA permitting authority stated, and the board affirmed, that the permitting program "does not have authority to determine surface, mineral, or storage rights when issuing permit decisions. Issues relating to property ownership or lessee rights are legal issues between the permittee and property owners."[122] Therefore, the authority may issue permits to the storing party without considering ownership because the only factor that is relevant to the issuance of a permit is whether drinking water may be contaminated. The permit confers no property right and no right to trespass.[123] Under these regulations, a wastewater storage permit does not give the holder any property right to store CO_2 underground and does not preclude a cause of action for trespass.[124] Accordingly, the storing party must be careful to gain permission from the proper property owners—whether the mineral owner, surface owner, or both. At this point, without an affirmative ownership declaration from the Texas courts, it is advisable to gain permission from both—at least regarding the tract where the injection operations will take place.

I have suggested that a robust regulatory process could, at least in some cases, eliminate the need to seek permission from mineral owners where CO_2 is injected for sequestration independent of an EOR project and where there is little likelihood of commercially recoverable oil and gas or where the sequestration operation is unlikely to interfere with ongoing or future oil and gas operations. This suggestion assumes that the surface owner owns the pore spaces. Absent a robust regulatory process and absent clarification of the ownership question, the words of Professor Eugene Kuntz, addressing gas storage, summarize the best practice for CO_2 sequestration:

> Because the cases on the subject are few in number and are not in harmony, when a subsurface stratum is acquired for storage purposes, the grant should be taken from the person having the rights to extract the particular substance to be stored,

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[120] Core Energy, LLC, E.P.A. Envtl. Appeals Bd. Permit No. MI-137-5X25-0001, UIC Appeal No. 07-02 (Jan. 15, 2008).

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

> the surface owner and the owner of any other mineral rights. Prudence also dictates that grants be secured from mineral owners of any separate strata not acquired whose rights of access might be impaired, from owners of various surface interests, and from owners of easements or other similar interests whose rights might be impaired in some way. It should be observed that an ordinary oil and gas lease will not yield the measure of protection required for subsurface storage of gas.[125]

APPENDIX 1

Ownership of Injected CO_2 and the Nature of a CO_2 Sequestration Right

Brief comments are appropriate regarding ownership of injected CO_2 and the nature of a CO_2 sequestration right. Again, legal analogies are helpful. In *Bingaman v. Corporation Commission*, the Oklahoma Supreme Court held that the operator of an EOR unit retained the right to recover gas injected in furtherance of the unitization plan.[126] That the injector or the injector's contractor retains continuing ownership of, and hence liability for, the injected CO_2 may not be the best policy if CO_2 sequestration is to be encouraged.[127]

The more appropriate legal analogy may be to treat CO_2 similarly to the atmospheric emissions of CO_2. Under this approach, the injector or its contractor would be deemed to have intentionally abandoned the CO_2 and hence be unable

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[125] 1 EUGENE KUNTZ, OIL AND GAS § 2.6(c) (1987) (footnotes omitted).

[126] Bingaman v. Corp. Comm'n, 421 P.2d 635, 638 (Okla. 1966).

[127] In Texas, the legislature has enacted legislation providing that the Railroad Commission will assume "ownership" of carbon sequestered under a clean coal FutureGen research project. TEX. NAT. RES. CODE ANN. § 119.002 (2006). Upon commission acquisition of title:

> the owner or operator of the clean coal project is relieved from liability for any act or omission regarding the carbon dioxide injection location, and the method or means of performing carbon dioxide injection, if the injection location and method or means of injection comply with the terms of a license or permit issued by the state and applicable state law and regulations.

TEX. NAT. RES. CODE ANN. § 119.004 (2007). Similar Illinois legislation regarding a clean coal FutureGen research project provides:

> If the FutureGen Project locates at either the Tuscola or Mattoon site in the State of Illinois, then the FutureGen Alliance agrees that the Operator shall transfer and convey and the State of Illinois shall accept and receive, with no payment due from the State of Illinois, all rights, title, and interest in and to and any liabilities associated with the sequestered gas, including any current or future environmental benefits, marketing claims, tradable credits, emissions allocations or offsets (voluntary or compliance based) associated therewith, upon such gas reaching the status of post-injection, which shall be verified by the Agency or other designated State of Illinois agency. The Operator shall retain all rights, title, and interest in and

to assert continuing title to it. This approach would also suggest that a neighboring landowner would have no trespass claim for CO_2 migration, although a nuisance claim would still be possible. However, this approach might also mean that the injected CO_2 would be available to the first finder or appropriator who captured it with the lawful permission of the landowner. Of course, recapture and any assertion of ownership of sequestered CO_2 by finders or any other interference with sequestered CO_2 could be fully addressed through a robust regulatory system, which could include regulatory safeguards to assure that the CO_2 would remain sequestered or, if extracted for some use, would be properly re-sequestered. Control, access to, and use of the strata containing CO_2 could also be regulated to assure that the CO_2 remains sequestered. If necessary, eminent domain could be used to further protect the integrity of CO_2 reservoirs.

A combined abandonment, regulatory, and eminent domain approach is preferable to an approach that would assume that the injector or the injector's contractor would continue to own injected CO_2. In other words, if an injector secured the necessary regulatory permits required under a robust regulatory regime and, acting in good faith, without negligence, and relying on sound science and technology, sequestered CO_2 in a confining stratum, the injector should not be deemed to be the indefinite owner of the CO_2. Realizing that CO_2 can be deadly in concentrated form and acidic if not pure, a comprehensive regulatory program must address how the escape of sequestered CO_2 that endangers public health should be addressed, both in terms of its containment and in terms of compensating injured parties; however, that topic is beyond the scope of this paper.

Under a well-devised regulatory approach, third parties, having a legal right and legitimate need to penetrate the sequestered reservoir to gain access to deeper natural resources, could have the right to do so if regulatory safeguards were followed to prevent the escape of CO_2. So long as these other parties are not prevented from developing deeper resources, they should not have a takings claim.

> to and any liabilities associated with the pre-injection sequestered gas. The Illinois State Geological Survey of the Illinois Department of Natural Resources shall monitor, measure, and verify the permanent status of sequestered carbon dioxide and co-sequestered gases in which the State has acquired the right, title, and interest under this Section.

20 ILL. COMP. STAT. 1107/20 (2008). Governor Dave Freudenthal of Wyoming has stated that the federal government must address the long-term liability and indemnification issues regarding the risk of a catastrophic release of sequestered CO_2. Dave Freudenthal, *Carbon Sequestration: Lawyer's Cornucopia or Pandora's Box?*, 31 WYOMING LAWYER 16, 18 (February 2008). For analogous federal law limiting liability for atomic-energy projects, see 42 U.S.C. § 2012 et seq.

The nature of the CO_2 sequestration right could be classified as a license, a lease, an easement,[128] or an outright conveyance of the pore space.[129] A 50-year gas storage "lease" was classified as a lease of real property.[130] The acquisition of a gas storage right by condemnation has been classified as an easement, not the taking of a fee.[131] The classification of a gas storage right as an easement can be significant in determining the compensation required in a condemnation proceeding. If classified as an easement, damages in such an action might be measured by the diminution in value of the burdened fee estate.[132]

The following discussion of *Reese Exploration Inc. v. Williams Natural Gas Co.*,[133] taken from the supplement to the Kuntz treatise,[134] offers insightful comments regarding the nature of a gas storage right and the consequences of the classification:

> In *Reese*, . . . the Tenth Circuit Court of Appeals, applying Kansas law and based upon the granting clauses of oil and gas leases that contained a gas storage provision, held that the right to store gas is not limited to the formation initially used for storage and that no part of the rights had been abandoned. And based upon provisions of the lease assignments, the court held that another party's oil rights were expressly subject to and inferior to the gas storage rights. The case involved a suit

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[128] When a gas storage right is acquired by eminent domain in Texas, statutory law provides that, upon "abandonment" of the storage facility, the storing party must file in the county deed records an instrument stating that "all property, both mineral and surface, . . . has reverted to those who owned the property at the time of condemnation, or their heirs, successors, or assigns." TEX. NAT. RES. CODE ANN. § 91.184 (2001). The reference to abandonment suggests that the interest condemned may be an easement, but the reverter language suggests that the interest condemned may be a fee simple determinable or a lease. However, another section suggests that the interest may be voluntarily acquired by "option, lease, conveyance, or other negotiated means . . . ." *Id.* § 91.179.

[129] In Pitsenberger v. N. Natural Gas Co. Inc. 198 F. Supp. 665, 677 (S.D. Iowa 1961), the court rejected a challenge to underground gas storage agreements brought on the grounds that the storage permit transaction licensed a permanent nuisance and was therefore unconscionable. *See also* Keasler v. Natural Gas Pipeline Co., 569 F. Supp. 1180, 87–88 (E.D. Tex. 1983) (holding that such transactions are not fraudulent); Storck v. Cities Serv. Gas Co., 575 P.2d 1364, 1369 (Okla. 1977) (holding that such transactions are not fraudulent or against public policy).

[130] *Storck*, 575 P.2d 1364, 1368 (Okla. 1977), *remanded to* 634 P.2d 1319 (Okla. Civ. App. 1981).

[131] *See* Peoples Gas Light & Coke Co. v. Buckles, 182 N.E.2d 169, 176 (Ill. 1962). *See also* Ozier v. Cent. Ill. Pub. Serv. Co., 297 N.E.2d 21, 22 (Ill. App. 1973).

[132] *Peoples Gas*, 182 N.E.2d at 176.

[133] Reese Exploration Inc. v. Williams Natural Gas Co., 983 F.2d 1514 (10th Cir. 1993).

[134] 1 EUGENE KUNTZ, *supra* note 125, § 3.6(c) (Supp. 2007).

for negligence in permitting injected gas to migrate from an underground gas storage zone into overlying oil sands that were being waterflooded by the owner of the oil rights. The owner of the oil rights charged that the owner of the gas storage rights knowingly increased pressure in its storage formation even though it knew that gas was escaping and hindering secondary oil recovery efforts. The court stated that, while the oil-rights owner owed an implied duty not to interfere with the superior gas storage rights, the gas storage owner owed no corresponding duty to the oil-rights owner. Although the court intimated that the gas storage owner might be subject to an implied covenant to reasonably and prudently conduct its storage operations, the court declined to further address that question because Kansas courts had not applied the reasonable and prudent operator standard to gas storage operations and because the parties had not raised the issue. . . . In reaching its decision, the court never discussed the nature of a gas storage right. Is it like a landlord/tenant lease? If so, then abandonment of part of a gas storage right would not be recognized (*e.g.*, if a tenant who leases a 10-story building uses only the first floor, the tenant will not be found to have abandoned the other floors). Is the gas storage right similar to an oil and gas lease—valid for so long as gas is stored? If so, [partial or complete] abandonment would be possible if the lease is classified as a profit [but the element of intent to abandon is often difficult to prove]. Or is a gas storage right like a general easement? Suppose that, under a general road easement, the road is constructed so that it crosses only a small portion of the burdened land. At that point, the corridor of the easement may be defined and limited. *See generally* 2 American Law of Property § 8.66 (A. J. Casner ed. 1952) and Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement, 127 O&GR 346, 620 N.E.2d 48 (Ohio 1993) (describing a gas storage right as an easement). Thus, if a gas storage right is like an easement, the storage right might be confined to the formations historically used when the easement is first put to use. Perhaps analogies are inappropriate. Perhaps a gas storage right is sui generis. If so, then it should not be compared to other interests, including the oil and gas lease—even though the storage right itself is included in such a lease. Thus, the court's reference to oil and gas lease implied covenants does not seem helpful or appropriate. Indeed, if the gas storage owner owed no duty regarding negligence, it is difficult to see how it would have owed a duty based upon an implied covenant. However, one analogy to an oil and gas lease that does seem appropriate is the right of the lessee to make reasonable use of the surface

> subject to the modern accommodation doctrine. In other words, perhaps the gas storage right should have been construed in light of a duty to accommodate multiple uses of the property. Under an accommodation approach, the test would be whether the gas storage owner could reasonably accommodate the efforts by the owner of the oil rights to recover additional oil through waterflooding. This case points out that conflicts among various subsurface users (*e.g.*, coal miners, oil producers, and gas storage users) may not be best resolved by a formalistic application of property interest priority rules originally established without contemplation of this kind of conflict. Perhaps they would be better resolved administratively in a manner that encourages multiple land use, promotes the greatest possible economic recovery of natural resources, prevents waste, protects correlative rights, and encourages accommodation.[135]

APPENDIX 2

Selected Survey of Other Jurisdictions Regarding Pore-Space Ownership

Colorado

Colorado has no case law that expressly addresses pore-space ownership; however, one could argue that *Grynberg v. City of Northglenn*[136] supports mineral-owner title to pore spaces. In this case, the City, desirous of installing a wastewater reservoir, was required by statute to determine whether the land was suitable for a wastewater reservoir.[137] The City obtained permission from the surface owner to obtain core samples and such samples were publicly filed with the state officials. Grynberg, an unrecorded lessee of the coal rights, which were held by the State of Colorado, sued for damages to the speculative value of his coal rights. In deciding in favor of Grynberg, the court held that Grynberg, as the coal lessee, had the exclusive right to grant permission to collect core samples from the coal seams. While this case did not hold that Grynberg owned the pore spaces in the coal, such an argument is likely to be made in a case that does involve pore-space ownership. In any event, the *Grynberg* decision seems wrong. A surface owner desirous of intense surface development should have the right to take core samples to determine whether the land is suitable for the intended development. The

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[135] 1 EUGENE KUNTZ, *supra* note 125, § 2.6(c) (Supp. 2007) (citing Phillip Lear, *Multiple Mineral Development Conflicts: An Armageddon in Simultaneous Mineral Operations?*, 28 ROCKY MTN. MIN. L. INST. 79 (1982); N.D. CENT. CODE ch. 38-15, § 2.6(c) (2007)).

[136] Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987).

[137] COL. REV. STAT. § 37-87-117 (1986 Supp.).

mineral owner should not be allowed to hold the taking of core samples for ransom, which is the practical effect of the decision.[138]

In *Board of County Commr's v. Park County Sportmen's Ranch, LLP*, the Colorado Supreme Court held that the storage of water in an aquifer does not constitute a trespass against neighboring landowners where there was no physical invasion of neighboring lands by directional drilling or occupancy by recharge structures or extraction wells.[139] In addition, the court concluded that such use of an aquifer would not require the use of eminent domain or the payment of just compensation.[140]

Kansas

Kansas has not directly addressed the issue of ownership of storage rights; however, where an oil and gas lease expressly grants storage rights, such rights are considered severable from the right to produce oil and gas.[141] In other words, a lessee having storage rights can separately assign such rights to a third party.

In the gas storage context, if gas stored by a private party—as opposed to a public utility having the power of eminent domain[142]—migrates to a neighboring tract, no trespass occurs, but the neighboring landowner is free to produce and claim the gas.[143] Since the landowner is permitted to produce the migrating gas, thus actually benefitting from the gas migration, the landowner suffers no actual damage.

In *Crawford v. Hrabe*, a case dealing with trespass of water injected for EOR purposes, the Kansas Supreme Court found no actionable trespass. The facts of the case involved a lessee who used wastewater brought onto the leased premises

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[138] After remand and further appeal, Grynberg received no damages. Grynberg v. Northglenn, 829 P.2d 473 (Colo. App. 1991).

[139] Bd. of County Comm'rs v. Park County Sportsmen's Ranch, LLP, 45 P.3d 693, 710 (Colo. 2002).

[140] *Id.* at 715.

[141] Rook v. James E. Russell Petroleum, Inc., 679 P.2d 158, 166–67 (Kan. 1984).

[142] Parties having the power of eminent domain may protect their rights by securing a state certificate and by condemning the reservoir, and such parties are further protected from the rule of capture if they can prove by a preponderance of the evidence that injected gas had migrated to adjoining property or to a stratum that has not been condemned. KAN. STAT. ANN. § 55-1210 (2007). *See* Williams Natural Gas Co. v. Supra Energy, Inc., 931 P.2d 7 (Kan. 1997); Union Gas Sys., Inc. v. Carnahan, 774 P.2d 962 (Kan. 1989). For the meaning of "adjoining," see N. Natural Gas Co. v. Nash Oil & Gas, Inc., 2005 U.S. Dist. LEXIS 10181 (D. Kan. May 16, 2005) (*unreported*). If gas migrates into another stratum, further condemnation may be pursued, but landowners' damages for the pre-condemnation trespass and unjust enrichment are measured by the fair rental value of such stratum. Beck v. N. Natural Gas Co., 170 F.3d 1018 (10th Cir. 1999).

[143] Anderson v. Beech Aircraft Corp., 699 P.2d 1023, 1031 (Kan. 1985).

from elsewhere to enhance production on the plaintiffs' land.[144] The plaintiffs claimed their interests had been injured by the migration of this water throughout the premises.[145] The court surveyed other jurisdictions' treatments of subsurface trespass of wastewater, finding that the orthodox rules applied to surface trespasses do not usually apply to subsurface trespass and that, when water is injected to increase production on the lessor's land, no actionable trespass occurs.[146] The court also found that secondary recovery by injecting wastewater was practical and an efficient use of a potentially hazardous waste product. The court held that plaintiffs had no cause of action for trespass.[147]

However, in *Tidewater Oil Co. v. Jackson*, plaintiff proved actual damages, and the court held the injector of wastewater for EOR liable when the water flooded the plaintiff's oil wells. The court reasoned:

> [T]hough a water flood project in Kansas be carried on under color of public law, as a legalized nuisance or trespass, the water flooder may not conduct operations in a manner to cause substantial injury to the property of a non-assenting lessee-producer in the common reservoir, without incurring the risk of liability therefor.[148]

To establish liability, "[i]t is sufficient that the water flooding activities were intentional and the consequences foreseeable. They were actionable, even though lawfully carried on, if they caused substantial injury to the claimants."[149] Nevertheless, because the activity was lawful under a conservation agency order, the court reversed an award of punitive damages.[150]

The Kansas Supreme Court has rendered three decisions concerning personal injury and property damage arising when stored gas migrated from the underground reservoir and eventually vented at a surface location in downtown Hutchinson, Kansas. The leak culminated in a massive explosion of natural gas in the heart of the city, killing several people and destroying several businesses.[151]

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[144] Crawford v. Hrabe, 44 P.3d 442, 444 (Kan. 2002).

[145] *Id.* at 447.

[146] *Id.* at 448–50 (citing Holt v. Sw. Antioch Sand Unit, Fifth Enlarged, 292 P.2d 998 (Okla. 1955)); *Manziel*, 361 S.W.2d at 568; *Geo-Viking, Inc.*, 817 S.W.3d at 357.

[147] *Crawford*, 44 P.3d at 452–53.

[148] Tidewater Oil Co. v. Jackson, 320 F.2d 157, 163 (10th Cir. 1963).

[149] *Id.* at 164.

[150] *Id.* at 165.

[151] Hayes Sight & Sound, Inc. v. ONEOK, Inc., 136 P.3d 428, 433–34 (Kan. 2006).

The first opinion dealt with an award of negligence and punitive damages for loss suffered by a particular business. The last two opinions dealt with unsuccessful class-action suits.[152]

Kentucky

Two Kentucky cases suggest that the mineral owner may have the right to control the use of potential petroleum-bearing sands.[153] In *Central Kentucky Natural Gas Co. v. Smallwood*, the court, citing what it believed to be the English rule and without deciding ownership of the pore space, found that the mineral owner had a continuing right to use strata to produce either naturally occurring or stored gas.[154] Thus, the mineral owner controlled the right to use the strata for that purpose. This case must be read in light of *Hammonds v. Central Kentucky Natural Gas Co.*, where the court held that injected natural gas was returned to nature and thus once again subject to the rule of capture.[155] Given the reasoning of *Hammonds* and the migratory nature of gas, the mineral owner would logically own the right to produce the migrated injected gas, but that does not mean that the mineral owner would own the injection right, which, under *Hammonds*, is of questionable value, given that the injected gas was deemed abandoned and subject to the rule of capture. However, in *Smallwood v. Central Kentucky Natural Gas Co.*, as between the mineral owner and oil and gas lessee, the lessee was not allowed to extend a lease beyond its primary term through injection operations where the secondary term of the lease habendum clause required production.[156]

Some of the abandonment and rule-of-capture reasoning of *Hammonds* and both *Smallwood* cases was overruled in *Texas American Energy Corp. v. Citizens Fidelity Bank & Trust Co*:

> It is therefore the opinion of this court that, in those instances when previously extracted oil and gas is subsequently stored in underground reservoirs capable of being defined with certainty and the integrity of said reservoirs is capable of being maintained,

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[152] Gilley v. Kan. Gas Serv. Co., 169 P.3d 1064 (Kan. 2007); Smith v. Kan. Gas Serv. Co., 169 P.3d 1052 (Kan. 2007).

[153] *See* Gray-Mellon Oil Co. v. Fairchild, 292 S.W. 743, 745–46 (Ky. 1927). *But see* Rice Bros. Mineral Corp. v. Talbott, 717 S.W.2d 515, 516 (Ky. 1986) (oil and gas "ownership is limited to possessing an exclusive legal right to explore and, if oil and gas is found, to reduce that substance to possession and ownership").

[154] Cent. Ky. Natural Gas Co. v. Smallwood, 252 S.W.2d 866, 868 (Ky. 1952).

[155] Hammonds v. Cent. Ky. Natural Gas Co., 75 S.W.2d 204, 205–06 (Ky. 1934).

[156] Smallwood v. Cent. Ky. Natural Gas Co., 308 S.W.2d 439, 442–43 (Ky. 1958).

> title to such oil and gas is not lost and said minerals do not become subject to the rights of owners of surface above the storage fields.[157]

Arguably, the court rejected little of the reasoning in *Hammonds*. First, ownership of any gas that was released back to nature and that migrated to nearby lands would presumably lie with the mineral owner, not the surface owner; however, that does not mean that the mineral owner owns the pore space. Second, if the language about maintaining integrity means that the injector controls all rights of access to the gas throughout the full extent of the reservoir—the facts in *Texas American*—then little of *Hammonds* has been overruled as a practical matter because, in *Hammonds*, the injector did not have full control.

Louisiana

In *United States v. 43.42 Acres of Land*, a federal eminent domain case construing Louisiana law, the court stated, "[w]hether a state is governed by an 'ownership' or a 'non-ownership' theory of mineral rights, the mineral owner cannot be considered to have ownership of the subsurface strata containing the spaces where the minerals are found."[158] By holding that the surface owner, rather than the mineral owner, was entitled to compensation, the court effectively held that the surface owner has the right to authorize subsurface storage. In *Mississippi River Transmission Corp. v. Tabor*, the court also held that the surface owner owns the storage rights, but the court recognized that the "mineral servitude owner . . . enjoys the 'right to participate in the production of the remaining natural gas and condensate in the reservoir' . . . and must be compensated for the expropriation of this right."[159] However, in a federal condemnation case arising in Montana, compensation for native gas was denied where the native gas could be produced only because of increased pressure caused by the stored gas.[160]

The issue of subsurface trespass in Louisiana is less definitive. In *Raymond v. Union Texas Petroleum Corp.*, the plaintiffs claimed saltwater injected under adjacent lands had migrated to their subsurface property.[161] The court held that,

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[157] Tex. Am. Energy Corp. v. Citizens Fidelity Bank & Trust, 736 S.W.2d 25, 28 (Ky. 1987).

[158] U.S. v. 43.42 Acres of Land, 520 F. Supp. 1042, 1043, 1046 (W.D. La. 1981).

[159] Miss. River Transmission Corp. v. Tabor, 757 F.2d 662, 672 (5th Cir. 1985) (citing S. Natural Gas Co. v. Poland, 406 So.2d 657, 666 (La. App. 2d Cir. 1981, writ denied)). *Accord* B&J Oil & Gas v. FERC., 353 F.3d 71 (D.C. Cir. 2004) (addressing the right of the pipeline operator to expand natural gas storage reservoir into area of active oil and gas production). State law determines the parties entitled to compensation. Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement, 962 F.2d 1192 (6th Cir. 1992).

[160] Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Lease Hold in the Judith River Subterranean Geological Formation, 999 F.2d 546 (9th Cir. 1993) (unpublished, but memorandum opinion is available at 1993 WL 242979).

[161] Raymond v. Union Tx. Petroleum Corp., 697 F. Supp. 270, 271 (E.D. La. 1988).

because the state regulatory agency had issued a permit for the saltwater injection, "it is not unlawful and does not constitute a legally actionable trespass."[162] In dicta, however, the court noted that a permit does not preclude recovery for actual damages and for inconvenience.[163] Later, in *Mongrue v. Monsanto*, the Fifth Circuit affirmed the decision of the federal district court in Louisiana, finding that migrating wastewater did not cause the injecting party to be liable for a taking without just compensation.[164] The plaintiffs also asserted at the district court level that the injector had committed subsurface trespass, although this issue was not raised on appeal.[165] Nevertheless, the Fifth Circuit stated that if wastewater had migrated across property lines, "appellants may recover under a state unlawful trespass claim . . . regardless of the permit allowing for injection."[166] The Fifth Circuit affirmed *Raymond* in another case, reasoning that migration of injected wastewater is not "unlawful" if a valid regulatory permit authorizes the action.[167]

Michigan

Michigan law supports the surface owner's title to subsurface pore space. In *Department of Transportation v. Goike*, the state acquired the surface estate of a tract of land to improve a highway, leaving the former fee-simple owner with only the mineral estate.[168] The issue before the court was to determine who owned the right to store non-native gas in the subsurface pore space.[169] The court held that "the storage space, once it has been evacuated of the minerals and gas, belongs to the surface owner."[170]

In *ANR Pipeline Co. v. 60 Acres of Land*, the court, in dicta, stated that "if injected gas moves across boundaries there may be a trespass."[171] However, the court held that the migration of non-native gas to neighboring property does not give rise to a claim of inverse condemnation.[172]

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[162] *Id.* at 274.

[163] *Id.*

[164] Mongrue v. Monsanto, 249 F.3d 422 (5th Cir. 2001).

[165] Mongrue v. Monsanto, No. CIV.A. 98-2531, 1999 WL 970354 (E.D. La. 1999), *aff'd*, 249 F.3d 422 (5th Cir. 2001).

[166] *Id.* at 432 n. 15.

[167] Boudreaux v. Jefferson Island Storage & Hub, LLC, 255 F.3d 271, 274 (5th Cir. 2001).

[168] Dep't. of Transp. v. Goike, 560 N.W.2d 365, 365 (Mich. App. 1996).

[169] *Id.*

[170] *Id.*

[171] ANR Pipeline v. 60 Acres of Land, 418 F. Supp. 2d 933, 940 (W.D. Mich. 2006).

[172] *Id.* at 941.

New Mexico

In *Hartman v. Texaco Inc.*, the court held that an oil and gas operator who suffered actual damages from subsurface flooding caused by neighboring waterflooding operations has a cause of action for trespass, but the statutory right of double damages does not apply to a subsurface trespass.[173] In an earlier case, the New Mexico Supreme Court affirmed a decision of the conservation agency that found that a salt-water disposal operation would not result in salt-water migration to a nearby tract.[174] However, the court stated in dicta:

> The State of New Mexico may be said to have licensed the injection of saltwater into the disposal well; however, such license does not authorize trespass. The issuance of a license by the State does not authorize trespass or other tortious conduct by the licensee, nor does such license immunize the licensee from liability for negligence or nuisance which flows from the licensed activity. . . . In the event that an actual trespass occurs by Mobil in its injection operation, neither the Commission's decision, the district court's decision, nor this opinion would in any way prevent Snyder Ranches from seeking redress for such trespass.[175]

New York

In *International Salt Co. v. Geostow*, the court construed a conveyance of "mines" of salt to mean that the grantee held fee title to the salt and not to the excavation cavity.[176] Nevertheless, the grantee retained exclusive right to use the cavity so long as salt was not exhausted and mining operations were not abandoned.[177] The case did not involve storage or disposal activities. Rather, the case involved the salt miner's right to continue to use the mined caverns to transport salt from parts of the mine that were beneath other lands. In *Miles v. Home Gas Co.*,[178] the court held that right to store foreign gas belonged to the surface owner. Together, these two cases suggest that the surface owner has title to pore spaces, but the mineral owner has a right to use stratum for ongoing mineral operations.

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[173] Hartman v. Texaco Inc., 937 P.2d 979 (N.M. App. 1997) (construing N. MEX. STAT. § 30-14-1.1).

[174] Snyder Ranches, Inc. v. Oil Conservation Comm'n, 798 P.2d 587 (N.M. 1990).

[175] *Id.* at 590.

[176] Int'l Salt Co. v. Geostow, 878 F.2d 570, 574 (2d. Cir. 1989) (construing New York law).

[177] *Id.* at 575.

[178] Miles v. Home Gas Co., 316 N.Y.Supp.2d 908 (N.Y. Sup. Ct. App. Div. 1970).

Ohio

In *Chance v. BP Chemicals, Inc.*, the plaintiffs brought a class-action suit against BP Chemicals, claiming *inter alia* that the company had trespassed on their subsurface property rights by injecting waste fluids through injection wells and that the fluids had migrated across their property lines.[179] Relying on the holding from *Willoughby Hills v. Corrigan*,[180] the court found that "ownership rights in today's world are not as clear-cut as they were before the advent of airplanes and injection wells."[181] Though surface owners may claim to own the land from the heavens to the depths and retain all not deeded in the severance of a mineral estate, limitations exist on their rights to the subsurface.[182]

> Just as a property owner must accept some limitations on the ownership rights extending above the surface of the property, we find that there are also limitations on property owners' subsurface rights. We therefore extend the reasoning of *Willoughby Hills,* that absolute ownership of air rights is a doctrine which "has no place in the modern world," to apply as well to ownership of subsurface rights.[183]

Therefore, the court found the appellants' subsurface rights to exclude others extend only to invasions that "actually interfere with the appellants' reasonable and foreseeable use of the subsurface."[184]

From the rule that subsurface rights extend only to the owner's "reasonable and foreseeable use," the court did recognize the operator's potential liability for subsurface trespass if injected waste interfered with "reasonable and foreseeable *use*" of the subsurface, not mere title or possession.[185] In other words, the pore-space owner must suffer actual damages. Though the plaintiffs' claims were deemed too speculative, the court noted that one class member might have a valid claim because the subsurface migration of BP Chemicals' waste forced that plaintiff to abandon drilling plans.[186] Accordingly, a mineral owner may have a valid trespass

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[179] Chance v. BP Chemicals, Inc., 670 N.E.2d 985 (Ohio 1996).

[180] Willoughby Hills v. Corrigan, 278 N.E.2d 658, 664 (Ohio 1972) (citing United States v. Causby, 328 U.S. 256, 260–261 (1946)) ("[T]he doctrine of the common law, that the ownership of land extends to the periphery of the universe . . . has no place in the modern world.").

[181] *Chance*, 670 N.E.2d at 992.

[182] *Id.*

[183] *Id.*

[184] *Id.*

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

[186] *Chance*, 670 N.E.2d at 993.

claim in Ohio against a party who injects waste on neighboring lands if that waste migrates across property lines and unreasonably interferes with access to oil and gas.

Oklahoma

In Oklahoma, subsurface pore space belongs to the surface owner. In *Sunray Oil Co. v. Cortez*, the Oklahoma Supreme Court held the surface owner had the right to grant permission to inject wastewater into the subsurface, as long as there was no interference with the mineral estate's recovery of oil and gas.[187] Relying on this holding and applying Oklahoma law, a federal district court, in *Ellis v. Arkansas Louisiana Gas Co.*,[188] held that a storage company must obtain permission from the surface owner to store natural gas produced off the leased premises. The court found that the mineral deed allowed the grantee the right to *produce* oil, gas, and other minerals; therefore, the subsurface strata itself was retained by the surface estate.[189] Furthermore, the court noted the public policy interest in such storage, stating that if "it was the mineral interest owner and not the surface owner who had the power to grant storage rights, it would typically mean that hundreds of severed mineral interest owners would have to be contacted if those rights were to be obtained privately."[190] Thus, the surface owner owns the rights for both wastewater injection and gas storage.

In *Oklahoma Natural Gas Co. v. Mahan & Rowsey, Inc.*, the court implicitly concluded that the injector retains title to injected gas that migrated to other lands.[191] However, evidence showed that the gas was confined to an identifiable and well-defined formation and that the gas was distinguishable, due to helium content and lack of certain organic compounds, from native gas in the area. Under Oklahoma statutory law, a public utility may acquire underground gas storage rights by condemnation.[192] Under this statutory law, injected gas remains the property of the injector, even if the gas migrates beneath other lands, provided that the injector can prove migration and also that the injector compensates the owner of the invaded stratum.[193]

Oklahoma recognizes a cause of action for private nuisance when injected water injures another's interest in a well or leasehold, even when the water is

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[187] Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792 (Okla. 1941).

[188] Ellis v. Ark. La. Gas Co., 450 F. Supp. 412, 421 (E.D. Okla. 1978), *aff'd*, 609 F.2d 436, 439 (10th Cir. 1979).

[189] *Id.*

[190] *Id.* at 422.

[191] Ok. Natural Gas Co. v. Mahan & Rowsey, Inc., 786 F.2d 1004, 1007–07 (10th Cir. 1986).

[192] OKLA. STAT. ANN. tit. 52, §§ 36.1–36.7 (1951).

[193] OKLA. STAT. ANN. tit. 52, § 36.6.

injected for EOR purposes[194] and even if injection is authorized by the Oklahoma Corporation Commission.[195] However, the requirement of showing actual injury or recoverable damages remains. Therefore, if the waste is injected into a stratum where oil, gas, or other minerals are unrecoverable, the likelihood of showing damages decreases. In *West Edmond Salt Water Disposal Ass'n v. Rosecrans*, the Oklahoma Supreme Court found the owner of an adjacent tract had no cause of action for trespass where the defendant injected saltwater into a stratum already containing saltwater because the owner had suffered no actual damages.[196] The court found underground disposal to be the most practical solution for dealing with wastewater and reasoned "[i]f such disposal of salt water is forbidden unless oil producers first obtain the consent of all persons under whose lands it may migrate or percolate, underground disposal would be practically prohibited."[197] Nevertheless, Oklahoma recognized a cause of action when damages can be proved. In *West Edmond Hunton Lime Unit v. Lillard*, saltwater injected into a formation migrated onto adjacent land and interfered with the plaintiff's oil and gas operations.[198]

Pennsylvania

In *United States Steel Corp. v. Hoge*, the Pennsylvania Supreme Court held that methane embedded in a coal seam belonged to the owner of the coal seam.[199] Some of the court's reasoning indicates that the court regarded the coal owner as owning the coal stratum: "[A]s a general rule, subterranean gas is owned by whoever has title to the property in which the gas is resting."[200] "When a landowner conveys a portion of his property, in this instance coal, to another, it cannot thereafter be said that the property conveyed remains as part of the former's land, since title to the severed property rests solely in the grantee."[201] "The landowner, of course, has title to the property surrounding the coal, and owns such of the coalbed gas as migrates into the surrounding property."[202] Nevertheless, "the coal owner's interest in that situs [is] in the nature of an estate determinable, which reverts to the surface landowner by operation of law at some time subsequent to the removal of the coal."[203] Since the case concerned ownership of gas, it does not directly

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[194] Greyhound Leasing & Fin. Corp. v. Joiner City Unit, 444 F.2d 439 (10th Cir. 1971); Boyce v. Dundee Healdton Sand Unit, 560 P.2d 234 (Okla. Civ. App. 1975).

[195] *Greyhound*, 444 F.2d at 444–45; *Boyce*, 560 P.2d at 234.

[196] W. Edmond Salt Water Disposal Ass'n v. Rosecrans, 226 P.2d 965, 970 (Okla. 1950).

[197] *Id.* at 969.

[198] W. Edmond Hunton Lime Unit v. Lillard, 265 P.2d 730, 731 (Okla. 1954).

[199] U.S. Steel Corp. v. Hoge, 468 A.2d 1380, 1383 (Pa. 1983) (Flaherty, J., dissenting).

[200] *Id.* at 1383 (Flaherty, J., dissenting).

[201] *Id.* (Flaherty, J., dissenting).

[202] *Id.* (Flaherty, J., dissenting).

[203] *Id.* at 1384 (Flaherty, J., dissenting).

address ownership of pore spaces. Would the coal owner's property interest allow him to inject CO_2 into coal for permanent sequestration, which, as a practical matter, would convert his fee simple determinable into a fee-simple absolute?

West Virginia

In *Tate v. United States Fuel Gas Co.*, the West Virginia Supreme Court of Appeals held the surface owner had title to the subsurface space for natural gas storage, based on the language in the particular severance deed at issue.[204] The deed severed from the grant a mineral estate in "[t]he oil, gas, and brine and all minerals, except coal underlying the surface of the land."[205] The deed further provided that "minerals" includes "clay, sand, stone, or other minerals [that] may be necessary for the operation for the oil, gas and other minerals reserved and excepted" in the deed.[206] The court ruled that the owner of the surface estate held title to the subsurface, including any clay, sand, and stone, subject to the right of the mineral owner to use these substances as necessary to facilitate oil, gas, and mining operations.[207] As long as there were no recoverable minerals in the stratum at issue, the surface owner could grant storage rights in the subsurface without unreasonably encumbering the mineral owner's recovery of their property.[208] In this case, the atypical reservation was an important part of the court's analysis.

Wyoming

Wyoming has no case law addressing the ownership of pore spaces; however, Wyoming is of special interest because it has enacted legislation that declares that pore spaces are owned by the surface owner for purposes of CO_2 sequestration.[209] A separate act, addressing the regulation of CO_2 sequestration,[210] is based upon the Model Statute drafted by the Interstate Oil and Gas Compact Commission Task Force on Carbon Capture and Geologic Storage.[211]

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[204] Tate v. United States Fuel Gas Co., 71 S.E.2d 65, 71–72 (W. Va. 1952).

[205] *Id.* at 67–68.

[206] *Id.* at 68.

[207] *Id.* at 72.

[208] *Id.*

[209] 2008 Wyo. Sess. Laws ch. 29, principally codified at WYO. STAT. ANN. § 34-1-152 (2008).

[210] 2008 Wyo. Sess. Laws ch. 30, principally codified at WYO. STAT. ANN. § 30-11-313 (2008).

[211] INTERSTATE OIL AND GAS COMPACT COMM'N TASK FORCE ON CARBON CAPTURE AND GEOLOGIC STORAGE, STORAGE OF CARBON DIOXIDE IN GEOLOGIC STRUCTURES, A LEGAL AND REGULATORY GUIDE FOR STATES AND PROVINCES, APPENDIX I: MODEL STATUTE FOR GEOLOGIC STORAGE OF CARBON DIOXIDE 31–35 (2007). The Task Force has also drafted model regulations. *Id.* at APPENDIX II: MODEL GENERAL RULES AND REGULATIONS at 36–47, *available at* http://www.crossroads.odl.state.ok.us/cdm4/item_viewer.php?CISOROOT=/stgovpub&CISOPTR =3726&CISOBOX=1&REC=1.

Because no Wyoming case law has addressed pore-space ownership, the legislature's declaration of pore-space ownership should be persuasive of Wyoming law, although the Wyoming Supreme Court will likely have the last word regarding nonfederal and non-Indian lands. Neither Wyoming case law nor statutory law would determine whether federally-owned or Indian-owned mineral rights—encompassing millions of acres in Wyoming—includes ownership of pore spaces. Although no federal case law addresses pore-space ownership, limited reservations of minerals, such as the reservation of coal, is not likely to reserve pore spaces in the federal government.[212]

On the other hand, a broad reservation of minerals, such as the one under the Stock-Raising and Homestead Act of 1916 ("SRHA"),[213] might arguably reserve pore spaces because of the very broad interpretation given to such reservations by the federal courts.[214] Nevertheless, I believe that the SRHA provision requiring the reservation of "coal and other minerals" in patents, no matter how broadly defined by the federal courts, should not be construed as reserving pore spaces. In *Watt v. Western Nuclear, Inc.*, the court, in a five to four ruling, held that gravel was a "mineral."[215] Writing for the majority, Justice Marshall stated: "we interpret the mineral reservation in the Act to include substances that are mineral in character . . . , that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate."[216] This statement emphasized the extraction of substances that are mineral in character.

Nevertheless, some language in the opinion might leave open the possibility for the federal government to claim pore spaces. For example, Justice Marshall concludes:

> Finally, the conclusion that gravel is a mineral reserved to the United States in lands patented under the SRHA is buttressed

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[212] *Cf.* Amoco Prod. Co. v. So. Ute Indian Tribe, 526 U.S. 865 (1999) (holding that the reservation of coal in patents issued under the Coal Lands Acts of 1909 and 1910 did not include methane gas embedded in coal).

[213] 43 U.S.C. § 299 (West 1993).

[214] *Cf.* Watt v. W. Nuclear, Inc., 462 U.S. 36 (1983) (holding, on a vote of five to four, that the reservation of "coal and other minerals" in a patent issued under the Stock-Raising and Homestead Act of 1916 reserved gravel); United States v. Union Oil Co., 549 F.2d 1271 (9th Cir. 1977) (holding that the reservation of "coal and other minerals" in a patent issued under the Stock-Raising and Homestead Act of 1916 reserved geothermal resources on the ground that legislative history revealed that Congress intended to reserve all mineral fuel resources). *But see* BedRoc Ltd. LLC v. United States, 541 U.S. 176 (2004) (holding that the reservation of "coal and other valuable minerals" in a patent issued under the Pittman Underground Water Act of 1919 did not reserve sand and gravel); United States v. Hess, 194 F.3d 1164 (10th Cir. 1999) (vacating a ruling that the reservation of "all oil and gas, coal and other minerals" in a land exchange reserved gravel).

[215] *Watt*, 462 U.S. at 55.

[216] *Id.* at 53.

> by "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." [citations omitted] . . . In the present case this principle applies with particular force, because the legislative history of the SRHA reveals Congress' understanding that the mineral reservation would "limit the operation of this bill *strictly to the surface of the lands.*"[217]

Although this statement of legislative intent is broad enough to encompass federal ownership of subsurface pore spaces, the Congressional focus of the Act was on reserving minerals, not pore spaces. Thus, I would argue that the SRHA does not vest ownership of pore spaces in the federal government.

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[217] *Id.* at 59–60, citing legislative history in H.R.Rep. No. 35, 64th Cong., 1st Sess. 18 (1916) (emphasis in original). United States v. Union Oil Co., 549 F.2d 1271 (9th Cir. 1977) contains similarly broad language: "All of the elements of a geothermal system—magma, porous rock strata, even water itself—may be classified as "minerals." *Id.* at 1273–74. Note, however, that even this Ninth Circuit opinion is silent about the pore spaces, and the thrust of the opinion regarded geothermal resources as a mineral because of its energy potential. In Rosette Inc. v. United States, 277 F.3d 1222, 1227–29 (10th Cir. 2002) (holding that geothermal resources were minerals under the SRHA), the court summarized the holding in *Watt* as follows:

> . . . [T]o qualify as a 'mineral' under the reservation of the SRHA a substance must be 1) mineral in character, i.e. inorganic, 2) removable from the soil, 3) usable for commercial purposes, 4) and of such a character that there was no reason to suppose Congress intended it to be included in the surface estate.
>
> . . . .
>
> The question is not what Congress intended to reserve, but rather what Congress intended to give away in its grant to the landholder in the SRHA. The established rule is that land grants are construed favorably to the government and nothing passes except that which is conveyed in clear language, resolving all doubts in favor of the government.

WYOMING LAW REVIEW

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GUARDING THE VIABILITY OF COAL & COAL-FIRED POWER PLANTS: A ROAD MAP FOR WYOMING'S CRADLE TO GRAVE REGULATION OF GEOLOGIC CO_2 SEQUESTRATION

*Delissa Hayano**

I. INTRODUCTION

When Governor Dave Freudenthal signed House Bills 89 and 90 on March 4, 2008, Wyoming became the first state to adopt comprehensive geologic carbon sequestration ("GCS") legislation. Given Wyoming's position as the largest coal producing state in the nation, the haste to enact GCS legislation as part of a push for new clean coal technologies is no surprise.[1] Almost all western states have addressed GCS in some fashion—most by appointing legislative committees to study the issue—and since the enactment of legislation in Wyoming, Washington state has followed suit by passing GCS legislation and adopting rules imposing standards for carbon sequestration activities.[2]

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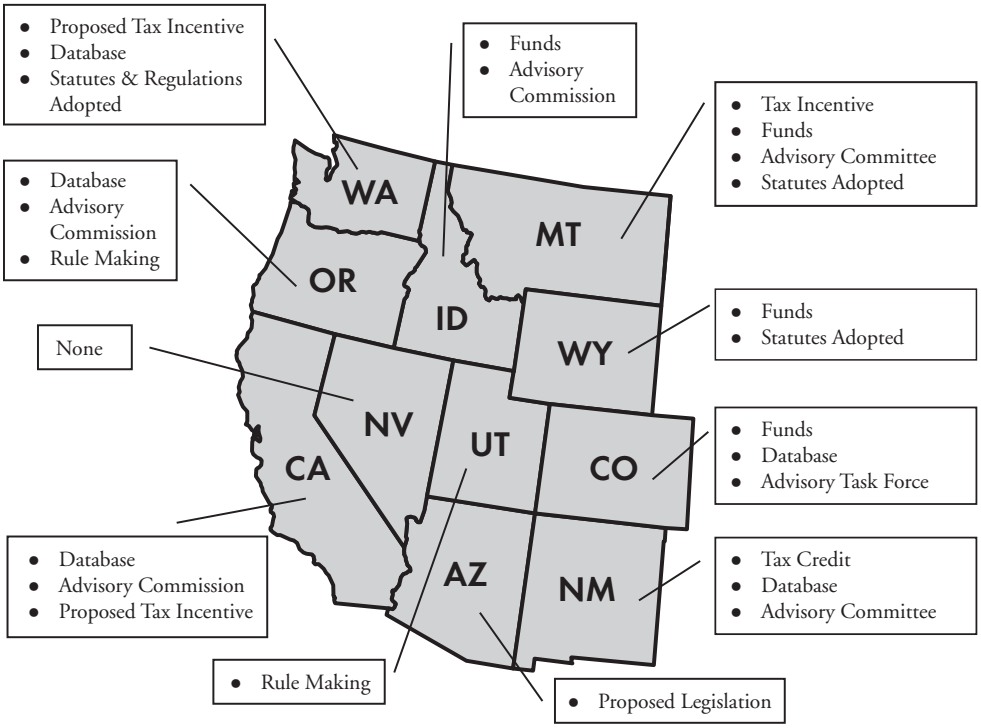
* Ms. Hayano is an associate with Holland & Hart LLP in their Cheyenne office. She is a member of the Natural Resources practice group and specializes in regulatory compliance issues and complex commercial litigation for energy and extractive industry clients. Ms. Hayano received her B.A., M.A., and J.D. from the University of Wyoming. The opinions expressed here are solely those of the author and not those of particular clients, corporations, or entities. The author would like to thank Linda Obrecht and Pauline Stevens for their assistance with this article.

[1] FRED FREME, ENERGY INFO. ADMIN., U.S. COAL SUPPLY AND DEMAND (Apr. 2008), http://www.eia.doe.gov/cneaf/coal/page/special/feature.html (last visited Nov. 4, 2008). Wyoming is the largest coal-producing state in the nation, a position it has held since 1988. *Id.* Wyoming produced 453.6 million short tons of coal in 2007. *Id.* This production was 73% of the Western Region production total. *Id.* Montana is the second largest coal-producing state in the Western Region, producing only 43.4 million short tons in 2007. *Id.* Wyoming's estimated coal reserves total 66,643 million short tons. *Id.* at http://www.eia.doe.gov/cneaf/coal/statepro/imagemap/wy4p1.html (last visited Nov. 4, 2008).

[2] *See* Figure 1 and Appendix A.

FIGURE 1

CARBON SEQUESTRATION LEGISLATION IN THE WESTERN STATES[3]



The following examines Wyoming's House Bills 89 and 90 and places Wyoming's GCS efforts in the context of the current socio-political and environmental focus on global warming. A brief summary of the provisions found in House Bills 89 and 90 precedes an analysis of the scope of GCS legislation and regulation necessary to support commercial-scale carbon dioxide ("CO_2") sequestration projects. The analysis includes a comparison of Wyoming's GCS legislation with the Interstate Oil and Gas Compact Commission's ("IOGCC's") Model Statute and Model Rules and Regulations for GCS. This backdrop reveals that Wyoming's pioneering legislation, while a step toward encouraging development of pilot-scale research projects, shares the IOGCC's naïveté in its underlying premise that a piecemeal, state-by-state approach to GCS can provide

[3] Current through September 2008. The author would like to recognize Tasha Newland, Don Quander, and Darcie Weingrad for their assistance in compiling the data contained in Figure 1 and Appendix A.

sequestration on the scale needed to address socio-political and environmental concerns about CO_2 emissions from coal-fired power plants. The costs and logistics of compressing, transporting, and sequestering CO_2 on the scale necessary to address these concerns requires a national interest parallel to that motivating the construction of equivalent-scale national infrastructure projects such as the interstate road system.

If Wyoming's state-based approach to GCS is to function as an effective first step toward the development of widespread, commercial-scale GCS projects, the statutory and regulatory framework requires a "cradle to grave" scope that encompasses capture, transportation, siting, operation, and closure. The framework must also recognize the enormous scale of GCS projects as even a pilot scale project associated with a single 1,000 megawatt ("Mw") coal-fired power plant could require acquisition of subsurface storage rights over a radius of six miles.[4] Given the scale of GCS projects and the need for a cradle to grave statutory regime, Wyoming's GCS legislation will need to further develop if it is going to position Wyoming "'to play a major role hosting clean coal generation development with CO_2 capture and sequestration.'"[5]

II. BACKGROUND

The carbon of interest in GCS is anthropogenic CO_2, which is the CO_2 emitted by the burning of fossil fuels by humans.[6] GCS is the injection of compressed CO_2 into underground geologic formations that have the ability to accept the injected CO_2 and the integrity to contain the CO_2 over time. GCS has taken the stage nationally due to concerns about global warming caused by the emission of greenhouse gases ("GHG"). According to the United Nations Intergovernmental Panel on Climate Change ("IPCC"), warming of the climate system is unequivocal and most of the increase in global temperatures since the 1950s is "very likely" due to increased anthropogenic GHG concentrations.[7] CO_2 is the most significant GHG, and nearly 57% of the 2004 emissions of CO_2 are linked to the consumption of fossil fuels.[8] Global CO_2 emissions from coal-fired power plants exceed seven billion megatons per year—"about 41% of

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[4] Steven L. Bryant, *Geologic CO_2 Storage—Can the Oil and Gas Industry Help Save the Planet?*, 54 ROCKY MTN. MIN. L. INST. 2-1, 2-8 (2008).

[5] Marcin Skomial, *Wyoming seeks to put in place CO_2 storage laws*, COAL OUTLOOK, Mar. 3, 2008, at 11 (quoting Steve Waddington, Wyoming Infrastructure Authority Executive Director).

[6] Jerry R. Fish & Thomas R. Wood, *Geologic Carbon Sequestration: Property Rights and Regulation*, 54 ROCKY MTN. MIN. L. INST. 3-1, 3-1 (2008).

[7] United Nations Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report, Summary for Policymakers* 2, 5 (Nov. 2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf [hereinafter IPCC Report].

[8] *IPCC Report, supra* note 7, at 5.

the total energy-related CO_2 emissions."[9] A study by the Massachusetts Institute of Technology declares carbon capture and sequestration "the critical enabling technology that would reduce CO_2 emissions significantly while also allowing coal to meet the world's pressing energy needs."[10] Wyoming is the nation's largest producer of coal, and one of the largest suppliers of coal to coal-fired power plants.[11] Thus coal is a pillar of Wyoming's economy, and the state's haste to enact GCS legislation and to attract GCS projects is understandable.

Because of the perceived link between coal-fired power plants, CO_2 emissions, and global warming, coal-fired power plants have landed in the socio-political hot seat. Responding in part to this increased socio-political pressure, in February 2008, three of Wall Street's seven largest financial backers of coal-fired power plant construction—Citigroup Inc., JP Morgan Chase & Co., and Morgan Stanley—announced "The Carbon Principles," climate change guidelines for financial backers of power plant construction in the United States.[12] Though the principles do not preclude financing for coal-fired power plants, "they set up a more rigorous evaluation process includ[ing] the impact of future global warming legislation on the loan risk of building new coal-fired power plants."[13]

New CO_2 regulations adopted by Washington State also require consideration of CO_2 emissions in power plant construction. All new fossil-fuel-fired generating plants producing more than 1,100 pounds of CO_2 per hour (i.e., more than a natural-gas-fired plant) are required to sequester their carbon emissions within five years of plant operation.[14] This requirement already has caused Washington regulators to reject an application for a power plant where plant backers failed to submit a plan for capturing and storing the excess CO_2 emissions and asserted that it was impossible to comply with the new state law requiring it to do so.[15] Wyoming has a vested interest in ensuring that coal-fired power plants in

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[9] James R. Katzer, *The Future of Coal-Based Power Generation,* CHEM. ENG'G PROGRESS, Mar. 2008, at S15.

[10] THE FUTURE OF COAL: OPTIONS FOR A CARBON-CONSTRAINED WORLD X (James R. Katzer et al. eds., 2007), http://web.mit.edu/coal/The_Future_of_Coal.pdf (last visited Nov. 5, 2008). *See also* Fish & Wood, *supra* note 6 at 3-2.

[11] FREME, *supra* note 1.

[12] Lisa Lee, *Banks to weigh CO_2 emissions in power lending*, REUTERS, Feb. 4, 2008, *available at* http://www.reuters.com/article/environmentNews/idUSWNAS913620080205. Citigroup Inc., JP Morgan Chase & Co, and Morgan Stanley are three of the so-called "Wall Street Seven"—the seven financial institutions in the United States financing most coal-fired power plant construction. Megan Tady, *Activists Target Big Banks for Financing Climate Change*, THE NEW STANDARD, Apr. 11, 2007, http://newstandardnews.net/content/index.cfm/ items/4650 (last visited Nov. 5, 2008).

[13] Lee, *supra* note 12.

[14] WASH. REV. CODE § 80.80.040 (2007).

[15] Erik Robinson, *State rejects proposal for coal plant in Kalama*, VANCOUVER COLUMBIAN, Nov. 28, 2007, at C1 (discussing impact of Washington's new geologic sequestration legislation on new coal-fired power plants); Daniel Jack Chasan, *Changing and challenging winds in the power*

Washington and elsewhere remain a viable source of electricity generation, and the State's GCS legislation is an attempt to ensure this future by paving the way for the development of GCS projects.

III. WYOMING HOUSE BILLS 89 & 90

A. *House Bill 89*

House Bill 89, titled "Ownership of Pore Space," created Wyoming Statute § 34-1-152 and amended Wyoming Statute § 34-1-202. With this legislation, Wyoming heeded commentators' suggestions that the determination of the ownership of subsurface pore space is an essential step in creating a statutory and regulatory framework for the development of GCS projects.[16]

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industry, CROSSCUT (Mar. 17, 2008), http://www.crosscut.com/energy-utilities/12625/Changing+and+challenging+winds+in+the+power+industry (last visited Nov. 5, 2008) (discussing Washington legislature's desire "to push development of sequestration technology, not wait until the technology was available off the shelf").

[16] Steven Bryant, *Geologic CO_2 Storage—Can the Oil & Gas Industry Help Save the Planet?*, 54 ROCKY MTN. MIN. L. INST. 2-1, 2-8 (2008); Elizabeth J. Wilson & Mark A. de Figueredo, *Geologic Carbon Dioxide Sequestration: An Analysis of Subsurface Property Law*, 36 ENVTL. L. REV. 10114, 10115 (2006); Interstate Oil & Gas Compact Commission Task Force on Carbon Capture & Geologic Storage: A Legal and Regulatory Guide for States & Provinces, Sept. 25, 2007, at 15, 22 [hereinafter *IOGCC Guide*]; Owen L. Anderson, *Geologic CO_2 Sequestration: Who Owns the Pore Space?*, 9 WYO. L. REV. 97, 98 (2009) [above]. Pore space ownership is an unsettled question in many jurisdictions and authorities are split on whether the rights to subsurface pore space remain with the surface owner when the mineral estate is severed from the surface estate or if the pore space rights transfer with the mineral estate. Authority appearing to support the surface owners' retention of the pore space rights when the mineral interest is conveyed include: Int'l Salt Co. v. Geostow, 878 F.2d 570 (2d Cir. 1989); Miss. River Transp. Corp. v. Tabor, 757 F.2d 662 (5th Cir. 1985); United States v. 43.42 Acres of Land, 520 F. Supp. 1042 (W.D. La. 1981); Ellis v. Ark. La. Gas Co., 450 F. Supp. 412, 421 (E.D. Okla. 1978), *aff'd*, 609 F.2d 436 (10th Cir. 1979); Emeny v. United States, 412 F.2d 1319 (1969); Dep't of Transp. v. Goike, 560 N.W.2d 365 (Mich. App. 1996); Miles v. Home Gas Co., 316 N.Y. Supp.2d 908 (N.Y. Sup. Ct. App. Div. 1970); Sunray Oil Co. v. Cortez Oil Co., 112 P.2d 792 (Okla. 1941); Getty Oil Co. v. Jones, 470 S.W.2d. 618 (Tex. 1971); Makar Prod. Co. v. Anderson, No. 07-99-0050-CV, 1999 WL 1260015 (Tex. App.1999) *no writ*; FLP Farming, Ltd. v. Tex. Nat. Res. Conservation Comm'n, 2003 WL 247183 (Tex. App. 2003) (mem. op., not designated for publication); Humble Oil & Ref. Co. v. West, 508 S.W.2d 812 (Tex. 1974); Tate v. United States Fuel Gas Co., 71 S.E.2d 65 (W. Va. 1952). Authority appearing to support the conveyance of pore space rights with the mineral interest conveyance include: Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987); Jilek v. Chicago, Wilmington & Franklin Coal Co., 47 N.E.2d 96 (Ill. 1943); Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., 109 P. 1002 (Kan. 1910); Grey-Mellon Oil Co. v. Fairchild, 292 S.W. 743 (Ky. 1927); Cent. Ky. Natural Gas Co. v. Smallwood, 252 S.W.2d 866 (Ky. 1952); United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983); Mapco, Inc. v. Carter, 808 S.W.2d 262 (Tex. Civ. App. 1991); HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL & GAS LAW § 222 at 335 (2007) ("[M]ineral severance should be construed as granting exclusive rights to subterranean strata for all purposes relating to minerals, whether 'native' or 'injected,' absent contrary language in the instrument severing the minerals.").

Wyoming Statute § 34-1-152 specifies that the surface owner owns the pore space underlying its lands.[17] The statute also provides that ownership of pore space is conveyed with the overlying real property unless the pore space has been previously conveyed or is excluded from the conveyance.[18] With the enactment of this legislation, pore space ownership can be conveyed in the same manner as mineral interests, but no conveyance of mineral interests shall convey the pore space unless the conveyance expressly so states.[19] In addition, legal requirements for notice to surface owners and/or mineral interest owners shall not be construed to require notice to the pore space owner unless the law specifies that such notice to the pore space owner is required.[20] The statute expressly recognizes the dominance of the mineral estate and does not alter the common law as it relates to the rights of the mineral estate.[21]

Significantly, Wyoming Statute § 34-1-152 requires that a transfer of pore space be accompanied by a description of any right to use the overlying surface estate and that the pore space owners' right to use the surface is restricted to what is described in a properly recorded instrument.[22] Transfers of pore space rights made after July 1, 2008, are null and void at the option of the surface owner if the instrument of conveyance does not include a specific description of the location of the transferred pore space.[23] If a surface description is used to describe the location of the transferred pore space, the pore space conveyance shall include all strata underlying the surface, unless specifically excluded.[24]

House Bill 89 also amended the Uniform Conservation Easement Act.[25] This amendment provides that the mineral interest owners' rights to use the surface are not limited by a conservation easement "unless the owners and lessees of the entire mineral estate and geologic sequestration right are a party to" or consent to the conservation easement.[26]

The legislature specified that all conveyances of real property on or after July 1, 2008, shall be construed in conformity with this legislation. Conveyances prior to July 1, 2008, also shall be construed in conformity with this legislation unless a party claiming an ownership interest contrary to the provisions of the legislation

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[17] WYO. STAT. ANN. § 34-1-152(a) (2008).

[18] *Id.* § 34-1-152(b).

[19] *Id.*

[20] *Id.* § 34-1-152(c).

[21] *Id.* § 34-1-152(e).

[22] WYO. STAT. ANN. § 34-1-152(f).

[23] *Id.* § 34-1-152(g).

[24] *Id.*

[25] *Id.* § 34-1-202.

[26] *Id.* § 34-1-202(e).

can establish such ownership by "a preponderance of the evidence in an action to establish ownership of such interest."[27]

B. House Bill 90

House Bill 90, entitled "Carbon capture and sequestration," created Wyoming Statute §§ 30-5-501 and 35-11-313 and amended Wyoming Statute § 35-11-103(c). Like the pore space ownership bill (HB 89), Wyoming's carbon capture and sequestration legislation recognizes the continuing dominance of the mineral estate.[28] Wyoming Statute § 30-5-501 states specifically that the carbon sequestration legislation enacted by Wyoming Statute § 35-11-313 shall not "affect the otherwise lawful right of a surface or mineral owner to drill or bore through a geologic sequestration site" so long as the drilling is conducted in conformity with rules for protecting the sequestration site against the escape of CO_2.[29]

Wyoming's GCS legislation calls for the management of CO_2 sequestration under the Underground Injection Control ("UIC") program of Part C of the United States Environmental Protection Agency's Safe Drinking Water Act ("SDWA").[30] Wyoming's legislation specifically calls for the Wyoming Department of Environmental Quality ("DEQ") to create subclasses of wells within the UIC program for the injection of CO_2 that will protect "human health, safety and the environment and allow for the permitting of the geologic sequestration of carbon dioxide."[31]

Wyoming's legislation also contains an overt attempt to attract pilot-scale GCS projects. This is found in a provision that allows the DEQ to issue "temporary time limited permits for pilot scale testing of technologies for geologic sequestration" under the department's "current rules and regulations."[32] Thus a pilot scale project can proceed at this time in Wyoming under the current UIC rules and regulations without the imposition of any GCS-specific permit or bonding requirements. This enticement presumably will be short-lived and eliminated once the DEQ adopts rules and regulations setting forth sequestration permit requirements.

The GCS legislation charges the DEQ water quality administrator with recommending permit requirements to the DEQ director.[33] The permit requirements shall include:

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[27] H.B. 89 § 3, 59th Leg. (Wyo. 2008).

[28] WYO. STAT. ANN. § 30-5-501.

[29] *Id.*

[30] *Id.* § 35-11-313(f)(i); 42 U.S.C. § 300h (2006); Wyo. Dep't Envtl. Quality, Water Quality Div. Rules & Regulations Ch. 8 & Ch. 12 (2008).

[31] WYO. STAT. ANN. § 35-11-313(f)(i).

[32] *Id.* § 35-11-313(d).

[33] *Id.* § 35-11-313(f)(ii).

(1) a description of the geology of the area to be affected by the injection of CO_2;

(2) characteristics of the injection zone and overlying and underlying aquifers;

(3) identification of existing well holes within and adjacent to the sequestration site;

(4) assessment of impacts of CO_2 injection and storage and mitigation measures;

(5) plans for environmental surveillance and excursion detection, prevention, and control programs;

(6) site and facilities description and documentation of applicants' rights to sequester CO_2 into the proposed injection zone;

(7) proof that injection wells meet the design and construction standards set forth by the Wyoming oil and gas conservation commission;[34]

(8) mechanical integrity testing plan;

(9) monitoring plan;

(10) proof of adequate bonding or financial assurance;

(11) post-closure monitoring, verification, maintenance, and mitigation;

(12) proof of applicant's notice of subsurface interests to surface owners, mineral claimants, mineral owners, lessees, and other owners of record. Such notice shall:

(a) be published once a week for four (4) weeks in a newspaper in the county where sequestration is to occur;

(b) be mailed to all surface owners, mineral claimants, mineral owners, lessees, and other owners of record that

[34] See Wyo. Oil & Gas Conservation Comm'n Rules & Regulations, Ch. 3 & Ch. 4 (2008), for injection well design and construction requirements.

> are located within one (1) mile of a proposed boundary of the sequestration site;
>
> (c) contain a statement of the DEQ requirement that immediate verbal notice be given to the DEQ of any excursion and that this verbal notice be followed by written notice to all surface owners, mineral claimants, mineral owners, lessees, and other owners of record within thirty (30) days of the discovery of the excursion;
>
> (d) contain procedures for termination or modification of any applicable UIC permit if an excursion cannot be controlled or mitigated; and
>
> (e) contain any other necessary conditions and requirements.

In addition to permit requirements, Wyoming Statute § 35-11-313 also creates a working group comprised of the state oil and gas supervisor, the state geologist, and the director of the DEQ.[35] This working group is charged with consulting on the draft permit requirements proposed by the administrator of DEQ's Water Quality Division. The working group also is tasked with developing appropriate bonding procedures and other financial assurance methods to ensure that any GCS-related reclamation or mitigation costs incurred by the state are covered.[36] The bond shall remain in place during operations as well as during the post-closure care period, and the working group is charged with recommending an appropriate duration for the post-closure care period to the joint minerals, business, and economic development and the joint judiciary interim committees on or before September 30, 2009.[37]

Wyoming Statute § 35-11-313 also articulates the role of the Wyoming Oil and Gas Conservation Commission ("WOGCC") in CO_2 injection and subsequent withdrawal. Historically, CO_2 injection for enhanced oil recovery ("EOR") has fallen within the jurisdiction of the WOGCC and this remains unchanged by the new GCS legislation.[38] However, once a program initiated as EOR ceases and becomes CO_2 storage, the injection program moves to the jurisdiction of the DEQ and is monitored under the UIC program.[39] If sequestered CO_2 is

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[35] WYO. STAT. ANN. § 35-11-313(g).

[36] *Id.*

[37] *Id.*

[38] *Id.* § 35-11-313(b); Wyo. Oil & Gas Conservation Comm'n Rules & Regulations, Ch. 4.

[39] WYO. STAT. ANN. § 35-11-313(c).

withdrawn from storage, the withdrawal program reverts back to the jurisdiction of the WOGCC so long as the extracted CO_2 is intended for commercial or industrial purposes.[40]

Though House Bill 90 evidences Wyoming's embrace of a state-based approach to GCS, Wyoming's legislation also recognizes the possible role the United States Environmental Protection Agency ("EPA") may play in GCS.[41] Wyoming's legislation requires the DEQ's director "to recommend to the [environmental quality counsel] any changes that may be required to provide consistency and equivalency between the rules or regulations promulgated [under Wyoming's GCS legislation] and any promulgated for the regulation of carbon dioxide sequestration by the" EPA.[42] Thus Wyoming is forging ahead with GCS, but at the same time remains cognizant of the possible implications of any federal program adopted by the EPA.

IV. CRADLE TO GRAVE— THE NECESSARY SCOPE OF GCS LEGISLATION & REGULATION

A "cradle to grave" statutory and regulatory framework addressing the rights, responsibilities, and liabilities associated with carbon capture and storage is a necessary precursor to commercial-scale development of GCS in Wyoming and elsewhere. This is the approach advocated by the IOGCC in its Model Statute and General Rules and Regulations prepared by the Commission's Task Force on Carbon Capture and Geologic Storage.[43] Though the cradle to grave scope is advocated by the IOGCC, its Model Statute and Rules and Regulations lack this scope as does Wyoming's current GCS legislation. In addition, both Wyoming and the IOGCC embrace a state-based approach to GCS that may lack recognition of the necessary scale of GCS. If the motivation behind GCS is to ensure the future viability of coal-generated electricity, GCS projects need to capture and sequester, or at least demonstrate the potential to capture and sequester, CO_2 in amounts

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[40] *Id.* § 35-11-313(k).

[41] *Id.* § 35-11-313(j).

[42] *Id.* On July 25, 2008, the EPA issued proposed federal requirements under the Safe Drinking Water Act's UIC program for CO_2 geologic sequestration wells. 73 Fed. Reg. 43,492 (July 25, 2008) (to be codified at 40 C.F.R. pt. 144, 146). The proposed requirements are "based on the existing UIC regulatory framework, with modifications to address the unique nature of CO_2 injection for [GCS]." *Id.* The proposal calls for the creation of a new class of wells (Class VI) for the injection of CO_2 for sequestration, but maintains Class II wells for the injection of CO_2 for enhanced oil recovery operations. *Id.* The proposed requirements also establish "minimum technical criteria for the geologic site characterization, fluid movement, area of review ("AoR") and corrective action, well construction, operation, mechanical integrity testing, monitoring, well plugging, post-injection site care, and site closure for the purposes of protecting underground sources of drinking water ("USDWs")." *Id.* The deadline for comments on the proposal was November 24, 2008. *Id.*

[43] *IOGCC Guide, supra* note 16; Fish & Wood, *supra* note 6, at 3-2.

sufficient to temper concerns about the use of coal in power generation. Some consensus has coalesced around the idea that stabilizing GHG concentrations around 550 parts per million ("ppm") by 2050 would "prevent most damaging climate change."[44] To attain this goal, the scale of GCS needs to reach 3.6 gigatons ("Gt") of CO_2 annually and enormous development is needed to sequester GCS on this scale.[45]

The cradle to grave scope of legislation and regulation necessary to foster the development of GCS on a commercial scale should address five broad and somewhat fluid categories: capture, transportation, siting, operation, and closure. Capture issues include the appropriate technology for determining and monitoring the concentrations of CO_2 in the post-combustion gas stream and the levels of other constituents that can be sequestered with the CO_2 without compromising the safety and integrity of the GCS project. Transportation includes the composition of the gas stream that can be safely transported via pipeline, as well as the location and acquisition of rights-of-way to build the necessary pipeline infrastructure to transport CO_2 from the power plant to the sequestration location. Siting issues are some of the most pressing and most contentious in the development of GCS. These issues include the applicability of eminent domain and/or unitization to the procurement of subsurface pore space on a scale sufficient to accommodate CO_2 sequestration projects, resolving multiple-use conflicts between various interest holders in and around the GCS site, and defining the characteristics of geologic formations sufficiently isolated and secure to contain injected CO_2 indefinitely. Operation issues include the mechanics of injection, such as the placement and drilling of injection and monitoring wells, as well as measurement, monitoring, and verification ("MMV") procedures. Finally, closure issues include the determination of long-term liability and adequate bonding amounts and timeframes.

The following discusses, in turn, the five categories included in a cradle to grave statutory and regulatory framework—capture, transportation, siting, operation, and closure. The coverage each category receives in the IOGCC Model Statute and Model Rules and Regulations is compared to the treatment

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[44] S. Pacala & R. Socolow, S*tabilization Wedges: Solving the Climate Problem for the Next 50 Years with Current Technologies*, 13 SCIENCE 968, 968 (2004); *see* Fish & Wood, *supra* note 6, at 3-1.

[45] Fish & Wood, *supra* note 6, at 3-1 to 3-2.

> As an example, two of the largest current GCS experiments in the North Sea (Statoil's Sleipner Project) and Alberta (EnCana's Weyburn Project) each inject about a million metric tonnes (Mt) of CO_2 per year. A single 1,000 megawatts (Mw) coal-fired electrical facility emits between 5 Mt and 8 Mt of CO_2 per year. To reach the target of sequestering 3.6 Gt of CO_2 per year, the world would need 3,600 Sleipner- or Weyburn-size projects.

Id. at 3-1.

each category receives in Wyoming's GCS statutes. This analysis will illustrate the strengths and shortcomings of Wyoming's current GCS legislation, and with the IOGCC model provisions as a guide, provide a roadmap for developing the statutory and regulatory scope necessary for the commercial-scale development of GCS in Wyoming. Where the joint judicial interim committee has drafted GCS legislation likely to be introduced in the 2009 legislative session, this information will be included in the analysis.[46]

A. Capture

In the cradle to grave scope of GCS legislation and regulation, capture issues include the requisite technology for determining and monitoring the concentrations of CO_2 in the post-combustion gas stream and the levels of other constituents that can be sequestered with the CO_2 without compromising the safety and integrity of the GCS project. The IOGCC addresses issues of capture in broad terms by defining CO_2 in the context of GCS as "anthropogenically sourced CO_2 of sufficient purity and quality as to not compromise the safety and efficiency of the reservoir to effectively contain the CO_2."[47] The IOGCC's prior report had defined CO_2 more specifically as "a direct emissions stream with purity in excess of 95 percent or a processed emission stream with commercial value."[48] The IOGCC's most recent definition is intended to accommodate evolving capture technologies and new research regarding transportation and reservoir storage capabilities.[49] Ultimately, the IOGCC advocates a determination on a state-by-state basis as to how CO_2 suitable for sequestration will be defined and acknowledges this definition will evolve with the evolution of capture technologies.

In contrast to the IOGCC, Wyoming's GCS legislation does not address capture issues even in broad terms. Neither the current legislation nor the

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[46] Fifty-ninth Wyoming Legislature Approved Interim Committee Studies: 2008 Interim, Joint Judiciary Interim Committee, http://legisweb.state.wy.us/2008/Interim/2008studies.htm. The legislature has assigned the joint judiciary interim committee the task of examining "eminent domain and forced pooling issues" and has requested the joint minerals, business, and economic development committee "consider ways to promote and provide incentives for the development of commercial clean coal facilities in Wyoming." *Id.*

[47] *IOGCC Guide, supra* note 16, at 37. The IOGCC Model Statute and Rules and Regulations are the culmination of a two-phase, five-year process. *Id.* at 3. The Phase I report was released in 2005 and examined the "technical, policy, and regulatory issues related to the safe and effective storage of CO_2 in subsurface geological media" including oil and natural gas fields, coal seams, and deep saline formations. *Id.* The Phase II report was released in September 2007 and included a Model CO_2 Statute, Model Rules and Regulations governing CO_2 geologic storage, an explanation of the various components of each, and a report addressing ownership and injection issues associated with CO_2 sequestration. *Id.*

[48] *Id.* at 10.

[49] *Id.*

regulations it requires the DEQ to implement address CO_2 concentration or the permissible level of other constituents in the captured gas stream. Capture issues are not listed as a topic of consideration in the joint judiciary interim committee study of carbon capture and sequestration. Given the committee's discussions and draft legislation to date, it does not appear likely that capture issues will appear in legislation proposed by the committee during the 2009 legislative session. Wyoming needs to address capture issues via legislation or regulation. Under the current GCS statutes, the concentration of CO_2 in the gas stream and the permissible level of other constituents could be addressed as a component of the statutory mandate to create new subclasses of wells for CO_2 sequestration under the UIC program.[50] These subclasses of wells could include constituent standards establishing the gas stream composition suitable for underground injection.

B. Transportation

At least two areas of concern exist with transportation: (1) the concentration of CO_2 and the level of other constituents in the gas stream that can be safely transported via pipeline and (2) the acquisition of rights-of-way for CO_2 pipelines. As with capture, new technologies may impact the ability to safely and cost effectively transport CO_2 over long distances. The IOGCC recognizes the role emerging technologies may play in regulation of the transportation of CO_2 for GCS and advocates a regulatory scheme that evolves to accommodate these technologies.[51] However, the IOGCC stops short of addressing either transportation of CO_2 from the site of production to the site of sequestration or acquisition of rights-of-way for CO_2 sequestration pipelines.

Like the IOGCC, Wyoming's GCS legislation does not address transportation issues associated with CO_2 sequestration. The current GCS provisions do not specify the concentration of CO_2 or the level of other constituents in the gas stream that may be transported via pipeline. In addition, the state's GCS provisions do not address acquisition of sequestration pipeline rights-of-way, and under Wyoming's current constitutional and statutory provisions, it is not clear whether a right-of-way for a CO_2 sequestration pipeline could be acquired absent the surface owner's consent. Though Wyoming Statute § 1-26-814 grants the right of eminent domain to "petroleum and other companies," the Wyoming Supreme Court has not determined whether CO_2 sequestration pipeline companies are "pipeline companies" within the meaning of the statute. And even if this question is answered in the affirmative, the sequestration pipeline company must meet the

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[50] WYO. STAT. ANN. § 35-11-313(f)(i) (2008).

[51] *IOGCC Guide, supra* note 16, at 10.

requirements of Wyoming Statute § 1-26-504(a) before a pipeline right-of-way can be condemned.[52] These requirements include:

> (i) The public interest and necessity require the project or the use of eminent domain is authorized by the Wyoming Constitution;
>
> (ii) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and
>
> (iii) The property sought to be acquired is necessary for the project.[53]

The project-specific requirements of planning for the greatest public good and least private injury as well as acquiring only the property necessary for the project necessarily will be evaluated by Wyoming's courts on a case-by-case basis, and thus an analysis of these requirements is not included here. However, the requisite showing that "[t]he public interest and necessity require the project" will remain relatively consistent across the majority of CO_2 sequestration projects and warrants further consideration. The Wyoming Supreme Court "has ascribed a broad meaning to the phrase 'public interest and necessity,' and that is consistent with the overall tenor of Wyoming's eminent domain statutes."[54] A condemnor seeking "to establish the requirement of necessity in an eminent domain proceeding . . . need only show a reasonable necessity for the project."[55] "Necessity" in this context means "'reasonably convenient or useful to the public.'"[56] The Wyoming Supreme Court specifically has "acknowledged that condemnation in aid of mineral development is in the public interest."[57] The Court has recognized "the great public interest in an imminent need for energy," and that the urgency of this need "has now become one of survival."[58] The Court "think[s] it plain beyond any doubt that the intended purpose of the [eminent domain] constitutional provision and statutes was to facilitate the development of our state's resources," and that such development serves "the common good."[59] The state's and the

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[52] See Matt Micheli & Mike Smith, *The More Things Change, the More Things Stay the Same: A Practitioner's Guide to Recent Changes to Wyoming's Eminent Domain Act*, 8 WYO. L. REV. 1 (2008) for a discussion of Wyoming's constitutional and statutory eminent domain requirements.

[53] WYO. STAT. ANN. § 1-26-504(a)(i)–(iii).

[54] Bridle Bit Ranch Co. v. Basin Electric Power Coop., 118 P.3d 996, 1014 (Wyo. 2005).

[55] Board of County Comm'rs of Johnson County v. Atter, 734 P.2d 549, 553 (Wyo. 1987).

[56] *Id.* (quoting City of Dayton v. Keys, 252 N.E.2d 655, 659 (Ohio 1969)).

[57] Micheli & Smith, *supra* note 52, at 5.

[58] Coronado Oil Co. v. Greives, 603 P.2d 406, 411 (Wyo. 1979).

[59] *Id.* at 410.

nation's need for energy, the need to reduce CO_2 emissions in order for coal to remain a viable source of energy given current socio-political and environmental concerns, and the state's economic dependence on coal all support an argument that CO_2 sequestration and related pipelines are required by the public interest and necessity.

Thus it appears that a CO_2 sequestration pipeline may satisfy the first requirement of Wyoming Statute § 1-26-504(a), and if the pipeline is planned in accordance with the greatest good and least harm and the property sought to be condemned is necessary to the project, a CO_2 sequestration pipeline company may be able to condemn a pipeline right-of-way under Wyoming's existing eminent domain provisions.

C. Siting

The issues surrounding the siting of CO_2 sequestration reservoirs are some of the most challenging for GCS legislation and regulation. These challenges include the need to determine all surface and subsurface interest owners, including interest owners in the subsurface pore space, and the need to acquire storage rights in the subsurface pore space on a scale sufficient to accommodate CO_2 sequestration projects. Siting challenges also include resolving multiple-use conflicts between various interest holders in and around the GCS site. And, of course, siting legislation and regulation must address the characteristics of storage formations that have the geologic integrity to contain injected CO_2 indefinitely.

The IOGCC adopts the position that the surface owner owns the subsurface pore space unless this ownership interest specifically has been conveyed,[60] and the IOGCC addresses the need for eminent domain and/or unitization so that storage rights can be acquired on the scale necessary for GCS.[61] The IOGCC also sets out a regulatory framework and public hearing process whereby the conflicting property rights of various interest holders in and around a proposed reservoir are settled via a Rights Amalgamation Hearing.[62] In addition, the IOGCC focuses on the need to locate GCS in geologically isolated formations capable of containing the CO_2 for an indefinite period and proposes specific regulatory requirements to ensure this need is met.[63] Like the IOGCC, Wyoming's legislature has recognized the need to address siting issues. As stated above, Wyoming Statute § 34-1-152 declares the subsurface pore space is owned by the surface owner.[64] And though the current GCS legislation does not address the use of eminent domain or

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[60] *IOGCC Guide, supra* note 16, at 22.

[61] *Id.* at 25, 27, 33.

[62] *Id.* at 42.

[63] *Id.* at 26, 28, 33, 39–40.

[64] WYO. STAT. ANN. § 34-1-152(a) (2008).

unitization to acquire the rights to the pore space, the legislature recognizes the need to address this topic and has assigned it as the first priority of the 2008 joint judiciary interim committee. Wyoming's legislature also has attempted to address conflicts between multiple interest owners in and around proposed GCS reservoirs by asserting that the dominance of the mineral estate remains unaltered by the GCS legislation.[65] Despite this declaration, further legislation or regulation may be needed to address the complex conflicts that may arise between multiple interest owners. In addition, Wyoming's current GCS legislation specifies the geologic information that must accompany a permit application and mandates the development of regulations to further clarify requirements for geologic isolation of proposed reservoirs.[66]

1. Eminent Domain/Unitization

Wyoming has resolved the question of ownership of subsurface pore space in favor of the surface owner; however, Wyoming's GCS legislation leaves unanswered how these rights are to be amalgamated so that the storage space can be acquired on a scale sufficient to allow GCS. In an effort to address this issue, the joint judiciary committee has voted to sponsor pore space unitization legislation during the 2009 legislative session.[67] This proposed legislation applies the oil and gas unitization model to the unitization of pore space, and several issues are raised by this approach.[68]

First and foremost, amalgamation of pore space for GCS by its very nature has constitutional implications. The draft unitization legislation recognizes this issue and contains a note stating:

> The approach taken in these provisions avoids allowing unit operators to take pore space for their use and then compensate the pore space owner. Such a regulatory scheme likely would raise concerns about unconstitutional takings. Instead, these provisions track the constitutionally valid approach taken in the oil and gas unitization/forced pooling statutes.[69]

The "constitutionally valid" approach taken in oil and gas unitization brings together the leases and wells overlying a producing formation so that the producing formation or large portions thereof are contained within and administered as one

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[65] *Id.* §§ 34-1-152(e), 30-5-501.

[66] *Id.* § 35-11-313(f)(ii).

[67] Joint Judiciary Interim Committee Draft Bills, Sequestration site unitization, Bill Draft 09LSO-0153.W4, http://legisweb.state.wy.us/2008/interim/Jud/bills.HTM.

[68] *Id.*

[69] *Id.*

unit.[70] The goals of oil and gas unitization are "conserving resources by preventing waste and protecting landowners' correlative rights."[71] Such an arrangement allows multiple lessees to share in the risks and costs of oil and gas production and to share in the benefits of production. Interest owners in an oil and gas unit receive compensation for, or take-in-kind, the minerals produced from the unit in proportion to their interest in the unit.[72] An interest in oil and gas is an inchoate interest in the right to produce the mineral, and this right becomes a personal property interest in the mineral only upon the mineral's production and severance.[73]

In contrast to oil and gas unitization, pore space unitization would pool real property interests in the subsurface pore space for the purpose of permanently placing CO_2 on the property, which is a process that may be more akin to the exercise of eminent domain than unitization. In addition, since nothing is produced in GCS, the source of compensation for the use of the pore space is uncertain. As currently written, the draft pore space unitization legislation suggests compensating the pore space owner with its proportionate share of any economic benefits generated by the CO_2 injector.[74] However, without further development of carbon markets and monetization of carbon credits or increased demand for CO_2 as a commodity, revenue generation via sequestration remains uncertain.

Though legislation is needed that allows for the amalgamation of pore space on a scale sufficient for GCS, application of the oil and gas unitization model to pore space unitization remains untested. The current draft of the unitization bill may raise constitutional issues by allowing a GCS developer to "force pool" an unwilling pore space owner instead of requiring the GCS developer to pursue condemnation of the pore space owner's property.[75] Though recent legislative

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[70] WILLIAMS & MEYERS, *supra* note 16, at 1109–1110 (2007); *see* Trout v. Wyo. Oil Gas Conservation Comm'n, 721 P.2d 1047, 1051 (Wyo. 1986).

[71] WILLIAMS & MEYERS, *supra* note 16 at, 1110 (2007); *see Trout*, 721 P.2d at 1051. The sequestration site unitization legislation sponsored by the joint judiciary committee redefines the oil and gas concepts of "waste" and "correlative rights" in terms of GCS. Joint Judiciary Interim Committee Draft Bills, Sequestration site unitization, Bill Draft 09LSO-0153.W4, http://legisweb.state.wy.us/2008/interim/Jud/bills.HTM. The implications of these new, GCS-specific definitions of "waste" and "correlative rights" warrant analysis beyond the scope of this article.

[72] Anschutz Corp. v. Wyo. Oil & Gas Conservation Comm'n, 923 P.2d 751, 757 (1996) ("When [in forced pooling] it is not practicable to determine reserves under each tract, it is reasonable to use surface acreage formula allocating production.").

[73] *See* State v. Pennzoil Co., 752 P.2d 975, 980 (Wyo. 1988); Denver Joint Stock Land Bank v. Dixon, 122 P.2d 842, 849 (Wyo. 1942); Boatman v. Andre, 12 P.2d 370, 374 (Wyo. 1932).

[74] Joint Judiciary Interim Committee Draft Bills, Sequestration site unitization, Bill Draft 09LSO-0153.W4, at 3, http://legisweb.state.wy.us/2008/interim/Jud/bills.HTM.

[75] Constitutional requirements for taking private property include Wyo. Const. art. 1, § 32 ("Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of

battles have dulled the legislature's appetite for amending the state's eminent domain provisions, such amendment may be necessary to allow private property to be taken for GCS projects and may prove a more certain path to encouraging the development of GCS projects in Wyoming.

2. *Multiple Use Conflicts*[76]

Wyoming's legislature has attempted to head off conflicts between multiple interest owners in and around proposed GCS reservoirs by asserting that the GCS legislation does not alter the dominance of the mineral estate.[77] Nevertheless, this declaration does not address the full range of scenarios that may arise between multiple interest owners, and any GCS siting decision may create the potential for conflict between surface and mineral interest owners and owners of sequestration rights. For example, Wyoming's GCS legislation restricts the pore space owner's right to use the surface estate to what is stated expressly in the instrument of conveyance or set out in a properly recorded instrument.[78] Given these restrictions, conflicts may arise where a party seeking to sequester CO_2 has acquired rights to the necessary pore space but not the rights to enter upon or use the surface. And despite the legislature's declaration that the mineral estate remains the dominant estate, conflicts may arise where a mineral interest is conveyed subsequent to the conveyance of a conflicting sequestration interest. The joint judiciary committee has recognized the need to further address these and other multiple use conflicts and has voted to introduce two bills during the 2009 legislative session further clarifying interest owners' respective rights and the dominance of the mineral estate.[79]

3. *Geologic Isolation*

Wyoming and the IOGCC recognize the importance of siting GCS projects in appropriate geologic formations. These formations need to be large enough to store the requisite volumes of CO_2 and geologically isolated so as to protect the rights of surrounding interest holders. The IOGCC proposes that GCS projects be required to obtain a permit before commencing injection and that

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others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.") and Wyo. Const. art. 1, § 33 ("Private property shall not be taken or damaged for public or private use without just compensation.").

[76] E-mail from Owen L. Anderson, Eugene Kuntz Chair in Oil, Gas & Natural Resources, University of Oklahoma College of Law, to Delissa Hayano, Attorney, Holland & Hart LLP (Oct. 30, 2008) (on file with author) (discussing multiple use conflicts that may need to be addressed by regulation despite the statute's assertion of the dominance of the mineral estate).

[77] WYO. STAT. ANN. §§ 34-1-152(e), 30-5-501 (2008).

[78] *Id.* § 34-1-152(f).

[79] Joint Judiciary Interim Committee Draft Bills, Bill Draft 09LSO-0154.W1, 09LSO-0310.W1, & 09LSO-0311.W1, http://legisweb.state.wy.us/2008/interim/Jud/bills.HTM.

said permit be granted only where the state regulatory agency has determined: (1) the reservoir proposed for injection is "suitable and feasible for the injection and storage of" CO_2; (2) use of the proposed storage facility "will not contaminate other formations containing fresh water or oil, gas, coal, or other commercial mineral deposits;" and (3) "the proposed storage will not unduly endanger human health and the environment and is in the public interest."[80] Though Wyoming's current GCS legislation lacks the clear directives of the IOGCC model, it does require the Water Quality Division of the DEQ to propose rules and regulations addressing the geologic fitness of reservoirs proposed for CO_2 sequestration.[81]

Geologic isolation is critical to the protection of interests in formations surrounding the CO_2 sequestration reservoir. Wyoming's GCS legislation makes clear that the mineral interest remains the dominant interest even after the enactment of the state's GCS statutes.[82] Though the dominance of the mineral estate is made clear and the mineral interest owner may drill through a CO_2 sequestration reservoir to access mineral rights below the reservoir, the question of liability for wells completed into or through the sequestration formation and abandoned prior to the acquisition of the formation for CO_2 sequestration remains unanswered. If well bores are abandoned in accordance with WOGCC rules and regulations for plugging and abandonment, will these requirements be adequate to prevent failure of the plug when the previously depleted reservoir is injected with CO_2 and brought to pressures exceeding those present in the reservoir when the wells were plugged and abandoned? If those old well plugs begin to fail at the new CO_2 reservoir pressures and communication occurs between the sequestration formation and surrounding formations or the surface, who will be liable? These are real and important questions as many of Wyoming's depleted oil and natural gas reservoirs currently eyed as likely candidates for CO_2 sequestration are pin cushions riddled with hundreds, if not thousands, of old drill holes and well bores. Though Wyoming's legislation requires that permit applications identify "all other drill holes and operating wells that exist within or adjacent to the proposed sequestration site," it stops short of requiring that the applicant verify the integrity of abandoned well bores and drill holes at the proposed reservoir pressures. It is not clear how the DEQ's Water Quality Division will evaluate the well bore and drill hole information, whether the division has the personnel to do so, and how Wyoming's courts will assign liability for any plugged and abandoned drill or well holes that fail as the result of a previously depleted reservoir being brought to the pressures associated with CO_2 injection.

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[80] *IOGCC Guide, supra* note 16, at 33.

[81] WYO. STAT. ANN. § 35-11-313(f)(ii).

[82] *Id.* §§ 30-5-501, 34-1-152(e).

D. Operation

The sections above have addressed capture, transportation, and siting issues, which are necessary prerequisites for getting a GCS project in place. A cradle to grave statutory and regulatory scope for GCS also needs to address the operation of a GCS project once it is in place and the closure of a GCS project once CO_2 injection is complete. This section will address GCS operational issues and the following section will address closure issues.

Operation issues associated with GCS include the mechanics of injection, such as the placement and drilling of injection and monitoring wells, as well as measurement, monitoring, and verification ("MMV") procedures. The IOGCC's proposed injection well requirements include practices designed to protect underground sources of drinking water and include well drilling, casing, sealing, and plugging requirements intended to prevent communication between formations used for CO_2 storage and surrounding formations and to prevent escape of CO_2 at the surface.[83] The IOGCC also includes special requirements intended to address the corrosive nature of CO_2. As part of the requirements for obtaining an operating permit, the IOGCC Task Force recommends the operator submit a CO_2 injection plan "that includes a description of mechanisms of geologic confinement" and specifically addresses how the mechanisms of confinement will "prevent migration of CO_2 beyond the proposed storage reservoir."[84]

Prevention and early detection of the migration of CO_2 are further addressed by the IOGCC's suggested MMV requirements. The MMV requirements focus on subsurface monitoring via observation wells completed within the CO_2 storage reservoir and in underlying formations and overlying formations. The IOGCC Task Force has determined that subsurface monitoring "would be the best mechanism to protect public health and safety and the environment and offer sufficient time to address the cause of . . . leakage."[85] Under the IOGGC plan, GCS operators would have to submit and obtain approval of detailed monitoring plans prior to project approval.[86]

As stated above, Wyoming's GCS program falls under the umbrella of the UIC program of the EPA's SDWA and § 404 of the Clean Water Act.[87] Like the IOGCC Model, Wyoming's legislation requires that permit applications contain

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[83] *IOGCC Guide, supra* note 16, at 39–46.

[84] *Id.* at 26.

[85] *Id.*

[86] *Id.*

[87] 42 U.S.C. § 300(h) (2006); 33 U.S.C. § 404 (2006). The IOGCC also notes the applicability of the SDWA's UIC program and the CWA § 404. *IOGCC Guide, supra* note 16, at 12, 35, 38.

"[p]lans and procedures for environmental surveillance and excursion detection, prevention and control programs."[88] But many of the specific provisions addressed by the IOGCC have been left by Wyoming's legislature to the Water Quality Division's proposed rules and regulations. Until the DEQ has proposed its rules for permit requirements, comment on Wyoming's operational and MMV provisions would be speculation. It should be noted, though, that the IOGCC's suggested operational and MMV provisions provide a solid foundation from which the legislature and the DEQ can draw as they work to develop Wyoming's GCS operation requirements.

E. Closure

The final category that needs to be addressed within the scope of GCS legislation is closure. Closure requires the determination of long-term liability and adequate bonding amounts and timeframes.[89] The IOGCC proposes a two-phase closure process divided into a Closure Period and a Post-Closure Period. The Closure Period begins after injection activities cease and injection wells have been plugged and continues for a set number of years (ten years is the time frame suggested by the IOGCC). During the ten-year Closure Period, the GCS operator maintains liability for the GCS project and is responsible for continued monitoring of the reservoir. Under the IOGCC plan, individual well bonds would be released as the injection wells are plugged, but the operational bond would remain in place until the commencement of the Post-Closure Period. Once the Post-Closure Period begins, the operational bond is released and the liability for ensuring that the GCS project remains a secure storage site transfers to the state. Funding for the state's monitoring and remediation activities would be provided by a trust fund created specifically for this purpose and funded by an injection fee imposed on GCS operators on a per ton basis.

The IOGCC recommends operational and per well performance bond requirements sufficient to cover all surface facilities as well as plugging and abandonment, injection well remediation, and subsurface observation well remediation. The IOGCC suggests applicable bond amounts should be calculated by using a standard methodology such as that used to calculate bond amounts for other regulated activities (e.g., the bond calculation methodology for coal mining under the Surface Mining Conservation and Reclamation Act).[90]

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[88] WYO. STAT. ANN. § 35-11-313(f)(ii)(E) (2008).

[89] See James A. HoltKamp, *Models Studied for Long-Term Liability Risks in CCS*, NATURAL GAS & ELECTRICITY, May 2008, at 12, for a discussion of liability risks associated with long-term sequestration of CO_2.

[90] *IOGCC Guide, supra* note 16, at 26, 35, 41.

Wyoming appears to have rejected the IOGCC's approach to long-term liability. In Wyoming, the bond shall remain in place during the operational and post-closure care period. The working group created by Wyoming Statute § 35-11-313(g) is required to propose by September 30, 2009, adequate bonding amounts and the duration of the post-closure care period. Draft legislation of the joint judiciary interim committee titled "Responsibilities of sequestration injectors and pore space owners" appears to reject the IOGCC's idea that the state assume liability for the sequestration sites after a ten-year, post-closure period. The draft bill states that "[a]ll material injected into any geologic sequestration site . . . shall be presumed to be owned by the injector . . . and all rights, benefits, burdens and liabilities of ownership shall belong to the injector."[91] Whether the working groups' proposed post-care period would temper this assertion of injector liability is not clear, but at this point it does not appear likely that Wyoming will assume liability for sequestration sites.

V. CONCLUSION

Wyoming's GCS statutes lack the cradle to grave scope necessary to support commercial-scale GCS development. Admittedly, House Bills 89 and 90 are Wyoming's first foray into GCS and the legislature has evidenced an intent to address several additional and necessary issues, but in its current state, Wyoming's GCS legislation does not adequately address capture, transportation, siting, operation, or closure issues. Given the socio-political and environmental pressure to limit CO_2 emissions from coal-fired power plants, Wyoming's state-based approach may not bring to the table sufficient sequestration capacity to assuage the current concerns about the contribution of anthropogenic CO_2 emissions to global warming. Though the IOGCC also advocates a state-based approach to GCS, consideration of the other aspects of the IOGCC's models would serve the State well as it continues to develop the State's GCS program.

Wyoming's pioneering GCS legislation, while a step toward encouraging development of pilot-scale research projects, needs to move forward carefully and thoughtfully. The future of one of Wyoming's economic pillars depends on the future viability of coal-fired power plants. Thus, Wyoming should not rush to implement a statutory and regulatory framework that does not recognize the complexity and scale of the socio-political and environmental factors present in the discourse that will determine the future viability of coal as a source of power generation.

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[91] Joint Judiciary Interim Committee Draft Bills, Responsibilities of sequestration injectors and pore space owners, Bill Draft 09LSO-0154.W1, at 2, http://legisweb.state.wy.us/2008/interim/Jud/bills.HTM.

APPENDIX A

CARBON SEQUESTRATION LEGISLATION BY STATE

Arizona

- Proposed legislation would require the adoption of rules requiring GHG emissions reporting, setting a GHG emissions limit to be achieved by 2021, and identifying emissions reduction measures including carbon sequestration.[92]

California

- Proposed tax incentives for "Clean energy technology" include reduced emissions via geologic sequestration.[93]

- By 2009, the State Board of Health and Safety shall identify opportunities for emission reduction measures from all verifiable and enforceable voluntary actions, including, but not limited to, carbon sequestration projects and best management practices.[94]

Colorado

- Grant of $50,000 to Colorado State University to research the potential of terrestrial carbon sequestration, and a grant of $50,000 to Colorado School of Mines to research the potential of geological carbon sequestration.[95]

- The Colorado Public Utilities Commission is to consider proposals by Colorado electric utilities to build one or more demonstration power plants using IGCC electric generation technology and demonstrate the capture and sequestration of a portion of its CO_2 emissions.[96]

- The Colorado Clean Energy Development Authority Act, Colorado Revised Statute §§ 40-9.7-101 to 40-9.7-123, created the Colorado Clean Energy Development Authority ("CCEDA"), which is charged with recommending whether clean coal technologies that have the potential for substantial sequestration of carbon emissions should be considered clean energy projects that the CCEDA may finance, refinance, or otherwise support, and, if so, the nature and extent of any restrictions, including, but not limited to, specific

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[92] H.B. 2542, 48th Leg., 2d Reg. Sess. (Az. 2008).

[93] S.B. 1484, 2007–2008 Sess. (Cal. 2008).

[94] CAL. HEALTH & SAFETY CODE §§ 38560–38565 (2006).

[95] COLO. REV. STAT. § 25-1-1303 (2006).

[96] *Id.* § 40-2-123.

CO_2 emissions sequestration requirements that such projects should satisfy as a prerequisite to authority financing, refinancing, or other support.[97]

Idaho

- Idaho has established a Carbon Sequestration Assessment Fund.[98]
- The Idaho Carbon Sequestration Advisory Committee may: (1) encourage production of educational and advisory materials regarding carbon sequestration; (2) identify and recommend areas of research needed to better understand and quantify the processes of carbon sequestration on agricultural lands; and (3) review carbon sequestration programs of other states.[99]

Montana

- The "Clean and Green" Energy bill was approved to provide tax incentives for equipment that sequesters carbon.[100]
- Montana has created the Big Sky Sequestration Partnership, led by Montana State University, which combines state-funded study of storage areas, storage standards, and similar issues, as part of one of DOE's seven approved regional partnerships. In 2007-2008, Montana's Environmental Quality Council studied the issue of carbon sequestration.[101]
- The Governor's Climate Change Advisory Committee completed inventory of GHG sources (primarily CO_2) in Montana. In November 2007, the Committee submitted a general report with fifty-four policy recommendations that are designed to help reduce Montana's emissions of GHGs to 1990 levels by the year 2020.[102]
- Montana Public Service Commission may not approve a utility company's acquisition of an equity interest in a coal-fired power plant constructed after January 1, 2007, unless the facility captures and sequesters a minimum of 50% of the CO_2 produced, either on- or off-site.[103]

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[97] *Id.* § 40-9.7-106.

[98] IDAHO CODE ANN. § 22-5206 (2003).

[99] *Id.* § 22-5203.

[100] MONT. CODE ANN. §§ 15-6-158, 15-24-3111 (2007).

[101] Sonja Nowakowski, *Carbon Sequestration Study: An analysis of geological and terrestrial carbon sequestration regulatory and policy issues*, Oct. 2008, http://leg.mt.gov/content/Publications/committees/interim/2007_2008/ 2008carbonsequestration.pdf.

[102] *Id.*

[103] MONT. CODE ANN. § 69-8-421.

- Bills drafted, but not yet introduced, include an interim study of geologic carbon sequestration and protection and compensation for surface owners of land overlying pore space that may be used for storage of CO_2.[104]

Nevada

- None.

New Mexico

- Tax credits approved for certain coal-fired power plants that employ carbon capture and sequestration.[105]

- The New Mexico Public Utilities Commission shall consider appropriate performance-based financial or other incentives to encourage public utilities to develop and construct clean energy projects.[106]

- Refineries, certain electrical generating units, and cement manufacturing facilities are required to inventory and report CO_2, and all GHS emissions are subject to voluntary reporting.[107]

- A Climate Action Team was formed pursuant to Executive Order ("EO") 2006-69. The team members include representatives from nine agencies. The team advises the governor on agency compliance with mandates of the EO. New Mexico Energy, Minerals, and Natural Resources Department ("EMNRD") fulfilled its EO mandate by working with a stakeholder group to explore and identify statutory and regulatory requirements needed to sequester CO_2. The EMNRD report was issued to the team and the Governor on December 1, 2007.[108]

Oregon

- Oregon Global Warming Commission will evaluate methods for carbon sequestration.[109]

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[104] *See* Energy and Telecommunications Interim Committee Draft Bills, Bill Draft LC4003, http://leg.mt.gov/content/committees/interim/2007_2008/energy_telecom/assigned_studies/co2page/lc4003.pdf.; Energy and Telecommunications Interim Committee Draft Bills, Bill Draft LC4002, http://leg.mt.gov/content/committees/interim/2007_2008/energy_telecom/assigned_studies/co2page/lc4002.pdf.

[105] N.M. STAT. ANN. § 7-9G-2 (2007).

[106] *Id.* § 62-6-28.

[107] N.M. CODE R. § 20.2.87.1–20.2.87.202 (2008).

[108] N.M. Exec. Order No. 2006-69 (Dec. 28, 2006).

[109] OR. REV. STAT. § 468A.250 (2007).

- Energy Facility Siting Council has adopted rules relating to CO_2 offset projects, including carbon sequestration projects.[110]

Utah

- Relevant state agencies are required to submit rules concerning geologic sequestration to the legislature by January 1, 2011, with a progress report on July 1, 2009.[111]

Washington

- A CO_2 mitigation program is established for electric generation facilities.[112]
- The governor shall develop policy recommendations for the reduction of GHG emissions and present to the legislature. These recommendations shall include carbon sequestration options.[113]
- Legislation identifies the requirements for Class V wells used to inject CO_2 for permanent geologic sequestration.[114]

Wyoming

- Wyoming is the first state to pass geologic sequestration legislation. The sequestration program is administered by the Wyoming Department of Environmental Quality.[115]
- The 2008 Wyoming Legislature appropriated $250,000 to fund the working group mandated by Wyoming Statute § 35-11-313 to develop bonding procedures for geologic sequestration projects.[116]
- On December 5, 2008, the joint judiciary interim committee voted to sponsor four GCS bills in the 2009 legislative session addressing unitization of pore space, injector liability for CO_2, and dominance of the mineral estate.[117]

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[110] *See* OR. ADMIN. R. CH. 345 (2007).

[111] UTAH CODE ANN. § 54-17-701 (2008).

[112] WASH. REV. CODE § 80.70.010–80.70.070 (2008).

[113] S.B. 6001, 60th Leg., 2007 Reg. Sess., 2007 Wash. Sess. Laws 1.

[114] WASH. ADMIN. CODE § 173-218-115 (2008).

[115] WYO. STAT. ANN. § 34-1-152 (2008) ("Ownership of pore spaces underlying surfaces"); *id.* § 30-5-501 ("Oil & gas activities at geologic sequestration sites"); *id.* § 35-11-313 ("Carbon sequestration, permit requirements").

[116] WYO. STAT. ANN. § 35-11-313.

[117] Joint Judiciary Interim Committee Draft Bills, Bill Draft 09LSO-0153.W4, 09LSO-0154.W1, 09LSO-0310.W1, & 09LSO-0311.W1, http://legisweb.state.wy.us/2008/interim/Jud/bills.HTM.

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WYOMING LAW DIVISION

REPORT TO THE WYOMING STATE BAR

*Barton R. Voigt, Chief Justice**

September 12, 2008

I am pleased to appear before you again to update the Bar on the past year's happenings in Wyoming's court system. I won't bore you with case load statistics, but will comment only that all of our court levels seem to see a slow but steady growth in that regard. The mineral industry boom has created particular stress in a few areas, with Sweetwater County being a prime example. We have begun discussions there that we hope will result in a new courthouse and at least one new judicial position.

Speaking of judges, I guess I should have begun this message by mentioning the retirement of long-time Fifth Judicial District Court Judge Gary P. Hartman. Judge Hartman was on the bench for 25 years. Although he will be sorely missed in the judiciary, Judge Hartman has not exactly retired. Governor Freudenthal has hired him as a special advisor on juvenile issues. We wish him well in that endeavor, just as we wish Judge Skar well in his attempt to fill Judge Hartman's shoes up in the Big Horn Basin. The Board of Judicial Policy and Administration and the Supreme Court, after studying the case loads in the four counties of the Fifth Judicial Circuit, determined that Judge Skar's replacement should reside in Washakie County, which is centrally located between Hot Springs County and Big Horn County, and has both the best court facilities and the largest caseload. Judge Waters will remain in Park County.

The retirement bug also struck in Laramie County, where District Judge Nick Kalokathis hung up his robe. Judge Kalokathis has been a fixture in Wyoming's judiciary for two decades and, like Judge Hartman, will be greatly missed. Judge Kalokathis quietly provided intellectual leadership to the judicial branch for all the years he was on the bench. While the void left by his departure will be felt for a while, we expect great things from his replacement, Judge Michael K. Davis, whose appointment was greeted by universal approbation.

Another change in the district bench was yesterday's appointment by the governor of Marv Tyler as district judge in Sublette County. That position was created during the last session of the legislature in response to the expanding work load in the Ninth Judicial District. The boom in the Pinedale area has increased

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* Barton R. Voigt was raised in Thermopolis, Wyoming. He obtained a B.A. and M.A. in American History, as well as a J.D., at the University of Wyoming. He practiced law in his home town for ten years, serving as Hot Springs County and Prosecuting Attorney for two terms. After two years as a county judge in Gillette, he was a district judge in Douglas for eight years. He was appointed to the Supreme Court on March 29, 2001, and became Chief Justice on July 1, 2006.

the work load to such an extent that it was no longer feasible for the judges in Jackson and Lander to provide sufficient coverage by periodic travel. We are hopeful that Judge Tyler will also be able to help out in Green River, and he will be the logical person to cover conflict cases in Afton. Please congratulate soon-to-be Judge Tyler the next time you see him.

Skipping next to the remodeling of the Supreme Court Building, I am pleased to report that the work is, relatively speaking, still on schedule. We expect to move back in within a month. We are confident that all who see our new facility—especially the courtroom—will be well pleased with the result. We are confident that the stateliness and expanse of the courtroom will produce even better oral arguments than the good ones to which we have become accustomed.

As you all know, a good part of the Court's energy and attention of late has been directed toward information technology. Within the past year, we have completed the installation of an electronic case management system in the Supreme Court and electronic filing of briefs is now required for both criminal and civil appeals. The trial courts will not be far behind. We are also working with law enforcement across the state in developing an electronic citation system that will allow electronic data entry into both law enforcement and judicial systems. In a somewhat related effort, we have obtained the agreement of the Sheriff's and Chief's Association, and the Wyoming Association of Municipalities to consider implementing a uniform municipal criminal code for the purpose of enhancing data transfer among all interested agencies. And finally, we will be asking the legislature in January to fund a new computer system for the Wyoming State Bar, to better communication between the Bar and the Court.

There are lots of other things going on in the judiciary, but I will mention only two more projects. Last year, the legislature established a Court Security Commission, whose mission is to study all of Wyoming's courthouses and to identify what must be done to make them safe for judges, staff members, attorneys and litigants, and the public. As part of that effort, the Supreme Court also sponsored six sessions of security training for court personnel. These sessions, put on by the National Center for State Courts, were attended by over 200 judges, clerks, court reporters, administrative assistants, and court security officers.

Lastly, I will mention another new committee project, this one being created by the Board of Judicial Policy and Administration. The judicial branch has never had a formal policy regarding public access to court records. Individual clerks have been left to guess as to what may or may not be a public record, and individual judges and clerks have developed their own policies as to what to make available to the public. The development of electronic records has brought more attention to this issue, as more and more demands for records are received. In response, the BJPA created an Access to Court Records committee whose membership includes not just judges and clerks, but representatives from the county attorney's

association and from the attorney general's office. We had our first meeting in late August and expect soon to have the outline of a policy ready for review by the BJPA.

I have not mentioned all of our endeavors, but I hope I hit the major ones. Please stop by the Supreme Court Building any time after about mid-October and take a look at what we have done with the place. We are proud of it, and we want the citizens of Wyoming also to be proud of it.

Thank you.

CASE NOTE

CRIMINAL LAW—The Road Not Taken: Parameters of the Speedy Trial Right and How Due Process Can Limit Prosecutorial Delay; *Humphrey v. State*, 185 P.3d 1236 (Wyo. 2008).

*Justin Daraie**

Introduction

The murder of Jack Humphrey occurred early morning on November 22, 1977.[1] The events surrounding his death led police to identify his wife, Rita Humphrey, as the prime suspect.[2] The State of Wyoming subsequently indicted Humphrey for first-degree murder on April 11, 1980.[3] Incriminating evidence included an adulterous affair between Humphrey and Ron Akers, which continued soon after the death of Jack Humphrey.[4] Overdue bills, bad checks, and unaccounted-for withdrawals additionally strained the Humphreys' relationship.[5] Police found Humphrey's custom-made rifle and a shell casing in the snow outside her home where the victim was shot.[6] This discovery, along with a gunshot-residue analysis revealing gunpowder on her left hand, implicated Humphrey.[7] The victim's sister, Bonnie Humphrey, approached Humphrey at the police station the morning of the murder, and Humphrey allegedly hid her face and cried: "God, what have I done?"[8]

Following an April 11, 1980 indictment, Humphrey applied for a preliminary hearing and waived her right to a speedy trial by agreeing to a hearing date of June 23, 1980.[9] Despite the affair, gunpowder residue, and other suggestive evidence, the preliminary hearing resulted in the dismissal of the murder charges due to lack of probable cause.[10] Twenty-four years later, the State recharged Humphrey for first-degree murder on March 5, 2004.[11] Humphrey contended the victim's

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* Candidate for J.D., University of Wyoming College of Law, 2010. I am grateful to my parents for all of their support and guidance over the years.

[1] Humphrey v. State (*Humphrey II*), 185 P.3d 1236, 1241 (Wyo. 2008).

[2] *Id.* at 1242.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 1241.

[6] *Humphrey II*, 185 P.3d at 1241.

[7] *Id.* at 1242.

[8] *Id.* at 1241–42.

[9] *Id.* at 1242.

[10] *Id.* (stating the county court formally dismissed the charges on August 22, 1980).

[11] *Humphrey II*, 185 P.3d at 1242.

sister, the newly elected mayor of Evansville, Wyoming, abused her appointment by compelling police to reopen Humphrey's case and press charges.[12]

In response to the twenty-four year delay preceding these renewed charges, Humphrey challenged her indictment on the grounds of a constitutional, speedy trial violation.[13] She argued a prejudiced defense, and the Natrona County District Court agreed with this claim.[14] The district court found that the twenty-four year delay between indictments led to the unavailability of evidence, which significantly damaged Humphrey's defense and required case dismissal.[15] Missing evidence included the attorney files used in Humphrey's original defense and the records from the 1980 preliminary hearing.[16] Humphrey valued this evidence since her defense at the 1980 hearing resulted in dismissal of her case.[17]

However, the State appealed and the Wyoming Supreme Court held that the district court misapplied the speedy trial analysis, and remanded the case for a new trial.[18] At trial, Humphrey continued to assert her procedural rights to a speedy trial and due process, but the district court overruled these objections.[19] Ultimately, a jury convicted Humphrey of second-degree murder.[20] For a second time this case received appellate review.[21] The Wyoming Supreme Court, in *Humphrey II*, declined to find either a speedy trial or due process violation and affirmed Humphrey's conviction.[22]

This case note discusses the scope of one's speedy trial right and its relationship to the law of pre-charge delay.[23] The right to a speedy trial and due process both serve as procedural safeguards, but they address different aspects of the criminal process which, as the case history shows, can confuse practitioners.[24] Beyond

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[12] *Id.* at 1247.

[13] *Id.* at 1242.

[14] *Id.* (claiming the twenty-four year delay between her 1980 and 2004 prejudiced her defense since exculpatory evidence was no longer available for rebutting the State's evidence).

[15] *Id.* at 1242, 1246 n.6 (noting the Natrona County District Court dismissed Humphrey's criminal charges in 2004 because of unobtainable evidence and witnesses).

[16] *Humphrey II*, 185 P.3d at 1248.

[17] *Id.*

[18] *Id.* at 1242–43 (citing to Humphrey v. State (*Humphrey I*), 120 P.3d 1027 (Wyo. 2005)).

[19] *Id.* at 1243 (declining to find either a speedy trial violation or a violation of due process).

[20] *Id.* (Humphrey's trial began March 13, 2006 and concluded March 24, 2006).

[21] *Humphrey II*, 185 P.3d at 1243. Humphrey appealed her conviction. *Id.*

[22] *Id.* at 1246–47 (concluding the reasons for delay between Humphrey's 2005 indictment and 2006 trial outweighed alleged prejudice, and the defendant failed to prove substantial prejudice caused by intentional misconduct by the prosecution).

[23] *See infra* notes 26–129 and accompanying text.

[24] *Humphrey I*, 120 P.3d at 1029–30 (finding both the district court and the defendant incorrectly believed that one's speedy trial right continues between dismissal of charges and re-indictment).

clarifying when the speedy trial right activates, this note seeks to explain the potential of due process as a guard against harmful delays in criminal prosecutions.[25]

BACKGROUND

Humphrey challenged the renewed murder charge against her on constitutional grounds.[26] Declining to hold the delays in *Humphrey II* as constitutional violations, the Wyoming Supreme Court applied principles and law promulgated by a line of United States Supreme Court cases.[27] Consequently, an examination of these United States Supreme Court cases explains the progression of speedy trial and due process law, and illuminates the court's analysis of *Humphrey II*.[28] The Speedy Trial Clause and Due Process Clause provide distinguishable protections against prosecutorial delay.[29] Therefore, this section will explain the parameters of the Speedy Trial Clause, and then discuss how due process limits prosecutorial delay.[30]

The Right to a Speedy Trial

The Sixth Amendment to the United States Constitution guarantees the right to a speedy trial, which is considered one of our most basic rights.[31] Wyoming's Constitution and Code of Criminal Procedure contain similar guarantees.[32] In Wyoming, a defendant can challenge pre-trial delay either by demonstrating the State's failure to adhere to Wyoming Rule of Criminal Procedure § 48(b), or by alleging deprivation of the constitutional right to a speedy trial.[33] This section will focus on the application of the constitutional objection to a speedy trial violation.[34]

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[25] *See infra* notes 171–240 and accompanying text (urging the Wyoming Supreme Court to adopt a due process analysis that mimics speedy trial analyses to better ensure fairness in criminal trials).

[26] *Humphrey II*, 185 P.3d at 1241, 1243–49 (asserting a violation of the Speedy Trial and Due Process clauses of the United States Constitution).

[27] *Id.*

[28] *See infra* notes 31–170 and accompanying text.

[29] *See infra* notes 96–97 and accompanying text (discussing the limits of the speedy trial right).

[30] *See infra* notes 31–129 and accompanying text.

[31] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."); *see* United States v. Lovasco, 431 U.S. 783, 800 (1977) (Stevens, J., dissenting) (explaining the presence of speedy trial notions since the Magna Carta).

[32] WYO. CONST. art. 1 § 10 ("In all criminal prosecutions the accused shall have the right . . . to a speedy trial."); WYO. R. CR. P. 48(b)(5) ("Any criminal case not tried or continued as provided in this rule shall be dismissed 180 days after arraignment.").

[33] *See Humphrey II*, 185 P.3d at 1243 (evaluating both).

[34] *See infra* notes 35–95 and accompanying text.

Despite the early existence of the speedy trial right in American law, the scope of this constitutional right lacked a full assessment until the United States Supreme Court heard *Barker v. Wingo* in 1972.[35] This case involved the murder of an elderly couple, and the prosecutor suspected a man named Willie Barker.[36] To bolster its case, the State repeatedly postponed trial in order to extract incriminating testimony from Barker's accomplice, pushing the trial back almost five years.[37] After spending ten months in prison, Barker posted bond and remained free until his trial, at which time the jury convicted him of murder.[38]

In response to Barker's contention that the government denied him a speedy trial, the United States Supreme Court created a test to define the concept of "speedy."[39] The Court acknowledged the myriad of interests involved when bringing an accused to trial.[40] One such interest involves the impact to an accused's defense resulting from a delay between arrest and trial.[41] Moreover, this type of delay can negatively affect a criminal's rehabilitation, especially when a defendant remains incarcerated.[42]

In addition, Barker's ability to post bond and spend most of his accused life in the community exemplifies how delay provides a criminal with the chance to do more harm.[43] Long delays may also entice accused individuals to "jump bail," and when unable to post bond, the problem of overcrowded jails arises.[44] Overpopulation in prisons can lead to rioting, and longer jail terms increase the overall price of detaining an individual.[45] In addition, a swift and fair proceeding also furthers society's interest in bringing an accused to trial.[46] A congested docket allows defendants to offer guilty pleas in exchange for lesser offenses, which does not comport with society's retributive values.[47]

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[35] 407 U.S. 514, 515–16 (1972).

[36] *Id.* at 516.

[37] *Id.* at 516, 518.

[38] *Id.* at 517–18.

[39] *Id.* at 529–30.

[40] *Barker*, 407 U.S. at 529–36.

[41] *Id.* at 521 (expressing concern with lost evidence, faded memories, and missing witnesses).

[42] *Id.* at 520 n.10, 12 (citations omitted).

[43] *Id.* at 519.

[44] *Id.* at 520.

[45] *Barker*, 407 U.S. at 520–21; *see generally* James J. Stephan, U.S. Dep't of Justice, State Prison Expenditures, 2001 1 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf (finding average state and Federal costs of housing one inmate equaled $22,650 per year and $22,632 per year, respectively).

[46] *Barker*, 407 U.S. at 519–20 (citations omitted).

[47] *Id.* (citations omitted).

Based on these legitimate concerns, the United States Supreme Court in *Barker* held a prosecutor has an affirmative duty to bring an accused to trial, and to do so in a manner that upholds due process.[48] Ultimately, the Court held the best way to ensure due process was to balance four factors: the length of delay, reasons for such delay, whether the defendant asserted his or her right to a speedy trial, and the level of prejudice affecting the defendant.[49] Adopting a multi-faceted test allows courts to carefully assign a value to each factor based on the circumstances, in relation to the others, as no one factor is dispositive.[50] The virtue of carefully considering all parties' interests led the majority of courts nationwide to accept and apply *Barker's* factor test.[51]

Factor One: The Length of Delay

The first factor relates to the promptness of bringing a defendant to trial, but also serves as a threshold question, necessary to answer before a court must engage in a full speedy trial analysis.[52] If a defendant can point to a lengthy delay, the circumstances will imply prejudice to the defendant and warrant further inquiry into the harms of the delay.[53] Furthermore, this factor establishes the time frame during which prejudice can result.[54] A court will more likely find a speedy trial violation if the pre-trial delay is significant, because ongoing delays intensify the degree of prejudice presumed to harm a defendant.[55] Therefore, when the speedy trial clock begins has significant implications for the total analysis.[56]

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[48] *Id.* at 527 (citing Dickey v. Florida, 398 U.S. 30, 37–38 (1970) and Hodges v. United States, 408 F.2d 543, 551 (8th Cir. 1969)).

[49] *Id.* at 530 (rejecting alternative methods of discerning a speedy trial violation, including a fixed-time and demand-waiver analysis).

[50] *Id.* at 533; Warner v. State, 28 P.3d 21, 26 (Wyo. 2001) (noting the analysis asks whether a delay prior to trial unreasonably, and substantially, impairs an accused's right to fair procedure).

[51] *E.g.*, United States v. Yehling, 456 F.3d 1236, 1243 (10th Cir. 2006) (citing to *Barker v. Wingo* and applying the balancing test set forth therein); United States v. Trueber, 238 F.3d 79, 87 (1st Cir. 2001) (same); Moody v. Corsentino, 843 P.2d 1355, 1363 (Colo. 1993) (same); State v. Trafny, 799 P.2d 704, 706 (Utah 1990) (same).

[52] *Barker*, 407 U.S. at 521, 530 ("Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.").

[53] Doggett v. United States, 505 U.S. 647, 652 n.1 (1992) (acknowledging that post-accusation delays approaching one year will lead most courts to consider the threshold met); United States v. Loud Hawk, 474 U.S. 302, 314 (1986) (analyzing a 90-month delay); *Warner*, 28 P.3d at 26 (analyzing a 658-day delay); Sisneros v. State, 121 P.3d 790, 797 (Wyo. 2005) (performing a speedy trial analysis based on a 349-day delay); Strandlien v. State, 156 P.3d 986, 990 (Wyo. 2007) (analyzing a 762-day delay).

[54] *See Barker*, 407 U.S. at 532 (implying a court must only consider prejudice that occurs *during* the post-charge delay).

[55] *E.g.*, *Doggett*, 505 U.S. at 656 (noting the degree of presumed prejudice increases with the passage of time); *accord* United States v. Batie, 433 F.3d 1287, 1290 (10th Cir. 2006).

[56] *See supra* notes 53–55 and accompanying text for a discussion of how the length of delay affects the total analysis.

The United States Supreme Court in *United States v. Marion* sought to clarify when one's speedy trial right activates.[57] The *Marion* Court noted the historic policies for constitutionally protecting an accused's speedy trial interest: long, oppressive confinement without explanation; the degree of personal anxiety accompanied by such incarceration; and the notion that an accused will lose the ability to adequately establish a defense while in prison.[58] The Court held that lengthy incarceration, corresponding anxiety, and prejudice to one's defense were interests implicated only *after* arrest or the filing of formal charges.[59] Therefore, only the formal charging or arrest of an accused triggers the speedy trial right.[60]

A decade later, the United States Supreme Court heard another significant case and further explained the scope of the speedy trial right.[61] The Court in *United States v. MacDonald* held delay between the dismissal of charges and re-indictment should be assessed under the Due Process Clause, not the speedy trial right.[62] The *MacDonald* Court justified this holding based on the same policies used to justify why the speedy trial right did not protect against pre-charge delay.[63] Despite prior accusation, a person is no longer subjected to the same restrictions on liberty as someone formally charged or under arrest.[64] The United States Supreme Court later expanded this holding when it declared that appearing for evidentiary hearings and hiring counsel were also not events that triggered the speedy trial clock.[65]

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[57] 404 U.S. 307 (1971).

[58] *Id.* at 320 (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)).

[59] *Id.* Certainly, prejudice to an accused's defense can occur before arrest or the filing of public charges, especially when a defendant remains unaware of the pending investigation against him or her. *See Doggett*, 505 U.S. at 654–58. The *Marion* Court held, however, that the Speedy Trial Clause is not meant to completely shield a defendant from prejudice. *Marion*, 404 U.S. at 319. The *Marion* Court stated:

> [T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. . . . Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Id.

[60] *Marion*, 404 U.S. at 320.

[61] United States v. MacDonald, 456 U.S. 1 (1982).

[62] *Id.* at 7 (noting, once again, the unique interests implicated only upon formal indictment or arrest).

[63] *Id.*

[64] *Id.*

[65] *Loud Hawk*, 474 U.S. 302, 312 (1986) (explaining that while bothersome, the Speedy Trial Clause must not shield a suspect from every harm incidental to criminal proceedings).

Factor Two: The Reason for the Delay

The United States Supreme Court in *Barker* discussed how courts should analyze the reasons for delay.[66] Valid reasons for delay, such as the unavailability of an ill witness, should not affect the analysis, while intentional procrastination should weigh heavily against the misbehaving party.[67] Negligence also tips the scale against the responsible party, although not as much as intentional conduct.[68] Even overcrowded dockets must slightly weigh against the prosecution since it has an affirmative duty to try suspects in a manner that affords due process.[69] The United States Supreme Court also determined how delays attributable to interlocutory appeals should be factored in the analysis.[70]

Factor Three: The Defendant's Assertion of the Speedy Trial Right

Speedy trial delays can benefit a defendant when memories fade and evidence disappears.[71] The State has the burden of proof, thus, it may be in the defendant's best interest not to insist on a speedy trial and hope the prosecution fails to establish guilt.[72] A defendant's failure to object to delays in the judicial process will not amount to a waiver of the speedy trial right.[73] The United States Supreme Court in *Barker* charged courts to apply discretion and assign weight to a defendant's actions based on the defendant's intentions, the effectiveness of his or her counsel, and the frequency and force of any objections made.[74] As a general rule, courts must balance affirmative requests for a speedy trial in favor of the claimant; such requests evidence that delays were harmful.[75]

Factor Four: Prejudice to the Defendant

The Court in *Barker* listed three interests of a defendant worthy of constitutional protection.[76] The aims of the speedy trial clause are to (1) minimize

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[66] *Barker*, 407 U.S. at 531.

[67] *Id.* (citations omitted).

[68] *Id.* (citations omitted).

[69] *Id.* (citations omitted).

[70] *Loud Hawk*, 474 U.S. at 316 (valuing delays from appeals based on the merits of the requested appeal, the importance of preventing unjust incarceration, and society's interest in protecting itself).

[71] *Barker*, 407 U.S. at 521.

[72] *Id.*

[73] *Id.* at 527–29.

[74] *Id.* at 529.

[75] *Loud Hawk*, 474 U.S. at 314; *Barker*, 407 U.S. at 531–32. The *Loud Hawk* Court warned, however, that a superficial demand for a speedy trial will not count as behavior evidencing an accused's deprivation of the right. *Loud Hawk*, 474 U.S. at 314.

[76] *Barker*, 407 U.S. at 532 (citations omitted).

an accused's jail-time preceding trial, thereby (2) reducing unnecessary anxiety and (3) the risk of losing evidentiary support for a defendant's case.[77] The *Barker* Court considered these three interests as sub-factors to the general concern of prejudice to a defendant.[78] In addition, *Barker* viewed the third sub-factor, prejudice to one's defense, as the most significant when determining the existence of a speedy trial violation.[79]

This assertion contradicted what the Court stated a year earlier in *United States v. Marion* about the primary role of the speedy trial clause.[80] Twice since *Marion*, the United States Supreme Court suggested that preventing prejudice to one's defense was a secondary concern in a speedy trial analysis.[81] However, in *Doggett v. United States* the Court eventually returned to its position in *Barker*, holding prejudice as the most important, protectable interest.[82] The Wyoming Supreme Court also considers the impairment of one's defense as the most damaging form of prejudice caused by pre-trial delay.[83]

A court's valuation of factor four, prejudice to one's defense, depends on what an accused can prove at trial.[84] *Doggett*, the most recent United States Supreme Court case discussing this issue, acknowledged that prejudice can exist despite what is specifically demonstrable, and the inability to show actual prejudice does not preclude a court from finding a speedy trial violation.[85] The Court, relying on its commentary in *Barker*, recognized the inherent difficulty in proving actual harm to one's defense caused by the passage of time.[86] In response, the Court

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[77] *Id*. at 531 n.32, 532 (reiterating the historic reasons for the speedy trial right, as identified in *United States v. Marion*: lengthy pre-trial confinement, corresponding anxiety, and prejudice to one's defense); *see supra* notes 58–59 and accompanying text (discussing the effects of arrest or formal accusation on a defendant).

[78] *Barker*, 407 U.S. at 532.

[79] *Id*. ("[T]he most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.").

[80] *Marion*, 404 U.S. at 320 ("[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense.").

[81] *MacDonald*, 456 U.S. at 8 (citations omitted); *Loud Hawk*, 474 U.S. at 311.

[82] *Doggett*, 505 U.S. at 655.

[83] *Strandlien*, 156 P.3d at 991 (citing *Barker*, 407 U.S. at 532); Whitney v. State, 99 P.3d 457, 475 (Wyo. 2004) (citation omitted).

[84] *See* Fortner v. State, 843 P.2d 1139, 1146 (Wyo. 1992) ("Although [Defendant] has shown a delay which could be prejudicial and did assert his right to speedy trial, he has not . . . demonstrated actual prejudice from the delay."); *see Loud Hawk*, 474 U.S. at 314 (affirming the lower court's decision to give only "little weight" to the fourth factor since the defendant could only point to the possibility of prejudice).

[85] *Doggett*, 505 U.S. at 655.

[86] *Id*. ("[I]mpairment to one's defense is the most difficult form of . . . prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" (quoting *Barker*, 407 U.S. at 532)). The Court added that the likelihood of prejudice is directly proportional to length of pre-trial delay. *Id.* at 651–52.

suggested that as delay intensifies, the burden of demonstrating actual prejudice begins to shift from the defendant to the State.[87]

Many courts have adopted *Doggett's* method of analyzing prejudice.[88] However, the unique and lengthy pre-trial delay in *Doggett* left courts with only an outer limit as to when a delay requires the prosecution to rebut a presumption of prejudice.[89] In *Doggett*, more than eight years passed between formal indictment and Doggett's trial, compelling the Court to charge the prosecution with rebutting a presumption of prejudice against the defendant.[90] A similar delay would require state courts to apply this burden-shifting procedure; however, *Doggett* did not explain whether a presumption of prejudice could arise before an eight-year delay.[91] Wyoming courts have yet to encounter a case of excessive pre-trial delay warranting the presumption that a defendant's case suffered from prejudice.[92]

In summation, the line of United States Supreme Court cases emerging from *Barker* and *Marion* highlight the many interests implicated by delays in bringing

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[87] *See id.* at 657–58 n.4 (admitting Doggett failed to specify any prejudice from the eight-and-a-half year delay between indictment and trial, but finding for him because the State did not persuasively rebut his allegations by showing how the defendant was unharmed by the delay).

[88] *E.g.*, State v. Ariegwe, 167 P.3d 815, 835 (Mont. 2007) ("[A s]howing by the accused of particularized prejudice decreases, and the necessary showing by the State of no prejudice correspondingly increases, with the length of the delay."); *see* Heiser v. Ryan, 15 F.3d 299, 304 (3rd Cir. 1994) (affirming the lower court's decision to apply the *Doggett* presumption, but finding the State successfully rebutted the presumption of prejudice); United States v. Aguirre, 994 F.2d 1454, 1457 (9th Cir. 1993) ("Five years delay attributable to the government's mishandling of [Defendant's] file, like the eight year delay in *Doggett*, creates a strong presumption of prejudice . . . the government [has not] 'persuasively rebutted' the presumption of prejudice." (citations omitted)); State v. Williams, 698 N.E.2d 453, 454–55 (Ohio App. 2 Dist. 1997) (finding a five-year delay caused by prosecutorial negligence required the State to rebut a presumption of prejudice).

[89] *E.g.,* Pelletier v. Warden, 627 A.2d 1363, 1371 n.12 (distinguishing *Doggett* based on its unique facts and significant delay); Goodrum v. Quarterman, No. 06-20980, 2008 WL 4648459, at *7 (5th Cir. Oct. 22, 2008) ("Additionally, the 2 1/2 year length of delay in this case falls well short of the 6 years attributed to official negligence in *Doggett* and which warranted a presumption of prejudice in that case.") (citations omitted); Jackson v. Ray, 390 F.3d 1254, 1264 (10th Cir. 2004) ("[B]ecause the delay is less than six years, clearly established Supreme Court law does not require application of the *Doggett* rule.").

[90] *Doggett*, 505 U.S. at 658. The government was responsible for six years of the delay. *Id.*

[91] *Compare id.* (finding a presumption of prejudice from a six-year delay due to prosecutorial negligence), *with Aguirre*, 994 F.2d at 1457 (noting a greater delay in *Doggett* but requiring the government to rebut a presumption of prejudice after five years), *and* United States v. Bergfeld, 280 F.3d 486, 491 (5th Cir. 2002) (finding presumed prejudice after a five-year delay caused by the government).

[92] *Humphrey II*, 185 P.3d at 1246 (holding until the length of delay gives rise to a probability of substantial prejudice, the defendant retains the burden of proving prejudice). In Wyoming, a 561-day delay does not create a probability of substantial prejudice. *Id.*; *Standlien*, 156 P.3d at 991 (finding a delay of 762 days does not lead to a presumption of prejudice); *Warner*, 28 P.3d at 27 (holding delay of 658 days does not presumptively prejudice); *Whitney*, 99 P.3d at 475 (holding a 374 day delay is not presumptively prejudicial).

defendants to trial.[93] To harmonize zealous prosecutions with the mandates of the Sixth Amendment, a four-factor test was devised.[94] Consequently, this test and all its nuances serve as the backbone of Wyoming's speedy trial law.[95]

The Fundamental Right to Due Process Bars Excessive Delay in Formally Charging or Arresting an Accused

Although the speedy trial right seeks to prevent harm from delays in the judicial process, it cannot operate until the prosecution arrests or formally charges an accused.[96] Thus, the Speedy Trial Clause does not account for pre-charge or pre-arrest delays in prosecution; however, other protections exist to accomplish this goal.[97] The United States Supreme Court in *Marion* asserted that applicable statutes of limitations serve this function, along with the Due Process Clause of the Fifth Amendment.[98] The Due Process Clause, in pertinent part, indicates no person shall be "deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment of the Constitution compels states to ensure this same guarantee.[99] Consequently, Wyoming's pre-charge law reflects the principles and guidelines set forth in *Marion*.[100] Understanding Wyoming's pre-charge law requires an examination of the United States Supreme Court's approach to this issue.[101]

The Court in *Marion* reiterated the maxim that due process signifies a fair trial.[102] An ambiguous term itself, the *Marion* Court did not say when a fair trial exists, but recognized that a fair trial does not exist when the prosecution

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[93] *See supra* notes 52–92 and accompanying text (discussing the role of the speedy trial clause in criminal prosecutions).

[94] *Barker*, 407 U.S. at 529–30; *accord MacDonald*, 456 U.S. at 7; *Loud Hawk*, 474 U.S. at 312–16.

[95] *See Humphrey II*, 185 P.3d at 1243–44, *passim* (applying the speedy trial law from the applicable United States Supreme Court cases).

[96] *Marion*, 404 U.S. at 320.

[97] *Id*. at 322–24.

[98] *Id*.

[99] *Compare* U.S. CONST. amend. V., *with* U.S. CONST. amend. XIV § 1 ("[N]or shall any State deprive any person of . . . due process of law.").

[100] Saldana v. State, 846 P.2d 604, 658 (Wyo. 1993) ("[T]he United States Supreme Court's construction of the federal [Constitution] is both authoritative for the federal system and a constitutional minimum which states must obey."); *see also* Story v. State, 721 P.2d 1020, 1027–29 (Wyo. 1986) (adopting *Marion*'s interpretation of due process in the context of pre-charge delay) (citations omitted).

[101] *See supra* note 99 and accompanying text.

[102] *Marion*, 404 U.S. at 324 (citations omitted).

(1) intentionally delays arrest or formal accusation of a defendant, and (2) such delay was so extensive that it caused substantial prejudice to the accused's defense.[103] Thus, scrutinizing prosecutorial delay became a fact specific analysis.[104]

Two main factors illustrate why the *Marion* Court set the base level of protection at a showing of intentional misconduct by the state and actual prejudice to one's defense.[105] First, the defendant alleged a violation of due process, notwithstanding an unexpired statute of limitation.[106] *Marion* considered statutes of limitations as "the primary guarantee" against attempted prosecution long after the commission of a crime.[107] By these legislative enactments, society acknowledges that a defendant will be deprived of a fair trial at some point.[108] Thus, as secondary protection against delay, the *Marion* Court required defendants to prove glaring injustice before finding a due process violation.[109]

Second, *Marion* valued prosecutorial discretion in choosing when to seek convictions.[110] The Court found it irrational to charge criminals immediately when investigators could establish probable cause.[111] In *United States v. Lovasco*, the United States Supreme Court held when pre-charge delay violates "fundamental conceptions of justice" and "the community's sense of fair play," a court must order dismissal of the case.[112]

The community's sense of fair play embraces prosecutorial discretion regarding when to charge and arrest suspects.[113] Expecting the state to prosecute as soon as legal, probable cause exists may lead to the dismissal of unripe, but worthy cases.[114] Convincing a jury of a defendant's guilt, at trial, requires more than probable cause.[115] Faced with the possibility of dismissals, prosecutors would imprison or

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[103] *Id.*

[104] *Id.* at 324–25 (noting that length of delay cannot be dispositive because actual prejudice can result from even short delays).

[105] *See id.* at 322–24 (discussing the significance of statutes of limitations and prosecutorial discretion in choosing when to charge defendants).

[106] *Id.* at 324.

[107] *Marion*, 404 U.S. at 324 (citing United States v. Ewell, 386 U.S. 116, 122 (1966)).

[108] *See generally id.* at 322–23 (discussing the prejudicial effects of the passage of time).

[109] *Id.* at 323–24 (explaining that statutes of limitation anticipate unfairness, but only by the end of the limitation period).

[110] *Id.* at 325 n.18 (citation omitted).

[111] *Id.* (citation omitted).

[112] *Lovasco*, 431 U.S. at 790–91 (citations omitted).

[113] *Id.* at 791, 792, 793, *passim* (citations omitted).

[114] *Id.* at 791–92 (citations omitted).

[115] *Id.* at 792 n.11 (citing United States v. Watson, 423 U.S. 411, 431 (1976) (Powell, J., concurring)); Granzer v. State, 193 P.3d 266, 269 (Wyo. 2008) (reciting proof beyond a reasonable doubt as the evidentiary standard of proving guilt in criminal cases).

charge defendants earlier than necessary, and before fully developing its case.[116] In turn, the prosecutor would be racing against the speedy trial clock and the accused would face longer periods of anxiety, unemployment, and diminished social relations.[117] Reality proves that cases often involve multiple actors and various crimes, and simply require more time to develop than what is necessary to arrest or charge a suspect.[118] Thus, a prosecutor must have freedom to decide when it should seek convictions.[119]

Courts have recognized the difficulties inherent in meeting the requirements of this *Marion* test.[120] In particular, showing prosecutorial misconduct poses a significant hurdle since the prosecution usually controls the information essential to prove this element.[121] In response, the Wyoming Supreme Court decided to adopt a more balanced test but retained the defendant's burden of proving each element: if the defendant can make a prima facie showing of intentional misconduct, the State must submit its reasons for delaying prosecution.[122] To prevail, the State need only rebut the assertion that the delay resulted from bad faith.[123]

The Wyoming Supreme Court also explained its method of evaluating actual prejudice.[124] If a defendant no longer has access to evidence, and the defendant can prove that the use of such evidence would have altered the outcome of the

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[116] *Lovasco*, 431 U.S. at 792 n.11 (citations omitted).

[117] *Id.*

[118] *Id.* at 729–93 (citations omitted).

[119] *Id.* at 795.

[120] *See* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L.REV. 607, 620, 621, *passim* (1990) (discussing the hurdles to proving actual prejudice and tactical delay by the prosecution); Tiemens v. United States, 724 F.2d 928, 929 (11th Cir. 1984) ("It was recently observed that this standard is an exceedingly high one."); *see* United States v. Moran, 759 F.2d 777, 782 (9th Cir. 1985) (adopting a due process analysis that requires less than actual prejudice and intentional delay).

[121] *Fortner*, 843 P.2d at 1143.

[122] *Compare id.* at 1143–44, *and* United States v. Comosona, 614 F.2d 695, 696–97 (10th Cir. 1980) (shifting the burden of proof upon a prima facie showing of tactical delay or harassment by the prosecution), *with* United States v. Carlock, 806 F.2d 535, 549 (5th Cir. 1986) (requiring the defendant to carry the entire burden of proof for both elements: actual prejudice and strategic delay), *and* United States v. Watkins, 709 F.2d 475, 479 (7th Cir. 1983) (requiring the defendant carry the entire burden of proof for both elements). Neither *Marion* nor *Lovasco* clarified how courts should allocate the burden of proof. *See* Goldfarb, *supra* note 120, at 623, 624, *passim* (discussing how various state and federal courts choose to distribute the burden of proving actual prejudice and intentional delay by the prosecution). *See also Gonzales*, 805 P.2d at 631–32 (explaining the jurisdictional differences in allocating the burden of proof).

[123] *Fortner*, 843 P.2d at 1143 (characterizing bad faith as harassment or strategic delay).

[124] Russell v. State, 851 P.2d 1274, 1280 (Wyo. 1993) ("[T]o establish substantial prejudice, [Defendant] is required to show . . . that, but for the delay, the result of his trial would be different."). *Marion* interchangeably used "actual prejudice" and "substantial prejudice" when referring this element of the test. *See Marion*, 404 U.S. at 324, 326.

trial, a court will find such circumstances amount to actual prejudice.[125] The defendant must convey the value of missing evidence or witnesses by emphasizing the exculpatory propensity of such evidence.[126] Again, the reasonable probability of actual prejudice will persuade a Wyoming court to dismiss charges, not possible prejudice.[127]

In summary, the United States Supreme Court decisions in *Barker* and *Marion* laid the foundation for analyzing the speedy trial right, as well as due process violations caused by pre-charge delay.[128] The Wyoming Supreme Court has structured its law accordingly, and recently confronted a murder case ripe for applying both constitutional principles.[129]

PRINCIPAL CASE

Humphrey accused the State of violating her right to a speedy trial and denying her due process when prosecutors reinstated murder charges against her, twenty-four years after the dismissal of her case.[130] The Wyoming Supreme Court, in a unanimous decision, ruled the State did not violate her constitutional rights.[131] Beginning with the speedy trial analysis, the court first considered whether the prosecution failed to follow Wyoming Rule of Criminal Procedure § 48(b), finding Humphrey waived the time limitations rule and consented to a trial date beyond the 180-day requirement.[132] Next, the court addressed the speedy trial claim from a constitutional standpoint, applying the *Barker* test.[133] Although the State re-charged Humphrey twenty-four years after her initial indictment, the court excluded this time when evaluating the first factor, length of delay.[134]

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[125] *Russell*, 851 P.2d at 1280; *Story*, 721 P.2d at 1029 (suggesting defendants must prove actual prejudice by a preponderance of the evidence).

[126] Vernier v. State, 909 P.2d 1344, 1349–50 (Wyo. 1996).

[127] *Id*. at 1350 (declining to dismiss based on speculative accusations); *Fortner*, 843 P.2d at 1143 ("Appellant has not claimed that the roommate would definitely support an alibi defense, only that he *might* if he could be found. This falls short of being actual prejudice.").

[128] *Barker*, 407 U.S. at 529–30; *Marion*, 404 U.S. at 322–24.

[129] *See Humphrey II*, 185 P.3d 1241–49 (analyzing Defendant's speedy trial claim and due process claim).

[130] *Id.* at 1242.

[131] *Id*. at 1249.

[132] *Id*. at 1243; *see supra* notes 32–33 and accompanying text (noting the procedural rule).

[133] *Humphrey II*, 185 P.3d at 1243–44.

[134] *Id.* at 1244 (running the speedy trial clock from her original indictment on April 11, 1980 until dismissal on August 22, 1980; tacking on the time between her second indictment on March 5, 2004 and her trial on March 13, 2006; excluding the time from December 2004 to October 2005, when the district court briefly dismissed her second charge).

Accordingly, the delay totaled 561 days, which compelled the court to continue its speedy trial analysis.[135]

The second factor, reasons for the delay, neutrally affected both Humphrey and the State.[136] The third factor, assertion of the constitutional right, weighed slightly in Humphrey's favor since she asserted her speedy trial right through motions, but acquiesced when the State sought continuances.[137] In addressing the fourth factor, prejudice to the defendant, the court noted the three evils targeted by the speedy trial clause: lengthy pre-trial incarceration, corresponding anxiety, and prejudice to one's defense.[138] The court also reiterated that defendants have the burden of proving prejudice until the delay is truly excessive.[139] The court found the delay of 561 days insufficient to presume prejudice.[140]

The court then addressed Humphrey's claim of actual prejudice in connection with the fourth factor, prejudice to the defendant.[141] Humphrey argued the twenty-four years between her 1980 and 2004 indictments severely hampered her defense, resulting in unavailable documents and witnesses.[142] The court acknowledged that this twenty-four year delay subjected Humphrey to significant prejudice.[143] The twenty-four year delay, however, did not fall within the ambits of the Speedy Trial Clause.[144] The clause did account for the 561-day delay preceding Humphrey's 2006 trial, but this delay was not responsible for the lost evidence.[145] Accordingly,

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[135] *Id.*; *see supra* note 53 and accompanying text (discussing the threshold amount of delay required to apply the *Barker* test).

[136] *Humphrey II*, 185 P.3d at 1245 (explaining that of the 561-day delay, Humphrey sought continuances and preliminary hearings, causing a 175-day delay; the State caused a 138-day delay due to a continuance, part of which was sluggishness by the court; and 80 days originated from neutral factors like miscommunication between the defendant and the State).

[137] *Id.* (noting Humphrey asserted her right but accepted State scheduling, and made numerous pretrial motions that required evidentiary hearings, and requested a five-month continuance in order to file a complaint with the United States Supreme Court).

[138] *Id.* at 1245–46 (citing *Barker*, 407 U.S. at 532).

[139] *Id.* at 1246 (reminding the defendant that prejudice is only presumed after truly extensive delay).

[140] *Id.* (requiring Humphrey to bear the burden of proving prejudice).

[141] *Humphrey II*, 185 P.3d at 1249 (finding Humphrey failed to adequately make a claim of actual prejudice).

[142] *Id.* at 1246.

[143] *See id.* at 1246 n.6.

[144] *Id.* at 1246 ("[T]he protection of the Speedy Trial Clause has no application to the period of time in which she was neither under arrest nor formally charged for the murder of her husband.").

[145] *Id.* (reiterating only post-charge, pre-trial delay implicates the Speedy Trial Clause, not delay between a crime and prosecution).

this factor did not weigh in favor of Humphrey, and the court ultimately ruled that a comparison of all four *Barker* factors did not justify the dismissal of her charge on the basis of a speedy trial violation.[146]

The Wyoming Supreme Court also analyzed whether re-charging the defendant for the murder, twenty-four years after the dismissal of her 1980 indictment, amounted to a violation of due process.[147] The court outlined the elements necessary to prove such a violation: actual prejudice to the defendant and intentional delay by the State to gain a tactical advantage.[148] First, regarding actual prejudice, the court found Humphrey's claims of missing evidence and unavailable witnesses did not support a finding of actual prejudice.[149]

The defendant argued that files used to establish her prior defense in 1980 had unique exculpatory value since her prior efforts convinced the district court to dismiss the charges for lack of probable cause.[150] However, the Wyoming Supreme Court accorded little value to this argument because Humphrey could not point to specific evidence in those documents that could alter the outcome of her current trial.[151] Next, the defendant pointed to missing tape-recordings and transcripts of the 1980 preliminary hearing, which may have contained persuasive arguments for Humphrey's case and functioned to impeach the State's key witnesses.[152] The court ruled Humphrey did not specifically explain how these items would help her defense, and thus found they were not demonstrative of a prejudiced defense.[153]

Additionally, Humphrey claimed the missing financial records of her 1977 bank account would prove that she and her former husband did not have monetary problems.[154] Humphrey argued these documents would effectively refute the prosecution's argument that financial instability caused tension between Jack and Rita Humphrey and motivated her to kill Mr. Humphrey.[155] The Wyoming Supreme Court also found this speculative and not representative of actual prejudice.[156] The court reiterated that mere passage of time will not emancipate

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[146] *Humphrey II*, 185 P.3d at 1246.

[147] *Id.* at 1246–49.

[148] *Id.* at 1247.

[149] *Id.* at 1248.

[150] *Id.*

[151] *Humphrey II*, 185 P.3d at 1248–49.

[152] *Id.* at 1248 (arguing that certain witnesses for the prosecution have altered their stories, rendering Humphrey more culpable).

[153] *Id.* at 1249 (ruling this evidence to be of no value).

[154] *Id.* at 1248.

[155] *Id.*

[156] *Humphrey II*, 185 P.3d at 1249 (noting similar evidence was available through cross-examining the State's witness for this issue).

an accused and that the legislature excluded statutes of limitations to prevent such an event.[157] Rather, a defendant must prove actual prejudice.[158] Ultimately, the court in *Humphrey II* had no basis on which to dismiss Humphrey's case due to actual prejudice to the defendant.[159]

Regarding the second element of the due process violation claim, intentional delay by the state, the Wyoming Supreme Court found that Humphrey's allegations did not satisfy the requisite prima facie showing of prosecutorial misconduct.[160] Humphrey accused the victim's sister, Bonnie Humphrey, of using her status as mayor to hire a police chief who would reopen Humphrey's case.[161] The court explained that aside from Bonnie Humphrey's motive, Humphrey could not prove the prosecutors, themselves, intentionally delayed pressing charges.[162] Nonetheless, Humphrey urged the court to require the State to explain the reasons for postponing accusation.[163] The court declined to uproot its law, and ruled that Humphrey failed to meet her burden for this element.[164]

In deciding how to assess the twenty-four years preceding Humphrey's renewed charges, the Wyoming Supreme Court analyzed the speedy trial right and due process right using its established law.[165] The court held the twenty-four years did not fall within the ambits of speedy trial protection.[166] Turning to the protection of due process, the court did not find that the State deprived Humphrey of a fair trial.[167] Although the Natrona County District Court believed the delay left Humphrey prejudiced, the Wyoming Supreme Court did not find actual prejudice.[168] The court also held that Humphrey failed to make a prima facie case of prosecutorial bad faith.[169] The outcome of the principal case evidences the patent difficulties in proving the requisite elements of a due process violation.[170]

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[157] *Id.* at 1246–47 (quoting *Vernier*, 909 P.2d at 1348).

[158] *Id.* at 1247, 1249 ("By itself, the fact 24 years elapsed between the dismissal of the original criminal case and the filing of the new murder charge does not establish a due process violation.").

[159] *Id.* at 1247.

[160] *Id.*

[161] *Humphrey II*, 185 P.3d at 1247.

[162] *Id.*

[163] *Id.*

[164] *Id.* (referring to the court's holding in *Fortner v. State* that the State must provide reasons for its delay *only after* a defendant makes a prima facie showing of prosecutorial bad faith).

[165] *Id.* at 1243, 1246.

[166] *Humphrey II*, 185 P.3d at 1246.

[167] *Id.* at 1246–49.

[168] *Id.* at 1246 n.6, 1249.

[169] *Id.*

[170] *See infra* note 172 and accompanying text.

ANALYSIS

Although the United States and Wyoming constitutions guarantee the quality of criminal adjudicative processes, the Wyoming Supreme Court's decision in *Humphrey II* suggests an accused charged with a crime in Wyoming may not, pragmatically, be protected by these documents.[171] By striving to convince the Wyoming Supreme Court to consider the time between her indictments in its speedy trial analysis, Humphrey actually sought the more probable avenue to protecting her right to a fair trial.[172] The difficult burden of proving a due process violation in Wyoming implies the State's pre-charge law needs reconfiguration.[173]

The Pre-charge Law Established in Marion *Must Be Tailored to Adequately Guard Against the Prosecution of Overly Stale Criminal Charges*

To begin, revisiting the context of Wyoming's adopted due process law will illuminate the core problems in the State's current law.[174] In *Marion*, the appellees, as in *Humphrey II*, sought to apply their speedy trial right to pre-accusation delay.[175] The Court acknowledged the harmful effects of pre-charge delay and unjust criminal proceedings.[176] However, the speedy trial protection does not activate until the prosecution publicly charges or arrests an accused.[177] Nonetheless, policy dictates that prejudice must always remain a factor when reviewing criminal procedure to insure the reliability of the system.[178] Thus, the Court held that due

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[171] *Compare* U.S. CONST. amend. XIV, § 1, *with* WYO. CONST. art. 1 § 10.

[172] *Compare* Petition for Writ of Certiorari at 5, Humphrey I, 120 P.3d 1027 (Wyo. Nov. 14, 2005) (No. 05-649) ("The speedy trial analysis in this case, without any doubt, results in a conclusion that the prejudice suffered by the defendant as a result of the delay in bringing her to trial is significant.") (citation omitted), *with* Humphrey II, 185 P.3d 1236, 1243, 1246 n.6, 1248–49 (Wyo. 2008) (acknowledging the lower courts finding of substantial prejudice, but reviewing the same evidence and arguments using a due process analysis, finding the defendant failed to demonstrate actual prejudice).

[173] *E.g.*, Vernier v. State, 909 P.2d 1344, 1348–50 (Wyo. 1996) (declining to find defendants met their burden of proving both intentional delay and actual prejudice); Fortner v. State, 843 P.2d 1139, 1142–44 (Wyo. 1992) (same); Story v. State, 721 P.2d 1020, 1027–29 (Wyo. 1986) (same).

[174] *Story*, 721 P.2d at 1027 (adopting the principles and tests set forth in *United States v. Marion*).

[175] United States v. Marion, 404 U.S. 307, 313 (1971) (declining to accept the appellees' argument that a three-year delay between the crime and indictment inherently prejudiced them, providing the grounds for dismissal).

[176] *Id.* at 320, 323 (noting loss of one's defense, social repose, and vigorous police work are interests connected to lengthy pre-charge delay) (citations omitted).

[177] *Id.* at 321 (citation omitted).

[178] *See* Barker v. Wingo, 407 U.S. 514, 532 (1972) ("Of [all the defendant's interests], the most serious is the last, because the inability of a defendant to adequately prepare his case skews the fairness of the entire system."). The integrity of judicial proceedings, by the administration of

process would address concerns of lengthy pre-charge delay that prejudice one's defense.[179]

To require proof of intentional misconduct and actual prejudice, however, demands much from a challenging defendant.[180] For one, a defendant cannot usually obtain the evidence illustrating the reasons for the pre-charge delay.[181] Without access to such information, an accused may have difficulty even building a prima facie case of intentional misconduct.[182] Second, only in rare instances can a defendant actually show to what extent the passage of time caused prejudice.[183] The exculpatory value of missing evidence will usually appear speculative, even when such evidence would effectively undermine a prosecutor's case.[184] In lieu of a more balanced test, however, the United States Supreme Court set these one-sided, stringent requirements in response to existing statutes of limitations.[185]

The United States Supreme Court in *Marion* analyzed due process *in conjunction* with an unexpired statute of limitation, and stated generally that such legislation served as the primary means of barring stale prosecutions. [186] *Marion*

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fair and just convictions, is the senior policy concern in criminal adjudications. *See Marion*, 404 U.S. at 324 (requiring dismissal if a defendant proves a violation of due process from prosecutorial delay); *see also* United States v. Comosona, 614 F.2d 695, 696 (10th Cir. 1980) (reaffirming that pre-charge delay, which violates due process, must result in case dismissal); *see Fortner*, 843 P.2d at 1152 (Urbigkit, J., dissenting) (commenting that notwithstanding the defendant's guilt, the accused did not receive a fair trial and the court should have dismissed the case).

[179] *Marion*, 404 U.S. at 324 (stating that if pre-charge delay (1) causes substantial prejudice to one's defense, and (2) stems from prosecutorial bad-faith, courts must dismiss the case for lack of a fair trial) (citations omitted).

[180] *See* United States v. Barken, 412 F.3d 1131, 1134 (9th Cir. 2005) (indicating defendants rarely meet the burden of showing intentional misconduct and actual prejudice); *see generally* Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 119 (2008) (stating that due process has been "watered-down" in the context of pre-charge delay, and offers limited protection).

[181] *Fortner*, 843 P.2d at 1143 (citing Goldfarb, *supra* note 120, at 624–25).

[182] *See id.* at 1150 (Urbigkit, J., dissenting).

[183] Doggett v. United States, 505 U.S. 647, 655 (1992) (quoting *Barker*, 407 U.S. at 532).

[184] *Id.*

[185] *Marion*, 404 U.S. at 323–24.

[186] *Id.* at 322–23. *Marion* stated:

> [Statutes of limitations] represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defence." . . . These statutes provide predictability by *specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced*.

Id. (emphasis added) (internal citations omitted). *Accord* United States v. Lovasco, 431 U.S. 783, 789 (1977); Jones v. Angelone, 94 F.3d 900, 906–07 (4th Cir. 1996); *Doggett*, 505 U.S. at 665–66 (Thomas, J., dissenting).

acknowledged that prejudice to an accused's defense will eventually arise in a way a defendant cannot actually demonstrate at trial.[187] Fairness to the defendant, the integrity of the judicial process, and the difficulty of proving substantial prejudice caused by pre-charge delay motivate legislatures to enact statutes of limitations.[188] Such statutes preemptively account for defendants' interests in receiving a fair trial.[189] Due process is a secondary protection in the area of pre-charge delay.[190] Thus, *Marion* required more from a defendant who sought to prove the criminal process failed to administer substantial justice, despite an applicable statute of limitations.[191] A major problem arises, however, when a jurisdiction lacks this primary guarantee against prejudicial delay in prosecution.[192]

Only two states, including Wyoming, do not have statutes of limitations for any criminal offense.[193] Social mores change and justify the decision against enacting statutes of limitations.[194] This case note does not seek to criticize the Wyoming legislature for declining to promulgate such statutes, nor does it advocate for their adoption.[195] Wyoming courts must acknowledge, however, that the United States Supreme Court's due process analysis complemented statutes of limitations.[196] Without legislation limiting pre-charge delay, the Due Process Clause becomes the sole means of shielding an accused from prejudicial delay.[197]

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[187] *See Marion*, 404 U.S. at 322 (noting that undeniable prejudice will occur eventually).

[188] *See id.* at 322 n.14 (quoting Mo., Kan. & Tex. Ry. Co. v. Harriman, 227 U.S. 657, 672 (1913)); *see also* Powell, *supra* note 180, at 129; James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1209 (2004).

[189] *See* Powell, *supra* note 180, at 129–30; *see infra* note 190.

[190] *Marion*, 404 U.S. at 322. *Marion* stated:

> The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we [have] said . . . "the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges."

Id.

[191] *See Lovasco*, 431 U.S. at 789 (according great weight to statutes of limitation, then proceeding to set demanding burdens for proving due process violations, and implying that such burdens are justified by an alternative means of protection).

[192] *See* Goldfarb, *supra* note 120, at 620–21, 657–58 (suggesting the *Marion* analysis demands too much of a defendant, and thereby, does not adequately focus on protecting a defendant's due process, but focuses on safeguarding prosecutorial discretion).

[193] *See* Powell, *supra* note 180, at 149 (identifying South Carolina as the other jurisdiction without such limitations).

[194] *See generally id.* at 124, 135, 138, *passim* (discussing the history of statutes of limitations and the rise of retributivism and victims' rights).

[195] *See infra* note 202 and accompanying text.

[196] *See Marion*, 404 U.S. at 322; *see supra* notes 186–91 and accompanying text.

[197] *Fortner*, 843 P.2d at 1142; *Story*, 721 P.2d at 1027 (noting that no state has a statute of limitations for murder).

Maintaining the basal requirements for proving due process violations, set out in *Marion*, inadequately accounts for a defendant's interests when alternate means of protection do not exist.[198] The Wyoming Supreme Court has even quoted *Marion*, saying that *in consideration of* an applicable statute of limitations, the mere possibility of prejudice cannot serve as the basis for proving a denial of due process.[199] The United States Supreme Court noted, however, that this ruling might have been different in the absence of such a limitation period.[200]

When legislatures do not protect an accused's interest in avoiding unidentifiable prejudice from pre-charge delay, courts must do this; fairness and efficiency must always be central to the judicial process.[201] Wyoming courts can ensure the integrity of this process by adopting a more balanced due process analysis.[202] Many jurisdictions apply a balancing approach, the type the Wyoming Supreme Court rejected in *Fortner v. State*.[203] The basis for this balancing analysis stems from ambiguity in the United States Supreme Court case *United States v. Lovasco*.[204]

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[198] *Cf. Humphrey II*, 185 P.3d at 1249 (affirming defendant's conviction and finding that she failed to prove intentional prosecutorial misconduct and actual substantial prejudice twenty-four years after her case was already dismissed and twenty-seven years after the crime occurred).

[199] *Story*, 721 P.2d at 1027 (quoting *Marion*, 404 U.S. at 326).

[200] *See Marion*, 404 U.S. at 322 (justifying why the Court would not presume prejudice, noting the legislature accounted for the probability of prejudice when deciding the length of a limitations period).

[201] *Barker*, 407 U.S. at 532; *see* Powell, *supra* note 180, at 139 (stating when governments abolish statutes of limitations, "interest-balancing," basic fairness, and efficiency are lost as well).

[202] *See* Goldfarb, *supra* note 120, at 679 (explaining that current applications of the *Marion* test are inadequate to shield defendants, and the judicial system, from the effects of pre-charge delay). Goldfarb views current pre-charge delay jurisprudence as a "contradiction of other widely shared norms, such as the need for a high level of accuracy in criminal convictions as an elemental feature of procedural fairness." *See* Goldfarb *supra* note 120, at 673.

[203] *Fortner*, 843 P.2d at 1144; *e.g.* United States v. Sowa, 34 F.3d 447, 451 (7th Cir. 1994) ("[O]nce the defendant has proven actual and substantial prejudice, the government must come forward and provide its reasons for the delay. The reasons are then balanced against the defendant's prejudice."); Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990) (holding that once a defendant makes a showing of actual prejudice, the defendant must submit legitimate reasons for the delay, at which time the reviewing court will weigh the degree of prejudice with the reasons for delay to decide whether the prosecution violated due process); Fritz v. State, 811 P.2d 1353, 1367 (Ok. App. Ct. 1991) (balancing the reasons for delay with prejudice to the defendant); People v. Lesiuk, 617 N.E.2d 1047, 1050 (N.Y. 1993) ("Where there has been a prolonged delay, we impose a burden on the prosecution to establish good cause." (citation omitted)); State v. Robinson, No. L-06-1182, 2008 WL 2700002, at *17 (Ohio App. 6th Dist. July 11, 2008) (requiring defendant to show actual prejudice to his or her defense, then requiring the State to justify its delay, and then the court weighs the reasons for delay with the degree of prejudice).

[204] State v. Gonzales, 794 P.2d 361, 363–64 (N.M. Ct. App. 1990); United States v. Mays, 549 F.2d 670, 675, (9th Cir. 1977) ("[T]here has been a good deal of confusion as to whether the two elements delineated in the [*Marion*] opinion actual (or substantial) prejudice, and intentional delay by the government for an improper purpose are to be applied in a conjunctive or disjunctive

Although the defendant in *Lovasco* proved actual prejudice, the United States Supreme Court considered the reasons for the delay before dismissing the case.[205] The Court held the government justifiably delayed prosecution, which outweighed the prejudice it caused the defendant.[206] Since this decision, various United States appellate courts either balance the due process elements as factors (the disjunctive approach), consider each a necessary element for the defendant to prove (conjunctive approach), or have yet to clearly choose an analysis.[207] To better account for defendants' rights, jurisdictions without statutes of limitations, like Wyoming, should adopt the disjunctive method of analyzing pre-charge delay, instead of the one-sided conjunctive approach.[208]

Adding Presumptive Prejudice to the Law of Pre-Charge Delay May Better Ensure Due Process

To completely guarantee due process, without the assistance of statutes of limitations, Wyoming courts should also consider adopting part of the speedy trial analysis: the presumption of prejudice when excessive delays ensue.[209] The United States Supreme Court case, *Doggett v. United States*, provides justification for this method.[210] In that case, the government formally indicted a defendant

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manner."). The "conjunctive" approach requires the defendant to prove both elements, while the "disjunctive" approach distributes the burden of proof. *Gonzales*, 794 P.2d at 363–67.

[205] *Lovasco*, 431 U.S. at 790.

[206] *See id*. at 796–97 ("In light of [the government's] explanation, it follows that compelling respondent to stand trial would not be fundamentally unfair."). The Court did find prejudice to the accused, however. *Id*.

[207] *See generally* WAYNE R. LAFAVE ET AL., *Unconstitutional pre-accusation delays*, *in* 5 CRIM. PROC. § 18.5(b) (3d ed. 2008) (discussing the various approaches); *Gonzales*, 794 P.2d at 363–67; *Mays*, 549 F.2d at 675 n.6–7 (discussing the various approaches). *See supra* note 203 (citing examples of jurisdictions applying the disjunctive analysis).

[208] United States v. Sabath, 990 F. Supp. 1007, 1017 (N.D. Ill. 1998) (indicating that while prosecutorial discretion in bringing charges is highly valued and the remedy of dismissal is extreme, due process requires fair proceedings and the truest method of testing the process is for a court to weigh the interests of both parties) (quoting United States v. Williams, 738 F.2d 172 (7th Cir. 1984)). A good argument exists that proving unlawful pre-charge delay is too difficult. *See* LAFAVE *supra* note 207, § 18.5(b). *See also* Goldfarb *supra* note 120, at 666–67, 679–80 (explaining that current pre-charge delay jurisprudence is overly burdensome for a defendant, and courts should adopt more balanced means of testing due process). Goldfarb also proposes examining due process violations using the same factor test employed in speedy trial analyses. *See* Goldfarb *supra* note 120, at 625, 679–80.

[209] *See Marion*, 404 U.S. at 321 ("Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself."); *see* Goldfarb, *supra* note 120, at 631–32 ("In fact, uncharged defendants lacking notice of a prosecution that would induce them to forestall the erosion of defense evidence are likely to suffer even greater delay-related prejudice than are charged defendants.").

[210] *Doggett*, 505 U.S. at 655.

who the police could not locate.[211] For eight-and-a-half years the accused remained unaware of the indictment and lived freely, under his true name, until the government apprehended him.[212] While examining the fourth factor of the speedy trial analysis, prejudice to the accused, the Court realized the defendant could only allege one type of prejudice: an injured defense.[213] Although Doggett could not specify how the delay hindered his defense, the Court dismissed the case.[214] In doing so, the Court explained that instances of lengthy delay may require a court to assume prejudice to an accused's defense, since demonstrating actual prejudice could be impossible.[215]

Aside from the technical fact that the government indicted Doggett, the circumstances resembled those in a pre-charge analysis.[216] It seems reasonable, then, to allow for this presumption in a due process context.[217] As evidenced in *Doggett*, delay in compelling a defendant to stand trial, regardless of formal charges or arrest, leads to the unavailability of evidence and testimony, and precisely the type of harm pre-charge delay begets.[218] Again, instances arise when neither a defendant nor a prosecutor can truly demonstrate the effects of missing evidence and faded memories, which suggests that always requiring an accused to show actual prejudice undermines the integrity of the judicial process.[219]

Humphrey II exemplifies the injustice that can result from strictly applying *Marion's* due process analysis without alternate means of guarding against overly stale prosecution.[220] Twenty-four years after a dismissal for lack of *probable cause*, with no indication of newly discovered evidence, the Natrona County District Court weighed the interests of both parties and found the re-prosecution unconstitutional.[221] Had the Wyoming Supreme Court fully recognized that

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[211] *Id*. at 648–49.

[212] *Id*. at 649–50.

[213] *Id*. at 654 (noting the absence of oppressive incarceration and anxiety, the other evils targeted by the Speedy Trial Clause).

[214] *Id*. at 658.

[215] *Doggett*, 505 U.S. at 655 ("[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.").

[216] *See id*. at 656.

[217] *See Marion*, 404 U.S. at 322 (implying the passage of time, eventually, will prejudice a defendant's case in an undeniable manner).

[218] *See Humphrey II*, 185 P.3d at 1246 n.6 (recognizing the Natrona County District Court's finding of actual prejudice to defendant regarding the twenty-four year delay between subsequent indictments).

[219] *Doggett*, 505 U.S. at 655.

[220] *See Humphrey II*, 185 P.3d at 1246 n.6, 1249 (acknowledging the lower court's finding of actual prejudice through the sensitive speedy trial test, but overruling this finding when viewing the same evidence under the tenets of the Due Process Clause).

[221] *Id.* at 1242.

Humphrey's interests were not accounted for by the legislature, and balanced this prejudice against the reasons for delay, Humphrey would have received due process.[222] In addition, the court may have also dismissed Humphrey's case.[223]

In summary, statutes of limitations normally reflect the interests of defendants and society in barring overly stale prosecutions.[224] Due to the absence of such legislation in Wyoming, however, the Supreme Court of Wyoming must remodel its due process analysis to prevent unfair, pre-charge delay.[225] By comparing the prosecution's reasons for the pre-charge delay with the resulting prejudice, defendants will have realistic means of protecting their right to a fair trial.[226] Notably, the only other jurisdiction without any statutes of limitations, South Carolina, employs this balancing method of analysis.[227]

CONCLUSION

The district court's dismissal of Humphrey's latest murder charges in 2005 reflected sound reasoning; the twenty-four year period between indictments seemed to irreparably harm Humphrey's defense.[228] In fact, the court did find the pre-indictment delay to substantially prejudice her case.[229] However, the court's

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[222] *See supra* note 172 and accompanying text (comparing the different court findings in relation to the type of analysis used: speedy trial factor-test versus the due process analysis).

[223] *See* Petition for Writ of Certiorari at 5, *supra* note 172, at 5 ("The speedy trial analysis in this case, without any doubt, results in a conclusion that the prejudice suffered by the defendant as a result of the delay in bringing her to trial is significant.") (citation omitted). The district court applied the speedy trial analysis, balancing prejudice with reasons for the delay. *See Humphrey II*, 185 P.3d at 1242.

[224] *Marion*, 404 U.S. at 322; *accord, e.g., Lovasco*, 431 U.S. at 789–90, 793, 794; *Comosona*, 848 F.2d at 1114.

[225] *See supra* notes 197–203 and accompanying text. "It still remains 'a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" Arizona v. Youngblood, 488 U.S. 51, 73 (1988) (Blackmun J., dissenting) (citation omitted).

[226] *See supra* notes 207–08 and accompanying text (explaining why courts should adopt a balanced method of evaluating due process violations from pre-charge delay). *See also supra* note 203 (citing courts that have chosen to employ a more balanced analysis (the disjunctive approach)).

[227] State v. Brazell, 480 S.E.2d 64, 68–69 (S.C. 1997); State v. Lee, 602 S.E.2d 113, 117 (S.C. Ct. App. 2004). No state has a statute of limitation for serious crimes like murder. *Story*, 721 P.2d at 1027. Some courts have adopted a balancing approach to evaluate pre-charge delay in murder cases. People v. Nelson, 185 P.3d 49, 58 (Cal. 2008) (synthesizing its precedent, in a case of first-degree felony murder, to expressly hold that reasons for delay will be compared to the defendant's prejudice); State v. Luck, 472 N.E.2d 1097, 1104–05 (Ohio 1984) (balancing the defendant's prejudice with the State's reasons for delay, in a murder case).

[228] *See supra* notes 150, 152, 159 and accompanying text (noting the unavailability of evidence).

[229] *See supra* notes 13–15 and accompanying text (noting the district court's finding of substantial prejudice).

finding did not ultimately favor Humphrey, because the speedy trial right only applies after formal indictment or arrest.[230] As the Wyoming Supreme Court later directed, the district court should have determined the effects of that twenty-four year period under a due process analysis.[231] Interestingly, by doing so the outcome of Humphrey's case was drastically altered.[232]

Humphrey's pre-charge situation, viewed through a speedy trial lens, permitted the district court to balance the reasons for delay against the resulting prejudices and dismiss her case.[233] Unlike the evenhanded speedy trial analysis, proving the lack of due process requires a defendant to prove actual prejudice and prima facie intentional delay by the prosecution.[234] This case highlights how difficult it can be for a defendant to successfully prove a due process violation caused by pre-charge delay, even if circumstances suggest otherwise.[235]

In light of Wyoming's reluctance to enact statutes of limitations for any crime, and that the United States Supreme Court established the law of pre-charge delay with such statutes in mind, this case note seeks to encourage the Wyoming Supreme Court to revamp its due process law.[236] The court can properly guarantee a fair trial by adopting a method of evaluating due process that compares reasons for the pre-charge delay to the level of prejudice asserted by the accused.[237] In certain instances, a court should even consider a presumption of prejudice when the delay is truly excessive.[238]

"To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case."[239] In the case of *Humphrey II*, had the Wyoming Supreme Court applied this logic and carefully balanced the interests of both the prosecution and defense, the State would have ensured fair play and justice, displaying the integrity of Wyoming's judicial system.[240]

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[230] *See supra* note 144 and accompanying text.

[231] *See supra* notes 18, 144 and accompanying text.

[232] *See supra* note 172 and accompanying text.

[233] *See supra* notes 13, 15, 49 and accompanying text.

[234] *See supra* notes 103, 122 and accompanying text.

[235] *See supra* notes 172, 202.

[236] *See supra* notes 201–02 and accompanying text.

[237] *See supra* note 208 and accompanying text.

[238] *See supra* notes 209–19 and accompanying text.

[239] United States v. Marion, 404 U.S. 307, 325 (1971).

[240] *See supra* notes 178, 201 and accompanying text (discussing why a lack of statutes of limitations requires courts to modify their pre-charge law in order to guarantee due process in cases of prosecutorial delay).

CASE NOTE

CONSTITUTIONAL LAW—Recent Developments in Wyoming's Reasonableness Requirement Applied to the Search Incident to Arrest Exception; *Holman v. State*, 183 P.3d 368 (Wyo. 2008).

*Maryt L. Fredrickson**

Introduction

On July 28, 2005, police officer Joseph Moody was sitting in his parked patrol car near the North Casper ball fields in Casper, Wyoming when a citizen approached and reported suspicious activity.[1] The citizen saw a man in a parked car watching children through a pair of binoculars, and the man kept moving his car when people noticed him.[2] Officer Moody initiated a traffic stop of the vehicle the citizen identified.[3] The single occupant explained he used a monocular to look for his two sons playing in an event in the ball fields.[4] Officer Moody requested the man's driver's license, registration, and proof of insurance.[5] The driver, Daniel Holman ("Holman"), provided a state-issued identification card instead of a driver's license.[6]

Officer Moody learned from police dispatch that Holman's driver's license was suspended.[7] Another officer arrived at the scene, and the two officers arrested Holman for driving with a suspended license.[8] After placing Holman in the back of the patrol car, the two officers searched Holman's vehicle and discovered a plastic bag containing a small amount of methamphetamine in the center console between the two front seats.[9]

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* Candidate for J.D., University of Wyoming, 2010. I would like to thank the *Wyoming Law Review* Board for their assistance with this project. I would also like to thank Professor Eric Johnson for his valuable time and insights. I extend my most sincere gratitude to my partner, Alan Bartholomew, for his love and support throughout this project and always.

[1] Holman v. State, 183 P.3d 368, 370 (Wyo. 2008).

[2] *Id.* At Holman's preliminary hearing, the officer described Holman's behavior as "skittish." Brief of Appellant at 8, *Holman*, 183 P.3d 368 (No. 06-140) (Aug. 2, 2006), 2006 WL 5953239.

[3] Brief of Appellant, *Holman*, *supra* note 2, at 3, 9. Officer Moody testified he initiated the stop to investigate whether the driver was a pedophile engaged in indecent exposure or masturbation in the park while watching children. *Id.* at 3.

[4] *Holman*, 183 P.3d at 370.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* Casper police regularly make arrests for driving under suspension as a general police practice. Pierce v. State, 171 P.3d 525, 527 n.2. (Wyo. 2007).

[9] *Holman*, 183 P.3d at 370–71.

The State charged Holman with third, or subsequent, possession of a controlled substance.[10] Holman moved to suppress the evidence of the drug charge, but the trial court denied his motion.[11] At the preliminary hearing, and again at the hearing for the motion to suppress, Officer Moody testified he searched Holman's vehicle "incident to arrest" because such searches were standard police procedure.[12] Holman pled guilty to the drug charge, but reserved his right to appeal the district court's denial of his motion to suppress.[13] On appeal, Holman argued the district court erred in denying his motion to suppress because the search of his vehicle was unreasonable, and therefore violated the Wyoming Constitution's search and seizure provision.[14] The Wyoming Supreme Court applied its unique "reasonable under all of the circumstances" test, and agreed with Holman—the warrantless search of Holman's vehicle was unreasonable and, thereby, unconstitutional.[15]

This case note examines the recent shift in Wyoming's reasonable under all of the circumstances approach as applied to the search incident to arrest exception for warrantless searches.[16] The background section of this note briefly addresses Wyoming's departure from Fourth Amendment precedent in all warrantless searches, but comprehensively reviews the small body of independent Wyoming case law applying the search incident to arrest exception leading up to the *Holman* decision.[17] Particular attention is given to *Holman*'s two companion cases: *Pierce v. State* and *Sam v. State*.[18] This note argues that *Holman* caps a triumvirate of cases that replaced the reasonable under all of the circumstances test with a requirement for reasonable grounds.[19] Furthermore, while the Wyoming Supreme Court failed to articulate in *Holman* which category of reasonable grounds applies to the search incident to arrest exception, this note determines reasonable suspicion is the only logical choice.[20] Finally, this note concludes the search incident to arrest analysis only considers circumstances that support a finding of reasonable suspicion, which

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[10] *Id.* at 371 (citing WYO. STAT. ANN. § 35-7-1031(c)(i) (LexisNexis 2007)).

[11] *Id.*

[12] *Id.* at 372.

[13] *Id.* at 370 (citing, mistakenly, WYO. R. CR. P. 11(e)). WYO. R. CR. P. 11(e) governs plea agreement procedures. Holman did not plead under WYO. R. CR. P. 11(e); he entered a conditional plea under WYO. R. CR. P. 11(a)(2). Brief of Appellant, *Holman*, *supra* note 2, at 2. WYO. R. CR. P. 11(a)(2) provides for the entry of a conditional plea with preservation of the right to appeal the denial of a pretrial motion.

[14] Brief of Appellant, *Holman*, *supra* note 2, at 11–12 (citing WYO. CONST. art. 1, § 4). Holman also argued the warrantless search violated the Wyoming Constitution and the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity under the investigatory detention exception. *Id.* at 4–10.

[15] *Holman*, 183 P.3d 368.

[16] *See infra* notes 83–285 and accompanying text.

[17] *See infra* notes 53–132 and accompanying text.

[18] *See infra* notes 83–132 and accompanying text.

[19] *See infra* notes 188–94 and accompanying text.

[20] *See infra* notes 201–29 and accompanying text.

is far less than *all* of the circumstances, but nevertheless provides helpful guidance for law enforcement and practitioners.[21]

BACKGROUND

Both the United States Constitution and the Wyoming Constitution prohibit unreasonable searches and seizures.[22] Warrantless searches are per se unreasonable under both the Fourth Amendment and the Wyoming Constitution.[23] The United States Supreme Court has developed a set of exceptions that indicate whether a search is reasonable.[24] Federal Fourth Amendment cases treat these exceptions as bright-lines; if a factual scenario fits into one of the exceptions, then the warrantless search is reasonable.[25] The Wyoming Supreme Court recognizes and applies the same exceptions, but imposes an additional requirement.[26] All warrantless searches, regardless of the applicable exception, must meet the

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[21] *See infra* notes 230–85 and accompanying text.

[22] *Compare* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."), *with* WYO. CONST. art. 1, § 4 ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.").

[23] *E.g.*, Fenton v. State, 154 P.3d 974, 975 (Wyo. 2007) ("We have stated that under both constitutions, warrantless searches and seizures are per se unreasonable unless they are justified by probable cause and established exceptions.") (citing Morris v. State, 908 P.2d 931, 935 (Wyo. 1995)); U.S. v. Ross, 456 U.S. 798, 825 (1982) ("[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.'") (emphasis in original) (citations omitted).

[24] Katz v. U.S., 389 U.S. 347, 357 (1967).

[25] Vasquez v. State, 990 P.2d 476, 482 (1999) ("The [United States] Supreme Court majority believed it was a reasonable construction of the Fourth Amendment to formulate bright-line rules.") (citations omitted).

[26] O'Boyle v. State, 117 P.3d 401, 409 (Wyo. 2005). Some of the exceptions to the warrant requirement recognized in Wyoming include: search of an arrested suspect and the area within his control (search incident to arrest); search conducted while in pursuit of a fleeing suspect; search and seizure to prevent the imminent destruction of evidence; search and seizure of an automobile based upon probable cause (the automobile exception); search which results when an object is in plain view of officers in a place where they have a right to be (plain view doctrine); search which results from entering a dwelling to save life or property (emergency assistance exception); search of an impounded vehicle without probable cause (inventory search); weapons frisk of an arrestee's companion without probable cause (automatic companion rule); search justified by reasonable suspicion arising from a stop to render aid (community caretaker function); and search justified by reasonable suspicion or probable cause during an investigatory detention (investigatory detention exception). Speten v. State, 185 P.3d 25, 28 (Wyo. 2008).

Wyoming Supreme Court's "reasonable under all of the circumstances" test or be found unconstitutional.[27]

Searches Incident to Arrest Under the Fourth Amendment

Understanding Wyoming's divergence from federal search incident to arrest jurisprudence requires a basic understanding of the federal exception.[28] In *Weeks v. United States*, the United States Supreme Court recognized that some type of search incident to arrest has been permitted throughout Anglo-American history.[29] A search of an arrestee's person was customary in order to either confiscate weapons or confiscate evidence.[30] However, the scope of the search incident to arrest *beyond* the search of the person has been the subject of extensive dispute.[31] The United States Supreme Court established a bright-line rule in its 1969 decision, *Chimel v. United States*, defining the appropriate scope of searches incident to arrest.[32] In *Chimel*, the Court authorized searches incident to arrest in "the area within the arrestee's immediate control," which means the area in which the suspect could reach either weapons or evidence.[33] The *Chimel* Court supported this limited scope by reiterating the two fundamental reasons for allowing searches incident to arrest in the first place: to prevent the arrestee from destroying evidence or from reaching weapons.[34] Post-*Chimel* decisions left unsettled whether the interior of an automobile (the area within the arrestee's immediate control just prior to the arrest) remained in the permissible scope of a search incident to arrest.[35]

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[27] *O'Boyle*, 117 P.3d at 409.

[28] *See generally* Kenneth Decock & Erin Mercer, Comment, *Balancing the Scales of Justice: How Will* Vasquez v. State *Affect Vehicle Searches Incident to Arrest in Wyoming*, 1 WYO. L. REV. 139, 140–41 (2001) (exploring Wyoming's rejection of the bright-line approach of federal search incident to arrest jurisprudence).

[29] 232 U.S. 383, 392 (1914); *see also* U.S. v. Robinson, 414 U.S. 218, 224 (1973) (explaining the search incident to arrest exception has two prongs: (1) authorizing a search of an arrestee's person, and (2) authorizing a search of the area within the arrestee's immediate control).

[30] *Weeks*, 232 U.S. at 392.

[31] *See generally* Decock & Mercer, *supra* note 28, at 139–57 (exploring the history of searches incident to arrest in federal and Wyoming courts leading up to and including the Wyoming Supreme Court's seminal 1999 decision in *Vasquez*). The history of searches incident to arrest is also reviewed in Chimel v. U.S., 395 U.S. 752 (1969), and *Robinson*, 414 U.S. at 224–26.

[32] 395 U.S. 752.

[33] *Id.* at 768.

[34] *Id. See generally* 3 WAYNE LAFAVE, SEARCH AND SEIZURE § 7.1(a) (3d ed. 1996) (evaluating *Chimel*).

[35] N.Y. v. Belton, 453 U.S. 454, 460 (1981) ("While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant."). State courts reflected the same inconsistency. *Id.* at 459 n.1; *see also* 3 LAFAVE, *supra* note 34, § 7.1(a) (reviewing federal case law leading up to the *Belton* decision).

Eleven years after *Chimel*, the Court created another bright-line rule in *New York v. Belton* to close the debate over the appropriate scope of vehicle searches incident to arrest.[36] In *Belton*, an officer initiated a traffic stop for a speeding violation and subsequently noticed an envelope on the floor of the vehicle labeled "Supergold," which the officer associated with marijuana.[37] Based on this association, and an odor of marijuana emanating from the vehicle, the officer had probable cause to believe the vehicle's occupants possessed marijuana.[38] The officer arrested the four occupants based on such probable cause and proceeded to search the interior of the vehicle incident to the arrests.[39] The officer discovered cocaine inside a jacket left inside the vehicle.[40] The Court addressed the issue of whether containers inside a vehicle, like the jacket, are within the proper scope of a vehicle search conducted incident to arrest.[41] The Court upheld the search of the vehicle's interior, including the jacket pocket or any other closed container, as valid under the Fourth Amendment.[42] The lawful arrest, by itself, justified a broad search and outweighed any expectation of privacy.[43] The *Belton* Court further reasoned that law enforcement needs bright-line policies to apply in the field, because officers have limited time and expertise to analyze the individual circumstances confronted in each arrest.[44]

Searches Incident to Arrest Under the Wyoming Constitution

Article 1, section 4 of the Wyoming Constitution prohibits unreasonable searches and seizures analogous to the Fourth Amendment.[45] In its early search

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[36] *Belton*, 453 U.S. at 460–61; *see also* Michigan v. Long, 463 U.S. 1032, 1050 n.14 (1983) (discussing the bright-line rule of *Belton*).

[37] *Belton*, 453 U.S. at 455–56. The officer knew from his experience that the term "Supergold" referred to marijuana. Brief of Petitioner at 2–3, *Belton*, 453 U.S. 454 (No. 80-328) (March 4, 1980), 1980 WL 339862.

[38] Brief of Respondent at 1, *Belton*, 453 U.S. 454 (No. 80-328) (April 3, 1981), 1981 WL 390386.

[39] *Belton*, 453 U.S at 455–56. The envelope labeled "Supergold" did in fact contain marijuana, but the officer did not discover this fact until after completing the arrests. *Id.* at 456.

[40] *Id.*

[41] *Id.* at 459.

[42] *Id.* at 460–62.

[43] *Id.* at 461. The expectation of privacy became the touchstone of the Fourth Amendment in the mid-twentieth century. *Katz*, 389 U.S. at 360–62 (Harlan, J., concurring); *see also* Warden v. Hayden, 387 U.S. 294, 304–06 (1967) (analyzing the shift in federal search and seizure jurisprudence from the protection of property interests to the protection of privacy interests).

[44] *Belton*, 453 U.S at 458 (discussing Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142 (1974)). *Contra* Wayne R. LaFave, *The Fourth Amendment In an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith'*, 43 U. PITT. L. REV. 307, 325–33 (1982) (criticizing the *Belton* decision and advocating against a bright line despite the needs of law enforcement).

[45] WYO. CONST. art. 1, § 4; *see supra* note 22.

and seizure decisions, the Wyoming Supreme Court relied on Federal Fourth Amendment cases and case law from other states to interpret Wyoming's search and seizure provision.[46] The development of Wyoming's search and seizure provision came to a halt in 1949, when the United States Supreme Court decided *Wolf v. Colorado*, which held states must, at a minimum, provide the protections of the Fourth Amendment.[47] In 1961, the United States Supreme Court went a step further when it declared, in *Mapp v. Ohio*, states must apply the exclusionary rule to evidence acquired in violation of the Fourth Amendment.[48] Accordingly, the Wyoming Supreme Court exclusively applied Fourth Amendment principles to search and seizure cases until the late twentieth century when many states returned to independent state constitutional interpretation.[49]

When *Belton* empowered law enforcement to conduct thorough vehicle searches per se, incident to arrest, including closed containers, many state courts turned away from the federal rule by recognizing greater protection under state constitutions.[50] In 1992, the Wyoming Supreme Court asked litigants to fully brief state constitutional arguments, using a "precise, analytically sound approach," to provide the court the opportunity to evaluate whether its state constitution afforded greater protections than the Fourth Amendment.[51] In *Vasquez v. State*, issued in 1999, a litigant finally presented the constitutional argument the court needed to rekindle its analysis of the Wyoming Constitution's search and seizure provision.[52]

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[46] Vasquez v. State, 990 P.2d 476, 483–84 (1999); *see* State v. Petersen, 194 P. 342 (Wyo. 1920); State v. George, 223 P. 683 (Wyo. 1924); State v. Crump, 246 P. 241 (Wyo. 1926).

[47] 338 U.S. 25 (1949). The Wyoming Supreme Court stated it abandoned independent state search and seizure jurisprudence earlier, in the 1920's and 1930's. *Vasquez*, 990 P.2d at 483–84.

[48] 367 U.S. 643 (1963). The exclusionary rule requires courts to deny admission of evidence acquired in violation of the Fourth Amendment in order to deter unreasonable searches. *See generally* 1 LAFAVE, *supra* note 34, § 1.1 (exploring the history and purpose of the exclusionary rule).

[49] *Vasquez*, 990 P.2d at 483–84. *See generally* , Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527 (1989) (analyzing the rebirth of state constitutional interpretation and methods to facilitate state constitutional analysis).

[50] *Vasquez*, 990 P.2d at 482. *Mapp* required states to provide a minimum of Fourth Amendment protections, but did not prevent states from providing more protection under state constitutions. *Id.* at 484 (discussing Mapp v. Ohio, 367 U.S. 643, 654–55 (1961)); *O'Boyle*, 117 P.3d at 408. State court decisions rejecting *Belton* in favor of greater protection under state constitutions include: State v. Hernandez, 410 So.2d 1381, 1385 (La. 1982); Commonwealth v. Toole, 448 N.E.2d 1264, 1266–68 (Mass. 1983); State v. Harnisch, 931 P.2d 1359, 1365–66 (Nev. 1997); State v. Pierce, 642 A.2d 947, 960 (N.J. 1994); State v. Rowell, 188 P.3d 95, 101 (N.M. 2008); People v. Blasitch, 541 N.E.2d 40, 44–45 (N.Y. 1989); State v. Gilberts, 497 N.W.2d 93, 97 (N.Dak. 1993); State v. Brown, 588 N.E.2d 113, 114–15 (Ohio 1992); Commonwealth v. White, 669 A.2d 896, 902 (Pa. 1992); State v. Bauder, 924 A.2d 38, 47 (Vt. 2007); State v. Stroud, 720 P.2d 436, 440–41 (Wash. 1986).

[51] Dworkin v. LFP, Inc., 839 P.2d 903, 909 (Wyo. 1992); Saldana v. State, 846 P.2d 604, 621–24 (Wyo. 1993) (Golden, J., concurring).

[52] *Vasquez*, 990 P.2d at 483–84.

Vasquez v. State

Vasquez v. State is the foundation for the Wyoming Supreme Court's modern search and seizure jurisprudence under the state constitution.[53] In *Vasquez*, officers arrested the appellant for driving while intoxicated.[54] The officers noticed empty ammunition shells in the bed of the appellant's truck, and subsequently searched the vehicle and its two passengers for any weapons posing a threat to the officers' or public safety.[55] In the fuse box, the officers discovered a plastic bag containing cocaine.[56] Under the Fourth Amendment, pursuant to *Belton*, the permissible scope of the warrantless vehicle search incident to arrest included opening the closed fuse box.[57] The appellant argued the Wyoming Constitution provides greater protection than the Fourth Amendment and presented a precise, analytically sound state constitutional argument.[58] The Wyoming Supreme Court partially agreed with the argument: it concluded Wyoming's search and seizure provision provides greater protections than its federal counterpart, but still upheld the warrantless search of the vehicle's fuse box.[59]

The Wyoming Supreme Court imposed, in *Vasquez*, a requirement that every warrantless search be "reasonable under all of the circumstances."[60] The court held a warrantless search conducted incident to arrest meets this reasonableness requirement if performed for one of two reasons: (1) to prevent the arrestee from reaching weapons posing a threat to officer safety, or (2) to prevent the arrestee from concealing or destroying evidence.[61] In *Vasquez*, both policy reasons were present.[62] First, the court held an arrest for suspected driving under the influence

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[53] *See, e.g.*, *Vasquez*, 990 P.2d at 489; *Holman*, 183 P.3d at 371; *O'Boyle*, 117 P.3d at 409; Almada v. State, 994 P.2d 299, 308 (Wyo. 1999).

[54] *Vasquez*, 990 P.2d at 479.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 482; *see supra* notes 36–44 and accompanying text (reviewing the *Belton* holding).

[58] *Vasquez*, 990 P.2d at 484. Vasquez presented his argument by applying the six-factor analysis Justice Golden recommended to the practicing bar. *Id.* (referring to *Saldana*, 846 P.2d at 621–24 (Golden, J., concurring)).

[59] *Id.* at 489. The state constitution provides greater protection because all searches must be "reasonable under all of the circumstances," a requirement the Wyoming Supreme Court resurrected from its pre-*Mapp* decisions. *Id.* at 488–89 (citing the reasonableness standard from State v. Kelly, 268 P. 571 (Wyo. 1928) and State v. Peterson, 194 P. 342, 345 (Wyo. 1920)). Wyoming's search and seizure provision is also stronger than its federal counterpart because the state provision requires an affidavit, as opposed to merely an oath or affirmation. Fertig v. State, 146 P.3d 492, 497 (Wyo. 2006) (citing *Peterson*, 194 P. at 345).

[60] *Vasquez*, 990 P.2d at 489.

[61] *Id.*; *see also supra* notes 32–34 and accompanying text (reviewing the United States Supreme Court's similar policy based reasoning in *Chimel*).

[62] *Vasquez*, 990 P.2d at 488–489.

justified a search for evidence of intoxication.[63] Second, the ammunition shells in the bed of the truck raised an issue of officer safety because the vehicle's occupants might possess the gun matching the empty shells.[64]

Modern Cases Preceding the Holman Triumvirate

The Wyoming Supreme Court predicted in *Vasquez* that a vehicle search incident to arrest would rarely fail its reasonable under all of the circumstances test.[65] In the seven years following *Vasquez*, only three Wyoming cases analyzed the search incident to arrest exception under the Wyoming Constitution.[66] True to the court's prediction, the court upheld all three searches as reasonable.[67] In the first case, *Andrews v. State*, the appellant placed his wallet on a counter next to him when the police informed him of his arrest for burglary.[68] The police searched the wallet incident to the arrest and discovered stolen coins and credit cards similar to items stolen in the burglary.[69] The State justified its search and subsequent seizure of the wallet under the search incident to arrest exception.[70] The Wyoming Supreme Court held the search reasonable under all of the circumstances because the wallet was in the area of the arrestee's immediate control at the time of arrest,

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[63] *Id.* at 488.

[64] *Id.*

[65] *Id.* at 489.

[66] Clark v. State, 138 P.3d 677, 682–83 (Wyo. 2006); Cotton v. State, 119 P.3d 931, 936 (Wyo. 2005); Andrews v. State, 40 P.3d 708, 715 (Wyo. 2002). The sparse existence of case law in this area is due to the failure of defendants to properly raise state constitutional challenges using the "precise, analytically sound approach" required by the Wyoming Supreme Court. *See Dworkin*, 839 P.2d at 909; *Fertig*, 146 P.3d at 492–501. The Wyoming Supreme Court dismisses state constitutional claims and decides search and seizure cases under the Fourth Amendment if the appellant fails to raise the state constitutional challenge sufficiently at the trial and appellate levels. *E.g.*, LaPlant v. State, 148 P.3d 4, 7 (Wyo. 2006) (dismissing the state constitutional claim for failure to raise the issue to the trial court); Bailey v. State, 12 P.3d 173, 177–78 (Wyo. 2000) (dismissing the state constitutional claim on appeal for failing to raise the Wyoming Constitution in the motion to suppress). One method of meeting this "precise, analytically sound" requirement uses the six-factor analysis recommended in Justice Golden's concurring opinion in *Saldana*, 846 P.2d at 621–24 (Golden, J., concurring). Another method uses the three part analysis recommended in *Dworkin*. Lovato v. State, 901 P.2d 408, 413 (Wyo. 1995) (explaining *Dworkin* and *Saldana* each demonstrate an acceptable constitutional argument).

[67] *Clark*, 138 P.3d at 682–83 (upholding the warrantless search under the officer safety prong of the search incident to arrest exception); *Cotton*, 119 P.3d at 936 (upholding the warrantless search under the officer safety prong of the search incident to arrest exception); *Andrews*, 40 P.3d at 715 (upholding the warrantless search under the evidentiary prong of the search incident to arrest exception).

[68] 40 P.3d at 715.

[69] *Id.* at 711.

[70] *Id.* at 712. When a defendant objects to evidence obtained without a warrant, the State bears the burden to prove an exception justified the search and seizure. Mickelson v. State, 906 P.2d 1020, 1022 (Wyo. 1995); *accord* Fenton v. State, 154 P.3d 974, 975–76 (Wyo. 2007); Pena v. State, 98 P.3d 857, 870 (Wyo. 2007).

and the wallet likely contained evidence of the burglary for which the defendant was arrested.[71]

The Wyoming Supreme Court analyzed a search incident to arrest under the Wyoming Constitution for the second time in *Cotton v. State*.[72] In *Cotton*, the officers arrested the appellant for driving with a suspended license, and the appellant asked the passenger in his vehicle to retrieve a shirt from the vehicle and take the shirt home.[73] The officers retrieved the shirt from the vehicle and searched it before surrendering the item to the passenger, in order to confirm neither the vehicle nor the shirt contained a weapon the passenger could use against the officers.[74] The officers discovered cocaine in the shirt's pocket.[75] The State raised the search incident to arrest exception to justify the search of the shirt and the inside of the vehicle.[76] The Wyoming Supreme Court upheld the scope of the search as reasonable under all of the circumstances because the search addressed officer safety concerns.[77]

The Wyoming Supreme Court analyzed a search conducted incident to arrest under the Wyoming Constitution for the third time in *Clark v. State*.[78] In *Clark*, the officers arrested the appellant for driving with a suspended license.[79] The officers searched the driver's area of the interior of the vehicle incident to the arrest and discovered marijuana inside a box sealed with duct tape.[80] The Wyoming Supreme Court upheld the scope of the search as reasonable under all of the circumstances because the presence of an intoxicated passenger raised officer safety concerns.[81] The court further concluded officer safety concerns existed because someone inside the vehicle covered up the box after the officer noticed it at the beginning of the traffic stop.[82]

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[71] *Andrews*, 40 P.3d at 715. The arrestee was suspected of stealing coins and cash. *Id.*

[72] 119 P.3d at 936.

[73] *Id.* at 932, 936.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 932.

[77] *Cotton*, 119 P.3d at 935–36. The Wyoming Supreme Court later re-characterized its *Cotton* holding as illustrating the automatic companion rule. *Speten*, 185 P.3d at 32. The automatic companion rule permits a warrantless pat-down search of an arrestee's companion without reasonable suspicion or probable cause to affirm officer safety. *Id.*

[78] 138 P.3d 677, 682–83 (Wyo. 2006).

[79] *Id.* at 679, 682.

[80] *Id.*

[81] *Id.* at 682.

[82] *Id.*

The First Two Cases in the Holman Triumvirate: Pierce v. State *and* Sam v. State

The Wyoming Supreme Court invalidated a vehicle search incident to arrest for the first time under its reasonable under all of the circumstances approach in the landmark case of *Pierce v. State*.[83] In *Pierce*, a police officer approached a car illegally parked in a city park.[84] The officer asked to see the driver's license of the vehicle's sole occupant, Roy Pierce ("Pierce"), and his proof of insurance.[85] Pierce provided a Montana license and told the officer the license was suspended and he did not maintain insurance on the vehicle.[86] Police dispatch confirmed the suspension of Pierce's license.[87] Another officer arrived at the scene, and the two officers arrested Pierce for driving under suspension and failing to maintain liability insurance.[88]

After placing Pierce in the back of the patrol car, the two officers searched the driver's area of the vehicle's interior.[89] One of the officers discovered syringes and a vial of liquid methamphetamine in a partially open bag on the floor behind the driver's seat.[90] The officer then searched other containers in the vehicle and found more drug paraphernalia, a list of names and phone numbers of individuals involved in the drug trade, and a recipe for cooking methamphetamine.[91] The State charged Pierce with three drug-related offenses, and Pierce moved to suppress the evidence on the grounds the search violated the search and seizure provisions of both the United States and Wyoming Constitutions.[92] The trial court denied Pierce's motion, and Pierce entered a conditional guilty plea reserving his right to appeal.[93]

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[83] 171 P.3d 525 (Wyo. 2007).

[84] *Id.* at 527. The park is closed from midnight to 6 a.m.; this stop occurred just after 5 a.m. *Id.* at 527 n.1.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 527–28.

[88] *Pierce*, 171 P.3d at 528. The arresting officer testified that arrests for driving under suspension are a common police practice in Casper. *Id.* at 528 n.2.

[89] *Id.* at 528.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 528–29. The State charged Pierce with three crimes: (1) third, or subsequent possession of powder or crystalline methamphetamine; (2) third, or subsequent, possession of liquid methamphetamine; and (3) possession of more than .3 grams of methamphetamine. WYO. STAT. ANN § 35-7-1031(c)(i)–(ii), (9) (LexisNexis 2007).

[93] *Pierce*, 171 P.3d at 529.

On appeal, Pierce argued the district court erred in denying his motion to suppress because the search of his vehicle was unreasonable, and therefore violated the Wyoming Constitution's search and seizure provision.[94] The State raised the search incident to arrest exception.[95] The State argued the search was reasonable because the scope of the search was limited to the area within the driver's immediate control just prior to the arrest.[96] Chief Justice Voigt issued the opinion of a divided court and held the vehicle search unreasonable and, therefore, unconstitutional.[97] The court recited the two policies that justify searches incident to arrest—to prevent the arrestee from concealing or destroying evidence, or to prevent the arrestee from reaching weapons.[98] Next, the opinion listed eleven factors that indicated the absence of either policy in the circumstances presented.[99] The court then distinguished *Pierce* from the small body of case law, which unfailingly upheld warrantless searches, applying the search incident to arrest exception under the Wyoming Constitution.[100]

Justices Hill and Burke each issued dissenting opinions.[101] Justice Burke criticized the court for not affording officer safety concerns appropriate weight as a factor in its reasonableness analysis.[102] Every arrest presents officer safety concerns according to Justice Burke, and therefore, all searches conducted incident to arrest are justified.[103] Justice Burke found the search reasonable and consistent with Wyoming precedent because the search's scope was limited to the area within the driver's immediate control just prior to the arrest.[104] Justice Burke further

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[94] *Id.* at 530 (citing WYO. CONST. art. 1, § 4).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Pierce*, 171 P.3d at 531.

[99] *Id.* at 531–32. The court considered eleven factors: (1) the apparent influence of alcohol or drugs on the arrestee; (2) the likelihood the vehicle contained evidence of any crime; (3) the pat-down search uncovered no evidence; (4) the State did not attempt to justify the search for evidentiary reasons in its appellate brief; (5) the apparent presence of weapons in the vehicle, on the person, or likely presence due to the nature of the crime; (6) the ratio of vehicle passengers to officers; (7) the isolation of the handcuffed arrestee in the back of the patrol car; (8) any suspicious or furtive behavior by the arrestee; (9) the inherent dangerousness of the setting of the arrest including time of day and location; (10) the interaction with the arrestee including information regarding past criminal history; and (11) the cooperation of the arrestee during the arrest. *Id.* The *Pierce* court indicated the questionable significance of the eleven factors when it said, "[t]hat is not to say, of course, that *any* of these considerations might not be viewed differently if it were to arise in the context of different facts." *Id.* at 532 (emphasis in original).

[100] *Id.* at 532–35 (discussing *Clark*, 138 P.3d 677; *Cotton*, 119 P.3d 931; and *Andrews*, 40 P.3d 708). *Clark* and *Cotton* reappear in *Holman*. *Holman*, 183 P.3d at 373.

[101] *Pierce*, 171 P.3d at 536–38, 539.

[102] *Id.* at 536–38 (Burke, J., dissenting).

[103] *Id.* at 537 (Burke, J., dissenting) (citing Wash. v. Chrisman, 455 U.S. 1, 7 (1982); Mich. v. DeFillippo, 443 U.S. 31, 35 (1979); Chimel v. Cal., 395 U.S. 752, 762–63 (1969)).

[104] *Id.* (Burke, J., dissenting).

criticized the court for undermining standard law enforcement policy permitting searches incident to arrest.[105] The court expects officers in the field to determine when a vehicle search is reasonable, and Justice Burke accused the majority of failing to provide law enforcement with sufficient guidance to make such a legal distinction.[106] Justice Hill's brief dissent concurred with Justice Burke's opinion, and added a conclusory statement that the court misapplied *Vasquez*.[107]

Only four months after issuing *Pierce v. State*, the Wyoming Supreme Court, once again divided, reversed itself by finding a vehicle search reasonable in *Sam v. State*.[108] In this case, the balance of the court was inverted—Justice Hill wrote the majority opinion, joined by Justices Burke and Kite.[109] Chief Justice Voigt and Justice Golden dissented.[110] The story of Sam's arrest and vehicle search began when police in Cody, Wyoming received a complaint that Steven Ace Sam ("Sam") violated a protective order by calling and following a woman and her daughter.[111] The officer requested an arrest warrant, but before the warrant arrived, the officer observed Sam repeatedly drive past the Crisis Intervention Center where the woman and her daughter went for help.[112] The officer stopped Sam, who drove with a passenger, and arrested Sam for violating the protection order and driving with a suspended license.[113] In the pat-down search of Sam, the officer discovered two large bundles of cash in Sam's pockets.[114] After placing Sam in the back of his patrol car, the officer searched the interior of Sam's vehicle incident to the arrest.[115]

The search of the vehicle did not produce any evidence of the two crimes for which Sam was arrested, but the search did uncover drug paraphernalia, methamphetamine, and cocaine.[116] The State charged Sam with possession

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[105] *Id.* (Burke, J., dissenting).

[106] *Pierce*, 171 P.3d at 537 (Burke, J., dissenting).

[107] *Id.* at 538 (Hill, J., dissenting); *compare supra* notes 53–64 and accompanying text (reviewing *Vasquez*), *with infra* notes 161–66 and accompanying text (articulating a similar interpretation of *Vasquez* that appeared in Justice Burke's dissenting opinion in *Holman*).

[108] 177 P.3d 1173 (Wyo. 2008).

[109] *Id.*

[110] *Id.* at 1178–80 (Voigt, C.J., dissenting).

[111] *Id.* at 1175. Sam lived with the victim and her daughter for several years preceding the dissolution of the relationship and subsequent domestic violence protective order. *Id.* Sam allegedly violated the protective order by telephone harassment several times in the days preceding the arrest. *Id.*

[112] *Id.*

[113] *Sam*, 177 P.3d at 1175.

[114] Brief of Appellee at 5, *Sam*, 177 P.3d 1173 (No. 07-57) (May 14, 2007), 2007 WL 5187033. Sam justified the large sum of money by alleging he just sold a car. Brief of Appellant at 4–5, *Sam*, 177 P.3d 1173 (No. 07-57) (Mar. 26, 2007), 2006 WL 5953239.

[115] Brief of Appellee, *Sam*, *supra* note 114, at 5.

[116] *Sam*, 177 P.3d at 1175–76.

of a controlled substance with intent to deliver.[117] Sam moved to suppress the evidence of the drug charges, and the trial court denied his motion.[118] Sam made a conditional guilty plea reserving his right to challenge the constitutionality of the search of his vehicle.[119] A divided Wyoming Supreme Court upheld the district court's decision denying Sam's motion to suppress.[120]

Writing for the majority, Justice Hill stated four situations remove a case from the reasonable under all of the circumstances analysis: (1) to search for weapons or contraband that pose a risk to officer or public safety; (2) when the presence of a passenger in the car poses a threat to officer or public safety; (3) the need to secure an arrestee's automobile; and (4) to search for evidence related to the crime that justified the arrest.[121] The court focused on the evidentiary prong of its *Vasquez* holding; the arresting officer in *Vasquez* was justified to search for evidence of intoxication because Vasquez was arrested for drunk driving.[122] Reasoning by analogy, the court held an arrest for violating a protection order justified a vehicle search incident to arrest to find evidence relating to that crime.[123] A review of the record indicated the arresting officer searched the vehicle for evidence related to the crime of violating a protection order: potential evidentiary items included the cell phone Sam used to make harassing telephone calls and documents that might indicate Sam's intentions toward the individuals protected by the order.[124] The court thereby found the warrantless vehicle search reasonable because the search met the evidentiary prong of the reasonable under all of the circumstances test.[125]

Chief Justice Voigt's dissent accused the court of misapplying *Vasquez*.[126] According to Chief Justice Voigt, the four exceptions to *Vasquez* cited by the court are not exceptions at all, but merely factors to consider when evaluating whether a search meets the reasonable under all of the circumstances test.[127] Chief Justice Voigt expressed concern that the court established a bright-line rule authorizing a vehicle search incident to arrest per se, thereby nullifying the court's reasonable

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[117] *Id.* at 1174.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 1173.

[121] *Sam*, 177 P.3d at 1177.

[122] *Id.* at 1178. In *Vasquez*, the court also justified the warrantless vehicle search for officer safety concerns evident by empty shell casings in the vehicle and the presence of additional passengers. *Vasquez*, 990 P.2d at 489; *see supra* notes 53–64 and accompanying text (reviewing *Vasquez*).

[123] *Sam*, 177 P. 3d at 1178.

[124] *Id.* at 1177.

[125] *Id.* at 1178.

[126] *Id.* at 1179 (Voigt, C.J., dissenting).

[127] *Id.* (Voigt, C.J., dissenting).

under all of the circumstances test.[128] Chief Justice Voigt agreed with the court that officer safety or evidentiary concerns justify vehicle searches incident to arrest, but found neither justification supported by the facts of the case at bar.[129]

Chief Justice Voigt suggested either probable cause or reasonable suspicion that the vehicle contains weapons or evidence of the alleged crime is required to justify a warrantless vehicle search incident to arrest.[130] The arresting officer testified at trial that he searched the vehicle incident to arrest—without asserting any level of suspicion to justify the search.[131] The State did not enunciate what evidence the officer searched for until the State filed its appellate brief, and Chief Justice Voigt found this post-hoc justification for a search inadequate to meet Wyoming's reasonable under all of the circumstances requirement.[132]

Pierce and *Sam* demonstrate a clear split in the Wyoming Supreme Court regarding warrantless vehicle searches conducted under the search incident to arrest exception.[133] Justice Kite was the swing Justice in each opinion.[134] With the seemingly inapposite opinions from *Sam* and *Pierce* as the backdrop, the Wyoming Supreme Court issued its third opinion in seven months concerning warrantless vehicle searches incident to arrest in *Holman*.[135]

PRINCIPAL CASE

Holman asked the Wyoming Supreme Court to find the warrantless search of his vehicle unreasonable, and thereby unconstitutional, and reverse the trial court's denial of his motion to suppress evidence.[136] Holman argued the search of his vehicle was unreasonable because the vehicle did not contain any evidence of the crime for which he was arrested, and nothing in the record indicated the

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[128] *Sam*, 177 P. 3d at 1179 (Voigt, C.J., dissenting) ("Most troubling to me is the idea that the arresting officer may always search the vehicle for evidence of the crime for which the driver was arrested. If that is the rule, then *Vasquez* has no meaning, and the vehicle may always be searched, because an arrested driver has always been arrested for the alleged commission of some crime.").

[129] *Id*. at 1179–80 (Voigt, C.J., dissenting).

[130] *Id*. at 1179 (Voigt, C.J., dissenting).

[131] *Id*. (Voigt, C.J., dissenting).

[132] *Id*. (Voigt, C.J., dissenting) ("Subsequent speculation does not make a search reasonable under all of the circumstances.").

[133] *Compare supra* notes 83–107 and accompanying text (*Pierce* majority comprised of Chief Justice Voigt, and Justices Golden and Kite), *with supra* notes 108–32 and accompanying text (*Sam* majority comprised of Justices Hill, Burke, and Kite).

[134] *See supra* note 133.

[135] *Compare Pierce*, 171 P.3d at 525 (issued November 15, 2007), *and Sam*, 177 P.3d at 1173 (issued March 16, 2008), *and Holman*, 183 P.3d at 368 (issued two months later on May 14, 2008).

[136] Holman v. State, 183 P.3d 368, 371 (Wyo. 2008).

presence of any officer safety issues.[137] The State countered with five factors supporting its conclusion that the search was reasonable under the search incident to arrest exception: (1) the search addressed officer and public safety concerns; (2) the officers needed to preserve evidence; (3) the search was limited in scope; (4) automobile drivers have diminished expectations of privacy; and (5) the officers needed to secure the vehicle.[138]

Majority Opinion

Chief Justice Voigt wrote the majority opinion, joined by Justices Golden, Kite, and Hill.[139] The court focused on the arresting officer's testimony that he searched Holman's vehicle incident to arrest as a matter of standard police procedure, without articulating facts raising officer safety or evidentiary concerns.[140] The court held an unadorned per se policy of searching vehicles incident to any arrest might satisfy the Fourth Amendment, but does not satisfy Wyoming's heightened constitutional protections requiring its "reasonable under all of the circumstances" analysis.[141] The court narrowed the issue to whether two exceptions applied to justify the search at bar: (1) the search incident to arrest exception, and (2) the search of an automobile upon probable cause exception.[142]

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[137] *Id.* at 373. Holman also argued the search was not justified by reasonable suspicion as an investigatory stop. *See* Brief of Appellant, *Holman*, *supra* note 2, at 4–10. One of the issues reviewed in investigatory stops is whether the initial stop was justified by reasonable suspicion. Brown v. State, 944 P.2d 1168, 1171 (Wyo. 1997). Holman argued the facts of the case were inadequate to give rise to a reasonable suspicion of criminal activity when the officer initiated the stop because there is nothing criminal about sitting in a car, using a monocular, or moving a car occasionally. Brief of Appellant, *Holman*, *supra* note 2, at 4–10. The State countered that Holman's furtive behavior supported the existence of a reasonable suspicion that Holman engaged in indecent exposure or masturbation while watching children. Brief of Appellee at 9–14, *Holman*, 183 P.3d 368 (No. 06-140) (Dec. 14, 2006), 2006 WL 5953240. The *Holman* court did not address these arguments in its opinion. *See Holman*, 183 P.3d 368.

[138] Brief of Appellee, *Holman*, *supra* note 137, at 17.

[139] *See Holman*, 183 P.3d 368.

[140] *Id.* at 372. The officer stated this simple justification for the warrantless vehicle search twice. *Id.* At the preliminary hearing, the officer stated he searched the vehicle incident to arrest because "[t]hat's what I always do." *Id.* At the hearing on the motion to suppress, the officer told defense counsel "[o]nce he's arrested, I'm going to search the vehicle regardless of whether we're going to leave it parked there or move it to a different spot to be parked or tow it. . . . It doesn't matter. I'm going to search the vehicle." *Id.*

[141] *Id.* at 372–73. A lawful arrest justifies a thorough search incident to that arrest in Fourth Amendment jurisprudence. Michigan v. Long, 463 U.S. 1032, 1050 n.14 (1983) ("[T]he 'bright line' that we drew in *Belton* clearly authorizes [an unlimited] search whenever officers effect a custodial arrest."); *see supra* notes 36–44 and accompanying text (reviewing *Belton*).

[142] *Holman*, 183 P.3d at 373. The State never raised the automobile exception. Brief of Appellant, *Holman*, *supra* note 2, at i, 15–29; *see infra* notes 217–26 and accompanying text (demonstrating the court's sua sponte discussion of the automobile exception is the strongest fact supporting the imposition of reasonable suspicion onto the search incident to arrest exception).

The court reiterated the rule of the automobile exception: a warrantless search of an automobile is permissible if probable cause exists to believe the vehicle contains weapons or contraband.[143] The court then compared the facts of the present case to the facts of *Vasquez* and *Pierce*.[144] The court re-characterized its *Vasquez* decision as discussing the automobile exception; the automobile exception applied because the probable cause necessary to justify an arrest for drunk driving equated to the same probable cause justifying a search of the vehicle for intoxicants related to that crime.[145] In *Pierce*, the automobile exception did not apply because of the improbability that evidence relating to the crime for which Pierce was arrested (driving under suspension) remained in the vehicle.[146] The court held that, analogous to *Pierce*, the automobile exception did not apply to the present facts because there was no likelihood, and thereby no probable cause, that evidence relating to the crime for which Holman was arrested (driving under suspension) would be found in the vehicle.[147]

The court began its discussion of the search incident to arrest exception by reciting the two policies that justify searches incident to arrest—to ensure officer safety where circumstances indicate the arrestee may have weapons, and to prevent the destruction or concealment of evidence.[148] Next, the court distinguished the facts of the case from the facts of *Vasquez*, *Cotton*, and *Clark* and concluded no facts in the present case raised officer safety concerns.[149] The court recited, but did not explicitly apply, eight of the eleven factors supporting its holding in *Pierce* that found a vehicle search incident to arrest unreasonable.[150] The court concluded that, analogous to *Pierce*, the record presented no objective facts to find

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[143] *Holman*, 183 P.3d at 374–75.

[144] *Id*. at 375–76.

[145] *Id*. at 375; *see supra* notes 53–64 and accompanying text (reviewing *Vasquez*, which analyzed the search incident to arrest exception).

[146] *Holman*, 183 P.3d at 375 (quoting *Pierce*, 171 P.3d at 531). The *Pierce* court never addressed the automobile exception. *Pierce*, 171 P.3d at 529 ("We are concerned in the instant appeal with the applicability of the search-incident-to-arrest exception."); *see supra* notes 83–107 and accompanying text (reviewing *Pierce*).

[147] *Holman*, 183 P.3d at 374–76.

[148] *Id*. at 373.

[149] *Id*. at 373–74; *see Pierce*, 171 P.3d at 532–35 (distinguishing *Pierce* from the small body of precedent applying Wyoming's unique search incident to arrest exception).

[150] *Holman*, 183 P.3d at 374. The court considered these factors: (1) the apparent influence of alcohol or drugs on the arrestee; (2) the apparent presence of weapons in the vehicle, on the person, or likely presence due to the violent nature of the crime; (3) the ratio of vehicle passengers to officers; (4) the isolation of the handcuffed arrestee in the back of the patrol car; (5) any suspicious or furtive behavior by the arrestee; (6) the inherent dangerousness of the setting of the arrest including time of day and location; (7) the interaction with the arrestee including information regarding past criminal history; (8) the cooperation of the arrestee during the arrest. *Id*.; *see infra* notes 230–85 and accompanying text (analyzing the *Pierce* and *Holman* factors).

either officer safety or other exigent circumstances justified the search of Holman's vehicle incident to his arrest.[151]

The court expressly rejected three factors the State argued weighed in favor of finding the warrantless vehicle search reasonable.[152] First, the court found the limited scope of the vehicle search immaterial.[153] According to the court, if probable cause existed to support the vehicle search, then the automobile exception applied and the search could have encompassed any part of the vehicle and its contents.[154] Second, the court recognized a diminished expectation of privacy in automobiles, but held the search invaded Holman's remaining privacy interest because the officers lacked probable cause and no evidence of officer safety concerns existed.[155] Third, the court was not persuaded by a need to secure the vehicle.[156] The court agreed the police should not abandon a car containing weapons or contraband in a city park, and if the police had probable cause to believe the vehicle contained such items, then a warrantless vehicle search would be reasonable under the automobile exception.[157]

Concurring Opinion

Justice Hill wrote a short concurrence to distinguish the present case from *Pierce* and *Sam*.[158] After carefully reiterating the standard of review and the need for ad hoc review in search and seizure cases, Justice Hill held the circumstances of this case inadequate to satisfy the court's reasonableness requirement.[159] Justice Hill stated a stop, search, and seizure based on a mere hunch is unreasonable and, therefore, unconstitutional.[160]

Dissenting Opinion

In the dissenting opinion, Justice Burke found the majority in the present case and its companion case, *Pierce*, inconsistent with Wyoming precedent,

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[151] *Holman*, 183 P.3d at 374.

[152] *Id.* at 376–77.

[153] *Id.* at 376 ("The limited nature of the scope of the search in this case does not justify the otherwise impermissible search.").

[154] *Id.* (citing Vassar v. State, 99 P.3d 987, 986 (Wyo. 2004)).

[155] *Id.*

[156] *Holman*, 183 P.3d at 376–77.

[157] *Id.* at 377.

[158] *Id.* (Hill, J., concurring).

[159] *Id.* (Hill, J., concurring). The standard of review is two-fold: the reviewing court will not disturb factual findings unless clearly erroneous, and the issue of law (whether an unreasonable search and seizure occurred and thereby violated the Wyoming Constitution) is reviewed de novo. *Id.* at 377 (Hill, J., concurring).

[160] *Id.* (Hill, J., concurring).

which authorizes a limited search of the area in the arrestee's immediate control incident to any arrest.[161] Justice Burke began by reviewing the foundation for the reasonable under all of the circumstances approach established in *Vasquez*.[162] According to Justice Burke, while *Vasquez* established a broad rule that all searches must be reasonable, the *Vasquez* holding was actually quite narrow because it only determined whether the scope of the search incident to arrest exception included closed or locked containers inside a vehicle.[163] Wyoming joined a minority of states that re-evaluated state constitutional provisions and eschewed *Belton* by holding vehicle searches incident to arrest do not per se permit opening containers.[164] Justice Burke explained that in *Vasquez*, the court determined the permissibility of *thorough* vehicle searches.[165] According to Justice Burke, the narrow *Vasquez* rule did not apply to the present case because the disputed search was *limited* to the area in the arrestee's immediate control.[166]

Justice Burke accused the court of muddling three exceptions to the warrant requirement: the automobile exception, the search incident to arrest exception, and the investigatory detention exception.[167] According to Justice Burke, the automobile exception (search and/or seizure of an automobile upon probable cause) explicitly requires probable cause.[168] By contrast, Justice Burke stated the search incident to arrest exception (search of an arrested suspect and the area within his control) does not explicitly require any justification beyond the arrest itself.[169] Justice Burke argued a lawful arrest supported by probable cause provides the same probable cause to uphold a search incident to that arrest.[170] Justice Burke also claimed the court misapplied the standard of reasonable suspicion which, he claimed, is a level of suspicion relevant only to the investigatory detention exception.[171]

Justice Burke further criticized the court for finding the crime for which the appellant was arrested a significant factor in its reasonableness analysis.[172] If the

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[161] *Holman*, 183 P.3d at 378 (Burke, J., dissenting).

[162] *Id.* (Burke, J., dissenting).

[163] *Id.* (Burke, J., dissenting) (discussing *Vasquez*, 990 P.2d at 488–89).

[164] *Id.* (Burke, J., dissenting).

[165] *Id.* (Burke, J., dissenting).

[166] *Holman*, 183 P.3d at 378 (Burke, J., dissenting). Justice Burke stated the *Vasquez* holding was appropriately applied in *Clark*, when the Wyoming Supreme Court upheld a warrantless vehicle search, including the opening of a sealed box, due to officer safety concerns. *Id.* (discussing Clark v. State, 138 P.3d 677 (Wyo. 2006)).

[167] *Id.* at 379–82 (Burke, J., dissenting).

[168] *Id.* at 379 (Burke, J., dissenting) (citing *Vassar*, 99 P.3d at 996).

[169] *Id.* (Burke, J., dissenting).

[170] *Id.* (Burke, J., dissenting).

[171] *Holman*, 183 P.3d at 382 (Burke, J., dissenting).

[172] *Id.* at 380 (Burke, J., dissenting).

nature of the crime indicates whether officer safety concerns exist, then, according to Justice Burke, the court failed to inform law enforcement which crimes and related arrests are inherently dangerous.[173] Justice Burke advised the court to follow federal precedent which treats every arrest as dangerous.[174]

ANALYSIS

The Wyoming Supreme Court stepped away from its search incident to arrest precedent in *Pierce*, and confirmed its new direction in *Holman*.[175] Regrettably, throughout the *Holman* triumvirate, the court failed to synthesize its new direction into a distinct set of rules for legal practitioners and law enforcement to apply.[176] The analysis section of this case note determines that in the search incident to arrest exception, the court defines "reasonable under all of the circumstances" as reasonable grounds.[177] The appropriate standard to be applied is reasonable suspicion.[178] The factors the Wyoming Supreme Court analyzes in search incident to arrest cases support this theory and provide practical guidance for law enforcement and practitioners.[179] These factors incidentally demonstrate continuity in Wyoming's search incident to arrest cases, and reconcile the anomalous case in the *Holman* triumvirate, *Sam*, with its companions.[180]

As a preliminary matter, a fundamental error in the court's opinion needs clarification.[181] The court stated no search was permissible incident to arrest.[182] At a minimum, a limited pat-down search of the arrestee's person for weapons or evidence was permitted: it was a factor considered by the court in its analysis.[183]

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[173] *Id.* (Burke, J., dissenting).

[174] *Id.* at 380–81 (Burke, J., dissenting) (citing Wash. v. Chrisman, 455 U.S. 1, 7 (1982)).

[175] *Compare supra* notes 53–82 and accompanying text (reviewing search incident to arrest decisions on independent state grounds preceding *Pierce* which unfailingly upheld warrantless vehicle searches), *with supra* notes 83–171 and accompanying text (reviewing the triumvirate of *Pierce*, *Sam*, and *Holman*).

[176] *See infra* notes 181–94 and accompanying text.

[177] *See infra* notes 188–94 and accompanying text.

[178] *See infra* notes 201–29 and accompanying text.

[179] *See infra* notes 230–85 and accompanying text.

[180] *See infra* notes 250–85 and accompanying text.

[181] *Holman*, 183 P.3d at 380 (Burke, J., dissenting) ("Fundamentally, [the court] fails to acknowledge the distinction between the authority to conduct a search incident to arrest, and the proper scope of that search.").

[182] *Id.* at 376 ("The limited nature of the scope of the search in this case does not justify the otherwise impermissible search.").

[183] *Id.* at 374 ("The . . . 'pat down' search of the appellant's person did not uncover anything of evidentiary value.").

Furthermore, the permissible search of an arrestee's person is the well-recognized foundation of the search incident to arrest exception.[184] The *scope* of a search made incident to arrest—beyond the person, to the interior of a vehicle—is the focus of the *Holman* opinion.[185] Every case in Wyoming's small body of case law interpreting its search incident to arrest exception focuses on the scope of the search.[186] The *Holman* court made a careless error in *Holman* by failing to distinguish between the permissible search of a person incident to arrest and the extension of that search to the interior of a vehicle.[187]

In the *Holman* triumvirate of cases, the Wyoming Supreme Court replaced its vague "reasonable under all of the circumstances" requirement with a "reasonable basis" standard.[188] A vehicle search incident to arrest is unconstitutional unless a reasonable basis—either probable cause or reasonable suspicion—suggests the vehicle contains weapons or evidence.[189] In the first case of the triumvirate, *Pierce*, Chief Justice Voigt stated "we must be able to find a *reasonable basis*, articulable from the totality of the circumstances in each case, to justify a search."[190] In the second case, *Sam*, Chief Justice Voigt dissented because "[t]he officer did not claim to have *probable cause* to search the vehicle, nor did he claim to have *reasonable*

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[184] Weeks v. U.S., 232 U.S. 383, 392 (1914); Chimel v. Cal., 395 U.S. 752, 762–63 (1969); U.S. v. Robinson, 414 U.S. 218, 224 (1973). *See generally* 1 LAFAVE, *supra* note 34, § 1.1(a)–(c) (discussing the history of the Fourth Amendment).

[185] *See* WILLIAM W. GREENHALGH, THE FOURTH AMENDMENT HANDBOOK 13 (2003). There are two issues under each exception to the warrant requirement: (1) identifying the predicate for the search, and (2) defining the permissible scope of that search. *Id*. The predicate under the search incident to arrest exception is the occurrence of a lawful arrest. *Id*. The most common dispute in search incident cases is the second issue—defining the permissible scope of the search. *Id*.; *see also Robinson*, 414 U.S. at 224 (explaining the search incident to arrest exception involves two searches: the search of the person and the search within the area of the arrestee's immediate control).

[186] See *supra* notes 53–132 and accompanying text (reviewing the small body of case law applying the search incident to arrest exception under the Wyoming Constitution). In *Andrews*, the court determined whether a wallet on a counter next to the arrestee lay within the permissible scope of a search. Andrews v. State, 40 P.3d 708, 715 (Wyo. 2002). In *Cotton*, the court considered whether the permissible scope of a search incident to arrest included the pocket of a shirt inside a vehicle. Cotton v. State, 119 P.3d 931, 933 (Wyo. 2005). In *Clark*, the court investigated whether the scope of a search incident to arrest included a sealed box behind the driver's seat inside the vehicle. Clark v. State, 138 P.3d 677, 680 (Wyo. 2006). The *Pierce* opinion clearly articulated the issue as whether extending the scope of a search incident to arrest to the interior of a vehicle violated the state constitution. Pierce v. State, 117 P.3d 525, 529 (Wyo. 2007). The *Sam* court also articulated the difference between the search of the person incident to arrest and the extension of that search to the interior of a vehicle. Sam v. State, 177 P.3d 1173, 1178 (Wyo. 2008).

[187] *Holman*, 183 P.3d at 380 (Burke, J., dissenting); *see also* GREENHALGH, *supra* note 185, at 13 (explaining the common dispute in search incident to arrest cases concerns the scope of the search beyond the arrestee's person).

[188] *See infra* notes 189–229 and accompanying text.

[189] *See infra* notes 190–198 and accompanying text.

[190] *Pierce*, 171 P.3d at 532 (emphasis added).

suspicion of anything when he searched it."[191] Writing for the majority again in *Holman*, Chief Justice Voigt remained silent on whether any level of reasonable grounds were required to justify the warrantless vehicle search.[192] Justice Burke filled that silence by criticizing the *Holman* court for imposing both reasonable suspicion and probable cause onto the search incident to arrest exception.[193]

The court never specified which level of suspicion is required.[194] The Wyoming Supreme Court defines reasonable suspicion as "'a particularized and objective basis' for suspecting the particular person stopped of criminal activity."[195] The court recognizes the higher standard of probable cause "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[196] Reasonable suspicion is the less demanding standard; it requires more than a mere suspicion or hunch but requires less than probable cause.[197] Reasonable suspicion is the only logical level of suspicion to apply to the search incident to arrest exception.[198]

As a threshold matter, it is helpful to recall the Wyoming Supreme Court recognizes two categories inside the search incident to arrest exception—the evidentiary prong and the officer safety prong.[199] The level of suspicion required

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[191] *Sam*, 177 P.3d at 1179 (Voigt, C.J., dissenting) (emphasis added).

[192] *Holman*, 183 P.3d 368.

[193] *Id.* at 380 (Burke, J., dissenting) ("[The court] borrows the probable cause requirement from automobile searches, and the reasonable suspicion requirement from investigatory detention cases, and imposes them as new requirements for searches incident to arrest.").

[194] *See supra* notes 188–93 and accompanying text (explaining that *either* reasonable suspicion *or* probable cause must justify a warrantless search).

[195] Speten v. State, 185 P.3d 25, 28 (Wyo. 2008) (citing Damato v. State, 64 P.3d 700, 707 (Wyo. 2003)).

[196] *Id.* The two concepts of probable cause and reasonable suspicion are objective standards unavailable as a neat set of legal rules; the standards take into account the ordinary human experience, and require fact specific inquiries in each context in which the standards are applied. 68 AM. JUR. 2D *Searches and Seizures* § 122 (2000). *Compare* BLACK'S LAW DICTIONARY 1007 (8th ed. 2005) ("[P]robable cause: a reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime."), *with* BLACK'S LAW DICTIONARY 1212 ("[R]easonable suspicion: a particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity.").

[197] *Damato*, 64 P.3d at 707 (quoting U.S. v. Wood, 106 F.3d 942 (10th Cir. 1997)); *see also* 68 AM. JUR. 2D, *supra* note 196, § 88 (explaining the lesser standard of reasonable suspicion is a minimal level of justification and requires only a fair probability contraband or evidence will be found).

[198] *See infra* notes 201–29 and accompanying text. *Contra* Decock & Mercer, *supra* note 28, at 164–66 (advocating for the adoption of probable cause to the evidentiary prong of Wyoming's search incident to arrest exception).

[199] *Vasquez*, 990 P.2d at 489 (citations omitted). In the evidentiary prong, the court further recognizes two subcategories—gathering evidence or preventing the destruction of evidence. *Id.*

under each prong is reasonable suspicion, but the reasoning for this prerequisite differs under each prong; each is thereby analyzed separately.[200]

Reasonable Suspicion Under the Officer Safety Prong

The reasonable basis to justify a warrantless vehicle search under the officer safety prong is reasonable suspicion.[201] Justice Burke correctly stated in his *Holman* dissent the court imported reasonable suspicion from its investigatory detention jurisprudence.[202] The court's import, however, was not inappropriate because officer safety is the common denominator for searches in both search incident to arrest and investigatory detention cases.[203] Moreover, Wyoming recognizes that law enforcement faces serious safety risks in the line of duty.[204]

Officer safety concerns were addressed by the United States Supreme Court in *Terry v. Ohio*—the foundation of the investigatory detention exception in Federal Fourth Amendment jurisprudence.[205] The *Terry* Court stated it would be unreasonable to force law enforcement to take unnecessary safety risks when an officer suspects a person in close proximity possesses a weapon; therefore, pat-down searches, while invasive of citizens' protected privacy interests, are permissible during investigatory detentions.[206] The Court adopted reasonable suspicion as the basis to justify searches conducted in the interest of officer safety.[207] The *Terry*

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[200] *See infra* notes 201–16 and accompanying text (discussing the officer safety prong), and *infra* notes 217–29 and accompanying text (discussing the evidentiary prong).

[201] O'Boyle v. State, 117 P.3d 401, 409 (Wyo. 2005) (discussing Vasquez, 990 P.2d at 489). The *Pierce* majority cited the same conclusion from *O'Boyle*. *Pierce*, 171 P.3d at 531.

[202] *Holman*, 183 P.3d at 381–82 (Burke, J., dissenting).

[203] *Speten*, 185 P.3d at 32 n.6, 33 (Wyo. 2008). Officer safety concerns based on less than probable cause also appear in the automatic companion rule. *Id*. at 31 (citing *Cotton*, 119 P.3d 931, 936).

[204] Brown v. State, 944 P.2d 1168, 1172 (Wyo. 1997) (quoting Mickelson v. State, 906 P.2d 1020, 1023 (Wyo. 1995)).

[205] Terry v. Ohio, 392 U.S. 1, 23–24 (1968). The *Terry* decision is a seminal case for multiple issues, not just the investigatory detention exception, and has been subject to extensive commentary. *See generally* Michael Mello, *Stop:* Terry v. Ohio *Step-by-Step, as an Illustration of Fourth Amendment Analysis (or, What Did Detective Martin McFadden Know, and When Did He Know It?)*, 44 NO. 4 CRIM. L. BULL. 5 (2008) (discussing issues of reasonable suspicion, seizures, frisks, and race in the 1968 decision); Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of* Terry v. Ohio, 34 HOW. L.J. 567, 570–76 (1991) (reviewing issues of the reasonable suspicion standard, police power, and individual privacy rights in *Terry*).

[206] *Terry*, 392 U.S. at 23–24.

[207] *Id*. at 27 ("The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."). While this standard bears striking similarities to the definition of probable

Court supported its holding by citing alarming national statistics regarding officer fatalities and injuries suffered by concealed weapons.[208] In *Michigan v. Long*, the Court extended the permissive pat-down search to the interior of automobiles during investigatory detentions so long as the officer has reasonable suspicion the suspect poses a threat, because vehicles may contain weapons easily accessible to suspects.[209] The same principle of preserving officer safety further authorizes the limited protective sweep inside homes during in-home arrests as long as officers have a reasonable suspicion that armed individuals exist inside the home during the arrest.[210]

The Wyoming Supreme Court recognizes that officer safety risks escalated exponentially in the years since *Terry*, and accepts that police officers may reasonably invade citizens' privacy interests to effectuate officer safety.[211] The Wyoming Supreme Court suggested reasonable suspicion justified limited searches in the interest of officer safety in *O'Boyle v. State*—the foundation of the investigatory detention exception in Wyoming's contemporary search and seizure jurisprudence.[212] The *O'Boyle* decision, issued in 2005, is one of the earliest decisions applying Wyoming's reasonable under all of the circumstances test.[213] In reviewing the reasonable under all of the circumstances test, the *O'Boyle* court concluded the *Vasquez* search met the test because the officers had a reasonable

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cause, commentators and courts concede *Terry* imposed the lower standard of reasonable suspicion to justify limited pat-down searches for weapons in the interest of officer safety. 4 LAFAVE, *supra* note 34, § 9.5(a); *see also* John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 784–93, 794, *passim* (1998) (detailing the shift from probable cause at *Terry*'s conference discussions to the sliding scale of reasonable suspicion in the final opinion).

[208] *Terry*, 392 U.S. at 27.

[209] 463 U.S. 1032, 1049–50 (1983).

[210] Marilyn v. Buie, 494 U.S. 325, 334 (1990). A limited search inside closets and spaces immediately adjoining the area where the arrest occurs is per se permissible, but searches beyond that area require reasonable suspicion. *Id.*

[211] *Mickelson*, 906 P.2d at 1023; *see also* Putnam v. State, 995 P.2d 632, 637–38 (Wyo. 2000) (finding the lateness of the hour, the history of burglaries in the area, and the nature of the suspected crime of auto burglary created reasonable suspicion pursuant to *Terry* and justified the pat-down search of a suspect during an investigatory detention in the interest of officer safety).

[212] 117 P.3d 401, 409 (Wyo. 2005).

[213] *Id.* ("Since *Vasquez*, we have not had the opportunity to consider a search and seizure claim brought under article 1, § 4 . . . [because], the issue was not raised at all, or the party raising the issue failed to provide cogent argument or properly present the question in the trial court, or we simply declined to address the state constitutional claim and decided the case on other grounds."). The other early case applying the test was *Almada v. State*. 994 P.2d 299 (Wyo. 1999) (applying the reasonable under all of the circumstances test to wiretap evidence). *See generally* Mervin Mecklenberg, Comment, *Fixing* O'Boyle v. State—*Traffic Detentions Under Wyoming's Emerging Search-and-Seizure Standard*, 7 WYO. L. REV. 69 (2007) (reviewing Wyoming's application of its young reasonable under all of the circumstances test to the investigatory detention disputed in *O'Boyle*).

suspicion one of the vehicle's occupants was armed.[214] In *Pierce*, the first case of the *Holman* triumvirate, the court also recognized this conclusion regarding *Vasquez* and the officer safety prong: the officers in *Vasquez* had a reasonable suspicion the vehicle's occupants were armed and therefore the search in *Vasquez* satisfied the test.[215] Clearly, reasonable suspicion satisfies the officer safety prong of the search incident to arrest exception.[216]

Reasonable Suspicion Under the Evidentiary Prong

The reasonable basis to justify a warrantless vehicle search under the evidentiary prong of the exception is also reasonable suspicion: applying the greater standard of probable cause triggers the automobile exception.[217] The *Holman* court raised the automobile exception on its own accord—the State and the appellant only discussed the search incident to arrest and investigatory detention exceptions.[218] The automobile exception justifies a warrantless search of an automobile if probable cause exists that the vehicle contains weapons or contraband.[219] This exception is supported by the inherent mobility of the vehicle and the diminished expectation of privacy in the use and regulation of the vehicle.[220] The *Holman* court went out of its way to explain that if an officer had probable cause to believe the vehicle contained weapons or contraband, the State may raise the automobile exception, and thereby leave the search incident to arrest exception superfluous.[221]

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[214] *O'Boyle*, 117 P.3d at 409 ("In *Vasquez* . . . [the search] *was reasonable under all the circumstances in that law enforcement had a reasonable suspicion that one of the occupants was armed*.") (emphasis in original).

[215] *Pierce*, 171 P.3d at 531 (reviewing *Vasquez* and *O'Boyle*). The court recently emphasized that officer safety is not its own independent exception nor do officer safety concerns create an automatic right to search a suspect; the search must occur in conjunction with a lawful arrest in the search incident to arrest exception, or in conjunction with an investigatory detention that is supported by reasonable suspicion. *Speten*, 185 P.3d at 33.

[216] *See supra* notes 201–15 and accompanying text.

[217] *See Holman*, 183 P.3d at 376.

[218] Brief of Appellant, *Holman*, *supra* note 2, at 4–14; Brief of Appellee, *Holman*, *supra* note 137, at 8–29.

[219] *E.g.*, McKenney v. State, 165 P.3d 96, 99 (Wyo. 2007). This exception emerged in Fourth Amendment jurisprudence in Carroll v. U.S., 267 U.S. 132, 149 (1925). Wyoming recognizes the same exception under its state constitution. *Speten*, 185 P.3d 30 (listing the automobile exception as one of the commonly recognized exceptions to the warrant requirement); Nielson v. State, 599 P.2d 1326, 1330 (Wyo. 1979) (exploring the development of the automobile exception); State v. Kelly, 268 P. 571, 572 (Wyo. 1928) ("[T]he court should in all cases be satisfied, before permitting the use of such evidence, that the searching officer had in fact probable cause for his search.").

[220] *Nielson*, 599 P.2d at 1330–34. Vehicles may move out of the area or jurisdiction before an official warrant issues, thereby making the warrant requirement impractical. *Id.* (discussing *Carroll*, 267 U.S. at 153–56). Wyoming also recognizes the diminished expectation of privacy articulated in federal precedent. *Id.*

[221] *Holman*, 183 P.3d at 374–77. Where an arrest involves an automobile, either the automobile exception or the search incident to arrest exception might trigger. *Id.* at 379 (Burke, J., dissenting)

The dissenting opinion in *Sam* further supports a requirement of reasonable suspicion.[222] Chief Justice Voigt (who wrote for the court in *Holman* and *Pierce*) criticized the officer in *Sam* several times for not having a reasonable suspicion the vehicle contained evidence.[223] By focusing on the officer's lack of reasonable suspicion with respect to evidence in the vehicle, as opposed to the lack of probable cause, Chief Justice Voigt clearly indicated reasonable suspicion meets the evidentiary prong of the court's reasonable under all of the circumstance requirement.[224] Furthermore, as in the *Holman* opinion, Chief Justice Voigt distinguished the automobile exception, which requires probable cause, from the search incident to arrest exception.[225] As stated above, where probable cause exists that the vehicle contains weapons or contraband, the automobile exception justifies a warrantless search of the vehicle, and the search incident to arrest exception is rendered superfluous.[226]

One final point supporting the import of reasonable suspicion to the evidentiary prong of the search incident to arrest exception is Justice Hill's concurring opinion in *Holman*.[227] Justice Hill used the language of the reasonable suspicion standard when he found the search of Holman's vehicle "prompted more by suspicions or hunches than by concrete fact."[228] Reasonable suspicion requires only something more than hunches or inchoate suspicions, and Justice Hill, by his choice of language, explicitly requires the same.[229]

Reasonable Under Some of the Circumstances

The Wyoming Supreme Court only takes into account factors supporting a finding of reasonable suspicion under either prong (officer safety or evidentiary) of the search incident to arrest exception.[230] Factors supporting probable cause are excluded from a search incident to arrest analysis.[231] In its first decision in

("These are separate and distinct exceptions to the prohibition against warrantless searches, and the two should not be confused."). Practitioners should distinguish between exceptions justifying warrantless searches because the Wyoming Supreme Court recently admonished counsel for presenting confusing arguments. *Speten*, 185 P.3d at 32–33, n.6.

[222] *See Sam*, 177 P.3d at 1179 (Voigt, C.J., dissenting).

[223] *Id.* (Voigt, C.J., dissenting).

[224] *Id.* (Voigt, C.J., dissenting).

[225] *Id.* (Voigt, C.J., dissenting).

[226] *See supra* notes 143–47, 154–57, 219–21 and accompanying text (reviewing the automobile exception).

[227] *See Holman*, 183 P.3d at 378 (Hill, J., concurring).

[228] *Id.* (Hill, J., concurring).

[229] *See supra* notes 195–98 and accompanying text (analyzing the definition of reasonable suspicion).

[230] *See infra* notes 235–85 and accompanying text.

[231] *See infra* notes 235–49 and accompanying text.

the triumvirate, *Pierce*, the court listed eleven factors, eight of which the court repeated in its *Holman* opinion.[232] The *Holman* court also rejected several factors as irrelevant to the search incident to arrest exception.[233] The *Holman* decision modifies Wyoming's semantically inaccurate "reasonable under *all* of the circumstances" test, and suggests the development of a factor test.[234]

At least three circumstances are not considered in the reasonable under all of the circumstances test applied to the search incident to arrest exception: the expectation of privacy in an automobile, the limited scope of a search to the driver's area of a vehicle's interior, and the need to secure a vehicle.[235] The State in *Holman* presented all three of these factors to support its conclusion the search was reasonable under all of the circumstances.[236] The court plainly dismissed all three factors.[237] This is remarkable because the Wyoming Supreme Court in *Vasquez* included two of these factors in its search incident to arrest analysis: the diminished expectation of privacy and the need to secure a vehicle abandoned after an arrest.[238]

The *Holman* court's discussion of the need to secure the abandoned vehicle strongly supports the import of reasonable suspicion to the search incident to arrest exception.[239] Responsible law enforcement cannot abandon an automobile in a public place, like the park in *Holman*, with drugs plainly visible on the center console.[240] However, if the officers knew drugs were in the car, the officers would have probable cause.[241] As stated above, once probable cause exists, the automobile exception applies instead of the search incident to arrest exception.[242]

The same reasoning applies to the factor of the diminished expectation of privacy.[243] It is well held that the expectation of privacy applies to the automobile

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[232] *Compare Pierce*, 171 P.3d at 531–32 (listing eleven factors the court found relevant), *with Holman*, 183 P.3d at 374 (repeating eight of the eleven factors from *Pierce*).

[233] *Holman*, 183 P.3d at 376–77.

[234] *See infra* notes 230–85 and accompanying text (analyzing factors considered in search incident to arrest cases). *See generally* MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 285–309 (2008) (exploring the psychological need for order that leads legal practitioners to develop factor tests and how such tests can be used effectively in persuasive writing).

[235] *Holman*, 183 P.3d at 376–77.

[236] Brief of Appellee, *Holman*, *supra* note 137, at 17–24.

[237] *Holman*, 183 P.3d at 376.

[238] *Vasquez*, 990 P.2d at 489.

[239] *See Holman*, 183 P.3d at 377.

[240] *Id.*

[241] *Id.*

[242] *Id.*; *see supra* notes 217–26 and accompanying text.

[243] *See Holman*, 183 P.3d at 376.

exception.[244] The import of this factor is inappropriate to the search incident to arrest analysis because Wyoming recognizes some privacy interests in vehicles.[245] Furthermore, the diminished expectation of privacy is criticized for affording too many invasions of Fourth Amendment rights.[246] The Wyoming Constitution affords greater protection than the Fourth Amendment, so it makes sense to exile the diminished expectation of privacy to the exception in which it was born, thereby protecting the recognized privacy interests in automobiles.[247]

The other factor the *Holman* court dismissed was the limited scope of the search to the driver's area of the vehicle.[248] The *Holman* court reasoned that the limited scope of a search fails to resolve whether the search was justified in the first place, and is therefore an immaterial factor at this point in the analysis: determining whether a warrantless vehicle search is in the permissible scope of a search incident to arrest.[249]

Some of the Circumstances

When evaluating the search incident to arrest exception, the Wyoming Supreme Court only considers factors supporting reasonable suspicion to meet its reasonable under all of the circumstances test.[250] The court considers at least these factors: (1) the nature of the crime; (2) facts arising out of the arrest; (3) apparent intoxication of the suspect; (4) the ratio of suspects to officers; (5) the physical ability of the suspect to reach weapons or evidence; (6) the suspect's behavior during the encounter and arrest; and (7) the time of day and location of the arrest.[251] This factor test provides continuity through Wyoming's small

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[244] *See generally* 3 WAYNE LAFAVE, *supra* note 34, § 7.2(b) (explaining the development and difficulties of the expectation of privacy in the automobile exception).

[245] *Holman*, 183 P.3d at 376 (quoting 1 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE § 18.4 (3d ed. 2000)).

[246] *See*, *e.g.*, Lewis R. Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 569–72 (1982) (offering a four-part criticism of the diminished expectation of privacy doctrine which subverts the practical application of the Fourth Amendment); Vivian D. Wilson, *The Warrantless Automobile Search: Exception Without Justification*, 32 HASTINGS L.J. 127, 158 (1980) (criticizing the diminished expectation of privacy doctrine as unrealistic in light of the pragmatic storage use characteristics of automobiles and advocating for increased warrant requirements to protect individual privacy interests).

[247] *Cf. O'Boyle*, 117 P.3d at 411 ("While we acknowledge the importance of drug interdiction, we are deeply concerned by the resulting intrusion upon the privacy rights of Wyoming citizens.").

[248] *Holman*, 183 P.3d at 376.

[249] *Id.*; *see supra* notes 181–87 (explaining the *Holman* decision applies to the *scope* of a search incident to arrest despite the court's careless statement that no search was permissible).

[250] *See infra* notes 250–85 and accompanying text.

[251] *See infra* notes 253–85 and accompanying text (evaluating each factor briefly). The *Holman* and *Pierce* courts also considered the point at which the State articulated circumstances that justify the warrantless vehicle search. *Pierce*, 171 P.3d at 531; *Holman*, 183 P.3d at 374. This factor is

body of search incident to arrest cases; reconciles the *Sam* decision with its companions, *Pierce* and *Holman*; and provides some guidance to law enforcement and practitioners in search incident to arrest cases.[252]

The first factor is the relationship between the nature of the offense and the likelihood of danger or evidentiary concerns.[253] The nature of the crime has been relevant to establishing reasonable suspicion since *Terry v. Ohio*.[254] In *Terry*, the United States Supreme Court found the nature of the suspected crime (a robbery) a relevant factor in establishing reasonable suspicion the appellant was armed, because robbery often involves the use of weapons.[255] The Wyoming Supreme Court similarly considered the nature of the offense in *Vasquez*: an arrest for driving while intoxicated supports a level of suspicion that the vehicle contains evidence of intoxication.[256] Likewise, in *Andrews*, the suspect could easily conceal in his wallet the coins and credit cards stolen in the alleged burglary.[257] This factor weighed in favor of finding reasonable suspicion in *Sam* because the suspect violated a domestic violence protective order concurrent to his arrest; this factor helps resolve *Sam's* incongruous position in the *Holman* triumvirate.[258] By contrast, this factor weighed against a finding of reasonable suspicion in *Holman* because, as Holman suggested in his appellate brief, there is nothing criminal or suspicious about sitting in a car watching ball games.[259] The holdings of *Holman* and *Pierce* make clear that an arrest for driving under suspension does not, by itself, justify a warrantless search incident to arrest.[260]

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merely a procedural matter: the court dismisses issues raised for the first time in the appellate court. Duke v. State, 99 P.3d 928, 959 (Wyo. 2004). Furthermore, law enforcement actions must be objectively justified at the search's inception. Mickelson v. State, 886 P.2d 247, 250 (Wyo. 1994), *aff'd* 906 P.2d 1020, 1025 (Wyo. 1995) (holding an officer entering a building without a warrant must have developed reasonable suspicion prior to entering according to statute); Wilson v. State, 874 P.2d 215, 225 (Wyo. 1994) (holding reasonable suspicion of criminal behavior must exist prior to initiating an investigatory stop).

[252] *See infra* notes 253–85 and accompanying text.

[253] *Pierce*, 171 P.3d at 531. This factor is enumerated in *Pierce*, but does not appear in *Holman*. *Compare id.*, *with Holman*, 183 P.3d at 374. Justice Burke nevertheless accused the *Holman* court of inappropriately applying this factor. *Holman*, 183 P.3d at 380 (Burke, J., dissenting).

[254] 392 U.S. 1, 28 (1968).

[255] *Id.* at 27–28.

[256] Vasquez v. State, 990 P.2d 476, 489 (Wyo. 1999); Sam v. State, 177 P.3d 1173, 1178 (discussing *Vasquez*).

[257] *Andrews*, 40 P.3d at 715.

[258] *Sam*, 177 P.3d at 1178 (acknowledging the officer searched the arrestee's vehicle for a cell phone, writings, and instrumentalities that might evidence Sam's intentions towards, or be used to hurt, the protected individuals).

[259] Brief of Appellant, *Holman*, *supra* note 2, at 10.

[260] *See Pierce*, 171 P.3d at 531; *Holman*, 183 P.3d at 377.

Reasonable suspicion of officer safety or evidentiary matters can also arise from facts discovered during the course of the arrest.[261] One source of facts discovered during the arrest arises from the search of the person, which is per se permissible incident to an arrest.[262] The court considers whether the pat-down search of an arrestee reveals evidence of any crime.[263] This factor appeared in *Sam*, although not discussed in the opinion, and helps to reconcile the three cases of the *Holman* triumvirate: the officer in *Sam* found large rolls of cash in the arrestee's pockets during the pat-down search incident to arrest.[264]

Apparent intoxication is another factor the Wyoming Supreme Court considers to determine whether reasonable suspicion exists under the officer safety prong to support a search incident to arrest.[265] In *Michigan v. Long*, the United States Supreme Court considered the appellants apparent intoxication to support a finding of reasonable suspicion during an investigatory stop.[266] Wyoming similarly recognized, in *Clark v. State*, the influence of alcohol on a suspect raises officer safety concerns.[267] Notably, evidence of intoxication is absent from the facts of *Pierce* and *Holman*.[268]

The ratio of officers to suspects at the time of arrest is another factor supporting a finding of reasonable suspicion under the officer safety prong of the search incident to arrest exception.[269] The presence of other vehicle passengers in the presence of a single officer presents officer safety concerns because the suspects outnumber the officer.[270] This factor bears relevance under Fourth Amendment jurisprudence in determining whether a suspect can potentially reach weapons

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[261] *Pierce*, 171 P.3d at 531; *Holman*, 183 P.3d at 374.

[262] *See supra* notes 29–30, 184 (searching the person is the foundation of the search incident to arrest exception).

[263] *Pierce*, 171 P.3d at 531 ("The officer's pat-down search of the appellant's person did not reveal anything of evidentiary value."). This court only lists this factor in *Pierce*. *Compare id.*, *with Holman*, 183 P.3d at 374.

[264] Brief of Appellee, *Sam*, *supra* note 114, at 5; Brief of Appellant, *Sam*, *supra* note 114, at 4–5; *see Sam*, 171 P.3d at 1174–76, 1178 (stating the facts of the case).

[265] *Holman*, 183 P.3d at 374; *Pierce*, 171 P.3d at 531; *Clark*, 138 P.3d at 679, 682 (detecting the odor of alcohol while standing outside the vehicle raised officer safety concerns); *see* Fender v. State, 74 P.3d 1220, 1228 n.4 (Wyo. 2003) (citations omitted) (dicta).

[266] 463 U.S. 1032, 1050 (1983).

[267] 138 P.3d at 679, 682.

[268] *Holman*, 183 P.3d at 372–74; *Pierce*, 171 P.3d at 527–32.

[269] *Holman*, 183 P.3d at 374; *Pierce*, 171 P.3d at 531.

[270] *Fender*, 74 P.3d at 1226–27 (citing Maryland v. Wilson, 519 U.S. 408, 413–15 (1997)). *Fender* presents a comprehensive discussion of the relationship between additional passengers and officer safety concerns under the Fourth Amendment. *Id.*; *see also* 3 LAFAVE, *supra* note 34, § 7.1(b)(4) (discussing the extent of control police have over the scene of arrest when outnumbered by suspects).

or evidence.[271] The Wyoming Supreme Court similarly recognized the officer to defendant ratio in the search incident to arrest exception in *Cotton v. State*: the presence of another passenger raised an officer safety concern that justified a search of the vehicle's interior and the pockets of a particular shirt.[272] The presence of a passenger also appeared in *Clark*.[273] This factor appeared in *Sam*, although not discussed, and helps reconcile the case with the rest of the triumvirate: the car in *Sam* contained an additional passenger during the arrest.[274]

Another factor the court considers when evaluating whether reasonable suspicion supports either the evidentiary or officer safety prong of the search incident to arrest exception is the handcuffing and isolation of the defendant in the back of a patrol car during the search.[275] Once an arrestee is taken into custody, the two justifications for a search incident to arrest—preventing the arrestee from reaching weapons or evidence—cannot be met because the arrestee cannot physically reach anything.[276]

The court also considers special information the officer knows about the suspect before the encounter, and the suspect's demeanor during the encounter.[277] In *Vasquez*, the suspect demonstrated an agitated demeanor throughout the traffic stop.[278] In *Clark*, one of the suspects acted suspiciously by disappearing from view and concealing a container during the traffic stop.[279] Special information includes information the officer knows about the suspect from prior criminal charges or activity, as in *Clark*: the officer recognized one of the vehicle's occupants from a former drug charge.[280] This is another factor appearing in *Sam* that helps reconcile the case with the rest of the *Holman* triumvirate: prior to the arrest, the officer received special information that Sam violated a protective order for several days,

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[271] 3 LAFAVE, *supra* note 34, § 7.1(b)(4).

[272] *Cotton*, 119 P.3d at 935–36; *Clark*, 138 P.3d at 682; *Vasquez*, 990 P.2d at 489.

[273] *Clark*, 138 P.3d at 679, 682.

[274] *Sam*, 171 P.3d at 1175.

[275] *Holman*, 183 P.3d at 374; *Pierce*, 171 P.3d at 531.

[276] Belton v. U.S., 453 U.S. 454, 466 (1981) (Brennan, J. dissenting); *see also* 3 LAFAVE, *supra* note 34, § 7.1(b) (defining the area in an arrestee's "immediate control" by the ability to reach weapons or evidence). Wyoming recognizes that a handcuffed suspect still presents some officer safety concerns. *Fender*, 74 P.3d at 1129 n.5 (discussing the ability of handcuffed suspects to harm officers). Suspects also present officer safety concerns even inside the patrol car. Mackrill v. State, 100 P.3d 361, 369–70 (Wyo. 2004) (citations omitted).

[277] *Holman*, 183 P.3d at 374; *Pierce*, 171 P.3d at 531.

[278] *Vasquez*, 990 P.2d at 479.

[279] *Clark*, 138 P.3d at 682; *see also* 68 AM. JUR. 2D, *supra* note 196, § 118 (discussing furtive activities by defendants including hiding items as the officer approaches).

[280] *Clark*, 138 P.3d at 682; *see also* 68 AM. JUR. 2D, *supra* note 196, § 119 (discussing the significance of the officer's knowledge of the defendant and other suspicious information).

and just minutes before, his stop and arrest.[281] By contrast, in *Pierce* and *Holman*, the officers had no special information about the suspects, who behaved normally throughout the encounter.[282]

The time of day and the location of the arrest can support a finding of reasonable suspicion under the officer safety prong of the search incident to arrest exception.[283] Arrests taking place at night or in high crime areas support a reasonable suspicion of officer safety concerns.[284] This factor weighed against a finding of reasonable suspicion in *Holman* because the arrest occurred during daylight hours near a public park in the presence of hundreds of people.[285]

CONCLUSION

The Wyoming Supreme Court's decision in *Holman* indicates that under the search incident to arrest exception, the reasonable under all of the circumstances test is satisfied if reasonable grounds indicate the vehicle contains weapons or evidence.[286] The correct standard of reasonable grounds to apply is reasonable suspicion.[287] Furthermore, *Holman* modified the reasonable under *all* of the circumstances test by only including some factors in its search incident to arrest analysis.[288] The only circumstances considered are those that support a finding of reasonable suspicion that the vehicle contains weapons or contraband.[289] Factors supporting probable cause are explicitly excluded from the analysis.[290] These factors stabilize Wyoming's search incident to arrest jurisprudence by demonstrating continuity in this area of case law and provide helpful guidance to law enforcement and practitioners.[291]

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[281] *Sam*, 171 P.3d at 1178 (discussing Sam's pattern of violating the protective order for days before his arrest).

[282] *Holman*, 183 P.3d at 374; *Pierce*, 171 P.3d at 531.

[283] *Holman*, 183 P.3d at 374; *Pierce*, 171 P.3d at 531.

[284] Putnam v. State, 995 P.2d 632, 638 (Wyo. 2000) (holding the time of day and a history of crime in the area presented officer safety concerns); *see also* 68 AM. JUR. 2D, *supra* note 196, § 119 (courts consider the general area or neighborhood when evaluating searches incident to arrest).

[285] *Holman*, 183 P.3d at 374; Brief of the Appellant, *Holman*, *supra* note 2, at 2.

[286] *See supra* notes 188–94 and accompanying text (reviewing the reasonable basis requirement).

[287] *See supra* notes 201–29 and accompanying text (advocating for reasonable suspicion as the logical standard).

[288] *See supra* notes 230–85 and accompanying text (reviewing the factors the court finds irrelevant).

[289] *See supra* notes 250–85 and accompanying text (evaluating factors supporting a finding of reasonable suspicion).

[290] *See supra* notes 235–49 and accompanying text (evaluating abrogated factors).

[291] *See supra* notes 250–85 and accompanying text (noting the role of factors throughout the small body of law).

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ENDING A DECADE OF FEDERAL PROSECUTORIAL ABUSE IN THE CORPORATE CRIMINAL CHARGING DECISION

*Dane C. Ball & Daniel E. Bolia**

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* Dane C. Ball and Daniel E. Bolia are litigation associates with the law firm of Skadden, Arps, Slate, Meagher & Flom LLP. This article expresses the views of the authors alone, and none of the views expressed in this article should be attributed to Skadden, Arps, Slate, Meagher & Flom LLP.

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I. INTRODUCTION

Congress should take swift and aggressive action to curb ongoing prosecutorial abuse by federal prosecutors directed at corporations and corporate constituents under investigation. Federal prosecutors have long wielded enormous power in their discretion to charge a corporation with a crime based on the alleged illegal acts of its employees, officers, or directors; discretion virtually unchallengeable in a court of law.[1] And though the theory of vicarious criminal liability for corporations[2] has changed little since its inception, aggressive prosecutorial tactics adopted over the past decade in response to three Department of Justice memoranda[3] have caused many in the corporate, legal, academic, and political worlds to cry out that the government has gone too far.[4]

On August 28, 2008, in response to growing criticism, the Department of Justice issued new Guidelines purporting to reign in prosecutorial discretion in two key areas—requests for or consideration of corporate privilege waivers, and consideration of corporations' advancement of their constituents' legal fees.[5] But

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[1] *See* Hartman v. Moore, 126 S. Ct. 1695, 1704–05 (2006) (noting that a prosecutor is absolutely immune from liability based on a decision to charge). *See also* Joseph A. Grundfest, *Over Before It Started*, N.Y. TIMES, June 14, 2005 at A23 (arguing that the downside of absolute immunity in prosecutorial authority to charge a corporation is that the prosecutor acts as both judge and jury, killing the corporation by indictment long before trial).

[2] Many of the principles discussed in this article apply equally to partnerships or other limited liability business entities. For purposes of clarity and consistency, however, this article will use the term corporation or company throughout.

[3] *See* Memorandum from the Dep't of Justice, Eric H. Holder, Deputy Attorney Gen., Bringing Charges Against Corporations (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html (last visited Sept. 1, 2008) [hereinafter Holder memo]; Memorandum from the Dep't of Justice, Larry D. Thompson, Deputy Attorney Gen., Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited Sept. 1, 2008) [hereinafter Thompson memo]; Memorandum from the Dep't of Justice, Paul J. McNulty, Deputy Attorney Gen., Principles of Fed. Prosecution of Bus. Orgs., *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf (last visited Sept. 1, 2008) [hereinafter McNulty memo].

[4] *See infra* Part III.

[5] *See infra* Part V.B.

the question remains whether the Guidelines alone, if adhered to, will change the culture among federal prosecutors pursuing corporate crime, or whether the result simply will be a "don't ask, don't tell" policy that drives the privilege waiver and legal fees issues underground.[6]

On the same day the Department of Justice issued its new Guidelines, the Second Circuit issued a landmark decision that, in many instances, will prohibit prosecutors from considering advancement of legal fees when deciding whether to charge.[7] Yet even these two important developments—the new Guidelines and the Second Circuit decision—may not be enough to reverse course.[8] Thus, legislation has been proposed, and should be enacted, to comprehensively address these issues and curb prosecutorial abuse.[9]

This article (1) discusses the aggressive tactics adopted by federal prosecutors in response to what the government perceived as increasing criminal conduct committed by or on behalf of corporations;[10] (2) explains recent attempts to put an end to such aggressive tactics,[11] and (3) analyzes whether these attempts will work, or whether more still needs to be done.[12]

Part II discusses a brief history of corporate vicarious criminal liability and some of its pros and cons.

Part III documents the move, beginning in the late 1990s, towards more aggressive prosecutorial tactics in fighting corporate crime, including the use of pressured privilege waivers and consideration of whether a corporation has advanced legal fees to its employees in deciding whether to charge the corporation itself.

Part IV focuses on illustrations of government prosecutorial abuse: the conviction—and ultimately the reversal of the conviction—of Arthur Andersen LLP after the collapse of Enron; and the case against partners and employees of KPMG International for orchestrating allegedly illegal tax shelter schemes.

Part V considers the backlash from what many perceive to be prosecutorial abuse in the form of (1) deterring the assertion of legitimate privileges, and (2) unconstitutional interference with criminal defendants' right to counsel. Part V also analyzes proposed legislation intended to curb such prosecutorial abuse.

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[6] *See infra* Part VI.

[7] *See* United States v. Stein, 541 F.3d 130 (2d Cir. 2008).

[8] *See infra* Part VI.

[9] *See infra* Part V.C.–VI.

[10] *See infra* Part III.

[11] *See infra* Part V.

[12] *See infra* Part VI.

Part VI analyzes where the issues raised in this Article currently stand, whether the new prosecutorial Guidelines will solve the problems or are really just a small step in the right direction, and compares the Guidelines to proposed legislation intended to solve the same problems.

Part VII concludes with a call for aggressive legislative action.

II. A BRIEF HISTORY OF CORPORATE CRIMINAL LIABILITY

A. *Let's Hold the People Responsible*

At common law, it originally was thought that a corporation could not be held criminally liable for the acts of its constituents. Blackstone himself agreed with this principle: "A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their distinct individual capacities."[13] The foundation for this belief appears to have arisen, at least in part, from an apocryphal quote attributed to Lord Holt from a case in 1701, where he is reported to have said "[a] corporation is not indictable, but the particular members of it are."[14] Shaky though it was, this foundation lasted until 1840, when Westminster Hall finally expressly held that a corporation was susceptible to criminal indictment.[15] Even then, common law courts were reluctant to hold corporations criminally liable for affirmative acts that required a specific *mens rea*, focusing instead on criminal nonfeasance.[16] The belief remained for some time that a corporation was not a "person," and thus could not form the requisite criminal intent to accompany an illegal act.[17]

B. *Respondeat Superior Opens the Door to Corporate Vicarious Criminal Liability*

Once the doctrine of corporate criminal liability became generally accepted, most early indictments directed at corporations involved cases analogous to public

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[13] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 464 (1768).

[14] Anonymous Case, 88 Eng. Rep. 1538 (1701). *See also* State v. Morris & Essex Ry. Co., 23 N.J.L. 360, 364–65 (1852) (doubting the veracity of the statement attributed to Lord Holt and discussing cases in Lord Holt's own court in which the Crown had indicted quasi-corporations for failure to maintain roads and bridges).

[15] R. v. Birmingham & Gloucester Ry. Co., 9 Car. & Payne 469, 3 Q.B. 223 (1840).

[16] *See Morris & Essex Ry. Co.*, 23 N.J.L. at 366–67 ("It is true that there are crimes (perjury for example) of which a corporation cannot, in the nature of things, be guilty. There are other crimes, as treason and murder, for which the punishment imposed by law cannot be inflicted upon a corporation. Nor can they be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient.").

[17] *See* BLACK'S LAW DICTIONARY Appendix B, Legal Maxims (8th ed. 2004) ("*Actus non facit reum, nisis mens sit rea*: An act does not make a person guilty unless the mind is guilty.").

nuisance torts, in which criminal intent was not a required element.[18] Once the camel's nose was under the tent, however, criminal liability for offenses requiring a *mens rea* soon followed. Indeed, through the "feat of anthropomorphic sleight of hand," it was not long before common law courts and legislatures changed the inanimate corporation into a "person" in the eyes of the law and eventually shackled it with the additional responsibility of "committing criminal delicts and harboring criminal intent."[19]

1. *The Floodgates Open*—New York Central & Hudson River R.R. v. United States

In 1909, the United States Supreme Court affirmed the conviction of a common carrier for giving illegal rebates in violation of the Elkins Act.[20] In *New York Central and Hudson River R.R. Co. v. United States*, the Court declared that the law

> cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through [corporations] . . . and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.[21]

Addressing the issue of whether a corporation can form criminal intent, the Court held: "We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element."[22] Finally holding that a corporation could form criminal intent, *New York Central* "opened the floodgates" for prosecutorial action directed towards both the corporation and its employees,

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[18] Frederic P. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 7–8 (1928). The early cases generally involved strict liability offenses such as permitting gaming at fair grounds, unlicensed practice of medicine, failing to repair highways, violating child labor laws, and delivering liquor to minors. *Id.*

[19] Kathleen Brickey, *Rethinking Corporate Criminal Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 593 (1988).

[20] N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 499 (1909).

[21] *Id.* at 495–96.

[22] *Id.* at 493 (quoting Telegram Newspaper Co. v. Commonwealth, 52 N.E. 445, 446 (Mass. 1899)) (noting that there is no real difference in imputing intent in a criminal proceeding than in a civil one, and that while a corporation cannot be arrested or imprisoned, its property may be seized and used to either compensate victims or as punishment for public wrong). Nine years later, English courts imputed to a corporation its manager's criminal intent to avoid toll payments. *See* Mousell Bros. v. London & N. W. R.R., 2 K.B. 836, 845 (1917).

setting the stage for a new era in judicial and legislative action that "transformed the rules of corporate criminal liability."[23]

2. *A More Developed System—Introducing Vicarious Liability into Corporate Criminal Law*

By the mid-twentieth century, the generally accepted rule had developed, adopted from the theory of civil vicarious liability, that "[a] corporation may be held criminally responsible for acts committed by its agents, provided such acts were committed within the scope of the agents' authority or course of their employment."[24] Federal law dealing with corporate criminal liability had fully developed by the middle of the twentieth century, whereas the states had a "large and somewhat more fetal but nonetheless readily recognizable" body of jurisprudence confronting the issue.[25] Recognizing that a "great mass of legislation call[ed] for corporate criminal liability statutes," in the 1950s the American Law Institute revised section 2.07 of the Model Penal Code and its provisions dealing with corporate criminal liability in an attempt to unify the existing state of the law.[26] Rather than unifying "this unruly branch of the law," however, state courts and legislatures instead have tended to pick randomly from section 2.07's "grab bag of rules."[27]

3. *A Complete and Coherent Theory—The Basic Principles of Corporate Vicarious Criminal Liability*

For corporate vicarious criminal liability to attach, a corporate agent must be acting within the scope of employment.[28] This requires that the agent had been "performing acts of the kind which he is authorized to perform," and that the agent was motivated at least in part by the intent to benefit the employer.[29] Thus, if a criminal act benefits only the employee, officer, or director, vicarious liability does not apply.[30] The typical example lacking corporate benefit is when

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[23] Lance Cole, *Corporate Criminal Liability in the 21st Century: A New Era?*, 45 S. TEX. L. REV. 147, 147 (2003).

[24] Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945) (quoting 19 C.J.S. *Corporations* § 1362) (internal quotations omitted).

[25] Gilbert Geis & Joseph F.C. Dimento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341, 348 (2002).

[26] MODEL PENAL CODE § 2.07 cmt. 1(c) (Tentative Draft No. 4, 1956).

[27] Brickey, *supra* note 19, at 631–32.

[28] United States v. Cincotta, 689 F.2d 238, 241 (1st Cir. 1982).

[29] *Id.* at 241–42. "Scope of employment" is a broad phrase that includes "acts on the corporation's behalf in performance of the agent's general line of work." United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972).

[30] *Cincotta*, 689 F.2d at 242.

an employee accepts a bribe paid directly to the employee, which does not benefit the shareholders of the corporation.[31]

The agent need not be a high-level corporate officer or director to impute criminal liability to the corporation.[32] And because the corporation should not "obtain the fruits of violations which are committed knowingly by agents of the entity within the scope of their employment,"[33] vicarious criminal liability may attach even in the face of actions that were contrary to express company policies or to explicit instructions from others within the organization.[34] In addition, under the collective-knowledge theory of corporate criminal liability, it is irrelevant whether the right hand knew what the left was doing.[35] Rather, the acts of all employees acting within the scope of employment constitute acts of the corporation.[36]

Finally, some instances of corporate vicarious criminal liability do not require a finding of intent for liability to attach. These strict liability infractions typically are not "in the nature of positive aggressions or invasions . . . but are in the nature of neglect where the law requires care, or inaction where it imposes a duty."[37] While the accused corporation may not have intended a violation, it is usually in a position to prevent the occurrence by the exercise of ordinary care, and public safety interests warrant corporate punishment.[38]

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[31] *Id.*

[32] United States v. Basic Const. Co., 711 F.2d 570, 573 (4th Cir. 1983) (rejecting the argument that the government must prove "that the corporation, presumably as represented by its upper level officers and managers, had an intent separate from that of its lower level employees to violate the . . . laws"). *See also* Standard Oil Co. v. United States, 307 F.2d 120, 127 (5th Cir. 1962) (noting that the corporation may be criminally bound by even "menial" employees).

[33] United States v. A & P Trucking Co., 358 U.S. 121, 126 (1958) ("The business entity cannot be left free to break the law merely because its owners . . . do not personally participate in the infraction.").

[34] *Hilton Hotels*, 467 F.2d at 1007. The court in *Hilton Hotels* reasoned that liability for the corporation was appropriate under these circumstances because the particular agents are often difficult to identify and their individual conviction is "particularly ineffective" as a deterrent to others within the organization, while punishment of the organization as a whole is "likely to be both appropriate and effective." *Id.* at 1006.

[35] United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).

[36] *Id.* ("Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation.").

[37] Morissette v. United States, 342 U.S. 246, 255 (1952); *see also* United States v. White Fuel Corp., 498 F.2d 619, 622 (1st Cir. 1974) (holding that mere fact that oil leaked from a deposit tank into navigable waters was enough to sustain a conviction under the Refuse Act).

[38] *Morissette*, 342 U.S. at 256.

4. Corporate Vicarious Criminal Liability—Is It a Good Thing?

Perhaps the most compelling argument for the imposition of vicarious criminal liability upon corporations is the idea that, because of the nature of the corporate structure and the number of employees, officers, and directors acting on the corporation's behalf, it is often difficult to locate the culpable individuals within the corporation.[39] Thus, the criminal act may go unpunished if prosecutors cannot prove individual culpability. Beyond this, commentators provide a number of other arguments to support the idea of vicarious criminal liability for corporations:

1. Corporations should not be allowed to merely terminate the guilty individual and avoid responsibility.

2. Effective deterrence requires sanctions aimed at the corporation as a whole.

3. Foregoing corporate liability might result in harsher forms of individual punishment.

4. Proper corporate reformation or rehabilitation requires collective responsibility.

5. Foreign corporations acting in the United States, whose officers or employees commit criminal acts outside American jurisdiction, should not be allowed to escape punishment.

6. The public has a right to know when its business organizations are involved in illegal activity, and the corporate indictment is the best way to accomplish this goal.

7. Corporate fines provide a "rough method of achieving just recoupment."[40]

Additional reasons given for corporate indictments include arguments that the corporate whole is greater than the sum of its parts and the theory that the corporate ethos may compel individuals to commit criminal acts that they might otherwise not have contemplated.[41]

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[39] *See* Brent Fisse, *Consumer Protection and Corporate Criminal Responsibility: A Critique of* Tesco Supermarkets v. Nattrass, 4 ADEL. L. REV. 113, 116 (1971).

[40] Fisse, *supra* note 39, at 116–18.

[41] Geis, *supra* note 25, at 345.

On the other hand, the primary reason for antipathy to corporate vicarious liability in criminal cases is the notion that the state should punish the people committing the crime rather than the artificial entity for which they work. Indeed, in addressing a joint session of Congress about the issue of trusts and monopolies, President Woodrow Wilson adopted this position when he declared:

> Every act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible and the punishment should fall upon them, not upon the business organization of which they make illegal use. It should be one of the main objects of our legislation to divest such persons of their corporate cloak and deal with them as with those who do not represent their corporations, but merely by deliberate intention break the law. Business men the country through would, I am sure, applaud us if we were to take effectual steps to see that the officers and directors of great business bodies were prevented from bringing them and the business of the country into disrepute and danger.[42]

Additional rationales espoused in support of decriminalizing vicarious liability include:

1. Judges unnecessarily strain the traditional theories of criminal law in an attempt to marry them to the economic realities of the corporate marketplace.

2. More deterrence is generated by punishing the individual rather than the corporation.

3. A group of men does not become one person merely because they associate themselves together for one end.

4. Discarding the corporate fiction does not result in more justice than retaining the fiction.

5. Imposing criminal liability on an artificial entity that can possess no state of mind is questionable absent some other theory ascribing fault to the corporation itself.[43]

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[42] President Woodrow Wilson, Address to a Joint Session of Congress on Trusts and Monopolies (Jan. 20, 1914), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=65374 (last visited Sept. 1, 2008).

[43] Geis, *supra* note 25, at 344.

As explained in the sections that follow, despite the arguments against corporate vicarious criminal liability, the theory almost certainly is here to stay—and an even more aggressive approach appears to have taken hold.[44]

III. A MORE AGGRESSIVE APPROACH TO CORPORATE CRIMINAL LIABILITY

A. The 1991 Changes to the United States Sentencing Guidelines

In 1991, the Department of Justice signaled a shift towards a more aggressive approach to prosecuting corporations by introducing a chapter entitled *Sentencing of Organizations* to the United States Sentencing Guidelines Manual.[45] A precursor to the language used in subsequent DOJ memoranda dealing with whether to charge a corporation, the Sentencing Guidelines set forth a list of factors that should be considered in determining the ultimate punishment of a corporation.[46] The factors that lean towards increasing the ultimate punishment of the corporation are: (1) the involvement in or tolerance of criminal activity; (2) the prior history of the corporation; (3) whether the corporation violated an order; and (4) whether the corporation obstructed justice.[47] Two factors tend to mitigate corporate punishment: (1) the existence of an effective compliance and ethics program; and (2) self-reporting, cooperation, or acceptance of responsibility.[48]

Ultimately, the Sentencing Guidelines were intended merely to create an incentive for corporations to create effective compliance and self-policing programs to reduce or eliminate criminal activity within the corporation.[49] However, at least one initially benign rationale underlying the Sentencing Guidelines—the need for corporate "cooperation" with the government—set the stage for later abuse by federal prosecutors.[50]

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[44] *See infra* Part III.

[45] United States Sentencing Commission, Guidelines Manual, Chp. 8, intro. cmt. (Nov. 1991). *See also* United States Sentencing Commission, Supplementary Report on Sentencing Guidelines for Organizations, *available at* http://www.ussc.gov/corp/OrgGL83091.PDF (noting that "[a] careful review of the literature on organizational sanctions and the public comment to the Commission made clear that there was no consensus as to a single theory of organizational sentencing") (last visited Sept. 1, 2008). The Sentencing Commission amended Chapter Eight in November 2004 to provide new guidelines for effective ethics and compliance programs in response to the Sarbanes-Oxley Act, Pub. L. 107-204. United States Sentencing Commission, Guidelines Manual, App. C, amend. 673 (Nov. 2004).

[46] United States Sentencing Commission, Guidelines Manual, Chp. 8, intro. cmt. (Nov. 1991).

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See id.*

B. The 1999 Holder Memorandum

On June 16, 1999, recognizing that "[m]ore and more often, federal prosecutors are faced with criminal conduct committed by or on behalf of corporations," then-Deputy Attorney General Eric Holder issued a memorandum to all Component Heads and United States Attorneys entitled *Bringing Criminal Charges Against Corporations.*[51] Although not binding on prosecutors, Holder intended that the memo serve as a guide for prosecutors to consider in deciding whether to charge a corporation in a criminal case.[52] However, the memo cautioned that prosecutors *should* consider the factors in *all cases* involving a decision whether to charge a corporation, and that a corporation should not be treated leniently merely because of its artificial nature.[53]

1. The Holder Factors

Although prosecutors should generally apply the same factors in determining whether to charge a corporation as they would an individual, because of the nature of the artificial corporate "person," the Holder memo called for consideration of eight *additional* factors in deciding whether to charge a corporation.[54]

The Nature and Seriousness of the Offense

One of the primary factors in determining whether to charge a corporation is the "nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct."[55] Because corporate conduct necessarily intersects with other federal economic, taxation, and law enforcement agencies, prosecutors should take into account specific goals and incentives of the respective agencies affected in considering whether to charge the corporation.[56]

Pervasiveness of Wrongdoing within the Corporation

Corporations may be charged for even minor misconduct where the wrongdoing was "pervasive and was undertaken by a large number of employees

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[51] Holder memo, *supra* note 3, at Intro.

[52] *Id.* ("These factors are . . . not outcome-determinative and are only guidelines. Federal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision.").

[53] *Id.* at I.A.–I.B.

[54] *Id.* at II.A.

[55] *Id.* at III.A.

[56] Holder memo, *supra* note 3, at III.A.–B.

. . . or was condoned by upper management."[57] The role of management is the most important consideration for this factor because management directs the corporation and management is responsible for the corporation's culture.[58]

The Corporation's Past History

The prosecutor should consider the corporation's history of similar misconduct, including prior criminal, civil, or regulatory actions, in determining whether to charge the corporation with a crime.[59] Where a corporation has not learned from past mistakes, a history of similar conduct may be probative of "a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs."[60]

Cooperation and Voluntary Disclosure

Perhaps the most controversial and troubling of the Holder factors encouraged the prosecutor to consider the corporation's willingness to "identify culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges."[61] Because the prosecutor is likely to encounter obstacles when investigating corporate criminal wrongdoing, the corporation's cooperation may be critical in identifying the individual wrongdoers and locating probative evidence.[62] As such, the prosecutor should consider granting immunity or amnesty to the corporation in exchange for its cooperation with the government.[63] Of course, a corporation's cooperation with the government is no guarantee of immunity or amnesty, and specific policies may still warrant prosecution regardless of the corporation's willingness to cooperate.[64]

The most discussed provisions of the Holder memo are the comments to Section VI, which specifically called for the prosecutor to consider corporate waivers of the attorney-client and work product privileges in the determination

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[57] *Id.* at IV.A. ("[I]t may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee.") (emphasis in original).

[58] *Id.* at IV.B.

[59] *Id.* at V.A.

[60] *Id.* at V.B.

[61] Holder memo, *supra* note 3, at VI.A.

[62] *See id.* at VI.B.

[63] *See id.*

[64] *See id.*

of whether the corporation has cooperated for purposes of this factor.[65] Although the memo made clear that waiver of privileges is not an absolute requirement to a finding of cooperation, the corporate defense bar insists that, post-Holder, requests (or even demands) for waiver occurred on a routine basis.[66]

Corporate Compliance Programs

Self-policing corporate compliance programs are encouraged but are not in themselves enough to avoid prosecution under a theory of respondeat superior.[67] Indeed, when crime is committed in spite of an existing compliance program, it may suggest the presence of a mere "paper program," and prosecution still may be appropriate.[68] The critical factor in evaluating a compliance program is "whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives."[69]

Restitution and Remediation

How a corporation responds to discovered misconduct is important in assessing its resolve to ensure that such misconduct is not repeated.[70] Although the corporation cannot avoid prosecution merely by paying restitution, the prosecutor may consider this in determining whether to charge the corporation,

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[65] *See* Cole, *supra* note 23, at 152–53 (discussing the two fundamental flaws of the Holder memo); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000); Letter from Maud Mater, Chair, Bd. of Dirs., American Corporate Counsel Ass'n (May 12, 2000), *available at* http://www.acca.com/public/accapolicy/holder.html) (last visited Sept. 1, 2008).

[66] *See* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1177 (2006); Letter from Maud, Chair, Bd. of Dirs., American Corporate Counsel Ass'n, *supra* note 65 ("ACCA members indicate that it is the regular practice of US Attorneys to require corporations to waive their attorney-client privileges and divulge confidential conversations and documents in order to prove cooperation with a prosecutor's investigation.").

[67] *See* Holder memo, *supra* note 3, at VII.A.

[68] *See id.* at VII.A.–B. S*ee also Basic Constr. Co.*, 711 F.2d at 573 (holding corporation responsible for antitrust violations committed by employees, even where the violations were against express corporate policy or instructions); *Hilton Hotels*, 467 F.2d at 1007 (concluding that the general rule for antitrust violations is that the corporation may be held liable for the acts of its employee if the acts were within the scope of employment, even if contrary to general corporate policy or express instructions); United States v. Beusch, 596 F.2d 871 (9th Cir. 1979) (holding that the existence of express instructions and corporate policies may be considered in whether the employee acted to benefit the corporation, but a corporation may still be liable for acts done contrary to corporate policy if the actions were in fact intended to benefit the corporation).

[69] Holder memo, *supra* note 3, at VII.B.

[70] *See id.* at VIII.B.

particularly when the corporation pays restitution in advance of a court order to do so.[71]

Collateral Consequences

Almost any criminal conviction of a corporation will adversely affect innocent third parties, including the corporation's employees, officers, directors, and shareholders.[72] Because of this, the prosecutor may take into account the collateral consequences of a corporate criminal indictment.[73] However, when wrongdoing runs deep within the corporation, and the shareholders have substantially profited from widespread criminal activity, "the balance may tip in favor of prosecuting" the corporation.[74]

Non-Criminal Alternatives

Prosecutors should consider whether non-criminal sanctions would adequately "deter, punish, and rehabilitate" a corporation accused of wrongful conduct.[75] The factors relevant in making this determination are: (1) the sanctions available under the alternative, non-criminal means of disposition; (2) the likelihood that effective sanctions will be imposed; and (3) the effect of a non-criminal disposition on federal law enforcement interests.[76]

2. Reaction to the Holder Memorandum—Criticism Abounds

Critics of the aggressive tactics encouraged by the Holder memo pointed out two fundamental problems, both of which flowed from the memo's focus on obtaining privilege waivers under the guise of merely seeking "cooperation": (1) the tactics pressured corporations to conduct investigatory work that the government should be conducting on its own; and (2) the tactics drove a wedge between senior management and other employees, and between corporate counsel and all employees.[77] This "deputizing" of the corporation takes place at the expense

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[71] *Id.* at VIII.A.–B.

[72] *Id.* at IX.B.

[73] *Id.* at IX.A.

[74] Holder memo, *supra* note 3, at IX.B. ("In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.").

[75] *Id.* at X.A.

[76] *Id.*

[77] *See* Cole, *supra* note 23, at 152–53; Zornow, *supra* note 65, at 147 ("The sound you hear coming from the corridors of the Department of Justice is a requiem marking the death of privilege in corporate criminal investigations.").

of important privilege principles that "lie at the core of our adversarial system of justice."[78]

There is a strong argument that corporations that abandon otherwise-sacred attorney-client and work product privileges in a desperate attempt to "cooperate" with the government, and thus avoid indictment, may actually undercut efforts aimed at corporate compliance rather than strengthen them.[79] Indeed, the purpose of the attorney-client privilege, for example, is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[80] But when the client believes that this bedrock privilege will not be honored, he has no incentive to be fully honest with his attorney—whose "sound legal advice . . . depends upon . . . being fully informed by the client."[81] This reluctance, then, may in fact hamper the corporation's efforts to comply with the law.[82] In addition, knowing that the longstanding privilege may be of little value, corporate clients may exclude lawyers from "critical meetings," because the lawyer's presence will be seen as "adding little value (at best) and as untrustworthy (at worst)."[83]

Holder-memo critics also pointed out that a footnote in the memo, authorizing waiver requests under "unusual circumstances" for attorney-client and work product communications related to advice about an ongoing criminal investigation, raised "a significant issue of potential abuse of government power."[84] Beyond a mere abuse of power, such actions may effectively deny a client the assistance-of-counsel and constitute a Sixth Amendment violation.[85] Absent an exception to the attorney-client and work product privileges—such as where the corporation has raised the assistance of counsel defense or the government claims that the crime-fraud exception applies—most critics argue that the prosecutor does not have a compelling need for such privileged communications.[86]

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[78] Zornow, *supra* note 65, at 147.

[79] *See* Letter from Maud Mater, Chair, Bd. of Dirs., American Corporate Counsel Ass'n, *supra* note 65.

[80] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[81] *Id.*

[82] *See* Letter from Maud Mater, Chair, Bd. of Dirs., American Corporate Counsel Ass'n, *supra* note 65 ("Knowing that sensitive and confidential conversations with their lawyers will be used as bargaining chips by the government, clients may be reluctant to create such chips for the government's use. They'll simply stop talking with their lawyers.").

[83] *Id.*

[84] Cole, *supra* note 23, at 152.

[85] *See id.*

[86] *See id.*

Finally, in addition to the implications in a pending criminal case, a waiver of the attorney-client or work product privilege may have dire financial consequences for the corporation in subsequent civil litigation.[87] Because waiver for one purpose is generally waiver for all purposes, corporations that waive privileges in an ongoing criminal investigation will likely lose those privileges for all litigation and regulatory proceedings that arise out of or relate to the criminal case.[88]

C. Establishment of the Corporate Fraud Taskforce

In response to the Enron debacle and the other corporate scandals from the late 1990s and early part of the twenty-first century,[89] President George W. Bush issued Executive Order 13271, authorizing the Attorney General to establish a Corporate Fraud Taskforce within the Department of Justice.[90] President Bush charged the Taskforce with providing direction for the investigation of cases of various types of fraud and other related financial crimes committed by corporations and their directors, officers, and employees.[91]

D. The 2003 Thompson Memorandum

In light of President Bush's new Corporate Fraud Taskforce, then-Deputy Attorney General Larry D. Thompson released a January 20, 2003 memo entitled *Principles of Federal Prosecution of Business Organizations*, attempting to revise the Holder memo and create "an increased emphasis on and scrutiny of the *authenticity* of a corporation's cooperation."[92] Clearly adopting a more hostile posture than its predecessor did, the Thompson memo from the beginning noted that "too often" corporations seek to impede government investigations while claiming

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[87] *See id.*

[88] *Id. See* United States v. Bergonzi, 216 F.R.D. 487, 494 (N.D. Cal. 2003) (finding that corporation waived the attorney-client and work product privileges for all purposes when it turned over a report prepared by outside counsel to the government).

[89] *See* KURT EICHENWALD, CONSPIRACY OF FOOLS 10 (2005) (documenting the financial and accounting scandals that led to the collapse of Enron Corporation, setting off a "cascading collapse in public confidence, . . . the first symptom of a disease that had somehow swept undetected through corporate America, felling giants in its wake from WorldCom to Tyco, from Adelphia to Global Crossing . . . all seemingly interlinked in some mindless spree of corporate greed").

[90] Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/07/20020709-2.html (last visited Sept. 1, 2008). The Sarbanes-Oxley Act ("SOX") also arose out of the ashes of the aforementioned corporate scandals, creating new corporate governance and accounting rules for public companies and audit firms. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). A discussion of the various and controversial provisions of SOX is beyond the scope of this Article.

[91] *Id.*

[92] Thompson memo, *supra* note 3, at Intro (emphasis added).

to cooperate, and that such conduct should "weigh in favor" of prosecuting the corporation.[93]

1. *The Thompson Factors*

The Thompson memo incorporated much of the same language (and all of the abuse-inviting problems) from the Holder memo, and in most respects, the two memoranda are virtually identical. However, at least three significant changes increased pressure on corporations under suspicion to cooperate or face crippling indictments.[94]

First, the Thompson memo, unlike the Holder memo, was made binding on all federal prosecutors.[95] As a result, all prosecutors were *required* to consider a corporation's response to a request for privilege waivers and its advancement of legal fees to its own employees as factors in deciding whether the corporation was cooperating with the government and therefore likely to receive favorable treatment in the decision whether to charge.[96]

Second, in the comments to Section II, which listed the factors to be considered in determining whether to charge a corporation, new language indicated that "[t]he nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors."[97] While this may have been intuitive, it did represent an emphasis that was not present in the Holder memo.

Third, the comments to the Cooperation and Voluntary Disclosure factor included a new paragraph discussing sub-factors the prosecutor should consider in determining whether the corporation has cooperated.[98] The following conduct,

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[93] *Id.* ("The revisions . . . address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.").

[94] One change from the Holder memo, the addition of a ninth factor to consider, may actually weigh against corporate indictment. The new factor calls for the prosecutor to consider "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance." *Id.* at II.A.8. Although this factor was not explained, the General Comments seemed to imply that culpable individuals should usually be charged in addition to the corporation, but when responsible individuals have been or are being prosecuted successfully, it may be appropriate—after consideration of all other factors—to withhold charging the corporation. *See id.* at I.B.

[95] *See* United States Attorney's Manual, Criminal Resource Manual § 162 (2006), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm (last visited Sept. 1, 2008).

[96] *See id.*

[97] Thompson memo, *supra* note 3, at II.B.

[98] *See id.* at VI.B.

Thompson noted, may cause the prosecutor to conclude that the corporation, "while purporting to cooperate," is really impeding the investigation (even if not rising to the level of criminal obstruction):

> 1. overly broad assertions of corporate representation of employees or former employees;
>
> 2. inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation, including, for example, the direction to decline to be interviewed;
>
> 3. making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and
>
> 4. failure to promptly disclose illegal conduct known to the corporation.[99]

Thus, the Thompson memo did far more than carry over the fundamental flaws inherent in the Holder memo—it greatly intensified them.

2. *Reaction to the Thompson Memorandum—More Criticism*

The Thompson memo, in addition to having carried over the fundamental flaws from the Holder memo, created a number of new problems for corporations. Defense lawyers found particularly troubling the new factors focusing on a corporation's alleged efforts to impede the government investigation.[100] A major concern growing out of the government's aggressive prosecutorial tactics was that corporations would no longer be able to do anything other than raise a white flag—voluntarily self-report evidence and fully cooperate (in the strictest sense of the word)—then hope that the prosecutor chose not to charge the corporation itself.[101] To do otherwise would be to proceed "at great peril."[102] Furthermore, critics argued, the government had reduced corporate counsel to nothing more than a deputy prosecutor—internally investigating his own employer and reporting any findings to the authorities (and sometimes forfeiting core privileges along the way)—while the corporation faced the looming threat of indictment.[103]

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[99] *Id.*

[100] *See* John Gibeaut, *Junior G-Men*, 89 A.B.A. J. 46, 51 (June 2003).

[101] Cole, *supra* note 23, at 169.

[102] *Id.*

[103] *See* Gibeaut, *supra* note 100, at 47–48 ("Simply put, companies are expected to do the work, suffer any consequences, and enable the government to take credit for striking at white-collar crime.").

The Thompson memo's heightened focus on conduct that impedes investigation significantly concerned many commentators because the list of vague and intimidating factors effectively ceded to the government a considerable advantage against its corporate opponent in our adversarial criminal system.[104] Because it was difficult to know, in advance, what the government would consider "overly broad assertions of corporate representation of employees," or what amounts to "inappropriate directions to employees or their counsel," corporations felt pressured to avoid taking positions that in the past had been standard practice in defending a corporation against criminal charges.[105] These practices included, among other things, payment of employees' legal fees and controlling access to witnesses and important documentary evidence (including the assertion of legal privileges).[106]

After the Department of Justice released the Thompson memo, corporate counsel complained vehemently that the government was trying to drive a wedge between the corporation and its employees in an effort to make its own job easier.[107] The likely result of such tactics, they argued, would be that employees would clam up, knowing that anything they say would be turned over to the government and possibly used against them.[108] Although some in the Department of Justice expressed sympathy for the predicament corporate employees faced,[109] Larry Thompson himself expressed a contrary (and rather extreme) opinion: "'[T]hey don't need fancy legal representation if they believe that they did not act with criminal intent.'"[110]

The new "cooperation" requirements in the Thompson memo, taken together with the prior waiver provisions carried over from the Holder memo, essentially changed the rules of the game for corporations dealing with white-collar criminal investigations.[111] Because a corporation facing criminal indictment lacks any advantage in its relationship with the prosecutor, prosecutors were able to force corporations to waive privileges, assist the government in building its case against the corporation's employees, and cut off routine payment of legal fees for those

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[104] *See* Cole, *supra* note 23, at 153–54.

[105] *Id.* at 154.

[106] *See id.*

[107] *See* Gibeaut, *supra* note 100, at 51.

[108] *Id.*

[109] *Id.* at 71 (quoting then-Assistant Attorney General Michael Chertoff as expressing the opinion that he "think[s] it's a little less rigid than it may appear at first," and that "[i]n an odd way, if you cut off indemnification, then you may cut off cooperation").

[110] Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1 (quoting then-Deputy Attorney General Larry Thompson).

[111] *See* Cole, *supra* note 23, at 169.

employees.[112] Thus, under authority of the Thompson memo, federal prosecutors were able to force corporations to hand over privileged information and do the government's investigatory work, all in hopes that the government hammer would not swing the way of the corporation itself.

IV. HOLDER AND THOMPSON IN ACTION: GOVERNMENT PROSECUTORIAL ABUSE AGAINST ARTHUR ANDERSEN AND KPMG

In the case of Arthur Andersen, the hammer did swing the corporation's way, crushing a company that once employed twenty-eight thousand people.[113] In retrospect, the Andersen indictment and conviction may represent the apogee of government power in its campaign to aggressively pressure companies to cooperate or be killed. In 2005, the Supreme Court reversed Andersen's conviction, holding that the jury instructions were invalid because (1) they did not require that the jury find any consciousness of wrongdoing on the part of Andersen employees, and (2) they did not require that the jury find a nexus between the corrupt persuasion to destroy documents related to Andersen's Enron representation and any particular government proceeding.[114]

Then, in 2006, in a tax fraud prosecution against employees of KPMG, Judge Lewis Kaplan of the Southern District of New York ruled, in an opinion that was later affirmed by the Second Circuit, that the government's actions in pressuring KPMG to cut off its employees' and former employees' legal fees was an unconstitutional interference with the defendants' right to counsel.[115] Subsequently, in December 2006, then-Deputy Attorney General Paul J. McNulty issued a memorandum purporting to change the way prosecutors handle the charging decision when investigating corporate malfeasance.[116]

A. Arthur Andersen: Death By Indictment

The case against Arthur Andersen arose out of the collapse of Houston energy giant Enron.[117] As the Enron saga unfolded in late 2001, Andersen—Enron's auditor—created an Enron crisis-response team to deal with a looming Securities & Exchange Commission ("SEC") investigation into Enron's suspect

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[112] *See id.*

[113] *See* Charles Lane, *Justices Overturn Andersen Conviction: Advice to Enron Jury on Accountants' Fraud is Faulted*, WASH. POST, June 1, 2005, at A1.

[114] Arthur Andersen LLP v. United States, 544 U.S. 696, 706–08 (2005).

[115] United States v. Stein, 541 F.3d 130, 135–36 (2d Cir. 2008).

[116] *See* Press Release, Department of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html (last visited Sept. 1, 2008).

[117] *Arthur Andersen*, 544 U.S. at 698–99; Lane, *supra* note 113, at A1.

financial practices.[118] Throughout the fall of 2001, in-house counsel, and senior partners in the Houston office, repeatedly urged Andersen employees to follow the company's document "retention" policy and to shred documents related to Andersen's representation of Enron.[119] In fact, Michael Odom, Andersen's risk-management practice director for the Houston office, advised his employees that, if they shredded documents in compliance with their policy and "litigation is filed the next day, that's great. . . . [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable."[120]

In all, before a November 9, 2001 order to stop shredding was issued in response to the SEC's formal notice of investigation, Andersen destroyed approximately two tons of Enron-related documents.[121] David Duncan, the head of Andersen's Enron Engagement team, who was later fired and pled guilty to witness tampering, agreed to cooperate as a witness against his former employer.[122] Andersen itself was charged in March of 2002 with one count of knowingly and corruptly persuading another person with intent to cause or induce any person to withhold documents from or alter, destroy, or mutilate documents for use in an official proceeding.[123]

For Andersen, however, cooperation with the government was not enough to stave off indictment.[124] Andersen tried to settle with the government but refused prosecutors' demands for an admission of criminal liability.[125] Furthermore, because Andersen's legal department was so involved in the document destruction, prosecutors felt that they had "little choice but to push this case into the criminal realm."[126] Thus, long before the criminal case even reached a courtroom, Andersen clients fled in droves at the prospect of allowing an accounting firm charged with a crime to "serve as their financial watchdog."[127]

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[118] *Arthur Andersen*, 544 U.S. at 699.

[119] *See id.* at 699–700.

[120] *Id.* at 700 (quoting United States v. Arthur Andersen LLP, 374 F.3d 281, 286 (5th Cir. 2004)) (internal quotations omitted).

[121] *See id.* at 702; Lane, *supra* note 113, at A1.

[122] *Arthur Andersen*, 544 U.S. at 702. *See also* EICHENWALD, *supra* note 89, at 666. Duncan's was the only individual conviction the government secured out of the entire Andersen affair. Gibeaut, *supra* note 100, at 71.

[123] *Arthur Andersen*, 544 U.S. at 696, 698; 18 U.S.C. § 1512(b)(2)(A)–(B) (2000).

[124] Gibeaut, *supra* note 100, at 71.

[125] EICHENWALD, *supra* note 89, at 666.

[126] *Id.*

[127] *Id.* at 667; *see also* Gibeaut *supra* note 100, at 71.

Andersen ultimately was convicted of one count of violating 18 U.S.C. § 1512(b)(2)(A) and (B), and the Court of Appeals for the Fifth Circuit affirmed.[128] The Supreme Court, however, reversed and remanded the case, holding that the jury instructions proffered by the government, and agreed to by District Court Judge Melinda Harmon, were faulty in two respects.[129] First, because the jury was told that, "even if [Andersen] honestly and sincerely believed that its conduct was lawful, you may find [Andersen] guilty," the jury was not properly instructed that it needed to find consciousness of wrongdoing in order to convict Andersen under § 1512(b)(2)(A) and (B).[130] Second, the instructions led the jury to believe that they were not required to find any nexus between the corrupt persuasion to alter or destroy documents and any particular government proceeding.[131] The Court concluded that one cannot knowingly and corruptly persuade others to shred documents when one does not "have in contemplation any particular official proceeding in which those documents might be material."[132]

While the Court's reversal of the Arthur Andersen conviction was not an endorsement of the accounting firm's actions in the underlying case—the government could have retried the case, and many think the government did present evidence of intent during the initial trial[133]—the case itself serves as an example of the coercive power federal prosecutors wielded under the authority of the Holder and Thompson memoranda. Andersen's attempts to cooperate with the government actually backfired against the company. By waiving its attorney-client and work product privileges in hopes to receive more lenient treatment, Andersen turned over an e-mail from its own in-house counsel that "ended up center stage for jurors who ignored reams of shredded Enron documents and used [the lawyer's] words to convict the 89-year-old firm."[134] The Andersen case also made painfully obvious, if it was not already clear, that an indictment itself can

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[128] *Arthur Andersen*, 544 U.S. at 696.

[129] *Id.* at 707–08.

[130] *Id.* at 706 (internal quotations omitted) ("Indeed, it is striking how little culpability the instructions required.").

[131] *Id.* at 707.

[132] *Id.* at 708.

[133] *See* Kurt Eichenwald, *The Andersen Decision: The Legal Fallout; A Reversal That Was Not a Declaration of Innocence*, N.Y. TIMES, June 1, 2005, at C6 ("While the reversal makes a retrial legally feasible . . . in truth the Supreme Court's judgment simply underscores the significance of a rule in white-collar cases: a jury cannot properly convict without first being required to conclude that a defendant had intended to engage in wrongdoing."). In an ironic twist of fate, the government later allowed David Duncan, the only *individual* convicted in the case, to withdraw his guilty plea after the Department of Justice made the decision not to retry Andersen. *See* John Roper, *Legal Accountability: Government Won't Retry Andersen Criminal Case*, HOUSTON CHRONICLE (Dec. 21 2005), *available at* http://www.chron.com/disp/story.mpl/front/3479506.html.

[134] Gibeaut, *supra* note 100, at 71.

kill the company. Thus, companies instantly became acutely aware of the need to avoid indictment, whatever the costs.[135]

B. Lesson Learned: Deferred Prosecution Agreements

No major corporation has been driven out of business by a government indictment since the Arthur Andersen case.[136] Instead, federal prosecutors and potential corporate defendants, both aware of the power prosecutors wield, have reached an "entente cordiale" wherein corporations under suspicion enter into deferred-prosecution agreements ("DPAs"),[137] pay enormous penalties, and undertake massive internal reforms.[138] All of this to avoid indictment, but with no guarantee that the axe will not drop if the prosecutor believes the corporation is not living up to the agreement.[139] DPAs have become such effective tools for prosecutors due to the two key obstacles corporations face when attempting to navigate the dangerous waters of a criminal investigation: (1) the concept of vicarious criminal liability and the fact that those involved in the alleged wrongdoing may in fact cooperate in the case against their employer; and (2) the collateral consequences of the indictment itself.[140] Indeed, particularly abusive DPAs can have the effect of "turning the prosecutor into judge and jury, thus undermining our principles of separation of powers."[141]

C. KPMG: Avoiding Indictment at All Costs

An example of a particularly abusive DPA arose out of an Internal Revenue Service investigation into allegedly illegal tax shelters, in what turned out to be probably the largest tax fraud case in United States history.[142] KPMG International,

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[135] *See id.* (noting that neither the maximum $500,000 fine nor the five years of probation for obstruction was what killed Andersen; rather, it was the indictment itself that drove Andersen's client base away in droves).

[136] Joseph A. Grundfest, *Over Before It Started*, N.Y. TIMES, June 14, 2005, at A23.

[137] *See* Richard A. Epstein, Op-Ed., *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14 ("A DPA is a provisional settlement of a criminal lawsuit whereby the prosecutor agrees to suspend—but not dismiss—any prosecution in exchange for the corporation's promise to reform its internal operations in specified ways.").

[138] Grundfest, *supra* note 136, at A23.

[139] *See id.*

[140] Epstein, *supra* note 137, at A14.

[141] *Id.* For example, Bristol-Myers Squibb, suspected of channel stuffing in an attempt to overstate quarterly earnings reports, was recently forced into a DPA that was noteworthy for personal touches the prosecutor added, including the requirement that the company endow a chair at Seton Hall University—the prosecutor's alma matter—for teaching business ethics, and the requirement that all of the corporation's activities be overseen by the prosecutor's independent advisor, who was given power to review all corporate documents and attend all meetings. *Id.*

[142] *See* United States v. Stein, 541 F.3d 130 (2d Cir. 2008).

the firm under suspicion, avoided destruction by entering into a DPA with the government in which the company agreed to a number of onerous conditions.[143] These included KPMG's agreement to: (1) waive indictment; (2) be charged in a one-count information; (3) pay a $456 million fine; (4) accept restrictions on its practice; and, most importantly for purposes of this discussion, (5) cooperate extensively with the government, both in general and in the government's prosecution of the current and former KPMG employees under indictment.[144]

Because of the pressures created by the Holder and Thompson memoranda, and after a number of discussions with government attorneys, KPMG clearly got the message that its duty to "cooperate" with the government required it to change longstanding company policy, capping and ultimately cutting off its payment of legal fees for employees and partners under indictment.[145] Beyond just pressuring KPMG to cut off payment of legal fees, government attorneys pressured KPMG to change the wording of an internal memorandum distributed to employees, to include language to the effect that employees were under no requirement to use company-provided counsel and could in fact meet with government investigators without the assistance of counsel.[146] As KPMG was signing off on the DPA, of course, the government began indicting current and former KPMG partners and employees.[147] True to its word, KPMG began to cut off all payments to the defendants under indictment.[148]

In January 2006, the KPMG defendants moved to dismiss the charges against them, or for other relief, because, they argued, the government had unconstitutionally interfered with their right to counsel (*i.e.*, KPMG's advancement of their attorney fees).[149] Judge Lewis Kaplan of the Southern District of New York agreed. In an opinion issued on June 26, 2006, Judge Kaplan found that: (1) the Thompson memo caused KPMG to reconsider its legal fees policy even before government attorneys began to apply pressure; (2) the government reinforced the Thompson memo's threats and actively pressured KPMG to cut off attorney fees for its agents under indictment; (3) the government sought to interfere with the defendants' Sixth Amendment right to counsel; and (4) KPMG's decision to

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[143] *Id.* at 137–40.

[144] *Id.*

[145] *Id.* Prior to the pressure applied by the government attorneys, it had been a longstanding practice of KPMG to advance and pay legal fees, "without a preset cap or condition of cooperation with the government," for counsel for partners, principals, and employees of the firm in situations where separate counsel was appropriate to represent the individual in any scope of the individual's duties and responsibilities. *Id.* at 143–44.

[146] *Id.* at 153.

[147] *Stein*, 541 F.3d at 139–40.

[148] *Id.*

[149] *Id.* at 140.

cut off all payments to the defendants was a direct result of the Thompson memo and the pressure applied by the government attorneys.[150]

In light of these findings, Judge Kaplan held that the government violated the defendants' Fifth Amendment right to due process by interfering with their ability to afford competent counsel.[151] Additionally, the government violated the defendants' Sixth Amendment right to counsel without adequate justification when it interfered with the defendants' right to "obtain resources lawfully available to them in order to defend themselves."[152] According to Judge Kaplan, the Thompson memo is unconstitutional to the extent that it allows prosecutors to take into account, in deciding whether to indict a company, whether the company would advance attorney's fees to present or former employees in the event they were indicted for activities undertaken in the course of their employment.[153] Thus, he ultimately dismissed the indictments against all of the defendants.[154]

The Second Circuit recently upheld the decision and agreed with the district court's finding that the defendants were stripped of their constitutional right to counsel.[155] Although the court carefully cabined its holding to the facts of the case, it agreed that the Thompson memo, coupled with the actions of federal prosecutors bound by the memo at the time, unfairly interfered with the defendants' right to counsel by pressuring KPMG to cap and ultimately cut off its promised payment of their legal fees.[156] The decision strongly suggests that prosecutors who follow the directives of the Thompson memo in the future do so at the risk of having their cases dismissed.[157]

V. REVERSING COURSE: REAL CHANGE OR MORE OF THE SAME?

A. *The Attorney-Client Privilege Protection Act of 2006*

On December 8, 2006, Senator Arlen Specter introduced a bill "designed to preserve the attorney-client privilege and work product protections available

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[150] *Id.* at 141.

[151] *Id.*

[152] *Id.*

[153] *Stein*, 541 F.3d 141.

[154] *Id.* at 141–42. Judge Kaplan initially did not dismiss the indictments against the KPMG defendants. Instead, he took the rare step of ordering the Clerk of Court, pursuant to the court's ancillary jurisdiction, to open a civil docket to allow the KPMG defendants to pursue a claim against KPMG for their legal fees while the criminal case was still pending. *Id.* The government appealed to the Second Circuit, arguing that the court lacked jurisdiction over such a claim, and won. *See id.* In response, Judge Kaplan dismissed the indictments. *See id.*

[155] *See generally id.*

[156] *See id.*

[157] *See id.*

to an organization and preserve the constitutional rights and other protections available to employees of such an organization."[158] Senator Specter's bill would have imposed a flat prohibition on government agents or attorneys "demand[ing], request[ing], or condition[ing] treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product."[159] Similarly, the Specter bill would have prohibited the government from using the following factors in determining whether a corporation is "cooperating" with the government:

> 1. valid assertion of the attorney-client privilege or work product privilege;
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> 2. payment of legal fees or expenses, or the provision of counsel, for an employee of the organization;
>
> 3. entering into a joint defense agreement with an employee of the organization;
>
> 4. sharing relevant information with an employee of the organization; or
>
> 5. failure to terminate or sanction an employee of the organization because of a decision by the employee to stand on his constitutional rights.[160]

As its text demonstrates, the proposed bill no doubt attempted to address the Thompson memo's most controversial provisions.[161] Unfortunately, the bill never made it out of committee.[162]

B. The 2006 McNulty Memo

On December 12, 2006, in light of Senator Specter's proposed bill and increasing criticism from judges, lawyers, and academics leveled at the aggressive government tactics condoned by the Thomson memo, then-Deputy Attorney General Paul J. McNulty issued a memorandum providing new guidance to

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[158] Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2006). The bill was reintroduced in identical form on January 4, 2007 as the Attorney-Client Privilege Protection Act of 2007, S. 86, 110th Cong. (2007). The bill never made it out of the Committee on the Judiciary. *See* GovTrack.us, *available at* http://www.govtrack.us/congress/bill.xpd?bill=s110-186 (last visited Sept. 1, 2008).

[159] Attorney-Client Privilege Protection Act of 2006, S. 30.

[160] *Id.*

[161] *Id.*

[162] *See* GovTrack.us, *supra* note 158.

prosecutors considering privilege waivers and the advancement of legal fees in connection with their determination of whether a corporation is "cooperating."[163] Although claiming that the government's "efforts to investigate and prosecute corporate fraud in the past five years . . . have been tremendously successful," the new memo restricted prosecutorial power in the two areas in which the Thompson memo was so heavily criticized.[164]

Recognizing that the Department of Justice had come under heavy criticism for its recent aggressive tactics aimed at corporations, the McNulty memo sought to promote public confidence in the Department and encourage fraud prevention, without sacrificing the ability to prosecute corporate fraud.[165] Addressing the criticism originating in the "corporate legal community," the memo pointed out that, to the extent that government practices were "discouraging full and candid communications between corporate employees and legal counsel," it was "never the intention of the Department for our corporate charging principles to cause such a result."[166]

Under the McNulty memo, prosecutors had to demonstrate a "legitimate need" when requesting a waiver of the attorney-client or work product privilege.[167] If the prosecutor could satisfy a number of factors to establish such need, the prosecutor was then required to secure written authorization from a United States Attorney, who then had to give the request to, and consult with, the Assistant Attorney General for the Criminal Division.[168] If the request was approved, the United States Attorney had to communicate the request to the corporation and seek the least intrusive waiver possible, beginning with purely factual information (Category I information).[169] The prosecutor could consider a corporation's refusal to waive privileges for Category I information in the determination whether the corporation was "cooperating" with the government.[170]

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[163] *See* McNulty memo, *supra* note 3, at VI–VII; Press Release, Department of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006), *available at* http://www.usdoj.gov/opa/pr/December/06_odag_828.html (last visited Sept. 1, 2008); Lynnley Browning, *U.S. Moves to Restrain Prosecutors*, N.Y. TIMES, Dec. 13, 2006, at C1.

[164] Press Release, Department of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html (quoting Deputy Attorney General Paul J. McNulty) (internal quotations omitted) (last visited Sept. 1, 2008).

[165] *See* McNulty memo, *supra* note 3, at Intro.

[166] *Id.*

[167] *Id.* at VII.B.2.

[168] *Id.*

[169] *Id.*

[170] *Id.*

If the "purely factual information" did not provide the prosecutor with sufficient information to conduct a thorough investigation, the government could request a waiver of attorney-client and work product privileged information, including legal advice given to the corporation "before, during, and after the underlying misconduct occurred" (Category II information).[171] A prosecutor could not, however, consider a corporation's declination of waiver of Category II information in his charging decision.[172]

Finally, in "extremely rare cases," a prosecutor could consider, as part of a charging decision, whether a corporation was advancing legal fees to its agents or employees.[173] In cases where the totality of the circumstances showed that advancement of legal fees was intended to impede the criminal investigation, prosecutors could consider the issue, along with other "telling facts," to determine whether the corporation was "acting improperly to shield itself and its culpable employees from government scrutiny."[174]

The immediate reaction to the McNulty memo was a mixture of both cheers and boos.[175] Despite reigning in prosecutorial discretion to request a formal privilege waiver or consider a corporation's payment of legal fees to its employees, the concern remained that corporations under investigation could "decide that the spirit of the new guidelines still tacitly encourag[ed] 'cooperation' with prosecutors"—the kind of back-breaking "cooperation" encouraged by the Holder and Thomson memoranda.[176] Moreover, because the McNulty memo forced prosecutors to jump through hoops to secure certain privilege waivers, it may have simply driven abusive prosecutorial tactics underground.[177]

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[171] *See* McNulty memo, *supra* note 3, at VII.B.2 (noting prosecutors are "cautioned" that only the rare case justifies a request for Category II information).

[172] *Id.*

[173] *Id.* at VII.B.3.

[174] *Id.* at n.3.

[175] *See* Browning, *supra* note 163, at C1 (noting that critics of the old guidelines were not all excited about the new ones and that defense lawyers would still lobby Congress to pass legislation barring all disclosure of privileged information and any credit to corporations that do disclose); Pamela A. MacLean, *McNulty Memo on Attorney-Client Privilege Blasted for Lack of Change*, THE NATIONAL LAW JOURNAL, January 26, 2007, *available at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1169719351771 (last visited Sept. 1, 2008) (discussing concerns that the new memo will create a culture of "don't ask, don't tell" that will merely drive prosecution waiver demands underground); Evan Perez and Kara Scannell, *U.S. Imposes Limits in Fighting Corporate Crime*, WALL ST. J., Dec. 13, 2006, at A6 (quoting a former Department of Justice official and member of the Enron Task Force as saying that the "fundamental problem that still remains to be tackled is the scope of criminal corporate liability and the government's ability to charge and ultimately ruin a corporation based on the allegedly illegal acts of one or a few employees").

[176] Browning, *supra* note 163, at C1.

[177] *See* MacLean, *supra* note 175.

Even after the McNulty memo, the issue of whether a prosecutor could consider a corporation's denial of a request for a privilege waiver or its advancement of legal fees to its employees and agents remained one of great concern.[178] After all, even though the McNulty memo eliminated the consideration of declination of requests for waivers for Category II information, prosecutors still could consider a declination of a request for waiver of Category I information.[179] In addition, while prosecutors generally were barred from considering a corporation's advancement of legal fees in the charging decision, "extreme case[s]" could warrant a different course.[180]

C. The Attorney-Client Privilege Protection Act of 2008

Senator Specter apparently has heard enough debate, and is convinced that the McNulty memo fell short of adequately protecting corporations and corporate constituents from government abuse.[181] Despite the McNulty memo's purported shift away from at least some of the Department of Justice's most abusive tactics, Specter reintroduced his 2006 protectionary bill aimed at correcting the shortcomings of the Holder and Thompson memoranda.[182] The new bill, entitled the Attorney-Client Privilege Protection Act of 2008, is armed to the teeth with provisions protecting corporations' core privileges and corporate constituents' right to counsel.[183] The bill attacks head-on every criticism courts, commentators, and the bar raised in response to government tactics permitted (or encouraged) by the Holder and Thompson memoranda.[184]

First, like the old bill, the proposed bill would put the force of law behind prohibitions on requests or demands for the waiver of the attorney-client privilege or work product immunity.[185] And second, it would strictly prohibit the government from basing any part of its decision whether to indict—specifically within the context of its "cooperation" analysis—on whether attorney-client privilege or work product immunity have been waived.[186] Likewise, the new bill would make it illegal for the government to base any part of its decision to indict on whether the corporation has provided counsel to or paid some or all of the legal fees for its targeted constituents.[187]

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[178] *See id.*

[179] McNulty memo, *supra* note 3, at VII.B.2.

[180] *Id.* at VII.B.3 n.3.

[181] See *infra* notes 182–191 and accompanying text.

[182] *See* Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008).

[183] *See id.* § 3.

[184] *See id.*

[185] *Id.* § 3(b).

[186] *Id.* § 3(b)(2).

[187] *Id.*

But Senator Specter's new bill goes even further, attempting to resolve additional, less talked about (but perhaps equally important) issues. To start, the bill would apply broadly to all government agencies—both criminal and civil.[188] Thus, the government could not, for example, shift its dirty work from the DOJ to the SEC and thereby avoid the bill's reach.[189] Additionally, the provisions would apply to more than just "charging decisions"—they would apply to all "enforcement decisions."[190] This broadened applicability likely would not be a distinction without a difference. Indeed, it would prevent government agencies from adhering to the prohibitions as they relate to charging decisions, while nevertheless considering whether privileges were waived or legal fees were provided in making other enforcement decisions.[191]

D. DOJ Response: New Prosecutorial Guidelines

Government agencies, not surprisingly, say that Specter's proposed legislation is unnecessary.[192] They insist that they understand the severity of their past abuses and that they can and will avoid them on their own.[193] In an attempt to evidence its willingness to change course, and possibly to moot the call for legislation, the Department of Justice recently issued new Guidelines for prosecutors investigating and considering whether to prosecute corporations and their constituents.[194]

The Guidelines still list "cooperation" as a factor in determining whether to indict.[195] But they bar prosecutors from: (1) requesting privilege waivers;[196] (2) requesting that corporations refuse to provide counsel to or pay legal fees for their constituents;[197] (3) considering whether privileges were waived in determining whether to charge;[198] and (4) considering whether counsel was provided or legal

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[188] Attorney-Client Privilege Protection Act of 2008, S. 3217 § 3(b).

[189] *See id.*

[190] *Id.*

[191] *See id.*

[192] *See* Lynnley Browning, *Bill to Protect Companies in Inquiries Adds Support*, N.Y. TIMES (June 23, 2008), *available at* http://www.nytimes.com/2008/06/23/business/23law.html?_r=1&ref=business&oref=slogin (last visited Sept. 1, 2008).

[193] *See id.*

[194] *See* Principles of Federal Prosecution of Business Organizations (hereinafter the Guidelines), issued Aug. 28, 2008, *available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf (last visited Sept. 1, 2008). The new Guidelines are often referred to as the "Filip Memorandum," but this article uses the term Guidelines to more easily distinguish them as the focus of the current discussion.

[195] *Id.* § 9-28.300(A)(4).

[196] *Id.* § 9-28.710.

[197] *Id.* § 9-28.730.

[198] *Id.* § 9-28.720(b).

fees were paid to corporate constituents in determining whether to charge.[199] The Guidelines also specify that counsel who believe a prosecutor is violating these rules should raise their concerns with the United States Attorney or Assistant Attorney General.[200]

Of course, the Guidelines come with one huge loophole—they do not carry the force of law, as explained explicitly in this DOJ caveat:

> These Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in a matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.[201]

Thus, the Guidelines are not truly binding.[202]

VI. THE NEED FOR DEFINITIVE LEGISLATIVE ACTION

So where do we stand? The Holder and Thompson memoranda are no longer official policy.[203] And though some questions remain whether many of the tactics implemented under the authority of those memoranda still are utilized, the Second Circuit's decision in *Stein* dealt a serious blow to the use of at least one such tactic—government interference with corporate constituents' right to counsel via payment of legal fees.[204] That is certainly a start, but nowhere near a comprehensive solution.

The Attorney-Client Privilege Protection Act of 2008 addresses more than its name implies, and attacks the problems rooted in the Holder, Thompson, and McNulty memoranda on all fronts.[205] Unlike *Stein*, the proposed bill addresses not only government interference with the right to counsel, but also addresses interference with core privileges.[206] The problem, however, is that Senator Specter's bill has been introduced in various forms three times, but has yet to be signed into law.[207]

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[199] *Id.* § 9-28.730.

[200] *See* the Guidelines, *supra* note 194, § 9-28.760.

[201] *Id.* § 9-28.1300.B

[202] *See id.*

[203] *Supra* Part V.B.

[204] *Supra* Part IV.C.

[205] *Supra* Part V.C.–D.

[206] *Id.*

[207] *Supra* notes 158–162 and accompanying text.

The Department of Justice also has paid attention to criticism of its past policies.[208] And its new Guidelines address most, if not all, of the issues raised by the proposed legislation.[209] For many reasons, however, the Guidelines cannot possibly afford the same level of protection as legislation.

First, guidelines are just that, guidelines—not law.[210] As such, they can be disregarded with little or no explanation, and are subject to selective application by the government.[211] Second, guidelines are extremely susceptible to change.[212] Although law too is subject to change, it is not as susceptible to frequent shifts in policy such as the ones we have seen by the Department of Justice on corporate prosecutorial tactics—from the Holder memo, to the Thompson memo, to the McNulty memo, to the new Guidelines.[213] Finally, and perhaps most importantly, the Guidelines are insufficient because their reach is too narrow. Because they were issued by the Department of Justice, the Guidelines necessarily only apply in the criminal context to agencies under the Department of Justice's umbrella.[214] Notably outside the reach of the Guidelines are civil actions, and thus dozens of extremely active civil enforcement agencies, such as the Securities & Exchange Commission and the Federal Trade Commission.[215] Guidelines have no meaning when they purposefully can be ignored before the Department of Justice's involvement. Thus, guidelines, without more, are insufficient.

VII. CONCLUSION

The history of corporate vicarious criminal liability has been one of steady accretion of power at the hands of the prosecutor, with corporate counsel forced into the status of quasi-deputy, turning over the corporation's privileged material, cutting off payment of legal fees, and actively assisting the government in building its case against the corporation's own employees. There is no dispute that corporate, white-collar crime was and still is a serious problem. But federal prosecutors should not resort to the destruction of longstanding privileges or warp the adversarial system of justice such that a corporate employee charged with a complex criminal offense cannot secure competent counsel.

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[208] *Supra* Parts V.B., D.

[209] *Supra* Part V.D.

[210] *Supra* notes 201–202 and accompanying text.

[211] *See* Edward Iwata, *Justice: Prosecutors Can't Ask Firms to Waive Legal Privileges*, USA TODAY (Aug. 29, 2008) *available at* http://www.usatoday.com/money/companies/regulation/2008-08-28-corporate-crime_N.htm (last visited Sept. 1, 2008) (noting that "[t]he proof will be in the pudding as to how [the Guidelines] are applied").

[212] *See id.*

[213] *Supra* note 3 and accompanying text.

[214] *Supra* notes 188–191.

[215] *Id.*

In order to restore balance to our system of criminal justice, the Department of Justice should abide by its new Guidelines and should not encourage a culture of underground privilege waivers and pressure on corporations to cut off employees' legal fees. Additionally, due to the shortcomings inherent in "guidelines" and the limited reach of *Stein*, Congress should pass, and the President should sign, the Attorney-Client Privilege Protection Act of 2008.

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TRUST TERM CONSTRAINTS AFTER REPEAL OF THE FEDERAL ESTATE TAX

*Kelly A. Moore**

I. INTRODUCTION

State law generally provides settlors with significant flexibility in establishing trust terms.[1] This flexibility is not unfettered, however, as state law typically restricts a settlor's freedom in regards to spousal interests, creditor rights, and rules against perpetuities, if still extant.[2] Beyond these state imposed restrictions, however, settlors enjoy tremendous freedom under state law to choose the terms that govern their trusts. Yet, for clients whose wealth levels, asset characteristics, or beneficiary attributes trigger the need for advanced estate planning, this freedom may be lost, and the trust documents created can be complex, containing many sophisticated provisions related to federal tax and other laws.[3] Among the federal laws constricting trust term selection is the federal estate tax, the long-term status of which is currently uncertain. This article examines the impact of the federal estate tax on the selection of state law trust terms, concluding that permanent repeal of the estate tax will not dramatically reduce the complexities and constraints imposed by federal law in the crafting of estate planning trust documents.

In 2001, Congress enacted the Economic Growth and Tax Relief Reconciliation Act,[4] ("EGTRRA") affecting a temporal compromise between those seeking

* Former Director of Tax LL.M. Programs, Lecturer in Law, Washington University in St. Louis School of Law. Thanks to Donald Johnson, Jr., my research assistant, and David Frederick for his editing assistance.

[1] UNIF. TRUST CODE § 105 (amended 2005).

[2] Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2466 (2006).

[3] *See, e.g.*, JEFFREY N. PENNELL, WEALTH TRANSFER PLANNING AND DRAFTING 8-1, 9-1, 10-1, 17-1, 18-1 (2005).

[4] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified as amended in scattered sections of 26 U.S.C.) [hereinafter EGTRRA].

permanent repeal of the estate tax and those favoring preservation of the estate tax in some form.[5] For those proposing repeal, the act triggered a one year repeal of the estate tax in calendar year 2010.[6] This one year "death tax"[7] holiday follows a staggered increase in the amount of property that could be transferred tax free at death under the estate tax between 2001 and 2009.[8] For those opposing repeal, the estate tax is reinstated in 2011 at 2001 year levels.[9] EGTRRA also repealed the generation skipping transfer tax ("GSTT") for 2010 with an accompanying increase in exemptions prior to 2010 and a reinstatement in 2011, also at 2001 year levels.[10] The gift tax is left in place, with an increase in the amount of property that could be gratuitously transferred *inter vivos* and a reduction in rates.[11]

Since EGTRRA was enacted, numerous unsuccessful attempts have been made to make the repeal of the estate tax permanent.[12] Putting aside the inherent compliance difficulties in the staged and temporary change and repeal of the estate tax foisted on taxpayers by EGTRRA,[13] the perceived imposition of compliance complexity by the estate tax on taxpayers is one of the arguments proponents of making permanent the death tax repeal posit.[14] It is said that estate planning documents are longer, more complex and more expensive due to the lawyer's need to plan around the estate tax.[15] If the estate and GSTT taxes are repealed, the argument continues, this burden on taxpayers and the attendant intrusions on the freedom under state trust law to select trust terms will be removed.[16]

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[5] *See* Reginald Mombrun, *Let's Protect our Economy and Democracy from Paris Hilton: The Case for Keeping the Estate Tax*, 33 OHIO N.U. L. REV. 61, 61–3 (2007).

[6] EGTRRA § 901(a)(2) (2001) (providing the return of the estate tax in 2011).

[7] *See* Daniel W. Matthews, *A Fight to the Death: Slaying the Estate Tax Repeal Hydra*, 28 WHITTIER L. REV. 663, 665 (2006) (discussing the adoption and manipulation of the term "death tax" by the proponents of repeal to sway public opinion against the estate tax).

[8] *See* I.R.C. §§ 2001, 2010 (West 2002).

[9] *Id.* § 2011.

[10] *Id.*

[11] *Id.* § 2011, 2503.

[12] *See* Dustin Stamper, *GOP Hoping for Resurrection of Estate Tax Reform in 2006*, TAX NOTES TODAY (Tax Analysts), Nov. 16, 2005, at 220–2, *available at* LEXIS, 2005 TNT 220-2.

[13] *See* Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261, 262 (2002).

[14] *See* Mombrun, *supra* note 5; *see also* Kristine M. Schlachter, *Repeal of the Federal Estate Tax and Gift Tax: Will it Happen and How Will it Affect our Progressive Tax System?*, 19 VA. TAX REV. 781, 798 (2000).

[15] Stephen Vasek, *Death Tax Repeal: Alternative Reform Proposals*, 92 TAX NOTES 955, 957 (2001).

[16] *See* Schlachter, *supra* note 14.

The imposition of this complexity manifests itself in the selection of terms used in trust documents.[17] In a narrow view of estate planning, repeal proponents may be correct. If estate planning is defined solely as the documentation of attempts to avoid and/or minimize only the impact of the estate tax, it is self evident that repealing the tax successfully removes complexity from trust terms. In a broader understanding of estate planning, however, one discovers that estate planning is more than avoiding the "death taxes," and includes planning tied to specific asset characteristics, and attempts to avail other federal benefits or avoid other federal taxes.[18] This article takes the broader view of estate planning, and evaluates the effect estate tax repeal has on the overall constraints imposed by federal law on the flexibility in trust term selection allowed under state trust law.

The impact of federal estate tax and other laws on trust terms selection takes two avenues: One, the magnitude of its impact as measured by the number of trusts created as a result of planning related to federal laws; and two, the variations in estate planning trust documents dictated by federal law requirements. This paper addresses the second of these avenues. I note, however, that the overall magnitude of the impact of the estate tax may be small. As only 0.3% of Americans incur estate tax liability, on average, 99.7% of Americans are left free to ignore the estate tax in most planning regards.[19] While not every American will create a trust and, perhaps, the repeal of the estate tax may cause a reduction in the number of trusts established, for those that create trusts, federal laws other than the estate tax may limit the trust terms they select. The potential impact of rules related to trusts receiving payments from deferred benefits plans may have on state trust law is significant because 57% of the nation's households have retirement savings in a deferred format, including 73% of retired households.[20] Also, whereas only 6,300 estates may be impacted by the federal estate tax in 2009,[21] upwards of

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[17] *See, e.g.,* I.R.C. §§ 2055–56 (West 2002) (dictating trust terms required for a decedent to obtain estate tax marital and charitable deductions).

[18] *See* Richard C. Spain, *Estate Planning for a Disabled Beneficiary*, PRAC. LAW., Oct. 1991, at 29; *see also* FRANK J. CROKE & WILLIAM F. CROKE, FAMILY TRUSTS 35–150 (1998); R. Randazzo, *Elder Law and Estate Planning for Gay and Lesbian Individuals and Couples*, 6 MARQ. ELDER'S ADVISER 1 (2004); *Estate Tax Concerns No Longer Drive Most Planning Decisions*, 14 ELDER L. ISSUES 5 (Fleming and Curti, PLC, Tucson, Ariz.), July 31, 2006, at 5, *available at* http://www.elder-law.com/2006/Issue1405.html.

[19] Pub. Citizen & United for a Fair Econ., *Spending Millions to Save Billions*, TAX NOTES TODAY, (Tax Analysts), Apr. 26, 2006, at 80-28, *available at* LEXIS, 2006 TNT 80-28 [hereinafter *Spending Millions to Save Billions*].

[20] Sharon A. Devaney & Sophia T. Chiremba, *Comparing the Retirement Savings of the Baby Boomers and Other Cohorts*, Bureau of Labor Statistics ed., 2005, http://www.bls.gov/opub/cwc/cm20050114ar01p1.htm.

[21] *See Spending Millions to Save Billions, supra* note 19 (estimating that for 2006 decedents only 6,300 estates will be subject to the estate tax, however with the estate tax exemption amount increasing from $2 million to $3.5 million in 2009, the figure may be even lower for 2009 decedents). *See also* Brian G. Raub, *Federal Estate Tax Returns Filed for 2004 Decedents*, 27 STAT. OF INCOME BULL. 115,

5,000,000 individuals own shares in an S-corporation and may be impacted by the S-corporation eligibility provisions regarding trusts as shareholders.[22]

This analysis shall proceed as the combination of several sections, each addressing particular issues relevant to the inquiry. Section II outlines general trust law as typically provided by state law. Section III discusses select limitations imposed on trust term selections by the estate tax. Section IV addresses the change in the step up basis rules which become effective with the repeal of the estate tax, and the possible influence the change may have on trust term selections. Section V evaluates the gift tax's continuing influence on trust term selection. Section VI discusses select income tax and supplementary security income provisions that impinge on state trust law flexibility. Section VII evaluates the federal constraints on trust term selection remaining after repeal of the estate tax, concluding that, although the repeal may somewhat reduce incursions into state law granted flexibility, the overall impact of remaining federal laws mute the repeal's impact. This article does not purport to discuss all of the aspects of the federal laws mentioned. Rather, the goal is to survey features of these laws which estate planners and settlors must consider in drafting trusts to achieve various planning objectives.

II. STATE TRUST LAW

Under state law, settlors, also known as grantors, are generally free to create trusts to accomplish any lawful purpose.[23] The primary restrictions imposed on trust creation by state law are related to grantor capacity, necessary components and parties, creditor protection, spousal property right protection, and rules against perpetuities.[24]

Having a lawful purpose is a threshold requirement for the creation of a trust.[25] Most trusts established for estate planning purposes have a lawful purpose such as asset management at life and/or death, provision for long term care of family

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115 (Spring 2008), *available at* http://www.irs.gov/pub/irs-soi/04esreturnbul.pdf (reporting that 19,294 estates incurred estate tax liability for 2004 decedents when the exemption amount was $1.5 million).

[22] Kelly Bennett, *S Corporation Returns*, 22 STAT. OF INCOME BULL. 63, 69 (Spring 2003), *available at* http://www.irs.gov/pub/irs-soi/00scorp.pdf.

[23] *See* Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 ALB. L. REV. 543, 543–45 (1998); *see also* UNIF. TRUST CODE § 404 (amended 2005).

[24] *See* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUST 1, 19–26, 178, 183, (Jesse H. Choper et al. eds., 1973); *see also* J. R. Kemper, *Validity of Inter Vivos Trust Established by One Spouse Which Impairs the Other Spouse's Distributive Share or Other Statutory Rights in Property*, 39 A.L.R. 3d 14 (1971).

[25] UNIF. TRUST CODE § 404.

members, minimizing taxes, or insuring access to welfare benefits.[26] Unlawful purposes involve requirements for the trustee to commit criminal or tortious acts.[27]

If the trust is testamentary, the required grantor capacity is the same standard as for wills: knowledge of assets, awareness of natural fruits of bounty and an understanding of what the executed document does.[28] If the trust is *inter vivos*, the standard may differ slightly depending upon whether the trust is revocable, only taking final effect upon the settlor's death as a will substitute, or whether it is an irrevocable trust. In the former, the will standard is generally applied. In the latter, a contract capacity is required.[29]

The necessary parties in a private trust are the settlor, at least one trustee, and at least one individual beneficiary.[30] The settlor must manifest intent to create a trust in appropriate form.[31] Although oral trusts are permissible, in trusts involving real property the statute of frauds typically requires a written declaration of trust.[32] The settlor names the trustee and chooses the beneficiaries. Courts will not necessarily invalidate a trust in the absence of a trustee and are hesitant to thrust the mantle of trusteeship on an unwilling party.[33] If a trustee refuses or resigns his position, the courts will appoint a replacement rather than invalidate the trust.[34] Trustees are subjected to strict fiduciary obligations to which they must willingly agree, but which the settlor may tailor with the trust's terms.[35] Individual beneficiaries are necessary to enforce the terms of the trust against the trustee.[36] In charitable trust situations, this requirement is unnecessary because

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[26] *See* VALERIE VOLLMAR, AMY MORRIS HESS & ROBERT WHITMAN, AN INTRODUCTION TO TRUSTS AND ESTATES, 173–75 (2002).

[27] GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUST AND TRUSTEES § 211 (rev. 2d ed. 1984).

[28] UNIF. TRUST CODE §§ 401, 601.

[29] RESTATEMENT (SECOND) OF TRUSTS § 19 (1959); RESTATEMENT (THIRD) OF TRUSTS § 11 (2003); UNIF. TRUST CODE § 402.

[30] RESTATEMENT (SECOND) OF TRUSTS § 17; RESTATEMENT (THIRD) OF TRUSTS § 10.

[31] For instance, due to the statute of frauds in most states, a trust involving real property must be in writing. *See, e.g.,* Dougherty v. Duckworth, 388 S.W.2d 870, 876 (Mo. 1965).

[32] *Id.*

[33] UNIF. TRUST CODE § 701(b); RESTATEMENT (THIRD) OF TRUSTS § 35.

[34] UNIF. TRUST CODE § 704(c); *see, e.g.*, *In re* Therese D. Steckler Trust, 678 So.2d 620, 622–23 (La. Ct. App. 1996).

[35] UNIF. TRUST CODE §§ 801–804.

[36] RESTATEMENT (SECOND) OF TRUSTS § 112 (1959); RESTATEMENT (THIRD) OF TRUSTS § 44; UNIF. TRUST CODE § 402.

the attorney general of the relevant state enforces the trust terms.[37] Closely related are honorary trusts, which are allowed under the Uniform Probate Code ("UPC") in certain situations.[38]

Another necessary component is the trust property, also known as res.[39] Trusts are designed to allow the bifurcation of property rights between legal and equitable rights.[40] The trustee must be given legal title over the trust property, while the beneficiary will hold beneficial title.[41] The type of delivery required to perfect the trust ranges from actual deeds/titles to symbolic delivery.[42] Trusts without property are called dry trusts, and were historically ineffective.[43] Under the UPC, such trusts are allowed in select situations, such as trusts anticipating receipt of life insurance death proceeds or transfers from a probate estate.[44]

The rule against perpetuities has historically limited the terms of trust duration.[45] Generally stated, the rule against perpetuities requires that, in the transfer of property, the gift must vest within 21 years of a life-in-being at the beginning of the transfer arc.[46] This rule is a compromise between not allowing dead hands to control property indefinitely, while allowing settlors to control property for the use of people they theoretically might have known, such as their children and grandchildren.[47] Recently, states have begun repealing their rules against perpetuities, which has occasioned a liberalization of trust modification procedures to address the changing circumstances that might impact a perpetual trust.[48]

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[37] *See, e.g.,* Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAWAII L. REV. 593, 622 (1999); *cf.* UNIF. TRUST CODE § 405(c) (granting settlor standing to enforce a charitable trust).

[38] UNIF. PROBATE CODE § 408 (2006) (trusts for care of animal) and § 409 (trusts without ascertainable beneficiary for general noncharitable purposes and trusts for a specific noncharitable purpose other than the care of an animal).

[39] RESTATEMENT (SECOND) OF TRUSTS § 74; RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. i.

[40] RESTATEMENT (THIRD) OF TRUSTS § 3.

[41] *Id.* at Ch. 1, Introductory Note.

[42] *See, e.g.,* Newton v. Wimsatt, 791 S.W.2d 823, 829–30 (Mo. Ct. App. 1990); Bakewell v. Clemens, 190 S.W.2d 912, 915 (Mo. 1945) (symbolic delivery).

[43] *See* Kully v. Goldman, 305 N.W.2d 800, 802–3 (Neb. 1981); RESTATEMENT (THIRD) OF TRUSTS § 75.

[44] UNIF. PROBATE CODE § 2-511 (amended 2006).

[45] *See* R. Zebulon Law et al., *The Rule Against Perpetuities: An Update*, 24 TAX MGMT, EST., GIFTS & TR. J. 222, 222–23 (1999); David M. Becker, *Tailoring Perpetuities to Avoid Problems*, PROB. AND PROP., March–April 1995, at 11.

[46] CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY: AN HISTORICAL BACKGROUND ON THE COMMON LAW OF REAL PROPERTY AND ITS MODERN APPLICATION 243 (3d ed. 2002).

[47] *See* Schanzenbach & Sitkoff, *supra* note 2, at 2470.

[48] *Id.* at 2472–81.

Creditor protection is a major component of state law.[49] As far as the settlor is concerned, if he is insolvent at the time he creates an *inter vivos* trust, his creditors may be able to reach these trust assets, even if the trust is irrevocable.[50] If a settlor is solvent at the time he creates the trust, but subsequently becomes insolvent, the assets of an *inter vivos* irrevocable trust may not be reachable by the settlor's creditors.[51] If revocable, the assets are reachable whether or not the settlor was insolvent at the time the trust was established.[52] From the standpoint of the creditors of trust beneficiaries, generally the assets will not be reachable under public policy if the trust has a spendthrift provision.[53] Absent such a provision in the trust document, creditors may be able to attach a beneficiary's trust distribution expectancy.[54]

Spousal rights and other support rights may also trump the trust terms otherwise selected by the settlor. This may present itself in one of three forms: the trust was testamentary, the trust was illusory, or the settlor's creation of the trust was intended to deprive the surviving spouse of her statutory distributive share.[55] These three forms represent the split among the states on the proper method of unwinding the settlor's intent and awarding the surviving spouse her statutory distributive share.[56] The settlor may not retain such extensive powers of ownership and control as to cause an *inter vivos* trust to be testamentary in nature, in essence a will.[57] What level of retained powers and ownership is required to render an *inter vivos* trust testamentary is unclear and ultimately is determined on a case-by-case basis.[58] Generally an *inter vivos* trust will be deemed testamentary in cases where the transfer occurred in contemplation of death.[59] Illusory trusts can be stricken if it is shown that the settlor's transfer to trust was not genuine, but merely an instrument to hide the settlor's retention of control and ownership.[60]

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[49] *Creditors' Rights Against Trust Assets*, 22 REAL PROP. PROB. & TR. J. 735, 740–41 (1987).

[50] MO. REV. STAT. § 428.039 (Vernon 2003).

[51] UNIF. TRUST CODE § 505 (amended 2005); *see also* RESTATEMENT (SECOND) OF TRUSTS § 156 (1959).

[52] Deposit Guar. Nat'l Bank v. Walter E. Heller & Co., 204 So. 2d 856 (Miss. 1967).

[53] *See* Ann S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV 179, 188 (1993); UNIF. TRUST CODE § 505(a) (trust invalid as to settlor's creditors); *cf.* RESTATEMENT (SECOND) OF TRUSTS § 157(a) (wife or child of beneficiary for support, or wife for alimony, may satisfy claim despite spendthrift provisions).

[54] UNIF. TRUST CODE § 503(c).

[55] *See* Kemper, *supra* note 24, at 24.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 14; *see also In re* Estate of Weitzman, 724 N.E.2d 1120, 1123 (Ind. Ct. App. 2000).

[60] Kemper, *supra* note 24, at 14.

If the settlor's intent when creating the trust is to retain beneficial control and ownership during lifetime and subsequently at death deny the surviving spouse her statutory distributive share, then the trust can be stricken as fraudulent against the surviving spouse.[61]

Beyond the preceding overview of state trust law requirements, state law is otherwise very flexible in regards to trust terms chosen by the settlor. For instance, if a trust is established by a settlor with capacity, having all of the necessary components and parties, the settlor is free to define the four main categories of trust terms: retained powers and rights; administrative and fiduciary powers; dispositive schemes; and termination terms.[62] Retained powers include powers such as the right to revoke, alter, amend, choose between named beneficiaries, invest trust property in a non-fiduciary fashion, and borrow trust assets.[63] Administrative and fiduciary powers are those imposed on the trustee and which may trump state law of fiduciary duties in many instances.[64] These powers may include the discretion to allocate receipts to income and principal in a manner contrary to the state's Principal and Income Act, invest in unproductive property, and hold certain types of assets.[65] The dispositive scheme relates to the current beneficiary, determining if, when and in what manner such beneficiary is entitled to income and/or principal of the trust.[66] The termination terms describe the remainder beneficiary, the point of termination, and may include the grant of a power of appointment to one or more individuals.[67]

State law flexibility, however, is constrained significantly by the myriad of federal tax and related provisions. For instance, retaining the power to revoke a trust has gift, estate, and income tax ramifications that, if the settlor wishes to avoid in some manner, the settlor must carefully narrow his term selections. Even after repeal of the estate tax, various other federal laws will restrict trust term selection.

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[61] Kemper, *supra* note 24, at 14; *see also* Hanke v. Hanke, 459 A.2d 246, 248 (N.H. 1983).

[62] *See* UNIF. TRUST CODE § 815 (amended 2005); *cf.* UNIF. TRUST CODE § 816 (enumerating general powers contemplated by the general grant of trusteeship).

[63] *See, e.g.,* Cleveland Trust Co. v. White, 15 N.E.2d 627 (Ohio 1938); BOGERT, *supra* note 27, §§ 993, 1061, 1291.

[64] *See, e.g.,* BOGERT, *supra* note 27, §§ 551, 1292–1302.

[65] *See, e.g.,* MO. REV. STAT. § 469.901 (Vernon 2003).

[66] *See, e.g.,* RESTATEMENT (THIRD) OF TRUSTS § 49 (2003); *In re* Madison Cmty. Found., 707 N.W.2d 285 (Wis. Ct. App. 2005).

[67] *See, e.g.,* RESTATEMENT (THIRD) OF TRUSTS § 61; Tudor v. Vail, 80 N.E. 590, 592 (Mass. 1907) (concerning termination by exercise of power of appointment).

III. FEDERAL ESTATE TAX

The federal estate tax impacts trust term selections in many ways. This article will highlight the terms imposed to obtain estate tax marital deductions, the most prominently sought after method of minimizing the tax. This deduction constrains state trust law flexibility because obtaining the deduction requires compliance with strict statutory requirements.[68]

To obtain the marital deduction for property placed in trust for a surviving spouse, the decedent must provide that the trust is either a general power of appointment trust, qualified terminal interest property trust ("QTIP"), estate trust, or a hybrid marital-charitable remainder trust.[69] For all but the estate trust, for transfers to these trusts to qualify for the marital deduction, the trust terms must provide the surviving spouse with the right to all trust income for life, at least annually.[70]

For transfers to a general power of appointment trust to qualify for the marital deduction, the trust terms must provide the surviving spouse the power to redirect the property from the settlor's named remainderman, potentially in direct contradiction of the settlor's dispositive scheme.[71] Similarly, the estate trust requires the trust property be paid directly to the surviving spouse's estate, allowing the survivor's will to dictate the ultimate disposition.[72]

To optimize minimization of the estate tax, a credit shelter trust is frequently created in tandem with a marital trust.[73] A credit shelter trust is designed to take maximum advantage of the estate and gift tax unified credit amount.[74] A common estate planning technique is designed to create a zero-estate-tax posture in the estate of the first to die.[75] This is accomplished by dividing the after expense property of the decedent's gross estate into two shares: one equal to the remaining amount of a decedent's unified credit amount, and the remainder of the estate to a marital trust.[76] In so doing, the estate tax liability is kept at zero at the time of the death of the first spouse. The share distributed to the credit shelter trust is shielded by the applicable credit amount stemming from the unified credit

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[68] *See* I.R.C. § 2056 (West 2002).

[69] *Id; see* SEBASTIAN V. GRASSI, JR., A PRACTICAL GUIDE TO DRAFTING MARITAL DEDUCTION TRUSTS 27–31 (2004).

[70] *See* I.R.C. § 2056.

[71] *Id.* § 2056(b)(5).

[72] *See* Treas. Reg. § 20.2056(c)-2(b) (1994).

[73] PENNELL, *supra* note 3, at 7-9.

[74] *See id.* at 7-5.

[75] *Id.* at 7-8.

[76] BORIS I. BITTKER ET AL., FEDERAL ESTATE AND GIFT TAXATION 545–47 (2005).

amount and the balance of the estate is poured into a qualifying marital trust and thereby shielded in the estate of the first spouse to die from transfer taxation by the marital deduction.[77]

The marital deduction is prefaced on the concept that a married couple is one economic unit and should have their combined property taxed only once by the estate tax.[78] The trust terms imposed to obtain the marital deduction insure this policy, as the required trust terms or attendant elections insure the property in the marital trust be taxed in the surviving spouse's estate at the death of the surviving spouse.[79] A general power of appointment trust is included in the surviving spouse's estate by virtue of the required power, a QTIP trust requires election by the surviving spouse, and the estate trust is included by virtue of the requirement the trust be paid to the estate of the surviving spouse at the surviving spouse's death.[80]

The credit shelter trust, on the other hand, is designed to avoid the estate tax at the surviving spouse's death, requiring the settlor to carefully choose trust terms to avoid granting the surviving spouse or any other beneficiary any powers, rights, or interest in the credit shelter trust that would trigger estate tax inclusion.[81]

IV. CHANGE OF STEP UP REGIME

Currently, the basis of any property included in a decedent's gross estate is stepped up to a date of death value basis, which eliminates built in capital gains when it passes to the decedent's heirs.[82] For instance, a piece of property with a $5 basis in the hands of the decedent, but which is included on decedent's estate tax return at a $10 date of death value, has a $10 basis in the hands of the estate and ultimate gratuitous recipient. There is an exception for property deemed income in respect of decedent,[83] but otherwise this stepped upped basis regime eliminates the eventual taxation of any pre-death appreciation of decedent's property.[84]

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[77] *Id.*; PENNELL, *supra* note 3.

[78] PENNELL, *supra* note 3, at 7-1.

[79] I.R.C. §§ 2033, 2041, 2044, 2056 (West 2002).

[80] *Id.*

[81] PENNELL, *supra* note 3, at 5-1, 7-9.

[82] I.R.C. § 1014; Kent N. Schneider, *The Modified Carryover Basis Rules of IRC § 1022: Current Implications of Fiduciaries*, 58 J. MO. B. 264, 264 (2002).

[83] I.R.C. §§ 691, 1014(c).

[84] *See* Janis v. Comm'r, 469 F.3d 256, 262 (2d Cir. 2006).

> This [step up] rule avoids a double tax on the appreciation in the value of the property that occurred prior to death. The estate tax, which is based on the fair market value at the time of death, taxes this unrealized capital gain. If the cost basis to the heirs was the acquisition cost to the decedent, the unappreciated capital

The repeal of the estate tax is accompanied by repeal of the current step up in basis rules under § 1014.[85] In the year of repeal, and presumably thereafter if repeal is made permanent, the step up in basis will be lost in some cases. Replacing it will be a step up in basis on the first three million dollars of property passing to a surviving spouse and $1,300,000 of property passing otherwise.[86] This change will present many bookkeeping and other difficulties to estates and in some situations may influence trust terms.[87] For instance, in estate plans with charitable bequests, the document may need to provide that high value, low basis properties are transferred to charity, and thus do not take up the limited allowable step up. The need for separate trusts for surviving spouses to differentiate between the property receiving the step up and property not so receiving may also be necessary.[88]

V. FEDERAL GIFT TAX

EGTRRA left the gift tax in force in 2010, establishing the unified credit amount for life time gifts at $1,000,000, effectively disunifying the gift and estate tax during the run up to the year of repeal.[89] Despite some scholars arguing that the gift tax should be repealed if the estate tax is repealed,[90] the discussions to make EGTRRA repeal permanent currently envision leaving the gift tax in place.[91] Whereas the gift tax's initial purpose was to prevent avoidance of the estate tax through the artifice of lifetime giving, the gift tax is now seen as an anti-income shifting provision.[92]

> gain would be taxed a second time. In order to avoid this result, the cost basis of the property when it is later sold is the fair market value at the time of death. . . . The only gain that is taxed on its subsequent resale is that incurred as a result of an increase in value after the date of death. The statutory scheme "express[es] Congress's intent that unrealized gain taxed to the decedent's estate at his death shall not be subjected to another tax when it is subsequently realized by the estate or a legatee."

Id. (quoting Levin v. United States, 373 F.2d 434, 438 (1st Cir. 1967)).

[85] EGTRRA §§ 541–542 (2001).

[86] *Id.* § 542.

[87] *See Federal Estate Tax: Uncertainty in Planning Under the Current Law: Hearing Before the S. Comm. on Fin.*, 110th Cong. (2007) (statement of Conrad Teitell, Principal, Cummings & Lockwood, LLC) (comparing the approach of EGTRRA to a roller coaster ride of increasing exemptions, followed by a precipitous fall in the year of repeal and a return in the next year to the pre-EGTRRA system).

[88] *Id.*

[89] EGTRRA §§ 511, 521.

[90] *See* Alana J. Darnall, *Toward an Integrated Tax Treatment of Gifts and Inheritances*, 34 SETON HALL L. REV. 671, 688–94 (2004).

[91] *Id.*

[92] Imposition of gift taxes ensures that taxpayers in high income-tax brackets who transfer income-producing property to those in low income-tax brackets, thereby reducing income taxes

The gift tax provides almost identical marital deduction requirements as the estate tax.[93] If properly drafted, a settlor receives a 100% gift tax deduction for all property passing to the trust for the spouse in a properly formed trust.[94] To obtain a marital deduction through a gift in trust, § 2523 requires the trust be in the same form as the estate tax requires under § 2056, discussed in the previous section.[95]

State trust law permits grantors to retain rights in trusts created *inter vivos*. Grantors may retain rights such as the right to income, or remainders and powers such as the right to revoke. The right to retain either the current or remainder interest in a trust leads to the creation of split interest gifts.[96] For instance, in cases where the grantor retains the right to the current income interest but irrevocably designates another to receive the remainder, the grantor has made a gift of the remainder interest. The inverse is true in situations where the grantor has retained the right to the remainder but irrevocably gives the current interest to another. Under standard gift tax valuation concepts, the value of the gift given in these cases would be limited to the actuarial valuation of the remainder or current income right in the trust so given.[97] Although state law allows these split interests trusts, trusts in which grantors retain the income or remainder interest are denied actuarial valuation for gift tax purposes if the interest given is given to a family member.[98] Instead, § 2702 provides that unless one of two detailed current beneficiary terms are used in the trust, the value of the gift made is the total value of the property transferred to the trust.[99] In essence, if the prescribed current beneficiary terms are not used, the value of the gift is determined as if the value of the retained interest is zero.[100]

To avoid having the retained interest valued at zero for gift tax purposes, § 2702 provides that the current beneficiary interest be either an annuity interest or a unitrust interest.[101] An annuity interest is "an arrangement under which a determinable amount is paid periodically, but not less often than annually, for

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paid on the income from the property, pay some tax upfront (the gift tax). Hence, the gift tax is said to supplement the income tax in this regard. *See, e.g.*, Dickman v. Comm'r, 465 U.S. 330, 339 (1984).

[93] *See* I.R.C. §§ 2522–2523 (West 2002).

[94] *Id.*

[95] *See* I.R.C. § 2523.

[96] *E.g.*, F. Ladson Boyle, *Evaluating Split-Interest Valuation*, 24 GA. L. REV. 1, 3 n.7 (1989).

[97] I.R.C. § 2512; Treas. Reg. § 25.7520-1 (2000).

[98] I.R.C. § 2702(e).

[99] *See id.* § 2702.

[100] *Id.*

[101] *Id.* § 2702(b).

a specified term of years or for the life or lives of certain individuals."[102] The unitrust interest is "the right pursuant to the instrument of transfer to receive payment, no less often than annually, of a fixed percentage of the net fair market value, determined annually, of the property which funds the unitrust interest."[103] If these terms are followed, the gift tax value is calculated by accounting for the value of the retained interest, thus reducing the value of the potentially taxable gift from 100% of the property transferred.

With repeal of the estate tax, much of the concern addressed by § 2702 seemingly disappears. Federal tax law designates trusts in which the grantor retains rights such as income and remainder interests, or powers to revoke as "grantor trusts."[104] Under current law, grantor trusts are generally ignored for income tax purposes.[105] Under EGTRRA new § 2511(c), grantor trusts are also ignored for gift tax purposes in the year of repeal (and presumably thereafter if repeal is made permanent).[106] Thus, seemingly no gift can be made of an interest in a grantor retained interest trust once § 2511(c) is in force.[107]

The potential removal of restrictions imposed by § 2702 may simply usher in a new tax constraint on trust term selection: namely, settlors may intentionally alter their trust terms to trigger grantor trust status in order to avoid imposition of the gift tax.[108]

VI. OTHER FEDERAL LAWS

In addition to the estate and gift taxes, a settlor's term selections are constrained by a myriad of other federal laws. As it would be impossible to address all of these laws, this section focuses on the impact on settlor term selections of select S-corporation, retirement benefit, and federal supplementary security income provisions.

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[102] *Id.*

[103] I.R.C. § 2702(b); Treas. Reg. § 20.2055-2(e)(2)(vii)(a) (2003).

[104] I.R.C. §§ 671–679.

[105] *Id.* § 677.

[106] EGTRRA § 511(e).

[107] This amendment complements the gift tax's goal of preventing income tax avoidance: If a transfer is made that does not shift income away from a grantor because of the grantor trust rules, no income attributes have been shifted and imposition of the gift tax is unnecessary.

[108] *See, e.g.*, Michael D. Milligan, *Sale to a Defective Grantor Trust: An Alternative to a GRAT*, 23 EST. PLAN. 1 (1996) (discussing an estate planning technique to avoid transfer tax restrictions by conducting transactions with a trust intentionally termed as a "grantor trust").

A. S-Corporation

If the res of the trust consists of stock in an S-corporation, the terms of any trust created in an estate plan are severely limited by the eligible shareholder provisions of the income tax code.[109] Normally, C-corporations incur income taxation at both the corporate entity level and the shareholder level.[110] S-corporations are a statutory exception to the historical double taxation of C-corporations; they are allowed a conduit form of taxation straight to the shareholder, resulting in only one level of taxation.[111] Federal law imposes strict requirements for an entity to qualify as an S-corporation, including eligible shareholder requirements.[112] Among these requirements are limitations of the types of trusts that may hold S-corporation stock. Only the following trusts may hold stock in an S-corporation: a grantor trust,[113] including two years after the grantor dies; testamentary trusts for two years; voting trusts; qualified subchapter S trusts ("QSSTs"); electing small business trusts ("ESBTs"); and certain retirement plan trusts.[114]

To establish a trust satisfying any of these allowed trust formats requires the settlor to adhere to strict requirements. For illustration, this article outlines the impact of the QSST constraints on state trust flexibility.

A QSST requires the trust terms to provide that:

i) there is only one beneficiary;

ii) corpus distributions during the current beneficiary life can only be made to him;

iii) the current beneficiaries' income interest must terminate at earlier of trust termination or his death; and

iv) trust assets must be distributed to the current beneficiary if his death triggers trust termination.[115]

The first requirement alone restricts a settlor's freedom, preventing the use of a spray or sprinkle trust format and forcing the creation of multiple trusts if

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[109] I.R.C. § 1361.

[110] *Id.* § 301.

[111] *Id.* § 1361.

[112] *Id.* §§ 1361(b), (c).

[113] *Id.* §§ 671–679.

[114] I.R.C. § 1361(c)(2).

[115] *Id.* §§ 1361(d)(3)(A), (d)(4)(A).

multiple beneficiaries are desired. If a multiple beneficiary trust is desired, ESBT status, which is not as beneficial from a tax standpoint, must be selected.[116]

B. Retirement Benefits

Federal income tax law allows individuals to defer income tax liability on appropriate contributions made to certain retirement plans.[117] Subject to detailed distribution requirements, the contributor does not have to include the contributed amounts in income until withdrawn.[118] Upon the death of the contributor, the deferred nature of the balance of the retirement plan may be preserved if the contributor names an allowable "designated beneficiary" to follow the contributor. The rules and regulations governing the creation and management of deferred retirement plans, allowing taxpayers to realize income without recognizing it until withdrawn from the account, are complex. Of particular concern to estate planners are the rules defining the terms necessary to consider a trust a designated beneficiary. The use of trusts as conduits of these benefits for wealth transfer purposes requires the settlor to select precise terms.[119]

The trust must be valid under state law,[120] all trust beneficiaries must be individuals not charities or estates,[121] and the trust may not provide for indirect payment of estate debts, expenses, or taxes.[122] In addition, the beneficiaries must be identifiable from the terms of the trust, and the trust must be irrevocable as of the contributor's death.[123] Only if this format is precisely followed will the trust beneficiaries be treated as designated beneficiaries and deferral of income recognition under the deferred income rules apply.[124] Even that is limited if the trust has multiple eligible beneficiaries, in which case, the beneficiary with the shortest life expectancy controls the rate of payout.[125]

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[116] *Id.* §§ 1361(d)(2), (e); Treas. Reg. § 1.1361-1(j)(b) (2001) (QSST requirements); I.R.C. §§ 1361(c)(2)(B)(v), 641(c) (unfavorable tax treatment of ESBT); Jerald David August & Joseph J. Kulunas, *Prop. Regs. On ESBTS: More Guidance For Family Trusts Owning S Stock*, 28 EST. PLAN. 459, 460 (2001) (explaining unfavorable tax treatment of ESBT).

[117] Keith A. Herman, *Coordinating Retirement Accounts with Estate Planning 101 (What Every Estate Planner Needs to Know)*, PROB. & PROP., Jan.–Feb., 2006, at 53.

[118] *Id.*

[119] Treas. Reg. § 1.401(a)(9)-4, Q&A (5)(b) (2004).

[120] *Id.*

[121] Treas. Reg. §§ 1.401(a)(9)-4, Q&A (5)(c) and 1.401(a)(9)-4, Q&A (3) (2004).

[122] *See* Treas. Reg. §§ 1.401(a)(9)-8, Q&A (11) (2004) and 1.401(a)(9)-4, Q&A (3).

[123] Treas. Reg. § 1.401(a)(9)-4, Q&A (5)(b) (2004).

[124] I.R.C. § 409(a)(9) (West 2002).

[125] Treas. Reg. § 1.401(a)(9)-5, Q&A (7)(a)(1) (2007).

C. SSI Planning

Estate planning frequently involves planning for individuals with disabilities. To properly plan for these individuals, the planner must consider the needs of the individual and examine the resources available to the individual, including need-based government programs such as the Federal Supplemental Security Income program ("SSI").[126] If an intended trust beneficiary is otherwise eligible for SSI, the settlor must use care in crafting trust terms to assure the trust assets do not have to be consumed as a prerequisite to SSI eligibility.[127] Care must also be taken to avoid claims on the trust assets by public agencies that have provided for the beneficiary.[128]

In general, trust term selection is limited by the need to deny the trust beneficiary rights such as the power to revoke the trust, appoint property of the trust, or otherwise use the trust funds for support or maintenance. If not so limited, the res of the trust may be depleted either before or as a result of the beneficiary's death. In addition, the trust terms must prevent distributions of in-kind income for a beneficiary's basic needs (food, clothing, or shelter).[129]

VII. CONCLUSION

The estate tax restricts the flexibility of settlors in selecting trust terms. If this were the only federal law impacting estate planning decisions, trust documents would be less complex as a result of estate tax repeal. That is not the case. Even if the gift tax joins the estate tax on the dust heap of tax history, the myriad of other statutes similarly impacting trust term selection results in significant complexity which, at most, is only marginally reduced by repeal.

Still, other policy arguments raised by repeal proponents may, in the end, justify permanent repeal of the estate tax. Perhaps it will be determined that the tax does not raise a sufficient amount of tax revenue to justify the cost of administering and complying with the tax. Also, it may be concluded that the social goal of breaking up large accumulations of wealth can better be accomplished with a different taxing method. In terms of repealing the tax to avoid the imposition of complexities on taxpayers as measured by constraints placed on their freedom to select trust terms under state law, however, the complexities placed on many taxpayers by the remaining tax laws and benefits rules dwarf those which would be removed by the repeal. In addition, the changed step up in basis regime that

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[126] 42 U.S.C. § 1382 (2000); 20 C.F.R. § 416.200, et seq. (2008).

[127] 42 U.S.C. §§ 1382b(e)(5), 1396p(d).

[128] 42 U.S.C. §§ 1382b(e)(5), 1396p(d).

[129] 42 U.S.C. § 1382; 20 C.F.R. § 416.1130, et seq. (2008).

comes into force with the repeal of the estate tax, replaces one set of constraints with another set related to marshaling assets in potential trust form to better track and account for basis characteristics.

The estate tax imposes constraints on the selection of trust terms and these will be removed if repeal of the estate tax is made permanent. Those creating trusts for a host of non-estate tax related reasons, however, will find the documents no less complex or restrictive as a result of other federal laws.

CASE NOTE

CONSTITUTIONAL LAW—Get the Balance Right: The Supreme Court's Lopsided Balancing Test for Evaluating State Voter-Identification Laws; *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008).

*Aaron J. Lyttle**

Introduction

In 2000 and 2004, the United States experienced two divisive presidential elections giving rise to accusations of widespread voting irregularities.[1] According to many commentators, these elections highlighted the problem of voter fraud.[2] A number of states responded by passing statutes requiring voters to present identification prior to voting.[3] Many critics allege Republican legislatures pass such laws to suppress turnout by groups more likely to vote for Democratic candidates.[4] Others argue voter-identification laws prevent fraud and ensure the integrity of the electoral process.[5] The Indiana legislature passed one such act: Senate Enrolled Act 483 ("SEA 483").[6] It requires citizens who vote in person on election day, or who cast a ballot in person at an office of the circuit court clerk before election day, to present a form of government-issued photo-identification.[7] Voters without

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* Candidate for J.D., University of Wyoming, 2010. I thank my wife, Abby, and my family for their love and support. I thank Lisa Rich for her advice and guidance. I also thank my friends and coaches from the Cheyenne East High School, University of Pittsburgh, and University of Wyoming debate teams.

[1] *See* David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 Wm. Mitchell L. Rev. 483, 493 (2008) (identifying widespread claims of voter intimidation and fraud in the 2000 and 2004 presidential elections).

[2] Linda Greenhouse, *Justices Agree to Hear Case Challenging Voter ID Laws*, N.Y. Times, Sept. 26, 2007, at A24 (describing the Republican push for voter-identification laws following the 2000 election); Dan Eggen & Amy Goldstein, *Voter-Fraud Complaints by GOP Drove Dismissals*, Wash. Post, May 14, 2007, at A04 (describing a massive Department of Justice effort to uncover evidence of voter fraud).

[3] *Developments in the Law—Voting and Democracy*, 119 Harv. L. Rev. 1127, 1144 (2006) [hereinafter *Developments in the Law*].

[4] John B. Judis, *Can the GOP Convince Blacks Not to Vote?*, New Republic, Nov. 11, 2002, at 12.

[5] *See*, *e.g.*, United States Senate Republican Policy Committee, *Putting an End to Voter Fraud* (Feb. 15, 2005), http://rpc.senate.gov/_files/feb1504Voterfraudsd.pdf (last visited Aug. 10, 2008) (pointing to a plague of fraud).

[6] Ind. Code Ann. § 3-11-8-25.1 (West Supp. 2007).

[7] *Id.*

identification may cast provisional ballots if they bring identification to the circuit court clerk's office within ten days of casting their ballots.[8]

The Indiana Democratic Party sued Indiana state officials in the United States District Court for the Southern District of Indiana, arguing SEA 483 unduly burdened First and Fourteenth Amendment voting rights.[9] The district court granted the defendant's motion for summary judgment, finding SEA 483 a reasonable regulation that did not violate the First or Fourteenth Amendments.[10] According to the court, Indiana had a sufficiently important regulatory interest in combating voter fraud to justify SEA 483's reasonable burden.[11] A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment.[12] Judge Posner, writing for the majority, held SEA 483 did not unduly burden voting rights.[13] According to the court, SEA 483 did not prevent any plaintiffs from voting.[14] The court refused to apply strict scrutiny because it found the state had an interest in preventing fraud, which dilutes legitimate votes.[15] Accordingly, a majority held SEA 483 constituted a reasonable electoral regulation, justified by Indiana's interest in preventing fraud.[16]

In *Crawford v. Marion County Election Board* (*Crawford II*), the United States Supreme Court affirmed the Seventh Circuit's decision, holding SEA 483 could withstand a facial challenge.[17] Although the Court issued no majority opinion,

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[8] *Id.* § 3-11.7-5-2.5(b) (West 2006). Voters who establish their residence and identity may receive free photo-identification from the Department of Motor Vehicles. *Id.* § 9-24-16-10(b) (West Supp. 2007). SEA 483 exempts persons who submit absentee ballots by mail or who live in state licensed facilities like nursing homes. *Id.* § 3-11-8-25.1(e) (West Supp. 2007).

[9] Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 782 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion County Election Bd. (*Crawford I*), 472 F.3d 949, 954 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610 (2008).

[10] *Id.* at 845.

[11] *Id.* at 826.

[12] *Crawford I*, 472 F.3d 949, 954 (7th Cir. 2007), *aff'g Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006). The United States District Court for the Southern District of Indiana and the United States Court of Appeals for the Seventh Circuit consolidated the Democratic Party's suit with a similar suit brought by William Crawford and other parties. Crawford v. Marion County Election Bd. (*Crawford II*), 128 S. Ct. 1610, 1614 (2008). Indiana intervened to defend SEA 483. *Id.*

[13] *Crawford I*, 472 F.3d at 954.

[14] *Id.* at 951–52.

[15] *Id.* at 952.

[16] *Id.* at 954.

[17] *Crawford II*, 128 S. Ct. at 1624. In contrast to challenging the constitutionality of a law's application, a facial challenge must demonstrate "no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987); *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 239–40 (1994) (describing the Rehnquist Court's harsh facial/as-applied division). Plaintiffs often challenge election laws facially

a six Justice plurality found SEA 483 protected the electoral process and did not unduly burden voting rights.[18] Applying the sliding-scale test articulated in *Burdick v. Takushi*, the Court found SEA 483 did not excessively burden any class of voters' rights.[19] Consequently, it refused to apply strict scrutiny and held the state's interest in securing electoral integrity gave Indiana's voter-identification law a plainly legitimate sweep, overcoming the petitioners' facial challenge.[20]

This note examines the United States Supreme Court's attempt to resolve confusion when evaluating the constitutionality of state voter-identification laws. First, it examines the legal background of voter-identification laws.[21] Next, it explains the Court's split decision in *Crawford v. Marion County Election Board* (*Crawford II*).[22] Then, it argues the Court adopted a lopsided balancing test, placing greater emphasis on states' interests in preventing fraud than on the risk of burdening voting rights.[23] Although as-applied challenges showing concrete evidence of disenfranchisement may succeed, the Court's failure to weigh voters' interests against those of the state leaves the prior confusion untouched, thus endangering voting rights.[24] Next, this note proposes that courts should move away from rigid tiers of scrutiny and facially evaluate voter-identification laws, applying *Burdick* in a balanced and flexible manner.[25] Finally, this note presents suggestions for practitioners and legislators.[26]

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because of the difficulty of remedying past elections. L. Paige Whitaker, *The Constitutionality of Requiring Photo Identification for Voting: An Analysis of* Crawford v. Marion County Election Board, CRS REPORTS FOR CONGRESS, May 19, 2008, at CRS-2 n.4, *available at* http://fpc.state.gov/documents/organization/106161.pdf.

[18] *Crawford II*, 128 S. Ct. at 1634; *see also* Daniel P. Tokaji, Crawford*: It Could Have Been Worse*, Election Law @ Moritz, Apr. 29, 2008, http://moritzlaw.osu.edu/electionlaw/commentary/articles.php?ID=411 (last visited Oct. 23, 2008) (describing *Crawford II's* divided result). Justice Stevens announced the Court's judgment, joined by Chief Justice Roberts and Justice Kennedy. *Crawford II*, 128 S. Ct. at 1612. Justice Scalia wrote a concurring opinion, joined by Justices Thomas and Alito. *Id.* Justice Souter dissented, joined by Justice Ginsburg. *Id.* Justice Breyer filed a separate dissent. *Id.*

[19] *Crawford II*, 128 S. Ct. at 1622–23; *see also* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (weighing a state ballot access restriction's burden on voting rights against the state's interest in that restriction); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (using a balancing test to evaluate state electoral regulations).

[20] *Crawford II*, 128 S. Ct. at 1623.

[21] *See infra* notes 27–97 and accompanying text.

[22] *See infra* notes 98–142 and accompanying text.

[23] *See infra* notes 143–76 and accompanying text.

[24] *Id.*

[25] *See infra* notes 179–92 and accompanying text.

[26] *See infra* notes 193–200 and accompanying text.

BACKGROUND

This section begins with a discussion of the legal background underlying *Crawford v. Marion County Election Board* (*Crawford II*).[27] First, it discusses the United States Supreme Court's pre-*Crawford II* voting rights jurisprudence, including the situations where it limited state election regulations to protect those rights.[28] It then examines statutes requiring voters to show identification and closes with a review of how lower federal courts have reacted to constitutional challenges to those laws.[29]

Voting Rights Jurisprudence

The United States Constitution gives state governments authority to determine the "times, places, and manner" of holding elections.[30] Federal courts grant states significant latitude in carrying out that role to maintain fair and efficient elections.[31] For much of United States history, the federal judiciary avoided getting involved in electoral disputes, deferring to states' interests.[32] Although the Constitution provides no explicit right to vote, the United States Supreme Court has found a fundamental right to vote implicit in the First Amendment of the Bill of Rights.[33] In spite of deference to state regulations, in most circumstances, states

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[27] *See infra* notes 30–97 and accompanying text.

[28] *See infra* notes 33–65 and accompanying text.

[29] *See infra* notes 66–97 and accompanying text.

[30] U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .").

[31] *See* Storer v. Brown, 415 U.S. 724, 730 (1974) (finding fair elections require substantial state regulation); Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (finding electoral regulations necessary for state independence).

[32] Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Regulations: Escape from the Political Thicket*, 20 T. MARSHALL L. REV. 87, 109 (1994) (explaining the United States Supreme Court's history of extreme deference to state electoral regulations); *see also* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959) (noting the states' long-standing power to regulate elections); Pope v. Williams, 193 U.S. 621, 632 (1904) (refusing to find the Fourteenth Amendment made the reasonability of state electoral regulations a federal question). However, the Constitution places explicit limits on the states' power to regulate elections and authorizes judicial intervention in many circumstances. *See* U.S. CONST. amend. XV, § 1 (preventing states from denying suffrage based on race); U.S. CONST. amend. XXIV, § 1 (denying states the ability to levy poll taxes). *But see* Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (holding the Fourteenth Amendment allows states to disenfranchise felons).

[33] Schultz, *supra* note 1, at 487–88; *see also*, *e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (identifying a fundamental right to vote that preserves all other rights); Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("[T]he right of suffrage is a fundamental matter in a free and democratic society.").

cannot place excessive burdens on voting rights, especially if doing so denies equal protection.[34]

The United States Supreme Court now recognizes a robust, fundamental right to vote and often relies on the Equal Protection Clause when evaluating state restrictions on voting rights.[35] In *Harper v. Virginia State Board of Elections*, the Court assessed a Virginia law requiring citizens to pay a $1.50 poll tax before voting.[36] The Court held that once states grant citizens voting rights, they may not qualify them in a manner denying equal protection of the law.[37] It found that Virginia's poll tax made affluence or payment of a fee an electoral standard, which bore no relation to a citizen's qualifications to vote.[38] According to the Court, state regulations conditioning voting rights on wealth constituted invidious discrimination, violating the Equal Protection Clause, regardless of the size of the tax or voters' ability to pay it.[39]

Following *Harper*, the Court subjected state election laws to varying levels of scrutiny.[40] Many early decisions, including *Harper*, seemed to subject such laws to strict scrutiny.[41] Although the Court did not announce strict scrutiny as the proper standard, it required states to narrowly tailor regulations to achieve a compelling interest.[42] In other decisions, often ballot access cases, the Court appeared to apply a rational basis test, presuming the constitutionality of state

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[34] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966) (finding a right to vote implicit in the First Amendment and prohibiting states from restricting it on the basis of a tax); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (finding states' electoral authority alone does not justify limiting voting rights).

[35] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 842–43 (2d ed. 2002).

[36] *Harper*, 383 U.S. at 664 n.1.

[37] *Id.* at 665.

[38] *Id.* at 667.

[39] *Id.* at 668–69.

[40] *See* Zywicki, *supra* note 32, at 88–89 (discussing federal courts' "scatter-shot" election jurisprudence).

[41] Schultz, *supra* note 1, at 490 (citing cases subjecting voting restrictions to strict scrutiny); *see also Harper*, 383 U.S. at 670 (subjecting a state poll tax to strict scrutiny); Williams v. Rhodes, 393 U.S. 23, 24 (1968) (finding the state lacked a compelling interest in requiring third party candidates to acquire a large number of signatures in a short time); Bullock v. Carter, 405 U.S. 134, 145 (1972) (finding a state's ballot filing fee required close scrutiny). When courts strictly scrutinize a statute, they require a compelling governmental interest necessitating that statute and refuse to presume its constitutionality. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 619 (2d ed. 2005).

[42] *See* Lubin v. Panish, 415 U.S. 709, 716–19 (1974) (finding a fixed filing fee unnecessary to achieve the state's interest of limiting ballot size).

regulations and deferring to their proffered rationale.[43] In *Storer v. Brown*, the Court considered a California statute barring primary election voters from running for office as independent candidates in the subsequent general election.[44] The Court refused to apply strict scrutiny or rational basis review because of the necessity of substantial state regulation to maintain effective elections.[45] The Court said evaluating regulations requires comparison of the facts and circumstances behind the law.[46] It refrained from applying a traditional strict scrutiny analysis, finding the state had a compelling interest in stable elections, but not requiring the state to narrowly tailor its regulation to that end.[47]

Anderson v. Celebrezze went a step beyond *Storer* and articulated a balancing test for determining the constitutionality of electoral regulations.[48] *Anderson* involved an Ohio statute requiring independent Presidential candidates to file a nominating petition eight months before the general election.[49] According to the *Anderson* Court, states must inevitably regulate elections to maintain electoral integrity.[50] The Court articulated a balancing test, which begins by assessing the character and magnitude of an electoral regulation's burden on First and Fourteenth Amendment rights.[51] Courts should then determine the legitimacy and strength of each state interest and whether those interests necessitate burdening voting rights.[52] Ohio's statute imposed a severe burden because it set a deadline far in advance of the general election, making it difficult for independent candidates to gather sufficient signatures to obtain ballot access.[53] Although Ohio had a

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[43] *See* Munro v. Socialist Workers Party, 479 U.S. 189, 194–95 (1986) (declining to require Washington to show specific evidence of confusion or ballot overcrowding to justify a statute requiring minor party candidates to receive at least one percent of primary election votes to appear on the general election ballot); Clements v. Fashing, 457 U.S. 957, 968–69 (1982) (holding a Texas constitutional provision limiting government office holders' ballot access need only be related to a rational end and need not be the least restrictive means available).

[44] *Storer*, 415 U.S. at 726.

[45] *Id.* at 729–30.

[46] *Id.* at 730.

[47] *See id.* at 729–30; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1107 (2d ed. 1988).

[48] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

[49] *Id.* at 782–83. The early filing deadline posed difficulties for independent candidates because it required them to submit a requisite number of registered voters' signatures with their nominating petitions. *See id.*; OHIO REV. CODE ANN. § 3513.257 (Baldwin 2008). Anderson sued after submitting a nominating petition to run as an independent candidate for President of the United States after the filing deadline. *Anderson*, 460 U.S. at 782.

[50] *Anderson*, 460 U.S. at 789.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 792.

legitimate interest in voter education and political stability, it failed to show those ends necessitated an early filing period.[54]

Although *Anderson* began as a test for assessing ballot access laws, it evolved into a general test for assessing electoral regulations.[55] For instance, in *Burdick v. Takushi*, the United States Supreme Court assessed a claim that Hawaii's prohibition on write-in voting unduly burdened voting rights.[56] The Court stated it would not subject every state electoral regulation to strict scrutiny because that would hamper states' ability to ensure equitable and efficient elections.[57] The Court transformed *Anderson's* rule into a flexible test, adjusting its degree of scrutiny based on an electoral regulation's severity.[58] The test requires states to narrowly tailor laws severely burdening voting rights to serve a compelling governmental purpose.[59] Statutes imposing reasonable and non-discriminatory burdens only require states to show important regulatory interests justify their statutes.[60] Hawaii's write-in ban imposed a slight burden on voting rights.[61] Thus, Hawaii did not need to demonstrate its law served a compelling interest, and the State's interest in preventing divisive "sore loser" elections justified its statute.[62] Some lower federal courts followed *Burdick* by applying rational basis or strict scrutiny review in a binary fashion, while others used a more flexible standard.[63]

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[54] *Id.* at 800–01, 805–06. *Anderson* based its analysis on a fundamental right to vote and did not engage in separate Equal Protection analysis. *Id.* at 786–87 n.7.

[55] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358–59 (1997) (applying *Anderson* to Minnesota's prohibition on cross-party candidate nominations); Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (applying *Anderson* to California's prohibition on party endorsement of election candidates).

[56] 504 U.S. 428, 430 (1992). Burdick sued Hawaii because its statute prevented him from casting a write-in protest vote for Donald Duck. *Id.* at 438.

[57] *Id.* at 433.

[58] *Id.* at 434. The Court explained:

> [W]hen [First and Fourteenth Amendment] rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" . . . "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Id. (citations omitted); *see also* McLaughlin v. N.C. Bd. of Elections, 65 F.3d 1215, 1220 (4th Cir. 1995) (stating *Burdick* modified *Anderson* by subjecting severe burdens to strict scrutiny).

[59] *Burdick*, 504 U.S. at 434.

[60] *Id.*; *see also* Norman v. Reed, 502 U.S. 279, 288–89 (1992) (requiring states to show a corresponding interest sufficient to justify electoral regulations and subjecting severe regulations to strict scrutiny).

[61] *Burdick*, 504 U.S. at 438–49.

[62] *Id.* at 439. Hawaii feared losing primary candidates would disrupt general elections with intraparty disputes. *Id.*

[63] Darla L. Shaffer, *Tenth Circuit Survey: Ballot Access Laws*, 74 DENV. U. L. REV. 657, 665–66 (1996). While some courts interpreted *Burdick* as requiring either the application of strict scrutiny

Although *Burdick* professed to establish a flexible test, it remained unclear whether *Burdick* superseded the Court's traditional tiers of scrutiny.[64] Confusion also remained because the Court failed to articulate a method for determining a statute's severity.[65]

Voter-Identification Laws

Several states complicated the judiciary's approach to voting rights by passing controversial laws requiring citizens to show identification before voting.[66] Voter-identification statutes stem from Congress' attempt to modernize election administration: the Help America Vote Act of 2002 ("HAVA").[67] Among other provisions, HAVA sets forth minimum identification requirements for state elections.[68] HAVA resulted from political compromise and contained less strict

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or rational basis, others disagreed. *See* Citizens for Legislative Choice v. Miller, 144 F.3d 916, 921 (6th Cir. 1998) (imposing rational basis review on regulations imposing incidental or "reasonable, nondiscriminatory restrictions"); League of Women Voters v. Diamond, 965 F. Supp. 96, 100 (D. Me. 1997) (interpreting *Burdick* as subjecting severe restrictions to strict scrutiny and reasonable restrictions to rational basis review). *But see* Rogers v. Corbett, 468 F.3d 188, 194 (3d Cir. 2006) ("[B]allot access cases should not be pegged into the three aforementioned categories."); Reform Party of Allegheny County v. Allegheny County Dep't of Elections, 174 F.3d 305, 314 (3d Cir. 1999) (applying intermediate scrutiny to a law prohibiting minor party cross-nominations). For an in-depth analysis of standards of review following *Burdick*, see Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 330 n.66 (2007).

[64] *See* Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L. J. 867, 917 (1994) (arguing *Burdick* left the Court's traditional, discrete tiers of scrutiny unchanged); Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353, 386–87 (1996) (arguing the *Burdick* sliding-scale created covert tiered scrutiny). The balancing approach in *Anderson* and *Burdick* mirrors the undue burden analysis in *Planned Parenthood v. Casey*. Brownstein, *supra* note 64, at 918; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872–74 (1992) (comparing the Court's undue burden analysis in ballot access cases to women's reproductive autonomy cases).

[65] *See* Buckley v. Am. Constitutional Law Found. Inc., 525 U.S. 182, 208 (1999) (Thomas, J., concurring) (arguing courts applying *Burdick* failed to coherently distinguish severe and lesser burdens); Schultz, *supra* note 1, at 492 (arguing *Burdick* created confusion by failing to define severe burdens).

[66] Joyce Purnick, *Stricter Voting Laws Carve Latest Partisan Divide*, N.Y. TIMES, Sept. 26, 2006, at A1.

[67] 42 U.S.C. § 15483 (2000, Supp. 2008). The United States House of Representatives passed a national voter-identification act, but it died in the Senate. *See* Federal Election Integrity Act of 2006, H.R. 4844, 109th Cong., 152 CONG. REC. H. 6765 (2006) (amending HAVA to require voters to show photo-identification before voting); David Mikhail, *GOP Voter-ID Legislation May Be Casualty of Dems' Takeover*, THE HILL (Wash. D.C.), Nov. 15, 2006, at 6 (describing H.R. 4844's probable demise).

[68] *See* Center for Democracy and Election Management, American University, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 2–3 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf (last visited Oct. 23,

voter-identification requirements than many subsequent state regulations.[69] It mandates that states require first-time voters who register by mail and do not verify their identity with their mail-in registration to provide identification before voting.[70] The statute allows voters to present non-photo forms of identification.[71] HAVA sets the ground floor for states' voter-identification laws and allows states to establish more strict standards.[72] States responded to HAVA by passing a variety of voting regulations, some of which required voters to provide photo identification before voting.[73]

Several parties sued state governments on the theory that voter-identification laws unduly burdened voting rights, forcing courts to address voting rights in new circumstances.[74] Lower federal courts diverged in responding to challenges

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2008) [hereinafter Carter-Baker] (outlining the components of HAVA); Robert S. Montjoy, *HAVA and the State*, *in* ELECTION REFORM: POLITICS AND POLICY 16–31 (Daniel J. Palazzolo & James W. Ceaser eds., 2005) (detailing HAVA requirements).

[69] Carter-Baker, *supra* note 68, at 4. The Carter-Baker Commission criticized HAVA for providing vague provisions and not adequately addressing voter fraud. *Id.*

[70] 42 U.S.C. § 15483(b).

[71] *Id.*

[72] *Id.* § 15484; *Developments in the Law, supra* note 3, at 1148–49. HAVA also gives states discretion in how to carry out its requirements. 42 U.S.C. § 15485.

[73] *Developments in the Law, supra* note 3, at 1148–49. Some states, such as North Dakota, declared themselves exempt from HAVA and have not yet been challenged. *Id.* at 1148 n.23. Many states follow HAVA guidelines, but do not require photo-identification. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 640 (2007). Seventeen states accept non-photo identification. *See* Nat'l Conference of State Legislatures, *State Requirements for Voter ID*, Oct. 23, 2008, http://www.ncsl.org/programs/legismgt/elect/taskfc/VoterIDReq.htm (last visited Oct. 24, 2008) (noting Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Virginia, and Washington require identification, but accept non-photo identification). Seven states went beyond HAVA guidelines and require voters to show photo-identification before voting. *See id.* (noting Florida, Georgia, Hawaii, Indiana, Louisiana, Michigan, and South Dakota require photo identification). One local government, Albuquerque, New Mexico, also established identification requirements. ACLU of N.M. v. Santillanes (*Santillanes I*), 506 F. Supp. 2d 598, 605–06 (D.N.M. 2007). Other states continue to debate voter-identification statutes. Editorial, *The Myth of Voter Fraud*, N.Y. TIMES, May 13, 2008, at A20 (stating many state legislatures assume *Crawford II* vindicated all voter-identification laws and noting twenty states considering new voter-identification statutes).

[74] Ohio State University: Election Law @ Moritz, *2006 Voter ID Litigation Chart*, May 15, 2008, http://moritzlaw.osu.edu/electionlaw/news/2006VoterIDLitigationChart4.php (last visited Oct. 24, 2008) [hereinafter Moritz] (noting suits filed in Ohio, Michigan, Georgia, Arizona, New Mexico, Indiana, and Missouri). Michigan, Indiana, and Missouri litigation has concluded; parties are settling in Ohio; litigation is pending in Arizona; and Georgia and Indiana litigation is on appeal. *Id.* Missouri litigation involved a challenge to a state law ("SB 1014") requiring voters to present photo-identification, alleging it violated voting rights under the Missouri Constitution. Weinschenk v. State, 203 S.W.3d 201, 204 (Mo. 2006). The *Weinschenk* court subjected SB 1014 to strict scrutiny and held Missouri had a compelling interest in stopping voter fraud, but found the state failed to narrowly tailor its statute, violating the Missouri Constitution. *Id.* at 221; *see also* MO. CONST. art. I, § 25 (guaranteeing the right of suffrage).

to photo-identification laws.[75] Courts struggled to find analogous laws assessed by the United States Supreme Court, leading to disparate outcomes.[76] Three decisions illustrate how federal courts assessed voter-identification laws prior to *Crawford II*: *Common Cause/Georgia v. Billups* (*Billups I*), *Indiana Democratic Party v. Rokita*, and *ACLU of New Mexico v. Santillanes* (*Santillanes I*).[77]

In *Common Cause/Georgia v. Billups* (*Billups I*), plaintiffs challenged Georgia's photo-identification statute, arguing it imposed an undue burden on voting rights.[78] House Bill 244 ("HB 244") required all in-person voters in Georgia to present government-issued photo-identification.[79] Although the United States District Court for the Northern District of Georgia applied the *Burdick* sliding-scale test to HB 244, it engaged in a separate strict scrutiny analysis and held HB 244 unconstitutional under both approaches.[80] Although Georgia had an important state interest in preventing fraud, it failed to narrowly tailor HB 244 because the statute addressed in-person fraud instead of absentee ballot fraud, which posed a greater threat to electoral integrity.[81] When the district court examined HB 244 under *Burdick*, it determined the law imposed a severe burden because many voters lacked identification and would likely find sufficient identification difficult to obtain.[82] The district court found HB 244 lacked a rational relation, much

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[75] *See* Overton, *supra* note 73, at 665–66 (noting that, lacking guidance, federal courts engage in ad hoc analysis of voter-identification cases and justify different results from similar facts).

[76] *See* Schultz, *supra* note 1, at 492 (arguing the Court failed to define severe burdens, leaving confusion); Elmendorf, *supra* note 63, at 319 ("[C]ourts have not been able to locate [United States] Supreme Court precedents addressing formally similar laws. For example, most courts have thought it strained to analogize ID requirements to poll taxes if the state charges no fee for its voter ID."); Kelly T. Brewer, Note, *Disenfranchise This: State Voter ID Laws and their Discontents, A Blueprint for Bringing Successful Equal Protection and Poll Tax Claims*, 42 VAL. U. L. REV. 191, 217–18 (2007) (describing the non-uniform approach of federal courts). Despite different outcomes, a clear circuit split did not exist prior to *Crawford II*. *See* Edward B. Foley, Crawford v. Marion County Election Board: *Voter ID, 5-4? If So, So What?*, 7 ELECTION L.J. 63, 63 (2008) (suggesting the Court granted certiorari to stave off a voter-identification suit related to the 2008 election).

[77] *See generally Santillanes I*, 506 F. Supp. 2d at 598; Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2007), *aff'd sub nom.* Crawford v. Marion County Election Bd. (*Crawford I*), 472 F.3d 949, 954 (7th Cir. 2007); *Billups I*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *infra* notes 78–97.

[78] *Billups I*, 406 F. Supp. 2d at 1328–29. The plaintiffs alleged Georgia's requirement violated the Georgia Constitution, the U.S. Constitution, and federal civil rights and voting rights statutes. *Id.*

[79] *Id.* at 1331. The requirement exempted non-first time absentee voters. *Id.* at 1337–38.

[80] *Id.* at 1361–62.

[81] *Id.* at 1361; *see also* Cathy Cox, *Letter from Cathy Cox, Ga. Sec'y of State, to Sonny Perdue, Governor of Ga.* (Apr. 8, 2005), *available at* http://www.aclu.org/VotingRights/VotingRights.cfm?ID=18652&c=168 (last visited Oct. 24, 2008) (stating HB 244 enhanced opportunities for absentee ballot fraud while focusing on non-existent in-person voter fraud).

[82] *Billups I*, 406 F. Supp. 2d at 1365.

less a narrow tailoring, to Georgia's stated purpose of fighting voter fraud because the State lacked evidence of in-person voter fraud.[83] The district court granted a preliminary injunction because it held the plaintiffs could likely succeed in their Fourteenth Amendment challenge.[84]

In *Indiana Democratic Party v. Rokita*, the United States District Court for the Southern District of Indiana evaluated the constitutionality of Indiana's voter-identification law, SEA 483.[85] The *Rokita* court applied the *Burdick* sliding-scale test, but in a different manner than *Billups I*.[86] It refused to apply strict scrutiny because the plaintiffs presented no evidence of voters or groups having been prevented from voting or facing significant barriers in doing so.[87] The court subjected SEA 483 to something akin to a rational basis test, holding Indiana's important regulatory interests justified SEA 483's reasonable, nondiscriminatory burden.[88] *Rokita* suggested a trend of federal courts using *Burdick* to analyze voter-identification laws, breaking from the *Billups I* court's suggestion that strict scrutiny may be appropriate.[89]

ACLU v. Santillanes (*Santillanes I*) differed from other voter-identification cases because it involved a city, rather than a state, voter-identification law.[90] The United States District Court for the District of New Mexico assessed whether an amendment to the Election Code of the Albuquerque City Charter requiring Albuquerque voters to present photo-identification violated the United States

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[83] *Id.*

[84] *Id.* Georgia adjusted its statute to allow more kinds of identification, but the district court granted a preliminary injunction barring its enforcement prior to the July 2006 election. Common Cause/Ga. v. Billups (*Billups II*), 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006). After another sequence of litigation, the district court held the statute did not constitute an undue burden on voting rights. Common Cause/Ga. v. Billups (*Billups III*), 504 F. Supp. 2d 1333, 1382 (N.D. Ga. 2007). Although *Billups III* considered identical facts to *Billups I*, it likely arrived at a contrary result because it modeled its reasoning on the intervening decision in *Indiana Democratic Party v. Rokita*. Brewer, *supra* note 76, at 217–18; *see also infra* notes 85–89 and accompanying text. Plaintiffs appealed *Billups III* to the United States Court of Appeals for the Seventh Circuit where litigation is pending. Moritz, *supra* note 74.

[85] *Rokita*, 458 F. Supp. 2d at 786.

[86] *Id.* at 821.

[87] *Id.* at 822, 823–24.

[88] *Id.* at 826. The *Rokita* court distinguished *Billups I* because it involved a non-publicized absentee ballot law, a decision in a different jurisdiction, and a ruling on a preliminary injunction. *Id.* at 831–32.

[89] *See id.* at 822 (applying *Burdick* as the proper standard for evaluating voter-identification laws); Brewer, *supra* note 76, at 217–18 (arguing *Rokita* demonstrated a trend of federal courts applying *Burdick* to voter-identification laws). In *Purcell v. Gonzalez*, the United States Supreme Court suggested in dicta it may take a balancing approach to voter identification, acknowledging the competing concerns of voting rights and fraud. 549 U.S. 1, 5 (2006).

[90] *Santillanes I*, 506 F. Supp. 2d at 605–06.

Constitution.[91] The district court applied the *Burdick* sliding-scale test, noting the severity of the regulation would determine the correct standard of review.[92] It found the amendment severely burdened voting rights because it surprised voters and introduced obstacles likely to discourage many citizens from voting.[93] Although the city had a compelling interest in preventing fraud, it failed to narrowly tailor the amendment because little in-person fraud existed, the statute's vagueness enabled arbitrary enforcement, and the city failed to implement less restrictive alternatives.[94] Thus, the *Santillanes I* court concluded Albuquerque's voter-identification law violated the Fourteenth Amendment.[95] *Santillanes I*, *Rokita*, and *Billups I* demonstrate the pre-*Crawford II* confusion about how to apply *Burdick* to voter-identification laws.[96] Each case weighed the benefits and burdens of such laws in different ways due to the lack of a clear standard, thus setting the stage for *Crawford II*.[97]

PRINCIPAL CASE

In *Crawford v. Marion County Election Board* (*Crawford II*), the United States Supreme Court considered the constitutionality of Indiana's voter-identification law ("SEA 483").[98] On appeal from *Indiana Democratic Party v. Rokita*, the Indiana Democratic Party argued the district court erred in finding Indiana's photo-identification law imposed a non-severe burden.[99] According to the petitioners, the United States Court of Appeals for the Seventh Circuit focused on the ease of voter compliance with SEA 483, rather than the nature of the burden it imposed on voting rights by creating hurdles for prospective voters.[100] The Democratic

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[91] *Id.* at 605–06.

[92] *Id.* at 628–29.

[93] *Id.* at 636. The district court distinguished *Rokita* because SEA 483 made absentee voting available to more voters than did Albuquerque's amendment. *Id.* at 639.

[94] *Id.* at 637, 640–41.

[95] *Santillanes I*, 506 F. Supp. 2d at 641–42. The United States Court of Appeals for the Tenth Circuit reversed the district court's judgment, applying *Crawford II* and holding that Albuquerque's amendment could withstand a facial challenge. ACLU of N.M. v. Santillanes (*Santillanes II*), No. 07-2067, 2008 U.S. App. LEXIS 23548, at *2 (10th Cir. Nov. 17, 2008).

[96] *See* Schultz, *supra* note 1, at 492 (describing confusion among federal courts in applying *Burdick*).

[97] *Id.*

[98] 128 S. Ct. 1610 (2008); *see supra* notes 84–89 and accompanying text.

[99] Brief for Petitioners, at 40–42, 47, *Crawford II*, 128 S. Ct. 1610 (No. 07-21), 2006 WL 1786073; *see also* Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 826 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion County Election Bd. (*Crawford I*), 472 F.3d 949, 954 (7th Cir. 2007) (upholding the constitutionality of SEA 483). Other organizations and officials, including Crawford, joined the Democratic Party. *Crawford II*, 128 S. Ct. at 1614.

[100] Brief for Petitioners, *supra* note 99, at 35–36. According to the petitioners, the Seventh Circuit determined SEA 483's severity based on the number of voters it disenfranchised, rather than based on whether it made voting more difficult for affected individuals. *Id.* at 27–28.

Party argued such a restriction was severe by nature, requiring strict scrutiny.[101] The petitioners also argued SEA 483 would interfere with the voting rights of thousands of Indiana voters, with a disproportionate impact on the elderly, racial minorities, the poor, and the disabled.[102] The petitioners conceded that Indiana had a compelling interest in preventing fraud, but argued no evidence of in-person voter fraud existed in Indiana.[103] Consequently, the petitioners argued Indiana failed to narrowly tailor SEA 483, making it an unconstitutional burden on voting rights.[104]

The respondents argued the petitioners failed to show SEA 483 prevented citizens from voting and suggested the Court should not apply strict scrutiny.[105] They pointed to a lack of evidence showing SEA 483 discriminated against different classes of voters.[106] The respondents further argued Indiana had a compelling interest in stopping fraud and referenced evidence of voter fraud.[107] Finally, they argued SEA 483 reasonably restricted voting rights and provided safeguards to prevent disenfranchisement.[108]

In a 3-3-2-1 decision, the United States Supreme Court affirmed the Seventh Circuit's decision.[109] Despite the lack of a majority opinion, a plurality held SEA 483 could withstand a facial challenge.[110] When the Court produces no majority rationale, its holding may be interpreted as the approach of the Justices who concurred with the judgment on the narrowest grounds.[111] Although the Court has done little to define "narrowest grounds," that phrase may refer to the opinion that is most confined to the issues and facts necessary to resolve the case at hand.[112] Justice Stevens' opinion may constitute *Crawford II's* holding because it limits the

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[101] *Id.*

[102] *Id.* at 39.

[103] *Id.* at 46–47.

[104] *Id.* at 54–55, 60–61.

[105] Brief for Respondent Marion County Election Board, at 19–22, *Crawford II*, 128 S. Ct. 1610 (Nos. 07-21, 07-25), 2006 WL 2180191. The respondents included Marion County Election Board and Todd Rokita, Indiana's Secretary of State. *Id.*

[106] *Id.* at 30–31.

[107] *Id.* at 47–49.

[108] *Id.* at 56–59.

[109] *Crawford II*, 128 S. Ct. at 1624.

[110] *Id.*

[111] Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

[112] United States v. Martino, 664 F.2d 860, 872–73 (2d Cir. 1981) (interpreting "narrowest grounds" as those confining themselves to the present case and affecting fewer future cases); Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 761–63, 767 (1980).

scope of its conclusion based on its SEA-specific findings regarding fraud and disenfranchisement.[113]

Justice Stevens' Opinion (Joined by Chief Justice Roberts and Justice Kennedy)

Justice Stevens' opinion likely constitutes the Court's holding because it uses the narrowest reasoning.[114] It applied the *Burdick* sliding-scale test to determine whether SEA 483 imposed a severe burden on voting rights, justifying strict scrutiny.[115] The opinion noted the lack of a litmus test for determining which level of scrutiny to use and stated it would weigh the injury to voting rights against the State's interests in favor of the regulation.[116] Due to the lack of concrete evidence of disenfranchisement, Justice Stevens' opinion found the statute did not excessively burden the rights of any class of voters.[117] It refused to apply strict scrutiny and found the State's interest in securing electoral integrity gave the statute a plainly legitimate sweep, overcoming the plaintiffs' facial challenge.[118] Indiana's interests in modernizing elections, maintaining voter confidence, and detecting and deterring voter fraud justified the minimal burden posed by SEA 483.[119] Although the statute imposed a special burden on the elderly and poor, provisional ballots solved those problems.[120] The petitioners failed to demonstrate the act's invalidity in all circumstances, so the Court rejected the facial challenge to

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[113] *See* Erwin Chemerinsky, *When It Matters Most, It Is Still the Kennedy Court*, 11 GREEN BAG 2d 427, 428, 440 (2008) (noting how Justice Stevens' opinion was largely based on the record before the Court, leaving the possibility of a different result with a more thorough record); *Crawford II*, 128 S. Ct. at 1623–24 (noting how different evidence may demonstrate that a voter-identification statute is unconstitutional as applied). In contrast, the concurring opinion announces a broader rule whereby courts defer to state interests whenever an electoral regulation imposes a uniform burden. *See Crawford II*, 128 S. Ct. at 1624 (Scalia, J., concurring). The United States Court of Appeals for the Tenth Circuit has interpreted the balancing test articulated in Justice Stevens' opinion as the Court's holding. *See* ACLU of N.M. v. Santillanes (*Santillanes II*), No. 07-2067, 2008 U.S. App. LEXIS 23548, at *18-19 (10th Cir. Nov. 17, 2008); *see also* Fla. State Conference of the NAACP v. Browning, 569 F. Supp. 2d 1237, 1249–51 (N.D. Fla. 2008) (applying Justice Stevens' opinion as the holding of *Crawford II*).

[114] *See supra* notes 111–13 and accompanying text.

[115] *Crawford II*, 128 S. Ct. at 1616.

[116] *Id.*; *see also* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (holding courts should compare the asserted injury to voting rights against the state's interest in a regulation).

[117] *Crawford II*, 128 S. Ct. at 1622–23.

[118] *Id.* at 1623.

[119] *Id.* at 1617–20.

[120] *Id.* at 1620–21. Indiana allows voters lacking identification on election day to cast provisional ballots, which the State counts if the voters present valid identification within ten days. *Id.* According to the Court, these ballots safeguarded the rights of the few who lack identification on election day because of "life's vagaries." *Id.* at 1620.

SEA 483.[121] Although Justice Stevens' opinion found evidence of partisanship in SEA 483's passage, partisanship alone failed to demonstrate an Equal Protection violation, especially when assessing a nondiscriminatory law with valid neutral justifications.[122]

Concurring Opinion (Justice Scalia, joined by Justices Thomas and Alito)

Justices Scalia, Thomas, and Alito concurred in the judgment, but disagreed with Justice Stevens' reliance on a sliding-scale test.[123] The concurrence's rationale was less narrow than that of the lead opinion and, therefore, is not the Court's holding.[124] Under the concurrence's broader rationale, *Burdick* required the Court to apply an important regulatory interests standard, deferring to the State's interest in maintaining effective elections when evaluating non-severe, non-discriminatory regulations.[125] According to the concurrence, *Burdick* transformed *Anderson's* flexible standard into an administrable rule.[126] The concurrence noted SEA 483 did not impose a special burden on any group of voters.[127] Rather, it imposed a uniform burden on all voters, but had different impacts on specific groups of voters.[128] All voters, regardless of their economic status, faced the same burden in voting, making SEA 483 non-discriminatory.[129] Disparate impact, absent evidence of discriminatory intent, failed to demonstrate a neutral law violated equal protection or required strict scrutiny.[130] Applying an important regulatory interests standard, the concurrence concluded SEA 483 constituted a reasonable electoral regulation, and Indiana's interest in preventing voter fraud justified SEA 483's minimal burden.[131] The concurrence also argued Justice Stevens' case-by-case application of *Anderson* would invite future challenges, producing electoral instability and infringing upon states' rights.[132]

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[121] *Id.* at 1621–22; *see also, e.g.*, Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 (2008) (holding a facial challenge only succeeds if all applications of a law violate the Constitution).

[122] *Crawford II*, 128 S. Ct. at 1624.

[123] *Id.* at 1624 (Scalia, J., concurring).

[124] *See supra* notes 113–15 and accompanying text.

[125] *Crawford II*, 128 S. Ct. at 1624 (Scalia, J., concurring).

[126] *Id.*

[127] *Id.* at 1625.

[128] *Id.* at 1625; *see also Burdick*, 504 U.S. at 436–37 (examining the effect of a law on voters in general, not particular individuals).

[129] *Crawford II*, 128 S. Ct. at 1626 (Scalia, J., concurring).

[130] *Id.*; *see also* Clingman v. Beaver, 544 U.S. 581, 593 (2005) (finding easy to overcome, generalized, and non-discriminatory restrictions insufficiently severe to trigger strict scrutiny); Washington v. Davis, 426 U.S. 229, 248 (1976) (holding generally applicable, non-discriminatory laws do not violate Equal Protection absent discriminatory intent).

[131] *Crawford II*, 128 S. Ct. at 1627 (Scalia, J., concurring).

[132] *Id.* at 1626–27.

Dissenting Opinion (Justice Souter, joined by Justice Ginsburg)

Justices Souter and Ginsburg agreed the *Burdick* sliding-scale test provided the proper test for evaluating electoral restrictions, but took issue with how Justice Stevens' opinion applied that test.[133] The dissent argued the Court must apply *Burdick* to the specific benefits and burdens of the present case.[134] The dissenters found Indiana's reference to abstract interests in electoral integrity failed to sufficiently justify its restriction on voting rights.[135] According to the dissent, states must provide a factual showing that specific threats outweigh the burden on voting.[136] It found SEA 483's burden had a large and disparate enough of an impact to justify comparing it to the state interest.[137] The dissent found Indiana failed to justify its restriction with evidence of fraud and doubted SEA 483 addressed existing fraud.[138] Consequently, the dissent found the state interest failed to justify a restriction placing a greater burden on poor and minority voters.[139]

Dissenting Opinion (Justice Breyer)

In a separate dissent, Justice Breyer also suggested the Court should use a balancing test.[140] He agreed with Justice Stevens' opinion that photo-identification statutes could be constitutional.[141] However, Justice Breyer found none of Indiana's interests justified SEA 483's disproportionate burden on eligible voters without identification.[142]

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[133] *Id.* at 1628 (Souter, J., dissenting).

[134] *Id.* at 1627.

[135] *Id.*

[136] *Crawford II*, 128 S. Ct. at 1627 (Souter, J., dissenting).

[137] *Id.* at 1634. The dissent discussed how the burden of travel has worse effects on some voters based on circumstance. *Id.* at 1628–29. It also noted the most common sources of identification cost money, a cost falling disproportionately on the poor. *Id.* at 1630–31.

[138] *Id.* at 1638–39. The dissent also argued Indiana's bloated rolls resulted from its own negligence and failed to justify restricting voters. *Id.* at 1641–42. Similarly, the State's interest in maintaining voter confidence resulted from its own shortcomings. *Id.* at 1642.

[139] *Id.* at 1643.

[140] *Id.* at 1643 (Breyer, J., dissenting) ("I would balance the voting-related interests that the statute affects, asking 'whether the statute burdens any one such interest . . . out of proportion to the statute's salutary effects upon the others . . . .") (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

[141] *Crawford II*, 128 S. Ct. at 1643–44 (Breyer, J., dissenting).

[142] *Id.* at 1645. Justice Breyer noted, although the Carter-Baker Commission suggested voter-identification requirements, it also concluded states should phase in such laws providing sufficient time for states to provide identification to those who lacked it. *Id.* at 1644.

ANALYSIS

This section assesses the implications of *Crawford v. Marion County Board of Elections* (*Crawford II*). Although *Crawford II* provided guidance on how to evaluate voter-identification statutes, it failed to compare the concrete benefits and burdens of SEA 483.[143] Justice Stevens' opinion applied *Burdick's* sliding-scale test in a lopsided manner, giving Indiana the benefit of the doubt while undervaluing the nature and magnitude of voter-identification laws' burdens on voting rights.[144] The Court placed the initial burden of proof on those challenging identification laws, preventing actual balancing until challengers provide quantitative evidence of disenfranchisement.[145] The Court should have applied *Burdick* in a more balanced fashion, adjusting the tailoring required of the statute based on its benefits and burdens.[146]

A Lopsided Balancing Test

On the surface, *Crawford II* resolved lower federal court disagreements over which test to use when hearing challenges to voter-identification statutes.[147] Most lower courts correctly used the *Burdick* test to assess whether voter-identification statutes violated the Fourteenth Amendment, even if courts applied it in disparate ways.[148] Under Justice Stevens' opinion, this analysis depends on the facts of

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[143] *Crawford II*, 128 S. Ct. at 1628 (Souter, J., dissenting).

[144] *See id.* (pointing to the Stevens opinion's skewed balancing of interests); Rick Hasen, *Initial Thoughts on the Supreme Court's Opinion in* Crawford*, the Indiana Voter Identification Case*, ELECTION LAW BLOG, Apr. 28, 2008, http://electionlawblog.org/archives/010701.html (last visited Oct. 24, 2008) (arguing *Crawford II* only requires states to offer plausible pretexts to justify voter-identification laws, while requiring voters to show specific burdens).

[145] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2851 (2008) (Breyer, J., dissenting) (arguing in favor of a flexible standard for assessing firearms regulations as opposed to presuming such laws are constitutional); Cofsky, *supra* note 64, at 386–87 (arguing *Burdick* might lead to veiled tiered scrutiny and a presumption of constitutionality).

[146] *See Crawford II*, 128 S. Ct. at 1643 (Breyer, J., dissenting) (suggesting the Court should balance SEA 483's benefits and burdens, asking whether it burdens voting rights disproportionate to its benefits).

[147] *Id.* at 1616 (lead opinion).

[148] *See* Daniel P. Tokaji, *Judicial Review of Election Administration*, 156 U. PA. L. REV. PENNUMBRA 379, 384 (2007), *available at* http://pennumbra.com/responses/response.php?rid=38 (last accessed November 15, 2008) (noting how many lower courts used *Burdick* to evaluate voter-identification cases); Elizabeth D. Lauzon, *Constitutionality of Requiring Presentation of Photographic Identification in Order to Vote*, 27 A.L.R.6th 541 (2007) (noting most federal courts applied *Burdick* to voter-identification laws, although some applied strict scrutiny, and how Justice Stevens' opinion in *Crawford II* adopted a balancing approach).

specific situations rather than a pre-existing formula.[149] Although the Court based its approach on *Burdick*, it departed from prior precedent because it assessed SEA 483's burden on specific voters, rather than its systemic burden on all voters.[150]

In applying *Burdick*, the Court morphed its balanced sliding-scale test into a lopsided balancing test.[151] *Burdick* required the Court to balance all relevant interests in favor of and against an electoral regulation.[152] In contrast, the *Crawford II* Court found the magnitude of SEA 483's injury non-severe and avoided comparing it to the State's interest.[153] Although the Court discussed the legitimacy of Indiana's interest in stopping fraud, modernizing elections, and ensuring electoral legitimacy, no comparison of those interests to the character and magnitude of the burden on voting rights occurred.[154] This deviates from *Burdick*, which required thorough evaluation of the State's rationale and the degree to which that interest necessitated burdening voting rights.[155] Justice Stevens' opinion examined evidence showing SEA 483's burden on voting with a skeptical eye, but accepted Indiana's claims of voter fraud at face value and did not require concrete

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[149] *Crawford II*, 128 S. Ct. at 1616; *see also* Am. Assoc. of People with Disabilities v. Herrera, No. CIV 08-0702, 2008 U.S. Dist. LEXIS 82597, at *54-57 (D.N.M. Sept. 17, 2008) (finding that *Crawford II* affirmed *Anderson's* sliding-scale as the proper test for assessing challenges to state electoral regulations).

[150] Reply Brief for Petitioners at 6–7, *Crawford II*, 128 S. Ct. 1610 (No. 07-25), 2007 WL 4466632 ("[*B*]*urdick* clearly calls upon courts to assess voting regulations facially. *Burdick* itself was a facial attack on a law that burdened the rights of only a subset of voters."); *see also* Tokaji, *supra* note 18 (arguing *Crawford II* erroneously focused on SEA 483's burden on individual voters, avoiding its systemic burdens and "skewing effect on the electorate"); Chemerinsky, *supra* note 113, at 441 (arguing *Crawford II* broke from *Harper*); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966) (finding it irrelevant whether the plaintiffs could identify individuals disenfranchised by a $1.50 poll tax and holding the tax facially invalid because it introduced a standard irrelevant to voter qualifications).

[151] *Crawford II*, 128 S. Ct. at 1627 (Souter, J., dissenting); Hasen, *supra* note 144 (arguing Justice Stevens' opinion failed to accurately compare SEA 483's benefits and burdens).

[152] *Crawford II*, 128 S. Ct. at 1627 (Souter, J., dissenting); *see also* Storer v. Brown, 415 U.S. 724, 730 (1974) ("The rule is not self-executing and is no substitute for the hard judgments that must be made."); Bullock v. Carter, 405 U.S. 134, 143 (1972) ("In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.").

[153] *Crawford II*, 128 S. Ct. at 1623 ("[T]he statute's broad application to all Indiana voters . . . 'imposes only a limited burden on voters' rights.' The 'precise interests' advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483.") (quoting *Burdick*, 504 U.S. at 434, 439).

[154] *Id.* at 1635–36 (Souter, J., dissenting).

[155] *See Burdick*, 504 U.S. at 434 (comparing the actual benefits and burdens of Hawaii's write-in ban).

evidence in support of those claims.[156] Since the petitioners failed to provide quantifiable evidence of a burden, the Court did not compare the interests.[157] Consequently, Indiana's theoretical interest in stopping fraud justified the burden its statute imposed on voting rights.[158] Rather than balancing based on the relative strengths of each interest, Justice Stevens' opinion found the petitioners failed to demonstrate SEA 483's burden in terms of quantifiable disenfranchisement and accepted the State's speculative interest in fighting fraud.[159] The Court used a lopsided balancing test to evaluate voter-identification laws, requiring a higher standard of proof from those who challenge such laws than from states seeking to justify them.[160] If the Court finds the statute lacks a quantifiable burden,

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[156] *Crawford II,* 128 S. Ct. at 1627 (Souter, J., dissenting). According to Souter's dissent:

> [A] State may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. The State has made no such justification here, and as to some aspects of its law, it has hardly even tried.

Id. (citation omitted). Courts should apply *Burdick* to state interests with a skeptical eye, conducting more than a cursory examination of a state's abstract interests and not allowing states to "swat flies with a hammer." Chad Flanders, *How to Think about Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 152–53 (2007); *see also* Richard L. Hasen, *Courts Need to Keep a Skeptical Eye on New Voter Identification Laws*, Ohio State University: Election Law @ Moritz, Apr. 24, 2007, http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=147 (last visited Oct. 24, 2008) (arguing courts should examine fraud claims skeptically in light of their partisan background and lack of empirical basis). Justice Stevens' opinion rigorously deconstructed the petitioners' evidence of disenfranchisement. *Crawford II,* 128 S. Ct. at 1623. It criticized the petitioners' statistics for using old numbers, not demonstrating the lack of transportation proves the lack of opportunity to obtain identification, and not demonstrating a distribution of voters lacking identification. *Id.* at 1623 n.20. In contrast, Justice Stevens' opinion accepted "scattered instances" of fraud elsewhere in the United States, justifying the State's interest. *Id.* at 1618–19; 1619 n.10. This bears similarity to the lopsided applications of lower federal courts. *See* Schultz, *supra* note 1, at 507–08, 525–26 (describing federal courts' imbalanced interpretation of *Burdick*).

[157] *Crawford II*, 128 S. Ct. at 1635–36 (Souter, J., dissenting).

[158] *Id.* at 1622 (lead opinion). According to Justice Stevens' opinion, "[SEA 483's] broad application to all Indiana voters . . . 'imposes only a limited burden on voters' rights.' The 'precise interests' advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483." *Id.* (quoting *Burdick*, 504 U.S. at 434, 439).

[159] *Id.* at 1623. Justice Stevens' opinion failed to discuss degrees of necessity or how narrowly Indiana must tailor SEA 483. *Id.* The unquantifiable nature of the threat to voting rights triggered a kind of rational basis review whereby a "sufficiently strong" justification for a neutral law sufficed to withstand a Fourteenth Amendment challenge. *See id.* at 1628 (Souter, J., dissenting) (arguing Justice Stevens' opinion failed to engage in the hard weighing of interests required by *Burdick*). The Court's approach had more in common with lower federal courts that assumed *Burdick* demanded an either/or choice between rational basis review and strict scrutiny based on the severity of the law in question, rather than courts that used a more flexible sliding-scale with intermediate standards of review. *See* Schultz, *supra* note 1, at 531 (arguing lower courts mistakenly applied *Burdick* as a binary choice between rational basis review and strict scrutiny).

[160] Hasen, *supra* note 144 (arguing the Court tipped the sliding-scale in favor of the state's interest). After *Washington State Grange*, Prof. Hasen suggested the Court might be moving in this

little weighing of interests occurs and the Court will likely defer to the state's regulatory interest.[161] Such a deferential test poses substantial problems to future voter-identification law challenges because a court's initial adoption of a standard of review often determines the outcome of an election law challenge.[162]

The Court's lopsided balancing test makes it extremely difficult to facially challenge a voter-identification law.[163] *Crawford II* involved a facial challenge because the petitioners alleged that all applications of SEA 483 violated the Constitution.[164] While Justice Stevens' opinion made such challenges difficult, it did not foreclose the possibility of as-applied challenges, which allege that a law's particular application violates the Constitution.[165] If a regulation imposes a minimal burden on the public and the legislature offers a neutral pretext, regardless of the strength of the evidence supporting that interest, the statute will likely survive a facial challenge.[166] Groups facing a disparate impact must challenge voter-identification laws as applied to specific situations and offer quantitative

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direction: "If a state tries to justify its election law, it can do so by merely positing—not proving—the existence of voter confusion. . . . [I]f voters . . . want to challenge a law, then they need to come forward with actual evidence . . . ." *Id.*

[161] *Compare Crawford II*, 128 S. Ct. at 1623 (holding SEA 483's limited burden on all voters sufficed to overcome a facial challenge), *with* Norman v. Reed, 502 U.S. 279, 288–89 (1992) (requiring the state to show a corresponding interest sufficiently weighty to justify denying parties the right to name themselves).

[162] Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 771–72 (2008) (arguing the burden often determines a case's outcome by setting the level of scrutiny). In unpublished decisions, some federal courts have interpreted *Crawford II* in this fashion, deferring to states' abstract interests rather than engaging in actual balancing. *See* Tex. Democratic Party v. Williams, No. 07-51064, 2008 U.S. App. LEXIS 16406, at *1–2 (5th Cir. July 30, 2008) (holding a district court correctly applied rational basis review to a voting system not allowing straight-ticket voters to emphasize votes because the statute imposed a non-severe burden); *Herrera*, 2008 U.S. Dist. LEXIS 82597, at *90 (finding no distinction between Justice Stevens' sliding-scale approach and Justice Scalia's deferential two-track approach where an election law imposes a non-severe burden); Paralyzed Veterans of Am. v. McPherson, No. C 06-4670, 2008 U.S. Dist. LEXIS 69542, at *48 (N.D. Cal. Sept. 9, 2008) (applying rational basis review to a voting system imposing minimal burdens on visually and manually impaired citizens). Cases await review in lower courts in response to *Crawford II*. *See generally* Common Cause/Ga. v. Billups, No. 07-14664 (11th Cir. filed Sept. 11, 2008) (order staying appeal pending resolution of *Crawford II*); Gonzalez v. Arizona, No. 08-17094 (9th Cir. filed Sept. 24 2008).

[163] *See Voting Rights: Hearing Before S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Pam S. Karlan) (arguing the Court continued its trend of rejecting facial challenges but left the possibility of as-applied challenges).

[164] *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (describing facial and as-applied challenges).

[165] *See Crawford II*, 128 S. Ct. at 1621–22 (discussing the heightened burden faced by the petitioners in succeeding in their broad challenge to SEA 483's constitutionality).

[166] Hasen, *supra* note 144.

evidence of disenfranchisement.[167] *Crawford II* comports with the Roberts Court's trend of resisting facial challenges to statutes burdening fundamental rights.[168] The Court's hostility to facial challenges is problematic because it allows potentially unconstitutional laws to exist for some time before opponents effectively challenge them as applied to specific situations.[169] In the meantime, voter-identification laws may infringe upon fundamental voting rights, an effect that is likely irreversible.[170]

Rather than resolving confusion about how lower federal courts should evaluate voter-identification laws, *Crawford II* compounded the confusion by failing to provide an example of how to weigh competing electoral interests.[171] Justice Stevens' opinion turned largely on the facts surrounding SEA 483, complicating attempts to articulate a general rule for evaluating future challenges to voter-identification laws.[172] The failure of any rationale to command a majority

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[167] *Id.* (arguing the Court's disfavor of facial challenges disadvantages burdened plaintiffs and contradicts decisions like *Harper*, which outlawed poll taxes for everyone); *cf. Harper*, 383 U.S. at 668 (striking down a poll tax regardless of a citizen's ability to pay it).

[168] Warshak v. United States, 532 F.3d 521, 530 (6th Cir. 2008) (suggesting *Crawford II* continued the Roberts Court's trend disfavoring facial challenges); David G. Savage, *About Face: A Tool of the Civil Rights Movement is Increasingly Unwelcome in the High Court*, 94 A.B.A. J. 21 (2008) ("In a series of rulings during the past two years, the court has rejected broad challenges to new laws while at the same time leaving open the door to a more targeted attack on some of the laws' provisions."); *see also* Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1183, 1191 (2008) (disfavoring facial challenges to election laws because they rely on speculation and interfere with popularly elected branches of government).

[169] Chemerinsky, *supra* note 113, at 441 (arguing *Crawford II's* preference for as-applied challenges forces challengers to wait for an election law to disenfranchise voters before challenging it); Tokaji, *supra* note 18 (arguing as-applied challenges focus on the end of the election process, risking partisan court battles).

[170] *See supra* notes 35–39 and accompanying text.

[171] *See* Hasen, *supra* note 144 (noting the cursory nature of Justice Stevens' opinion and the difficulty it creates in predicting the outcomes of future voter-identification litigation). Although Justice Stevens' opinion found insufficient evidence to invalidate SEA 483 on facial grounds, it left the door open for future as-applied challenges. *See* Chemerinsky, *supra* note 113, at 428 (arguing *Crawford II* leaves open the possibility of as-applied challenges); Carrie Apfel, *The Pitfalls of Voter-Identification Laws in a Post-*Crawford *World*, AM. CONSTITUTION SOCIETY, at 1 (2008), *available at* http://www.acslaw.org/files/Apfel%20Issue%20Brief.pdf (last visited Oct. 24, 2008) (arguing *Crawford II* invites as-applied challenges in the future). The Court suggests one type of evidence capable of invalidating voter-identification laws, but fails to explain what constitutes a severe burden or how narrowly the state must draw its law to justify such a burden. *See Crawford II*, 128 S. Ct. at 1623–24 (suggesting the unconstitutionality of voter-identification laws without non-partisan motivations). Unfortunately, few major empirical studies of in-person voter fraud exist. Overton, *supra* note 73, at 665–66. As long as little hard data exists, courts may continue to apply the balancing test in an ad hoc manner, leading to contrary results based on similar facts. *Id.*

[172] Michael W. Hoskins, *Voter ID Questions Remain After SCOTUS Ruling*, IND. LAWYER, May 14, 2008, at 13.

of the Court also risks confusion in lower courts regarding how to apply it to future election regulation challenges.[173] The lack of a clear rule encourages future litigation because the Court did not rule out future as-applied challenges, so long as plaintiffs can present more evidence of disenfranchisement.[174] In spite of *Crawford II's* narrow holding, both advocates of voter-identification laws, and those who seek to challenge them, remain undeterred.[175] Not only have several states expressed interest in passing voter-identification laws in the post-*Crawford II* world, but activists also retain hope that they may succeed in challenging such laws.[176]

A Flexible Alternative

A better approach to voter-identification cases would apply the *Burdick* test in a balanced fashion, adhering to its flexibility.[177] The Court should actually weigh a statute's burden on both individual and group voting rights against the realistic threat of voter fraud.[178] Since courts have no predetermined test for which standard of review to use, the relative nature and magnitude of the two competing interests should determine the proper level of scrutiny.[179] In his dissent, Justice Breyer

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[173] Chemerinsky, *supra* note 113, at 428; *see also Herrera*, 2008 U.S. Dist. LEXIS 82597, at *90 (noting confusion as to whether to apply Justice Stevens' flexible standard or the two-track standard articulated in Justice Scalia's concurrence); Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (noting federal courts' contradictory interpretations of the plurality rationale in *Regents of the University of California v. Bakke*).

[174] *Crawford II*, 128 S. Ct. at 1626 (Scalia, J., concurring) (arguing the lack of clear standards before elections encourages disruptive litigation).

[175] Erwin Chemerinsky, *A Severe Setback to Voting Rights*, TRIAL, July 1, 2008, at 64 ("This rationale is an open invitation to state legislatures across the country to devise statutes that will disenfranchise one party's voters."); Karen Brooks, *Texas Voter ID Debate Revived Justices' Support of Indiana Photo Law Means Proponents In Legislature Likely to Try Again*, DALLAS MORNING NEWS, Apr. 29, 2008, at 1A ("Now that the [United States] Supreme Court has cleared strong voter-identification requirements. . . . Texas Republicans say there's nothing to stop them from making it the law here in 2009.").

[176] Hoskins, *supra* note 172, at 13.

[177] *Crawford II*, 128 S. Ct. at 1628 (Souter, J., dissenting).

[178] *Id.*

[179] *Id.* According to the dissent:

> Under *Burdick*, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," upon an assessment of the "character and magnitude of the asserted [threatened] injury," and an estimate of the number of voters likely to be affected.

Id. (quoting *Burdick*, 504 U.S. at 434); *see also* Overton, *supra* note 73, at 667 (stating voter-identification laws' relative benefits and burdens determine their permissible over and under-inclusiveness).

suggested how to apply a more balanced flexible test.[180] A severe burden on voting rights and a weak threat of fraud justifies heightened scrutiny.[181] Less extreme cases call for some form of intermediate scrutiny, requiring the state to show its statute substantially relates to an important government interest.[182] The degree of narrow tailoring states must demonstrate changes based on the interests at hand and the evidence supporting them.[183] Even heightened scrutiny need not be "strict in theory, fatal in fact," as strong evidence of voter fraud may justify a properly tailored voter-identification law where a disproportionate risk of fraud exists.[184]

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[180] *See Crawford II*, 128 S. Ct. at 1643 (Breyer, J., dissenting) (proposing the Court balance voting interests and determine if the statute imposes burdens disproportionate to the interests it serves). In *District of Columbia v. Heller*, Justice Breyer suggested a similar test in the Second Amendment context, which could serve as a useful rule for evaluating voter-identification laws:

> [R]eview of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.

District of Columbia v. Heller, 128 S. Ct. 2783, 2851 (2008) (Breyer, J., dissenting) (quoting *Nixon*, 528 U.S. at 402 (Breyer, J., concurring)). This breaks from the rigid application of discrete tiers of scrutiny, opting for more flexibility when statutes implicate rights on both sides of the scale. *Crawford II*, 128 S. Ct. at 2852–53 (Souter, J., dissenting).

[181] *See Norman*, 502 U.S. at 288–89 (holding a state must show a corresponding interest strong enough to justify electoral regulations and narrowly tailor severe restrictions). Some lower federal courts and a state court subjected voter-identification laws to heightened scrutiny. *Santillanes I*, 506 F. Supp. 2d at 636; Common Cause/Ga. v. Billups (*Billups I*), 406 F. Supp. 2d at 1361, 1365–66 (N.D. Ga. 2006); Weinschenk v. State, 203 S.W.3d 201, 211 (Mo. 2006).

[182] *See* Crawford v. Marion County Election Bd. (*Crawford I*), 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) (suggesting the possibility of "strict scrutiny light"); United States v. Virginia, 518 U.S. 515, 524 (1996) (requiring Virginia to show the Virginia Military Institute's exclusion of women bore a substantial relationship to an important governmental objective); Flanders, *supra* note 156, at 151–52 (arguing state interests should not get a "free pass" by a plausible justification for maintaining electoral integrity and suggesting a court must determine how an interest necessitates its burden); Schultz, *supra* note 1, at 531 (arguing courts should subject some non-severe burdens to intermediate scrutiny).

[183] *See Santillanes I*, 506 F. Supp. 2d at 628–29.

> As the burden that an election law imposes . . . becomes more severe, the State's interest in imposing that burden must become more compelling, and the burden the law imposes must become more narrowly tailored to serve that interest. Under this approach, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."

Id. (quoting *Nixon*, 528 U.S. at 391).

[184] *See* Chemerinsky, *supra* note 175, at 64 (arguing a law like SEA 483 could meet strict scrutiny if necessitated by a real risk of voter fraud).

Courts should balance the nature and magnitude of a statute's burden and not arbitrarily tip the scale in favor of the state's interest, as the Court did in *Crawford II*.[185] The *Crawford II* Court erred in finding SEA 483 failed to severely burden petitioners' voting rights and in refusing to weigh those interests against the state interest.[186] Undue burden analysis does not require a statute to eliminate a right before comparing it to the state's interest.[187] Courts should compare the specific interests at hand, regardless of their initial determination of a statute's severity.[188] Even a seemingly minimal voting interest may invalidate a state regulation if the state has no rational justification for it.[189] Actually weighing interests may reduce

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[185] *See* Schultz, *supra* note 1, at 526 ("[E]vidence must be offered to support the interest to override a fundamental right."); David Schultz, *Lies, Damn Lies, and Voter IDs: The Fraud of Voter Fraud* 6 (2008), http://www.hlpronline.com/Schultz_HLPR.pdf (last visited Oct. 24, 2008) (arguing *Burdick* requires at least intermediate scrutiny and pointing to *Santillanes I* as an example of how to take the flexible standard seriously); Scott Ryan Nazzarine, Comment and Casenote, *A Faceless Name in the Crowd: Freedom of Association, Equal Protection, and Discriminatory Ballot Access Laws*, 72 U. CIN. L. REV. 309, 347–56 (2003) (arguing, while not every voting regulation deserves strict scrutiny, courts should apply a more balanced test, subjecting more severe restrictions to heightened scrutiny).

[186] *Crawford II*, 128 S. Ct. at 1627 (Souter, J., dissenting); *see also* Reynolds v. Sims, 377 U.S. 533, 562 (1964) (requiring meticulous examination of voting restrictions); Langholz, *supra* note 162, at 777–78 (stating *Burdick* requires courts to assess the burden of a law and then compare it to the state interest).

[187] *See Casey*, 505 U.S. at 877 (holding a statute unduly burdened reproductive right by placing a substantial obstacle in the path of women seeking abortions, in spite of not proscribing abortions).

[188] *Crawford II*, 128 S. Ct. at 1627 (Souter, J., dissenting); *see also* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) ("Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional."); *Buckley*, 424 U.S. at 48–49 (requiring the state to show empirical foundation for burdening a fundamental right); Brief of Amici Curiae of the Brennan Center For Justice in Support of Petitioners, at 6–7, *Crawford II*, 128 S. Ct. 1610 (Nos. 07-21, 07-25), 2007 WL 4102238 (arguing states must show more than a rational basis for non-severe laws); Brief of Richard L. Hasen as Amicus Curiae Supporting Petitioners, at 4–5, *Crawford II*, 128 S. Ct. 1610 (Nos. 07-21, 07-25), 2007 WL 3353103 [hereinafter Hasen Brief] (arguing courts misconstrue *Burdick* when they fail to engage in hard balancing of non-severe statutes). *Santillanes I* explains such a comparison:

> [T]he *Burdick* test does not call for the Court to look for any conceivable, generalized interest that might serve as a justification for imposing a burden on the exercise of First and Fourteenth Amendment rights in the context of elections. Rather, this test calls for the City to put forward "the precise interests [which serve] as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it *necessary* to burden the plaintiff's rights."

Santillanes I, 506 F. Supp. 2d at 637 (quoting *Burdick*, 504 U.S. at 434).

[189] *Santillanes I*, 506 F. Supp. 2d at 629 (explaining how bureaucratic burdens may impose significant obstacles on voting rights); *see also* McLaughlin v. N.C. Bd. of Elec., 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) (holding even moderate regulations serving rational, but minor, interests, may fail the sliding-scale test); Hasen Brief, *supra* note 188, at 4–5 (arguing states must reasonably tailor election laws imposing non-severe burdens to their interests).

uncertainty regarding how courts should determine the severity of an election regulation.[190]

Suggestions for Practitioners and Legislators

Crawford II suggests a few lessons for legal practitioners and legislators seeking to design voter-identification legislation. Although challengers face significant burdens in facially challenging photo-identification requirements, challenges to specific applications of such statutes may succeed.[191] The Court's lopsided interpretation of *Burdick* imposes substantial burdens on those challenging voter-identification laws, but successful challenges remain possible.[192] Challengers may succeed in the difficult task of unearthing quantitative evidence of voters finding it difficult to obtain documents necessary to receive identification.[193]

State legislatures should take caution before passing voter-identification laws because such laws invite challenges even after *Crawford II*, risking expensive court battles and the possibility of unsatisfactory outcomes.[194] Lawmakers should assess

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[190] Chris Elmendorf, *Judicial Review of Electoral Mechanics*, Election Law @ Moritz, May 6, 2008, http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=417 (last visited Oct. 24, 2008) (arguing *Crawford II* avoided clarifying how courts should weigh competing voting interests); Elmendorf, *supra* note 63, at 393 (arguing appellate courts should determine severity de novo, clarifying what constitutes a severe burden for lower courts). *But see* Tokaji, *supra* note 148, at 389 (arguing the fact intensive nature of election cases makes de novo review not optimal). Prof. Elmendorf draws a more systematic approach from Justices Breyer and Souter, suggesting courts should look for danger signs of a substantial threat to the democratic process before applying heightened scrutiny. Elmendorf, *supra* note 63, at 325; *see also* Randall v. Sorrell, 547 U.S. 230, 248–49 (2006) (independently evaluating a statute's danger signs to determine its severity); Vieth v. Jubelirer, 541 U.S. 267, 344 (2004) (Souter, J., dissenting) (searching for clues of a statute's unfairness).

[191] *See supra* notes 162–68 and accompanying text.

[192] Hasen, *supra* note 144; Apfel, *supra* note 171, at 1. The few decisions applying *Crawford II* to non-voter-identification election laws did so in a lopsided manner, applying less demanding standards of review. *See* Paralyzed Veterans of Am. v. McPherson, No. C 06-4670 SBA, 2008 WL 4183981, *15 (N.D. Cal. Sept. 9, 2008) (subjecting a California voting system for the disabled to rational basis review because it imposed a minimal burden); Nader v. Cronin, Civ. No. 04-00611 ACK-LEK, 2008 WL 1932284, *11 (D. Haw. May 1, 2008) (holding Hawaii's regulatory interests justified stringent third party petition requirements).

[193] *See Crawford II*, 128 S. Ct. at 1621 (suggesting documentation justifying a voter-identification law challenge). The probability of successful challenges may increase as more data emerges during the next few elections. Apfel, *supra* note 171, at 7. However, the Court may demonstrate the same kind of skepticism expressed by the *Crawford II* Court towards disenfranchisement claims in future cases. *See* Andrew M. Siegel, *From Bad to Worse?: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*, 59 S.C. L. REV. 851, 860–61 (2008) (describing the Court's skepticism during oral arguments that SEA 483 would block access to the franchise).

[194] Apfel, *supra* note 171, at 9; Whitaker, *supra* note 17, at CRS-6; Hoskins, *supra* note 172, at 13 (predicting future litigation); Martin Frost, *GOP Cranking Up Suppression Efforts*, Politico.com, May 27, 2008, http://www.politico.com/news/stories/0508/10615.html (last visited November 15, 2008). The concurrence suggested as much when it warned Justice Stevens' reliance on specific facts risked "constant litigation." *Crawford II*, 128 S. Ct. at 1626 (Scalia, J., concurring).

whether voter fraud poses a realistic problem in their jurisdictions and carefully determine if that risk outweighs the costs of protracted litigation and burdening voting rights.[195] States may avoid larger problems if they opt for alternative means of addressing fraud, such as technological measures, increased enforcement of current rules, and changes in electoral administration.[196] Photographing registering voters and matching their faces before allowing them to vote may achieve the purported benefits of voter-identification legislation without burdening voting rights.[197] For the near future, states and litigants must navigate judicial uncertainty concerning what constitutes a severe burden on voting rights.[198]

CONCLUSION

Crawford II will do little to end disputes over voter-identification laws.[199] Many state legislatures continue to pursue such laws and challengers think they can succeed in attacking the application of such laws by making as-applied challenges.[200] The United States Supreme Court failed to articulate the method to compare interests in future photo-identification legislation.[201] Justice Stevens' opinion in *Crawford II*, which constitutes the Court's holding, failed to balance Indiana's interest requiring voter-identification against the burden the law poses to voting rights.[202] The Court's application of *Burdick* suggests a lopsided test, requiring concrete evidence from challengers to identification laws and accepting theoretical risks of fraud from states.[203] *Crawford II* illustrates the Roberts Court's

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[195] Apfel, *supra* note 171, at 9–10. Even if the abstract threat of voter fraud justified SEA 483, the little evidence available suggests in-person voter fraud poses a minor threat to electoral integrity. *See* David Callahan and Lori Minnite, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 7, 16–17 (2003), http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf (last visited Oct. 24, 2008) [hereinafter Demos] (explaining the dearth of evidence of fraud by pointing to declining local party power, stronger election administration, and new voting technology).

[196] Demos, *supra* note 195, at 7; *see also* Richard Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 969–70 (2005) (suggesting registration reform using biometric identification).

[197] Edward B. Foley, *Is There a Middle Ground in the Voter ID Debate?*, Ohio State University: Election Law @ Moritz, Sept. 6, 2005, http://moritzlaw.osu.edu/electionlaw/comments/2005/050906.php (last visited Oct. 24, 2008).

[198] *See Leading Cases—Constitutional Law*, 113 HARV. L. REV. 286, 293–94 (1999) (arguing Justices Stevens, Kennedy, Scalia, Souter, and Ginsberg will never agree on the definition of severity).

[199] *See supra* notes 171–76 and accompanying text.

[200] *See supra* notes 174–76 and accompanying text.

[201] *See supra* notes 171–73 and accompanying text.

[202] *See supra* notes 147–62 and accompanying text.

[203] *Id.*

resistance to facial challenges, suggesting future litigation will depend on the facts of specific situations.[204] As such, both litigators and legislators should take caution in how they approach voter-identification laws.[205]

[204] *See supra* notes 163–70 and accompanying text.

[205] *See supra* notes 191–98 and accompanying text.

CASE NOTE

CONSTITUTIONAL LAW—Open the Floodgates to Public Parks: The Tenth Circuit Welcomes All to Put Up Personal Permanent Monuments; *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007), *cert. granted*, 128 S. Ct. 1737 (2008).

*Joshua Tolin**

Introduction

Pleasant Grove, a small city in Utah, has numerous parks, one of which, Pioneer Park, contains historical buildings, statues, and artifacts.[1] Among those displays stand the town's first city hall and fire department, a pioneer era school house, and a granite stone from the first Mormon temple, recognizing the community's first settlers.[2] Pioneer Park also contains a monument depicting the Ten Commandments, donated by the Fraternal Order of Eagles and placed in the park in 1971.[3]

Approximately forty miles away, in Salt Lake City, is the headquarters for Summum, a non-profit religious group.[4] In September 2003, Summum formally requested that Pleasant Grove allow the erection of a monument containing the Seven Aphorisms of Summum in Pioneer Park.[5] Summum proposed its monument be similar in size and nature to the Ten Commandments monument already present in the park.[6] The mayor denied Summum's request, explaining

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* M.B.A., Candidate for J.D., University of Wyoming, 2010. I would like to thank my teachers, friends, and family for the many lessons and continued support. Special thanks to Professor Lisa Rich for her assistance with this note.

[1] Summum v. Pleasant Grove City (*Pleasant Grove I*), 483 F.3d 1044, 1047 (10th Cir. 2007).

[2] *Id.*

[3] *Id.* Throughout the 1950s, '60s, and '70s, the Eagles donated similar monuments to communities across the United States in an effort to promote morals to America's youth. Summum v. Ogden, 297 F.3d 995, 998 (10th Cir. 2002).

[4] *Pleasant Grove I*, 483 F.3d at 1047. Corky Nowell founded Summum as a non-profit organization in 1975. Keenan Lorenz, Survey, Summum v. Pleasant Grove City*: The Tenth Circuit "Binds the Hands of Local Governments as They Shape the Permanent Character of Their Public Spaces,"* 85 Denv. U. L. Rev. 631, 638 n.73 (2008). Mr. Nowell founded Summum after he started experiencing encounters with aliens ("Beings"). *Id.* Mr. Nowell continued having these encounters and legally changed his name to Summum Bonum Amon Ra, the name the Beings called him. Welcome to Summum, http://www.summum.us/about/welcome.shtml (last visited Nov. 17, 2008). The Beings introduced Mr. Nowell to the principles of Summum. *Id.*

[5] *Pleasant Grove I*, 483 F.3d at 1047. Summum's philosophy includes seven aphorisms: Psychokinesis, Correspondence, Vibration, Opposition, Rhythm, Cause and Effect, and Gender. Lorenz, *supra* note 4, at 638 n.73.

[6] *Pleasant Grove I*, 483 F.3d at 1047.

all permanent displays in the park must directly relate to the city's history or be donated by community groups.[7] Summum met neither of these requirements, but still made a second proposal attempt, which the city again denied.[8] Summum then filed suit in the United States District Court for the District of Utah, claiming the city violated Summum's First Amendment right to free speech.[9]

The district court denied Summum's request for a preliminary injunction requiring the city to display its monument in the park, and Summum subsequently appealed to the United States Court of Appeals for the Tenth Circuit.[10] The Tenth Circuit, sitting in panel, reversed the district court's ruling and held the following: (1) the donated Ten Commandments monument constitutes the private speech of the Eagles, as opposed to the governmental speech of the city; (2) the city park constitutes a traditional public forum, which requires any discriminatory content-based decisions be subjected to strict scrutiny review; and (3) the city did not meet this heightened standard and unconstitutionally discriminated against Summum's speech.[11] Accordingly, the court required Pleasant Grove to allow Summum to display the Seven Aphorisms monument.[12] In an evenly split decision, the Tenth Circuit denied rehearing en banc.[13] The United States Supreme Court subsequently granted certiorari.[14]

If the United States Supreme Court does not reverse the Tenth Circuit's decision, the City of Pleasant Grove will not be the only governmental entity affected.[15] Affirming the Tenth Circuit's decision will effectively force the City of Casper, Wyoming to permit Pastor Fred Phelps to build a flagrantly anti-

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[7] *Id.*

[8] *Id.* While Summum maintains its headquarters in nearby Salt Lake City, the group claims no ties with the City of Pleasant Grove. *See id.* Summum also does not claim its monument relates to the history of the city. *See id.*

[9] *Id.* For information on the Ten Commandments and the Establishment Clause, see generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.2 (3d ed. 2006); 5 RONALD D. ROTUNDA & JOHN E. NOWAK, NOWAK AND ROTUNDA'S TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.3 (4th ed. 2008); Antony Barone Kolenc, *"Mr. Scalia's Neighborhood": A Home for Minority Religions?*, 81 ST. JOHN'S L. REV. 819 (2007); Haynes Maier & Eric R. Mull, Casenote, *Holy Moses: What Do We Do with the Ten Commandments?*, 57 MERCER L. REV. 645 (2006).

[10] *Pleasant Grove I*, 483 F.3d at 1048.

[11] *Id.* at 1047 n.2, 1050, 1057.

[12] *Id.* at 1057.

[13] Summum v. Pleasant Grove City (*Pleasant Grove II*), 499 F.3d 1170, 1171 (10th Cir. 2007).

[14] Pleasant Grove City, Utah v. Summum (*Pleasant Grove III*), 128 S. Ct. 1737 (2008). The United States Supreme Court heard oral arguments on November 12, 2008. Transcript of Oral Argument at 1, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-665). However, the Court has yet to issue an opinion on the case.

[15] *See infra* notes 182–91 and accompanying text.

homosexual statue condemning one of the city's former residents.[16] Moreover, failure to reverse would prohibit governments at all levels across the country from regulating their public lands.[17]

This case note argues the Tenth Circuit erroneously decided *Summum v. Pleasant Grove City* (*Pleasant Grove I*) in favor of Summum.[18] First, this note introduces the panel's decision in *Pleasant Grove I* and the opinions of *Summum v. Pleasant Grove City* (*Pleasant Grove II*), in which the Tenth Circuit denied rehearing en banc.[19] Second, this note analyzes the Tenth Circuit's reliance on *Summum v. Ogden*, which held a privately-donated monument remains the speech of the donor.[20] Third, it analyzes the panel's holding that a public park constitutes a traditional public forum for the erection of permanent monuments.[21] This note demonstrates the Tenth Circuit erred in its First Amendment analysis and the United States Supreme Court should reverse the Tenth Circuit's decision.[22]

BACKGROUND

The First Amendment provides "Congress shall make no law . . . abridging the freedom of speech."[23] The United States Supreme Court, however, has expressly stated the United States Constitution does not protect this right absolutely.[24] As such, the government can regulate speech, but courts must determine when regulation violates the Constitution.[25]

When a government restricts speech on government property, a reviewing court follows a multi-step framework to determine whether the restriction violates the individual's right to freedom of speech.[26] First, the court determines who speaks on the government property.[27] When the government speaks, the United States Constitution entitles it to make content-based decisions and engage in viewpoint-based decision making.[28] However, when dealing with private speech,

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[16] *See infra* notes 182–88 and accompanying text.

[17] *See infra* notes 189–91 and accompanying text.

[18] *See infra* notes 80–199 and accompanying text.

[19] *See infra* notes 80–109 and accompanying text.

[20] *See infra* notes 110–53 and accompanying text.

[21] *See infra* notes 154–99 and accompanying text.

[22] *See infra* notes 110–99 and accompanying text.

[23] U.S. CONST. amend. I.

[24] Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961).

[25] CHEMERINSKY, *supra* note 9, at 924–25. *See generally* Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008).

[26] *See infra* notes 31–73 and accompanying text.

[27] *See infra* notes 31–45 and accompanying text.

[28] *See infra* note 31 and accompanying text.

the reviewing court conducts a forum analysis to determine the constitutional validity of the exclusion.[29] Depending on the forum classification, the court uses the applicable standard to determine if the exclusion satisfies constitutional requirements.[30]

Government vs. Private Speech

In a free speech case, a court first decides who speaks on the government property, the government itself or a private individual.[31] To make this determination, the United States Court of Appeals for the Tenth Circuit applies a four-factor test adopted from the United States Court of Appeals for the Eighth Circuit.[32] The Eighth Circuit developed the four-factor test in *Knights of the Ku Klux Klan v. Curators of the University of Missouri*, and the Tenth Circuit first adopted the test in *Wells v. City & County of Denver*.[33]

The United States Supreme Court has not adopted a specific framework for this determination, but in *Johanns v. Livestock Marketing Association*, the Court held a beef advertising campaign constituted government speech.[34] While the Court did not specify the test used, its analysis included factors similar to those in the four-factor test.[35] The Court assessed the purpose of the program, who had editorial control of the speech, and who exercised ultimate control over the advertising campaign.[36]

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[29] *See infra* notes 46–49 and accompanying text.

[30] *See infra* notes 50–73 and accompanying text.

[31] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797 (1985). If a court classifies the speech at issue as private, the court then completes a forum analysis to determine the degree to which the government can restrict access. *Id.* However, if a court classifies the speech as governmental, the United States Constitution entitles the government to make content-based decisions and engage in viewpoint-based decision making. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995); *see infra* notes 194–95 and accompanying text (explaining restrictions on government speech).

[32] Summum v. Ogden, 297 F.3d 995, 1004 (10th Cir. 2002). Prior to adopting the four-factor test, the Tenth Circuit had no formal framework to determine speech ownership. *See* Wells v. City & County of Denver, 257 F.3d 1132, 1140–42 (10th Cir. 2001). Previously, however, in *Summum v. Callaghan*, the Tenth Circuit—without analysis—characterized a privately-donated Ten Commandments monument as private speech. 130 F.3d 906, 919 n.19 (10th Cir. 2002).

[33] *Wells*, 257 F.3d at 1140–42 (adopting the four-factor test to determine a "Happy Holidays" sign erected by the government represents governmental speech for the purposes of free speech analysis); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–94 (8th Cir. 2000) (developing the four-factor test to determine state-sponsored radio announcements recognizing private donors constitute government speech).

[34] 544 U.S. 550, 560 (2005).

[35] Ariz. Life Coalition, Inc. v. Stanton, 515 F.3d 956, 965 (9th Cir. 2008) (adopting the four-factor test after recognizing the United States Supreme Court followed similar reasoning in *Johanns*); *see Johanns*, 544 U.S. at 560–61.

[36] *Johanns*, 544 U.S. at 560–61.

The Wells *Factors*

Because the United States Supreme Court has not clearly specified how to make this determination, the United States Court of Appeals for the Tenth Circuit uses the test it adopted in *Wells*.[37] Whether the speech belongs to the government or another relevant actor depends on the balancing of the following four factors: (1) the central purpose of the government program in which the speech occurs, (2) the amount of editorial control over the content, (3) the identity of the literal speaker, and (4) with whom ultimate responsibility of the content rests.[38] In addition to the Tenth and Eighth Circuits, the United States Courts of Appeals for the Fourth and Ninth Circuits apply this four-factor test.[39]

Shortly after adopting this four-factor test, the Tenth Circuit, in *Summum v. Ogden*, applied it to a Ten Commandments monument donated by the Eagles and displayed on municipal grounds.[40] In analyzing the first factor, the court held the central purpose of the monument was to promote the views of the donors.[41] In assessing the second factor of the *Wells* test, the court recognized the Eagles, and not the city, exercised complete control over designing the entirety of the monument, including its content.[42] While recognizing the city may have become the literal speaker after accepting the donation, under the third *Wells* factor, the court concluded the Eagles constituted the literal speaker of the text on the monument.[43] In addressing the final *Wells* factor, the court recognized Ogden became the true owner of the monument when the city accepted the donation.[44] In sum, the court concluded the Ten Commandments monument represented the speech of the Eagles, and not that of the city government.[45]

Free Speech Fora

If a court classifies the speech at issue as private, the court then completes a forum analysis to determine which speech the government can exclude from the

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[37] *Ogden*, 297 F.3d at 1004.

[38] *Wells*, 257 F.3d at 1141.

[39] *E.g.*, *Ariz. Life*, 515 F.3d at 964–65; Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dept. of Motor Vehicles, 288 F.3d 610, 618–19 (4th Cir. 2002).

[40] *Ogden*, 297 F.3d at 1004–05.

[41] *Id.* at 1004.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 1005.

[45] *Ogden*, 297 F.3d at 1005 (recognizing three of the four factors support the finding of private speech).

property.[46] In doing so, the court considers both the government property at issue and the type of access sought by the excluded speaker.[47] Once the court identifies the forum in question, it then determines the proper forum classification, as the United States Supreme Court set forth in *Perry Education Association v. Perry Local Educators' Association*.[48] The *Perry* court distinguished three categories: the traditional public forum, the designated public forum, and the nonpublic forum.[49]

Traditional Public Fora

The United States Constitution affords the most protection to individual rights in the first *Perry* classification, the traditional public forum.[50] Traditional public fora include those places which have always been reserved for the public's use.[51] This category includes public streets and parks, because the public has historically used them in order to assemble, communicate, and discuss issues.[52] In traditional public fora, the government cannot make content-based exclusions without satisfying a strict level of scrutiny by proving that such regulation is necessary to serve a compelling state interest.[53] Furthermore, to satisfy strict scrutiny, the exclusion must be narrowly drawn to protect that interest.[54] The Constitution, however, does not completely prohibit government from regulating speech on public property.[55] In traditional public fora (as well as designated and nonpublic fora), the government may enact time, place, and manner of expression regulations, so long as they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[56]

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[46] *Cornelius*, 473 U.S. at 797. Forum analysis is only required for protected speech on government property. *Id.* If the proposed speech represents a type of unprotected or less-protected speech, e.g., obscenity, libel, or commercial speech, different standards apply and a forum analysis is unnecessary. ROTUNDA & NOWAK, *supra* note 9, § 20.1.

[47] *Cornelius*, 473 U.S. at 797.

[48] 460 U.S. 37, 45–47 (1983).

[49] *Cornelius*, 473 U.S. at 802 (citing *Perry*, 460 U.S. at 45–47).

[50] *Perry*, 460 U.S. at 45.

[51] *Id.*

[52] *Id.*

[53] *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)). A government makes content-based exclusions when it restricts access to a forum based on the subject matter of the speech excluded or on the identity of the individual trying to speak. *Id.* at 49. For example, Pleasant Grove required that Pioneer Park monuments relate to the history of the town (subject matter) or be donated by an individual or group with long-standing ties to the community (speaker identity). Summum v. Pleasant Grove City (*Pleasant Grove I*), 483 F.3d 1044, 1052 n.5 (10th Cir. 2007).

[54] *Perry*, 460 U.S. at 45.

[55] *Id.*

[56] *Id.* at 45–46.

Designated Public Fora

The *Perry* court recognized a second classification, the designated public forum.[57] A government creates a designated public forum, and this type of forum carries with it the same use protections as those associated with traditional public fora.[58] In order to create a designated public forum, the government must intentionally open a nonpublic forum for the purpose of free speech.[59] For example, the City of Chattanooga, Tennessee created a designated public forum when it opened a municipal theater for use by its citizens.[60] Nothing requires a government to create these fora.[61] However, even if it chooses to do so, nothing requires a government to keep them open indefinitely.[62] As long as a government keeps a designated public forum open to the public, the courts will use the standard of review applicable to traditional public fora.[63]

Nonpublic Fora

Lastly, the *Perry* court recognized a residual category of public property, the nonpublic forum.[64] A nonpublic forum includes any public property not considered a traditional public forum or designated by the government as a public forum.[65] An army base, for example, represents a nonpublic forum.[66] Nonpublic fora carry with them different standards of regulation.[67] In addition to the time, place, and

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[57] *Cornelius*, 473 U.S. at 802; *see Perry*, 460 U.S. at 45.

[58] *Cornelius*, 473 U.S. at 802.

[59] *Id.* ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."); *see* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 757 (1995) (plaza opened for free speech by statute).

[60] *Perry*, 460 U.S. at 45 (citing Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), as an example of a designated public forum); *see Se. Promotions*, 420 U.S. at 555 (recognizing city created a public forum when it opened a municipal theater for use by the public and unconstitutionally excluded a theater company by refusing to permit the performance of the musical "Hair" at the public theater).

[61] *Perry*, 460 U.S. at 45–46.

[62] *Id.*

[63] *Id.* If a government does not want a court to apply the traditional public forum standards to a designated public forum, it can revert the forum back to a nonpublic forum by removing the public's access. *Id.* A traditional public forum, however, cannot be changed into another forum type. *Id.* at 45.

[64] *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 46.

[65] *Perry*, 460 U.S. at 46.

[66] Greer v. Spock, 424 U.S. 828, 836–37 (1976).

[67] *Id.*

manner regulations permitted for each of the forum types, in a nonpublic forum, the government may utilize more expansive (i.e., content-based) exclusions, as long as they are both reasonable and viewpoint-neutral.[68]

Limited Public Fora

While the *Perry* court categorized only three forum types, federal courts have developed a fourth label, the limited public fora.[69] At times, courts use this label when referring to a designated public forum; at other times, courts treat limited public fora as a type of nonpublic fora.[70] Recently, the United States Supreme Court used "limited public forum" when applying the less restrictive standard reserved for *Perry*'s third category, nonpublic fora.[71] In *Arkansas Educational Television Commission v. Forbes*, the Court clarified that a public forum is designated when "generally open" to the public or specific classes of groups, but is a nonpublic forum when the government allows merely "selective access."[72] The classification of limited public forum, therefore, refers to a nonpublic forum the government opened for selective access, requiring restrictions to be reasonable and not viewpoint-based.[73]

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[68] U.S. Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114, 131 n.7 (1981); *Cornelius*, 473 U.S. at 806.

[69] *E.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993) ("The school property, when not in use for school purposes, was neither a traditional or designated public forum; rather it was a limited public forum . . . ."); *Callaghan*, 130 F.3d at 914–15 ("We use the term 'limited public forum' here to denote a particular species of nonpublic forum . . . .").

[70] *Compare* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (applying viewpoint discrimination and reasonableness test to limited public forum), *with* Widmar v. Vincent, 454 U.S. 263, 272 (1981) (applying strict scrutiny to limited public forum).

[71] *Callaghan*, 130 F.3d at 914–15; *e.g.*, *Good News*, 533 U.S. at 106–07; *Rosenberger*, 515 U.S. at 829–30; *Lamb's Chapel*, 508 U.S. at 390, 393–94; *see* W. Brent Woodall, *Fixing the Faulty Forum Framework: Changing the Way Courts Analyze Free Speech Cases*, 2 FIRST AMEND. L. REV. 295, 307 (2004) ("Thus, in *Good News Club* the Court once again rejected the guidance of *Perry* and indicated that a limited public forum is a type of nonpublic forum.").

[72] 523 U.S. 666, 679 (1998). For example, in *Widmar*, the only United States Supreme Court decision treating a limited public forum as a designated public forum, a university kept its facilities generally open to all student groups. *See Widmar*, 454 U.S. at 272. However, in the most recent United States Supreme Court decisions involving limited public fora, the government merely granted selective access, and the Court has treated such fora as nonpublic. *E.g.*, *Good News*, 533 U.S. at 106 (facility access for limited purposes during limited after-school hours); *Rosenberger*, 515 U.S. at 832 (publication funding for specific subset of student organizations); *Lamb's Chapel*, 508 U.S. at 389–90 (facility access for limited purposes during limited after-school hours).

[73] *Callaghan*, 130 F.3d at 916; Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 77 (2004). *But see* Woodall, *supra* note 71, at 313–15 (recognizing the United States Supreme Court's recent decisions and arguing for a return to the original *Perry* framework, wherein courts treat limited public fora as a species of designated public fora).

Summum and the Constitutionality of the Ten Commandments

Summum first began its legal crusade against government-displayed Ten Commandments monuments in 1994.[74] In *Summum v. Callaghan*, Salt Lake County allowed the Eagles to install a Ten Commandments monument on the lawn outside the county courthouse.[75] In its complaint, Summum alleged violation of the Establishment, Free Exercise, and Due Process Clauses of the United States Constitution.[76] Since filing its first complaint, Summum has filed lawsuits claiming Establishment Clause and Freedom of Speech Clause violations against multiple Utah municipal and county governments.[77]

In 2005, the United States Supreme Court decided *Van Orden v. Perry*, in which it held Texas' display of a privately-donated Ten Commandments monument on government property did not violate the Establishment Clause.[78] Since the Court's decision in *Van Orden* effectively closed the door on the Ten Commandments and Establishment Clause claims, Summum narrowed its claims to the freedom of speech.[79]

PRINCIPAL CASE

United States District Court for the District of Utah

Summum v. Pleasant Grove City (*Pleasant Grove I*) presented the question of whether a city violated an organization's free speech rights under the United States Constitution.[80] Summum, a religious group, argued Pleasant Grove unconstitutionally denied its request to erect a permanent monument espousing its Seven Aphorisms in Pioneer Park, a public municipal park.[81] Summum claimed this violated the Constitution because the city, at the same time, displayed other

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[74] Freedom of Speech, http://www.summum.us/about/freespeech.shtml (last visited Nov. 17, 2008).

[75] *Callaghan*, 130 F.3d at 909–10.

[76] *Id.* at 910.

[77] *See Pleasant Grove I*, 483 F.3d at 1047; Summum v. Duchesne City, 482 F.3d 1263, 1267 (10th Cir. 2007); *Ogden*, 297 F.3d at 999; *Callaghan*, 130 F.3d at 911.

[78] 545 U.S. 677, 692 (2005).

[79] *See* Pleasant Grove City, Utah v. Summum (*Pleasant Grove III*), 128 S. Ct. 1737, 1737 (2008); *Pleasant Grove I*, 483 F.3d at 1048; Alberto B. Lopez, *Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment*, 55 BAYLOR L. REV. 167, 209 (2003) ("In fact, the free speech strategy has proven effective with judges across the ideological spectrum against opponents who rely on the First Amendment's clause against the establishment of religion.") (internal quotations omitted).

[80] 483 F.3d 1044, 1047 (10th Cir. 2007).

[81] *Id.*; *see supra* notes 4–5 and accompanying text (providing background information on the religion of Summum).

privately-donated statues, including a Ten Commandments monument.[82] The United States District Court for the District of Utah denied an oral motion for a preliminary injunction to force display of Summum's proposed monument, and Summum appealed the ruling.[83]

United States Court of Appeals for the Tenth Circuit

Sitting in panel, the United States Court of Appeals for the Tenth Circuit reversed the district court, holding Pleasant Grove violated Summum's constitutionally guaranteed rights to free speech.[84] The court's decision was threefold: (1) a donated Ten Commandments monument, which sat in the park, constitutes the private speech of its donors; (2) the city park constitutes a traditional public forum, which requires the court to subject any content-based decisions to strict scrutiny; and (3) Pleasant Grove failed to meet this heightened standard of scrutiny.[85]

The Tenth Circuit cited two of its previous decisions, *Summum v. Ogden* and *Summum v. Callaghan*, when it concluded the Ten Commandments monuments remain the private speech of its donors.[86] In *Callaghan*, the Tenth Circuit concluded a similarly donated Ten Commandments monument involved private speech, as it expressed the views of its donors.[87] Five years later in *Ogden*, the Tenth Circuit applied the four-factor *Wells* test it had since adopted to conclude the Ten Commandments monument did not constitute governmental speech, but the private speech of the donors.[88]

After dispensing with the private speech characterization in a footnote, the *Pleasant Grove I* court conducted a forum analysis to determine the appropriate

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[82] *Pleasant Grove I*, 483 F.3d at 1047.

[83] *Id.* at 1048.

[84] *Id.* at 1057.

[85] *Id.* at 1047 n.2, 1050, 1057.

[86] *Id.* at 1047 n.2. Both cases involved a similar Ten Commandments monument located on government property and Summum's attempts to display its own monument. *See* Summum v. Ogden, 297 F.3d 995, 999 (10th Cir. 2002) (Ten Commandments displayed on municipal building grounds); Summum v. Callaghan, 130 F.3d 906, 909–10 (10th Cir. 1997) (Ten Commandments displayed on county courthouse lawn).

[87] *Callaghan*, 130 F.3d at 919 n.19.

[88] *Ogden*, 297 F.3d at 1006. Between *Callaghan* and *Ogden*, the Tenth Circuit decided *Wells v. City & County of Denver*, in which it adopted a test from the Eighth Circuit to determine when it classifies speech as private as opposed to governmental. *See* Wells v. City & County of Denver, 257 F.3d 1132, 1140–42 (10th Cir. 2001) (adopting the four-factor test); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–94 (8th Cir. 2000) (developing the four-factor test).

level of scrutiny to apply to the city's denial of Summum's request.[89] The court identified the forum in question as the "permanent monuments in the city park."[90] Once the court determined the relevant forum, it then turned to classifying the forum into one of the three original *Perry* classifications: (1) traditional public forum, (2) designated public forum, or (3) nonpublic forum.[91]

In determining the relevant classification, the Tenth Circuit noted the district court incorrectly categorized the monuments in the city park as a nonpublic forum because it applied the reasonable and viewpoint-neutral test.[92] The Tenth Circuit, instead, classified the monuments in the park as a traditional public forum.[93] The court reasoned that because of the forum's location inside a city park, which the United States Supreme Court characterized as a traditional public forum, the Pleasant Grove forum constituted—by default—a traditional public forum.[94]

Once the Tenth Circuit determined the monuments in the park to be a traditional public forum, it reviewed Pleasant Grove's speech restrictions based on the corresponding level of review, strict scrutiny.[95] As Pleasant Grove based its exclusions on subject matter and speaker identity, the city conceded it made content-based exclusions.[96] In applying this heightened level of scrutiny, the court

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[89] *Pleasant Grove I*, 483 F.3d at 1047 n.2, 1050. The panel did not specifically characterize the monuments in Pioneer Park as private speech. *Id.* at 1047 n.2. Before reaching the discussion section of its decision, the Tenth Circuit mentioned in a background footnote that it had previously characterized a similar donated Ten Commandments monument as private speech. *Id.* In its discussion, the Tenth Circuit skipped the *Wells* test and applied the forum analysis posthaste. *Id.* at 1050.

[90] *Id.* at 1050.

[91] *Id.*

[92] *Id.* Courts apply this test to nonpublic fora; a reviewing court will hold content-based exclusions constitutional if it considers the exclusions both reasonable and viewpoint-neutral. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985). The Tenth Circuit, however, failed to recognize the United States Supreme Court's and its own holdings that this standard applies also to limited public fora. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (accepting parties' classification of limited public forum and applying viewpoint discrimination and reasonableness test to limited public forum); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829–30 (1995) (applying viewpoint discrimination and reasonableness test to limited public forum); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 390, 393–94 (1993) (accepting lower court's classification of limited public forum and applying reasonableness standard); *Callaghan*, 130 F.3d at 916 ("Regulations of speech in a nonpublic or limited public forum are subject to the more deferential reasonableness standard.").

[93] *Pleasant Grove I*, 483 F.3d at 1050.

[94] *Id.* at 1050–51; *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (classifying public streets and parks as traditional public fora).

[95] *Pleasant Grove I*, 483 F.3d at 1052–53.

[96] *Id.* at 1052, 1052 n.5.

held Pleasant Grove's interest in promoting its history was not compelling.[97] Alternatively, even if Pleasant Grove possessed a compelling interest, its exclusion was not necessary and narrowly drawn to serve that interest.[98] As such, the court held Pleasant Grove's speech restrictions violated the United States Constitution.[99] The panel concluded the trial court should have granted the preliminary injunction and ordered the city to allow erection of Summum's proposed monument.[100]

Petition for Panel Rehearing and Rehearing En Banc

Pleasant Grove subsequently filed a petition for panel rehearing and a petition for rehearing en banc in *Summum v. Pleasant Grove City* (*Pleasant Grove II*).[101] The original panel denied rehearing, and the court denied rehearing en banc by an evenly split six-to-six vote.[102]

Dissenting Opinion (Judge Lucero)

Judge Lucero filed a dissenting opinion from the denial of rehearing en banc, in which he agreed the application of the *Wells* test indicated the Ten Commandments monument remains the private speech of the Eagles.[103] Judge Lucero, however, concluded the permanent monuments in the park represented a nonpublic forum, not a traditional public forum.[104]

Dissenting Opinion (Judge McConnell, joined by Judge Gorusch)

Judge McConnell also filed a dissenting opinion from the denial of rehearing en banc, in which Judge Gorsuch joined.[105] Judge McConnell disagreed with the

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[97] *Id.* at 1053.

[98] *Id.* ("As the [United States] Supreme Court has explained, defining a governmental interest this narrowly (i.e., the promotion of the city's history in this particular park) turns the *effect* of the regulation into the governmental interest.") (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 120 (1991) ("[T]his sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored.")).

[99] *Id.* at 1054 (evaluating likely merits of the case based on procedural posture).

[100] *Pleasant Grove I*, 483 F.3d at 1057.

[101] 499 F.3d 1170, 1171 (10th Cir. 2007).

[102] *Id.* The original panel included Chief Judge Tacha, Judge Ebbel, and Judge Kane, sitting by designation from the United States District Court for the District of Colorado. *Pleasant Grove I*, 483 F.3d at 1045. The active judges hearing the en banc petitions included Chief Judge Tacha and Judges Kelly, Henry, Briscoe, Lucero, Murphy, Hartz, O'Brien, McConnell, Tymkovich, Gorsuch, and Holmes. *Pleasant Grove II*, 499 F.3d at 1170. The Tenth Circuit local rules require a majority of the active judges to order a rehearing en banc; therefore, an equally divided vote allowed the lower decision to stand. *Id.* at 1171.

[103] *Pleasant Grove II*, 499 F.3d at 1172 (Lucero, J., dissenting).

[104] *Id.* at 1173–74.

[105] *Id.* at 1174 (McConnell, J., dissenting).

court's holding that the donated monuments remain the private speech of the donors.[106] Judge McConnell further explained that once the court recognizes the statues as government speech, the need for a forum analysis disappears.[107]

Response to the Dissenting Opinions (Chief Judge Tacha)

Chief Judge Tacha then took the self-described "unprecedented step" of responding to the dissents from the denial of rehearing en banc to reinforce the original panel's decision, which she authored.[108] Writing separately in her response to the dissents, Chief Judge Tacha reiterated the panel's holdings that privately-donated monuments remain the private speech of the donors and a city park constitutes a traditional public forum for the erection of monuments.[109]

ANALYSIS

In *Summum v. Pleasant Grove City* (*Pleasant Grove I*), the Tenth Circuit made two major errors in its ultimate conclusion.[110] The Tenth Circuit incorrectly relied on its previous holdings that privately-donated monuments remain the private speech of the donors for First Amendment purposes.[111] Had it applied the *Wells* four-factor test to the facts, the court would have concluded the privately-donated Ten Commandments monument constitutes governmental speech.[112] Even if the court had not applied the *Wells* test to hold the speech governmental, following a thorough forum analysis, it should have determined a city park constitutes a nonpublic forum for the erection of monuments, requiring the court to apply a lesser standard of review.[113]

Private Speech vs. Government Speech

In its first of three substantive holdings in this case, the Tenth Circuit characterized the Ten Commandments monument as the private speech of its donors, as opposed to the governmental speech of the city that acquired it.[114] The panel conducted no analysis of its own, but cited two of its previous decisions,

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[106] *Id.* at 1177.

[107] *Id.*

[108] *Pleasant Grove II*, 499 F.3d at 1178 (Tacha, C.J., responding to dissents).

[109] *Id.* at 1178–82.

[110] *See infra* notes 114–99 and accompanying text.

[111] *See infra* notes 114–34 and accompanying text.

[112] *See infra* notes 134–53 and accompanying text.

[113] *See infra* notes 154–99 and accompanying text.

[114] Summum v. Pleasant Grove City (*Pleasant Grove I*), 483 F.3d 1044, 1047 n.2 (10th Cir. 2007). Because Summum sought access to display its Seven Aphorisms monument in Pioneer Park, where the government already displayed some monuments, the court must determine if the

Summum v. Callaghan and *Summum v. Ogden*.[115] However, those decisions do not create a sound basis for the holding in *Pleasant Grove I*, as one case lacked analysis on the issue and the other misapplied the test for determining speech ownership.[116]

In *Wells v. City & County of Denver*, the Tenth Circuit adopted a test from the Eighth Circuit to characterize speech as governmental or private in nature.[117] The *Wells* test determines whether the speech in question belongs to the government or another relevant actor by weighing the following four factors: (1) the central purpose of the program in which the speech occurs, (2) the amount of editorial control the government exercises over the content, (3) the identity of the literal speaker, and (4) with whom ultimate responsibility of the content rests.[118]

The Tenth Circuit, however, adopted the *Wells* test to resolve speech ownership questions after it decided *Callaghan*; therefore, *Callaghan* should not be determinative on this issue.[119] Moreover, the *Callaghan* court performed no speech ownership analysis; it simply stated that the Ten Commandments monument represented private speech expressing the views of its donors.[120]

Five years later in *Ogden*, the Tenth Circuit used the *Wells* four-factor test to characterize the ownership of the speech in question.[121] After applying the test, the *Ogden* court concluded Ogden's Ten Commandments monument represented the

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current displays constitute governmental or private speech. *See* Wells v. City & County of Denver, 257 F.3d 1132, 1139 (10th Cir. 2001). The Tenth Circuit focused on the privately-donated Ten Commandments monument displayed in Pioneer Park, as the facts surrounding this donation were the most developed. *See Pleasant Grove I*, 483 F.3d at 1047–48.

[115] *Pleasant Grove I*, 483 F.3d at 1047 n.2. Both cases dealt with a similar Ten Commandments monument placed on government property and Summum seeking to remove the Ten Commandments or display its own monument on the same property. Summum v. Ogden, 297 F.3d 995, 999 (10th Cir. 2002) (Ten Commandments on municipal building grounds); Summum v. Callaghan, 130 F.3d 906, 909–10 (10th Cir. 1997) (Ten Commandments on county courthouse lawn).

[116] Summum v. Pleasant Grove City (*Pleasant Grove II*), 499 F.3d 1170, 1176, 1176 n.1 (10th Cir. 2007) (McConnell, J., dissenting); *see infra* notes 119–34 and accompanying text (demonstrating *Callaghan*'s lack of analysis and *Ogden*'s misapplication of the *Wells* test); *see also Ogden*, 297 F.3d at 1000 n.3 (explaining the Tenth Circuit's precedent with respect to one municipality's display of a similar Ten Commandments monument does not control the constitutionality of another municipality's display).

[117] 257 F.3d at 1140–42.

[118] *Id.*; Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–94 (8th Cir. 2000).

[119] *See Pleasant Grove II*, 499 F.3d at 1176. *See generally Wells*, 257 F.3d 1132; *Callaghan*, 130 F.3d 906.

[120] *See Callaghan*, 130 F.3d at 919 n.19 ("[T]he monolith is private speech expressing the views of the Eagles and not speech the County itself has uttered in furtherance of official government business."); Harmelin v. Michigan, 501 U.S. 957, 967 (1991) (rejecting an earlier holding because the previous court did not analyze the issue in question).

[121] *Ogden*, 297 F.3d at 1004–05.

speech of its donors rather than that of the city.[122] However, a thorough analysis of these factors demonstrates the speech in question constitutes governmental, not private speech.[123]

Misapplying the Wells *Factors in* Ogden

In discussing the first factor, the *Ogden* court focused on the actual text of the Ten Commandments monument.[124] The first factor, however, looks to the central purpose of the *program in which the speech is located*, not the purpose of the speech content.[125] As the *Ogden* court noted, the court should look to the *Knights* decision for clarification in applying the four factors.[126] In *Knights*, this factor did not turn on the donor's purpose for its donation, but on the government's purpose for accepting and recognizing the donation.[127] Similarly, the *Ogden* court should have focused on the city's purpose for the acceptance and display of permanent monuments and historical markers on the municipal grounds, not merely the purpose of the text inscribed on one such monument.[128]

Similarly, the Tenth Circuit focused on the text of the Ten Commandments monument in its analysis of the third factor, the identity of the literal speaker.[129] The

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[122] *Id.* at 1006.

[123] *Pleasant Grove II*, 499 F.3d at 1176–77 (McConnell, J., dissenting).

[124] *Ogden*, 297 F.3d at 1004.

[125] Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 633 (2008); *e.g.*, *Wells*, 257 F.3d at 1141 ("the central purpose of the . . . program") (quoting *Knights*, 203 F.3d at 1093); Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 923 (10th Cir. 2002) ("the 'central purpose' of the project"); Ariz. Life Coalition, Inc. v. Stanton, 515 F.3d 956, 964 (9th Cir. 2008) ("the central 'purpose' of the program in which the speech in question occurs") (quoting Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dept. of Motor Vehicles, 288 F.3d 610, 618–19 (4th Cir. 2002)).

[126] *Ogden*, 297 F.3d at 1005 n.5.

[127] *Knights*, 203 F.3d at 1093 (considering the central purpose of the "enhanced underwriting program" and not the donor's desire to promote the Ku Klux Klan). In *Knights*, a state-owned radio station accepted donations and in return, would make announcements using the donors' "logograms, slogan, and product summaries." *Id.* at 1094 n.9. The Ku Klux Klan (KKK) tried to make a donation in order to receive on-air recognition. *Id.* at 1089. The state denied acceptance, and the KKK sued for a free speech violation. *Id.* at 1089–90. While discussing the first factor, the *Knights* court explained the central purpose of the program was "not to promote the views of the donors, but to acknowledge" the donors for their actions. *Id.* at 1093.

[128] Brief of Amicus Curiae International Municipal Lawyers Ass'n in Support of Petitioners at 19, Pleasant Grove City, Utah v. Summum (*Pleasant Grove III*), 128 S. Ct. 1737 (2008) (No. 07-7665), 2008 WL 2550618 [hereinafter Int'l Brief] ("[T]he essential question is not what the donors of a monument had in mind, but rather, what was the *city*'s purpose in agreeing to display the monument."); *see Knights*, 203 F.3d at 1093 (analyzing the overall purpose of the aggregate decisions to accept or reject funds). In *Wells*, only one display existed; therefore, the court did not need to distinguish between the actual speech and the program in which the speech was located. *See Wells*, 257 F.3d at 1141–42.

[129] *Ogden*, 297 F.3d at 1004.

Eagles did speak by selecting the text and look of the monument they donated.[130] However, the government was the literal speaker in question, as it selected and displayed several monuments on the municipal grounds; the Ten Commandments merely constituted a portion of that overall speech.[131] The United States Supreme Court has, on multiple occasions, recognized that a compilation of speech of third parties qualifies, in itself, as a form of speech.[132] The display of monuments on the municipal grounds in question constitutes such a compilation, which makes the Ogden city government the literal speaker.[133] The *Ogden* court's misapplication of two *Wells* factors resulted in a holding that the Ten Commandments monument constituted private speech.[134]

Applying the Four Factors to Pleasant Grove

The *Pleasant Grove I* court relied on the *Ogden* court's misapplication of the factors instead of applying the *Wells* test itself.[135] As such, the United States Court of Appeals for the Tenth Circuit should have conducted a proper application of the *Wells* factors to the facts of *Pleasant Grove I*.[136]

The first *Wells* factor that should have been applied is the central purpose of the program in which the questioned speech occurs.[137] Pleasant Grove maintained Pioneer Park and its displays with the goal of promoting the city's pioneer heritage.[138] The city carried out its purpose by accepting only permanent monuments

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[130] *Id.*

[131] *See Knights*, 203 F.3d at 1093–94 (recognizing the government was the literal speaker by selecting which donations it would accept and deny); Corbin, *supra* note 125, at 633 ("Here, the government acts less like an author or host and more like an editor or moderator exercising control over the agenda.").

[132] *E.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998) ("Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts.") (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 570 (1995) ("[A] speaker does not forfeit constitutional protection simply by combining multifarious voices . . . or by failing to generate, as an original matter, each item featured in the communication.")).

[133] Corbin, *supra* note 125, at 629–30 ("In such cases, the literal speaker might be considered the one who owns the sign or the property on which the message is displayed.").

[134] Int'l Brief, *supra* note 128, at 19; *see Ogden*, 297 F.3d at 1004–05.

[135] *See Pleasant Grove II*, 499 F.3d at 1176–77 (McConnell, J., dissenting) (advocating overruling of *Ogden* and reapplying the four-factor *Wells* test).

[136] *See id.*; Brief of the Foundation for Free Expression as Amicus Curiae Supporting Petitioner at 11, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-7665), 2008 WL 2511783 [hereinafter Found. Brief] ("When applied correctly to *Pleasant Grove*, the presence of government speech is evident.").

[137] *Wells*, 257 F.3d at 1141.

[138] Brief of Appellee at 3, *Pleasant Grove I*, 483 F.3d 1044 (No. 06-4057), 2006 U.S. 10th Cir. Briefs LEXIS 524.

directly relating to the history of Pleasant Grove or donated by groups with long-standing ties to the community.[139] These requirements advance the city's central purpose for maintaining Pioneer Park, the promotion of its history.[140] This factor weighs in favor of governmental speech.[141]

The second factor of the *Wells* test is the amount of editorial control over the content of the speech.[142] Little question exists as to the result of this factor; Pleasant Grove asserted no control over the content of the Ten Commandments monument.[143] This factor weighs in favor of the speech being private.[144]

The third *Wells* factor focuses on the identity of the literal speaker.[145] Here, Pleasant Grove is the literal speaker, as it selected and displayed the historical monuments and artifacts at Pioneer Park.[146] Each monument and artifact indeed had its own message, but the government became the literal speaker when it selected and combined them all into the single collection promoting its history.[147]

In the final factor, the court should have assessed who bore ultimate responsibility for the content of the speech.[148] Little doubt exists that Pleasant Grove held responsibility; once the Eagles turned the Ten Commandments

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[139] *Pleasant Grove I*, 483 F.3d at 1047.

[140] Int'l Brief, *supra* note 128, at 19; *see* Van Orden v. Perry, 545 U.S. 677, 681, 691 (2005) (recognizing Texas' legitimate purpose of promoting "its political and legal history" by displaying Ten Commandments among other monuments and markers celebrating the "people, ideals, and events that compose Texan identity").

[141] Int'l Brief, *supra* note 128, at 19.

[142] *Wells*, 257 F.3d at 1141. The factors of the *Wells* test that focus on content of the speech could focus instead on the content of one of Pleasant Grove's other privately-donated monuments, e.g., the September Eleven firefighters, but the facts surrounding the Ten Commandments monument are more developed in the record. *See Pleasant Grove I*, 483 F.3d at 1047–48.

[143] *Pleasant Grove II*, 499 F.3d at 1180 (Tacha, C.J., responding to dissents); *Ogden*, 297 F.3d at 1004. *But see* Found. Brief, *supra* note 136, at 11 (arguing Pleasant Grove exercises editorial control over the content by choosing whether to accept or reject items based on their content).

[144] *See Ogden*, 297 F.3d at 1004–05. *But see* Found. Brief, *supra* note 136, at 11 (arguing this factor weighs in favor of government speech).

[145] *Wells*, 257 F.3d at 1141.

[146] Int'l Brief, *supra* note 128, at 12; *see Knights*, 203 F.3d at 1094 n.9 (recognizing announcements primarily indentified the individual sponsors, but noting the selection and dissemination of the collateral speech makes the government the literal speaker).

[147] Found. Brief, *supra* note 136, at 12 ("The amalgamation of monuments, while containing private expression, is a collective 'whole.' The city is not parroting the words engraved on individual monuments, but through the completed exhibit says: 'This is our pioneer-era history.'").

[148] *Wells*, 257 F.3d at 1142.

monument over to the city, all property rights transferred with it.[149] At that point, the city could have done whatever it wanted with the monument.[150]

Therefore, a close analysis of the *Wells* test demonstrates at least three of the four factors weigh in favor of governmental speech.[151] If the panel had conducted this analysis, it would have concluded the Ten Commandments monument constitutes governmental speech.[152] Doing so would have negated the panel's need for the forum analysis, as the First Amendment allows government entities to speak, including or excluding any speech it sees fit, subject to other constitutional provisions.[153]

Free Speech Forum Analysis

Because the Tenth Circuit did conclude the privately-donated monuments on display at Pioneer Park constitute the private speech of its donors, it then engaged in a forum analysis to determine the degree to which the government could deny public access.[154] In conducting the forum analysis, the courts consider both the government property at issue and the type of access sought.[155] In determining the relevant forum, the Tenth Circuit correctly indentified the "permanent monuments in the city park" as the relevant forum.[156]

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[149] *Pleasant Grove II*, 499 F.3d at 1177 (McConnell, J., dissenting).

[150] *Id.*; *see Ogden*, 297 F.3d at 1005 ("After the City acquired title to the Monument, however, presumably the City could have sold, re-gifted, modified, or even destroyed the Monument at will.").

[151] *See supra* notes 137–50 and accompanying text; *cf.* Found. Brief, *supra* note 136, at 4–15 (arguing all four factors weigh in favor of governmental speech). *But see* Corbin, *supra* note 125, at 628 (arguing the United States Supreme Court should create a third category, "mixed speech," which exists when not all factors point exclusively to government or private speech).

[152] *Pleasant Grove II*, 499 F.3d at 1176–77 (McConnell, J., dissenting); Tebbe, *supra* note 25, at 1334 ("And Judge McConnell, dissenting from the denial of rehearing en banc, argued powerfully that the existing displays constituted government speech, from which the city could excluded [sic] Summum.").

[153] *Pleasant Grove II*, 499 F.3d at 1177 (McConnell, J., dissenting) (citing Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000) ("Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.")); *see infra* notes 194–95 and accompanying text (discussing restrictions on government speech).

[154] *Pleasant Grove I*, 483 F.3d at 1050.

[155] *Id.* The type of access refers to the type of speech an individual wishes to communicate on the property, e.g., leaflet, concert, or permanent monument. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 801 (1985). The general public's access to view or hear the speech is not relevant to this analysis. *See id.*

[156] *Pleasant Grove II*, 499 F.3d at 1172 (Lucero, J., dissenting) ("Because the government property involved in [*Pleasant Grove I*] consists of the city park[], and the access sought is the installation of permanent monuments, the panel correctly concluded that the relevant forum consists of permanent monuments in the city park[].").

Once a court indentifies the relevant forum, it then determines into which of the three *Perry* categories it falls.[157] At this crucial point in the analysis, the court took a misstep.[158] After identifying the forum as the "permanent monuments in the city park," the court prescribed the entire city park as the forum to be classified.[159]

The Tenth Circuit asserted it could identify the narrower forum in step one (permanent monuments in the city park) and classify the broader forum in step two (the entire city park).[160] However, the forum identified in the first step *is the same forum* to be classified in the second step of the analysis.[161] Identifying the forum in step one of the analysis and classifying a broader forum in step two leads to an illogical conclusion; i.e., the public has a right to erect permanent monuments in all public parks.[162]

The court, then, should have categorized the "permanent monuments in the city park."[163] Traditional public fora consist of places which have forever been used by the public for speech, discussion, and assembly.[164] The public has used

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[157] *Pleasant Grove I*, 483 F.3d at 1050.

[158] *Pleasant Grove II*, 499 F.3d at 1172 (Lucero, J., dissenting).

[159] *Id.* By re-characterizing the forum as the entire city park in the second step, the Tenth Circuit easily classified it as a traditional public forum, as the United States Supreme Court has characterized public streets and parks as quintessential public fora. *Id.*; *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[160] *Pleasant Grove I*, 483 F.3d at 1051 ("[T]he fact that Summum seeks access to particular means of communication (i.e., the display of a monument) is relevant in defining the forum, but it does not determine the *nature* of that forum.") (citing *Cornelius*, 473 U.S. at 802 ("Having identified the forum . . . we must decide whether it is nonpublic or public in nature.")).

[161] *See, e.g.*, *Cornelius*, 473 U.S. at 801, 805 (identifying the forum as "CFC [a charity drive] and its attendant literature" and classifying it instead of the federal workplace in which the charity drive was held); *Perry*, 460 U.S. at 46–47 (identifying the forum as "internal mail system" and classifying it instead of the public school in which the mail system was located); *Ogden*, 297 F.3d at 1002 (identifying the forum as "permanent monuments on the lawn of the Ogden City municipal building" and classifying it instead of the municipal grounds on which the monuments stood).

[162] *Pleasant Grove II*, 499 F.3d at 1172 (Lucero, J., dissenting) ("In [*Perry*], a case which the panel cites, the [United States] Supreme Court first narrowed the forum to the mail delivery system within a school, and only then did it consider the nature of this forum; it did not simply conclude that schools in general are public fora."); *Cornelius*, 473 U.S. at 801 ("[F]orum analysis is not completed merely by identifying the government property at issue."); *see* Graff v. City of Chi., 9 F.3d 1309, 1314 (7th Cir. 1993) ("[N]o person has a constitutional right to erect or maintain a structure on the public way. . . . 'If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures.'") (quoting Lubavitch Chabad House, Inc. v. Chi., 917 F.2d 341, 347 (7th Cir. 1990)).

[163] *Pleasant Grove II*, 499 F.3d at 1173 (Lucero, J., dissenting).

[164] *Perry*, 460 U.S. at 45.

parks as such for longer than can be remembered—but for speech, concerts, and protests—not for erecting permanent monuments.[165] The monuments in the park, therefore, do not constitute a traditional public forum.[166]

Because parks do not constitute traditional public fora for the display of permanent monuments, the court should have determined if Pioneer Park represents a designated public forum or a nonpublic forum for the display of permanent monuments.[167] Public property remains a nonpublic forum if the government does not allow free speech access on the property.[168] A nonpublic forum will become a designated public forum when the government intentionally opens a nonpublic forum for public speech.[169]

A complication arises, however, when the government allows some, but not all, speech on a piece of public property.[170] How the government opens the forum determines which of the two forum types it maintains.[171] When the government makes the forum generally available to the public, it creates a designated forum.[172] If, however, the government only allows selective access for some individuals, as opposed to general access for the public, the forum remains nonpublic (characterized as a limited public forum).[173]

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[165] *Lubavitch Chabad*, 917 F.2d 341, 347 (7th Cir. 1990) ("Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will."); Tucker v. City of Fairfield, Ohio, 398 F.3d 457, 462 (6th Cir. 2005) ("Courts have generally refused to protect on First Amendment grounds the placement of objects on public property where the objects are permanent or otherwise not easily moved."); *Pleasant Grove II*, 499 F.3d at 1173 (Lucero, J., dissenting) ("In short, a park is a traditional public forum when access is sought to it for temporary speech and assembly, such as protests or concerts, but it hardly follows that parks have been held open since time immemorial for the installation of statues . . . .").

[166] *Pleasant Grove II*, 499 F.3d at 1175 (McConnell, J., dissenting) ("[N]either the logic nor the language of these [United States] Supreme Court decisions suggests that city parks must be open to the erection of fixed and permanent monuments expressing the sentiments of private parties.").

[167] *Id.* at 1173 (Lucero, J., dissenting).

[168] *Cornelius*, 473 U.S. at 802.

[169] *Id.*

[170] *Forbes*, 523 U.S. at 679.

[171] *Id.*

[172] *Perry*, 460 U.S. at 45; *e.g.*, Eagon v. City of Elk City, 72 F.3d 1480 (10th Cir. 1996) (granting plaintiff access for temporary display in park open to the public for such displays during "Christmas in the Park" event).

[173] *Forbes*, 523 U.S. at 679; *see supra* notes 69–73 and accompanying text (explaining that selective access creates a limited public forum, a subset of nonpublic fora).

Pleasant Grove did not grant access to the general public to its park for erection of permanent monuments.[174] Instead, Pleasant Grove had a system in place that permitted certain individuals meeting certain specifications to propose privately-donated displays.[175] Pleasant Grove required all permanent displays in Pioneer Park pertain to the community's history or be donated by groups with long-standing community ties.[176] If a proposal met those specifications and the city council determined that such an addition would be agreeable to the city, then the individual could donate, and the city would accept, the permanent monument.[177] Furthermore, the city has only accepted a handful of these privately-donated monuments in sixty years, which illustrates selective access.[178]

Therefore, if the court must conduct a forum analysis, the City of Pleasant Grove opened Pioneer Park for selective access to individual speakers, which created a limited public forum.[179] As the United States Supreme Court has treated limited public fora as nonpublic, the court should have then determined whether it considered the exclusions reasonable and viewpoint-neutral.[180] In denying Summum's motion for a preliminary injunction, the district court applied this test and decided Pleasant Grove's policy met the standard.[181]

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[174] *Pleasant Grove II*, 499 F.3d at 1174 (Lucero, J., dissenting).

[175] *Pleasant Grove I*, 483 F.3d at 1047.

[176] *Id.*

[177] *Id.*; *see Perry*, 460 U.S. at 47 (concluding when principals grant limited access to school mailboxes by their own discretion, the nonpublic forum is not transformed into a designated public forum).

[178] *Pleasant Grove II*, 499 F.3d at 1174 (Lucero, J., dissenting); Brief for the United States as Amicus Curiae Supporting Petitioners at 3, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-665), 2008 WL 2521267 [hereinafter U.S. Brief] (recognizing the city only accepted eleven privately-donated displays during the park's sixty-year existence).

[179] *See supra* notes 114–53 and accompanying text (arguing the speech in question constitutes government speech, which removes the need for a forum analysis); *Pleasant Grove II*, 499 F.3d at 1174 (Lucero, J., dissenting) (recognizing Pleasant Grove opened the park for selective access, creating a limited public forum). *But see* Dolan, *supra* note 73, at 111–18 (arguing limited public fora where government has a subjective expressive purpose and makes selective choices should instead be classified as "special public purpose" fora and should be treated as government speech).

[180] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001); *see supra* notes 69–73 and accompanying text (demonstrating courts treat limited public fora as nonpublic fora).

[181] *Pleasant Grove I*, 483 F.3d at 1050. However, Judge Lucero recognized the trial court may have erred in this regard and urged for arguments on this issue. *Pleasant Grove II*, 499 F.3d at 1174 (Lucero, J., dissenting).

Implications of the United States Court of Appeals for Tenth Circuit Decision

The Tenth Circuit's decision focused on the Ten Commandments displayed in Pleasant Grove, Utah.[182] The result of this decision, however, put governments at all levels in a difficult position.[183] By classifying monuments in a city park as a traditional public forum, the Tenth Circuit gave governments two choices: (1) allow permanent monuments inside the park (including any created by the government and any and all created by individuals), or (2) allow no monuments of any kind.[184]

For example, the Tenth Circuit's holding in *Pleasant Grove I* forced the City of Casper, Wyoming into this troubling dichotomy.[185] The city government owns a city park, the Historical Monument Plaza, which houses several monuments and plaques, some privately-funded, recognizing the history of the city, state, and nation.[186] Fred Phelps, the Kansas pastor of the Westboro Baptist Church, began pressuring the city to erect a monument in the park condemning Matthew Shepard, a Casper native killed in 1998.[187] Under the Tenth Circuit's holding, Casper will have to remove all monuments from the park (which would destroy the park's purpose) or allow Pastor Phelps (and any other person who so wishes) to place his monument on the property.[188]

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[182] *Pleasant Grove II*, 499 F.3d at 1175 (McConnell, J., dissenting).

[183] *Id.* at 1174 (Lucero, J., dissenting).

[184] *Id.* at 1175 (McConnell, J., dissenting). It should be noted, however, that the second option only remains available if a court considers the exclusion of all monuments narrowly tailored to serve a compelling government interest. *Perry*, 460 U.S. at 45; *see* Lopez, *supra* note 79, at 219–20 (arguing a blanket ban on permanent monuments would constitute a justifiable time, place, and manner restriction that is narrowly drawn to satisfy a compelling state interest).

[185] Brief Amicus Curiae of the Cities of Casper, Wyoming et al. in Support of the Petition at 1, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-665), 2007 WL 4618401 [hereinafter Casper Brief].

[186] *Id.*

[187] *Id.* at 2–3. In 1998, two men met Matthew Shepard, a gay University of Wyoming student, and lured him from a bar, tied him to a split-rail fence, bludgeoned him in the head with a pistol, and left him to die in the Wyoming cold. CNN – Suspect Pleads Guilty in Beating Death of Gay College Student (Apr. 5, 1999), http://www.cnn.com/US/ 9904/05/gay.attack.trail.02/ (last visited Nov. 17, 2008) [hereinafter CNN]; Matthew Shepard Foundation: Matthew's Life, http://www.matthewshepard.org/site/PageServer?pagename=mat_Matthews_Life (last visited Nov. 17, 2008) [hereinafter Foundation]. Matthew Shepard was born in Casper, Wyoming, where his family held his funeral. Foundation. Pastor Fred Phelps began his involvement with Matthew Shepard and the City of Casper when he organized an anti-gay protest outside Shepard's funeral. CNN.

[188] Casper Brief, *supra* note 185, at 13.

Pleasant Grove and Casper represent just the beginning.[189] The Tenth Circuit's decision would effectively impact all governmental entities—from small towns to the federal government.[190] Allow one monument, allow them all.[191]

Implications of the United States Supreme Court Decision

After hearing arguments on appeal in *Pleasant Grove III*, the United States Supreme Court should reverse the United States Court of Appeals for the Tenth Circuit.[192] The Court should conclude that selection and denial of privately-donated monuments amounts to an act of government speech.[193] This would allow governments to make aesthetic and content-based decisions when beautifying their properties.[194] Individual citizens could challenge choices the government makes via the democratic process or through other constitutional provisions.[195]

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[189] *Id.* The City of Santa Fé faces a broader type of harm than Casper:

> La Villa Real de la Santa Fé de San Francisco de Asis (Santa Fé) was founded in 1610 and is world-renowned for its long history and its eponymous trail, railroad, and architectural style. Santa Fé celebrates these glories with permanent monuments and sculptures in its parks. Many of the monuments and works of art were donated by private parties, accepted by the City, and proudly displayed in its public spaces for the reason just described. The decision below, if allowed to stand, will force the City to choose between denuding its public spaces of artwork reflecting its history and culture or allowing those public spaces to be inundated with hundreds of permanent displays furthering private expression.

Id. at 4.

[190] *Id.* at 1; Brief of the Commonwealth of Virginia et al. as Amici Curiae in Support of the Petitioners at 1, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-665), 2008 WL 2550616 [hereinafter Va. Brief] (arguing for fourteen states and Puerto Rico that the United States Supreme Court reverse the lower decision and allow state governments to control their properties); U.S. Brief, *supra* note 178, at 1–2 ("National parklands contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, a great deal of the public sculpture in Washington, D.C., and all but one of the 1324 monuments, markers, tablets, and plaques on display at Vicksburg National Military Park.").

[191] *Pleasant Grove II*, 499 F.3d at 1175 (McConnell, J., dissenting) ("Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter."); Lorenz, *supra* note 4, at 650.

[192] Va. Brief, *supra* note 190, at 1; U.S. Brief, *supra* note 178, at 10.

[193] Va. Brief, *supra* note 190, at 4. Regardless of the conclusion of this decision, an acceptance, clarification, or rejection of the four-factor test as applied by several circuits will provide guidance to courts and practitioners alike. *See Ariz. Life*, 515 F.3d at 965, *cert. denied*, No. 07-1366, 2008 WL 1926739 (Oct. 6, 2008) (looking for guidance from the United States Supreme Court on the four-factor test).

[194] U.S. Brief, *supra* note 178, at 11 ("[A government] 'may legitimately' seek 'to communicate to others an official view as to proper appreciation of history, state ride, and individualism.'") (quoting Wooley v. Maynard, 430 U.S. 705, 717 (1977)); Brief of Amici Curiae American Humanist Ass'n et al. in Support of Neither Party at 7, *Pleasant Grove III*, 128 S. Ct. 1737 (No. 07-665), 2008 WL 2511782.

[195] U.S. Brief, *supra* note 178, at 12 ("'If the citizenry objects' to what its government chooses to say, 'newly elected officials later could espouse some different or contrary position.'") (quoting

If the Court holds otherwise, it should classify a public park as a nonpublic forum for the display of permanent monuments, or, if the government allows selective access, a limited public forum.[196] This holding would allow governments at all levels to make content-based decisions, but still force them to follow a standard of reasonableness and viewpoint neutrality.[197] Cities like Pleasant Grove and Casper could set standards for private displays, e.g., requiring a historical significance.[198] Government officials would still be prohibited from making arbitrary decisions, and individuals could still challenge exclusions in the court system.[199]

CONCLUSION

In deciding *Summum v. Pleasant Grove City*, the Tenth Circuit sitting in panel made two crucial errors.[200] First, it relied on a previous Tenth Circuit decision which incorrectly applied the *Wells* four-factor test to determine the display in question constitutes private, rather than government speech.[201] After doing so, the panel conducted a forum analysis, in which it incorrectly classified monuments in a park as a traditional public forum instead of a nonpublic forum, subjecting the city's actions to stricter scrutiny than necessary.[202] The court should have characterized Pioneer Park as a limited public forum and applied the lesser standard of reasonableness and viewpoint neutrality to Pleasant Grove's exclusion of Summum's proposed monument.[203] Instead, the court held all public parks

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Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000)). Moreover, Professor Norton explained numerous other protections the United States affords citizens when dealing with governmental speech:

> [Government speech] may still, for example, contravene the Constitution's Establishment or Equal Protection Clauses if it endorses religion or furthers racial discrimination . . . [and] may in some settings violate constitutional constraints like the Guarantee Clause or statutory limitations like state and federal laws prohibiting the use of government resources for campaign speech.

Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 600 (2008) (footnotes omitted).

[196] Lorenz, *supra* note 4, at 649.

[197] *Callaghan*, 130 F.3d at 916.

[198] *Pleasant Grove II*, 499 F.3d at 1174 (Lucero, J., dissenting).

[199] *Id.*

[200] *See supra* notes 114–99 and accompanying text.

[201] *See supra* notes 114–53 and accompanying text.

[202] *See supra* notes 154–73 and accompanying text.

[203] *See supra* notes 174–81 and accompanying text.

open for cluttering by any and all individuals wishing to add their own permanent monuments.[204] The United States Supreme Court, therefore, should reverse the Tenth Circuit and allow governments to reasonably control the look of their public properties.[205]

[204] *See supra* notes 182–91 and accompanying text.

[205] *See supra* notes 192–99 and accompanying text.

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