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Limiting Tourism to Sustainable Levels: Options for Hawai'i

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Cover Page Footnote

I thank Lance Collins, Meagan DeGaia, Patricia Gotschalk, and Genesis Young for their valuable comments on a previous draft of the paper.

Barry D. Solomon*

LIMITING TOURISM TO SUSTAINABLE LEVELS: OPTIONS FOR HAWAI‘I

ABSTRACT

Many popular tourist destinations across the world are experiencing overtourism, which can cause a variety of negative environmental and socio-cultural impacts. As a result, an increasing number of governments are searching for solutions to overtourism. In the United States, Hawai‘i needs such solutions. Until recently, many legal scholars and other observers believed that restricting tourism may be unconstitutional. However, a careful examination of the United States Supreme Court’s decisions on the Dormant Commerce Clause and the interstate right to travel show that certain restrictions on tourism may be constitutionally permissible. Indeed, recent federal court rulings support state action designed to limit tourism in the interest of sustainability, although sustainability is often a vague concept. Hawai‘i’s public trust doctrine, which is embedded in the state constitution, establishes that natural and native Hawaiian cultural resources should be conserved and protected for public use. This article presents a variety of policy instruments that could be used individually or in concert to lower tourism levels to conserve and protect the natural and cultural resources and natural beauty that are held in trust by the State of Hawai‘i for the benefit of its people.

INTRODUCTION

Tourists often prioritize visiting certain destinations based on their beauty, historical significance, and cultural or natural values. Inevitably, some locales attract more tourists than others. Over time, certain tourist destinations—such as Hawai‘i, Cancun, the Las Vegas Strip, the Great Pyramid of Giza, Rome’s Colosseum, Barcelona, Venice, and the Galápagos Islands—have become so popular that large crowds are the norm.¹ An excessive number of tourists visiting particular locations can cause undesirable socioeconomic and environmental effects. These effects include overcrowding, long wait times, inadequate parking, and decreased quality of

* Professor Emeritus of Geography and Environmental Policy, Michigan Technological University. I thank Lance Collins, Meagan DeGaia, Patricia Gotschalk, and Genesis Young for their valuable comments on a previous draft of the paper.

1. Zoe Williams, *Wish You Weren’t Here! How Tourists are Ruining the World’s Greatest Destinations*, THE GUARDIAN (Aug. 17, 2023), <https://www.theguardian.com/travel/2023/aug/17/wish-you-werent-here-how-tourists-are-ruining-the-worlds-greatest-destinations>.

visitor experience from the tourist's perspective; noise, traffic congestion, decreased safety, water shortages, pollution, and declining quality of life from the local's perspective; and stress on wildlife and ecosystems from an environmental perspective.² While the term 'overtourism' was not used frequently until 2015,³ it has been a phenomenon in some areas since at least the 1840s.⁴ Overtourism has been increasingly recognized as a global problem in recent years—both before the COVID-19 pandemic and after the pandemic-era travel restrictions were lifted.⁵

Governments across the world have implemented a variety of mitigation measures in response to overtourism.⁶ The Galápagos National Park Directorate has restricted visitors to specific sites where they must adhere to fourteen rules, including being accompanied by a licensed guide.⁷ Peru imposed restrictions on tourists at Machu Picchu, including limiting them to two timed entries per day with an approved guide, and restricting them to specific trails through the ruins.⁸ Nepal has increased the fee for foreign climbers of Mount Everest to \$11,000.⁹ Venice has implemented a sitting ban on the Rialto Bridge and at several major churches, asked tourists to not linger on the bridges too long, and added a levy on day trippers from 3–10 € starting in Spring 2024.¹⁰ Amsterdam has limited Airbnb rentals, stopped beer biking, banned large coach buses, increased its day tripper fee to 14 € per person, and uses mobile

2. Natasha Bourlin, 'Your Vacation is My Home': Hawaii's Residents are Speaking Out Against Tourists Behaving Badly, SFGATE (April 2, 2021), <https://www.sfgate.com/newsletters/hawaii/article/Your-vacation-is-my-home-Hawaii-s-residents-16073121.php>; Julia Buckley, *Tourists in Italy are Behaving Badly This Year: Here's Why*, CNN TRAVEL (July 1, 2023, 2:32 AM), <https://www.cnn.com/travel/article/italy-tourists-bad-behavior/index.html>; Dalia Perkumienė & Rasa Pranskūnienė, *Overtourism: Between the Right to Travel and Resident's Rights*, 11 SUSTAINABILITY 1, 11 (2019).

3. Ko Koens et al., *Is Overtourism Overused? Understanding the Impact of Tourism in a City Context*, 10 SUSTAINABILITY 1, 4–9 (2018).

4. Alex Ledsom, *Overtourism and Digital Nomads – Are Tourist Quotas the Answer?*, FORBES (Sept. 22, 2022, 3:07 PM), <https://www.forbes.com/sites/alexledsom/2022/09/22/overtourism-and-digital-nomads-are-tourist-quotas-the-answer/?sh=3dd3c7c7e776>.

5. *Id.*; Jonathan Tourtellot, *Overtourism: Too Much of a Good Thing*, NAT'L GEOGRAPHIC (Dec. 21, 2018), <https://www.nationalgeographic.com/travel/article/overtourism-how-to-make-global-tourism-sustainable>; Stephen Starr, *Overtourism is Stressing Our National Parks: Here's How Visitors Can Help*, NAT'L GEOGRAPHIC (Oct. 4, 2019), <https://www.nationalgeographic.com/travel/article/avoid-over-tourism-indiana-dunes-gateway-arch>; Rachel Dodds & Richard Butler, *The Phenomena of Overtourism: A Review*, 5 INT'L J. TOURISM CITIES 519, 519–28 (2019); Richard Butler & Rachel Dodds, *Overcoming Overtourism: A Review of Failure*, 77 TOURISM REV. 35, 35–53 (2022); Michael Duignan et al., *Events as Catalysts for Communal Resistance to Overtourism*, 96 ANNALS OF TOURISM RSCH. 1, 3 (2022); Ledsom, *supra* note 4; Cecilia Rodriguez, *Summer in Europe? Anti-Tourists and Over-Touristed Destinations Unveiled by Experts*, FORBES (May 28, 2023, 8:00 AM), <https://www.forbes.com/sites/ceciliarodriguez/2023/05/28/summer-in-europe-anti-tourists-and-over-touristed-destinations-unveiled-by-experts/?sh=3fbaef777215>.

6. CNT Editors, *15 Beloved Places Struggling with Overtourism*, CONDÉ NAST TRAVELER (Oct. 24, 2018), <https://www.cntraveler.com/galleries/2015-06-19/barcelona-bhutan-places-that-limit-tourist-numbers>; Cheryl Rosen, *New Laws and Fees Aim to Avert Overtourism – Or at Least Make it Pay*, TRAVEL RSCH. ONLINE (July 29, 2022), <https://www.travelresearchonline.com/blog/index.php/2022/07/new-laws-and-fees-aim-to-avoid-overtourism-or-at-least-make-it-pay/>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*; Jonas Martiny, *Italy's Battle Against Mass Tourism*, DW (Aug. 9, 2023), <https://www.dw.com/en/italy-tourism-bans-controls-fees-restrictions/a-66453047>.

apps and live streams to encourage tourists to visit less busy areas.¹¹ Barcelona has banned large coach buses and limited the number of beds in hotels and tourist apartments.¹² Dubrovnik has limited the number of cruise ships.¹³ Tourists visiting Bali now receive ‘dos and don’ts’ cards from the Provincial Government upon arrival at the airport, and a tax of \$10 is levied on foreign visitors.¹⁴

In contrast, few measures or policies have been implemented in the United States to control overtourism despite rising concerns.¹⁵ The lack of tourism control measures in the United States is most likely due to the economic benefits tourism provides.¹⁶ Much of the focus of overtourism in the U.S. has been on national parks.¹⁷ Several parks have overwhelming numbers of visitors during key holidays, and many parks have become increasingly popular since the removal of COVID-19 travel restrictions.¹⁸

The National Parks and Recreation Act of 1978 required U.S. national parks to adopt carrying capacity limits for all areas of each park unit and general management plans for individual parks.^{19,20} Unfortunately, the vast majority of parks did not do so.²¹ An important factor is that many of the most popular parks are underfunded and have been struggling to address overcrowding.²² Yosemite National Park in California—one of the most visited and congested parks—went so far as completely banning cars in Yosemite Valley from 1907-1914.²³ The National Park

11. CNT Editors, *supra* note 6; Cynthia Barnes, *7 Places That Will Charge a Tourist Fee to Visit in 2024*, DAILY PASSPORT (Jan. 2024), <https://dailypassport.com/places-that-charge-tourist-fee-to-visit/>.

12. *Id.*

13. *Id.*

14. Bill Birtles, *Bali Tourists to Receive ‘Dos and Don’ts’ Card on Arrival as Part of Crackdown on Unruly Behaviour*, ABC NEWS (AU) (May 30, 2023), <https://www.msn.com/en-au/travel/news/bali-tourists-to-receive-dos-and-donts-card-on-arrival-as-part-of-crackdown-on-unruly-behaviour/ar-AA1bVllz>; *Tourist Quotas: These Hotspots Around the World are Limiting Visitor Numbers*, TRAVEL + LEISURE (Sept. 25, 2023), <https://www.travelandleisureasia.com/global/news/tourist-quotas-the-destinations-limiting-visitor-numbers/>.

15. See, e.g., Butler & Dodds, *Overcoming Overtourism: A Review of Failure*, *supra* note 5.

16. *Id.* at 38, 39.

17. Dennis Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENV’T L.J. 3, 3 (1992); Robert Manning, *What to do About Crowding and Solitude in Parks and Wilderness? A Reply to Stewart & Cole*, 35 J. LEISURE RSCH. 107, 107–18 (2003).

18. Michael Coren & Dan Kopf, *Once Again, a Pandemic has Stoked Americans’ Love for National Parks*, QUARTZ (Sept. 29, 2020), <https://qz.com/1908674/covid-19-has-americans-visiting-national-parks-in-record-numbers>.

19. 16 U.S.C. § 1(a)–7(b) (repealed 2014). Certain sections of Title 16 were repealed and recodified at Title 54 in 2014.

20. Robert Manning, *Visitor Experience and Resource Protection: A Framework for Managing the Carrying Capacity of National Parks*, 19 J. PARK RECREATION ADMIN. 93, 95–98 (2001).

21. Abby Timmons, *Too Much of a Good Thing: Overcrowding at America’s National Parks*, 94 NOTRE DAME L. REV. 985, 986–87 (2019).

22. *Id.*; Richard Ansson, Jr., *Our National Parks – Overcrowded, Underfunded, and Besieged with a Myriad of Vexing Problems: How Can We Best Fund Out Imperiled National Park System?*, 14 FLA. STATE UNIV. J. LAND USE ENV’T L. 1, 7–23 (1998).

23. Shane Reiner-Roth, *How a Car Ban in Yosemite Park Ushered the Car-Friendly National Parks of Today*, AUTOMOBILE CLUB OF S. CAL. (July 20, 2022), <https://www.pbssocal.org/food-discovery/how-a-car-ban-in-yosemite-park-ushered-the-car-friendly-national-parks-of-today>.

Service promised a quieter and more peaceful Yosemite in its 1980 master plan and considered banning cars again, but ultimately failed to do so when the plan was rejected in 1989²⁴ and 1998.²⁵ However, Yosemite requires wilderness permits for backpacking, overnight climbing, and any other overnight stay. Yosemite has also required permits to climb Half Dome since 2010, where the number of daily permits issued was dramatically reduced.²⁶ In 2000, Zion National Park in Utah became the first national park to completely restrict vehicular travel within its park boundaries when it implemented a free shuttle bus system into Zion Canyon, since 99.9% of visitors go to a six mile corridor there.²⁷ Even so, only four of the 63 national parks have identified and implemented carrying capacity limits, and none of these limits regulate the entire park.²⁸ Some parks have low visitation, either due to their lack of automobile access, such as Michigan's Isle Royale National Park,²⁹ or due to their extreme remoteness, such as Alaska's Gates of the Arctic National Park.³⁰ To address overcrowding and overtourism at other parks, park officials have identified and in some cases implemented several options.³¹ The remainder of this Article considers the special case of Hawai'i and identifies specific challenges in addressing overtourism there.

The State of Hawai'i transitioned from plantation-style agriculture focused on sugarcane and pineapple production to a tourism-based economy during the

24. Kevin Roderick, *Park Service Backs Off on Banning Cars in Yosemite*, L.A. TIMES (Sept. 2, 1989, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-09-02-mn-1152-story.html>.

25. Eric Brazil, *Plan to Ban Cars in Yosemite Fails*, SFGATE (Aug. 4, 1998), <https://www.sfgate.com/news/article/Plan-to-ban-cars-in-Yosemite-fails-3076175.php#:~:text=1998-08-04%2004%3A00%3A00%20PDT%20CALIFORNIA%20--%20The%20National%20Park,Regional%20Transportation%20Strategies%20%28YARTS%29%20agency%20buried%20it%20Monday.>

26. Christopher Reynolds, *At Half Dome, Yosemite Rangers Make Permits a Daily Requirement*, L.A. TIMES (Dec. 14, 2010, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2010-dec-14-la-trb-yosemite-halfdome-permits-2010-1214-story.html>.

27. See Timmons, *supra* note 21, at 996, 1008–09. Personal cars in Zion are technically banned during the high season only from March through November.

28. *Id.* at 992.

29. Jeffrey Marion & Tracy Farrell, *Management Practices That Concentrate Visitor Activities: Camping Impact Management at Isle Royale National Park, USA*, 66 J. ENV'T MGT. 201, 201–12 (2002).

30. Brian Glaspell et al., *Selecting Indicators and Understanding Their Role in Wilderness Experience Stewardship at Gates of the Arctic National Park and Preserve*, 20 GEORGE WRIGHT FORUM 59, 59–71 (2003).

31. For example, shuttle bus systems could be expanded along with some restrictions on cars. Bus systems are already in place at Yosemite, Glacier, Acadia, Denali, and Grand Canyon National Parks. Boat transportation is available (and needed) to travel to the Channel Islands and Dry Tortugas National Parks. See Katie Jackson, *8 National Parks You Can See Without a Car*, OUTSIDE (Sept. 15, 2022), <https://www.outsideonline.com/adventure-travel/national-parks/national-parks-without-car/>. In addition, free seasonal trolleys are available from January through April in the Everglades and Biscayne National Parks. See Katie Jackson, *Park-N-Ride: 7 National Parks Where You Don't Need a Car*, KOA (Aug. 4, 2022), <https://koa.com/blog/park-n-ride-7-national-parks-where-you-dont-need-a-car/>. Reservation and permitting systems can also be implemented (or expanded beyond those already in place), though these tend to be unpopular with the public. See Timmons, *supra* note 21, at 1010–12. Additional options include targeted advertising campaigns to encourage or discourage the use of specific parks, trails, or facilities, and limiting the use of electronic media within parks. See *id.* at 1012–15.

1960s.³² These changes were especially rapid on the islands of Maui, O‘ahu, Kaua‘i, Hawai‘i, and Lāna‘i.³³ By 2018, tourism grew to over 20% of the state’s economy. In 2019, Hawai‘i had over 10 million tourists, compared to a resident population of only 1.4 million.³⁴ Despite the employment and income benefits of tourism, a backlash has developed in recent years because of the adverse social, cultural, and environmental impacts of tourism in the state, especially on Maui³⁵ and Kaua‘i.³⁶

The state legislature created the Hawai‘i Tourism Authority (HTA) in 1998 to market and manage the growth of the tourism industry. The HTA is funded by hotel room taxes and has led the tourism surge in the state.³⁷ However, the Hawai‘i tourism industry was shut down during the COVID-19 pandemic in 2020 and 2021, during which an increasing number of residents came to believe that the state was too dependent on tourism. This sentiment was reflected in public opinion surveys by the Hawai‘i Department of Business, Economic Development & Tourism, though public sentiment towards tourism turned slightly more positive in 2023.^{38,39} The leading problems identified in the survey were overcrowding,⁴⁰ damage to the environment, higher cost of living, traffic problems, and lack of respect for the local culture and traditions. These concerns have been especially pronounced on Maui and Kaua‘i.⁴¹ In 2023, this dissatisfaction led the state legislature to attempt to eliminate the HTA and replace it with a tourism management agency. While the effort failed,

32. The State of Hawai‘i officially recognizes 137 islands and has five counties—Hawai‘i, Honolulu, Kalawao, Kaua‘i, and Maui—and eight main islands: Hawai‘i, Maui, Kaho‘olawe, Lāna‘i, Moloka‘i, O‘ahu, Kaua‘i, and Ni‘ihau. O‘ahu is by far the most populous island and Hawai‘i, the southernmost island, has by far the largest land area. The Island of Hawai‘i is typically called the Big Island to differentiate it from the State of Hawai‘i.

33. MANSEL BLACKFORD, *FRAGILE PARADISE: THE IMPACT OF TOURISM ON MAUI, 1969-2000* (2001); JAMES MAK, *DEVELOPING A DREAM DESTINATION: TOURISM AND TOURISM POLICY PLANNING IN HAWAII* (2008).

34. Jerome Agrusa et al., *Tourism Well-Being and Transitioning Island Destinations for Sustainable Development*, 14 J. RISK FIN. MGMT. 1, 1 (2021); *2023 State Population Estimates*, DEP’T OF BUS., ECON. DEV., & TOURISM (Dec. 20, 2023), <https://census.hawaii.gov/main/2023-state-pe/#:~:text=On%20July%201%2C%202022%2C%20the,by%2012%20people%20a%20day>.

35. Maui County consists of four islands: Maui, Lāna‘i, Moloka‘i and Kaho‘olawe (where access is restricted due to unexploded military ordnances), though 93 percent of its people live on the island of Maui; *2023 State Population Estimates*, *supra* note 34; *Guidelines for Right of Entry Permit Requests*, KAHO‘OLAWA ISLAND RSRV. COMM’N, <http://www.kahoolawe.hawaii.gov/access/Right%20of%20Entry%20Permit%20Request.pdf> (last visited Mar. 30, 2023).

36. Allison Schaefer, *Frustrated Residents Push Back as Hawai‘i Tourism Resurges*, HONOLULU STAR-ADVERTISER (April 11, 2021), <https://www.staradvertiser.com/2021/04/11/hawaii-news/frustrated-residents-push-back-as-hawaii-tourism-resurges/>.

37. MAK, *supra* note 33, at 64, 65.

38. In an annual survey that has been administered to residents since 1999, the most recent findings were that 59 percent of 1,949 respondents in the Fall of 2022 believed that Hawai‘i was too dependent on tourism and should diversify its economy. *Resident Sentiment Survey – Fall 2022*, OMNITRAK (Jan. 2023), https://www.hawaiitourismauthority.org/media/10335/dbedt-resident-sentiment-fall-2022-final-0122623_accessible.pdf.

39. *Resident Sentiment Toward Tourism Recovering After Prolonged Downturn*, HAW. TOURISM AUTH. (Feb. 8, 2023), <https://www.hawaiitourismauthority.org/news/news-releases/2023/resident-sentiment-toward-tourism-recovering-after-prolonged-downturn/>.

40. See Agrusa et al., *supra* note 34.

41. See Schaefer, *supra* note 36.

the HTA has been tasked with focusing on destination management rather than marketing going forward.⁴²

The problem of overtourism in Hawai‘i has been recognized outside of the state as well. For example, Fodor’s Travel took the unusual step of placing Maui on its ‘No List’ of places that tourists may want to avoid in 2023 because of water shortages in residential areas and housing shortages that have especially affected Native Hawaiians.⁴³ Tensions between locals and the tourism industry were reignited in August 2023 in the aftermath of the devastating, tragic, and deadly wildfire that shut down and destroyed much of Lāhainā, one of Maui’s main tourism centers.⁴⁴

This Article reviews the options available for the State of Hawai‘i and its tourism-stressed areas to begin to shift away from tourism by reducing the number of visitors to sustainable levels.⁴⁵ Part I identifies three constitutional issues such restrictions could raise, namely the right to interstate travel, potential state economic protectionism, and the public trust doctrine (both in common law and in the state constitution). Part II discusses why Hawai‘i is a unique case that is worthy of special consideration to implement policies and procedures for sustainable tourism. Part III then reviews a range of policy instruments that can be applied to enact such policies, including a variety of practical challenges and considerations, such as how to determine the carrying capacity for limiting tourist levels, and which government agencies might get involved in implementation.

I. CONSTITUTIONAL ISSUES

As the previous discussion suggested, government leaders in Hawai‘i have been reluctant to restrict tourism. In March 2023, however, the COVID-19 pandemic led former Governor David Ige to stop all tourist arrivals as part of the statewide lockdown in order to protect the health and safety of residents.⁴⁶ While initially the lockdown was only intended to last 30 days, the restrictions were not lifted until November 2021.⁴⁷ The over-reliance on tourism led to extremely adverse economic

42. Stewart Yerton, *The Hawai‘i Tourism Authority Just Won’t Die Despite Some Lawmakers’ Best Efforts*, HONOLULU CIVIL BEAT (May 16, 2023), <https://www.civilbeat.org/2023/05/the-hawaii-tourism-authority-just-wont-die-despite-some-lawmakers-best-efforts/>; see Burhanettin Zengin et al., *Rethinking Overtourism in the Post-COVID-19 Period: Is Demarketing A Solution?*, 10 TOUR. MGT. RSCH. 32, 32 (2023).

43. *Fodor’s No List 2023: Ten Regions to Reconsider in 2023*, FODOR’S TRAVEL (Nov. 2, 2022), <https://www.fodors.com/news/news/fodors-no-list-2023>.

44. Maanvi Singh, *Maui Wildfires Expose Rift Over Island’s Tourism: We’re More Vulnerable Than Anyone Admits*, THE GUARDIAN (Aug. 17, 2023), https://www.theguardian.com/us-news/2023/aug/17/maui-wildfires-expose-rift?CMP=Share_iOSApp_Other.

45. Visitation to another one of the eight main islands, Ni‘ihau, is also restricted. Ni‘ihau however is a small, completely privately-owned island. See Daniel Rennie, *Niihau: Hawaii’s “Forbidden Island” Without Paved Roads, Plumbing, or Police*, ALL THAT’S INTERESTING (Jan. 23, 2019), <https://allthatsinteresting.com/niihau>.

46. Dan Nakaso, *Gov. Ige Calls for Tourism Halt for 30 Days Amid Coronavirus Pandemic*, HONOLULU STAR ADVERTISER (March 18, 2020), <https://www.staradvertiser.com/2020/03/18/hawaii-news/ige-calls-for-tourism-halt-for-30-days/>.

47. Eduardo Medina, *Hawaii is Easing Restrictions and Preparing to Welcome Back Tourists*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/2021/11/03/us/hawaii-covid-restrictions-tourists-ige.html>.

consequences in the State during 2020 and 2021.⁴⁸ This vulnerability led many residents to reconsider the benefits of tourism.⁴⁹ State or local restrictions on tourism—whether for health and safety reasons or for sustainable tourism—raise two important constitutional issues: (1) the freedom to travel between states, and (2) potential state economic protectionism.⁵⁰ A third constitutional issue, which would support sustainable limits on tourism, is the public trust doctrine. These three issues will be discussed in turn.⁵¹

A. The Interstate Right to Travel

A right to travel was mentioned in Article 4 of the Articles of Confederation: “the people of each state shall have free ingress and regress to and from any other state.”⁵² Although no such right to travel is explicitly enumerated in the U.S. Constitution, the Supreme Court has ostensibly found the right to interstate travel in seven different constitutional provisions.⁵³ Thus, it has been up to the Supreme Court in a series of decisions to delineate a right to travel, as well as any exceptions.⁵⁴

The first important ruling came in 1868 in *Crandall v. Nevada*,⁵⁵ though the textual justification for the holding was vague. *Crandall* established that a state cannot prevent people from leaving for another state by taxing them, and thus freedom of movement is a right of national citizenship though it is not absolute. As noted below, some circuit courts have found that this right does not imply a right to use a particular mode of travel. In *Williams v. Fears*, the Supreme Court held that the right to travel is an attribute of personal liberty protected by the Constitution under the 14th Amendment and other provisions.⁵⁶ A 1920 decision by the Court in *U.S. v. Wheeler* held that a fundamental right to travel was covered by the Privileges and Immunities Clause of the 14th Amendment, while simultaneously noting that the

48. Steven Bond-Smith & Peter Fuleky, *The Effect of the Pandemic on the Economy of Hawaii* (The Econ. Rsch. Org. at the Univ. of Haw., Working Paper No. 2022-4, 2022); Yong Yan et al., *Can Tourism Sustain itself Through the Pandemic: Nexus Between Tourism, COVID-19 Cases and Air Quality Spread in the ‘Pineapple State’ Hawaii*, 25 CURR. ISSUES TOUR 421, 421–40 (2022).

49. Lauren Aratani, *Can Hawaii Reset its Stressed Out Tourism Industry After the Pandemic?*, THE GUARDIAN (June 21, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/jun/21/hawaii-tourism-industry-after-covid>.

50. Preventing state economic protectionism is the purpose of the Dormant Commerce Clause. See *infra* Section I.B.

51. Consideration of these three constitutional issues in concert is necessary for a robust defense of potential state restrictions on tourism levels.

52. *Articles of Confederation (1777)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/articles-of-confederation> (last visited Apr. 30, 2024).

53. *Lutz v. City of New York*, 899 F. 2d 255, 259–67 (3d Cir. 1990) (detailing the seven constitutional provisions where the right to travel had previously been found).

54. Exceptions to the right to travel include public health emergencies and national security, among others.

55. See *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

56. *Williams v. Fears*, 179 U.S. 274 (1900). The interstate right to travel is a subcategory of the right to travel more generally, which is similarly not found in the U.S. Constitution. The general right to travel, while fundamental, can be subject to a variety of limitations, such as restrictions or travel bans on travel bans on certain classes of people arriving from overseas, as discussed below.

Constitution did not grant the federal government the power to protect freedom of movement.⁵⁷ In *Kent v. Dulles*, the Court held that the right to travel is a part of the “liberty” of which a citizen cannot be deprived without due process of law under the 5th Amendment.⁵⁸

In the landmark 1999 decision *Saenz v. Roe*, which struck down residency requirements to receive welfare benefits in California, the Court identified three separate but related rights to travel among states:⁵⁹ (1) the right to freely enter one state while leaving another state, (2) the right under the Privileges and Immunities Clause to be treated as a welcome visitor as opposed to an unfriendly alien, and (3) the right for immigrants to be treated as the same as native-born citizens of a state.⁶⁰ The first two of these three rights are most pertinent to tourism.

The right of free travel has been challenged several times. For example, California passed an “anti-Okie” law in 1937 to stop the migration into the state by economic refugees of the Dust Bowl in Oklahoma.⁶¹ In *Edwards v. California*, the Court ruled based on the Commerce Clause that these restrictions were unconstitutional.⁶² Most infamously, beginning in 1947, the U.S. Department of State enforced a series of regulations restricting citizens from traveling because of their political views.⁶³ The denial of passports by the federal government had been a somewhat common occurrence since the end of World War I, but became more common during the Cold War.⁶⁴ Several Court rulings in the 1950s would return the passport practices to pre-Cold War norms.⁶⁵ In *Bauer v. Acheson*, the Court held that procedural due process demanded a “quasi-judicial hearing” in passport revocation cases.⁶⁶ *Shachtman v. Dulles* went further and held that substantive due process was also required in the hearings, that the denial of a passport should not be arbitrary.⁶⁷ *Nathan v. Dulles* involved the application for a passport by economics professor Otto Nathan. His passport application had been pending for almost 20 months.⁶⁸ The district court ordered a hearing, which was appealed, and ultimately the State Department dropped the case and issued a passport on June 6, 1955 without a

57. See *U.S. v. Wheeler*, 254 U.S. 281 (1920).

58. See *Kent v. Dulles*, 357 U.S. 116 (1958).

59. See *Saenz v. Roe*, 526 U.S. 489 (1999).

60. See *id.*

61. Welfare and Institutions Code of California, St. § 2615 (1937), which provided: “Every person, firm or corporation, or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor.”

62. See *Edwards v. California*, 314 U.S. 160 (1941).

63. Notes, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 *YALE L. J.* 171 (1952); Reginald Parker, *Comment, “Passport Denied”: State Department Practice and Due Process*, 3 *STAN. L. REV.* 312, 312 (1951).

64. Roger Williams, *Passport Denial and the Freedom to Travel*, 2 *WM. & MARY L. REV.* 266, 266–67 (1959).

65. Leonard Boudin, *The Constitutional Right to Travel*, 56 *COLUM. L. REV.* 47, 51–71 (1956).

66. *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952); James Kirkham, *Administrative Law: Denial of Passport Upon Undisclosed Information*, 44 *CALIF. L. REV.* 579, 579 (1956); Charles Fahy, *The Right to Travel Note*, 62 *NAT. L. FORUM* 109, 114–15 (1961).

67. *Shachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955); Fahy, *supra* note 66, at 115–16.

68. *Dulles v. Nathan*, 225 F.2d 29, 30 (D.C. Cir. 1955).

hearing.⁶⁹ In *Kent v. Dulles*, the Secretary of State had refused to issue a passport to a citizen based on suspicion that the applicant was going to travel abroad to promote communism. The Court held that the federal government could not restrict the right to travel without due process of law.⁷⁰

Given the fundamental right to travel, what exceptions might be allowed? Since 1999, several circuit courts have held that being denied access to a single mode of transportation is not a violation of the fundamental right to travel—this is generally called the single mode doctrine.⁷¹ In addition, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 can restrict the freedom of movement as punishment for child support debtors.⁷² The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations included a provision for the right to travel.⁷³ For international tourists, of course, there are requirements for citizens to have a passport (and in some cases a visa) and in some cases this is denied. Under the Passport Act of 1926, a passport can be denied for national security or foreign policy reasons, in a wartime emergency or otherwise.⁷⁴ Other current exceptions will be turned to next.

1. *Public Health Emergencies*

The emergency powers of the federal government to refuse entry to non-residents and to quarantine U.S. residents returning from abroad have existed by statute from nearly the start of the nation's independence.⁷⁵ Today, such powers to restrict travel are given to the President, the Secretary of the Department of Health and Human Services, and state governors to address public health emergencies. As the recent COVID-19 pandemic demonstrated, these powers to control travel can be sweeping and extensive, although it is not clear exactly how to best balance public health exigencies, including cases of less serious or deadly diseases, and constitutional rights.⁷⁶ However, some have questioned whether the COVID-19

69. *Nathan v. Dulles*, 129 F. Supp. 951, 952 (D.D.C. 1955); Boudin, *supra* note 65, at 59; William Gould, *The Right to Travel and National Security*, 161 WASH. UNIV. L. QUART. 334, 344–45 (1961).

70. *Kent v. Dulles*, 357 U.S. 116 at 117–18, n.1; *see supra* note 58.

71. *See Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972) (holding that Federal Aviation Act requiring tariffs on air carriers did not infringe upon the constitutional right to travel); *see also Miller v. Reed*, 176 F.3d 1202, 1204 (9th Cir. 1999) (relying on the language of in the holding of *Monarch Travel* to develop the Single Mode Doctrine). *See generally* Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 JOHN MARSHALL J. INFO. TECHNOL. PRIV. L. 639, 655–60 (2014) (discussing and criticizing the Single Mode Doctrine and Circuit Court precedent).

72. 42 U.S.C. § 652(k).

73. GA Res. 217(III) A, Universal Declaration of Human Rights, at 74 (Dec. 10, 1948).

74. 22 U.S.C. § 211a.

75. An Act Relative to Quarantine, ch. 38, 1 Stat. 474 (1796); *see also* Meryl Chertoff, *The Right to Travel and National Quarantines: Coronavirus Tests the Limits*, GEORGETOWN L. (2020), <https://www.law.georgetown.edu/salpal/the-right-to-travel-and-national-quarantines-coronavirus-tests-the-limits/>.

76. Chertoff, *supra* note 75.

travel restrictions were effective in combating the pandemic and might have been politically motivated.^{77, 78}

2. *Exceptions to the Right to Travel Under the Privileges and Immunities Clause*

In *Supreme Court of New Hampshire v. Piper*, the U.S. Supreme Court held that the Privileges and Immunities Clause prohibited discrimination against a non-resident, except (1) where there are “substantial” reasons for the difference in treatment, and (2) the difference in treatment bears a close or substantial relationship to the state’s objective. For the latter requirement to be met, the Court considered the availability of less restrictive means.⁷⁹ Kathryn Piper was a non-resident who had sought to practice law in New Hampshire, but the Supreme Court of New Hampshire had held that only residents could practice law in the state.⁸⁰ While the U.S. Supreme Court ruled against the Supreme Court of New Hampshire in this case, it is possible to conceive of some restrictions on out-of-state and international tourists from visiting Hawai‘i passing constitutional scrutiny if such restrictions were limited in time, applied equally to all out of state and international tourists, and based on evidence that such limits are needed to protect the natural—i.e., public trust—resources of the state.⁸¹

In a recent law review article, right to travel jurisprudence is considered in light of the COVID-19 pandemic.⁸² Only two of the four district court decisions reviewed apply strict scrutiny to travel restrictions, and thus conflicting standards have been used. For example, both strict scrutiny and a highly deferential standard were applied in *Carmichael v. Ige*, a federal case from the District of Hawai‘i that upheld the state’s COVID-19 travel restrictions in part because they did not discriminate between residents and non-residents.⁸³ Grounded in a faithful reading of *Saenz v. Roe*, a review by Timothy Carey shows that this case and other case law that followed indicates that different components of the right to travel have received differing levels of scrutiny.⁸⁴ For example, the direct restraint on interstate travel in *Edwards v. California* was a violation of the first of the three components and strict scrutiny is the appropriate standard in such cases.⁸⁵ Alternatively, the second component of the right to travel—the right to be treated as a welcome visitor—directs a lower standard of review as was applied in *Piper*, often called intermediate scrutiny (i.e., more rigorous than the rational basis test but less rigorous than strict scrutiny).⁸⁶

77. Benjamin Mason Meier et al., *Travel Restrictions and Variants of Concern: Global Health Laws Need to Reflect Evidence*, 100 BULL. WORLD HEALTH ORG. 178, 178–78A (2022).

78. See *id.*; see also Siamak Seyfi et al., *COVID-19 and International Travel Restrictions: The Geopolitics of Health and Tourism*, 25 TOURISM GEOGR. 1, 3–12 (2023).

79. Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985).

80. *Id.* at 276.

81. See *infra* Section I.C (discussing the breadth and strength of the public trust doctrine in Hawai‘i).

82. Timothy Carey, *Comity, Coronavirus, and Interstate Travel Restrictions*, 2021 UNIV. CHIC. LEG. FORUM 325, 334–45 (2021).

83. *Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1146 (D. Haw. 2020).

84. See Carey, *supra* note 82.

85. *Id.*

86. See *id.*; see also Piper, 470 U.S. 274.

In the case of tourism limitations, my argument is that Hawai'i has an important government interest in lowering tourism levels in order to adequately protect the state's natural and cultural resources for the benefit of its people. Crucially, no potential tourists from other states or abroad would be unwelcome from visiting Hawai'i, however they may be given time and place restrictions in order to further the important government interest.

B. State Economic Protectionism

While the Commerce Clause of the U.S. Constitution gives Congress,⁸⁷ not the states, far-reaching power to regulate commerce among the several states and with foreign nations, it is unlikely to be relevant to tourism-related business activity wholly within a state.⁸⁸ This is because any limits placed on tourism within Hawai'i would not be likely to have a substantial effect or be related to interstate commerce. For more than half a century, *Wickard v. Filburn* had established sweeping and near limitless powers for Congress to regulate economic activity that had even an indirect effect on interstate commerce, and to preempt or prevail over conflicting state regulation of the same economic activity.⁸⁹ However, this consensus changed with three decisions by the Rehnquist Court. First, in *U.S. v. Lopez*, the Court held that the Gun-Free School Zones Act of 1990 was unconstitutional because it exceeded federal authority under the Commerce Clause.⁹⁰ This Act had made possessing a gun within a school zone a federal offense. This decision affirmed that federal regulation was permissible only for activity that uses channels of interstate commerce, for persons or things in interstate commerce, or activity that substantially affect or relate to interstate commerce. To determine this, a rational basis test was applied. *U.S. v. Morrison* then held that parts of the Violence Against Women Act of 1994 was similarly unconstitutional because it exceeded federal authority under the Commerce Clause.⁹¹ This Act penalized violent crimes motivated by gender. A contrary decision followed in *Gonzalez v. Raich*, which held that Congress can criminalize the production and use of homegrown cannabis even if state law allows its use for medicinal purposes.⁹² A notable dissent in this 6-3 decision was by Chief Justice Rehnquist (jointly with Justice O'Connor), who argued for limiting the Commerce Clause authority as was held in the *Lopez* and *Morrison* cases.⁹³

Potentially relevant to sustainable tourism is the so-called Dormant (or negative) Commerce Clause, which has been found to be implicit in the Commerce Clause.⁹⁴ Dormant Commerce Clause jurisprudence has long been used by federal

87. U.S. Const. art. 1, § 8, cl. 3.

88. An exception and possible violation of the Commerce Clause would be the case of Hawai'i attempting to regulate incoming airline travel to the State, which is highly unlikely to occur.

89. *Wickard v. Filburn*, 317 U.S. 111 (1942).

90. *U.S. v. Lopez*, 514 U.S. 549 (1995).

91. *U.S. v. Morrison*, 529 U.S. 598 (2000).

92. *Gonzalez v. Raich*, 545 U.S. 1 (2005).

93. *Id.* at 42-45.

94. See generally Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979); Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L. J. 425 (1982); Donald

courts to invalidate certain economic protectionist state laws and regulations that discriminate against interstate commerce. These state laws and regulations are allowable if there is a legitimate local non-economic purpose to treat such commerce differently and this purpose cannot be served as well by available nondiscriminatory means.⁹⁵ The latter requirements were established in *Hughes v. Oklahoma*.⁹⁶ Moreover, the Dormant Commerce Clause has a negative command, effectively forbidding some state economic regulations even when Congress has not legislated on the subject.⁹⁷

There are, however, exceptions to the Dormant Commerce Clause. A balancing test of the benefits and burdens of a state law known as the *Pike* doctrine is applied, based on the decision in *Pike v. Bruce Church, Inc.*⁹⁸ The test considers the nature of the state or local interest, and whether or not regulation could be better tailored to serve that interest with a less burdensome impact on interstate commerce.⁹⁹ In *Pike*, the Supreme Court held that a state law should be struck down only if its impact on interstate commerce “is clearly excessive in relation to the putative local benefits” of the law.¹⁰⁰

A landmark environmental decision based on the Dormant Commerce Clause was *City of Philadelphia v. New Jersey*.¹⁰¹ In 1973, New Jersey banned the import of most solid and liquid waste that originated or was collected out of state.¹⁰² The Supreme Court found this law unconstitutional because it considered the ban to be economic protectionism without an otherwise legitimate local concern.¹⁰³ Interestingly, Justices Rehnquist and Burger dissented on the basis of the validity of quarantine laws, which allow a state to prohibit the import of items such as germ-infected rags or diseased meat to protect the health of its own citizens.¹⁰⁴

Two recent decisions are especially relevant to the constitutionality of state-level restrictions on tourism. In *Maine v. Taylor*, the Court held that a state may prohibit the importation of out-of-state baitfish even if the law discriminates against interstate commerce on its face, because importing fish could introduce parasites and non-native species that could harm local ecology.¹⁰⁵ In essence, the Court found that Maine met the requirements of the tests outlined in both *Hughes* and *Pike*. The

Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Martin Redish & Shane Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 187 DUKE L. J. 569 (1987); Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 266 (2016).

95. *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

96. *Id.*

97. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

98. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

99. Colin Knoer, *Climate Change Meets the Commerce Clause: Obstacles and Alternatives for State and Local Responses to Climate Change*, 32 ENV'T CLAIMS J. 153, 159 (2020).

100. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142.

101. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

102. N.J. Stat. Ann. § 58:10A-1 (West 1977).

103. *City of Philadelphia v. New Jersey*, 437 U.S. at 629.

104. *Id.* at 630–33.

105. *Maine v. Taylor*, 477 U.S. 131 (1986).

second and most recent decision is *National Pork Producers Council v. Ross*.¹⁰⁶ *Ross* involved a Dormant Commerce Clause challenge to California's public health and welfare requirements of Proposition 12.¹⁰⁷ Enacted in 2018, Proposition 12 was a ballot initiative which imposed some of the strictest animal welfare rules in the nation.¹⁰⁸ Among other requirements, it forbid pork farmers from cruelly confining a breeding sow with less than 24 square feet and prohibited the sale of pork in California that does not comply with this public health and welfare standard.¹⁰⁹ Since almost all pork sold in California is imported, the Proposition has a major impact on other state's producers and market prices.¹¹⁰ The petitioners did not allege economic discrimination, but raised two alternative legal theories that the Court rejected.¹¹¹ Thus, the Court upheld California's requirements as legal, though it was a 5-4 decision with several dissents. Justice Gorsuch, writing for the majority, addressed the ruling in *Pike*, agreeing with it but arguing that its standard of prohibiting "clearly excessive" effects on interstate commerce was too vague.¹¹²

C. Public Trust Doctrine

A third constitutional issue, and one that can be used as a basis to support sustainable limits on tourism, is the public trust doctrine. At its core, the doctrine is a requirement that the state or sovereign holds in trust public lands, waters, and a variety of other resources for the general public's benefit and use.¹¹³ These resources should be preserved for the public need, benefit, and interest.¹¹⁴ The doctrine dates to Roman civil law and was historically codified in the Institutes of Justinian.¹¹⁵ Eventually the doctrine was applied through English, European, and American common law.¹¹⁶ The trust resources that are covered by the doctrine are extensive and have grown over time, including navigable waters and the lands submerged by them, oceans, beaches, seashores, parklands, a variety of other natural assets or capital, ecosystems and ecosystem services, wildlife and biological diversity, the atmosphere, legal and political systems, libraries, educational systems, public

106. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023). *Ross* is Karen Ross, Secretary of the Calif. Dep't Food & Agric.

107. *Proposition 12—Prevention of Cruelty to Farm Animals Act* (2018).

108. *Id.*

109. *Id.*

110. Hanbin Lee et al., *The Economics of Regulations Limiting Farm Practices for Products Sold Within Jurisdiction: California's 2022 Pork Rules*, Paper Prepared for Presentation at the 2022 Agricultural & Applied Economics Association Annual Meeting, Anaheim, CA (July 31 – Aug. 2, 2022).

111. The rejected legal theories were i) the sales ban impermissibly regulates extraterritorial conduct by requiring out-of-state producers to change their operations to meet California standards, and (ii) imposes excessive burdens on interstate commerce by significantly increasing operation costs and changing market structure without advancing legitimate local interests.

112. *Id.*

113. See, e.g., *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

114. Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH L. REV. 471, 477 (1970).

115. JOHN MOYLE, *THE INSTITUTES OF JUSTINIAN* (5th ed.1913).

116. Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 634 (1986).

bathhouses, transportation infrastructure, city streets, radio spectrum, and the Internet.¹¹⁷

The public trust doctrine imposes three limits on government power.¹¹⁸ First, property subject to the doctrine must be used for a public purpose and made available for use by the general public.¹¹⁹ Second, the government must preserve the trust property for current and future use.¹²⁰ Third, public trust duties can limit or prohibit the transfer of property rights.¹²¹

While it has long been recognized that the public trust doctrine has been incorporated into statutory, constitutional, and federal and state common law,¹²² an argument can be made that there is a federal constitutional public trust as well. For example, the Property Clause of the U.S. Constitution states, “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”¹²³ A broad reading could be used to argue that the public trust doctrine is a structural and judicially enforceable constitutional principle, since it provides Congress with power over federal lands and a limit on the federal government’s power, among other things.¹²⁴

1. *Public Trust Doctrine in the States and Hawai‘i*

The 50 U.S. states exhibit a rich complexity and a variety of philosophies in their adoption of the public trust doctrine.¹²⁵ In general, there is a strong emphasis on the navigable waterways of the states and associated submerged lands, and thus

117. See, e.g., Joseph Sax, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, YALE L. J. 762, 763–64 (1970); Joseph Sax, *Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 UC DAVIS L. REV. 185, 185–94 (1980); Charles Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980); Bruce Thom, *Climate Change, Coastal Hazards and the Public Trust Doctrine*, 8 MACQUARIE J. INT. COMP. ENV’T L. 21, 23–26 (2012); Hope Babcock, *Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Wildlife from the Effects of Climate Change*, 95 NEB L. REV. 649, 675 (2017); Kayla Steinberg, *Using the Public Trust Doctrine to Balance the Impacts of Renewable Energy Projects*, 33 GEORGETOWN ENV’T L. REV. 293, 294–96 (2021); Samuel Ruddy, *Finding a Constitutional Home for the Public Trust Doctrine*, 43 ENV’T L. POL’Y J. 139, 146 (2020).

118. See Sax, *supra* note 114, at 477.

119. Ruddy, *supra* note 117, at 141.

120. *Id.*

121. *Id.*

122. Raphael Sagarin & Mary Turnipseed, *The Public Trust Doctrine: Where Ecology Meets Natural Resources Management*, 37 ANNU. REV. ENV’T RES. 473, 484–85 (2012); the classic U.S. Supreme Court case cited is usually *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), which held that the public trust “is neither a creature nor a component of federal law”, but rather a “judicial explication of state . . . law principles.” The Court held that Illinois’s title in lands under the navigable waters of Lake Michigan were not only held in trust for the public, but that they were held in trust for the purpose of navigation, fishing, and commerce. However, the U.S. Supreme Court first accepted the public trust doctrine in *Martin v. Lessee of Waddell* 41 U.S. 367 (1842).

123. U.S. CONST. ART. IV, § 3, cl. 2.

124. See Ruddy, *supra* note 117, at 146–61.

125. Robin Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOL. L. QUART. 53-198 (2010); Robin Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN STATE ENV’T L. REV. 1-113 (2007); Michael Blum, ed., *THE PUB. TRUST DOCTRINE IN 45 STATES* (2014).

state water law and water rights.¹²⁶ Besides navigation, the protected public rights in water are for fishing and commerce, and often recreation and aesthetics.¹²⁷ Over half of the states have enshrined public trust provisions in their state constitutions, which is especially common in the western states.¹²⁸ In the western states there has been more of a shift to ecological and sustainability public trust doctrines, especially in California and Hawai‘i, and to a much lesser extent in Alaska, Washington, and North Dakota.¹²⁹ In many eastern states, navigable waters are given an admixture of public and private rights.¹³⁰ ---130---

Hawai‘i has one of the most developed public trust doctrines in the country, which is based on common law, statutory law, and the state constitution. The doctrine was first recognized in the 1899 case *King v. Oahu Railway & Land Co.*, which was decided 60 years before statehood.¹³¹ A key passage was added to the state constitution at the State Constitutional Convention in 1978, as Art. IX, § 1:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.¹³²

Hawai‘i’s public trust doctrine thus covers not only navigable waterways of the state and the use of water resources, but also its natural beauty, land, wildlife, all other natural resources, including biodiversity.¹³³ Moreover, public trust provisions are found in a dozen sections of the state constitution and over a dozen sections of state laws.¹³⁴ Among these provisions are several that extend the public trust to Native Hawaiians and which establish an Office of Hawaiian Affairs.¹³⁵ Besides Art. IX, § 1 of the state constitution, several of Hawai‘i’s public trust provisions could

126. *Id.*

127. *Id.*

128. *Id.*

129. Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines*, *supra* note 125, at 80–92.

130. Craig, *A Comparative Guide to the Eastern States’ Public Trust Doctrines*, *supra* note 125, at 25.

131. Steinberg, *supra* note 117 at 306–08 (2021); *King v. Oahu Railway & Land Co.*, 11 Haw. 717, 725 (1899). The Court held that the government had “ownership and trusteeship over submerged lands.”

132. Haw. Const. ART. XI, § 1.

133. *See* Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines*, *supra* note 125, at 88.

134. *Id.* at 118–22.

135. *Id.* The Off. Hawaiian Affairs was established at the 1978 State Constitutional Convention.

easily be argued to provide a legal basis for potential limits to tourism levels. These include:

The State shall have the power to promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State's resources.¹³⁶

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulations as provided by law.¹³⁷

The people shall have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on lands granted in fee simple[.]¹³⁸

Further, State Water Code Section 174C-2(a) "recognize(s) that the waters of the State are held for the benefit of the citizens of the State" and "declare(s) that the people of the State are beneficiaries and have a right to have the waters protected for their use." In addition, the Code requires the "protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest."¹³⁹ Finally, several rulings in the state courts of Hawai'i have favored the public use and enjoyment of water, land, wildlife, and other resources over private uses in the state. These decisions include *Robinson v. Ariyoshi*¹⁴⁰, *In re Water Use Permit Applications*¹⁴¹, *Kobayashi v. Zimring*¹⁴², and *Morimoto vs. Board of Land and Natural Resources*.¹⁴³

Summing up, Hawai'i has one of the most extensive public trust doctrines among all states, which extends well beyond its navigable waters. Given the two dozen plus sections of the State's constitution and laws to favor public over private uses and protections of land, waters, and wildlife, I argue that Hawai'i's public trust doctrine provides a strong legal basis for sustainable limits to tourism.

136. HAW. CONST. ART. IX, § 8.

137. *Id.* at § 9.

138. HAW. REV. STAT. § 7-1 (1859).

139. *Id.* at ch. 174C.

140. *Robinson v. Ariyoshi*, 658 P.2d 287, 310-12 (Haw. 1982).

141. *In re Water Use Permit Applications*, 93 P.3d 454 (Haw. 2004); *In re Water Use Permit Applications*, 93 P.3d 643 (Haw. 2004).

142. *State by Kobayashi v. Zimring*, 566 P.2d 725, 735 (Haw. 1977).

143. *Morimoto v. Bd. of Land & Nat. Res.*, 113 P. 3d 172, 184 (Haw. 2005).

II. THE UNIQUE CASE OF HAWAI'I

The State of Hawai'i's tourism-stressed islands were selected for this case study in sustainable tourism for several reasons. First, Hawai'i is the only state that is comprised entirely of islands, which presents some unique challenges and considerations. Based on its land area, Hawai'i is the fourth smallest state in the country,¹⁴⁴ and it is highly dependent upon food imports from the mainland and foreign countries. Second, as the recent COVID-19 pandemic demonstrated, Hawai'i is highly sensitive due to its limited health care resources and the long distance to the mainland for potential medical referrals.¹⁴⁵ Third, Hawai'i has by far the largest number of endangered and threatened plant and animal species in the nation.¹⁴⁶ Fourth and finally, Hawai'i has extremely fragile coral reefs and other coastal and marine resources that are further stressed by its tourism industry.¹⁴⁷ More background detail on these issues follows below.

A. Import Dependence

The State of Hawai'i has for many years been concerned about its high import dependence and vulnerability, especially for food, which began soon after statehood in the 1960s.¹⁴⁸ It was during this post-statehood period that thousands of acres of the state's prime farmlands were gradually converted to hotels and other types of commercial development.¹⁴⁹ What remained in the agricultural sector was a greater reliance on sugarcane and pineapple plantations, although these crops were already well established.¹⁵⁰ While the exact rate of imports varies from year to year, food import dependence from other states and abroad is currently around 85 to 90%,

144. U.S. CENSUS BUREAU, UNITED STATES SUMMARY: 2010 CENSUS OF POPULATION AND HOUSING, Table 18 (2012).

145. Kirstin Downey, *Over Decades, Hawaii Cut Acute Hospital Beds. Then Came the Pandemic*, HONOLULU CIV. BEAT (Sept. 13, 2021), <https://www.civilbeat.org/2021/09/over-decades-hawaii-cut-acute-care-hospital-beds-then-came-the-pandemic/>.

146. *Listed Species with Spatial Current Range Believed to or Known to Occur in Hawai'i*, U.S. FISH & WILDLIFE SERV. (2023), <https://ecos.fws.gov/ecp/report/species-listings-by-state?stateAbbrev=HI&stateName=Hawaii&statusCategory=Listed>.

147. For these reasons and more, the State of Hawai'i launched its own Sustainable Hawai'i Initiative in 2016. See *Reaching 'Beyond the Possible' in Hawaii to Meet Sustainability Goals*, UN NEWS (Mar. 23, 2020), <https://news.un.org/en/story/2020/03/1059832>.

148. *Increased Food Security and Food Self-Sufficiency Strategy*, OFF. PLAN., DEP'T OF BUSINESS ECON. DEV'T & TOURISM, STATE OF HAW. (2012), [https://files.hawaii.gov/dbedt/op/spb/INCREASED_FOOD_SECURITY_AND_FOOD_SELF_SUFFICIENCY_STRATEGY.pdf#:~:text=About%2085-90%25%20of%20Hawaii%E2%80%99s%20food%20is%20imported%20which,currently%20import%20would%20amount%20to%20approximately%2024313%20million](https://files.hawaii.gov/dbedt/op/spb/INCREASED_FOOD_SECURITY_AND_FOOD_SELF_SUFFICIENCY_STRATEGY.pdf#:~:text=About%2085-90%25%20of%20Hawaii%E2%80%99s%20food%20is%20imported%20which,currently%20import%20would%20amount%20to%20approximately%2024313%20million;); Brittany Lyte, *How Hawaii Squandered its Food Security – and What it Will Take to Get it Back*, HONOLULU CIV. BEAT (Apr. 23, 2021), <https://www.civilbeat.org/2021/04/how-hawaii-squandered-its-food-security-and-what-it-will-take-to-get-it-back/>; Richard Butler & Rachel Dodds, *Island Tourism: Vulnerable or Resistant to Overtourism?*, 1 HIGHLIGHTS OF SUSTAINABILITY 54, 54–64 (2022).

149. Ryan Perroy et al., *The Evolving Agricultural Landscape of Post-Plantation Hawai'i*, 76 APPLIED GEOGRAPHY 154, 155 (2016).

150. Lyte, *supra* note 148; LAURA BREWINGTON, TRANSITIONS AND DRIVERS OF LAND USE/LAND COVER CHANGE IN HAWAI'I: A CASE STUDY OF MAUI 89, 92 (2020).

including any imports needed to feed tourists.¹⁵¹ Moreover, food prices in Hawai'i are often the highest in the nation.¹⁵² The combination of high food prices and import dependence results in over \$3 billion in spending leaving the state's economy each year.¹⁵³ In addition, the drinking water supply is limited and subject to potential disruption, as demonstrated by the Maui fires in August 2023.¹⁵⁴

Import dependence makes the state highly vulnerable to natural disasters and global events that can disrupt the shipping industry and the food supply. Thus, solutions are likely to be complex and expensive.¹⁵⁵ As noted earlier, the Hawai'i Constitution lists self-sufficiency as an important goal.¹⁵⁶ However, complete food self-sufficiency may not be realistic and greater reliance on locally produced and sourced food is a long-term project.^{157,158} A more realistic goal may be to achieve 50% self-sufficiency in staple crops, e.g., rice, sweet potatoes, wheat, breadfruit, taro, and bananas.¹⁵⁹

B. Limited Health Care Resources

Given the fact that Hawai'i is over 2,000 miles away from California and other west coast states, its limited number of hospital beds and other health care resources is concerning, especially during a pandemic or other health emergencies.¹⁶⁰ Indeed, Hawai'i has the ninth fewest number of hospital beds per capita among all states, at 1.9 beds per 1,000 people compared to the national average of 2.4.¹⁶¹ While health emergencies are unpredictable, the potential stress on health care resources and patient capacity at hospitals was highlighted during the COVID-19 pandemic and was a major consideration during Governor Ige's lockdown of the state's

151. Paulina Jany, *Food Sovereignty in Hawai'i*, UNIV. OF HAW. AT HILO (April 2023), <https://hilo.hawaii.edu/news/kekalahea/spring-2023/april/food-sovereignty-in-hawaii>.

152. Jack Flynn, *Average Cost of Groceries by State*, ZIPPPIA (Feb. 27, 2023), <https://www.zipppia.com/advice/average-cost-of-groceries-by-state/>.

153. See Lyte, *supra* note 148.

154. Mike Baker et al., *As Inferno Grew, Lahaina's Water System Collapsed*, N.Y. TIMES (Aug. 22, 2023), <https://www.nytimes.com/2023/08/13/us/lahaina-water-failure.html>; Brittany Peterson & Michael Phillis, *When Kula Needed Water to Stop Wildfire, It Got a Trickle. Many Other US Cities Are Also Vulnerable*, ASSOCIATED PRESS (Sept. 30, 2023, 9:37 AM), <https://apnews.com/article/fire-maui-kula-hawaii-water-pumps-epa-285a21f64d20d2a58a5c420f5a04a218>.

155. Jennifer Chirico & Gregory S. Farley, eds., *Thinking Like an Island: Navigating a Sustainable Future in Hawai'i*, 30–34 (2015).

156. HAW. CONST. Art IX, § 1.

157. Jessica Terrell, *Why Hawaii Needs to Rethink Efforts to Increase Local Food Production*, HONOLULU CIV. BEAT (Jan. 2, 2022), <https://www.civilbeat.org/2022/01/why-hawaii-needs-to-rethink-efforts-to-increase-local-food-production/>.

158. See *Increased Food Security and Food Self-Sufficiency Strategy*, OFF. OF PLAN., DEP'T BUS. ECON. DEV'T & TOURISM, STATE OF HAW. (Oct. 2012), https://files.hawaii.gov/dbedt/op/spb/INCREASED_FOOD_SECURITY_AND_FOOD_SELF_SUFFICIENCY_STRATEGY.pdf.

159. See Lyte, *supra* note 148.

160. Downey, *supra* note 145.

161. *Id.*

economy and halting of tourism for over a year and a half.¹⁶² Kaiser Permanente, the main healthcare provider in Hawai‘i, will transfer some patients from the outer islands to hospitals on O‘ahu, and sometimes even to California, for serious health issues, although such travel is rare because of cost considerations.¹⁶³

Tourism in Hawai‘i is permitted on six islands only: O‘ahu, Maui, the Big Island of Hawai‘i, Kaua‘i, Lāna‘i, and Moloka‘i.¹⁶⁴ The largest number of tourists visit the islands of O‘ahu and Maui, with average daily visitation levels commonly exceeding 100,000 and 70,000, respectively.¹⁶⁵ However, more relevant is the ratio between the number of visitors and the resident populations on the islands, since it is the relatively excessive number of visitors that will risk taxing health care resources for residents.¹⁶⁶ While it is debatable how many visitors is too many, depending on the carrying capacity of each island, Maui County adopted a rule of thumb that it is desirable to not exceed an island-wide visitor population of roughly 33% of the resident population.¹⁶⁷ Based on this metric, among the six main islands (omitting Kaho‘olawe and Ni‘ihau, which do not allow tourism), Maui and Kaua‘i consistently exceed the 33% threshold year round, but especially in early summer.¹⁶⁸

C. Endangered and Threatened Species

Hawai‘i has by far the highest number of endangered and threatened species of all states, and most of them are endangered. With almost 500 total species on the federal endangered species list in Hawai‘i, the next highest state is California, with around 200 less (and with a high concentration in southern California).¹⁶⁹ Around

162. Anita Hofschneider, *Hospitals Near a Breaking Point as Hawaii's COVID Count Grows*, HONOLULU CIV. BEAT (Aug. 11, 2021), <https://www.civilbeat.org/2021/08/hospitals-near-a-breaking-point-as-hawaii-covid-case-count-grows/>; *Hawai‘i Covid-19 Daily News Digest August 6, 2020*, HAW. STATE DEP’T OF HEALTH (August 6, 2020), <https://health.hawaii.gov/news/covid-19/hawaii-covid-19-daily-news-digest-august-6-2020/>.

163. *Getting Care Away from Home*, KAISER PERMANENTE, <https://healthy.kaiserpermanente.org/content/dam/kporg/acaac/get-care/emergency-urgent-care-while-away-from-home.pdf> (last visited Mar 30, 2024).

164. Tourism is not allowed on Kaho‘olawe because of the public safety risks, and the private island of Ni‘ihau, with less than 100 inhabitants, also does not allow visitors. In the case of Kaho‘olawe the island is uninhabited, and a special right of entry permit is needed to visit due to the presence of unexploded military ordnances and lack of food and drinking water. Tourists are also not allowed on the Northwestern Hawaiian Islands, part of Honolulu County and the site of the Papahānaumokuākea Marine National Monument, without a special permit jointly administered by the U.S. federal government and the State of Hawai‘i. See *Monument Access*, PAPAHAANAUMOKUĀKEA MARINE NAT’L MONUMENT, <https://www.papahanaumokuakea.gov/access/> (last visited May 1, 2024).

165. See *Monthly Visitor Statistics*, DEP’T OF BUS., ECON. DEV’T & TOURISM, <https://dbedt.hawaii.gov/visitor/tourism> (linking to news releases of tourism for various months, 2022 & 2023) (last visited May 1, 2024).

166. See generally *Maui County General Plan 2030, Chapter 4: Economic Development*, MAUI CNTY. (2012), <https://www.mauicounty.gov/DocumentCenter/View/84679/Chapter-4?bidId=>.

167. *Id.* at 4–14.

168. *Monthly Visitor Statistics*, DEP’T OF BUS., ECON. DEV’T & TOURISM, *supra* note 165.

169. Andrew Dobson et al., *Geographic Distribution of Endangered Species in the United States*, 275 SCIENCE 550, 551 (Jan. 24, 1997); U.S. FISH AND WILDLIFE SERV., *supra* note 146; *Listed Species with Spatial Current Range Believed to or Known to Occur in California*, U.S. FISH AND WILDLIFE SERV.:

85% of the Hawaiian species are flowering plants or ferns and fern allies.¹⁷⁰ Among Hawai'i's listed species, the vast majority fall under the jurisdiction of the U.S. Fish and Wildlife Service, while 15 additional species are marine animals that fall under the jurisdiction of the National Oceanographic and Atmospheric Administration (NOAA) Fisheries. These marine animals include six whale species, five types of sea turtles, two shark species, the giant manta ray, and the Hawaiian monk seal. All of these marine species live at least seasonally in the Pacific Ocean waters off Hawai'i.¹⁷¹ In many cases, legal restrictions are made on access to the habitat of endangered or threatened species, and in the case of whales, monk seals, and sea turtles, people must keep various minimum distances from the animals and violators can be subject to substantial fines.¹⁷² While only a small number of the total listed species in Hawai'i are marine animals, most tourists are more likely to see and experience the endangered or threatened marine animals since spending time in the ocean is a popular tourist activity.¹⁷³

D. Coral Reefs

A major tourist attraction in Hawai'i is its beautiful and abundant coral reefs and associated marine resources, which tourists experience through snorkeling and scuba diving either near the shoreline or further into the ocean off of dive boats.¹⁷⁴ Hawai'i's main islands include over 140,000 acres of coral reef habitat, which provide food for many fish and other marine species, filter water pollution, buffer beaches from erosion from strong waves and currents, and provide hundreds of millions of tourism dollars annually to the state's economy.¹⁷⁵ Coral reefs and fishing are also extremely important to Hawaiians and the reefs of the main Hawaiian island have an estimated value of \$33.57 billion.¹⁷⁶ Unfortunately, many coral reefs are being degraded by combinations of overfishing and destructive fisheries, sedimentation, water pollution, sunscreen chemicals, coastal construction, invasive

ENV'T CONSERVATION ONLINE SYS. (ECOS), <https://ecos.fws.gov/ecp/report/species-listings-by-state?stateAbbrev=CA&stateName=California&statusCategory=Listed> (last visited Mar. 14, 2024). It should also be noted that California has substantially more land area than Hawai'i.

170. Fern allies are a related but diverse group of species of seedless vascular plants that are non-flowering but not true ferns.

171. *Marine Protected Species of the Hawaiian Islands*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/pacific-islands/endangered-species-conservation/marine-protected-species-hawaiian-islands> (March 28, 2024).

172. *Viewing Marine Life*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/insight/viewing-marine-life> (last visited Mar. 30, 2024).

173. See generally Pieter van Beukering & Herman Cesar, *Ecological Economic Modeling of Coral Reefs: Evaluating Tourist Overuse at Hanauma Bay and Algae Blooms at the Kīhei Coast, Hawai'i*, 58 PAC. SCI. 243, 254 (2004).

174. Extensive coral reefs also exist off the Florida and Texas coasts.

175. *U.S. Coral Reefs*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/coral-reefs/americas-coral-reefs> (Feb. 28, 2024); Herman Cesar & Pieter van Beukering, *Economic Valuation of the Coral Reefs of Hawai'i*, 58 PAC. SCI. 231, 236 (2004).

176. RICHARD BISHOP ET AL., NAT'L OCEANIC AND ATMOSPHERIC ADMIN., *TOTAL ECONOMIC VALUE FOR PROTECTING AND RESTORING HAWAIIAN CORAL REEF ECOSYSTEMS: FINAL REPORT* (2011).

species, global warming, and coral bleaching.¹⁷⁷ An additional factor in reef degradation can be overtourism through intentional and unintentional contact by divers, which may be very difficult to isolate from the other causes.¹⁷⁸

A recent study used over 250,000 geotagged Instagram posts from 2018 to 2021 by tourists visiting Hawaiian coral reefs and compared them with flyover maps of live coral cover to determine how tourist divers are damaging reefs.¹⁷⁹ The authors also used artificial intelligence to assess live coral reef map images with a 2-meter and 16-meter resolution.¹⁸⁰ The major findings of the study were that divers more often visited the most accessible sites with the most live coral, but at the more popular sites the coral covers were more degraded compared to the coral at less popular sites.¹⁸¹ Coral tended to thrive farther out into the ocean where fewer people dove and interacted with the reefs.¹⁸² Thus, tourism was concluded to suppress and degrade live coral coverage at the sites where tourists were more concentrated.¹⁸³

Further support for the role of tourists in degrading coral reefs in Hawai'i is provided from another recent study of a very popular marine protected area visited by divers near the island of Maui—the Molokini Crater.¹⁸⁴ Before the COVID-19 pandemic, in one survey one third of scuba divers at Molokini reported conflicts with other divers.¹⁸⁵ The researchers found that when tourism was shut down during the COVID-19 pandemic from March 2020 through May 2021, the fish biomass and predatory species increased their use of shallow habitats, areas concentrated by diving tourists.¹⁸⁶ Following the return of tourism in the area to pre-pandemic levels in May and June of 2021, the fish biomass and habitat use also decreased to pre-pandemic levels.¹⁸⁷ These findings suggest that additional policies are needed beyond voluntary dive standards and education and dive operator recognition programs to curb coral reef damage.¹⁸⁸

177. Clive Wilkinson, *Global and Local Threats to Coral Reef Functioning and Existence: Review and Predictions*, 50 *MARINE FRESHWATER RSCH.* 867, 867–68 (1999); Bernhard Riegl et al., *Coral Reefs: Threats and Conservation in an Era of Global Change*, 1162 *ANNALS OF THE N.Y. ACAD. OF SCI.* 136, 143–46 (2009); Morgan Pratchett et al., *Reef Degradation and the Loss of Critical Ecosystem Goods and Services Provided by Coral Reef Fishes*, 7 *CURRENT OP. IN ENV'T SUSTAINABILITY* 37, 37–38 (2014); Lance Collins, *Segmentation and Seawalls: Environmental Review of Hawaii's Coastal Highways in the Era of the Anthropocene*, 20 *HAW. BAR J.* 89, 89–94 (2016); Jamison Gove et al., *Coral Reefs Benefit from Reduced Land-Sea Impacts Under Ocean Warming*, 621 *NATURE* 536, 536 (2023).

178. See generally *supra* note 177.

179. Bing Lin et al., *Coral Reefs and Coastal Tourism in Hawaii*, 6 *NATURE SUSTAINABILITY* 254, 254 (2023).

180. *Id.* at 257.

181. *Id.* at 254.

182. *Id.* at 256.

183. *Id.* at 257.

184. Kevin Weng et al., *Decreased Tourism During the COVID-19 Pandemic Positively Affects Reef Fish in a High Use Marine Protected Area*, 18 *PLOS ONE* 1, 2–15 (2023).

185. Li Philips et al., *Tourist Value Orientations and Conflicts at a Marine Protected Area in Hawaii*, 21 *INT'L J. TOURISM RSCH.* 868, 868 (2019).

186. Weng et al., *supra* note 184.

187. *Id.*

188. Bing Lin, *Close Encounters of the Worst Kind: Reforms Need to Curb Coral Reef Damage by Recreational Divers*, 40 *CORAL REEFS* 1429, 1431–33 (2021).

In summary, Hawai‘i is unique among the 50 states in multiple ways, which make a strong case for limiting its tourism to sustainable levels. It is comprised entirely of a series of islands and highly dependent upon food imports.¹⁸⁹ The state has limited health care resources.¹⁹⁰ Additionally, it has by far the most number of endangered plant and animal species, and its coral reefs and other coastal and marine resources are highly stressed.¹⁹¹ Given these circumstances and challenges,¹⁹² I will now consider a range of policy instruments that the state could use to better manage its tourism sector.

III. POLICY INSTRUMENTS FOR SUSTAINABLE TOURISM

To consider limiting tourism to sustainable levels in Hawai‘i, this Article will first define the term ‘sustainable tourism.’ For the purposes of this Article, sustainable tourism is tourism that is developed and maintained in a geographic area in such a manner and at such a scale that it remains viable over an indefinite period.¹⁹³ It takes full account of economic, social and environmental impacts, addressing the needs of visitors, the industry, the environment and host communities.¹⁹⁴ Also, it does not degrade or alter the environment in which it exists to such a degree that it prohibits the successful development and well-being of other activities and processes.¹⁹⁵

Sustainable tourism may be best understood by the classic equation, known as IPAT, which emerged from the Paul Ehrlich and John Holdren vs. Barry Commoner debate in environmental science in the early 1970s, where I (environmental impact) = P (human population) \times A (affluence) \times T (technology).¹⁹⁶ In this equation, I can be considered as a proxy for all of the impacts of tourism—social, economic, and cultural, as well as environmental.¹⁹⁷ P , or the population level of tourists, is a quantitative measure that should ideally be set based on the carrying capacity of the tourist destination.¹⁹⁸ A , or the affluence of the tourists, is a constant, and a function of the income levels and spending behavior of the tourists, which is

189. Jany, *supra* note 151.

190. Downey, *supra* note 145.

191. U.S. FISH & WILDLIFE SERV., *supra* note 146; Riegl et al., *supra* note 177.

192. Downey, *supra* note 145; U.S. FISH & WILDLIFE SERV., *supra* note 146; Jany, *supra* note 151; *supra* note 177.

193. Richard Butler, *Tourism: An Evolutionary Perspective*, in TOURISM & SUSTAINABLE DEVELOPMENT: MONITORING, PLANNING, MANAGING 27, 29 (J. G. Nelson et al. eds., 1993).

194. *Id.*

195. *Id.*; ‘Overtourism’? – *Understanding and Managing Urban Tourism Growth Beyond Perceptions*, UNITED NATIONS WORLD TOURISM ORG. (Sept. 2018), <https://www.e-unwto.org/doi/epdf/10.18111/9789284419999.1>; *See generally* TOURISM AND RESILIENCE (Richard Butler ed., 2017).

196. John Holdren, *A Brief History of IPAT*, 2 J. POPULATION & SUSTAINABILITY 66, 70 (2016); Marian Chertow, *The IPAT Equation and its Variants: Changing Views of Technology and Environmental Impact*, 4 J. INDUS. ECOLOGY 1, 14–15 (2000).

197. *Id.*

198. Some of Hawaii’s leading economists do not seem to appreciate the role of overtourism and carrying capacity in determining the adverse environmental impacts of tourism, apparently assuming that technology alone can solve the problems. *See, e.g.*, Allison Schaefer, *Hawaii Losing Economic Strength, Economist Says*, STAR ADVERTISER (July 5, 2023), <https://www.staradvertiser.com/2023/07/05/hawaii-news/hawaii-losing-economic-strength-economist-says/>.

not very amenable to change by policy makers.¹⁹⁹ And T, or technology, can be thought of as the combination of the energy and resource usage, waste generation, and other technologies used by hotels and tour operators, such as the transportation modes of tourists.²⁰⁰ Thus, technology here is a qualitative measure, and along with population is amenable to change by policy makers.²⁰¹

For example, county governments in tourist areas such as Hawai‘i’s eight main islands can be encouraged or required by policy makers to seek certification based on sustainable tourism standards for them as destinations, and similarly for hotels, other accommodations, and tour operators as well. The Global Sustainable Tourism Council (GSTC) sets the international industry “gold standard” for sustainable tourism standards and practices.²⁰² While both qualitative and quantitative dimensions of sustainable tourism are important, the focus in this Article is on the quantitative metrics and policy instruments.

It is crucial that Hawai‘i residents and tourists alike support sustainable tourism and support policy makers setting quantitative limits on tourism levels.²⁰³ A recent survey of tourists visiting Hawai‘i found that mainland U.S. visitors support a variety of practices that would lead toward the state becoming a more sustainable tourist destination.²⁰⁴ Research on Kaua‘i found that over 95% of residents surveyed support “regenerative tourism.” Regenerative tourism is a travel model that requires visitors to actively work to leave the destination better off than before they arrived by engaging in local activities such as replanting native trees, removing invasive plants from hiking trails, helping to remove plastic wastes and abandoned fishing nets from beaches, and so on.²⁰⁵ Even with these measures, however, the majority of Hawai‘i residents still support setting limits to reduce the number of tourists.²⁰⁶ This was borne out by extensive stakeholder discussions led by the HTA island-based steering committees on three of the four most populous islands (all except Big

199. *Supra* note 196.

200. *Id.*

201. *Id.*

202. *About the Global Sustainable Tourism Council (CSTC)*, GLOB. SUSTAINABLE TOURISM COUNCIL <https://www.gstcouncil.org/> (last visited Apr. 3, 2024); Richard Sharpley, *Tourism, Sustainable Development and the Theoretical Divide: 20 Years On*, 28 J. SUSTAINABLE TOURISM 1932 (2020); Andreea Marin-Pantelescu et al., *Role of Tour Operators and Travel Agencies in Promoting Sustainable Tourism*, 21 AMFITEATRU ECON. 654, 658–65 (2019).

203. Cathrine Linnes et al., *What Tourists Want, a Sustainable Paradise*, 3 TOURISM HOSP. 164, 164–83 (2022).

204. *Id.*

205. Umer Zaman et al., *Linking Regenerative Travel and Residents’ Support for Tourism Development in Kaua‘i Island (Hawaii): Moderating-Mediating Effects of Travel Shaming and Foreign Tourist Attractiveness*, 62 J. TRAVEL RSCH. 782, 782–801 (2023).

206. Dan Nakaso, *Hawaii Residents Support Limits on Tourism, Survey Finds*, STAR ADVERTISER (June 2, 2021), <https://www.staradvertiser.com/2021/06/02/hawaii-news/hawaii-residents-support-limits-on-tourism-a-survey-finds/>; Dawn Gilbertson, *‘We Get Cussed at Every Day’: Maui Tourist Surge Raises Tensions, Renews Calls for Visitor Limits, New Fees*, USA TODAY (July 11, 2021), <https://www.usatoday.com/story/travel/news/2021/07/11/maui-hawaii-travel-island-struggles-covid-tourism-rebound/7890764002/?gnt-cfr=1>.

Island).²⁰⁷ In the case of O‘ahu, the HTA approved plans three years ago to reduce the number of tourists as part of its Destination Management Action Plan.²⁰⁸ The HTA cannot implement such policies on its own, however, which would include managing the number of tourist accommodations on O‘ahu, seeking land use and zoning changes, and reviewing airport policies.²⁰⁹ Moreover, the policy proposals are vague and the Plan fails to discuss how to determine the carrying capacity of O‘ahu as a scientific basis for setting the number of tourists that should be allowed.²¹⁰ In the following several sections, a range of policy options for limiting tourism levels in Hawai‘i will be explored, irrespective of the administrative authority. As will be seen, most examples of where these measures are being implemented abroad are also on islands.

A. Tourist Quotas

The first policy instrument to control and lower tourism levels is to set up a quota system for individual tourist visits to an area, which would require creating an overall cap on the number of tourists allowed to visit and a requirement for obtaining a tourist travel permit with a reservation system for individual people.²¹¹ As noted earlier, a precedent for establishing tourist restrictions in Hawai‘i has been established by the government creating long-term restrictions on travel to the island of Kaho‘olawe and the Northwestern Hawaiian Islands.^{212,213} The cap levels for other islands could vary by season, month, or day.²¹⁴ In this sense, tourist quotas would be conceptually similar to cap-and-trade systems that have been established to control

207. *Maui Nui Destination Management Action Plan 2021-2023*, HAWAI‘I TOURISM AUTH (2021), <https://www.hawaiiitourismauthority.org/media/6860/hta-maui-action-plan.pdf>; *Kaua‘i Destination Management Action Plan 2021-2023*, HAWAI‘I TOURISM AUTH. (2021), <https://www.hawaiiitourismauthority.org/media/6452/newly-released.pdf>; *Hawai‘i Islander Destination Management Action Plan 2021-2023*, HAWAI‘I TOURISM AUTH. (2021), <https://www.hawaiiitourismauthority.org/media/7244/hta-hawaii-island-action-plan-2021.pdf>; *O‘ahu Destination Management Action Plan 2021-2024*, HAWAI‘I TOURISM AUTH (2021), <https://www.hawaiiitourismauthority.org/media/7785/hta-oahu-dmap.pdf>.

208. *O‘ahu Destination Management Action Plan 2021-2024*, *supra* note 207, at 22.

209. *Id.*; Associated Press, *Hawai‘i Tourism Officials Plan to Reduce the Number of Visitors in Oahu*, USA TODAY (July 31, 2021), <https://www.usatoday.com/story/travel/destinations/2021/07/31/hawaii-to-reduce-number-visitors-oahu-tourism-cap/5443732001/>.

210. Christian Palmer, *Oahu Destination Management Plan Laudable but Outdated*, HONOLULU CIVIL BEAT (Oct. 22, 2021), <https://www.civilbeat.org/2021/10/oahu-destination-management-plan-laudable-yet-outdated/>.

211. Ledsom, *supra* note 4.

212. *Supra* note 164.

213. While the general exclusion of visitors to Kaho‘olawe is based on state police power, in the case of the Northwestern Hawaiian Islands it is based on the need to protect the pristine and unique coral reefs and marine ecosystems and species found there, not unlike concerns raised earlier in this paper for the main Hawaiian Islands. But the use of police power for Kaho‘olawe amounts to a *de facto* travel restriction on residents and non-residents alike due to the unique status of that island as well. Thus, in both cases this represents a more extreme and sweeping scale of restrictions than is contemplated for the main Hawaiian Islands.

214. Ledsom, *supra* note 4.

sulfur dioxide²¹⁵ and nitrogen oxide emissions²¹⁶ in the United States, and greenhouse gas emissions in Europe.²¹⁷ However, the free trading of tourist permits would not be recommended because of the potential to economically exploit or exclude lower income travelers.²¹⁸

The idea of setting tourist quotas has already been implemented in several places. The Kingdom of Bhutan in South Asia has had de-facto tourist quotas since opening to tourists in 1974²¹⁹ to safeguard its rich cultural and environmental heritages, and also charges a very high sustainable development fee, although it does not set a hard and fast limit on tourist numbers.²²⁰ Rather, the government sets target figures based on the number of people it believes that its limited lodgings can accommodate.²²¹ In practice, tourist levels in Bhutan have been controlled by the daily minimum tariff,²²² a required guided tour,²²³ certain spatial restrictions, and the perception of inconvenience associated with the process of getting a visa.²²⁴ In addition, the Galápagos (a province and national park of Ecuador and an archipelago of 18 main islands in the Pacific Ocean) has had tourist quotas in place for 50 years, though the levels have changed over time.²²⁵ A third protected natural area is a national marine park and conservation area, Fernando de Noronha (21 islands off of Brazil),²²⁶ which has limited tourism levels since its establishment in 1986. Kāpiti

215. See, e.g., Richard Schmalensee et al., *An Interim Evaluation of Sulfur Dioxide Emissions Trading*, 12 J. ECON. PERSP. 53, 54–56 (1998); Byron Swift, *How Environmental Law Works: An Analysis of the Utility Sector's Response to Regulation*, 14 TUL. ENV'T L. J. 309, 319–22 (2000).

216. See, e.g., Dallas Burtraw et al., *Economics of Pollution Trading for SO₂ and NO_x*, 30 ANN. REV. ENV'T RES. 253, 272–75 (2010); Joshua Linn, *The Effect of Cap-and-Trade Programs on Firms' Profits: Evidence from the Nitrogen Oxides Budget Trading Program*, 59 J. ENV'T ECON. MGMT. 1, 1–14 (2010).

217. See, e.g., A. Denny Ellerman et al., *The European Union Emissions Trading System: Ten Years and Counting*, 10 REV. ENV'T ECON. POL'Y 89, 90 (2016); Jordi Teixidó et al., *The Impact of the EU Emissions Trading System on Low-Carbon Technological Change: The Empirical Evidence*, 164 ECOL. ECON. 106346, 106347 (2019).

218. In cap and trade emissions trading systems, permit trading is normally allowed and is primarily between companies, not individual consumers, who must institute pollution reduction measures. Most economists believe that free trading of goods and services between private parties is the most efficient way for markets to determine the highest and best use and determine the most economically efficient allocation of resources.

219. Tandi Dorji, *Sustainability of Tourism in Bhutan*, 3 J. BHUTAN STUD. 84, 85 (2001).

220. Jane Margolies, *Why is Everyone Going to Bhutan?*, N.Y. TIMES (Jan. 9, 2005), <https://www.nytimes.com/2005/01/09/travel/why-is-everyone-going-to-bhutan.html>.

221. *Id.*

222. *Id.*

223. *Id.*

224. Gyan Nyaupane & Dallan Timothy, *Power, Regionalism and Tourism Policy in Bhutan*, 37 ANNALS TOURISM RSCH. 969, 976–81 (2010).

225. Claudia Anne Reinhart, *Tourism Management in the Galapagos Islands: A Social Carrying Capacity Study* (1992) (Master's Thesis, University of Rhode Island), at 2–3.

226. Sarah Brown, *10 Things to Know Before Visiting Fernando de Noronha*, CULTURE TRIP (Jan. 24, 2018), <https://theculturetrip.com/south-america/brazil/articles/10-things-know-visiting-fernando-de-noronha/>.

Island, a small nature reserve near Wellington, New Zealand, has also had tourist limits since visitor permits were first issued in the late 1980s.²²⁷

Like Hawai'i, some other areas with newer tourist quotas are also islands. These include Corsica, a territory of France,²²⁸ and Australia's Lord Howe Island.²²⁹ A quota system is currently being seriously considered in the Indonesian Province of Bali.²³⁰ In addition, the Seychelles, an archipelago of 115 islands off of East Africa in the Indian Ocean, considered a tourism cap from 2015 to 2017, but instead has focused on accommodation quality and has restricted the construction of large new hotels.²³¹ However, carrying capacity studies for its three main islands have shown that these areas are nearing the limit of the provision of utility services.²³²

While not an island, a cap has also been placed on the number of visitors allowed at Maya Beach, Thailand,²³³ a site made famous by Leonardo DiCaprio's adventure drama film *The Beach*.²³⁴ In theory, there are restrictions placed on tourism in Antarctica as well, although these are based on self-regulation by tour operators and there is no annual cap on the number of tourists who can visit.²³⁵ Additional tourist quotas have been set for smaller tourist hot spots such as Machu

227. Christine Langdon, *Tourism Operators Say Booming Visitor Numbers on Kāpiti Island Have Many Benefits*, STUFF (Dec. 26, 2018, 5:00 AM), <https://www.stuff.co.nz/environment/109514378/tourism-operators-say-booming-visitor-numbers-on-kpiti-island-have-many-benefits>.

228. Hannah Thompson, *Corsica Limits Access to Three of its Major Tourist Sites*, THE CONNEXION (July 3, 2022, 1:31 PM), <https://www.connexionfrance.com/article/French-news/Corsica-limits-access-to-three-of-its-major-tourist-sites>.

229. Luisa Rubbo, *Lord Howe Island Population Doubles as Tourists Descend After COVID Ban Ends*, ABC NEWS (Jan. 6, 2021, 9:25 AM), <https://www.abc.net.au/news/2021-01-07/tourists-flock-to-lord-howe-island-after-covid-ban/13035770>.

230. Mahinda Arkyasa, *Bali to Implement a Quota System to Tackle Problematic Foreign Tourists*, INDONESIA BUS. POST (May 17, 2023), <https://indonesiabusinesspost.com/risks-opportunities/bali-to-implement-a-quota-system-to-tackle-problematic-foreign-tourists/>.

231. Daniel Laurence, *New Hotels on Seychelles Inner Islands to Have No More than 24 Rooms*, SEYCHELLES NEWS AGENCY (Jan. 7, 2019, 7:17 PM), <http://www.seychellesnewsagency.com/articles/10301/New-hotels+on+Seychelles%27+inner+islands+to+have+no+more+than++rooms>.

232. Salifa Karapetyan, *Carrying Capacity Study: Seychelles' Main Islands Reaching Limits of Tourism Impacts*, SEYCHELLES NEWS AGENCY (May 25, 2023, 5:23 PM), <http://www.seychellesnewsagency.com/articles/18733/Carrying+capacity+study+Seychelles%27+main+islands+reaching+limits+of+tourism+impact>.

233. Austin Bush, *Thailand's Iconic Maya Beach Reopens with New Sustainability Efforts*, LONELY PLANET (Jan. 6, 2022), <https://www.lonelyplanet.com/news/maya-bay-thailand-sustainable-visitor-rules>.

234. *Id.*

235. John Bartlett, *Antarctica Tourism is Booming – But Can the Continent Cope?*, THE GUARDIAN (June 25, 2023 at 3:00 AM), <https://www.theguardian.com/world/2023/jun/25/antarctica-cruise-tourism-environment-impact>.

Picchu,²³⁶ and several cities in Europe such as Barcelona (where tourist groups are limited to 20 people),²³⁷ and a growing number of locations in France.²³⁸

B. Caps on Visitor Accommodations

State and county officials in Hawai‘i believe that their main policy tool to limit or reduce tourist numbers is to restrict or cap visitor accommodations. This is reflected in the O‘ahu Destination Management Action Plan, the only one for the islands with specific actions proposed to reduce visitor numbers.²³⁹ In particular, the Plan proposed to (1) lower the number of illegal short-term vacation rentals by supporting the County’s efforts to improve enforcement of current regulations and implement new rules, (2) provide resources to engage communities and agencies to collaborate on additional rules, especially to limit expansion of legal short-term vacation rentals outside of the resort areas, and (3) commit resources to study methods of limiting supply such as controlling new visitor accommodations development through building permits or approval for new sites, and exploring changes to land use, zoning, and airport policies that influence tourism infrastructure.²⁴⁰ Other Hawaiian islands have also prioritized enforcement action against illegal short-term vacation rentals and to explore capacity limits at tourist hot spots.²⁴¹ The only major policy implemented on O‘ahu by 2023 has been passage of Bill 41 by the Honolulu City Council to regulate short-term vacation rentals with improved enforcement.²⁴²

To be most effective, limits on tourist accommodations need to be comprehensive by setting an overall cap. Maui County officials have considered these issues and challenges in the most detail. However, not all visitors in Hawai‘i are tourists. Many people travel for business as well as to visit family, especially among state residents, and there are several categories of visitor accommodations besides hotels.²⁴³ While the majority—or at least a plurality—of tourists stay in hotel rooms, many others stay in condominiums, rental homes, timeshares, or with relatives or friends (especially non-tourist visitors). For more details, see Table 1

236. Rick Vecchio, *Access vs Excess: Tourist Limits at Machu Picchu After Covid-19*, PERU TRAVEL BLOG (Nov. 8, 2022), <https://www.fertur-travel.com/blog/2022/access-vs-excess-tourist-limits-at-machu-picchu-after-covid-19/16723/>.

237. *Barcelona Extends 20-Person Tour Group Limit Until September 2024*, CATALAN NEWS (July 20, 2023, 6:15 PM), <https://www.catalannews.com/society-science/item/barcelona-extends-20-person-tour-group-limit-until-september-2024>; Peter Yeung, *Barcelona’s ‘Bold Strategy’ to Quell the Tourism Crisis*, REASONS TO BE CHEERFUL (Aug. 3, 2023), <https://reasonstobecheerful.world/barcelona-fighting-overtourism/>.

238. Clément Guillou, *France’s Natural Wonders Introduce Quotas to Tackle Overtourism*, LE MONDE (Aug. 17, 2022, 9:37 AM), https://www.lemonde.fr/en/economy/article/2022/08/17/french-national-sites-introduce-quotas-to-tackle-overtourism_5993828_19.html.

239. O‘ahu Destination Management Action Plan 2021-2024, *supra* note 207, at 20.

240. *Id.* at 22.

241. Associated Press, *Hawai‘i Tourism Officials Plan to Reduce the Number of Visitors on Oahu*, USA TODAY (July 31, 2021, 4:04 PM), <https://www.usatoday.com/story/travel/destinations/2021/07/31/hawaii-to-reduce-number-visitors-oahu-tourism-cap/5443732001/>.

242. HAWAI‘I TOURISM AUTH., O‘AHU DESTINATION MGMT. ACTION PLAN: PHASE I REP. (2022).

243. CNTY. OF MAUI, COST OF GOVERNMENT COMMISSION: REPORT ON MANAGING VISITOR NUMBERS BY MANAGING VISITOR ACCOMMODATIONS (2023), at 3–4.

below.²⁴⁴ Thus, ideally a cap on visitor accommodations would cover all of these categories except for the last one.

As noted earlier, Maui County adopted a rule of thumb that it is desirable to not exceed an island-wide visitor population of around 33% of the resident population, but this ratio is regularly exceeded on Maui and Kaua‘i.²⁴⁵ On January 7, 2022, the Maui County Council adopted—over Mayor Mike Victorino’s veto—a temporary moratorium on all new commercial transient visitor accommodations, including hotel rooms and timeshare units.²⁴⁶ Less than a year later, on November 4, 2022, the Maui County Council adopted new legislation removing the moratorium on new hotel rooms and timeshares as long as the new construction is above a mapped line for coastal erosion at 3.2 feet of sea level rise.²⁴⁷ Thus, what remains in effect is a limited ban on new commercial visitor accommodation construction in Maui County.²⁴⁸

Table 1. Visitor Accommodation Usage in the State of Hawai‘i and Maui County^{249, 250}

	State in 2019	State in 2021	Maui in 2019	Maui in 2021
Hotels	59.7%	51.9%	53.8%	45.9%
Condos	16.6%	19.4%	27.2%	32.2%
Rental Homes	10.1%	11.9%	9.3%	11.1%
Timeshares	8.3%	10.1%	10.0%	11.9%
Family/Friends	9.1%	12.0%	6.3%	6.7%

Additional policy options exist for managing and limiting the number of visitor accommodations, such as further prioritizing enforcement actions against illegal transient vacation rentals and tax collections from such properties, zoning changes, and lowering property tax rates on rental properties to encourage short-term rentals to convert to long-term rental properties for island residents.²⁵¹ Indeed, the latter policy changes have recently been adopted in Hawai‘i County,²⁵² as well as in Maui County.²⁵³

Another reason to limit and reduce the number of visitor accommodations in Hawai‘i is because of the chronic shortage of affordable workforce housing on

244. *Id.*

245. See DEP’T OF BUS., ECON. DEV’T & TOURISM, *supra* note 165; MAUI CNTY., *supra* notes 166–67.

246. CNTY. OF MAUI, *supra* note 243, at 10.

247. *Id.* at 11.

248. *Id.*

249. *Id.*; HAW. TOURISM AUTH., 2019 ANNUAL VISITOR RESEARCH REPORT (2019), at 15, 20; STATE OF HAW. DEP’T OF BUS., ECON. DEV. & TOURISM, 2021 ANNUAL VISITOR RESEARCH REPORT (2021), at 13, 26.

250. The percentages of visitor accommodation usage do not sum to 100 percent each year because some visitors stay at more than one type of accommodation during their trip.

251. STATE OF HAW. DEP’T OF BUS., ECON. DEV. & TOURISM, *supra* note 249 at 19–24.

252. See 19 HAW. CNTY CODE 7 § 19-53(e) (2023).

253. *Long-Term Rentals to be Eligible for Exemption*, THE MAUI NEWS (May 22, 2021), <https://www.mauinews.com/news/local-news/2021/05/long-term-rentals-to-be-eligible-for-exemption/>.

most of the main islands.²⁵⁴ While new housing construction has picked up pace in the state,²⁵⁵ the conversion of a large number of condominiums and short-term rental homes to long-term rental or owner-occupied dwellings (through changes in property tax rates or other means) would greatly help alleviate the housing crisis in the State as well as help control tourist levels.²⁵⁶

C. Caps on Rental Cars

Caps on rental cars can also be enacted, at least theoretically, to limit tourism numbers in a similar manner to caps on the number of visitors and visitor accommodations. However, there is not much precedent for such policy and there are some practical issues to consider. An increasing number of large cities in Europe and elsewhere have begun to restrict or ban car travel to some if not all of their jurisdictions, at least for part of the week.²⁵⁷ However, these efforts are mostly motivated by an interest in reducing traffic congestion and air pollution and making the urban areas more pedestrian friendly.²⁵⁸ Moreover, these restrictions in the participating cities do not target rental cars as such, as they typically apply to all vehicular traffic but especially older and higher polluting diesel cars.²⁵⁹

Several places ban or restrict the use of rental cars. The small North Atlantic island of Bermuda does not allow tourists to rent conventional cars on its small and congested roads, only scooters, and since April 2017 two-seater electric mini cars can be rented.²⁶⁰ In addition, several local governments have banned tourist vehicles on Italian islands, including Lampedusa, Linosa, and Procida, and starting in the

254. *Hawai'i's Affordable Housing Crisis: The High Cost of Our Affordable Housing Shortfall*, HAW. APPLESEED CTR. FOR L. & ECON. JUST. (2014), https://static1.squarespace.com/static/601374ae84e51e430a1829d8/t/602f33626fd92b190f1794f5/1613706084756/Hawaii+Affordable+Housing+Crisis_ReDesign.pdf; see Cassie Ordonio, *A 'Tremendous Need' for Affordable Housing in Hawaii Leads to Long Waitlists*, HONOLULU CIVIL BEAT (Sept. 7, 2022), <https://www.civilbeat.org/2022/09/a-tremendous-need-for-affordable-housing-in-hawaii-leads-to-long-waitlists/>.

255. See Melissa Tanji, *Maui County's 5,000-Home Goal Could Take Much Longer*, THE MAUI NEWS (March 1, 2023), <https://www.mauinews.com/news/local-news/2023/03/maui-countys-5000-home-goal-could-take-much-longer/>; Cait Medearis, *New Affordable Housing Projects Coming to Honolulu*, ISLAND NEWS (May 2, 2023), https://www.kitv.com/news/local/new-affordable-housing-projects-coming-to-honolulu/article_b9eb0fae-e978-11ed-9400-b707933d737e.html; Kalie Hunt, *More Affordable Housing to be Built on Kauai*, KHON 2 (Sept. 30, 2022, 2:45 PM), <https://www.khon2.com/kauai-news/more-affordable-housing-to-be-built-on-kauai/>; *Hawaii County Breaks Ground on Kaloko Heights Affordable Housing Development in Kona*, BIG ISLAND NOW (April 28, 2023, 10:22 PM), <https://bigislandnow.com/2023/04/28/hawaii%CA%BBi-county-breaks-ground-on-kaloko-heights-affordable-housing-development-in-kona/>.

256. See generally THE MAUI NEWS, *supra* note 253. Hawaii's Governor Josh Green has been seeking to convert 3,000 vacation rentals to longer-term housing for the victims of Maui's August 2023 wildfires. See, e.g., Audrey McAvoy, *Hawaii Governor Threatens to Use "Hammer" to Convert 3,000 Vacation Rentals to Housing for Newly Homeless Maui Wildfire Survivors*, FORTUNE (Dec. 18, 2023, 7:41 AM), <https://fortune.com/2023/12/18/hawaii-governor-josh-green-convert-vacation-rentals-housing-lahaina-maui-wildfire-survivors/>.

257. Aria Bendix, *15 Major Cities Around the World that are Starting to Ban Cars*, BUS. INSIDER (Jan. 12, 2019, 6:00 AM), <https://www.businessinsider.com/cities-going-car-free-ban-2018-12>.

258. *Id.*

259. *Id.*

260. *Scooter and Electric Car Rentals in Bermuda*, GUIDE.BM (Nov. 12, 2021), <https://guide.bm/vehicle-rentals/>.

summer of 2022, tourist vehicles traveling to Italy's Amalfi Coast have been subject to an odd-even numbered day ban based on their license plate numbers during summer weekends, as well as from 10 a.m. to 6 p.m. during August and a few springtime holidays.²⁶¹ Additional restrictions have been placed on larger vehicles, camper vans, and vehicles with trailers.²⁶²

Elected officials in Hawai'i have discussed rental car caps for several years.²⁶³ However, these proposals have yet to receive serious consideration. Also, some areas in Hawai'i rely less on rental cars, such as the tourist mecca of Waikīkī Beach in Honolulu. The Honolulu Airport actually has less rental cars available than are found on Maui, even though O'ahu receives more tourists than Maui does.²⁶⁴ Most tourists on O'ahu take shuttles, taxis, rideshares, or Ubers from the airport to their resorts and thus a rental car cap on O'ahu would be ineffective.²⁶⁵ Another challenge is the growth in the use of peer-to-peer private car sharing services such as Turo, Getaround, Zipcar, and Kayak, which would need to be covered by a rental car cap.²⁶⁶ A bill in the Hawai'i Legislature proposed banning such rentals, but it did not pass.²⁶⁷

D. Airport and Airline Policies

Given Hawai'i's remote location in the Pacific Ocean, the vast majority of visitors arrive by commercial airline. However, direct regulation of airlines by a state to limit out of state tourism may violate the Commerce Clause.²⁶⁸ Fortunately, there are several other policies for airports and airlines that can be considered by public

261. Martiny, *supra* note 10; Laura Itzkowitz, *Italy Issues New Rules for Driving the Amalfi Coast*, AFAR (June 24, 2022), <https://www.afar.com/magazine/italy-issues-new-rules-for-driving-the-amalfi-coast>.

262. Itzkowitz, *supra* note 261.

263. Kehaulani Cerizo, *Case: Rental Car Cap, Hotel Room Freeze May Mitigate Overtourism*, THE MAUI NEWS (Oct. 14, 2021), <https://www.mauinews.com/news/local-news/2021/10/case-rental-car-cap-hotel-room-freeze-may-mitigate-overtourism/>; *Paltin to Advocate Rental Car Caps in Legislative Session*, THE MAUI NEWS (Sept. 17, 2021), <https://www.mauinews.com/news/local-news/2021/09/paltin-to-advocate-rental-car-caps-in-legislative-session/>.

264. Yoohyun Jung, *Hawaii's Pandemic-Induced Rental Car Shortage – Here's What the Data Shows*, HONOLULU CIV. BEAT (April 2, 2021), <https://www.civilbeat.org/2021/04/hawaiis-pandemic-induced-rental-car-shortage-heres-what-data-shows>.

265. Kathleen Wong, *Save on Your Hawaii Vacation by Booking Cheaper, More Sustainable Options to a Rental Car*, USA TODAY (Dec. 8, 2022, 5:00 AM), <https://www.usatoday.com/story/travel/destinations/2022/12/08/hawaii-rental-car-cheap-sustainable/10714711002/>.

266. *See generally* Brett Helling, *Turo vs Getaround: Pros, Cons % Which is Better in 2024?*, RIDESTER (Nov. 10, 2023), <https://www.ridester.com/turo-vs-getaround/>.

267. U.S. Const. art. 1, § 8, cl. 3. However, it should be noted that the U.S. Congress eliminated federal regulation of airline fares by passing the Airline Deregulation Act of 1978, 92 Stat. 1705, and by eliminating the Civil Aeronautics Board. *See* STEVEN MORRISON & CLIFFORD WINSTON, *THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION* (1986).

268. U.S. Const. art. 1, § 8, cl. 3. However, it should be noted that the U.S. Congress eliminated federal regulation of airline fares by passing the Airline Deregulation Act of 1978, 92 Stat. 1705, and by eliminating the Civil Aeronautics Board. *See* STEVEN MORRISON & CLIFFORD WINSTON, *THE ECONOMIC EFFECTS OF AIRLINE DEREGULATION* (1986).

officials in Hawai‘i that could limit or reduce tourism without violating the Commerce Clause or the Dormant Commerce Clause.²⁶⁹

For example, construction of a second main runway at the Kahului Airport on Maui has been deferred by the Hawai‘i Department of Transportation’s (HDOT) Airport Division, though it could still be built.²⁷⁰ A decision to place a moratorium on plans to build or expand runways and gates at the state’s largest airports would set an ultimate limit or ceiling on visitor numbers, but would not reduce it.²⁷¹

Another option is for the HDOT to increase the landing fees for commercial airline service at the airports on Maui, Kaua‘i, O‘ahu and Big Island, at least during the busy summer season.²⁷² The HDOT had previously waived the landing fees for one year—from 2021 to 2022—on Moloka‘i and Lāna‘i in order to *increase* air travel to these islands because of their very small populations and the low profitability of these routes.²⁷³ Any increase in the landing fees would likely have a negligible effect on airline travel to the Hawaiian Islands (as would comparable increases in rental car taxes) unless the increase was substantial.²⁷⁴

A more radical policy to reduce visitor travel to Hawai‘i would be for the state to subsidize the airlines to keep a certain target percentage of their seats unsold, especially during the peak summer season.²⁷⁵ This would be tricky to implement, since many inbound flights will have some vacant seats anyway, and to be effective in reducing visitor numbers such a policy would likely be prohibitively expensive for the state.²⁷⁶ Ideally the airlines traveling to Hawai‘i would voluntarily adopt

269. The airport and airline policies discussed herein are illustrative and not exhaustive of the possibilities.

270. *Supra* note 243, at 24, 25.

271. *Supra* note 243, at 26; Guthrie Scrimgeour, *Lihue Runway Project Gets Kaua‘i Planning Commission Approval*, THE GARDEN ISLAND (Nov. 16, 2022, 12:05 AM), <https://www.thegardenisland.com/2022/11/16/hawaii-news/lihue-runway-project-gets-kauai-planning-commission-approval/>.

272. The Airports Division of the Hawaii Department of Transportation is required to periodically revise the rental rates and charges to be comparable with rental fees charged for similar facilities and services. The effect of the State’s airports’ landing fees on tourism levels could be considered during the next periodic review. *See Procedure No. 4.5 SCHEDULE OF RATES AND CHARGES*, STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION – AIRPORT DIVISION (Oct. 11, 2019), <https://hidot.hawaii.gov/airports/files/2012/10/4.5-Schedule-of-Rates-and-Charges.pdf>.

273. Letter from Jade T. Butay, Director of Transportation, Letter on Policy on Waiver of Landing Fees at Select Airports, STATE OF HAW., DEP’T OOF TRANSP. – AIRPORT DIV. (Feb. 18, 2021).

274. A substantial increase in landing fees would therefore need a strong external policy justification to go beyond a strict reading of Procedure No. 4.5.

275. A precedent for subsidizing airlines to keep a certain target percentage of their seats empty has been established by Payment for Ecosystem Services (PES), which are programs and policies that offer financial incentives to farmers or other landowners in exchange for managing their land to provide some sort of ecological service. *See, e.g.,* Kent Redford & William Adams, *Payment for Ecosystem Services and the Challenge of Saving Nature*, 24 CONSERVATION BIOLOGY 785, 785-87 (2009); James Salzman et al., *The Global Status and Trends of Payments for Ecosystem Services*, 1 NATURE SUSTAINABILITY 136, 136 (2018).

276. Again, such a major policy change would require a strong external justification. Alternatively, the State could consider restricting the types of airplanes that could land at Hawaii’s commercial airports, especially Honolulu, Kahului, and Lihue, e.g., by only permitting narrow-body aircraft that seat no more than 200 passengers as opposed to wide-body Airbus and Boeing aircraft that fly with 278 or more passengers into Hawai‘i. Such a policy, however, might violate the Commerce Clause of the U.S. Constitution.

sustainable tourism goals and plans, though this would only be effective if all of them accepted limits to tourism levels.²⁷⁷

E. Visitor Impact Fees

Visitor impact fees, sometimes also called green fees, green taxes, environmental levies, or tourism taxes, are user charges placed on visitors to a park, monument, seashore, marine protected area, forest, hiking or recreation area, or other tourist site or facility, or even a whole country, which provides a revenue source for conservation or to help manage the area.²⁷⁸ These fees are an increasingly popular example of a conservation finance mechanism.²⁷⁹ Visitor impact fees are usually not meant to reduce tourism levels, though if enacted at a high enough level they could have such a dampening effect as well.²⁸⁰

While most familiar to the American public as a small entrance fee per person or per vehicle to a national park, monument, seashore, or recreation area,²⁸¹ a variety of visitor impact fees could be considered in Hawai'i. However, no comprehensive mandatory visitor impact fee system exists in the United States, perhaps due to concern over potential legal challenges.²⁸² But given the fact that Hawai'i has an approximately \$358 million annual budget deficit in funding to adequately care for its ecosystems and biocultural resources,²⁸³ a review of international experience with visitor impact fees is instructive.

Hawai'i charges a small entrance fee and parking fee to non-resident visitors at ten of its 50 state parks on the five main islands, thus the program is far from comprehensive.²⁸⁴ In some cases, reservations are also required. Several bills have been proposed in the state legislature in recent years to expand these fees but

277. Hawaiian Airlines has produced and shows a "Travel Pono" (Responsibly) in-flight video and also supports regenerative tourism programs. See, e.g., *Hawaiian Airlines 2022 Corporate Kuleana (Responsibility) Report Outlines Goals to Eliminate Single-Use Plastics from Cabins, Increase Local Food Sourcing and Promote Sustainable Tourism*, HAWAIIAN AIRLINES (May 2, 2022), <https://newsroom.hawaiianairlines.com/releases/hawaiian-airlines-2022-corporate-kuleana-responsibility-report-outlines-goals-to-eliminate-single-use-plastics-from-cabins-increase-local-food-sourcing-and-promote-sustainable-tourism#:~:text=HONOLULU%20%E2%80%93%20Hawaiian%20Airlines%20today%20issued,food%20and%20beverage%20for%20its>.

278. EMILIA VON SALTZA, GREEN PASSPORT: INNOVATIVE FINANCING SOLUTIONS FOR CONSERVATION IN HAWAII, A REPORT PREPARED FOR CONSERVATION INTERNATIONAL (2019).

279. David Meyers et al., *Conservation Finance: A Framework*, CONSERVATION FINANCE ALL. (2020), <https://static1.squarespace.com/static/57e1f17b37c58156a98f1ee4/t/5e8c97ecf33f8960fc2cbda3/1586272239963/Conservation+Finance+Framework.pdf>.

280. A high visitor impact fee would lead to lower visitation at targeted sites due to the price elasticity of demand and a shift to greater usage of feeless sites such as beaches.

281. *Entrance Fees by Park*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/entrance-fee-prices.htm> (last visited April 30, 2024).

282. *Supra* note 278, at 14.

283. *Supra* note 278, at 20.

284. Kimberly Burnett et al., *Charging Visitors to Access Hawaii's State Parks and Natural Recreation Areas*, THE ECON. RSCH. ORG. OF THE UNIV. OF HAW. (2022), <https://uhero.hawaii.edu/charging-visitors-to-access-hawaii-state-parks-and-natural-recreation-areas/>.

have not passed.²⁸⁵ An expanded system of visitor impact fees in Hawai‘i could thus be developed and implemented with a narrow or broad scope. Each of these options will be addressed in turn.²⁸⁶

A ‘narrow scope’ visitor impact fee system would be charged on a limited number of tourist destinations in Hawai‘i.²⁸⁷ An example of this was the proposed \$50 green fee charge for an annual license for non-state residents to visit specified state parks, forests, hiking trails, and other natural resources.²⁸⁸ The proposed bill had broad public support in Hawai‘i. While this proposal made it to conference committee, it failed to pass in the 2023 legislative session. However, the sponsors have promised to reintroduce the bill again in 2024, possibly with an even higher fee.²⁸⁹ The proposal was considered ‘narrow scope’ because Hawai‘i has far more beaches and natural areas than were included in the proposed bill and that that could be practically monitored for compliance. Thus, even if the bill had passed, there undoubtedly would have been some shift to non-covered beaches or other natural areas among visitors who seek to avoid paying the fee. Hawai‘i’s green fee proposal was considered comparable to a \$34.50 per head cruise passenger head tax that was approved in Alaska in 2010.²⁹⁰

A ‘broad scope’ visitor impact fee system would be designed to cover all visitors, irrespective of their ultimate travel behavior or itinerary. This type of visitor impact fee would need to be levied at the point of entry, i.e., entry into any of Hawai‘i’s counties. Given the constitutional concerns about state regulation of airlines noted in the previous section, and the fact that not all tourists rent cars, the most practical way to implement such a fee would be through an electronic platform.²⁹¹ Several jurisdictions worldwide have experience with these broader visitor impact fees.²⁹² The fees have a variety of names, such as Green Tax, Eco Tax, Sustainable Development Fee, Pristine Paradise Environmental Fee, among others.²⁹³ Some of the fees are modest, such as \$3 to 6 per day in the Maldives, \$10 per visit in the British Virgin Islands, €3-10 per visit in Venice, Italy, and \$23 per visit in New Zealand.²⁹⁴ Other fees are higher, such as \$100 per visit in the Galapagos

285. Marcel Honore, *Hawaii’s Green Fee Proposal Dies at the Last Minute – Again*, HONOLULU CIVIL BEAT (April 28, 2023), <https://www.civilbeat.org/2023/04/hawaiis-green-fee-proposal-dies-at-the-last-minute-again/>.

286. *Id.*

287. *Id.*

288. Angela Symons, ‘*The Idea is Not Dead*’: *Visitor Fee to Protect Hawaii’s Delicate Ecosystems Rejected by Lawmakers*, EURONEWS TRAVEL (May 5, 2023), <https://www.euronews.com/travel/2023/05/05/hawaii-overtourism-new-visitor-fee-targets-tourists-visiting-delicate-eco-sites>; Island Miller, *Hawaii 2023 Green Fee Fails*, JEFFSETTER TRAVEL (May 19, 2023), <https://www.jeffsetter.com/hawaii-2023-green-fee-fails/>.

289. *Id.*

290. Johanna Jainchill, *Alaska Cruise Tax Reduction Signed into Law*, TRAVEL WEEKLY (June 28, 2010), <https://www.travelweekly.com/Cruise-Travel/Alaska-cruise-tax-reduction-signed-into-law>.

291. *Supra* note 278, at 8.

292. *Supra* note 278, at 6–9; Emelia von Saltza & John Kittinger, *Financing Conservation at Scale via Visitor Green Fees*, 10 FRONTIERS IN ECOLOGY & EVOLUTION 1, 2–5 (2022).

293. *Id.*

294. *Supra* note 278, at 6.

and Palau, and \$100 per day in Bhutan.²⁹⁵ Only a very high fee such as charged to visitors to Bhutan would likely reduce tourism levels, though such a high fee is unlikely to be seriously considered in Hawai‘i at this time. However, it should be noted that New Zealand has successfully operated its International Visitor Conservation and Tourism Levy since 2019 on an electronic platform.²⁹⁶

F. Implementation Issues

If tourist quotas or caps on accommodations or rental cars are enacted, as well as visitor impact fees, a few administrative issues must be considered by the implementing authority. These issues will be addressed in turn.

1. Defining and Setting Carrying Capacities

Carrying capacity is a topic of critical importance to sustainable tourism. While Maui County’s rule of thumb that it is desirable to not exceed an island-wide visitor population of 33% of the resident population is a good starting point for determining desirable tourism levels,²⁹⁷ this rule does not consider carrying capacity. The concept of the carrying capacity of an environment was originally developed in biology and ecology in the 1870s.²⁹⁸ Carrying capacity can be defined in the context of tourism as the total number of tourists that can be supported indefinitely in a state or county without permanently damaging the ecosystems of the state or county.²⁹⁹ Two methods that can be used to estimate tourism carrying capacity are the Visitor Experience and Resource Protection framework of the U.S. National Park Service and the Limits of Acceptable Change system for wilderness planning.^{300, 301} A third approach, which focuses on resource usage, is the Biocapacity Method used in Ecological Footprint analysis.³⁰²

The Visitor Experience and Resource Protection (VERP) framework was developed in the 1990s by the U.S. National Park Service to account for both environmental resources and social dimensions of carrying capacity at National Parks, i.e., the quality of visitor experience which inevitably declines in overcrowded conditions.³⁰³ Similar considerations apply to tourism to Hawai‘i. VERP has nine

295. Reuters, *Bhutan Cuts Daily Tourist Fee by Half to Lure More Visitors*, CNN TRAVEL (Aug. 27, 2023, 1:10 AM), <https://www.cnn.com/travel/article/bhutan-tourist-fee-cut-intl-hnk/index.html>. Bhutan’s fee was significantly decreased in September 2023, from \$200–250 per person per night to \$100, while becoming no longer inclusive of amenities and travel package items.

296. *Id.*

297. See *Maui County General Plan 2030*, *supra* note 166, at 4–14.

298. Nathan Sayre, *The Genesis, History, and Limits of Carrying Capacity*, 98 ANN. ASOC. AM. GEOGR. 120–34 (2008).

299. Harry Coccossis, *Tourism Carrying Capacity*, in Dimitrios Buhalis, editor, ENCY. TOUR. MGT. & MKTG. (2022), at 400–03; Harry Coccossis & Alexandra Mexa, editors, THE CHALLENGE OF TOURISM CARRYING CAPACITY ASSESSMENT (2004).

300. *Supra* note 20, at 98–104; NAT’L PARK SERV., THE VISITOR EXPERIENCE AND RESOURCE PROTECTION (VERP) FRAMEWORK: A HANDBOOK FOR PLANNERS AND MANAGERS (1997).

301. GEORGE STANKEY ET AL., THE LIMITS OF ACCEPTABLE CHANGE (LAC) SYSTEM FOR WILDERNESS PLANNING, USDA FOREST SERVICE (1985); NAT’L PARK SERV., *supra* note 300, at 5–7.

302. MATHIS WACKERNAGEL & BERT BEYERS, ECOLOGICAL FOOTPRINT: MANAGING OUR BIOCAPACITY BUDGET (2019).

303. *Supra* note 20, at 98.

elements: (1) creating a project team; (2) public involvement; (3) developing a clear statement of the destination's purposes, significance, and interpretative themes; (4) mapping and analyzing the important resources and potential visitor experiences; (5) identifying potential management zones; (6) creating a proposed plan and alternatives for the management zones; (7) selecting quality indicators and standards for each zone; (8) comparing desired conditions with existing conditions; and (9) developing a management strategy to address any discrepancies.³⁰⁴

In the case of tourism in Hawai'i, it would make sense to focus on the main tourist areas on the different islands as management zones, e.g., Kā'anapali, Kīhei/Wailea, Molokini Crater, and the Road to Hāna on Maui. The important resources for quality indicators and standards would necessarily include coral reefs and fish populations, the number and frequency of tour boats for snorkeling, fishing, and whale watching at various hotspots, and so on. Environmental, ecological, and social data collected over several years could be used to develop management plans to improve conditions to desired levels, feeding back into setting target levels for tourist quotas or caps on visitor accommodations.

The Limits of Acceptable Change (LAC) system was developed initially in the 1980s by the U.S. Forest Service for setting carrying capacity in the wilderness planning context. LAC attempts to compromise between the absolute protection of natural resources and those who want unrestricted access (which is a value held among many tourists).³⁰⁵ The LAC system can be used if VERP is unable or unlikely to resolve any scientific and management uncertainties and conflicts. The LAC system has six steps: (1) identify two or more goals in conflict, e.g., environmental protection of a natural resource and unrestricted recreational access; (2) determine if all goals can be compromised (if not, one goal must be compromised to meet the others); (3) decide which of the goals will constrain the others; (4) write LAC indicators and standards and monitor for the constraining goal as minimally acceptable conditions; (5) compromise the ultimately constraining goal(s) until the standards are met, e.g., a cap on visitation levels; and (6) compromise the other goal(s) so standards are never violated.³⁰⁶

A third approach to determine carrying capacity of an area that focuses on resource demands rather than the number of people is the Biocapacity Method, which estimates the biologically productive land and sea area that is available to provide the ecosystem services that people consume.³⁰⁷ Biocapacity estimates an ecological budget or nature's regenerative capacity, and should be compared to the Ecological Footprint of the same area: a measure of the demand and activities placed on the biosphere in a specified area in a given year, given the prevailing technology and

304. *Id.* at 98, 99.

305. *Supra* note 301.

306. David Cole & Stephen McCool, *Limits of Acceptable Change and Natural Resources Planning: When is LAC Useful, When is it Not?*, Proceedings – Limits Of Acceptable Change And Related Planning Processes: Progress And Future Directions, From A Workshop Held At The University Of Montana's Lubrecht Experimental Forest 69–71 (May 20-22, 1997).

307. Michael Borucke et al., *Accounting for Demand and Supply of the Biosphere's Regenerative Capacity: The National Footprint Accounts' Underlying Methodology and Framework*, 24 *ECOL. INDIC.* 518, 519 (2013).

resource management of that year.^{308, 309} These metrics are usually expressed as global hectares or acres per capita. If the Ecological Footprint exceeds biocapacity the area is in “overshoot” and is running an ecological deficit, while if biocapacity exceeds the Ecological Footprint then the area is living sustainably.³¹⁰ Since these measures are based on a given human population in a specified place and time, given the prevailing technology and resource management practices, it would be possible to convert the results to target population levels of resident people and tourists, the latter being a relatively high percentage in Hawai‘i.

While most Ecological Footprint studies have been conducted at the national level, an Ecological Footprint analysis for Hawai‘i was completed in 2015 along with the other U.S. states and Washington, D.C.³¹¹ The study found that only 16 of the states (less than a third) had Ecological Footprints below their biocapacity.³¹² In the case of Hawai‘i, the authors were unable to calculate its biocapacity because of insufficient data, though given the state’s high level of food imports it is likely that it would have been found to be in ecological deficit.

2. *Quota or Permit Allocation Methods*

If tourist quotas or caps on rental cars are established, a method needs to be determined to allocate quotas or permits to visitors. A “first come, first served” system would be most preferable since the policy goal is to limit tourism levels based on carrying capacities, not to discriminate against some people over others or to raise revenue. A reservation system would need to be established by the administrative authority. The process would be similar to a cap on visitor accommodations that would be allocated to tourists based on preexisting reservation systems with hotels and other establishments. In addition, it would be preferable to implement these programs without application fees or to allow for open trading of quotas or permits among visitors.^{313, 314} It would also make sense to exempt state resident travelers from these requirements, and to set aside a small quantity of quotas or permits, e.g.,

308. *Id.* A related measure, the Touristic Ecological Footprint, has been proposed but this focuses on the Ecological Footprint of visitors to a particular destination based on their behavior, and individual tourism products. See, e.g., Colin Hunter, *Sustainable Tourism and the Touristic Ecological Footprint*, 4 ENV’T DEV. SUSTAIN. 7, 7 (2002).

309. These two measures quantify the mutually exclusive areal units required to meet the demand for ecosystem services in terms of cropland, grazing land, fishing grounds, forests, land for absorbing carbon dioxide emissions, and built-up areas for shelter and other infrastructures needed to support the human population in a specified area, as well as the bioproductive supply area of the same that is available.

310. *Supra* note 307, at 526.

311. Ronna Kelly et al., *State of the States: A new perspective on the wealth of our nation*, GLOB. FOOTPRINT NETWORK (July 2015), https://www.footprintnetwork.org/content/images/article_uploads/USAFootprintReport_final_lores.pdf.

312. *Id.* The states with Ecological Footprints below their biocapacity, in rank order from the ones most below their biocapacity, were: Alaska, South Dakota, Montana, Wyoming, Nebraska, North Dakota, Maine, Arkansas, Kansas, Mississippi, Vermont, Oregon, Idaho, Oklahoma, Iowa, West Virginia.

313. Open trading of quotas or permits among visitors would be favored by many economists since it would allow potential visitors to use market forces to reveal their valuation of a visit by their willingness to pay level.

314. Tom Tietenberg, *The Tradable-Permits Approach to Protecting the Commons: Lessons for Climate Change*, 19 OXF. REV. ECON. POL’Y 400, 400 (2003).

1 to 5%, for family and personal emergencies that would be granted on a case-by-case basis.

3. *Setting Visitor Impact Fees*

It is difficult if not impossible to determine the precise cost imposed by tourists on Hawai'i's ecosystems and biocultural resources, as the marginal cost for one individual's visit is at or near zero. Rather, adverse impacts result from overuse of tourist sites by masses of people over time. Even so, given the state's \$358 million annual budget deficit in funding to adequately maintain these resources,³¹⁵ charging visitors to help close the budget gap seems reasonable. The level of visitor impact fees will likely be a political decision, as was the recently proposed annual fee of \$50 per person,³¹⁶ and a green fee is unlikely to close the budget gap. However, the more comprehensive the coverage of the fee to state parks and other natural sites the closer Hawai'i will be to being able to adequately maintain its ecosystems and biocultural sites.

4. *Program Administration*

Hawai'i is unique among the 50 U.S. states in that, other than the state and County of Honolulu, it does not have any cities—only towns and villages—and counties are the only legally constituted governments below the state. With one minor exception,³¹⁷ county governments in Hawai'i constitute one or more of the main Islands. Thus, both counties and the state could potentially implement any enacted tourism limits in the state. While ideally these policies would be comprehensive and approved and implemented at the state level, there are already some controls on visitor accommodations in Maui County and non-resident entrance fees at some of the state parks on several of the islands. Several government agencies could conceivably implement these programs (subject to legislative authorization), including the Hawai'i State Department of Business, Economic Development & Tourism, the Department of Land and Natural Resources (including the Division of State Parks), as well as county agencies (e.g., Departments of Planning, Transportation, etc.).³¹⁸ Given its recent controversy, it is unlikely that the HTA would be a good fit for limiting tourism levels unless it underwent significant structural reform beyond its recent focus on destination management.

The same government agencies that would be tasked with limiting tourism numbers must also dedicate adequate resources to enforcement. While enforcement actions against illegal short-term vacation rentals have been a recent priority on several islands,³¹⁹ enforcement would be a critical component of other policies as

315. *Supra* note 278, at 20.

316. *Supra* note 288.

317. The exception is Kalawao County, which is the small village on the Kalaupapa Peninsula of Moloka'i (actually the smallest county by land area in the whole country and the second-smallest county by population after Loving County, Texas), which was established as a judicial district from 1866 to 1969 for settlements for treatment of quarantined persons with Hansen's Disease. *See, e.g.,* Alia Wong, *When the Last Patient Dies*, THE ATLANTIC (May 27, 2015), <https://www.theatlantic.com/health/archive/2015/05/when-the-last-patient-dies/394163/>.

318. CLAIRE MARUMOTO & MATTHEW COKE, *GUIDE TO GOVERNMENT IN HAWAII* (15th ed. 2020).

319. *Supra* notes 241, 242.

well. Tourist quotas could be implemented on an electronic platform for efficient verification of visitors by a state government agency (e.g., at the airport upon arrival), while limits on rental cars could be similarly put on an electronic platform with the cooperation of the rental car companies (and potentially per-to-peer private car rental services). Visitor impact fee programs require an attendant checking for payment at park entrances and other natural sites, though in some cases it would not be practical due to site logistics and low usage rates, and thus some sites may need to be excluded.

CONCLUSIONS

Hawai'i is unique among the 50 states and similar to many over-visited islands around the world that are experiencing significant stress upon their natural and cultural resources. The current levels of tourism are not sustainable and are not consistent with some key planning documents. As a result, policy action is needed now to control the tourism levels in Hawai'i and its most visited islands, especially Maui, O'ahu and Kaua'i. While a limited number of policies to control tourism have already been enacted, more needs to be done.

Several constitutional issues are typically cited as a rationale to not control tourism levels, especially the Commerce Clause, the Dormant Commerce Clause, and the right to interstate travel.³²⁰ However, a closer examination of these constitutional issues shows that while there may be legal challenges, carefully constructed limits to tourism levels are likely to withstand legal scrutiny. For example, the recent decision in *National Pork Producers Council v. Ross* would seem to suggest that a state enacting limits on tourism into the state for non-economic reasons would be seen as a reasonable way to protect the public health, welfare, and natural resources without violating the Dormant Commerce Clause.³²¹ Similarly, narrowly defined limits to tourism would seem to be allowable as exceptions to the right to interstate travel under the Privileges and Immunities Clause, and a logical extension of existing government restrictions on the right to travel to the Northwestern Hawaiian Islands and Kaho'olawe. When combined with the state's broad and strong responsibility under the public trust doctrine to protect its navigable waterways, natural beauty, wildlife, other natural resources and biodiversity, a strong legal case can be made for limits to tourism in Hawai'i.

A variety of policy instruments can and should be enacted in Hawai'i to place firm and reasonable limits to tourism in the state. While recently the state and its counties have considered caps on visitor accommodations as their main option, these restrictions have been incomplete. In addition to strengthening and better enforcing these caps, additional policy options should be considered. These include tourist quotas, caps on rental cars on some islands, airport and possibly airline policies, to be supplemented by broader visitor impact fees.

While any additional limits placed on tourism levels in Hawai'i may be distasteful or seem unfair to some, they are needed in order to fully respect the value of the state not only as a tourist destination but as the home for 1.4 million people. Tourism limits are needed precisely to avoid loving the islands to death. Importantly,

320. See, e.g., HAWAII TOURISM AUTH., O'ahu Destination Management Action Plan 2021-2024, *supra* note 207, at 20.

321. *Supra* notes 94, 106.

it should be recognized that additional limits would not be enacted to exclude people, but rather to better manage them in space and time. This shift in direction in tourism policy is also in line with the recent shift in the posture of the Hawai'i Tourism Authority.³²²

Ultimately, the State of Hawai'i has the kuleana to take action to set reasonable limits to tourism levels based on Article IX, § 1 of the State Constitution.³²³

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.³²⁴

322. *Supra* note 42.

323. Kuleana is the Hawaiian word for responsibility, right, and privilege. The Kuleana Act of 1850 is the foundation of Hawaiian State law pertaining to native Hawaiian land rights. *See, e.g.,* Maivân Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 233 (1989).

324. Haw. Const. art. XI, § 1.