UNIVERSITY OF HAWAII LAW REVIEW

VOLUME 10

1988

University of Hawaii Law Review

Volume 10 / Number 2 / Winter 1988

ARTICLE

COMMENTS

NOTES

RECENT DEVELOPMENTS

Testing the Current: The Water Code and the Regulation of Hawaii's Water Resources

by Douglas W. MacDougal*

* J.D., Washington & Lee University, 1973. The author is a partner in the law firm of Ashford & Wriston, Honolulu. The author wishes to express his appreciation for the excellent research assistance provided in the preparation of this article by Judy Zecchin, a law student attending the University of Chicago.

I. INTRODUCTION

In 1987, the Hawaii legislature established a Commission on Water Resource Management, which is the "water resources agency" required by Article XI, Section 7 of the Hawaii Constitution.[1] To that Commission has been handed the extraordinarily complex task of allocating and protecting Hawaii's ground and surface water resources. The State Water Code,[2] which is the legislative vehicle for the creation of the Commission, provides no blueprint for this task. Rather, the Commission will have to create its own blueprint. It will consist of the Hawaii Water Plan,[3] an immediate task of the Commission, and of regulations, standards, and guidelines to be developed and published by the Commission. Over time, there will also evolve a body of contested case adjudications of water disputes.[4] The Code itself tells the Commission the job it has to do. How it does that job will be up to the Commission.

The scope of the Water Code is intended to be broad: "All waters of the State are subject to regulation" unless specifically exempted, and the exemptions are narrow.[5] But the political tradeoffs required to achieve passage of the Code

---

[1] Article XI, section 7, adopted in 1978, mandated the creation of an agency to set policies affecting water use:

> The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.
>
> The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments, establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses, and establish procedures for regulating all uses of Hawaii's water resources.

HAW. CONST. art. XI, § 7 (1978).

[2] The State Water Code is the amended form of H.B. No. 35, H.D. 1, S.D. 2 entitled "A Bill for an Act Relating to the State Water Code," recommended for passage in Conference Committee Report No. 119 (April 27, 1987). The Fourteenth Legislature enacted the Code May 29, 1987 and it became effective July 1, 1987. It is codifed in chapter 174C of the Hawaii Revised Statutes and is hereinafter cited as the "Code," with section numbers as found in the Hawaii Revised Statutes. HAW. REV. STAT. ch. 174C (1987 Supp.)

[3] Code § 31 *et seq. See infra* notes 60-75 and accompanying text.

[4] Code section 9 requires that: "All proceedings before the commission concerning the enforcement or application of any provision of this chapter or any rule adopted pursuant thereto, or the issuance, modification, or revocation of any permit or license under this code by the commission, shall be conducted in accordance with chapter 91." Chapter 91 refers to the Hawaii Administrative Procedure Act. HAW. REV. STAT. ch. 91 (1985). Under Code section 60, appeals from contested case hearings in connection with permit administration must be made directly to the Supreme Court of Hawaii for final decision.

[5] Code § 4(a). Code § 48(a) exempts "domestic consumption of water by individual users" and catchment systems from permit requirements, when permits would otherwise be required. *See infra* text accompanying notes 96-99.

are also evident. While the Code's registration requirements apply state-wide, its key regulatory mechanisms only take effect upon the designation of a "water management area" when certain criteria (e.g., water shortages) are met.[6] This procedure is the same as that required for designation of ground water control areas in the state,[7] and allows an as-needed phase-in of water regulation. The Code takes no explicit position on the sensitive issue of ownership of water, although an analysis of the Code in the context of Hawaii's decisional water law suggests positions have indeed been taken, as will be seen.[8] Deference is duly accorded county land use and zoning prerogatives,[9] and County Water Use and Development Plans are to become integrated into the Hawaii Water Plan.[10]

The purpose of this article is to present a general overview of the Water Code. Part II briefly reviews some key definitions in the common law of water rights in Hawaii. Part III first summarizes the structure and impact of the Code, and then details its major provisions, highlighting the basic elements of its structure. Part III thus emphasizes the practical aspects of the Water Code, as enacted.

Part IV puts the Water Code in the context of Hawaii's decisional law re-

---

[6] Code § 41. *See infra* text accompanying notes 85-95.

[7] Code section 41(c) provides: "Designated ground water areas established under chapter 177, the Ground Water Use Act, and remaining in effect at the effective date of this chapter shall continue as water management areas." Ground waters are regulated under Hawaii Revised Statutes, chapter 177, known as the Ground Water Use Act. HAW. REV. STAT. ch. 177 (1985). The language of Chapter 166 of Title 13, Administrative Rules for "Control of Ground Water Use" in the State of Hawaii promulgated by the Department of Land and Natural Resources (May 1981) is quite similar to the provisions of Code section 41(a) for designation of water management areas:

> When it can be reasonably determined, after conducting scientific investigation and research, that the beneficial uses of the ground water resources in an area are being threatened by existing or proposed withdrawals of water, it shall be the duty of the Board to designate such areas for the purpose of establishing administrative control over the withdrawals of ground waters in the area to insure the most beneficial use, development, or management of such ground water resources in the interest of the people of the State.

HAW. ADMIN. RULES § 13-166-7 (1981).

Section 41(a) of the Code includes diversions of water, broadens the context to include "water resources," and incorporates the notion of "reasonable-beneficial use" and "in the public interest" in place of "beneficial use, development, or management . . . in the interest of the people of the State." As with the Code, the Ground Water Use Act and regulations establish a permit procedure, and a mechanism for preserving existing uses. *See* HAW. ADMIN. RULES, tit. 13, ch. 166, subchs. 4, 5 (1981).

[8] *See infra* text accompanying notes 169-73.

[9] *See, e.g.*, Code § 2(e) (Code interpretation shall conform with intentions and plans of counties with respect to land use planning); Code § 31(b)(2) (requiring water use and development plans to be consistent with county general plans and zoning).

[10] Code § 31(a), (c).

garding ground and surface waters.[11] The subject is complex, and the analysis is limited to a brief survey of essentials. Detailed analysis of the extensive *McBryde Sugar Co., Ltd. v. Robinson*[12] litigation is not the article's purpose, although a basic background of the case itself is necessary to an understanding of the Water Code's impact on common law water rights.[13]

II. A Summary of Common Law Water Rights in Hawaii

The purpose of this section is briefly to review the three major categories of common law water rights in Hawaii, as defined by the Hawaii Supreme Court. After many years of relative stability, Hawaiian water law was thrown into considerable confusion by several Hawaii Supreme Court decisions. The cases most responsible for this confusion are *McBryde*[14] and *Reppun v. Board of Water Supply*.[15] Both cases enunciated principles of water law which represent significant departures from earlier law, or have proven either difficult or impracticable in their application. These cases, discussed in Part III of this article, address the two broad categories of surface water rights, riparian rights and appurtenant rights.

Riparian rights are rights to the flow of water in a stream for drinking or other domestic purposes "without substantial diminution, or the right to flow of a stream in the form and size given it by nature."[16] Riparian water rights appertain only to land adjoining a natural water course. These rights were held by the Hawaii Supreme Court to be of "statutory rather than common law origin" in the State of Hawaii.[17] The statutory basis for riparian rights is contained in Hawaii Revised Statutes Section 7-1,[18] originally enacted in 1850 as section 7 of what has come to be known as the "Kuleana Act." Riparian rights thus are said to have originated in Hawaii at approximately the time of the legislation dividing lands among King, government, chiefs and common people in 1848, commonly known as the Great Mahele.[19]

Appurtenant water rights are deemed to be a part of the land in the same sense that an easement might be appurtenant to a parcel of land. They are

---

[11] *See* text accompanying notes 140-49.

[12] 54 Haw. 174, 504 P.2d 1330 (1973), *aff'd on rehearing*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed*, 417 U.S. 962 *cert. denied*, 417 U.S. 976, (1974).

[13] For a discussion of the *McBryde* case, see *infra* text accompanying notes 150-68.

[14] 54 Haw. 174, 504 P.2d 1330 (1973).

[15] 65 Haw. 531, 656 P.2d 57 (1982).

[16] *McBryde*, 54 Haw. at 192-93, 504 P.2d at 1342.

[17] *Reppun*, 65 Haw. at 549, 656 P.2d at 69.

[18] Haw. Rev. Stat. § 7-1 (1985). For the text of section 7-1, see *infra* note 138.

[19] *See generally* text accompanying note 161.

"incidents of land ownership,"[20] and are measured as of the time of the Great Mahele. The *McBryde* court determined appurtenant water rights by multiplying the number of acres of land owned by the respective parties which had been under taro cultivation at the time of the Land Commission Award (implementing the Great Mahele) by the average quantity of water then used per acre per day in growing taro.[21] More generally, "appurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land."[22]

The third major category of water rights concerns ground waters. Ground waters are those which flow or are in a state of rest beneath the ground, regardless of source. There is often no clear demarkation of ground and surface waters in the sense that they may each "represent no more than a single integrated source of water with each element dependent upon the other for its existence."[23] In Hawaii, the leading case addressing ground water rights is *City*

---

[20] *McBryde*, 54 Haw. at 187 n.13 & 188, 504 P.2d at 1339 & n.13; *see also Reppun*, 65 Haw. at 551, 656 P.2d at 70.

[21] *McBryde*, 54 Haw. at 188, 504 P.2d at 1339-40.

[22] *Reppun*, 65 Haw. at 551, 656 P.2d at 71. *See also infra* text accompanying notes 205-08. For a brief overview of Hawaiian water law before the *McBryde* case, see generally, Territory v. Gay, 31 Haw. 376 (1930), *aff'd*, 52 F.2d 356 (9th Cir. 1931), *cert. denied*, 284 U.S. 677. The *Gay* court presumed the existence of prescriptive rights in water, as well as a "normal daily surplus" of water which was that amount left over after prescriptive rights and appurtenant rights (including uses of water for domestic purposes) were accounted for. This normal daily surplus was the property of the "konohiki of the land of origin," to do with as he pleased, including to divert elsewhere, according to *Gay*. *Id.* at 401-02.

[23] *Reppun*, 65 Haw. at 555, 656 P.2d at 73. The court reasoned as follows: "The common law in treating surface and ground water as distinct failed to recognize that both categories represent no more than a single integrated source of water with each element dependent upon the other for its existence." (citing Haase, The Interrelationship of Ground and Surface Water: An Enigma to Western Law, 10 SW. L.J. 2069 (1978)). A summary of the geologic features associated with groundwater aquifers in general, and Oahu in particular, may be found in the Honolulu Board of Water Supply's "Oahu Water Plan":

> The most extensive of the three types of ground water bodies on which Oahu depends for its water supply is the basal lens of fresh water within much of the southern and northern portions of the island. . . . The immense basal water bodies, which are artesian where they underlie the coastal plain, exist because of the difference in density between infiltrated rainfall and sea water. Fresh water floats on the heavier sea water, both of which permeate the subsurface rock.
>
> Less widespread, but still important, is infiltrated rainfall impounded behind impermeable dikes in the mountains, called dike water, or high-level water. Dikes were formed when molten lava solidified in linear volcanic vents, resulting in vertical slabs of dense massive rock. Water impounded in the permeable lavas occurring between the dikes is of excellent quality and not subject to contamination by sea water.
>
> The third type is ground water held up, or perched, on horizontal or inclined impermeable beds such as volcanic ash. Perched water, which is not found widely on Oahu, normally occurs as springflow and is of excellent quality. In a few small areas this type of

Mill v. Honolulu Sewer and Water Commission.[24] In *City Mill*, the court adopted the rule of correlative rights in ground waters, one of several common law theories for allocating ground water resources.

Under the rule of correlative rights, all fee simple owners of lands overlying a common groundwater resource have rights to use water from that resource. The rights are termed "correlative" since each owner may use the water only as long as he does not impair the rights of neighboring landowners to do the same. Uses initiated earlier in time generally enjoy no priority over later uses. A primary purpose of the rule is to ensure that *all* parcels of land overlying a ground-water resource enjoy reasonable and continuous access to the water. When there is not enough water to support all uses, all uses must be proportionately reduced. Water may be used on lands outside a basin area only if surplus waters are available in the basin; if there is a shortage, exporters' rights are regarded as inferior and subject to correlative rights. The burden of proof is typically on the exporter to prove the existence of the surplus.[25]

III. The Hawaii Water Code: Its Structure and Functions

In a footnote to *McBryde*, Justice Abe made an invitation to the Hawaii legislature to rewrite Hawaii's water law:

> It does seem a bit quaint in this age to be determining water rights on the basis of what land happened to be in taro cultivation in 1848. Surely any other system must be more sensible. Nevertheless, this is the law in Hawaii . . . . We invite the legislature to conduct a thorough re-examination of the area.[26]

The legislature ultimately did so, and enacted the Hawaii Water Code. Before examining the key parts of the Code in detail, it is useful to survey its general framework and its overall impact on the landscape of Hawaii water law.[27]

---

water has solved local supply problems.

Honolulu Board of Water Supply, Oahu Water Plan, 6-7 (4th ed. 1982).

[24] City Mill Co. v. Honolulu Sewer and Water Comm'n, 30 Haw. 912 (1929).

[25] See generally *id.* at 922-33, for the general discussion of ground water rights from which the discussion in the text was drawn. *See generally* Allen v. California Water & Tel. Co., 29 Cal.2d 466, 176 P.2d 8 (1946); Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 P. 260 (1908); Katz v. Walkenshaw, 141 Cal. 116, 74 P. 766 (1903).

[26] *McBryde*, 54 Haw. at 189 n.15, 504 P.2d at 1340 n.15.

[27] The key parts and sections of the Code which form the basis of the discussion which follows are summarized here:

Part	*Title*	*Purpose and Key Sections*
I	Administrative	Establishes policy (§ 2),

A. *Overview of the Code*

The Commission on Water Resource Management established by the Code

	Structure	definitions (§ 3), scope (§ 4), and Commission structure (§ 7).
II	Reports of Water Use	Sets up registration procedure for water users to declare existing uses (§ 26) and to obtain a certificate from the Commission (§ 27).
III	Hawaii Water Plan	Mandates plan (§ 31) and division of counties into hydrologic units (§ 31(e)). Sets forth goals of plan (§ 31 (d)).
IV	Regulation of Water Use	Establishes structure for water management area designation (§ 41); ground water criteria (§ 44) and surface water criteria (§ 45) for designation. Permit requirements (§§ 48-51); revocation (§ 58), transfer (§ 59) and contest of permits (§ 60); declarations of water shortage (§ 62); and appurtenant rights (§ 63).
V	Water Quality	Requires Department of Health to establish water quality plan (§ 68).
VI	Instream Uses of Water	Requires Commission to establish program to protect instream uses (§ 31).
VII	Wells	Requires registration of wells everywhere (§ 83), mandates permits (§ 84), and standards to be established for their construction (§ 86).
VIII	Stream Diversion Works	Mandates permits required for stream diversion works (§ 93).
IX	Native Hawaiian Rights	Preserves certain traditional and customary Hawaiian rights. (§ 101).

Draft regulations for the Water Code were prepared by the Department of Land and Natural Resources, on February 24, 1988. They formed subtitle 7 (Water Resources) of title 13, Hawaii

may designate water management areas where water is scarce or diminishing, and for other reasons.[28] In those areas, unless exempted, one must obtain a *permit* from the Commission to use water. The common law on riparian, appurtenant, and correlative interests in water will continue to apply throughout the state in "free" areas, where the Commission has not invoked its water management area jurisdiction. Certain aspects of the common law of water rights will continue to apply to designated areas as well, but only to the extent directly or indirectly incorporated by the Water Code. Moreover, that law will be applied through a comprehensive administrative structure which invests much discretion in the Commission to apply, reinterpret, or reject such principles as the Commission sees fit (albeit subject to judicial review) in the course of its administration of permits and resolution of disputes.

Thus, the law of water rights will no longer evolve exclusively in the courts: the Code gives jurisdiction to the Commission to "hear any dispute regarding water resource protection, water permits, or constitutionally protected water interests, or where there is insufficient water to meet competing needs . . ."[29] regardless of whether any area has been designated. While the Commission's jurisdiction is not stated to be exclusive, the doctrines of finality and exhaustion of administrative remedies[30] promise to figure prominently in the adjudication of future water resource and constitutional issues. Indeed, jurisdictional and procedural issues will add a whole new dimension of complexity to Hawaii's water law.

Much of the adjudicatory function of the Commission will no doubt be taken up with permit entitlements. Once an area is designated a water management area, no appurtenant, riparian, or correlative use will be possible without ultimately obtaining a permit, no matter how firmly established such use may be under Hawaii's common law. One must analyze the Code with particular care

---

Administrative Rules. Final regulations were issued April 20, 1988, and approved by the Governor in May, 1988 [hereinafter Regulations]. The Regulations consist of Rules of Practice and Procedure for the Commission on Water Resource Management, designated under subtitle 7 as Chapter 167; Water Use, Wells, and Stream Diversion Works, Chapter 168; Protection of In-Stream Uses of Water, Chapter 169; Hawaii Water Plan, Chapter 170; and Designation and Regulation of Water Management Areas, Chapter 171.

[28] *See* Code § 41(a). *See also infra* text accompanying notes 85-95.

[29] Code § 10.

[30] Unless one has first obtained a conclusive determination of one's rights under all applicable laws and administrative procedures, federal courts are increasingly loath to acknowledge jurisdiction of consitututional takings claims. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). While the concept of finality is conceptually distinct from that of exhaustion of administrative remedies, the policies underlying each overlap. *Id.* at 192-93.

The United States Supreme Court's remand of the *Robinson* case, was for "further consideration in light of Williamson County . . . ." Ariyoshi v. Robinson, 477 U.S. 902 (1986). *See infra* note 160.

to see how such rights and uses fare under the permit system to be administered by the Commission. Such considerations are examined in Part IV of this Article.

B. Legislative Findings and Policy

The Hawaii legislature made three primary findings when it enacted the Water Code:

> During the past decades, there have been shortages of water and a decline in the ground water levels. Moreover, in recent years, some of Hawaii's waters have been severely polluted by a variety of toxic contaminants. Furthermore, there has been a great deal of uncertainty regarding the status of water rights.[31]

Shortages, pollution, uncertainty in the law—these central problems define the structure of Hawaii's Water Code. Developing a workable, administrative framework for solving these problems may be regarded as the goal of the Code; its achievement is delegated to the Commission on Water Resource Management.[32]

The Water Code provides only the most general policy guidelines for the Commission to follow in its work.[33] The legislature required, for example, that the Code "shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses."[34] Unless one reads something into the order in which these uses are listed,[35] the legislature has established no priority among them. Apparently as an afterthought, the legislature added that "adequate provision" shall be made for the protection of Hawaiian rights, fish and wildlife, ecological balance, scenic beauty, recreational and similar uses.[36] Unfortunately, the Code is silent

---

[31] *Id.* § 1.

[32] *Id.* § 7(a).

[33] *See id.* § 2.

[34] *Id.* § 2(c).

[35] *See, e.g.*, Fullerton v. California State Water Resources Control Bd., 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979) (where the court impliedly took a similar listing as a ranking of preferred uses, with recreational and environmental uses coming last). *See also* Prather v. Hoberg, 24 Cal. 2d 549, 150 P.2d 405 (1944) (domestic uses preferred over all others).

[36] Code § 2(c). The full text of this provision reads as follows:

> The State Water Code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper eco-

as to whether these latter uses are to be subordinated to the former, or whether, instead, the domestic and various commercial uses are to be conditioned upon threshold protection of the more vulnerable, intangible uses and values. It is unclear, for example, whether commercial uses would thereby be permitted if fish and wildlife would be threatened in a given stream.[37] Moreover, if some protection is required, the Code does not explain what protection would be "adequate," and how that protection is to be balanced (assuming it is to be "balanced" at all) with the concept of "maximum beneficial use." These fundamental policy issues were not sorted out by the legislature. They are left to the Commission to deal with.

The legislature seemed to want to speak plainly about eliminating water pollution. In one of its declarations of policy, it stated that "no substance [shall] be discharged" into waters "without first receiving the necessary treatment or corrective action."[38] Although this statement suggests a firm legislative priority, it also appears unconnected with the rest of the Water Code.[39] Part V of the Code delegates to the Department of Health the task of creating a water quality plan for drinking water, and of establishing criteria for determining when surface or ground water quality is degraded.[40] Undoubtedly, such plans will permit the

---

logical 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.

Id.

[37] It is possible that future regulations could clarify this. Conditions for permits under section 49, for example, do not specifically require that the in-stream flow standards not be exceeded, but the Commission could interpret the references in section 49 to "accommodated," "reasonable-beneficial" and "public interest" to arrive at that result. Indeed such a result is strongly suggested by section 31(g) which mandates the Commission to "protect" instream flows and to condition permits under part IV of the Code to achieve that result. *See infra* text accompanying note 74. *See also* Code § 31(h) (requiring the Commission to give "careful consideration" to requirements of recreation and the environment).

[38] Code § 2(d). This section reads:

The State Water Code shall be liberally interpreted to protect and improve the quality of waters of the State and to provide that no substance be discharged into such waters without first receiving the necessary treatment or other corrective action. The people of Hawaii have a substantial interest in the prevention, abatement, and control of both new and existing water pollution and in the maintenance of high standards of water quality.

Id.

[39] This "disconnectedness" is a problem within the Code. *See, e.g., supra* note 37, *infra* note 118, and *infra* text accompanying notes 39, 98-99, and 113-14.

[40] Code §§ 66, 68(a). Section 68(a) reads:

The department of health shall formulate a state water quality plan for all existing and potential sources of drinking water and that plan shall become part of the Hawaii water plan described in part III. Requirements for the plan shall be governed by chapters 340E and 342. The state water quality plan shall include water quality criteria for the designation of ground water areas and surface water sources pursuant to section 174C-44.

existence of some level of pollutants in waters, whether or not the waters have received treatment or other corrective action. One section in the Code, for example, discusses the "capacity" of streams to "assimilate pollutants."[41] The question of how much pollution will be permitted is left almost wholly to the Department of Health, whose plan becomes integrated into the overall Water Resource Protection and Quality Plan, discussed below.[42] Notwithstanding the "final authority"[43] of the Commission and the sharp mandate of the legislature regarding discharge of substances into water, it appears that the Commission itself will have comparatively little direct involvement in this important area, deferring instead to the Department of Health.

C. *The Commission on Water Resource Management*

A six member Commission on Water Resource Management is to be established within the Department of Land and Natural Resources. Four members are appointed by the Governor, and are subject to senate confirmation. The other two are automatic appointments: One is the chairperson of the Board of Land and Natural Resources (who also chairs the Commission) and the other is the Director of Health.[44]

The Commission's responsibilities fall into three general and broadly overlapping categories, each of which is conceivably substantial enough to warrant a

---

Code § 68(a). This language is troublesome in that it seems to suggest that the Department of Health's only concern here is for the quality of *drinking* water. Section 13-170-50 of the Regulations reinforces this conclusion. *See* Regulations, *supra* note 27. Pollution that affects flora and fauna in waters that are not sources of drinking water are only indirectly addressed by the Code, under section 45(2) as one of the surface water criteria for designating a water management area. There is no specific means, however, by which the Commission will obtain data it needs for such assessments, nor any regulatory mechanism to monitor or control it.

[41] Code § 45(2). The reduced capacity of a stream to "assimilate pollutants to an extent which adversely affects public health or existing instream uses" is one of the surface water criteria for designating an area for water use regulation under section. *See generally infra* text accompanying notes 85-91.

[42] *See infra* text accompanying notes 60-68.

[43] Code § 7(a).

[44] *Id.* Code § 7(b). This section further provides that "[e]ach member shall have substantial experience in the area of water resource management." *Id.* A Commission member may be disqualified under the Regulations only when he or she "has any pecuniary or business interest involved in the proceeding or . . . is related within the first degree by blood or marriage to any party to the proceeding." Regulations, *supra* note 27, § 13-167-61. Thus, a Commissioner would not necessarily be disqualified even if he or she would, as a party, qualify as an "interested party" in a contested case under the Regulations, that is, as one who has a property interest in land within a hydrologic unit, or resides there, or is an adjacent property owner, or whose interest would be "so directly and immediately affected" that his or her interest is "clearly distinguishable from the general public." *See id.* § 13-167-54(a)(3).

separate staff, and possibly an agency of its own:[45]

(1) Technical determination of in-stream flow standards and sustainable yields for water resources in the state which, together with the Department of Health's "Water Quality Plan," will enable determination of the capacity of each water source studied to sustain use;[46]

(2) Coordination with each county, and each agency with jurisdiction over specific water projects, in the formulation of such county's Water Use and Development Plans and the state Water Projects Plan, respectively;[47] and

(3) Permit administration, including agency adjudication of disputes among the many competing users of water in the state.[48]

Proceedings before the Commission will be in the agency context of rulemaking, or of adjudication of contested cases, under Hawaii's Administrative Procedure Act.[49] The establishment of standards and yields under (1) above, and the adoption of plans under (2) above, will be by rule. Resolution of disputes in contested cases in (3) above will be by adjudication.[50]

The delegation of responsibility by the legislature to the Commission is comprehensive and complete.[51] Indeed, the Commission has "exclusive jurisdiction

---

[45] See *infra* note 51 for a discussion of issue of delegation of legislative authority.

[46] *See* Code § 31(f)(1) (instream use and protection program); § 31(f)(2) (sustainable yields), § 68 (Water Quality Plan).

[47] *See generally* Code § 31(c). Planning in general is thoroughly treated in section 31.

[48] The Code gives the Commission jurisdiction to hear any dispute regarding water resource protection, water permits, or constitutionally protected water interests, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been designated as a water management area under this chapter. The final decision on any matter shall be made by the commission. Code § 10.

[49] HAW. REV. STAT. ch. 91 (1985).

[50] For statutory definitions of "rule" and "contested case" see *id.* § 91-1(4), (5). Subchapter 3 and subchapter 4 of chapter 167 of the Regulations contain detailed procedures for rulemaking and contested case proceedings. *See* Regulations, *supra* note 27.

[51] There has been a growing trend in state courts towards upholding the constitutionality of a delegation of legislative power if there are adequate safeguards to protect the interests of those individuals subject to the agency's actions. DAVIS, 1982 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE § 3.15, at 23-24 (1980). Instead of focusing its inquiry on whether the legislature has provided adequate statutory standards, courts have instead been examining whether there are adequate safeguards to protect against arbitrariness, unfairness and favoritism. Such safeguards are often in the form of judicial review. This new focus adequately addresses the basic concerns regarding nondelegation of legislative power: the making of policy choices by a politically accountable body, and the prevention of the arbitrary exercise of uncontrolled discretionary power. *Id.*

Warren v. Marion County, 222 Or. 307, 353 P.2d 257 (1960), is cited by Davis as the leading case emphasizing safeguards rather than standards. The statute in *Warren* empowered counties to adopt a building code based on broad, general standards. The plaintiff claimed that a building code adopted pursuant to that statute was unconstitutional as a product of an unconstitutional delegation of legislative power. *Id.* at 310-11, 353 P.2d at 260. The court held that no

and final authority in all matters relating to implementation and administration of the state water code," except for certain projects vested in other agencies.[52] The six Commission members are to serve without compensation,[53] and their task is formidable.

For example, under Part VI of the Act, the Commission must establish "in-stream flow standards" on a stream-by-stream basis "whenever necessary to protect the public interest."[54] In-stream flow standards establish certain minimum quantities, flows, or depths of water required to be present in a stream at given times of the year to "protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses."[55] There is broad latitude on the part of the Commission, however, to avoid a finding that the public interest in a given stream requires standards, even if a private citizen or other interested party has petitioned to establish such a standard.[56]

---

greater specificity was needed in order to keep the delegation within proper constitutional bounds. It upheld the constitutionality of the code based on the adequacy of the safeguards which were provided. Noting that various cases in which statutes were upheld based on vague standards such as "public convenience, interest or necessity" provided affected individuals with no real protection against arbitrariness or unfairness, the court stated that "the important consideration is not whether the statute delegating the power expresses *standards*, but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action." *Id.* at 314, 353 P.2d at 261 (emphasis in original). The safeguard which the court found to be sufficient was an appeals procedure enabling an affected party to seek review by a separate administrative body. The building code itself did not specify the details of the appeals procedure, but rather created a Board of Examiners Appeals which was to set up its own procedure. This was held not to affect the adequacy of the safeguard. *Id.* at 318, 353 P.2d 261-62.

Section 9 of the Code provides that all proceedings before the Commission including the determination of "reasonable-beneficial use" for existing uses, are to be conducted in accordance with the Administrative Procedure Act, which provides for judicial review. *See* HAW. REV. STAT. ch. 91 (1985). However, Code section 10 states that the Commission is to hear any dispute regarding constitutionally protected water interests, and that "[t]he final decision on any matter shall be made by the Commission." If Code section 10 is subject to chapter 91 via Code section 9, then there appears to be an adequate safeguard that would withstand the scrutiny of any test discussed in the above cases and authority. An additional safeguard is found in Code section 12 which provides for judicial review of rules and orders of the Commission. *See also* Code § 60.

[52] Code § 7(a). Issues of water quality are largely delegated to the Department of Health. *See supra* note 40 and accompanying text.

[53] Code § 7(c). The members are to be reimbursed for necessary expenses, including travel expenses. *Id.*

[54] Code § 71(1). *See also* Regulations, *supra* note 27, ch. 169.

[55] Code § 3. Obviously the definition allows for broad discretion on the part of the Commission to set these standards. A great amount of subjectivity is implicit. "Instream uses," referred to in that definition, also are defined to include both subjective and objective factors. *See id.*

[56] Code § 71(2)(A). Parties may petition under section 71(2)(A): "Any person with the proper standing may petition the commission to adopt an interim instream flow standard for streams in order to protect the public interest pending the establishment of a permanent instream

In pursuing the inquiry stream by stream, the Commission must take into account a bewildering array of factors.[57] In addition to contacting every governmental body or agency with an interest in the stream, it must weigh "potential instream values" with uses of water "for non-instream purposes, including the economic impact of restriction of such uses."[58] Protection of fish, scenery, and recreation here has no *per se* priority, but will compete with forces favoring economic growth; the balance is left to the six members to achieve. This inquiry, together with public hearings on the appropriate island,[59] must occur for each stream subject to the Commission's in-stream flow standards. An obvious practical concern is whether the enormity of its task in this area will cause the Commission either to set standards of such generality as to be of no real use, or else leave streams undesignated with standards simply because the Commission and its staff have too much other work to do.

D. The Hawaii Water Plan

The legislature intended the Water Code to address the "problems of supply and conservation of water," and asserted a need in the Water Code for a "program of comprehensive water resources planning."[60] Accordingly, the Code di-

---

flow standard[.]" Code § 71(2)(A). *See also* Regulations, *supra* note 27, § 13-169-40.

[57] The Code provides that:

> [t]he commission shall consult with and consider the recommendations of the department of health, the United States Fish and Wildlife Service, the mayor of the county in which the stream is located, and other agencies having interest in or information on the stream, and may consult with and consider the recommendations of persons having interest in or information on the stream. In formulating the proposed standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water from the stream for non-instream purposes, including the economic impact of restriction of such uses. In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the commission shall consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solution.

Code § 71(1)(E). The Fourteenth State Legislature amended this section, requiring that the Commission shall also consult with and consider the recommendations of "the aquatic biologist of the department of land and natural resources, the natural area reserves system commission, [and] the University of Hawaii cooperative fishery unit." S.B. No. 2462, 14th Haw. Leg., Reg. Sess. (1988). That bill also mandated the Commission to establish a "wild and scenic rivers system" in the state, as part of Code section 31(c). *Id.*

[58] *Id.*

[59] Code § 71(1)(F). See also section 9 of the Code regarding sites of hearings, and section 11 regarding hearings officers in such matters.

[60] Code § 2(b).

rects the Commission to assemble a four-part Hawaii Water Plan.[61]

One part, a "Water Quality Plan," is to be developed by the Department of Health.[62] A second part consists of each county's "Water Use and Development Plan."[63] The county plans are to be passed by ordinance, and must be consistent with county zoning, state land use classifications, and the state-level water plans.[64] A third part of the plan is called the state "Water Projects Plan," and pertains to specific state water projects being administered by state agencies.[65]

The final and chief part of the plan is the "Water Resource Protection Plan" developed by the Commission itself.[66] This plan, among other things, is to specify the "existing and contemplated uses of water," and the "quantity and quality" of both surface and underground water resources in the state.[67] The amount of data the Commission needs in order to construct such a plan is vast; much of the necessary information is undoubtedly not even known.[68] Assessing

---

[61] Code § 31(a).

[62] Code § 66. *See supra* note 40.

[63] Code § 31(a), (b).

[64] Code § 31(b). This section reads in part:

> All water use and development plans shall be prepared in a manner consistent with the following conditions:
>
> (1) Each water use and development plan shall be consistent with the water resource protection and quality plan.
>
> (2) Each water use and development plan and the State water projects plan shall be consistent with the respective county land use plans and policies including general plan and zoning as determined by each respective county.
>
> (3) The water use and development plan for each county shall also be consistent with the state land use classification and policies.

Id.

[65] Code § 31(a)(3).

[66] Code § 31(c).

[67] *Id.*

[68] *Id.* The Commission's mandate under this section 31(c), quoted in part, is as follows:

> To prepare the water resources protection and quality plan, the commission shall: study and inventory the existing water resources of the State and the means and methods of conserving and augmenting such water resources; review existing and contemplated needs and uses of water including state and county land use plans and policies and study their effect on the environment, procreation of fish and wildlife, and water quality, study the quantity and quality of water needed for existing and contemplated uses, including irrigation, power development, geothermal power, and municipal uses; and study such other related matters as drainage, reclamation, flood hazards, floodplain zoning, dam safety, and selection of reservoir sites, as they relate to the protection, conservation, quantity, and quality of water.

Code § 31(c).

The Fourteenth State Legislature amended Code section 31(c) to require the Commission to identify rivers or streams "of high natural quality" or "significant scenic value" to be placed within a "wild and scenic rivers system, to be preserved and protected as part of the public trust." S.B. No. 2462, 14th Haw. Leg., Reg. Sess. (1988).

the capacity of a single aquifer, for example, is a matter of considerable guesswork, and wide differences of opinion among hydrologists are routine. Nevertheless, the Commission has its mandate, and in many cases it will have to do what it can with only partial information and estimates.

The core of the planning part of the act is found in sections 31(e), (f), and (g) of Part III of the Water Code.[69] Section 31(e) establishes the fundamental unit of water management in the state, the "hydrologic unit."[70] Hydrologic units will encompass both the surface water and ground water drainage areas and basins, respectively, all over the State of Hawaii.

Under Section 31(f), the Commission must establish, within each hydrologic unit, (1) an in-stream use and protection program for the surface water courses of the unit, and (2) the "sustainable yield," or limit on amounts of water that can be withdrawn from an underground acquifer or other sources.[71] Both of the

---

[69] The rest of the Code essentially elaborates these three sections.

[70] Section 31(e) states:

> The Hawaii water plan shall divide each county into sections which shall each conform as nearly as practicable to a hydrologic unit. The board shall describe and inventory:
>
> (1) All water resources and systems in each hydrologic unit;
>
> (2) All presently exercised uses;
>
> (3) The quantity of water not presently used within that hydrologic unit, and
>
> (4) Potential threats to water resources, both current and future.

Code § 31(e).

The hydrologic unit is itself defined as "a surface drainage area or a ground water basin or a combination of the two." Code § 3. Groundwater basins were established for the Ground Water Control Act; that work may be useful to the Commission in establishing hydrologic units. *See* HAW. REV. STAT. ch. 177 (1985). Presumably, water management areas would most likely relate to discrete and complete hydrologic units. *Cf.* Code § 50(h) (definition of competing users). Neither the Code nor the Regulations require that to be the case. Future regulations may clarify this. Code section 47 also addresses this issue, implying that the boundaries of a water management area may lie otherwise than congruent with hydrologic units.

[71] Code § 31(f). Under this provision "[t]he sustainable yield shall be determined by the commission using the best information available and shall be reviewed periodically. Where appropriate the sustainable yield may be determined to reflect seasonal variation." *Id.* It is useful to examine what is meant by the "sustainable yield" of an acquifer. The concept of sustainable yield is a function of the "head" or height above sea level, at which the ground water in an aquifer is to be maintained. Given a calculated rate of "recharge" or entry of water into the aquifer, and given the initial or historic head of the aquifer, the sustainable yield may be calculated by formula for any given head. For example, in a study commissioned by the State of Hawaii Board of Land and Natural Resources, of the Pearl Harbor Groundwater Control Area, the long-term equilibrium head for the Koolau acquifer was chosen to be 18 feet. For this head, the sustainable yield for the Koolau aquifer was calculated at 147 million gallons per day (abbreviated "mgd"). But if the equilibrium head were allowed to drop to 15 feet, the sustainable yield would be 167 mgd. *See generally* J.F. Mink, G.A.L. Yuen, & J.Y.C. Chang, Review and Re-evaluation of Groundwater Conditions in the Pearl Harbor Groundwater Control Area, Oahu, Hawaii (Feb. 20, 1988) (unpublished draft).

Generally, the lower the head, the higher the sustainable yield; however, a lower head means

above establish danger points or threat levels for a given stream or well. If in-stream flows go below "in-stream flow standards" to be developed by the Commission, harm will come to the stream and the flora and fauna dependent upon it.[72] If wells draw more than the sustainable yield of an acquifer, salinity may result and the acquifer may also be damaged.[73]

Section 31(g) of the Code describes much of what the Water Code is about. It provides: "The commission shall condition permits under Part IV of this chapter in such a manner as to protect in-stream flows and maintain sustainable yields of ground water established under this section."[74] This sentence alone summarizes the central purpose of the Code better than any other in the Act.

In addition to threats to water by withdrawals, water is also threatened by the addition of pollutants to water sources. In a key provision of the Water Code, the Department of Health is to establish the criteria for threats to both surface and ground water quality.[75]

On a first reading of the Code, one is tempted to conclude that planning is being attempted here on an unprecedented scale. Almost nothing using water in the state will escape the labyrinthine maze of plans envisioned by the Code. But closer reading indicates that the emphasis in the Code is not on establishing what uses of water should occur in the future in a given area, but on what may be called "threat assessment," a more limited and manageable goal. The Water Code does not use the term "threat assessment," but the term conveys the Code's purpose more precisely than the general notion of planning. The Code, in fact, merely sets up a kind of limited rationing system in critical areas where water is becoming short in supply, or is otherwise threatened.[76]

Once water quality, in-stream flows, or sustainable yields appear threatened, the Commission can act by designating the area a water management area "for the purpose of establishing administrative control over withdrawals and diversions of ground and surface waters in the area . . . ."[77] But until an area is "threatened by proposed withdrawals or diversions of water,"[78] there is essen-

---

that the depth of the fresh water lens below sea level will be less by a ratio of about 40:1. This is the so-called "Ghyben-Herzberg ratio," which describes the effect of buoyant fresh water upon denser sea water. Thus, for every foot above sea level, the head is decreased, and the depth of the lens below sea level is decreased by 40 feet. As sustainable yields increase, the depth of the fresh water below sea level decreases and the "transition zone" between fresh water and salt water rises, limiting well depth. If the transition zone rises to or above the depths of existing wells, such wells may become overly saline and useless as sources of potable water. *Id.* at 83-87.

[72] *See generally* Code § 45.

[73] *See generally* Code § 44.

[74] Code § 31(g).

[75] *See* Code § 68. *See also* note 40 and accompanying text.

[76] *See generally infra* text accompanying notes 96-99.

[77] Code § 41(a).

[78] *Id.*

tially no regulation over the use of such water, notwithstanding the multiplicity of plans covering all areas of the state, threatened or not.[79] In short, one may fairly read the Act as requiring the Commission to use its broad powers principally as a kind of arbiter, sorting out conflicting claims and demands when there is an already perceived problem. This approach differs from the most general form of "planning" (that is, allocating overall water resources and future uses), as that term is commonly understood and as it is used in parts of the Water Code. Indeed, the Code's general thrust seems inconsistent with planning.

Arguably, most of the important decisions affecting water allocation will have been made long before demand upon a given aquifer has reached ninety percent of its sustainable yield (which is a key criterion for designating a water management area).[80] Many surface water resources, too, will have been irrevocably committed for the future by the time existing in-stream uses may be detrimentally affected.[81] But until such time, and except for the Commission's specific on-going powers regarding permits for stream channel alterations and stream diversion works,[82] and its power to establish permit standards for the construction of new wells,[83] the Commission will have little or no impact on future water allocation decisions with respect to areas not designated as water management areas.[84]

E. Designation of Water Management Areas

Assume that the Commission has found "after conducting scientific investigations and research" that an area (presumably a hydrologic unit, though it is not required to be) may be "threatened" by further drawing or diverting of water.[85] The Commission has followed the mandate of Part IV of the Code and

---

[79] No permits are required for water use in an undesignated area.

[80] Code § 44(1).

[81] *Cf.* Code § 45(1).

[82] Code §§ 91-95.

[83] Code §§ 81-87. Note that all wells in the state must be registered with the Commission. Code § 83. Well construction and installation of pumps and pumping equipment require a permit from the Commission, even if no water management area has been designated. Code § 84.

[84] *But see* Code § 26 (regarding filing declarations of existing uses, and potential future impact of doing or failing to do same). *See generally infra* text accompanying notes 101-19.

[85] Code § 41. Part IV of the Code addresses the regulatory function of the Commission. The Commission becomes a permit administrator for water use only upon designation of a water management area. Under section 41(c) of the Code, designated ground water areas established under the Ground Water Use Act and in effect as of July 1, 1987, continue as water management areas. *See* HAW. REV. STAT. ch. 177 (1985). Nowhere in the Code or Regulations, however, is there any provision whereby permits issued under chapter 177 will be deemed permits under Part IV of the Code, without the necessity for users to reapply.

has designated a water management area.[86] Notice was published and a public hearing held "in the vicinity of the area proposed for designation."[87] Assume further that one or more of the section 44 ground water criteria or section 45 surface water criteria has been met. For example, existing uses of ground water might be approaching ninety percent of sustainable yield, or there might be a perceived water quality degradation (including salinity), waste, serious disputes, or simply alarm at the rapidity of decline in ground water levels.[88]

With regard to surface waters, the most likely reason for designation of a water management area would be the decline of surface water levels to a point where "existing in-stream uses or prior existing off-stream uses" might be detrimentally affected.[89] But designation might also be triggered as a result of higher concentrations of pollutants in a certain area, or serious disputes regarding use of surface water.[90] Designation on any of these grounds may also result

---

[86] The designation may be initiated by the chairperson or by written petition. Code § 41(b). The Code does not specify who may or may not initiate such a petition, but the Regulations provide that any "interested person" may initiate such a petition. *See* Regulations, *supra* note 27, at § 13-171-4(a). The Code requires the chairperson to consult "with the appropriate county mayor and county water board," before the decision is reached. *Id.* Note that the county water board plays a multiple role in the process since it also is a "person" under section 3, and must obtain a permit if an area is so designated. As a water purveyor, the Board has "authority to allocate the use of water for municipal purposes, subject to the limits of water supply allocated" to it. Code § 48(b).

[87] Code § 42.

[88] Code § 44. The statute provides that the Commission shall consider the following criteria in designating an area for water use regulation:

(1) Whether an increase in water use or authorized planned use may cause the maximum rate of withdrawal from the ground water source to reach ninety per cent of the sustainable yield of the proposed water management area;
(2) There is an actual or threatened water quality degradation as determined by the department of health;
(3) Whether regulation is necessary to preserve the diminishing ground water supply for future needs, as evidenced by excessively declining ground water levels;
(4) Whether the rates, times, spatial patterns, or depths of existing withdrawals of ground water are endangering the stability or optimum development of the ground water body due to upcoming or encroachment of salt water;
(5) Whether the chloride contents of existing wells are increasing to levels which materially reduce the value of their existing uses;
(6) Whether excessive preventable waste of water is occurring;
(7) Serious disputes respecting the use of ground water resources are occurring; or
(8) Whether water development projects that have received any federal, state, or county approval may result, in the opinion of the commission, in one of the above conditions.

Id.

[89] Code § 45.

[90] *Id.* Surface water criteria are specified in section 45 as follows:

(1) Whether regulation is necessary to preserve the diminishing surface water supply for

from a favorable response to an indivudual's written petition to the Commission.[91]

In any event, once a decision to designate a water management area is final, "[n]o person [including county boards of water supply] may make any withdrawal, diversion, or impoundment" of water in that designated area without a permit.[92] An existing use in a newly designated water management area, however, may be continued, provided one has applied to the Commission for such a permit within one year of designation, of which application the Commission also must give public, published notice.[93] The Commission will invite written objections to the proposed permit and may ask for responses to objections.[94]

The question of whether one has a *right* to a permit under the above circumstances will ultimately raise issues of "ownership," "vested rights," "existing legal uses," "appurtenant rights," "riparian uses," "correlative uses," "native rights," and more which make up the complex and confused state of Hawaii's water law. How the Water Code sorts out these issues in the context of Hawaii's decisional law will be discussed later in this article.[95]

F. Permits for Surface and Groundwater Uses

All existing uses and any new uses of water in a designated water management area require a permit issued by the Commission, unless the use is for "domestic consumption by individual water users" or unless a catchment system is the source.[96] To obtain a permit, one must establish that his or her use

---

future needs, as evidenced by excessively declining surface water levels, not related to rainfall variations, or increasing or proposed diversions of surface waters to levels which may detrimentally affect existing instream uses or prior existing off stream uses;

(2) Whether the diversions of stream waters are reducing the capacity of the stream to assimilate pollutants to an extent which adversely affects public health or existing instream uses; or

(3) Serious disputes respecting the use of surface water resources are occurring.

Code § 45.

[91] Code § 41(b). *See also supra* note 56.

[92] Code § 48(a). With respect to areas already designated as ground water control areas as of July 1, 1987, see *supra* note 85.

[93] *Id. See also* Code § 50(a)-(i).

[94] Code § 52(c).

[95] *See infra* text accompanying notes 140-49 and following.

[96] Code § 48. Presumably the reference to a catchment system refers to rainwater catchments. Surface water collection systems would be regarded as stream diversion works, requiring a permit under Part VIII of the Code.

Section 51 (application for a permit) raises the question of whether the applicant for a permit must have an interest in the land where the water source is located. That section, which sets forth the requirements for a permit application, states in subsection (1) that the name and address of

can be "accommodated" by the available water source, that the use is "reasonable-beneficial," consistent with various state and county land use plans and the public interest, and notably, that the use "[w]ill not interfere with any existing legal use of water."[97] This latter requirement evidently refers to other permit holders or those with certificates of existing use issued by the Commission under section 27.[98] Once a water management area is designated, the permit system thus acts as a kind of first-come, first-serve allocation system. In an apparent oversight, however, the legislature neglected to include among the conditions for a permit any specific requirement that the proposed use be consistent with the Hawaii Water Plan.

When a threat is determined to exist, and an area is designated as a water management area, decisions as to reasonable-beneficial uses will generally be made on a case-by-case basis in the order presented to the Commission.[99]

---

the applicant and landowner are required, "provided that: . . . (B) In the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land, which is the water source of permitted water, applies for a water permit, the landowner shall also be stated as a joint applicant for the water permit." Code § 51. Such a joint application seems to be required to ensure that the permit holder has a continuing interest in the land on or under which the water is found. Even though the section does not state that the applicant must be the landowner, it seems illogical to require the landowner to jointly apply with a person having a terminable interest, while a person with absolutely no interest in the land can apply for a permit without the involvement of the landowner.

[97] Code § 49(a). The section reads:

> To obtain a permit pursuant to this part, the applicant shall establish that the proposed use of water:
>
> (1) Can be accommodated with the available water source;
>
> (2) Is a reasonable-beneficial use as defined in section 174C(3);
>
> (3) Will not interfere with any existing legal use of water;
>
> (4) Is consistent with the public interest;
>
> (5) Is consistent with state and county general plans and land use designations; and
>
> (6) Is consistent with county land use plans and policies.

Id.

[98] Code § 26. *See infra* note 117 regarding possible interpretations of the phrase "existing legal use."

[99] Exactly how this process will work in practice remains to be seen. The fundamental issue is whether permits will be issued on a first-come, first-serve basis, or whether the Commission will hold back applications and issue permits more or less as a group. The consequences of these two methods of processing permits could be significant. Once issued, the permit allows a use of water that may not be interfered with by other permits. *See* Code § 49(a)(3). This may be so even if a later use is deemed far more beneficial, or otherwise has priority by statute, such as is the case with appurtenant rights under section 63. It is possible that the Commission will have to reserve water for those applicants that it expects will have "favored" applications based upon appurtenant rights under section 63 and existing uses under section 50. *Cf.* Code § 49(d). The Section 27 certifications would provide some means for the Commission to know how much to set aside; however, such data could be quite incomplete. Conditioning permits on such possible future allocations would be another means by which the Commission could avoid over-commitment of

G. Existing Uses

One of the immediate impacts of the Water Code is the provision that "[a]ny person making a use of water in any area of the State shall file a declaration of the person's use with the commission within one year from the effective date of rules adopted to implement this chapter."[100] This requirement exists *even if no water management area has been designated for a particular user*, and constitutes an important provision in the Code. If the Commission finds that the use set forth in the declaration is a "reasonable, beneficial" use, it shall issue a certificate which shall be "deemed to constitute a description of the use declared."[101] The Water Code gives the section 27 certificate paramount importance: "With respect to certificates for water use, the confirmed usage shall be recognized by the commission in resolving claims relating to existing water rights and uses including appurtenant rights, riparian and correlative use."[102] If no declaration is filed, the Commission may "conclusively determine" the extent of the use required.[103] The Water Code does not say that one may not continue the uncertified use. One presumably can, at least until a permit application to continue an existing use, made under section 50 of the Water Code within one year after designation of a water management area, has been denied.[104]

The Commission must hold a hearing "upon the request of any person ad-

---

statutorily favored uses, although at the risk of diluting the value of the permit and the ability to plan uses and improvements based thereon. *See also infra* text accompanying notes 200-01. Hopefully, future regulations will clarify the procedure for permit issuance.

[100] Code § 26(a). In fact, the Regulations limit the reporting requirement to any person "making a use of water from a well or stream diversion works in existence on the effective date of these rules." Regulations, *supra* note 27, § 13-168-5(a). Thus those persons connected to the county boards of water supply lines would appear to be excluded from the reporting requirement.

[101] Code § 27(a). One must also register stream diversion works and wells even if no water management area is designated. *See* Regulations, *supra* note 27, § 13-168-31 (stream diversion works) and § 13-168-11 (wells). These regulations require monthly reports with respect to stream diversion works. *Id.* § 13-168-7(b).

[102] *Id.* The Regulations have somewhat diluted the legal effect of a section 27 certificate of water use. Section 13-168-6(a) provides in part:

> The certificate shall be deemed to constitute a description of the use declared, but shall not constitute a property right or interest nor a determination that the use declared therein is a legal one. The certificate shall give rise to a rebuttable presumption in favor of the certificate holder that the use declared therein is reasonable and beneficial.

Regulations, *supra* note 27, § 13-168-6(a). Compare the above interpretation of section 27 certificate with CONF. COMM. REP. NO. 118, 14th Haw. Leg., Reg. Sess., 1987 SENATE J. 885. ("The section of certificates of use is intended to afford protection to constitutionally recognized interests under Article XII, Section 7 of Hawaii's Constitution that are not in designated areas.")

[103] Code § 26(d).

[104] Code § 50(c).

versely affected" by either the certification or refusal to certify by the Commission.[106] It is unclear whether one who has failed to file a declaration for an existing use would have the benefit of a hearing before the Commission, to contest a "conclusive" determination of use. It is possible that the Commission will not issue a certificate for the amount of water actually declared if not all the use is deemed by the Commission to be reasonable and beneficial.[108] Much of the controversy would doubtless center on applications of the term "reasonable, beneficial use." This term is used for certifications of existing uses in general, and for permits under sections 49 and 50 for new and existing uses in water management areas.[107] Article XI, section 7, of the state constitution requires the legislature to "define beneficial and reasonable uses."[108] The Water Code stipulates what may pass for this definition: "Reasonable-beneficial use" means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest."[109]

The words "beneficial," "for a purpose," and references to "economic and efficient utilization" most probably mean: not wasteful.[110] The reference to "reasonable," of course, does not help in defining the term "reasonable-beneficial." But it seems clear that broad discretion to enlarge or narrow this definition rests with the Commission.[111]

Part II of the Water Code thus contains a mechanism for a limited "grandfathering" of uses of water that were in existence up to one year after the date of the promulgation of rules intended to implement the Code. The inclusion of this provision seems to be the legislature's concession to claims of "vested rights" in water in existence at the time the Code was enacted.[112] But

---

[105] Code § 27(b).

[106] *Cf.* Code § 27(a).

[107] *Compare* Code § 27(a) *with* § 49(a)(2) *and* § 50(b).

[108] *See supra* note 1.

[109] Code § 3.

[110] The definition of "beneficial use" in the Rules for Control of Ground Water Use also refers to such use as is "reasonable and consistent with the public interest." HAW. ADMIN. RULES, *supra* note 7, § 13-166-2.

[111] Discussion of this issue is found in REPORT OF THE ADVISORY STUDY COMMISSION ON WATER RESOURCES TO THE THIRTEENTH LEGISLATURE STATE OF HAWAII, (Jan. 14, 1985), app. F, at 4 [hereinafter ASC REPORT]. The Commission was established under Act 170, Session Laws of Hawaii 1982, to, among other things, "formulate a proposed water code." *Id.* at 2. The originally proposed code is found in appendix D to the Report. The Advisory Study Commission stated that reasonable-beneficial "is a term of art and should not be confused with either the western prior appropriation term 'beneficial use' or the riparian term 'reasonable use.' " ASC REPORT, app. F, at 4. Implied is that the former must also be reasonable, taking into account the requirements of other users; the latter must also be beneficial, and not wasteful, regardless of the propriety of consumption. *Id.* at 4-5.

[112] *But see supra* note 102.

the provision also raises several questions. For example, persons living on rivers or streams in the state are often riparian users, even though their use may be incidental or casual as contemplated in *Reppun* and section 7-1 of the Hawaii Revised Statutes from which those rights are said to derive.[113] Under Part II of the Code, however, it is not clear whether such users (or potential users) risk losing their riparian rights if they fail to identify and declare their uses, *Reppun* and section 7-1 notwithstanding. It is apparent that failure to obtain certification of an existing use may have consequences later, when a dispute occurs or when a water management area is designated. But exactly what those consequences are is not specified in the Code. This is because the part of the Code dealing with certification of existing uses stands alone and is not integrated into the rest of the Code, even in the Code's procedures elsewhere for obtaining permits for existing uses.

In the event that a water management area is designated, persons with existing uses on the effective date of the Code (July 1, 1987), may obtain "existing use" permits to continue those uses.[114] Under section 50, one must merely show that the existing use is "reasonable-beneficial" and "allowable under the common law of the state."[115] The requirements for a new user, on the other hand, are much more stringent. A new user must not only show (among other things) that the use is reasonable-beneficial, but also that it will not interfere with any "existing legal use" of water and that the water source can "accommodate" the proposed use.[116] Thus, some users may be strongly tempted to try to qualify their use as an "existing use" so as to benefit from the more lenient permit approval procedure for existing uses, and from the priority such uses would enjoy under the Code over applications for new use permits.[117]

Nowhere, however, does the Code provide that the Commission will recognize *any* "existing uses" under section 50 which were not originally certified

---

[113] *See generally infra* notes 174-87.

[114] Code § 50(a), (b).

[115] Code § 50(b). The Code thus appears here to incorporate *City Mill*, *McBryde* and *Reppun* into its structure. The reference in section 50(b) would seem, therefore, to exclude existing surface water uses which involve transport outside a watershed, or uses outside of the water-side lands solely benefitted by the riparian doctrine of *Reppun*. The Commission will presumably evaluate each existing use in the context of the *McBryde*, *Reppun* and *City Mill* standards, and adjust existing use permits to conform. *But cf.* Regulations, *supra* note 27, § 13-171-14(b), which provides that if the Commission finds a use to be disallowed under common law, "such finding of itself shall not constitute a bar to the granting of the permit." *Id.*

[116] Code § 49.

[117] It is not at all clear whether the "existing legal use," to which a general permit under section 49(a) is subject, is: (1) a use certified as such under section 27; (2) a use for which a permit under section 50 has issued; (3) any use deemed by the Commission to be "legal" (i.e., consistent with the common law of the state); or (4) some combination of the above.

under the section 27 certification procedure.[118] If only certified uses qualify as existing uses under section 50, then section 50 will only apply to the discrete class of persons who happened to declare their use in the one-year post regulation "window" for such filings under section 26.[119] As time goes on, and uses change (and after the opportunity for declaring any other existing uses has passed), the applicability of the simplified permit procedure under section 50 will be even further diminished.

On the other hand, section 50 does not expressly require its existing uses to be certified either. One might therefore read section 27 and section 50 together to conclude that one's rights to continue an existing use under section 50 cannot be improved by a section 27 certificate. However, it would seem that having a section 27 certificate from the Commission could enable one to cross one hurdle under section 50 more easily in obtaining a permit to continue an existing use. This hurdle is the "reasonable-beneficial" standard[120] which would appear to have been presumptively met by issuance of a section 27 certificate, at least insofar as the amount of use at the time of certification is concerned.

Conversely, a failure to file the declaration necessary for a section 27 certificate could be harmful as against (1) others who have filed (and have thus arguably established their existing legal uses),[121] or (2) new users seeking permits, since their permits under section 49 will be conditioned upon not interfering "with any existing legal use of water."[122]

Under section 50(c), an application to continue an existing use must be made within one year from the date a water management area is designated.[123] Except for appurtenant rights, failure to apply for an existing use permit creates a "presumption of abandonment."[124] Apparently this may be so even with a

---

[118] Neither Code section 26 nor section 27 is mentioned in section 50.

[119] *See* Code § 26(a).

[120] Code § 50(b). One cannot rely upon a section 27 certification itself to overcome the "allowable at common law standard," since the certification does "not constitute a property right or interest nor a determination that the use declared therein is a legal one." Regulations, *supra* note 27, § 13-168-6(a). *See also supra* note 102. The "allowable under common law" standard incorporates into the Commission's administration of permits the complex and confusing decisional law on water in the State of Hawaii. *See infra* text accompanying notes 132-42 and following.

[121] *See text supra* accompanying note 101.

[122] Code § 49(a)(3).

[123] Code § 50(c). With respect to late filings, this section provides:

> If the commission determines that there is just cause for the failure to file, it may allow a late filing. However, the commission may not allow a late filing more than five years after the effective date of rules implementing this chapter. The commission shall send two notices, one of which shall be by registered mail, to existing users to file for an application for a permit to continue an existing use.

Id.

[124] *Id.* It is not clear what will constitute "just cause." Nor is it clear whether one must first have a determination from the Commission, before one may make his or her case for a just-cause

section 27 certificate.[125] Existing uses deemed competing (because to allow both would risk exceeding sustainable yields or in-stream flow standards) will be subject to conditions (presumably some form of ratable allocation) imposed by the Commission after hearing.[126]

H. Scarcity

Even where a water management area has been designated, and even if permits have been issued consistent with all the foregoing criteria, the Commission may have to exercise its emergency powers when a period of water shortage exists. The Commission may declare that a water shortage exists within all or any part of an area where "insufficient water is available to meet the requirements of the permit system or when conditions are such as to require a temporary reduction in total water use within the area to protect water resources from serious harm."[127] The Commission is supposed to publish criteria for determining when such a shortage would exist.[128]

Once a water shortage is declared, water usage even under valid permits will be cut back.[129] The Commission will adopt a "reasonable system of permit classification" which will be based upon source of water supply, method of

---

delay, that the water use has not been "abandoned" under the presumption of abandonment for failure to file in this section.

[125] The Code provides that the amount of the existing use may be verified by metering or guaging devices, notwithstanding that such amounts may bear no relation to July 1, 1987 usage. Code § 50(f). Such devices, if used, must be in place for a year. The amount of existing use must, in general, be verified by "the best available means not unduly burdensome on the applicant, as determined by the commission." *Id.* Obviously, considerable expense may be entailed for some applicants. This requirement exists even if a section 27 certificate has issued for the use. Seemingly inconsistent with the concept of fixing of existing uses at the effective date of the code or within the time set under section 26, is section 50(f) which states that the quantity (of the "existing use") shall be verified by the applicant, using metering or gauging devices for at least one year. This is required "before a determination is made as to the quantity of water being consumed in an existing use . . . ." This implies that (1) the use to which the water is put at the time of the application must be the same *kind* of use as existed at the effective date of the act, but (2) the *quantity* of water under the use will be measured as of the time of permit application, provided it does not exceed the June 1, 1987 quantity.

[126] Code § 50(h). *See also* Code § 54. Section 54 provides that when applications compete, the "commission shall first, seek to allocate water in such a manner as to accommodate both applications if possible; second, if mutual sharing is not possible, then the commission shall approve that application which best serves the public interest." *Id.* Note too the objectives stated to be in the "public interest" in Code section 2(c). *See also supra* text accompanying notes 33-43.

[127] Code § 62(b).

[128] *Id.*

[129] Code § 62(c).

extraction or diversion, use of water or any combination of these factors.[130] The statute provides no further guidance to the Commission for creating this classification system. Although ground and surface waters often form an integrated water source, it is possible that, in some areas, ground water users within a given hydrologic unit (aquifer) could be one logical class. Surface water users within the same hydrologic unit might be another. Users of domestic drinking water—hotel users, for example,—might also be a class, whereas agricultural users, where potability is not generally required, might be another.[131]

In any event, the Commission will merely publish notice of the shortage, notify permittees of any changes in their permit, suspend permits, or make any other restriction on use deemed necessary.[132] The Commission also has broad powers to issue orders "apportioning, rotating, limiting, or prohibiting the use of water resources" in any area, whether within *or without* a water management area, if it declares an emergency condition.[133]

I. Native Hawaiian Water Rights

Part IX of the Water Code sets forth a small but important provision regarding the preservation of "traditional and customary rights of an ahupua'a's[134] tenants who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778 . . . ."[135] Another section states that the appurtenant water rights of kuleana[136] and taro lands "along with those traditional and

---

[130] Code § 62(a).

[131] It is unclear whether priority under this section will be determined by the nature of the *use* (i.e., which use is more beneficial) or by priority of initiation of use. Regulations may clarify this issue.

[132] Code § 62(f).

[133] Code § 62(g).

[134] The ahupua'a is the Hawaiian term for the large divisions or units of land (varying in size from hundreds of acres to hundreds of thousands of acres) into which the islands have been deemed divided from ancient times, typically extending from the top of the mountains to the sea. They are often regarded as roughly wedged-shaped, with the apex of the triangle in the mountain; however, a great many ahupua'as are irregular, and do not conform to simplistic description. So configured, the ahupua'a afforded the chief who possessed it from the king the opportunity for hunting, farming and fishing within its boundaries. *See generally* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 6-7, 656 P.2d 745, 748-49 (1982), for a discussion of the nature of the ancient ahupua'a. *See also* In re Boundaries of Pulehunui, 4 Haw. 239, 240-42 (1879).

[135] Code § 101(c).

[136] Kuleanas were small plots of land or homesteads awarded to common people during the Great Mahele, in order that they might own the land within an ahupua'a which they occupied and on which they had traditionally farmed. The kuleanas of the common people consisted primarily of small parcels of irrigated taro lands in the valleys, which were, at that time, regarded as extremely valuable lands. *See generally* HUTCHINS, THE HAWAIIAN SYSTEM OF WATER RIGHTS, 23, 30-36 (1946).

customary rights assured in this section" are not to be diminished or extinguished by a failure to receive a permit under the Water Code.[137] While Part IX seems to make a plain statement that certain rights will not be denied by the Water Code, it raises many questions, mostly on the basis of what is not included and not said.

For example, no mention is made in Part IX of Hawaii Revised Statutes Section 7-1,[138] the statute which in its present form is a descendant of the so-called "Kuleana Act," and which forms the basis of riparian rights in the State of Hawaii,[139] certain gathering rights,[140] and certain rights of access to kuleanas.[141] Whether or not the language of Part IX of the Code means that section 7-1 "traditional and customary" riparian rights are now restricted to "descendants of native Hawaiians who inhabited the islands prior to 1778" is unclear.

Riparian uses are subject to regulation under the Water Code.[142] There is no reference, however, to riparian rights or riparian uses in the list of water rights preserved in Part IX. Is section 7-1 still a valid source of those rights? One might well read Part IX to say that only two classes of native Hawaiian water rights are protected: first, appurtenant water rights of kuleana and taro lands, and second, the "traditional and customary rights" of actual descendants of pre-1778 native Hawaiians. Since appurtenant rights are elsewhere given a measure of protection by the Water Code,[143] the central question is whether "traditional and customary rights" extend to those riparian rights which the Hawaii Supreme Court in *Reppun v. Board of Water Supply* held are derived exclusively from section 7-1.[144] The Water Code does not otherwise preserve these riparian rights, as such; but they may nevertheless be entitled to qualified protection under the Code as existing uses.[145] The question thus remains whether Part IX

---

[137] Code § 101(d).

[138] This section reads as follows:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also 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 all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

HAW. REV. STAT. § 7-1 (1985).

[139] *See* Reppun v. Bd. of Water Supply, 65 Haw. 531, 549, 656 P.2d 57, 69 (1982).

[140] *Kalipi*, 66 Haw. 1, 656 P.2d 745 (1982).

[141] Palama v. Sheehan, 50 Haw. 298, 440 P.2d 95 (1968).

[142] *See infra text* accompanying notes 188-202.

[143] Code § 63. *See also infra* text accompanying note 208 and following.

[144] *Reppun*, 65 Haw. at 549, 656 P.2d at 69.

[145] *See supra* text accompanying notes 114-15 and following.

of the Water Code has greatly restricted the applicability of section 7-1 to descendants of pre-1778 native Hawaiians, and made section 7-1 narrower than the Hawaii Supreme Court's interpretation of it in *Reppun*.

IV. THE CODE IN THE CONTEXT OF EXISTING HAWAII WATER LAW

One of the legislature's express goals in enacting the Water Code was to rectify the "great deal of uncertainty regarding the status of water rights" in Hawaii.[146] Whether the Code succeeds in this respect is open to debate. To some, the Water Code may appear to be a complete package, substituting a well-organized, administrative planning and permit system for certain imprecise common law doctrines which only invited time-consuming and costly litigation. To some extent, this perception may prove to be correct. But there were tensions existing before the Water Code came into effect, and some of these have found their way into the Water Code. Such tensions were the source of the *City Mill* case,[147] and the *McBryde*[148] and *Reppun*[149] cases, which have primarily defined current Hawaii law regarding surface and ground water rights. In the Water Code, the tensions appear as contradictions or ambiguities which, for the most part, remain to be sorted out. This Part will discuss these tensions in the context of the following issues: (1) do individuals have ownership rights in water?; (2) does the riparian owner still have a right to use water?; (3) what has happened to correlative rights in ground water?; (4) are appurtenant rights protected?

These background legal issues form the context in which the Water Code has arisen and against which it must be interpreted. In addition, the boundary between administrative discretion under the Water Code and individual "vested" rights has yet to be clearly defined, and will continue to evolve.[150] This section will first briefly discuss the repudiation of private ownership in surface waters in *McBryde*,[151] then, riparian rights in light of both *Reppun* and *McBryde*,[152] and finally *City Mill* and the issue of correlative rights to ground waters.[153] The only "rights" in water preserved by the Water Code, appurte-

---

[146] Code § 1. *See supra text* accompanying note 18. Other states have also adopted water legislation. Among them are Arizona, California, Colorado, Florida, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico and South Dakota. See *infra* note 176 for selected citations.

[147] City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912 (1929).

[148] McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973).

[149] *Reppun*, 54 Haw. 174, 504 P.2d 1330 (1973).

[150] *Cf.* ASC REPORT, *supra* note 111, at 31-35, for a discussion of the constitutional factors considered by the Advisory Study Commission.

[151] *See infra* text accompanying notes 155-73.

[152] *See infra* text accompanying notes 179 and following.

[153] *See infra* text accompanying note 255 and following.

nant rights, are discussed separately.[154]

A. McBryde *and the Repudiation of Private Ownership in Surface Waters*

In *McBryde*, the Hawaii Supreme Court held that neither riparian nor appurtenant water rights entitle a landowner to transport water to other lands or to any other watershed.[155] This decision dealt a potentially serious economic blow to the parties in *McBryde*, and to other landowners in the state who had invested in irrigation works, and had relied upon the use of waters which prior law held were theirs to divert as needed.[156] The court, having held that there were no surplus waters that belonged to any private party, and certainly none that could be diverted for irrigation uses, overturned a previous judicial decree to the effect that a party could use surplus waters of the normal flow of a stream as it saw fit, subject to the rights of downstream riparian owners.[157] The principal issue in *McBryde* was the diversion of waters from the Hanapepe ahupua'a into dry lands outside of the Hanapepe watershed. The *McBryde* opinion was challenged in a separate action, *Robinson v. Ariyoshi*,[158] brought in the United States District Court for the District of Hawaii. The *Robinson* court held that the Hawaii Supreme Court's decision in *McBryde* constituted a taking of vested rights in violation of the fifth and fourteenth amendments of the United States Constitution.[159] The *Robinson* decision was appealed and remanded, and has not yet been fully resolved as of this writing.[160]

---

[154] *See infra* text accompanying note 229 and following.

[155] *McBryde*, 54 Haw. at 191, 504 P.2d at 1341.

[156] *Id.* at 208, 504 P.2d at 1349 (Marumoto, J., dissenting and concurring opinions).

[157] *Id.* at 182, 186-87, 504 P.2d at 1336, 1338-39. While Territory v. Gay, 31 Haw. 376, 402 (1930), had held that "[a]ll Hawaiian cases . . . award water of the normal surplus to the konohiki [or chief] of the land of origin," *McBryde* completely discarded the notion of konohiki rights to such water. The *McBryde* court held that riparian owners are entitled to the amount of flow of waters of their streams "as water flowed . . . at the time of the [Land Commission] award without substantial diminution." *McBryde*, 54 Haw. at 199, 504 P.2d at 1345. From that premise, the court concluded "there can be no quantity of water which may be deemed 'normal daily surplus water' . . ." *Id.* The court seemed to suggest that because riparian owners *could* conceivably take more water from a given stream, no other rights in that water were possible, even if riparian owners did not in fact use such water, and ample surplus existed.

[158] 441 F. Supp. 559 (D. Haw. 1977).

[159] *See id.* at 580, 581, 586.

[160] Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977), *modifying*, 753 F.2d 1468 (9th Cir. 1985), *vacated and remanded*, 477 U.S. 902, *vacated and remanded*, 796 F.2d 339 (9th Cir. 1986), *on remand*, 676 F. Supp. 1002 (D. Haw. 1987). The 1987 Federal District Court decision is hereinafter cited as *Robinson Decision On Remand*. It contains Judge Pence's history of the *Robinson* litigation, as well as a biting critique of the *McBryde* decision and subsequent actions in *Robinson* of the Hawaii Supreme Court. For a discussion of the *McBryde* litigation, see generally Comment, *Hawaii Surface Water Law: An Analysis of Robinson v. Ariyoshi*, 8 U. HAW. L. REV.

The genesis of many water rights in Hawaii date back to the 1800's, when Hawaii was still a kingdom. The *McBryde* court examined the foundations of Hawaiian water rights, and concluded that the Great Mahele did not transfer ownership in water to individuals along with ownership in land, but rather, simply the "usufruct," or right of enjoyment only, of the water was transferred.[161]

The historical analysis begun in *McBryde* was carried over into the *Reppun* opinion, which summarized the major features of the ancient Hawaiian water system, as understood by the Hawaii Supreme Court.[162] Land, having been divided into ahupua'as, was governed by a konohiki, or chief of the ahupua'a. There was, according to the court, a spirit of mutual dependence within an ahupua'a, and the water was distributed among the residents of the ahupua'a according to the need for one's crops.[163] In return, each resident had to aid in the construction of irrigation systems and insure that his water would be productively applied. No one was entitled to use of water simply because it happened to run through his land or along its borders. The konohiki aimed to provide each resident with adequate water for his crops, subject to total availability of water.[164]

In 1845, a board of land commissioners to quiet land titles, commonly known as the "Land Commission," was established to quiet land titles.[165] The Land Commission was created under the Land Commission Act, which also implemented the Great Mahele, in which lands in Hawaii were divided, first between King Kamehameha III and the chiefs or konohikis; then between the king and the government; and finally, by government grants to konohikis and the common people.[166] The Land Commission in 1846 adopted certain principles to be followed in confirming titles.[167] These principles indicate, according to the court, that the Land Commission was authorized only to convey certain of the King's rights in lands; specifically, his "private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation," including the power to "encourage and even to enforce the

---

603 (1986). *See also* Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982) (where Hawaii Supreme Court presented its Answers to Certified Questions from the United States Court of Appeals for the Ninth Circuit. Those answers were later harshly criticized by Judge Martin Pence of the Federal District Court for the District of Hawaii upon remand by the Ninth Circuit.).

[161] *McBryde*, 54 Haw. at 181-87, 197-98, 504 P.2d at 1336-39, 1344.

[162] *Reppun* 65 Haw. at 540, 656 P.2d at 64.

[163] *Id.*

[164] *Id.* at 541, 656 P.2d at 64.

[165] *Id.* at 543, 656 P.2d at 66.

[166] *Id.* See also *McBryde*, 54 Haw. at 184-86, 504 P.2d at 1337-38, for a discussion of the historical considerations that influenced the court's opinion. On the subject of the Mahele generally, see Hutchins, *supra* note 136, at 28-31.

[167] *McBryde*, 54 Haw. at 185, 504 P.2d at 1338.

usufruct of land for the common good . . . . These prerogatives, power and duties, his Majesty ought not, and ergo, he cannot surrender."[168]

Based on these principles, as interpreted by the Hawaii Supreme Court, *McBryde* held that "the right to water is one of the most important usufruct of lands, and it appears clear to us that by the foregoing limitation the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants."[169] The court then concluded that the "right to water was not intended to be, and could not be, and was not transferred to the awardee, and the ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good."[170] The court in *Reppun* restated this conclusion.[171]

The Hawaii Supreme Court's holding in *McBryde* is central to the evolution of the litigation, legislation, and decisional law which followed. The court construed the 1846 Principles to mean that water rights were retained by the King as part of "his sovereign prerogatives as head of the nation" (which, of course, could never be surrendered). The court's only apparent reason for lumping water rights with the weighty concept of sovereignty was that the King had the power and duty to "encourage" and to "enforce" the usufruct of lands for the common good. In other words, the King could exercise certain powers of regulation for the general welfare.

Implicit here are two unstated conclusions of the court: first, the King's powers and duties over water were tantamount to perpetual ownership of the water by the sovereign; second, the sovereign's general police powers and duties could not be effectively exercised if the water were conveyed with the land. Neither of these conclusions is compatible with experience; for example, government pervasively regulates many things in society without either presuming or requiring ownership. Yet, according to the court, water became as inalienable by the King as other sovereign attributes. This was so even though no reference to the word "water" appears anywhere in the Principles cited by the court, nor are such broad water rights reserved in the grants themselves. In *Robinson*, Judge Pence characterized the findings of the Hawaii Supreme Court in *McBryde* as "completely revolutionary."[172] Yet in *Reppun*, the Hawaii Supreme Court fully reaf-

---

[168] *Id.* at 185-86, 504 P.2d at 1338.

[169] *Id.* at 186, 504 P.2d at 1338 (footnote omitted).

[170] *Id.* at 186-87, 504 P.2d at 1339.

[171] *See Reppun*, 65 Haw. at 548-49, 656 P.2d at 69.

[172] *Robinson*, 441 F. Supp. at 564. Subsequent to *McBryde*, in *Robinson On Remand*, Judge Pence remarked as follows, with respect to the revolutionary nature of the holdings of *McBryde*:

> One has but to read those recognized authorities on Hawaiian history and Hawaiian water rights, viz., R. Kuykendall, *The Hawaiian Kingdom*, Chapter XV, 1938; R. Kuykendall and A. Day, *Hawaii: A History*, 1948; E.S. Handy and E.G. Handy, *Native Planters in Old Hawaii*, 56-67, 1972; H.A. Wadsworth, *A Historical Summary of Irrigation in Ha-*

firmed the reasoning in *McBryde*.[173]

The Advisory Study Commission indicated that it was not its intent in drafting the Water Code to preempt the judicial determination of *McBryde*.[174] The Commission stated that it followed the lead of the 1978 Constitutional Convention in not dealing with the issue of ownership, but merely repeating the "affirmative duty on the State to take an active role in regulating and protecting the waters of this State."[175]

Thus, the Code in section 2(a) provides: "It is recognized that the waters of this state are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use."[176] This language strongly echoes *McBryde* and seems

---

waii, 37 The Hawaiian Planters Record 124, 1933; 4 Honolulu Water Commission Records 169, 1908; C.R. Hemmingway, Attorney General, *A Statement Regarding the Laws of Waters and Water Rights in Hawaii as Existing in Relation to Fresh Waters*; A. Perry, *A Brief History of Hawaiian Water Rights*, 1912; and The Water Commission Report of January 13, 1917, to know that in 1973 it was solid, affirmed and reaffirmed law in Hawaii that the commonlaw doctrine of riparianism was not the law of Hawaii; that the State did not own all of the water, but, rather, that the owner of the lands along the streams had vested rights in the water, according to the number of acres of taro lands anciently using that water; that the konohiki had the right to take the normal surplus waters of a stream and use it where and as he wished, that water could freely be diverted out of the watershed, and that water rights could be freely bought and sold.

Robinson Decision On Remand, 676 F. Supp. at 1011.

[173] *Reppun*, 65 Haw. at 548, 656 P.2d at 69. The court stated that "*McBryde* was a necessary and proper step in the rectification of basic misconceptions concerning water 'rights' in Hawaii." *Id. Contra Robinson*, 441 F. Supp. 559 (D. Haw. 1977); *Robinson Decision On Remand*, 676 F. Supp. 1002 (D. Haw. 1987).

[174] ASC REPORT, *supra* note 111, at 10-11.

[175] *Id.* at 11 (footnote omitted).

[176] Code § 2(a). Other state water statutes generally tend to provide that ownership of waters is in the people or the state, subject to vested rights or (more commonly) vested uses. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-141A (1986) (waters "belong to the public and are subject to appropriation"); *Id.* § 45-171 (1987) (nothing shall "impair vested rights to the use of water . . ."); CAL. WATER CODE § 102 (West 1987) ("All water within the state is the property of the people of the State, but, the right to the use of water may be acquired by appropriation in the manner provided by law."); COLO. REV. STAT. § 37-82-101 (1973) ("All water . . . has always been and is hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law."); FLA. STAT. ANN. § 373.016 (West 1988) ("[w]aters of the state are among its basic resources" [but no overt statement of ownership]); *Id.* § 373.171 (West 1988) (water boards must "act with a view to full protection of the existing rights to water . . . insofar as is consistent with the purpose of this law."); IDAHO CODE § 42-101 (1977) (waters when flowing in their natural channels are property of the state); *Id.* § 42-226 (Supp. 1987) (ground waters are declared to be the property of the state) ; *Id.* § 42-101 (1977) ("the right to the use of any of the public waters which have heretofore been or may hereafter be alloted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the

plainly to be based on the public trust doctrine.[177] Nevertheless, the Advisory Study Commission stated that it had no intent to take any position on ownership: "The recommended code does not deal with the ownership issue and avoids the use of the term "public trust" which might connote ownership to some."[178]

B. Decisional Law of Riparian Rights

The Hawaii Supreme Court in *McBryde* stated that there exist riparian rights of *statutory* origin.[179] According to the court, the "Enactment of Further Princi-

---

appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause" than the failure to pay certain fees for water delivery.); KAN. STAT. ANN. § 82a-702 (1984) ("All water[s] . . . [are] dedicated to the use of the people of the state . . ."); *Id.* § 82a-703 (1984) ("nothing in this act shall impair the vested right of any person except for non-use."); MONT. CODE ANN. § 85-2-101 (1987) ("Waters . . . are the property of the state for the use of its people . . ."); *Id.* § 85-1-101 ("nothing in this act shall impair the vested right of any person except for non-use."); NEB. REV. STAT. § 46-202 (1984) ("The water of every natural stream not heretofore appropriated . . . is hereby declared to be the property of the public . . . subject to appropriation."); NEV. REV. STAT. § 533.025 (1985) ("water . . . whether above or beneath the surface of the ground, belongs to the public"); *Id.* § 533-085-1 ("vested rights to use water [are not] to be impaired"); N.M. STAT. ANN. § 72-1-1 (1987) ("all natural waters flowing in streams and water courses . . . belong to the public and are subject to appropriation for beneficial use"); *Id.* § 72-12-1 ("underground [water] . . . are . . . declared to be public waters."); *Id.* § 72-12-4 ("Existing water rights based upon application to beneficial use are . . . recognized."); S.D. CODIFIED LAWS § 46-1-3 (1983) ("all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law"); *Id.* § 46-1-9 ("Vested rights" are (1) "right of riparian owner to continue to use water actually applied to any beneficial use on March 2, 1955, or within three years immediately prior to that date to the extent of the existing beneficial use made of the water"; (3) right of a riparian owner to use water for a beneficial purpose if the owner was in the process of actual application of the water to a beneficial purpose; (4) "rights granted before July 1, 1955, by court decree"; (5) "use of water under diversions and applications of water prior to the passage of the 1907 water law and not subsequently abandoned.").

[177] *See, e.g.*, Nat'l Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983) (applying public trust doctrine to navigable and non-navigable waters of California to prevent acquisition of vested rights to appropriate water in a manner harmful to interest protected by public trust). The public trust doctrine was early articulated as "a title [to submerged lands] held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction of interference of private parties." Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892). California has, with other states, expended the doctrine to include recreational and environmental purposes. *See, e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

[178] ASC REPORT, *supra* note 111, at 11.

[179] *McBryde*, 54 Haw. at 197-98, 504 P.2d at 1344.

ples," passed by the Hawaiian government on August 6, 1850, granted landowners a "right to drinking water, and running water."[180] The *McBryde* court interpreted this provision as granting a right to the same flow of water in a stream or river as existed at the time of the Mahele, "without substantial diminution . . . in the form and size given it by nature," and without prejudicing the riparian rights of others.[181] The court found the basis for this rule in English common law.[182] This common law established the right to use water running over an individual's land, provided that the individual did not substantially divert or diminish the quantity of that water.[183] English case law held that a landowner had no property in the water itself, but simply had a right to the usufruct of that water.[184] This part of the Enactment of Further Principles, relating to riparian rights, has been carried forward to the present day and now appears as section 7-1 of the Hawaii Revised Statutes.[185]

Certain key features of the Hawaii Supreme Court's understanding of riparian rights can be derived from *McBryde* and its successor case, *Reppun*. According to those cases:

1. Riparian rights in Hawaii are based exclusively upon a specific statute, Hawaii Revised Statutes section 7-1.[186]

2. Riparian rights may not be severed from the land "adjoining a natural water course" (as for example by sale or reservation in a deed), and such rights "appertain" only to such land. Accordingly, water drawn from streams by virtue of one's riparian ownership may not be transported elsewhere.[187]

3. Riparian rights may be used by a riparian proprietor for "irrigation, watering his cattle, and other domestic purposes, provided he does not materially diminish the supply of water or render useless its application by others."[188] One may not, however, enjoin another's diminution of the quantity or flow of a natural watercourse (material or otherwise) unless he can demonstrate "actual harm to his own reasonable use of those waters."[189]

---

[180] *See generally id.* at 191-92, 504 P.2d at 1342.

[181] *Id.* at 192-93, 504 P.2d at 1342.

[182] *Id.* at 193, 504 P.2d at 1342.

[183] *Id.* at 193-98, 504 P.2d at 1342-44.

[184] *Id.*

[185] See *supra* note 138 for the language of section 7-1.

[186] *See, e.g., Reppun*, 65 Haw. at 549, 656 P.2d at 69 ("Riparian rights in Hawaii are a product of the people's statutory rights to 'flowing' and 'running' water currently embodied in HRS § 7-1 (1976).").

[187] *Id.* at 549-50, 656 P.2d at 69-70; *McBryde*, 54 Haw. at 198, 504 P.2d at 1344. The *McBryde* court stated, in a somewhat off-hand way: "Of course, the riparian right appertains only to land adjoining a natural watercourse for its use." *Id.*

[188] *Reppun*, 65 Haw. at 552-53, 656 P.2d at 71 (quoting Peck v. Bailey, 8 Haw. 658, 662 (1867)).

[189] *Reppun*, 65 Haw. at 553, 656 P.2d at 72.

4. There is no ownership or "property" in the water itself. Only the "usufruct" is given by the statute.[190]

5. The use to which one is entitled by virtue of his riparian rights must not be wasteful. The means chosen for a particular use, however, need not be the most efficient, so long as it is not unreasonable in comparison to other more efficient means available.[191]

6. There is no other measure of riparian rights; such rights are not reduceable into gallons per day or other precise measure.[192]

C. Riparian Rights and the Water Code

In any area not designated a water management area, the above principles of riparian water use will continue to apply, unless and until the legislature or courts in Hawaii decide otherwise.[193] Under the Code, one must still seek certification of existing uses under section 27,[194] but that is the only Code impact on such uses. For designated areas, one must eventually seek a permit under section 50 for an existing use,[195] and a permit will issue only if the use is deemed to be reasonable-beneficial and "allowable under the comnon law of the State."[196]

Thus, all of the above factors will bear on the issuance of an existing use permit. In this sense, the Water Code may be deemed to have incorporated existing riparian law, with the substantial qualification that these rights become *uses* which may be adjusted by the Commission when a water management area is designated.[197] It is possible that a failure to certify riparian uses under section 27 may have consequences to the riparian user even when no designation has occurred.[198]

Moreover, there are instances when a permit for an existing riparian use may provide a riparian owner with greater rights than he would otherwise have en-

---

[190] *Id.* at 550, 554, 656 P.2d at 70, 72; *McBryde*, 54 Haw. at 186-87, 504 P.2d at 1338-39.

[191] *Reppun*, 65 Haw. at 553, 656 P.2d at 72.

[192] *Id.* at 552, 656 P.2d at 71 (citing *McBryde*, 54 Haw. at 198, 504 P.2d at 1344).

[193] *See, e.g., Robinson Decision on Remand*, 676 F. Supp. 1002 (D. Haw. 1987). Even in water management areas, these principles have validity in certain contexts. *See, e.g.*, Code § 50(b), *supra* note 120.

[194] *See supra* text accompanying note 100.

[195] Code § 50(a). *See supra* text accompanying note 97.

[196] Code § 50(b).

[197] *See supra* text accompanying notes 96-99. *See also* ASC REPORT, *supra* note 111, at 36. The changeover from rights to uses tracks the language of article XI, section 7 of the state constitution. *See supra* note 1. Reference there is to correlative and riparian uses, and appurtenant rights. *See generally infra* text accompanying notes 230-38.

[198] *See supra* text accompanying note 113.

joyed if no Water Code existed.[199] For example, a riparian permit holder might be able to draw water to the allowable amount under his or her permit, even if doing so prejudices other riparian owners who have no permits. Likewise, a latecomer's permit is subject to his not interfering with "any existing legal use of water."[200]

These examples suggest that the overall scheme of the Code favors those who come first. Favoring "first-comers," however, seems inconsistent with the "correlative" nature of riparian rights extolled in *Reppun* [201] unless a permit by its terms can be conditioned upon the riparian uses of others. The Water Code does not address this issue, although subsequent regulations may. But even if the regulations eventually provide that rights under permits shall be subordinated to pre-existing use rights, such conditioning of permits could create considerable uncertainty as to just what one has when he owns a permit, and what getting one really means in terms of allocating water use.

Moreover, the Code does not appear to provide a specific mechanism by which a non-permittee can petition for a change in someone else's permit under the section 57 permit modification structure.[202] The Commission seems equally powerless in this respect. The Commission can revoke permits[203] and declare water shortages,[204] when the relevant statutory criteria apply.[205] But the Code contains no provisions whereby the Commission might amend a permit to make way for another riparian user. At best, in the easy case where two applicants apply at the same time, the Commission may allocate use among them to provide "mutual sharing," if possible, under section 54.[206]

In areas not yet designated as water management areas, all of the decisional law principles of riparian water use still apply.[207] This means that one of the most restrictive aspects of pre-Code law, the prohibitions on severance, selling, and export, still exists. Since much of the State will probably always be outside a water management area, the prohibitions of *McBryde* and *Reppun* remain very much in effect. The Water Code allows transport only to permittees under cer-

---

[199] *See, e.g., infra* text accompanying notes 241-46.

[200] *See* Code § 49(a)(3).

[201] *See, e.g., Reppun*, 65 Haw. at 546-47, 656 P.2d at 67-68.

[202] Code § 57. *But cf.* Code § 13 (regarding a citizen's right to complain if someone is using water without a permit, or if waste or pollution is discovered). A permittee may petition for a modification "of any term" of a permit. Code § 57(a). But he or she must show either a change of conditions necessitating a greater water ration, or a more efficient means of utilizing the water than would be possible under the existing permit. Code § 57(b)(1), (2).

[203] Code § 58.

[204] Code § 62(c), (g).

[205] *Id.*

[206] Code § 54. *See supra* note 126.

[207] *See supra* note 193.

tain conditions.[208] Section 49(c) provides that the Commission shall "allow the holder of a use permit to transport and use surface or ground water beyond overlying land or outside the watershed from which it was taken" if consistent with the public interest and general plans and land use plans of the state and counties.[209] Those users not in a water management area (and those within who have no permits) do not enjoy this benefit of the Code's "liberalization" of the water law. In addition, those who had transport permits under section 49(c) of the Code will apparently no longer have the sanction of a permit when the water management area designation is rescinded, to legitimate their export of water. Thus there are now two contradictory systems of law on the critical issue of transport.

D. Further Thoughts on the Issues of Transport and Severance

Discussed above are the means by which Hawaii's Supreme Court has rationalized the repudiation of private ownership in surface waters.[210] This is the most striking feature of Hawaii's water law. Another distinct and peculiar feature is that the concept of *right* has become intimately bound up with a strict notion of *use*, with the result that sale and export of surface water is prohibited under Hawaii common law. How did this unusual state of affairs come about?

McBryde briefly commented that the riparian rights may be used for the benefit of land adjoining a natural watercourse for its use.[211] *Reppun* greatly expanded upon this concept, saying that the "nature of the water rights provided in HRS 7-1 are limited by the purposes for their establishment."[212] The *McBryde* court came to a similar conclusion with respect to appurtenant rights, holding that such rights could be utilized only on lands to which appurtenant rights attached at the time of the Great Mahele. Thus, one effect of *McBryde*

---

[208] Code § 49. This section must not be confused with section 59 which allows transfer of permits, in whole or in part, provided only that the permit conditions of place, quality, and purpose are adhered to, and that the Commission is "informed of the transfer within ninety days." It is not certain how broadly the word "transfer" will be construed; presumably it should permit various kinds of sale, license, sublicense, mortgage, and conditional arrangements (although use must not be affected). Failure of notification invalidates the transfer, and constitutes grounds for revocation of the permit. Code § 59. To be safe, buyers of permits should condition closing on simultaneous notification to the Commission, and receipt therefor. Of course, in the event the section is deemed to mean a *prior* notification, other safeguards would be necessary.

[209] Code § 49(c). Although the Commission "shall allow" such transport, the public interest qualification is especially vague, and may permit room for a considerable amount of Commission discretion.

[210] *See supra* text accompanying notes 155-78.

[211] *See supra* note 187.

[212] *Reppun*, 65 Haw. at 550, 656 P.2d at 70.

was to prohibit transport of waters to other lands.[213] *Reppun* essentially enlarged upon this restriction.[214] The *Reppun* court also addressed the issues of whether riparian and appurtenant rights could, in effect, be "severed" from the land,[215] that is, whether those rights could be sold or the water subject to them transported, and whether appurtenant rights could be extinguished. The defendant Board of Water Supply in *Reppun* based its right to the water on a series of transfers of land and reservations of water rights dating from the Great Mahele.[216] According to the Board of Water Supply, the ahupua'a of Waihee was transferred in 1855 to Benjamin Parker, and eventually acquired by the Bishop Trust Company. Bishop Trust, in 1950, transferred by deed all water rights on or under the ahupua'a to the Koolau Company. The land in this ahupua'a, subject to the grant of water rights, was transferred to the Kahaluu Company. The plaintiffs in *Reppun* acquired this land, allegedly subject to the grant of water rights to the Koolau Company.[217]

In 1955, the Board of Water Supply's predecessor-in-interest purchased all the water rights held by the Koolau Company. The Board claimed that such transfer of water rights from the Koolau Company was valid, entitling it to the use of water in the Waihee Stream and precluding plaintiffs from enjoining such use. The court below, relying on *McBryde*, held that the plaintiffs' appurtenant and riparian water rights could not be severed from the land and thus the 1955 transfer of water rights from the Koolau Company to defendant's predecessor was null and void.[218]

The Hawaii Supreme Court affirmed the trial court's voidance of the Koolau Company's transfer of water rights to the defendant's predecessor-in-interest, noting that certain water rights were transferred in the Mahele only in order for individuals to make productive use of their land.[219] Moreover, the court characterized all previous decisions condoning the sale or transfer of water rights severed from the land as based on misconceptions of the nature of water rights. The court found that "the deed that attempted to reserve such [appurtenant]

---

[213] *McBryde*, 54 Haw. at 190-91, 504 P.2d at 1340-41.

[214] *Reppun*, 65 Haw. at 549-51, 656 P.2d at 69-70.

[215] *Id.* at 549-52, 656 P.2d at 69-71.

[216] *Id.* at 535-37, 656 P.2d at 61-62.

[217] *Id.* at 535-36, 656 P.2d at 61.

[218] *Id.* at 536, 656 P.2d at 62. The conclusions in *McBryde* regarding the severance and transfer of water rights, while based on the court's analysis of Hawaiian history and legislation, were dicta, since the transferability or severability of water rights was not an issue there. *See McBryde*, 54 Haw. at 201, 204, 504 P.2d at 1346, 1347-48 (Marumoto, J., dissenting and concurring). Nevertheless, the *Reppun* trial court interpreted this dicta in light of the facts of the case and held that the plaintiffs' water rights could not be severed from the land to which they appertained.

[219] *Reppun*, 65 Haw. at 547-48, 656 P.2d at 68-69.

rights had the effect of extinguishing them."[220] With respect to riparian rights, the court held that, since such rights are statutory, "they [are] not the grantor's to reserve."[221]

Thus, under pre-code case law in Hawaii, both appurtenant and riparian rights were deemed to attach *only* to those lands actually appurtenant to or directly benefitted by a given water source.[222] Accordingly, no right to sell or export water to other lands was recognized. Indeed, misrouting or otherwise using water on lands to which neither an appurtenant nor a riparian right attached was enough to cause the extreme consequence of forfeiture of such rights with regard to lands on which the water could otherwise be rightfully used.

One might well ask why the right to water should be lost just because it is used on another parcel. It is apparent that the Hawaii Supreme Court, in distancing itself from the idea that anyone should own the state's surface waters, discarded notions of reservation, transfer, and severance of water rights because they resembled unwanted properties of ownership.[223] Thus with respect to riparian rights, the *Reppun* court denied those benefitted by section 7-1 "an independent source or profit for the possessors of water rights"[224] that would be

---

[220] *Id.* at 552, 656 P.2d at 71.

[221] *Id.* at 551, 656 P.2d at 70.

[222] It is curious to note that the *Reppun* court cited cases dealing with Indian reservations in formulating this rule with respect to riparian rights. 65 Haw. at 549-50, 656 P.2d at 69-70 (citing Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546 (1963), Colville Confederated Tribes v. Walton, 460 F. Supp. 1320 (E.D. Wash. 1978) and other cases). Federal policy of insuring that sufficient water remained on Indian reservations to fulfill the purposes of Indian treaties was sufficiently analogous to the Hawaiian situation in the mid-1800's, in the opinion of the court, to be "highly persuasive and applicable" to the general issue of non-severability of riparian water rights before the court. *Reppun*, 65 Haw. at 550, 656 P.2d at 70. The court offered no analysis of why such would be applicable.

[223] *See, e.g.*, *Reppun*, where the court cited HANDY & HANDY, NATIVE PLANTERS IN OLD HAWAII 64 (1972) as follows:

> Water, then, like sunlight, as a source of life to land and man, was the possession of no man, even the ali'i nui or mo'i. The right to use it depended entirely upon the use of it. So long as a family lived upon and cultivated land, using a given water source, and continued to contribute its share of labor required to maintain that water source, just so long did it maintain its "right" to that water. If the family did not use it, it no longer had a right to claim it.
>
> The freezing of land titles and related irrigation and fishing rights by legalistic procedures and grants in fee simple was wholly a foreign innovation. After this occurred, from the point of view of old Hawaiian principles of land, water, and fishing tenure, the only Hawaiians who maintained land, water, or fishing rights were those who stayed with and continued to use their areas of cultivation, water, and fishing grounds. Those who abandoned and neglected them, leased or sold them, no longer had any rights, namely the continued use and exercise of the right to use.

65 Haw. at 547-48, & 548 n.14, 656 P.2d at 68-69 & 68 n.14.

[224] *Reppun*, 65 Haw. at 550, 656 P.2d at 70. The court drew upon the language of section 7-

possible if those rights could be reserved or transferred. The court reached the

---

1 itself to bolster its conclusion. *See* HAW. REV. STAT. § 7-1 (1985) (denying the right to "sell for profit" the articles referred to therein, even though such "articles" do not refer to water or water rights).

The Water Code does not address whether water covered by permits may be sold. The Code does provide in section 59 that a permit may be transferred if the conditions of the permit, including place, quantity and purpose of use, must remain unchanged, for any transfer. Even given these requirements and the duty to notify the Commission, there is an open door for the transfer of permits independent of any transfer of land. But it would seem that the more crucial question is whether one may separately sell water covered by a permit. The ASC Report draft of the Water Code contained the precursor to Code section 59 (Transfer of Permit), *prohibiting* sales of water covered by permits. The ASC Report draft provided:

> Water covered in permits may not be sold under this chapter. This, however, does not preclude the assessment of charges to recover the costs of development and distribution of water. A valid transfer of water pursuant to this section shall not be deemed a sale of water if the transfer is incidental to the sale or exchange of a property interest in land.

ASC REPORT, *supra* note 111, app. E, at 33-34. Yet the ASC version was deleted by the Conference Committee in the final draft of the Code, with the following comment:

> Your Committee deleted the provision relating to the prohibition of the sale of water covered by permits and the ability of permitees to recover the costs of development and distribution of water. However, this deletion does not imply that the "sale" of water is affirmatively sanctioned by this Act; nor does this deletion imply that this act curtails the ability of permitees to recover costs of developing and distributing water subject to the provisions of this Act.

CONF. COMM. REP. NO. 118, 14th Haw. Leg., Reg. Sess., 1987 SENATE J. 886.

While the Water Code is thus silent on the sale of water and of permits, the issues will be critically important in the future. Suppose, for example, that landowner digs a well and then sells a portion of his property for commercial development which will need to utilize the waters of that well. The well may have cost several million dollars to dig and equip, and owner's costs could be recovered by selling the right to that well water. The uncertainty about his right to do so once a water management area is designated, and about the scope of his rights under a permit in that event, is a significant unaddressed issue in the Code.

Similarly, it is not clear whether existing contracts for the sale of water will be recognized by the Commission once a water management area is designated. The ASC Report contains a lengthy dissertation on the subject, concluding that "water should not be subject to purchase and sale for profit on the open market." ASC REPORT *supra* note 111, at 37. The Advisory Study Commission believed that under their version of the Code all future sales of water for profit were prohibited and all contracts for the sale and purchase of water would be void:

> It is clear that under the recommended code, future sale of water for profit is prohibited. The commission is aware, however, that there exists today a number of contracts for the sale and purchase of water. These agreements are between and among governmental agencies and private parties. The probable effect of the recommended code is to nullify these existing contracts as well as to prohibit future sales of water. This conclusion flows from the fact that all existing uses, although grandfathered, are subject to permits, and any water subject to the permit system is precluded from being sold.

ASC REPORT, *supra* note 111, at 37. The reference to the prohibition on sale is to the deleted provision of the draft Code, discussed above.

The Advisory Study Commission seemed to think that decisional law of the state already

same result with respect to appurtenant rights, merely by analogizing such rights to appurtenant easements attaching to land, and by noting that appurtenant easements "cannot exist or be utilized apart from the dominant estate."[225]

Finally, the court determined that the measure of appurtenant rights is the amount of water used at their creation, that is, the amount of water used for taro irrigation in 1848, at the time of the Mahele.[226] Apparently recognizing the inherent difficulties in applying this standard, but also apparently wanting to keep the principle of original use alive, the *Reppun* court created a presumption that current use approximates 1848 use.[227]

Thus, with the inception of the Code, Hawaii water law has arguably come around full circle. Pre-Code law recognized appurtenant rights, then limited the exercise of those rights only to the land originally benefitted, thus prohibiting the transport of water to other lands, and fixed the measure of the rights by referring to the amount of water used in 1848. Today, however, current use (if the use is traditional) will be presumed to be equivalent to 1848 use, whether it actually is or not. Moreover, transport rights can now be obtained under the Code's permit system.[228]

E. Appurtenant Rights

In *McBryde* and *Reppun*, the Hawaii Supreme Court treated the concepts of water rights and appropriate use as intimately linked together. Thus, a water right, whether riparian or appurtenant, could be exercised only on the condition that the water be used on the land to which the right appertained. Under the Water Code, this requirement appears to have been dispensed with, at least with regard to designated Water Management Areas. Use permits in such areas may be transferred and water for which a permit has been issued may be transported, if the Commission approves.[229]

Certain distinctions between rights and uses, however, are still evident in the

---

precluded sales of surface water, but stated that "the law is less clear as to correlative groundwater rights." *Id.* at 37. It nevertheless concluded that contracts for the sale of correlative water rights are also void. *Id.* at 38. But *City Mill* contains nothing that would prohibit it, at least under the circumstances outlined in that case. It would seem to permit the sale of water provided the sale is consistent with the correlative rights doctrine.

With the Conference Committee's rejection of the ASC Report's draft language on the issue of sale of water, the question remains one of primary importance.

[225] *Reppun*, 65 Haw. at 552, 656 P.2d at 71.

[226] *Id.* at 554, 656 P.2d at 72.

[227] *Id.* This is so *if* the land is being used to cultivate "traditional products by means approximating those used at the time of the Mahele." *Id.* Otherwise, the burden of proof will still be on the user to show his 1848 use as the measure of his appurtenant rights.

[228] *See supra* note 193; Code § 49(c) (transport); Code § 59 (transfer).

[229] *See supra* note 228.

Code. Once a water management area is designated, existing uses will, as mentioned, qualify for the simplified permit procedure under section 50 of the Code.[230] One must have an existing, verifiable *use* of water to be considered for such permit.[231] Alleging a riparian or correlative *right* to such water will not justify issuance of an existing use permit. The situation is otherwise with respect to appurtenant rights, which are accorded a special status under the Code; permits based upon appurtenant rights will be "issued upon application" under section 63 of the Code.[232]

As discussed above, appurtenant water rights are water rights which were used at the time of the Great Mahele in an amount sufficient to cultivate each owner's crops, and are regarded still as "appurtenant" or attaching to the land.[233] Section 63 of the Code states that "[a]ppurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time."[234] Nothing, that is, except perhaps failure to declare that right under section 26,[235] or its revocation under section 58.[236] The Code therefore treats appurtenant rights as in a class by themselves. Even a failure to apply for a continuation of an existing use of an appurtenant right to water under section 50 will not create a presumption of abandonment of that right.[237] The Advisory Study Commission explained the reasons for this special treatment of appurtenant rights:

> In contrast to riparian and correlative *uses*, appurtenant *rights* are to be protected under the constitution. The choice of language here is indicative of a desire to preserve intact unexercised claims to appurtenant rights. The constitutional use of the word "rights" with respect to appurtenant rights is a recognition by the framers of the State Constitution that appurtenant rights are deeply rooted in the culture of native Hawaiians. As such appurtenant rights have value in themselves. As such, it appears necessary that the recommended code recognize this constitutional requirement. The recommended code, thus, preserves all appurtenant

---

[230] Code § 50(a), (b). *See supra* text accompanying notes 114-15.

[231] Code § 50(f).

[232] Code § 63.

[233] *McBryde*, 54 Haw. at 188, 504 P.2d at 1339. *McBryde* held the following general rule to be the source of appurtenant rights:

> It is the general law of this jurisdiction that when land allotted by the Mahele was confirmed to the awardee by the Land Commission and/or when Royal Patent was issued based on such award, such conveyance of the parcel of land carried with it the appurtenant right to water for taro growing.

Id.

[234] Code § 63.

[235] *See supra* text accompanying notes 100-03 and 113.

[236] *See* Code §§ 26 & 58. A permit may be revoked for willful violations of the act or a permit, misrepresentations, or continuous nonuse for four or more years. Code § 58.

[237] Code § 50(c).

rights.[238]

The Advisory Study Commission apparently believed that reserving the estimated small amounts of such waters for appurtenant users would not interfere with the overall conservation objectives of the Water Code, and thus "grandfathering" these rights was acceptable.[239] Even given the right to a section 63 permit based upon proof of an appurtenant right to water, the permit will still be subject to all of the Commission's powers to restrict classes of permits during a water shortgage.[240] These "classes" are not defined.[241] This could mean that those with permits based on appurtenant rights may be cut back as much as those whose permits are based upon riparian use, or are not based on any prior right. If this were the case, appurtenant rights to that extent would not be "preserved," despite the language of section 63.

Under common law, appurtenant users, having priority over riparian users, are first entitled to the water needed according to their appurtenant rights.[242] Riparian users are next entitled to water needed for reasonable use on their lands without prejudicing the reasonable use of water by other riparian users. Since the riparian right is limited to the "natural flow of the stream . . . and the shape and size given it by nature,"[243] during a water shortage, each riparian user at common law must decrease his water use according to the diminution of the flow of the water.

Under the Water Code, an appurtenant user may not have the right to an undiminished quantity of water during a water shortage.[244] Rather, if permits based on appurtenant rights are part of the permit class upon which restrictions are imposed, an appurtenant user will be required to decrease his use. Indeed, holders of permits based on existing riparian uses may actually benefit from the Code provisions. If the permit is not part of a restricted permit classification, the riparian user will have the right to an undiminished quantity of flow according to his permit, since the *McBryde* "natural flow" limitation appears not to have been incorporated into the Code provisions.

References to appurtenant rights are sprinkled throughout the Code,[245] and several technical questions of interpretation remain. Although the section 63

---

[238] ASC REPORT, *supra* note 111, at 36 (emphasis added).

[239] *Id.* at 36-37.

[240] Code § 62(b), (g).

[241] The Code requires the Commission to adopt a "reasonable system of permit classification according to source of water supply, method of extraction or diversion, use of water, or combination thereof." Code § 62(a).

[242] Such rights would be measured according to *Reppun*, 65 Haw. at 554, 656 P.2d at 72. *See supra* text accompanying notes 226-27.

[243] *McBryde*, 54 Haw. at 192-93, 504 P.2d at 1342.

[244] *See* Code § 62(b), (c). *Cf.* Code § 63.

[245] *See, e.g.*, Code § 27(a), § 50(c), § 63 and § 101(d).

permit for water use based upon an existing appurtenant right shall be issued automatically, such permit will still be subject, among other things, to sections 26 and 27.[246]

Section 26, for example, provides that all users of water in the state must file a declaration of such use within one year of the effective date of the rules implementing the section.[247] Section 27 provides that, once a declaration is filed, a certificate of use shall be issued which "shall be recognized by the commission in resolving claims relating to existing water rights and uses including appurtenant rights, riparian and correlative use."[248] The certificate of use will be issued only if the commission determines that "the use declared is a reasonable, beneficial use."[249]

Sections 26 and 27 can be interpreted as favoring that use which is covered by a certificate, be it riparian, correlative or appurtenant, over an appurtenant right which is not subject to a certificate or which has been found not to be reasonable and beneficial. This interpretation is undermined, however, by the comments of the Conference Committee with respect to sections 26 and 27:

> The section on certificates of use is intended to afford protection to constitutionally recognized interests under Article XII, Section 7 of Hawaii's Constitution that are not in designated areas. The Commission should adopt rules to provide adequate notice and procedural safeguards for all users including actual notice of applications to other users, that may be affected, hearing procedures, and conditions in a manner similar to that provided for permits in designated areas. Certificates of use shall be subject to appurtenant rights, existing riparian uses, and existing correlative uses.[250]

These comments suggest that sections 26 and 27 should be construed in such a manner as to provide the greatest protection and preservation of appurtenant rights. Moreover, applying the "reasonable-beneficial use" concept in section 27 to appurtenant rights is inconsistent with the fact that section 63 permits are excused from the reasonable-beneficial use test of section 50(b) (issuance of permits for existing uses).[251] If no reasonable-beneficial use need be shown in order to obtain a permit for water use based upon appurtenant rights in a designated water management area, it is illogical that an appurtenant use must be reasona-

---

[246] Code section 63 states that the permit (for water use based upon an appurtenant right) "shall be subject to sections 26 [filing of existing use declaration] and 27 [issuance of certificate] and 58 to 62 [revocation of permits (§ 58), transfer of permit (§ 59); contested cases (§ 60); permit fees (§ 61) and declarations of water shortage (§ 62)]." Code § 63.

[247] Code § 26.

[248] Code § 27(a).

[249] *Id.*

[250] CONF. COMM. REP. NO. 118, 14th Haw. Leg., 1987 SENATE J. 885-86.

[251] Code § 63; *see also supra* note 245.

ble-beneficial under section 27 in non-designated areas where the water resources are not threatened.

Permits issued under section 63 are also subject to revocation for, *inter alia*, nonuse of the water for four years or more.[252] This conflicts with the comment of the Advisory Study Commission that the choice of language in the 1978 constitutional amendment indicates "the desire to preserve intact unexercised claims to appurtenant rights."[253] In order for the constitutional mandate to be followed, it would seem that the nonuse provision should not be applied to section 63 permits. The legislature's failure to do so appears to be a significant oversight. The other conditions under which permits are revocable are procedural, relating to fraud, rather than substantive, relating to policy.[254] The intent of the Advisory Study Commission and the 1978 constitutional amendment to confer special status on appurtenant rights should be followed by subjecting section 63 permits only to procedural conditions for revocation.

F. Correlative Rights to Ground Waters

Ground waters generally have received different treatment from that accorded to surface waters under pre-code law in Hawaii. In *McBryde*, the Hawaii Supreme Court declared surface waters to be owned by the state.[255] That highly contested holding was essentially ratified in *Reppun*. Forty-three years earlier, however, the court had held in *City Mill*[256] that ground waters were not state-owned, and it is unclear whether *McBryde* and *Reppun* implicitly overruled *City Mill*.

City Mill involved an act requiring a permit in order to drill an artesian well.[257] Under the act, no permit would be issued if the proposed well would threaten the safety of the artesian water or basin by lowering its level or increasing its salinity. No restrictions were placed on existing wells.[258] The *City Mill* court held that prohibiting an overlying landowner from using his reasonable share of the ground water, without due compensation, was an unconstitutional taking.[259] The court analyzed the rights of overliers with respect to the ground water. It rejected the common law absolute ownership doctrine and the so-called reasonable use doctrine, because either one of those would permit unlimited

---

[252] Code § 58(4). Section 63 permits are generally subject to section 58's provisions on revocation.

[253] *See* ASC REPORT, *supra* note 111, at 36.

[254] *See generally* Code § 58(1), (2), (3).

[255] *See supra* text accompanying notes 170-71.

[256] 30 Haw. 912 (1929).

[257] *Id.* at 915, 918.

[258] *Id.* at 915.

[259] *Id.* at 947.

withdrawals of ground water in appropriate circumstances, regardless of the consequences to other overliers.[260]

The court also held that the Territory of Hawaii was not the owner of all the artesian water, but rather the ownership of such water was transferred to individual landowners during the Great Mahele.[261] The court pointed out that, while all mineral and metallic mining rights were reserved to the Hawaiian government pursuant to principles adopted by the Board of Land Commission, there was no mention in those principles of the reservation of underground water.[262] Of course, this omission may simply have been due to the fact that the existence of such ground water in Hawaii may not have been known at the time of the Mahele.[263]

Nevertheless, the court adopted the doctrine of correlative rights as applying to the use by overliers of the underlying artesian water. This doctrine provided that "all the owners of all the many portions of [the land overlying the artesian basin should be regarded] as co-owners of the waters of the basin."[264] The

---

[260] *Id.* at 922-24.

[261] *Id.* at 934. The court's reasoning on this issue of ownership is set forth below:

> While the Territory of Hawaii, in so far as it may be the owner of any piece or pieces of land over an artesian basin, has the same rights in the artesian waters which a private owner of the same pieces of land would have, no reason occurs to us which would sustain the view that the Territory is, or that its predecessors were, the owners of all artesian waters in the Territory. Prior to 1845 the King was the sole owner, because he was the owner of all of the land in the islands under the system and conceptions then prevailing. When in the late 40's and thereafter the system was voluntarily abandoned by the King and was radically changed and land tenures became vested in individuals, the ownership of the subterranean waters which were a part of the land passed, as a part of the lands themselves, from the King to the individuals. With the issuance of land commission awards, confirmed thereafter by royal patents, the ownership of the King ceased and the ownership of individuals began. In the transaction all "mineral or metallic mines" were reserved to the Hawaiian government, but there was no reservation whatever of the subterranean waters.

Id. It is informative to compare the above language with *McBryde*, 54 Haw. at 184-87, 504 P.2d at 1337-39, which reached precisely the opposite result with regard to surface waters.

[262] *City Mill*, 30 Haw. at 934.

[263] *Id.* at 938. The court in fact noted that the first artesian well in Hawaii was not sunk until 1879, after the Mahele. *Id.*

[264] *Id.* at 925. The court in *City Mill* began with an analysis of the rights of overlyers with respect to the groundwater. In addition to rejecting the concept of territorial ownership of water, the court considered, and rejected:

> 1) Common law (absolute ownership) doctrine: This doctrine, under which a landowner is the absolute owner of all water running on or under his land, was deemed inapplicable to artesian wells because artesian water runs through many persons' lots. Taking water from the basin under one lot would necessarily mean taking property from another. *Id.* at 922, 923-25.
>
> 2) Reasonable use doctrine: Under this doctrine, the owner of land can use underlying

court thus held that wholly depriving a co-owner of underlying water of his right to a reasonable share of that water without due compensation was unconstitutional.[265]

The *City Mill* decision was based on the assumption that, pursuant to the Mahele, ownership of subterranean waters was transferred to individuals along with the land, since such ownership was not explicitly reserved to the government.[266] This assumption may have been implicitly repudiated in *McBryde*. which held that "the right to water was specifically and definitely reserved for the people of Hawaii for their common good."[267] Though this is dicta with respect to ground water, since the facts in *McBryde* involved flowing surface water, it is possible that the court would apply the same historical analysis of water rights in a dispute over ground water and reach the same result. In any event, if overliers no longer own the water in the underlying artesian basin, then they no longer have any vested right to a reasonable share of that water. They might, however, be deemed to have a usufructuary right to the water which would entitle them to use the water, provided such use did not interfere with the reasonable use of others.

As between ground water users, the application of *McBryde* principles to ground water would not result in a system that deviated greatly from a pure application of the correlative rights doctrine. In both cases, overliers (assuming that "foreign" appropriators could only appropriate any surplus remaining after appropriation by all overliers) would have the right to the use of a reasonable quantity of ground water. During a ground water shortage, each user would be required to decrease its share proportionately.[268] Thus, no user would have a greater right to the use of water than any other user, whether a prior or future appropriator.

Under the Code, if all users of ground water from a particular ground water basin have permits of the same class, a restriction on that class of permits will apply with equal force to each permittee.[269] Thus, the same result is obtained from a ground water shortage under the Code and under common law.

As between the ground water user and the state, however, the application of *McBryde* to ground water use would result in a conflict with the correlative rights doctrine. The state would be permitted to impose prospective restrictions on ground water usage, including prohibiting an overlier from appropriating

---

water on his land only for irrigation, domestic purposes, and the like, but there is no limit to the quantity of water used. The same problem of a common groundwater basin arises here as under the common law doctrine. *Id.* at 922, 925-27.

[265] *Id.* at 947.

[266] *Id.* at 244.

[267] *McBryde*, 54 Haw. at 185-87, 504 P.2d at 1338-39.

[268] *See generally City Mill*, 30 Haw. at 928-33.

[269] Code § 62(c).

any ground water.[270] This would amount to overruling *City Mill*, and would permit the state to impose, under the Code, the same restrictions found unconstitutional in *City Mill*.[271]

Moreover, rights of overliers under the Code would no longer be superior to those of nonoverlying "foreign" appropriators of ground water. Indeed, a foreign appropriator might be permitted to use ground water in a certain basin to the exclusion of the subsequent overlier. Under the correlative rights doctrine, a foreign appropriator would be divested of any rights to draw ground water from the basin if that basin could not accommodate usage by both the foreign appropriator and the subsequent overlier.

The constitutionality of preventing an overlier from using underlying ground water without due compensation remains a problem, both under the Code and pre-code case law.[272] Although *McBryde* is still being contested, both *McBryde* and *Reppun* arguably removed the constitutional barrier with respect to a denial of surface water use by holding that such waters are owned by the state. *McBryde* and *Reppun* apply to ground water, however, only by extension, if at all. Thus, until the Hawaii Supreme Court decides a case on point, or until *City Mill* is expressly overruled, the holding of the latter case keeps the "taking" issue with respect to ground water very much alive.

What was the drafters' view of this problem? The Advisory Study Commission's report stated that both riparian and correlative rights "are weak property rights in that they are not rights to specific bodies or quantities of water."[273] The Commission also pointed out that both riparian and correlative "systems of rights may be viewed as systems of equitable distribution administered for the benefit of the group," and that this is what the statutory permit system was to be all about.[274] It can be argued that the Code's permit system roughly mimics the existing common law (which provides for mutual self-adjustment for the

---

[270] Though the facts in *City Mill* involved artesian waters, that fact alone should not affect the generality of the rule adopted by the court regarding ownership and correlative rights. The court did not appear to restrict its holding to artesian waters, and relied for its holding on many cases and authorities which dealt with the general issue of percolating ground water. *Contra* Comment, *Groundwater Rights in Hawaii: Status and Suggested Change*, 8 U. HAW. L. REV. 513, 553 (1986).

[271] *But see Robinson Decision On Remand*, 676 F. Supp. 1002 (D. Haw. 1987).

[272] *City Mill* held that to "wholly deprive any co-owner of the waters of the basin under consideration, without due compensation, of his right to share in the artesian waters of that basin, violates the provisions of the Constitution is invalid." *City Mill*, 30 Haw. at 947. Such holding was based upon the finding that the King had granted (or at least not reserved) such waters at the time of the Mahele. *See supra* note 260. The court did not find that reasonable and necessary regulation for the drilling and use of such waters under the police power would be unconstitutional. *Id.* at 945-46.

[273] ASC REPORT, *supra* note 111, at 33.

[274] *Id.*

benefit of others) with respect to riparian and correlative rights. Thus, the concepts of ownership, which in the category of riparian and correlative rights are "weak property rights" to begin with, give way under the Code to a regulatory scheme which is consistent with the highly qualified nature of that ownership, and denial of a permit consistent with Code provisions would therefore not constitute a taking.[275] *City Mill* did use the words "co-ownership" and hold that, under the facts of that case, an actual taking had occurred.[276] Yet the Code clearly relegates both riparian and correlative rights to the category of uses, which may or may not be sanctioned by permit. Correlative and riparian rights or uses take up the bulk of water use in the state.[277] One might say that the Water Code takes the broadest view of *McBryde* with respect to the surface riparian rights (now riparian uses) and the narrowest view of *City Mill* with respect to correlative rights (now correlative uses) in ground water.

V. CONCLUSION

It should be clear that regulations issued by the Commission will be exceedingly important in resolving some of the problems noted in this article. But the real question is whether the massive legislative framework will, in the last analysis, *actually* protect Hawaii's water from pollution, create reasonably efficient avenues of dispute resolution, and allow vital growth to Hawaii's economy without future destruction to "traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, [and] the maintenance of proper ecological balance and scenic beauty. . . ."[278]

In short, we must distinguish between a functioning bureaucratic framework established for these goals, which itself may give a comforting *appearance* of progress, and the actual achievement of such goals over time. We cannot assume the water problems of this state are solved. The work has just begun, and the legislature should continue its critical examination of this area and follow up if the Commission needs help.[279]

---

[275] *Id.* at 32-37.

[276] *City Mill*, 30 Haw. at 947.

[277] ASC REPORT, *supra* note 111, at 36-37.

[278] Code § 2(c).

[279] Section 5(a) establishes a review commission within the Legislative Reference Bureau for the purpose of comprehensively reviewing the adequacy of the Water Code with a view to improving it, if necessary. It begins its work in 1992, and must report to the legislature within two years thereafter.

Japanese Labor Law: The Legitimacy of the Absolute Prohibition Against Concerted Activity under the PCNELR Law

I. INTRODUCTION

To many Westerners, Japan is a fascinating enigma. One area of particular interest is the interaction of cultural and traditional norms with formal legal rules[1] regulating employee activities in the public sector. Japanese labor law distinguishes between the public and private sectors with regard to the right of employees to engage in concerted activities against their employers.[2] In particular, certain laws prohibit only public sector employees from engaging in these activities.[3] This type of prohibition is not unique to Japan. Indeed, several American states have enacted similar statutes.[4] Interestingly, however, the Japanese Constitution appears to confer the right to engage in concerted activities upon all workers without qualification.[5]

The apparent conflict between Japan's Constitution and the public sector la-

---

[1] One commentator suggests that when dealing with Japan the focus should be on the living law. This refers to the tendency of traditional behavioral practices to persist in some areas despite formal law to the contrary. The formal law incorporates these practices into the Japanese system of positive law. When traditional ways conflict with written law, the latter is frequently ignored in behavior and observed only in litigation, if at all. D. HENDERSON, FOREIGN ENTERPRISES IN JAPAN 163 (1973).

[2] In this Comment, the term "concerted activities" is used to indicate not only strikes, but all illegal acts of dispute. The Labour Relations Adjustment Law defines acts of dispute as "strikes, go-slows, lock-outs, and other acts and counter-acts hampering the normal course of work in an enterprise and performed by the parties concerned with labour relations with the object of attaining their respective claims." LABOUR RELATIONS ADJUSTMENT LAW art. 7 (Japan) (Sept. 27, 1946).

[3] Yamaguchi, *The Public Sector: Civil Servants*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 304 (T. Shirai ed. 1983) (explaining the restrictions imposed on various activities).

[4] *See generally* Duff, *Japanese and American Labor Law: Structural Similarities and Substantive Differences*, 1984 EMPLOYEE REL. L.J. 629 (for a general discussion of differences between the countries' labor laws).

[5] Article 28 of the Japanese Constitution states: "The right of the workers to organize and to bargain and act collectively is guaranteed." KENPO (Constitution) art. 28 (Japan) (Nov. 3, 1946).

bor laws has prompted some Japanese jurists to question the validity of the latter.[6] Notwithstanding opposition to these laws, however, the government refuses to amend them. Recently, when unions in the public sector sought to litigate the issue, the judiciary supported the government's position by declaring that the laws are in fact constitutional and need not be amended.[7] Naturally, the unions believe that such decisions deprive them of their most effective means for furthering their members' causes. Moreover, unions argue that the legal sanctions imposed for engaging in concerted activities impede the employees' exercise of their constitutional rights. Against this background, the unions' stubborn resistance to the laws prohibiting concerted activities is understandable.

This Comment examines the justification and necessity for the laws promulgated to control the incidence of conflict-provoking, concerted activity in the Japanese public sector.[8] In order to appreciate the subtleties of this issue, a general awareness of the role of formal legal rules as they function in the labor environment is necessary. The justification for the government's failure to amend the public sector laws becomes clearer as the interplay between formal legal rules and Japanese custom and tradition is recognized.

In the private sector, traditional and cultural norms effectively supplant legal rules and serve to deter undesired concerted activity.[9] In public entities, however, neither cultural nor societal norms are effectively incorporated into the work environment. Consequently, the bond between labor and management, characteristically found in private entities in Japan, is noticeably lacking in public enterprises. These differences between public and private entities necessitate the maintenance of laws prohibiting concerted activities in the public sector.

In the private sector, for example, advancement, promotion, and bonuses are typically related to the enterprise's growth and profitability. Thus, private sector employees come to understand the direct link between their own welfare and that of the entity. In the public sector, however, the employees' welfare is only marginally related to the growth of the company. The absence of any direct link between the interests of labor and management renders Japan's unwritten law,

---

[6] *See generally* Hanami, *The Function of Law in Japanese Labor Relations*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 161-78 (T. Shirai ed. 1983) (discussing Japanese unions' reliance on the law and the importance of legal theories and court decisions).

[7] *See infra* note 91 and accompanying text.

[8] According to the results of a survey on labor disputes (released on May 25 by the Ministry of Labor), there were a total number of 4,826 disputes in 1985, involving 3,289,000 workers. Further, there were 625 strikes involving 123,000 workers lasting 12 hours or longer, and loss of work days resulting from those strikes totaled 270,000 days. *No. of Strikes and Workdays Lost in '85 Lowest on Record*, 25 JAPAN LAB. BULL. 3 (Aug. 1986) [hereinafter *Workdays Lost*].

[9] Tobioka, *Japan's Matrix of Nature, Culture and Technology*, 1985 MGMT. REV. 42-7 (a brief look at how the Japanese harmonize traditional practices in a modern industrial world).

composed of cultural and traditional practices, ineffective as a means to prevent labor strife. Thus, the need arises for a system of formal legal rules to control conflicts. In the absence of such a system, public entities might not be able to supply the goods and services necessary for the well-being of Japanese society.[10]

In examining the importance of culture and tradition on Japanese labor law, Part I of this Comment describes the attitudes and perceptions the Japanese have toward the government and the laws it enacts. Part I also discusses the people's general attitude toward conflict resolution. Part II sets forth the legal authority advanced by opponents of the anti-concerted activities laws to challenge the government's refusal to amend the laws. Part III discusses the general sources of authority supporting the government's position.

Inherent characteristics of public and private enterprises profoundly influence the efficacy of both unwritten and written law with respect to the suppression of strikes in Japan. Part IV outlines some of the major differences between the public and private labor sectors in Japan, and examines the extent to which these differences either facilitate or hinder the effectiveness of both types of law. Part IV proposes that the government's reliance on formal legal rules — rather than on the unwritten law — to control the incidence of concerted activity in the public sector is justified.

II. JAPANESE PERCEPTIONS AND ATTITUDES

A. *Attitudes Toward Society*

A fair understanding of the government's justification for enacting laws that prohibit public sector workers from engaging in concerted activity requires a brief examination of the roles of culture and tradition in Japan. The government's general reliance upon the people to comply voluntarily with the laws derives from the substantial impact that Japanese custom and tradition generally have upon an individual's perception of his role as a member of society.[11]

In Japan, tradition and culture shape and inform the social apparatus that orders the formal and informal affairs of the average citizen. More so than in

---

[10] The PUBLIC CORPORATION AND NATIONAL ENTERPRISE LABOR RELATIONS LAW [hereinafter PCNELR LAW] states in article one that:

> [T]he law aims at securing the uninterrupted operation of the public corporation and national enterprise at maximum efficiency for the promotion and protection of the public welfare, by establishing the useages [sic] and procedures of collective bargaining in order to bring out an amicable and peaceful adjustment of grievances or troubles over working conditions of employment of the public corporation and national enterprise.

PCNELR LAW art. 1 (Dec. 20, 1948).

[11] E. ISHIDA, JAPANESE CULTURE 46-94 (T. Kachi trans. 1974) (for an interesting overview of the Japanese culture, its formation and the factors responsible for its perpetuation).

western cultures, Japanese society emphasizes homogeneity and group harmony.[12] Groupism, the term used to describe these characteristics, is partially responsible for the Japanese respect for order.[13] Groupism recognizes a greater dignity in the group than in the individual. Accordingly, an individual feels morally bound to devote himself to promoting harmonious relations within a particular group.[14]

The importance of groupism is further illustrated by the relationship between an individual's reputation and the respect the group with which he associates commands in wider society. In Japan, reputation is a vicarious concept. Thus, the conduct of each member of a group is an essential component of group formation, and each member's conduct reflects upon the others.[15] In order to preserve one's harmonious relationship with a group, as well as enhance its reputation, each member must strive to abide by societal norms, at least in public.

Membership in society obligates individuals to follow formal legal rules as well as the uncodified norms of culture and tradition. In the case of formal rules, the concern of the individual is less with the substance of the law than with the fact that law embodies cultural norms.[16] Respect for the formal law thus reinforces the cohesiveness of society in general, and is an objective manifestation of an individual's willingness to sacrifice individual desires for the good of the group.

The focus on the group, however, is not entirely at the expense of the individual:

---

[12] R. SMITH, JAPANESE SOCIETY 92-95 (1983) (for a discussion of the relationship between an individual and a particular group).

[13] Hiroshi, *Historical Overview of Cultural Supposition in Japanese Business Management*, 19 EAST 1, 54 (1983) (for analysis of the components of groupism). *See generally* Ozaki, *Groupism and Economic Growth*, in UNIVERSITY OF WESTERN AUSTRALIA CENTRE FOR EAST ASIAN STUDIES 1 (1981) (discussing the relationship between groupism and industrial development in Japan).

[14] Lebra, *Nonconfrontational Strategies for Management of Interpersonal Conflicts*, in CONFLICT IN JAPAN 55-58 (E. Krauss, T. Rohlen & P. Steinhoff eds. 1984) (discussing the mechanisms Japanese employ to maintain harmony with the group).

[15] In the labor environment, an employee's responsibility to the entity extends to his conduct outside of work. "[T]he work rules of many enterprises stipulate that the employees must try to promote the company's good name and prestige, and avoid dishonoring it." Hanami, *Japan*, in INTERNATIONAL ENCYCLOPEDIA OF LABOUR LAW AND INDUSTRIAL RELATIONS 62 (Dr. Blanpain ed. 1985).

[16] Although the law historically is not always enforced, it never loses its relevance. Professor Mitsuo Riko remarked that law in Japan is analoguous to the *tokonoma* (functionally the most useless but also the most important room) in the traditional Japanese home. Legal rules serve as *tatemae* (guiding principles) relating directly to the development of social and political consensus. As *tatemae*, even unenforced law is significant. because it influences the formation of consensus and is thus critical to social and political life. Haley, *Introduction: Legal vs. Social Controls*, in 17 LAW JAPAN: AN ANN. 1, 5-6 (1984).

> The cooperative, relativistic Japanese is not thought of as a bland product of social conditioning that has worn off all individualistic corners, but rather as the product of firm inner-self-control that has made him master of his . . . anti-social interests . . . . [S]ocial conformity . . . is no sign of weakness but rather the proud, tempered product of inner strength.[17]

Interestingly enough, legal rules may be outrageously flouted in private so long as there is the outward appearance of observation. The failure to abide by the law may be known to (but not condoned by) the group with which an individual intimately associates. Yet, when the violation becomes public, condemnation by the group as well as society in general must follow.

B. Attitudes Toward Government

The special affinity the Japanese have for following the norms of the group also impacts government. The Japanese revere and respect the government as the higher authority and the creator of the laws which govern society.[18] The deference the Japanese have for governmental authority is strengthened by the bond between government and society, the by-product of the government's moral leadership. The people believe the government enacts laws that inure to the greater good of society[19] and, therefore, to advance the common good, laws must be obeyed.

Historically, the Japanese have expected the government to play a moderately active role in their lives.[20] This expectation may stem from the paternalistic

---

[17] R. SMITH, *supra* note 12, at 56-57.

[18] Parker, *The Authority of Law in the United States and in Japan*, 33 OSAKA L. REV. 1, 9-10 (1986) (for a broad comparison of the role of laws, government and the constitutions of the two nations).

[19] Over long periods of time the general public is quiescent towards government policies. The public receives constant psychological assurances that the government is acting in society's best interests. Under these circumstances, group outbursts of protest generally occur only when the government sharply deviates from its expectations. Levine and Taira, *Interpreting Industrial Conflict: The Case of Japan*, in INDUSTRIAL RESEARCH ASSOCIATION SERIES 130 (1977).

[20] Evidence suggests that the Japanese expect the role of the government to be moderately activist. The clearest proof of this comes from the articulations in Prince Hirobumi Ito's commentaries of 1889 concerning the Meiji Constitution. Prince Ito noted that:

> [T]hose also who maintain that the preservation of the public peace and order is the only object of administrative ordinances, are mistaken in defining the limits of the executive. . . . Owing to the advancement of civilization, it was found imperatively necessary to promote the welfare and prosperity of the people, both materially and intellectually, by economical and educational means. It thus came to be recognized that the object of the administrative ordinances is not confined to the negative measures of police, but that their object ought also to be to take the positive measures of promoting the material prosperity of the people by economical means and of cultivating the intellect of the people through

conception the Japanese have of their government.[21] The people's acquiescence to the government's retention of control over their daily lives is believed to be necessary for the development of the nation's well being. Acceptance of government control may be partially attributable to the fact that "the Japanese do not make a sharp distinction between society and government."[22] Traditionally, government workers have been entrusted with the duty of leading and educating the common people.[23]

C. Attitudes Toward Law and the Constitution

Government officals employ a system of laws originating from two sources. The formal legal rules enacted by lawmakers comprise the first source. The second is the unwritten law,[24] derived from custom and practices passed down from generation to generation.

The unwritten law has a pervasive effect upon the administration of formal law in Japanese society. Nevertheless, its influence is frequently unappreciated or misunderstood by foreigners. Japanese, however, are familiar with the unwritten law and, as members of various social groups, adhere to its standards.[25]

One of the fundamental concepts underlying the unwritten law is the notion of "face." In Japan, face — the honor and reputation an individual is known to possess — is partially responsible for an individual's adherence to group standards.[26] The informal sanctions that attend the loss of face compel individuals

---

education.

Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 944 n.84 (1984).

[21] Karsh, *Managerial Ideology and Workers Co-Option: The U.S. and Japan*, in VIABILITY OF THE JAPANESE MODEL OF INDUSTRIAL RELATIONS, 87-88 (Int'l Indus. Relations Ass'n 1983).

[22] Parker, *supra* note 18, at 10.

[23] *Id.*

[24] Professor Hanami elaborated on the importance of unwritten law by stating:

> It is generally accepted that customs which do not contradict imperative law or public order can be regarded as a source of law. Furthermore, in some cases, the judges have in fact accepted customs which contradict imperative law. Such judgments are . . . justified because the judge is not so much required to apply the existing rules of law at any cost, but rather to give a reasonable solution to the parties actually before him.

Hanami, *supra* note 15, at 51.

[25] One commentator has observed:

> Most Japanese view their society as extremely homogenous. Thus, they may well believe that determinations of societal consensus are easier to make and do not require strict compliance with all the technical formalities of the legal and political processes. . . . [T]hey are more confident in the accuracy of less formal means. . . .

Young, *supra* note 19, at 968 n.163.

[26] Ohta & Hozumi, *Compromise in the Course of Litigation*, 6 LAW JAPAN: AN ANN. 97, 100-101 (1973).

to conduct their lives in a manner that avoids conflict with others.[27] As a result, conciliation,[28] rather than the absolute vindication of one's rights, is the preferred method of settling disputes.[29]

The Japanese Constitution plays a peculiar and limited role in people's lives. The constitution is an abstract document, and does not command the same respect among the Japanese as either the statutory or unwritten law.[30] The Allied Powers, rather than the Japanese, brought the constitution into existence approximately four decades ago. Perhaps because of its origin, some Japanese regard the constitution as little more than a ceremonial symbol of government that lacks any independent authority.[31] Moreover, the principles of personal liberty and freedom which constitute the foundation of the constitution are notions conspicuously absent from Japanese tradition and culture.[32]

While it is true that certain doctrines within the constitution express current societal beliefs, it should not be inferred from this that the constitution manifests the beliefs of Japanese society.[33] What acceptance there is may be attributable to a pragmatic acknowledgment that the constitution promotes political stability and social harmony, rather than a commitment to its principles.[34] Furthermore, the Japanese do not believe that any one body, document, or text should have the independent authority to dictate important policy decisions that will affect their lives.[35]

---

[27] The ineffectiveness of formal sanctions increases the importance of the various forms of social controls. Boycotts, refusals to deal with an individual and other forms of modern *murahachibu* (ostracism) are typical means by which social order is maintained. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAP. STUD. 265, 277 (1982).

[28] Professor Henderson has observed that conciliation is the cornerstone of Japanese law. It takes three distinctive forms: 1) *jidan*-the essentially informal discussion designed to lead to settlement; 2) *chotei*-the primarily formal prelitigation procedure and 3) *wakai*-the procedure by which the judge encourages and assists the disputants to reach a compromise settlement. R. SMITH, *supra* note 12, at 41.

[29] Conciliation is a desirable method for resolving conflicts because it spares the average Japanese the embarassment of appearing unable to solve one's own problems. Unlike conciliation, resort to the law "presupposes a total breakdown in social harmony, a confession by all persons concerned that they have not been able to act like true Japanese." Parker, *supra* note 18, at 7.

[30] Professor Parker states: "The idea of an authorative text in the sense that the Bible or the United States Constitution or even an old legislative statute is authoritative for Americans is not shared by the Japanese." Parker, *supra* note 18, at 13.

[31] Parker, *id.* at 13.

[32] Parker, *id.* at 14.

[33] Professor Parker cites universal suffrage as one example, the acceptance of which is possibly due to the acknowledgement that it contributes to political stability and social harmony. Parker, *id.*

[34] Parker, *id.*

[35] Parker, *id.* at 13.

D. Attitudes Toward Conflict

Although the Japanese seek first and foremost to maintain harmony,[36] this does not entirely eliminate the outbreak of conflict. When conflict does occur, Japanese typically rely on subtle adjustments made by both parties, rather than resort to institutional procedures. Conflict resolution thus involves the use of traditional practices which emphasize trust and harmony.[37]

The idiom *arasoi o mizu ni nagasu* (literally "let the dispute flow to water") best expresses the traditional form of dispute settlement in the work environment,[38] as well as in society. Practically speaking, dispute settlement follows from the parties' desire to put the dispute aside in order to preserve their previous relationship. Phrases such as *kenka ryo-seibai* ("both disputants are penalized equally") or *arasoi o maruku osameru* ("to settle the dispute in a circle") also express traditional approaches to conflict resolution.[39]

If the disputants are unable to resolve the problem between themselves, they may resort to *arasoi o azukeru* ("to leave the dispute to someone else"). The disputants request the assistance of a mutually trusted third person who has face among both disputants.[40] Fully aware of the fact that legal principles or other set standards may be ignored, the disputants trust the third person to come up with a just solution. The expectation is that the resolution will restore and maintain the friendly personal relations that previously existed between the

---

[36] A good example of the Japanese desire to maintain harmony in the industrial setting can be seen in the settlement of the suit JNR authorities filed against DORO (Japan National Railway Power Union). The suit was filed in 1975 following the political strike (a dispute over the right to strike), but was withdrawn because of the cooperative stance of DORO toward the JNR reforms and because DORO withdrew a series of suits it had filed against JNR. While in this case the initial adjustment was not made by the stronger party, it nevertheless illustrates the preference for maintaining harmonious relations by resolving the matter through cooperative rather than formal means.

Reform of National Railways, 25 JAPAN LAB. BULL. 4 (Nov. 1986).

[37] Hanami, *supra* note 15, at 46.

[38] Generally, in the labor environment, the central characteristics of conflict-avoidance techniques are cooperation and harmony. The resolution of labor disputes comprises three distinguishing features: 1) the societal pressure towards consensus and the resolution of disputes without resorting to overt conflict; 2) the "tendency for industrial action to be taken in demonstrative form;" 3) the union's reluctance to refrain from taking action likely to jeopardize its long term future. This is a consequence of the degree to which its members' interests are bound to the enterprise, hence the unions typically initiate action that will merely interfere with the entity's operations. Duff, *supra* note 4, at 636. (The public sector unions, however, are not as concerned with the entities' survival as they are aware of the government's commitment to the mainrenance of the entity because of the need to supply society with the essential goods and services of these enterprises).

[39] T. HANAMI, LABOR RELATIONS IN JAPAN TODAY 203 (1979).

[40] *Id.*

disputants. Settlement generally requires both disputants to yield something as a show of mutual trust and willingness to continue their previous relationship.[41]

E. *Attitudes Toward the Judiciary and Litigation*

The Japanese attitude toward the judiciary and litigation also illustrates the importance of the concept of face.[42] Japanese dislike litigation and shun the courts whenever possible,[43] viewing litigation as an invasion into their personal affairs. One commentator has observed that "[t]o an honorable Japanese the law is something undesirable, even detestable, something to keep as far away from as possible. . . . To take someone to court to guarantee the protection of one's own interests . . . is a shameful thing. . . ."[44] Consequently, Japanese rely on litigation only as a last resort, when conventional dispute resolution mechanisms fail.[45] The legalistic nature of the process is perceived as depriving the parties of all effective choice and control, while simultaneously ignoring the important non-legal consequences the process has upon the parties' former relationship.[46]

The limited role the judiciary plays in affecting social policy is in part attributable to society's perception of the court system. The common perception is

---

[41] *Id.* at 203-204. *See also*, Matsuda, *Conflict Resolution in Japanese Industrial Relations*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 179, 181-201 (T. Shirai ed. 1983) (for a discussion of dispute resolution procedures in Japanese industrial relations).

[42] The detrimental effects that accompany threats to face can have a powerful effect on the conduct of the parties. An example of its importance as it concerns the judicial process appears in the *SMON* (Subacute-Myelo-Optics Neuropathy) drug case. In a nation-wide series of suits involving one foreign and two Japanese companies and the Ministry of Health and Welfare, for injuries resulting from the drug dioquinol, the primary hurdle preventing settlement was not the terms or amount of the damage award but the requirement that the presidents of the companies involved issue public apologies.
Haley, *supra* note 27, at 275.

[43] *Cf.* Haley, *supra* note 27, at 273. (discussing the institutional barriers that dissuade Japanese from relying on formal adjudicative procedures).

[44] Brown, *Labor Law Issues Facing Multinational and Japanese Companies Operating in the United States and United States Companies Using Japanese-Style Labor Relations: Agenda Items Under the "New Labor Relations."* 8 U. HAW. L. REV. 261, 272 n. 42 (1986) [hereinafter *New Labor Relations*].

[45] Ohta & Hozumi, *supra* note 26, at 100-101.

[46] In the framework of Japanese society, litigation is an ineffective means of resolving conflict. Litigation works best in societies in which the parties' rights and duties are clearly defined from the start. In Japanese society, however, the parameters of an individual's rights and duties are only vaguely defined. Social relations are not conducted in light of the abstract rules known as laws. Consequently, the resolution of a dispute is essentially the restoration of the harmonious relationship that existed before the occurrence of the dispute. This comports with the Japanese preference for resolving disputes by washing away the underlying problem without clarifying the rights and duties of the parties or affixing blame. Ohta & Hozumi, *supra* note 26, at 100.

that the courts' role should be limited.[47] Aware of this belief, courts tend to favor good faith informal negotiations, formal intervention by third parties, or compelled bargaining.[48] These procedures allow the courts conveniently to remove themselves from the dispute resolution process, where judicial doctrines may be ill-suited to provide appropriate relief for the disputants.

Judicial decisions on questions of major social policy, for example, rarely influence the actions of the government.[49] Consequently, because laws appear as statements of government policy,[50] the unions cannot realistically expect court decisions to have a major impact upon the government's position with regard to the worker's rights.

Practical considerations also play a part in decreasing the judiciary's role in the resolution of conflicts.[51] Individuals are not likely to turn to the courts even

---

[47] Professor Parker states that courts in Japan are "extraneous and command little popular respect. Court decisions on major questions of social policy are not causally efficacious in Japan; they are simply an epiphenomenon reflecting changing social consensus." Parker, *supra* note 18, at 10. Moreover, Professor Haley has concluded that any major change in the real power of the courts would have a major impact on Japanese society. He states: "To strengthen legal sanctions, to make courts more efficient and judicial remedies more effective, or by any means to broaden the enforcement of law through the legal process, would inevitably erode the social structure that now exists." Parker, *supra* note 18, at 11 n.4.

[48] The courts' preference for compelled bargaining is typically seen in the context of actions between administrative agencies and individuals. Three factors make compelled bargaining desirable. First, an important requisite to the resolution of a dispute is the ability to identify the interested parties. The courts' uncertainty about the disputants' identity prevents them from meaningfully supervising the genuineness of the negotiations. Second, if the disputants' competing interests are too great in number, restructuring and supervising incentive patterns becomes impracticable. Finally, the dispute may not be the type that is susceptible to resolution through the application of uniform rules. Young, *supra* note 20, at 981.

[49] In his article, Professor Parker observes that:

> [T]he Supreme Court of Japan has never seriously challenged the Japanese government directly on any major issue and would lose if it did. Lawsuits in Japan on major question[s] of public policy function something like political demonstrations in the United States. Court decisions may call attention to some social problems . . . but the judiciary has no power to speak dispositively on any major social policy issue.

Parker, *supra* note 18, at 10.

[50] The law does not derive its authority through enactment by a democratic process. Rather, laws in Japan have force as a result of being the directives of the government. Parker, *id.* at 10.

[51] A variety of institutional barriers exist which inhibit the resolution of conflicts through formal channels. Japanese legalists have stated that, "[t]he litigation of a small claim . . . tends to be an economic disaster." Haley, *supra* note 27, at 274. As Professor Haley points out:

> The continental system of disconnected hearings, trials *de novo* upon first appeal, the appeals of right to the Supreme Court rather than by court discretion, filing fees, bond posting requirements, stringent requirements of evidentiary proof, the unwillingness of judges to discipline lawyers for unnecessary delays — all combine to foreclose the courts as a viable means of obtaining relief.

Haley, *id.*

when they believe their rights have been violated. People are aware that litigation is a costly, time consuming, and unpredictable process with only limited remedies available.[52] Consequently, formal litigation presents itself as an unattractive alternative to the relief available under the unwritten law.

III. AUTHORITY FOR THE RIGHT TO ENGAGE IN CONCERTED ACTIVITY

A. *The Constitution*

Opponents of Japan's anti-concerted activities laws draw the bulk of their support from Japan's Constitution,[53] the conventions of the International Labor Organization [hereinafter ILO],[54] and case law. In an effort to regain the right to engage in concerted activities, the opponents primarily rely upon arguments based on provisions in the constitution.[55] The heart of their claim lies in articles twelve and twenty-eight of the constitution. Article twenty-eight[56] guarantees

---

[52] In Japan, the notion of *jokentsuki kyusai* (conditional orders) suggests that remedies are primarily designed to promote good industrial relations in the future, rather than recreate the past. This rationale mirrors society's concern for ongoing harmonious relations.

An example of this rationale is seen in the courts' approach to back pay proceedings. Often the orders are framed in very general and imprecise language (e.g., a floor for the benefits to be negotiated subsequent to consultation between the union and the employer). The overriding considerations are the need to bring the parties together through conciliatory means in the future and the belief that the charging party is often as blameworthy as the respondent. W. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 89 (1977).

[53] *But see* Tokikuni, *Procedures in Constitutional Litigation and Judgments of Constitutionality*, 13 LAW JAPAN: AN ANN. 1 (1980) (discussion of difficulties in litigating a constitutional issue and the limited value of prior decisions as precedent).

[54] The ILO today is an independent international organization working with but not under the United Nations. It is known as one of the "specialized agencies" of the United Nations. I. AYUSAWA, A HISTORY OF LABOR IN MODERN JAPAN 112-33 (1966).

[55] Professor Hanami suggests, however, that:

> The constitutional guarantee of these rights reveals another characteristic of Japanese labour law . . . almost everything concerning union organisation . . . poses two obvious problems. First, there is no system of labour courts in Japan and so the ordinary courts, which are not specialised in labour problems, have to handle collective labour relations — a subject which . . . is not well suited to the traditional legal approach. Secondly, the fact that there is a Labour Relations Commission system which deals with unfair labor practices and dispute settlement in a semi-judicial way raises difficult problems with regard to the overlapping jurisdiction of the Commission and the courts in certain fields.

Hanami, *supra* note 15, at 101.

[56] KENPO (Constitution) art. 28 (Japan) (Nov. 13, 1946). Professor Hanami contends that:

> The legal theories . . . start with the contention that the right of workers to organize is something more positive than the freedom of association of ordinary citizens. Relying on the German theory of *organizationszwang* (coercion to organize), most of the theories hold that a freedom to refrain from being organized does not exist.

the right of the workers to organize, bargain, and act collectively as a fundamental human right.[57] Article twelve stipulates that the rights and freedoms guaranteed by the constitution are "eternal and inviolable."[58] Therefore, "any agreement, including a collective one, which infringes the fundamental human rights of workers as guaranteed by the Constitution is null and void. . . ."[59]

Those advocating the abolition of the laws which restrict these rights interpret this language to mean that the spirit of the constitution ensures the fair treatment of workers.[60] This interpretation is shared by members of the judiciary, who, along with many legal experts, assert that unions may engage in "positive" action, such as strikes, demonstrations, and boycotts rather than merely resorting to the "negative" refusal to work.[61]

Opponents of the laws argue that the courts should protect certain acts that are otherwise illegal when committed by ordinary citizens, if committed by union members during a labor dispute.[62] Because the constitution describes the workers' rights as "eternal and inviolable," these rights have acquired a sacred character. Accordingly, legal scholars assert that the right to strike, organize, and act collectively makes the workers all powerful.[63]

Hanami, *supra* note 6, at 164.

[57] Ishida, *Fundamental Human Rights and the Development of Legal Thought in Japan*, 8 LAW. JAPAN: AN ANN. 39 (1975) (summary of issues concerning "fundamental rights").

[58] The article states in pertinent part, "[t]he right of the workers to organize and to bargain and act collectively is guaranteed." KENPO (Constitution) art. 12 (Japan) (Nov. 3, 1946). The constitution, however, also states that people should refrain from abusing any of these rights, and that they shall be responsible for utilizing them for the public welfare (article 12). Moreover, individual rights are to be respected only to the extent they do not interfere with the public welfare (article 13). Hanami, *supra* note 6, at 163.

[59] Hanami, *supra* note 15, at 35.

[60] These provisions are a source of pride for Japanese labor lawyers, because few other countries recognize the workers' right to organize as including the right to bargain and act collectively. Not one Anglo-Saxon country guarantees the right to organize as separate from the freedom of association in its constitution or bill of rights. Only West Germany, France and Italy have constitutional guarantees with regard to the workers' right to organize. Italy and France acknowledge the right to strike but not to bargain. T. HANAMI, *supra* note 39, at 73.

[61] *Id.*

[62] For instance, the majority of Japanese lawyers maintain that recognition of the right to organize can be distinguished from freedom of association. The workers' right to organize confers more extensive rights than an ordinary citizens' right to associate. The legality of union actions to secure its positions are typically justified using this notion. Any pressure on workers to join a union is legal even though it may violate the individuals' rights of association. Hanami, *supra* note 6, at 162-67.

[63] *Id.*

B. *Conventions of the International Labor Organization*

Conventions ninety-eight and eighty-seven of the ILO are another source of authority which the opponents of the laws originally offered to justify their claim that the right to engage in concerted activity belongs to all workers.[64] At least in the field of labor law, it is generally acknowledged that ratified conventions of the ILO have legal effect at the national level.[65] In addition, courts, including the Japanese Supreme Court, have implied that legislation contravening conventions of the ILO is null and void.[66]

ILO convention ninety-eight, as ratified in 1953, recognizes the workers' right to organize and bargain collectively. Acts of anti-union discrimination and employer interference in union affairs are the primary targets of this convention. Convention eighty-seven, as ratified in 1965, guarantees the right of freedom of association without interference by public authorities. This convention provides for the drafting of constitutions and rules for the selection of union members and officials. Such procedures advance the ILO's policy of union self-determinism.

There is no specific language in either convention authorizing concerted activity in the public sector. Nevertheless, opponents of the laws conclude that the government cannot legally prohibit all concerted activity in the public sector. The opponents point to language in the ILO's Dryer Commission Report in support of this proposition.[67] Arguably, public employees may properly engage in concerted activity when circumstances exist such that there are no other safeguards by which their legal rights are protected, even though concerted activity in the public sector is prohibited.[68]

---

[64] *See generally* Cook, *The International Labor Organization and Japanese Politics*, in INDUSTRIAL AND LABOR RELATIONS REVIEW 41 (1965) (overview of ratification process concerning conventions 98 and 87); *see also* Hansaker, *The ILO and Japanese Employee Unions*, 1967 INDUS. REL. 80 (for a summary of unions' involvement in ratification of ILO conventions).

[65] Hanami, *The Influence of ILO Standards on Law and Practice in Japan*, 120 INT'L LAB. REV. 765, 765-66 (1981) (discussion of ratification of ILO conventions and effect on labor law).

[66] *Id.* at 778.

[67] Named after ILO chairman Erik Dryer, the ILO established the Dryer Commission in response to Japan's Liberal Democratic Party's failure to fulfill the promise it had made to public sector unions to ratify convention 87. As a result, the government became the object of repeated ILO scrutiny. Finally, the ILO drafted a motion of censure and sent a full fledged commission of inquiry to Japan (the first the ILO had ever dispatched to a member nation) to investigate the state of the Japanese labor situation. *See generally* A. COOK, THE ILO AND JAPANESE POLITICS, II: GAIN OR LOSS FOR LABOR? (1969).

[68] The Commission's report concluded:

> Whenever strikes in essential services or in the civil service are forbidden, such a restriction should be compensated for by adequate, impartial and speedy conciliation and arbitration procedures which awards, once made, should be fully and promptly implemented, etc.

The ILO's Report on Arbitration Awards, 22 JAPAN LAB. BULL. 3 (Jan. 1983).

C. Case Law

The final source of authority supporting the proposition that the anti-concerted activities laws are unjustified is case law. The judiciary first signaled its willingness to consider the appropriateness of the total ban on all strikes and concerted activity in the *National Railways Hiyamaru Case*.[69] There, the supreme court concluded that appropriate activities conducted by employees in the public sector would be protected from criminal prosecution as provided under the Trade Union Law. The supreme court based its decision on the fact that the constitution did not differentiate between the workers in the public and private sectors. The supreme court further cautioned both the Diet[70] and other courts from restricting the constitutional rights of the workers without careful consideration. Moreover, criminal punishment for violations of article seventeen of the Public Corporation and National Enterprise Labor Relations Law [hereinafter PCNELR Law] would be proper only in cases where political strikes or acts threaten people's lives.

Subsequently, in *Japan v. Sotoyama et al.*, (*Zentei Tokyo Central Post Office Case*),[71] the supreme court declared that the right to strike should also be extended to public employees. The court, however, qualified its opinion by adding that the right to strike is not absolute but is "subject to inherent restrictions consistent with the national welfare."[72] The supreme court enunciated the following test to determine the constitutionality of strikes: 1) whether the strike was as short as possible; 2) whether, when totally prohibited, an alternative dispute settlement procedure was available to the striking parties, and 3) whether the imposition of penal sanctions against those involved in an ordinary walkout was used only as a measure of last resort.

So long as laws exist which prohibit concerted activity in the public sector, the opponents of these laws can be expected to continue their campaign to regain what they feel is their constitutional right. They must also contend, however, with the fact that substantial legal authority exists in opposition to their position. The fact that Japan is a civil law country must also be confronted. With no formal recognition of the doctrine of stare decisis, courts are not necessarily obligated to follow prior decisions.[73]

---

[69] W. GOULD, *supra* note 52, at 157-58.

[70] The Diet refers to that unit of the Japanese government which is most analogous to the Congress of the United States. It is composed of two Houses: the House of Representatives and the House of Councillors. Beer, *Japan's Constitutional System and Its Judicial Interpretation*, 17 J. JAP. STUD. 7, 16 (1984).

[71] Yamaguchi, *supra* note 3, at 307 and 308.

[72] *Id.*

[73] The orthodox view maintains that the sole source of law is statutory and that judicial precedents and juristic commentaries are only suggested interpretations of the law. T. HATTORI & D.

IV. AUTHORITY FOR PROHIBITING CONCERTED ACTIVITY IN THE PUBLIC SECTOR

In Japan, a variety of laws sanction employees' involvement in concerted activity.[74] The applicability of these laws to the conduct of a specific entity's employees hinges upon that enterprise's classification as either public or private. This section highlights the primary sources of legal authority prohibiting concerted activity in public enterprises.

A. PCNELR Law

The PCNELR Law[75] presents a major impediment to concerted activity in the public sector. Article seventeen of the PCNELR Law prohibits those activities which might interfere with the normal operations of public enterprises.[76] The applicability of article seventeen cannot be determined without further consideration of article two of the PCNELR Law.

Article two of the PCNELR Law classifies but three corporations as "public": Japan National Railways, [hereinafter JNR] Nippon Telegraph and Telephone, [hereinafter NTT] and the Monopoly Corporation.[77] In addition, the PCNELR Law also recognizes as public five national enterprises: the Postal Service, the National Forestry, the Government Printing Office, the Mint, and the Alcohol Monopoly.

The lack of definitive criteria by which to determine accurately whether an entity is properly classified as public complicates the task of determining the

---

HENDERSON, CIVIL PROCEDURE IN JAPAN 1-32 (1985).

[74] The fact that the law only generally prohibits "acts of dispute" allows the employees to engage in a variety of activitites in protest of management's policies. Generally, for an activity to be regarded as legitimate it should fall within one of three broad categories: 1) going slow (also known as soldiering); 2) taking simultaneous vacations or 3) pasting posters and wearing ribbons. Hanami, *supra* note 15, at 141.

But compare the decision in *Taisei Kanko Case*, (Supreme Court, April 3, 1982), which caused labor union lawyers to doubt the continued legitimacy of ribbon wearing tactics. In a brief and ambiguous decision, the Court affirmed the original sentence, declaring "[t]he judgment that it is not appropriate to use arm bands in labor struggles during normal working hours is approved in conclusion." (the original sentence was clearly based upon the finding that such activity was inappropriate). *Ribbon Wearing Tactics*, 23 JAPAN LAB. BULL. 8 (May 1984); *Union Literature Posting*, 23 JAPAN LAB. BULL. 7 (May 1984) (recent Supreme Court decision exemplifying growing impatience with literature posting).

[75] S. LEVINE, INDUSTRIAL RELATIONS IN POSTWAR JAPAN 146-48 (1960) (discussing the enactment of the PCNELR LAW).

[76] *See infra* note 80 and accompanying text.

[77] Obviously the law as it now reads is no longer applicable to JNR, NTT and the Monopoly Corporation, as the government has since denationalized all three. *See infra* note 159.

legitimacy and applicability of the anti-concerted activities laws. Currently, the most widely accepted definition of a public entity sets forth three essential factors common to public enterprises: 1) public ownership, 2) public control, and 3) managerial autonomy. A public corporation is defined as "an enterprise run under public control because of its public ownership. At the same time, it is allowed managerial autonomy for the purpose of integrating both social aspects and economic rationality into its operations."[78] Although accurate, this definition omits entities that might otherwise be characterized as public depending on the consideration given other factors, such as economics, business, or administrative law.[79]

Once an entity is definitively characterized as public, the conduct of the employees with respect to concerted activity is specifically regulated by article seventeen of the PCNELR Law. Article seventeen stipulates: "Employees and unions shall not engage in . . . acts of disputes hampering the normal operations of a public corporation or national enterprise; nor should any employees or union members and union officials conspire to effect, instigate or incite such prohibited conduct."[80] Although the law prohibits acts of dispute in general, there is no specific delineation of the exact nature of the acts concerned. Consequently, article seventeen provides unions with no practical guidance as to the legal status of any contemplated activity.

B. Article 37 of the Labour Relations Adjustment Law

The Labour Relations Adjustment Law, [hereinafter LRA Law] also restricts the activities of employees engaged in public welfare work.[81] Article eight of the same law defines public welfare work as that which provides essential services for the daily life of the general public.[82] Article thirty-seven of the LRA Law prohibits any concerted activity unless there is compliance with the article's notice provisions.[83] The law requires notice of any act of dispute at least ten days before any such act is scheduled to commence. The notice must be com-

---

[78] Koshiro, *Labor Relations in Public Enterprises*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 261 (T. Shirai ed. 1983).

[79] *Id.* at 261-263 (discussing some examples of entities not included in the statute enumerating public entities).

[80] PCNELR LAW art.17 (Japan) (Dec. 20, 1948).

[81] LABOUR RELATIONS ADJUSTMENT LAW art. 37 (Japan) (Sept. 27, 1946).

[82] Public welfare works include entities providing transportation, post and telecommunications services, the supply of water, gas and electricity, medical treatment, and public health services. In fact, public welfare works include any other work designated by the Prime Minister with the approval of the Diet as work which if stopped for less than one year would seriously affect the national economy or endanger the daily life of the general public. Hanami, *supra* note 15, at 143.

[83] LABOUR RELATIONS ADJUSTMENT LAW art. 37 (Japan) (Sept. 27, 1946).

municated either to the Labor Relations Commission[84] and the Ministry of Labor, or to the Prefectural Governor.

C. *The Peace Obligation*

The notion that employees should refrain from engaging in concerted activity is not only found in statutes. An amorphous concept known as the "peace obligation" also requires employees, as parties to a collective bargaining agreement, to refrain from engaging in concerted activity.[85] As a result, the peace obligation prohibits employees from engaging in strikes and other conduct aimed at challenging the contents of an enforceable bargaining agreement. Legal scholars, however, disagree as to the scope of the obligation. The majority asserts that the obligation is inherent in the nature of all collective bargaining agreements. Thus, the obligation cannot be denied even with the consent of both parties.[86] Even though the obligation may be absolute, it is generally understood that not all acts of dispute are prohibited. Only those acts which challenge the contents of the collective bargaining agreement are illegal.[87] Thus, when a dispute arises, the crucial inquiry is whether the concessions demanded by the employees were part of the collective bargaining agreement.

In determining whether a collective bargaining agreement includes a particular concession, the courts seek to ascertain the original intent of the parties. The courts consider such factors as custom, common business practices, and the parties' bargaining position. Frequently, the true intent of the parties is impossible to determine because of the Japanese way of drafting contracts. Rather than elaborating on all points, Japanese contracts typically leave various terms unspecified and dependent upon the mutual understanding of the parties.[88]

---

[84] Local Labor Relations Commissions are set up in each prefecture, and the main Central Labor Relations Commission is permanently located in Tokyo. The local commissions have jurisdiction when both parties live in the prefecture, their headquarters are located there, or if the labor dispute occurs there. The Central Labor Relations Commission hears those cases which cover more than one prefecture or which are clearly matters of national concern. It also reviews the orders of the local commissions on matters concerning unfair labor practices. Hanami, *supra* note 6, at 176.

[85] Hanami, *supra* note 15, at 127-28.

[86] *Id.*

[87] *Id.*

[88] Particularly in the case of labor agreements, various terms are left unspecified, dependent upon the mutual understanding of the parties. In the Saturn Agreement (a joint venture between Toyota and GM to produce automobiles), a provision in the contract between the United Auto Workers and General Motors read, "[t]he parties acknowledge that the matters set out in this memorandum are neither all inclusive nor complete." *New Labor Relations*, *supra* note 44, at 280 n.91.

D. Case Law

The final source of authority supporting the prohibition of concerted activity in the public sector is case law. Early decisions evinced the courts' lenient stance towards union members who engaged in concerted activities.[89] Nevertheless, in subsequent cases, the supreme court withdrew to a more hardline position.

In *Japan v. Tsurozo et al.* (*Zennorin Case*) the court reversed the prior doctrine of cautiously limiting the strike rights of those in the public sector.[90] Returning to its post World War II position, the court declared strikes in the public sector to be inconsistent with public welfare. Thus, restrictions on such activities were found to be reasonable. The court also cautioned strike proponents that, when used in the public sector, strikes erode the democratic process, making it impossible for public officials to respond to the electorate.

In a suit involving unionists of the Japan Tobacco and Salt Corporation (*Yamagata Factory*), the union filed suit against management demanding that reprimands be retracted. The supreme court held:

> The constitutionality of article 17 of the Public Corporation and National Enterprise Labor Relations Law, which prohibits employees in the public corporations and national enterprises from striking and [conducting] other activities disrupting production or services has already been established by the *Nagoya Central Post Office Case*, of May 1977, involving members of the Zentei (Japan Postal Workers Union). There is no reason to restrict application of the law from employees of the Japan Tobacco and Salt Monopoly Corporation.[91]

This was the first time the supreme court ruled that the PCNELR Law was also applicable to disciplinary sanctions relating to the activities of employees in public corporations.

The courts' current position comports with the view that the present laws should not be amended.[92] Advocates of the laws prohibiting public employees from engaging in concerted activity believe these laws codify societal norms. Furthermore, actively campaigning against the present laws may violate tenets of the unwritten law, and lead to the sanctions which attend such violations.[93]

Regardless of any authority, legal or otherwise, prohibiting concerted activity, employees are unlikely to litigate the legitimacy of any such authority in

---

[89] *See supra* notes 69 and 71 and accompanying text.

[90] Yamaguchi, *supra* note 3, at 308.

[91] *Constitutionality of Disciplinary Sanctions Against Public Corporation Strikers*, 20 JAPAN LAB. BULL. 4 (1981) (June 1981).

[92] *See Strikes and Liability for Strike-Related Damages*, 15 JAPAN LAB. BULL. 6 (1976) (examination of the judiciary's considerations when determining the issue of liability).

[93] Haley, *supra* note 27, at 277.

court.[94] Typically, Japanese do not turn to formalized procedures to resolve their conflicts, because that would leave them with little control over the outcome. In addition, institutionally imposed remedies rarely offer the disputants the specialized solutions that are available when they are left to their own resources to settle their differences amicably.[95]

Finally, any opposition to a government that has historically been viewed as paternalistic[96] is likely to be construed as a sign of disrespect. Moreover, it may be interpreted as an implicit statement by those advocating change that they are more concerned with their own individual welfare than that of society. Such selfish behavior may result in the loss of face to the particular individual, as well as those who associate with him.[97]

V. ENTERPRISE STRUCTURE AND ITS EFFECT ON THE INFLUENCE OF CULTURE AND TRADITION

A. *Culture and Tradition: Effective Conflict Suppressing Mechanisms in the Private Sector*

The suppression of conflict for the sake of maintaining a harmonious relationship with one's group is a fundamental characteristic of Japanese culture.[98] The laws prohibiting concerted activity in the public sector are directed at controlling the conflict which may result from such activity. In the private sector,[99]

---

[94] Particularly in the labor context, the reluctance of employees to litigate labor issues may also be due to the considerable amount of time that passes between filing of the complaint and the rendition of the final decision. In 1980 a complaint filed with the Central Labor Relations Commission would have taken on the average 746 days until a final decision was rendered. Ballon, *Industrial Relations in Japan*, in INSTITUTE OF COMPARATIVE CULTURE BUSINESS SERIES 27 (1983).

[95] In their article, Ohta and Hozumi state that:

> In Japanese society a means of dispute resolution that clarifies rights and obligations . . . will not produce a smooth settlement. Japanese feel [this will result in a settlement that is either] . . . "not amicable" (*kado ga tatsu*), or afterwards [causes] a "stiffness [to] remain" (*ato ni shikori o nokosu*) between the parties.

Ohta & Hozumi, *supra* note 26, at 100.

[96] The Japanese Constitution embraces the principle of a welfare state, which obliges the government to guarantee a certain standard of living for the people in general and equal labor standards for the workers. Hanami, *supra* note 15, at 27.

[97] *See supra* notes 12-14 and accompanying text.

[98] A. WHITEHEAD & S. TAKEZAWA, CULTURAL VALUES IN MANAGEMENT WORKER RELATIONS 86-110 (1961) (analysis of influence of culture and tradition on workers' attitudes). *See also* Levine, *Changing Strategies of Unions and Management: Evolution of Four Industrialized Countries*, 18 BRIT. J. INDUS. REL. 70, 71-76 (1980) (utilization of various decision making procedures which comport with cultural values).

[99] In Japan, the reference to the private sector has a specialized meaning. A "dual structure" characterizes the economy of the Japanese private sector. This refers to the mass of small and

however, employees are generally free to engage in concerted activities. It is curious that in the private sector, the control of such potentially conflict provoking behavior is left to chance.[100] This section explores this dichotomy by highlighting the inherent differences between the public and private sectors which obviate the need for formal legal rules in the latter.[101]

In the private sector, industrial relations incorporate traditional and cultural values into the work environment.[102] These values help cultivate the formation of a familial type bond between labor and management.[103] The establishment

---

medium sized enterprises that exist alongside the major corporations, while operating under a very different set of circumstances. Furthermore, the existence and operation of this dual structure does not affect all workers in a similar manner. The classification of the individual as either a permanent (regular) or a temporary employee greatly influences the degree to which an employee will receive the benefits associated with permanent employee status. Hanami, *Labour Relations and Development in Japan*, in LABOUR-MANAGEMENT RELATIONS SERIES 4-7 (1982) (discussing the structure of Japanese private enterprises).

[100] Article one of the Trade Union Law (also referred to as the Labor Union Law) states:

> The purposes of the present Law are to elevate the status of the workers by promoting that they shall be on equal standing with their employer in their bargaining therewith; to protect the exercise by the workers of autonomous self-organization and association in labor unions so that they may carry out collective action including the designation of representatives of their own choosing for negotiating the terms and conditions of works; and to encourage the practice and procedure of collective bargaining resulting in labor agreements governing relations between employers and workers.

TRADE UNION LAW art. 1 (Japan) (June 1, 1949).

[101] The observations and conclusions are directed at only those public enterprises that offer goods or services on an individualized basis to those persons who voluntarily seek to purchase them. Accordingly, these results do not relate to public entities such as police, fire and military forces.

The results of a case study conducted by Kenneth A. Skinner and published in the 1980 Journal of Japanese Studies form the basis of the observations hereunder. Mr. Skinner utilized an ethnographic approach based upon the intensive holistic study of individual organizations. It includes descriptions of organizational structures and procedures as well as patterns of interaction among the personnel. This type of approach is beneficial for three reasons: 1) Intensive studies of specific organizations force an awareness of the variety of organizations in society; 2) Studies using this approach demonstrate that an organization develops its own inner logic and direction which do not necessarily follow the designs of those who appear to be in control; and 3) This approach is one of the few that attempts to understand how an organization's structure and operations are influenced by its environment.

Skinner, *Conflict and Command in a Public Corporation in Japan*, 6 J. JAP. STUD. 301, 303 (1980).

[102] Tobioka, *supra* note 9.

[103] Japanese notions of familism and collectivism merge individual interests with group interests. These principles persist in Japanese corporations in the form of a relationship which is analogous to the *oyabun-kobun* (parent-child or master-servant) relationship.

An employer's attempt to treat his employees as a part of a family humanizes employment relations. "These efforts manifest themselves in policies which discourage layoffs and firings and which encourage retention and retraining rather than replacement of employees when new tech-

and maintenance of this bond minimizes the likelihood that differences between the parties will escalate into concerted activity which might jeopardize the production schedule.[104] The bond exists because the structure and management techniques of private entities emphasize harmony and cooperation. Workers believe management is genuinely concerned with their interests and they, in turn, commit themselves to the company's objectives.[105] The alignment of both parties' interests decreases the necessity of enacting formal rules to control conflict.

The characteristic independence found among management personnel in the private sector also enhances the benefits of alignment between the employer and employees' interests. Management requires autonomy to react quickly and effectively to sudden changes in the marketplace, which in turn facilitates profitable operation. Moreover, management independence reinforces the workers' belief that the company can and will respond to their requests. So long as management respects the applicable legal guidelines and other non-legal directives of the government, there is minimal concern that the government will interfere in the decision making process of the entity.[106]

The ability of management in a private enterprise to instill in its employees a sense of respect for the entity and loyalty to its goals is a critical ingredient to long term success. Management accomplishes this objective through various means. Some of the more common methods involve uniquely Japanese concepts, such as *shushin koyo* (lifetime employment), *amae* (the desire to be dependent on another),[107] joint consultation,[108] and various other practices which

---

nology would otherwise displace them." *New Labor Relations*, *supra* note 44, at 269.

[104] *Workdays Lost*, *supra* note 8.

[105] Hanami, *supra* note 15, at 27.

[106] It is worth noting that in Japan, there are extralegal sources of authority which exert considerable influence over the decisions of management in the private sector. *Gyosei shido* (administrative guidance) is one significant form of such authority. Yet such guidance is not susceptible to precise definition, nor are the rules or court precedents on the subject totally consistent. As defined in Japan, it is the guidance which administrative agencies use to influence parties to cooperate willingly (through voluntary nonauthoritative force — as opposed to legally coercive means) with the agencies towards the integration of what is called "social order." The rationale for this broad grant of power stems from the notion that extralegal administrative activity promotes efficient problem solving. D. HENDERSON, *supra* note 1, at 200-201.

[107] *Amae* (the tendency of an individual to desire to depend on another) manifests itself in the form of the workers' dependence on the company for housing, transportation allowances and leisure time activities. *Shushin koyo* is the unilateral promise of the employer to keep the employee productive throughout his working life. W. Gould, *supra* note 52, at 9-11 and 125-26; *See* Versagi, *What American Labor and Management Can Learn from Japanese Unions*, 71 MGMT. REV. 6, 24-27 (1982) (for a discussion of the possible negative side effects resulting from *nenko* and *shushin koyo*).

[108] Consultation systems are most prevalent in the larger companies. Nevertheless, when such systems are employed — even in smaller companies — workers do participate. The significance of these systems is probably not as great in the public sector, because of management's limited

seek the active participation and cooperation of the employees in the decision making process.[109] Because the employee's relationship with the company is permanent, both sides strive to make the relationship as productive as possible.

1. Organizational Hierarchy

In Japan, private enterprises are structured so as to optimize the respect Japanese hold for those in positions of authority. In the work environment, this respect comes about through a system whereby executive status is achieved after having progressed from the bottom of the organization up through its ranks. Thus, once an individual achieves executive status, he has typically exhibited considerable concern and devotion to the company and probably has gained the respect of his fellow workers.[110]

The practice of promoting former union officials to executive posts mitigates the risk of the development of adversarial relationships between employees and management. One out of every six Japanese business executives is a former union official and the ratio increases yearly.[111] Accordingly, tenure as a union official becomes a stepping stone to future leadership positions.[112] This practice inures to the benefit of the enterprise. As union officials, individuals carefully temper wage and other benefit demands so that they coincide with the needs of management as well as the employees.[113]

---

bargaining authority. JAPANESE WORKING LIFE PROFILE STATISTICAL ASPECTS 55 (Japan Institute of Labour in cooperation with the Ministry of Labor ed. 1986).

[109] Management personnel practices which seek to gain the consensus of workers and management before decisions are implemented are a significant part of the management scheme. *Ringi seido* (consensus-decision making), *nemawashi* (the before-meeting manuevering undertaken to ensure that a desired outcome is unananimous), and collective bargaining are a few of the more prevalent practices. *New Labor Relations*, *supra* note 44, at 269-70.

[110] The fact that Japanese companies typically utilize some type of seniority-based promotion system may contribute to the respect executives receive. Under such systems, an executive is confident that a subordinate:

> cannot surpass him on the ladder of advancement in the organization, [and he] does not feel threatened by competent subordinates and hence can accept their recommendations and criticisms with equanimity. On the contrary, good work by his subordinates is a credit to the quality of his leadership.

New Labor Relations, *supra* note 44, at 274, n.63.

[111] *Unions Are Pools for Future Executives*, 29 INFO. BULL. 13 (1982).

[112] Both blue-and-white collar employees of a Japanese company belong to the enterprise union and those employees who demonstrate competence and leadership abilities have good prospects of being promoted to top management positions under the internal promotion system. Thus, the appointment of a former union official to a company's board of directors is regarded as a normal progression in Japan's industrial relations system. *New Labor Relations*, *supra* note 44, at 275, n.65.

[113] The vertical structure of the enterprise unions also discourages indiscriminate strikes and

2. *Work Assignments*

The familial-like bond which develops in private enterprises is also due to the manner in which management delegates work assignments.[114] In the private sector, the norm is to assign tasks to a group. This practice reinforces the cultural emphasis upon the individual's identification with a group and the subordination of his personal desires to the group's objective.[115] Task success becomes contingent upon the cooperation and efforts of all members in the group.[116] The feeling each individual has, that he contributes and is necessary to the ultimate completion of the assigned task, further solidifies the bond between employees and their company.[117] Under these circumstances, it is unlikely that an individual will jeopardize his harmonious relationship with the company by engaging in any protracted concerted activity.[118]

---

decreases the instances of unions making unreasonable demands on management. If the union negotiates wages which dramatically exceed the market level, the company's products will not be competitive and the decrease in demand will work to the ultimate disadvantage of the employees as well as the union. Ken'ichi, *The Competition Principle in Japanese Companies and Labor Unions*, 31 JAPAN Q. 27 (1984).

[114] The description of the worker's particular task is not necessarily exclusive. The job description is merely an outline and it is not uncommon for one worker to assist another in a task outside his immediate job description. This accounts for the importance of skill diversification and the camaraderie found in Japanese companies. Inagami, *Labor-Management Communication at the Workshop Level*, 11 JAPANESE INDUSTRIAL RELATIONS SERIES 25 (1983).

[115] S. LEVINE & K. TAIRA, LABOR MARKETS, TRADE UNIONS AND SOCIAL JUSTICE: JAPANESE FAILURES? 93-95 (1980) (discussion of manner by which clique formation is diffused).

[116] One commentator described the Japanese approach as follows:

> Job function in Japan is related to the work unit rather than individual performance. The Japanese employer pursues efficiency through the improvement of the performance of the work unit as a whole and not the aggregate behaviours of individual workers. In order to improve the achievement of the entire unit, it is normal and expected that individual workers will cross job lines within the unit to lend a helping hand to a unit cohort.

New Labor Relations, *supra* note 44, at 271, n.35.

[117] As one commentator observed,

> The Japanese principle of collectivism, therefore, is self-strengthening. The Japanese employees' often unwaivering loyalty to his company is not a real sacrifice because he also gains from such loyalty. Employers often provide recreational facilities and bonuses and treat workers in a paternalistic manner.

New Labor Relations, *supra* note 44, at 268 n.24.

[118] An employee's fear of permanently jeopardizing his relationship with the enterprise probably explains why the actual work stoppage may be brief, even though the underlying dispute may continue. Strikes lasting longer than one day are exceedingly rare, amounting to less than a fraction of one percent in 1984. On the other hand, strikes for less than half a day were almost six times as likely to occur in the same year. This may also be because unions do not have large scale strike funds. Ballon, *Labor-Management Relations in Japan*, in INSTITUTE OF COMPARATIVE CULTURE BUSINESS SERIES 33 (1986).

B. Culture and Tradition: Ineffective Conflict Regulators in the Public Sector

Unlike the peaceful relationship that exists between labor and management in the private sector, turbulence best describes the relationship between labor and management in the public sector.[119] As an employer, the Japanese government has had problems with employees and unions.[120] From the outset of the postwar period, the enterprises in this sector have been the most radical, militant, and unionized.[121] Nevertheless, "in view of the importance of the public corporations and national enterprises to the national economy and people's welfare[,]"[122] the government continually attempts to prevent interruptions in the flow of goods and services provided by these entities.[123] Because these goods and services are essential for the maintenance of the public welfare and national economy, the Government must protect their availability.[124]

1. Management Independence and Autonomy

In the public sector, management is unable to convince employees that their prosperity is directly linked to the profitability of the company. This is because

---

[119] *National Railway Services in Tokyo Paralyzed by Sabotage*, 35 JAPAN NEWSL. 48 (1985) (for recent examples of the extent of acts of sabotage). *See also JNR Strike and Guerrilla Attack by Extremists*, 25 JAPAN LAB. BULL. 3 (Feb. 1986) (description of activities of militant new ultra-left group known as Chukakuha).

[120] *Sohyo*, consisting primarily of public sector employees, is the largest, and also most militant national union. However, this situation may change as the result of the denationalization of JNR, NTT and the Monopoly Corporation. Especially in the case of JNR, the loss of such a traditionally militant enterprise union may be reflected by a decrease in the total number of Sohyo led disputes in subsequent years. *Labor Unions and Labour-Management*, in 2 JAPANESE INDUSTRIAL RELATIONS SERIES 39 (Japanese Institute of Labor ed. 1986) [hereinafter *Labor Unions*].

[121] *Shinsanbetsu* (National Federation of Industrial Organizations) once declared its main purpose to be "militant unionism." Officials of *Shinsanbetsu* promise to strengthen labor unions into one massive organization independent of any other organization. The recent denationalization of JNR, NTT and the Monopoly Corporation has caused *Shinsanbetsu*'s proposition for labor unification to get more attention. Denationalization is seen by some union leaders as an attempt to weaken the strength of the public sector labor movement. This makes it imperative that the remaining unions in the public sector ban together as one, to increase their strength. Ballon, *supra* note 118, at 9-16.

[122] PCNELR LAW art. 1 (Japan) (Dec. 20, 1948).

[123] Hanami, *supra* note 15, at 33.

[124] Society's reliance on the goods and services supplied by entities regulated by the PCNELR LAW includes goods which at first glance appear to have little connection with the promotion of social welfare. The tobacco industry is a case in point. This industry, as a government monopoly, provides a major source of revenue for the national treasury. The average citizen finds it important that tobacco products are made continuously available at uniform prices. Tokikuni, *supra* note 53, at 13.

public sector entities generally lack the independence of their private sector counterparts.[125] Typically, a particular ministry supervises the activities of a specific enterprise.[126] This relationship severely circumscribes management's autonomy and contributes to an atmosphere of tension and conflict. Because management has no authority to respond independently to the demands of the workers,[127] the traditional bonds of cooperation and harmony that exist between labor and management in the private sector do not develop. As a result, the cultural restraints which operate in the private sector to keep conflict at a minimum are less effective and must be supplanted with formal legal rules.

Management's lack of independence also diminishes the importance and benefits of the traditional concepts of *amae* (the desire to be dependent on another) and *shushin koyo* (lifetime employment).[128] Normally, both are essential elements in the creation of the sense of loyalty and obligation that employees feel toward their company. Problems arise because management lacks the authority to respond to the employees' demands without prior approval from the appropriate ministry. Consequently, the workers lacking any close identity with the enterprise are not dissuaded from quarreling with management.

2. *Wage Determination*

Even assuming the government repeals the laws prohibiting concerted activity in the public sector, management still lacks the authority to address the issues underlying most labor disputes. This is because wage-related matters are the

---

[125] Bowman, *Japanese Management: Personnel Policies in the Public Sector*, 13 PUB. PERSONNEL MGMT. J. 197 (1984) (overview of typical management styles in the public sector).

[126] In the public sector, although the clients' preferences influence the organization procedures, it is the relevant ministry which is the central figure in the corporation's environment. Typically, the entities' establishment laws will specify the positions that will be appointed by the ministry. Even without specific legal provisions, a ministry may place its officials on all levels of public corporations. Skinner, *supra* note 101, at 306.

[127] The relevant laws which restrict public sector management from addressing matters relating to operations are the PCNELR LAW art. 8; the LPELR LAW art. 7; the NATIONAL PUBLIC SERVANTS LAW art. 108 § 5, and the LOCAL PUBLIC SERVANTS LAW art. 55 § 3. While the laws are theoretically quite clear, the question of "matters affecting management and operations" has been the source of serious disputes because of the ambiguous wording in the statutes. A. COOK, S. LEVINE & T. MITSUFUJI, PUBLIC EMPLOYEE LABOR RELATIONS IN JAPAN: THREE ASPECTS 15 (1971). *See also* Koshiro, *supra* note 78, at 275.

[128] In the public sector, traditional practices and concepts are minimally effective in resolving labor disputes. Instead, there exists an institutional framework for the settlement of labor disputes and grievances. There are three methods established for the settlement of labor disputes. The utilization of a particular method is dependent upon the type of public entity involved. Koshiro, *supra* note 78, at 271.

major concern of the workers.[129] Negotiation of these issues,[130] however, is beyond the scope of management's bargaining authority and any wage increase must be funded by an appropriation included in the national budget.[131]

The PCNELR Law regulates the wage structure in the public sector. Although wage issues are listed as bargainable topics, article sixteen of the PCNELR Law takes them out of the scope of labor negotiations.[132] The law confers upon the Diet the final and absolute authority to approve all settlements. Consequently, management is left without any realistic power to bargain with the unions over wages issues.[133]

The real purpose of wage negotiations is to reach an impasse so that the matter can be turned over to the National Personnel Authority.[134] Once the

---

[129] *Labor Unions*, *supra* note 120, at 40.

[130] The wages that are negotiated comprise only about 65% of the total wage payment. The other portion consists of the bonuses (negotiated at a later time), and overtime. Based upon the firm's financial condition, the bonus can amount to as much as the equivalent of six months wages. Gould, *Labor Law in Japan and the United States: A Comparative Perspective*, 6 INDUS. REL. J. 1, 10 (1984).

[131] T. HANAMI, *supra* note 39, at 103.

[132] The PCNELR LAW states: "Such agreements shall be submitted to the Diet with reasons thereof for ratification or disapproval. . . . Approval by the Diet shall render the terms of the agreement effective as of the date specified in such agreement." PCNELR LAW art. 16 (Japan) (Dec. 20, 1948).

[133] The financial constraints which the management of public entities in Japan faces are typical of those common to public entities in America. Although they comprise the most serious restraints on management in the public sector, they are not the only factors that must be considered.

There are three other problems that management must also confront, which relate to, but are slightly different from funding per se. First, the government's budget making process and the collective bargaining process are not necessarily coordinated. The budget is approved separately, and is distinct from the labor negotiations. Thus, when a wage figure is negotiated, the budget may already have been completed but the funds appropriated may be insufficient to cover the unions' demands. Once the budget passes, the issue becomes whether any increases should be retroactively applied from the beginning of the budget period, or prospectively applied from the date of the labor agreement. Third, management must face the problems that result from the lack of the synchronization between the legislative decisions regarding the funds to be allocated and the timing of the unions' demands for wage increases. Rehmus, *Constraints on Local Government in Public Employee Bargaining*, 67 MICH. L. REV. 919, 921-26 (1969).

[134] In the public sector, the official formula for determining the wage figure is outlined in article three or the PCNELR LAW. The restrictions placed upon the parties in the public sector show the influence of private sector wage agreements and their relationship to wage increases in the public sector.

The National Personnel Authority [hereinafter NPA], serving national civil servants, and the Local Personnel Commission, serving local civil servants, play a crucial role in the determination of wage increases for public sector employees. The NPA must recommend adjustments in the budget to the Diet and the Cabinet when it finds that wages in the private sector exceed those of civil servants by five percent or more. The NPA's recommendation has no binding authority on

National Personnel Authority receives the matter it is obligated to make wage increase recommendations to the Diet if the wages in the public sector are more than five percent below wages paid for comparable tasks in the private sector. The law then requires the members of the Diet to use their best efforts to implement the recommendations. While this process does not always result in the increase the workers desire,[135] providing a specific procedure for the determination of wages increases shows the government's concern for the welfare of the workers. In addition, the government's involvement evinces an attempt to guarantee the protection of public employees' financial interests.

3. *Organizational Practices*

A particular ministry that oversees the affairs of a public entity may inhibit the workers' internalization of the entity's objectives. In particular, the ministries' practice of *amakudari* (reassigning ministry executives to management positions in public entities), exacerbates the animosity between labor and management.[136] *Amakudari* allows the ministries to fulfill their goal of regularizing the flow of their personnel, but it comes at the expense of the public entity's regular employees.

Workers in the public sector feel *amakudari* exploits them. The resulting influx of outside workers makes it difficult for the regular employees to achieve their goals. With opportunities for promotion and salary increases restricted, the employees have very personal reasons for resenting top management. Consequently, the employees do not believe management's interests are compatible

---

lawmakers, because wage increases can come only after legislation revising the budget has been enacted. The government, however, attempts to give full effect to these recommendations. Nevertheless, in times of substantial deficits in the national budgets, the government has either frozen the civil servant's pay as an emergency measure, or passed legislation providing for wage adjustments substantially lower than that recommended by the NPA. *Recommendation on Pay Raises for Public Servants*, 23 JAPAN LAB. BULL. 4 (Dec. 1983).

The repercussions of any wage adjustments in a civil servant's rate will be further reflected in the rates of those in the public corporations as a result of article three of the PCNELR LAW. Article three stipulates that wages will: 1) correspond to the content and responsibility of the job and shall consider the degree of realized efficiency; and more significantly, 2) shall be determined with consideration given to pay levels of both national and local civil servants along with other relevant considerations such as the cost of living and the supply and demand in the labor market. PCNELR LAW art. 3 (Japan) (Dec. 20, 1948).

[135] *Labor Opposes Wage Freezes for Public Employees*, 21 JAPAN LAB. BULL. 2 (Dec. 1982) (government ignores wage recommendations of NPA and freezes wages).

[136] The retired ministry officials are usually given the executive positions while the younger officials in active service are appointed to positions as section or division chiefs lasting two or three years. These positions are transfers known as *shukko* (temporary transfers). Skinner, *supra* note 101, at 306.

with their own and view the entity as a mere clone of a particualry ministry.

4. Decision Making

Another characteristic of public entities which inhibits the beneficial effect of culture and tradition in suppressing conflict is the "one man" approach to decision making.[137] Executives that are sent from the various ministries feel they are personally responsible for the success or failure of the entity to which they have been sent. Because the assignments are usually temporary, there is little incentive for them to establish any type of lasting personal relationships with the employees.[138] The unilateral nature of the decisions made by these individuals reinforces the workers' feeling of inferiority, further preventing the formation of a bond between labor and management.

5. Work Assignments

The method utlized by management in the public sector of assigning tasks also evinces a practice which is not conducive to group cohesiveness. Within the various work sections, management assigns the workers specific tasks with clearly defined individual responsibilities.[139] Working independently tends to develop specialists who do not see the necessity of the group as either desirable or instrumental to the completion of the assigned task or the achievement of the workers'individual desires. Under such conditions, workers become more concerned with their individual interests than with the probable negative reaction the public would have toward their participation in prohibited concerted activities. In such an environment, custom and tradition cannot effectively minimize the occurrence of conflict.

VI. Formal Law: A Necessary Requirement for Controlling Conflict in the Public Sector

In the proper setting, cultural and traditional practices can function as effective substitutes for formal legal rules to control conflict in the industrial environ-

---

[137] *Labor Unions*, *supra* note 120, at 27-32.

[138] Skinner, *supra* note 101, at 306.

[139] Besides contributing to interpersonal conflict among personnel, the pattern of individually assigning work has two other significant consequences on an organization's operations. First, it encourages a reluctance among the staff members to propose new ideas or show enthusiasm toward their work. Second, it fosters a perception among workers that routinization is an effective strategy for improving work performance. Skinner, *supra* note 101, at 315.

ment.[140] The degree to which these practices can successfully reduce conflict largely depends, however, on the nature of a particular entity. To the extent an entity bears the characteristics of those found in the public sector, labor-management alienation and conflict will continue to prevail.

The benefits that cultural and traditional values provide in helping to control conflict are most effective in settings which approximate those generally found in private entities.[141] The structure and management practices found in these entities reinforce the interpersonal relationships between the employees and employer which are based on mutual trust and respect. Once these relationships are established, the employees begin to internalize the goals and objectives of the entity. Thereafter, participation in concerted activities directed against the entity may result in a loss of face. Thus, employees will neglect their best economic interests in order to maintain harmonious relations with the entity.[142]

The organizational structure and management practices prevailing in the public sector, however, precipitate conflict.[143] In the public sector, formal legal rules become necessary alternatives to culture and tradition as the means for controlling outbreaks of concerted activity and minimizing possible work stoppages. Furthermore, because public employees are unlikely to identify with the entity, they have few incentives for tempering such acts against management.[144]

The philosophy of unions in the public sector compounds the problem between labor and management.[145] Unions in the public sector are less concerned with the profitability of the entity than their counterparts in private enterprises,[146] and continue to stage illegal demonstrations directed against manage-

---

[140] A WHITEHEAD & S. TAKEZAWA, *supra* note 98.

[141] Bairy, *Motivational Forces in Japanese Life*, in THE JAPANESE EMPLOYEE 41 (R. Ballon ed. 1969) (for discussion of traditional attitudes of employees and their influence on the job).

[142] Hanami, *supra* note 15, at 85.

[143] Levine & Taira, *supra* note 19, at 123-25.

[144] The harmonious relationship between the employees and the employer exists as long as both parties share common interests. When their interests diverge, the relationship is destined to break down. "Such cases arise, most typically, either when the employer decides to dismiss a number of employees . . . or when some of the employees feel dissatisfied with their treatment by the enterprise" (as results from the practice of *amakudari*). Hanami, *supra* note 15, at 46.

[145] Yoshida, *Japanese Workers-Suffering in Distrust of Unions*, 16 JAPAN ASIA Q. REV. 20, 24-25 (1984) (discussion of unions' selfish attitudes and disregard of workers' interests); *Japan's New Unionism*, in 451 TRANSLATION SERVICE CENTER 1 (1984); Yoshio, *The Japanese Labor Movement-Grasping for Refreshment*, 17 AMPO JAPAN-ASIA Q. REV. 36, 40 (1985) (survey indicates that less than 50% of workers "trust" the unions).

[146] Unions in the public sector are not as concerned with the entity's profitability because of the commonly held belief that the government will continue to operate these entities regardless of their profitability. Nevertheless, when a profitable entity such as NTT is denationalized, Sohyo's strength decreases. The resulting decrease in membership, political power and revenue to the public corporate sector as a whole adversely affects Sohyo's ability to push for higher wages among the remaining less profitable enterprises. Fukushima, *Repercussion of Denationalization of*

ment.[147] Among public sector unions, there is a shared belief that the government as employer cannot go bankrupt, and that it has a duty to provide the public with the essential goods and services of these entities at a reasonable price on a consistent basis.

Permitting employees to engage in unchecked concerted activity might also affect the political balance of power. With respect to the public sector, the government is particularly susceptible to activities which have political ramifications because it is a political employer.[148] Unions, no less aware of this fact, are strictly prohibited from conducting political strikes.[149] Nevertheless, public sec-

---

NTT Case, 21 NIHON RODO KYOKAI ZASSHI 58 (1985) (unions' reaction to denationalization).

[147] The prohibition of concerted activity does not effectively deter unions from staging the large scale seasonal demonstration known as *Shunto* (a strike like demonstration conducted by the public sector workers). The main reason why *Shunto* is staged in the spring is due to the following factors: 1) April is the month when new school graduates join enterprises, and many companies raise wages concomitantly as a salary adjustment for the number of years worked; 2) many firms settle accounts in March and personnel transfers and promotions are announced in this period and 3) as a political concern, the regular Diet session lasts for 150 days from the end of December through mid or late May of the following year, with deliberations on the budget for the new fiscal year beginning on April 1 and ending on March 31 of the following year. *Labor Unions*, *supra* note 120, at 32.

[148] Professor Shirai has observed that unions in Japan operate as major pressure groups. The parties they support have no foreseeable chance of being elected to public office, thus "[t]he unions have been forced into attempting to influence directly or to apply pressure on the government. . . ." Shirai, *Japanese Labor Unions and Politics*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 338 (T. Shirai ed. 1983).

[149] It is generally understood that the legitimacy of the industrial action should be judged on a case by case basis. However, an exception exists in the case of political strikes (strikes to regain the right to strike) and sympathy strikes. These actions are not within the employer's control or authority and thus are illegitimate as their incitement is not constitutionally protected free speech. Although concerted activity initiated by unions is not prohibited, an exception exists in the case of unions whose object is political or social change. Article two of the Trade Union Law states in pertinent part:

> Labor unions under the present Law shall be those organizations, or federations thereof, formed autonomously and substantially by workers for the main purpose of maintaining and improving the conditions of work and for raising the economic status of the workers. Provided that this shall not apply to any one of the following items . . . (4) Which principally aims at carrying on political or social movement.

TRADE UNION LAW art. 2 (Japan) (June 1, 1948).

As for the public sector, in the 1973 *Zennorin Case* (in which the underlying issue was the legitimacy of a political demonstration by members of the All-Japan Agriculture and Forestry Workers Union), the supreme court acknowledged the rights of the public workers under article 28, but held that the rights of "clerical national public employees" must be limited "from the standpoint of the collective benefit of all the people." The public functions of such workers justified restricting their labor rights to a reasonable and unavoidable degree. Beer, *supra* note 70, at 25.

tor unions attempt to mobilize political power to influence politicians.[150] In order to carry out its political objectives, the unions send delegates to various government committees.[151] When organizing these activities, unions first seek support from among their own members. If the activity requires additional support, the unions then turn to groups in the public sector with goals sympathetic to their own.[152]

Specifically, it is the unions' link with labor and liberal political parties that attracts the most concern. In Japan, unions[153] and the political parties traditionally enjoy a unique relationship. A local union's association with a national union organization links it to a specific political party. Typically, each of the national unions identifies with a particular philosophical position, manifested in the form of an alignment with a particular political party.[154] This relationship gives a union the capability of organizing formidable movements against selected politicians.[155] The threat of such activity combined with management's inability to resolve disputes precipitated by differences in political beliefs, may explain the authorities' harsh treatment of employees engaged in political strikes.[156]

---

[150] The fact that public enterprise employees may not legally participate in politics does not lessen the pressure on their labor organization to do so. Employees resort to alternative strategies which do not violate the legal restrictions, yet permit the mobilization and exercise of political power. For example, the wives of the union members, fellow unionists in non-public trades and the agents and members of allied political parties are all potential substitutes for the actual members themselves. A. COOK, LABOR RELATIONS IN PUBLIC SERVICE: A UNIQUE BRANCH OF LABOR RELATIONS PRACTICE: THE JAPANESE CASE IN LOCAL GOVERNMENT 48 (1969).

[151] Hanami, *supra* note 15, at 112.

[152] *Id.*

[153] In appearance, local Japanese unions (referred to as enterprise unions) resemble the locals of an industrialized union, or an "intermediate" organization like Ford or General Motors' Departments of the United Automobile Workers of America. The essential difference between the enterprise union and the local industrialized union is that the former is a unit in and of itself. Enterprise unions, however, are not merely an administrative component of a national union; nor are they simply "inside" independent company wide unions.

Enterprise unions have the following characteristics: 1) membership is limited to the regular (permanent) employees of a particular enterprise and location; 2) in general, both blue and white collar workers are organized in a single union; 3) union officers are elected from among the regular employees of the enterprise and during their tenure in office, they usually retain their employee status, but are paid by the union and 4) about three quarters of the enterprise unions are affiliated with national centers outside the enterprise. Because most of these centers are loosely organized, national industrial type unions, sovereignty is retained almost exclusively at the local enterprise level. A. COOK, JAPANESE TRADE UNIONS 28-31 (1966) (detailed look at the character of national unions); *See generally* A. COOK, AN INTRODUCTION TO JAPANESE TRADE UNIONISM 28-81 (1966) (detailed look at the organizational function of national unions).

[154] Hanami, *supra* note 15, at 42-43.

[155] *Labor Unions*, *supra* note 120, at 39.

[156] The authorities deal harshly with strikers who engage in political activities. An example of

Unlike the situation in the private sector, the effects of culture and tradition cannot significantly control the employees' conduct. For the government to be in a position seriously to consider amending the laws would first require a significant change in the management philosophy, organizational structure, policies, and objectives of public entities. To the extent any such change left the entity with characteristics similar to a private enterprise,[157] the beneficial aspects of culture and tradition in suppressing conflict might be realized.

For this to occur, the government should relinquish control of the entity. The attendant independence and autonomy may convince the employees that management is capable of appropriately responding to their demands.[158] A change of such magnitude should not be expected to produce the desired results instantly. The passage of time is necessary before employees and employers develop a less adversarial posture.

Recently, the government attempted to effect such a change by denationalizing select public enterprises.[159] Such denationalization may prove to be an effec-

---

this can be seen in the action taken against officials of four JNR unions and their members for staging a series of strikes in opposition to the return of a U.S. nuclear submarine to its home port Yokosuka. The headquarters' division chief of *Doro* (National Railway Locomotive Engineers' Union) was dimissed, with ten others suffering either temporary dismissals or pay cuts. The harsh punishment was symbolic of the authorities' hard line stance against these types of strikes. *JNR Disciplines Union Officials Over Strikes*, 20 JAPAN LAB. BULL. 3 (Sept. 1981); *JNR Takes Disciplinary Steps Aganist Unions*, 20 JAPAN LAB. BULL. 5 (Apr. 1981) (survey of the range of punishment handed out to 10,645 unionists for participating in an illegal act of dispute).

[157] Management philosophies and industrial relation policies of Japanese employers generally contain five underlying principles: First, their primary concern is the continued existence and further development of their corporation. Second, they regard all company employees, including themselves as members of the same corporate community. Third, they take an egalitarian view of income distribution between labor and management within the company. Fourth, they are crucially concerned with maintaining stability and peace in the company's industrial relations. In other words, they strive to avoid industrial disputes and strikes, often at any costs. Fifth, they tend to reject the intervention of outside labor groups in any negotiations over internal labor problems, an attitude that might be described as exclusionist. *New Labor Relations*, *supra* note 44, at 267-68.

[158] The employers share a common belief about the government's participation in the affairs of the work environment. Employers believe that the government should refrain from interfering in matters concerning the work environment and leave them to labor and management to work out. Yamada, *Working Time in Japan: Recent Trends and Issues*, 124 INT'L LAB. REV. 698, 713-14 (1985).

[159] Currently, statistics are not locally available on the particulars of all of the denationalized public enterprises. However, information concerning NTT and the Monopoly Corporation is as follows: 1) NTT went private on April 1, 1985. It was renamed Nippon Telegraph and Telephone Corporation. It is a giant firm capitalized at 780 billion yen with sales of 4,500 billion yen in fiscal '83 and a work force of 320,000. 2) The Monopoly Corporation was renamed Japan Tobacco Inc. and is also a formidable corporation with initial capitalization at 100 billion yen, and sales in fiscal'82 of 2,800 billion yen and 36,000 employees. *NTT, Tobacco and Salt Corp.*

tive means of significantly altering the essential nature of those entities affected. After denationalization, formerly public entities function as private enterprises, incorporating values and systems of rewards into their operations similar to those in other private entities. As is the case in the private sector, cultural and traditional norms should prove effective in suppressing conflict once an entity is denationalized.

Once denationalization takes place, management has the opportunity to begin establishing a relationship with the employees that will facilitate their eventual identification with the company's goals and objectives.[160] In time, the harmony that typifies the traditional relationship found between labor and management in the private sector should develop in the denationalized enterprises as well.

Denationalizing an entity evinces the government's attempt to reorganize the entity and place it under independent ownership and control. Nevertheless, the government is not oblivious to the fact that the formation of the bond between labor and management may not develop immediately, if at all. There is always the possibility that serious problems may arise between labor and management before the development of any favorable relationships. Accordingly, the government's denationalization strategy provides a mechanism designed to prevent the disruption of the flow of the entity's goods and services. In the initial phase of denationalization, for example, the government can classify the denationalized entity as an "essential service."[161] The employees of a denationalized "essential service" do not enjoy an unrestricted right to engage in concerted activities. Instead, the law imposes a "cooling off" period during which the employees are forbidden from conducting any collective acts of dispute.[162] The purpose of the

---

Privatized, 24 JAPAN LAB. REV. 1-2 (June 1985).

[160] Egami, *The Division of JNR and Response of Kokuro (National Railway Workers' Union)*, 28 NIHON RODO KYOKAI ZASSHI 54 (1986) (discussion of various JNR unions' reactions to denationalization); *JNR Reform and Labor Unions*, 25 JAPAN LAB. BULL. 3-4 (Sept. 1986) (unions' varied responses to denationalization); Letter from Mr. Emori (Zen Tobacco Union's Legal Department) to Donn Manning-Fudo, (April 18, 1987) (discussion of issues regarding denationalization).

[161] The Labour Relations Adjustment Law defines essential services as work that is indispensible to the daily life of the public within such industries as transportation, post, telegraph and telephone, water, electricity and gas supply, medical care and public hygiene. LABOUR RELATIONS ADJUSTMENT LAW, art. 8 (Japan) (Sept. 27, 1946).

If necessary, the Prime Minister may designate other entities as essential services if stoppage would seriously affect the national economy or endanger the daily life of the general public. In such a case, the Prime Minister must specify the period during which this designation shall apply (not to exceed one year) and also obtain the approval of the Diet. Hanami, *Labour Relations and Development in Japan*, in 59 LABOUR-MANAGEMENT RELATIONS SERIES 16 (1983).

[162] Any strike action may be prohibited for a period not exceeding fifteen days if a mediation process occurs simultaneously at the Central Labor Relations Commission upon request from the Ministry of Labor. *Shift to Private Status of the Telegraph and Telephone Service, and the Right of*

cooling off period is to allow time for labor and management to arrive at a solution to their differences and avert any significant disruption in the entity's operations.

Moreover, even after concerted activities legally commence, in a denationalized "essential service" entity, a provision in the law gives the Prime Minister the authority to order the workers to cease such activities. The Prime Minister may exercise this authority when he deems that a work stoppage would affect welfare services (such as police or fire protection), or when the special nature of the work would pose a serious threat to the national economy or disrupt the lives of the people.[163] If the order is issued, any concerted activity taken within fifty days of the publication of the order would be unlawful. The Prime Minister's order has the effect of terminating disruptive action and extending the cooling off period so that further attempts can be made to resolve the parties' differences.

Notwithstanding its possible chilling effect on the initiation of concerted activity, the Prime Minister's power appears justified. Once denationalized, an enterprise is not automatically transformed into an ordinary private entity. While a recently denationalized enterprise may outwardly appear similar to other entities in the private sector, the relationship between labor and management which is critical in suppressing the occurrence of conflict may not yet exist. This is understandable in light of the fact that the denationalized entity is comprised of many of the same individuals as when it formerly existed in the public sector.

It is difficult in any given case to predict accurately when animosities will desist. Therefore, the law granting the Prime Minister the authority to control potentially detrimental concerted activity appears justified and reasonable.

VII. CONCLUSION

The Japanese government recognizes its duty to ensure the continuous availability of the goods and services provided by public enterprises. Arguably, however, the government also has a responsibility as an employer. In that capacity, the government should attempt to work with the employees to create an environment where they can acheive their individual goals. The government's dual

---

Employees to Strike, 23 JAPAN LAB. BULL. 4 (Sept. 1984).

[163] Before issuing an emergency adjustment, the Prime Minister must ask the opinion of the Central Labour Relations Commission. Once the decision is made, it must be published and communicated to the Commission, along with the reasons in support. Hanami, *supra* note 15, at 143. Where the Central Labour Relations Commission is consulted, it must give first priority to the dispute and use its utmost efforts to settle the case through conciliation, mediation or arbitration. Hanami, *supra* note 161, at 16.

role as guardian of the public interest and employer requires it to weigh the interests of both society and public employees. The laws prohibiting concerted activity in the public sector attempt to maintain this delicate balance.

The laws appear to be a legitimate — and arguably necessary — limitation on public employees' activities and required to ensure that the public's interests are not compromised as a result of any interference in the operation of a public entity caused by labor strife. In spite of the existence of these laws, the majority of the political strikes in Japan have been conducted by unions in the public sector. Although the left-wing unions are aware of the public's distaste for political strikes and their lack of effectiveness, the unions continue to use them, perhaps to further their ideological imperatives.[164] In contrast, the ebb and flow of the competitive pressures felt in the private sector compel labor and management to settle their disputes quickly, so as to avoid disruptions in the entity's operation.

As a political employer, the government appears to have few viable alternatives other than to continue to prohibit concerted activity in the public sector. Thus, so long as the government remains vulnerable to political strikes, it cannot realistically repeal the laws.[165] The peculiarities of the public sector neutralize the effectiveness of culture and tradition in controlling conflict. Consequently, the government arguably must rely on legal sanctions, until such time as it appears other effective alternatives become available. In any event, there is little reason to expect Japanese lawmakers to modify the anti-concerted activities laws without a concomitant change in the fundamental nature of Japanese culture and tradition.

Donn Fudo

---

[164] Shirai, *supra* note 148, at 339.

[165] That union membership has steadily declined in recent years can also be expected to influence any decision to repeal the laws. *Labor Unions*, *supra* note 120, at 9; Oshima, *A Labor Market in Flux*, in 1986 JAPAN ECON. INST. 2A, at 7; *Cf.* Kazutoshi, *The Path for Unionism in the Eighties*, 8 JAPAN ECHO 20 (1981) (summary of one scholar's impressions of factors responsible for employees' reluctance to leave job); Moy, *Recent Trends in Unemployment and the Labor Force 10 Countries*, 1985 MONTHLY LAB. REV. 9, 14; Ohta, *Japan's Weak Kneed Unions*, in 457 TRANSLATION SERVICE CENTER 1 (The Asian Foundation's Translation Service Center).

Loss of Consortium: Extending the Cause of Action to Cohabitors In Hawaii

I. INTRODUCTION

Imagine that you and your spouse have been living together quite happily in Hawaii for a number of years. You enjoy each other's company, affection, and the sexual aspects of your relationship. One day your spouse is injured in an accident caused by another person's negligence. Your relationship changes dramatically because your spouse is in substantial pain. You can no longer engage in activities together or obtain the comfort and affection you need from your spouse, and you are no longer happy.

The common law loss of consortium action compensates a spouse for the losses described in the foregoing hypothetical. The action is commonly defined as the loss of society, affection, assistance, and conjugal fellowship, and includes loss or impairment of sexual relations.[1] Loss of consortium, however, is traditionally limited to married persons. Thus, if you are not married, but are cohabiting,[2] your claim will likely be denied. At present, the increase of nonmarital cohabitation by couples is pressuring the courts to consider the issue of whether a valid marriage is necessary to the loss of consortium action.

Part II of this comment examines the evolution of the loss of consortium action, beginning with its origins in ancient Rome, continuing with its development through English common law, and ending with its modern form in the

---

[1] Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950). For a full discussion of *Hitaffer*, see *infra* text accompanying notes 20-22.

[2] The situation where two persons habitually live in a common residence sharing an intimate physical and emotional relationship, without a legal marriage and/or a marriage license, has been referred to in different ways by various courts. *See, e.g.*, Kiesel v. Peter Kiewitt & Sons' Co., 638 F.Supp. 1251 (D. Haw. 1986) (relationship called a "common-law marriage" and plaintiff referred to as a "common-law wife"); Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980) (relationship referred to as "cohabitation"); Ledger v. Tippett, 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985) (couple referred to as "meretricious spouses"); Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (couple referred to as "non-marital partners"); Parkinson v. J. & S. Tool Co., 64 N.J. 159, 313 A.2d 609 (1974) (couple referred to as "de facto spouses"). This comment will use the term "cohabitation" and "cohabiting" to refer to the relationship described above, and "cohabitors" or "cohabitants" to refer to the people involved.

face of a changing society. Part III analyzes some of the policy reasons against extending the loss of consortium action to unmarried couples and weighs these arguments against those that favor such an extension. The last section suggests how Hawaii courts should deal with this issue, given the uniqueness of Hawaii law and its traditional paternalistic approach to relational interests. In addition, this comment advocates the adoption of a test that Hawaii state courts can use in determining whether a cohabitor's relationship merits compensation for loss of consortium.

II. HISTORICAL PERSPECTIVE

A. Development of the Action for Loss of Consortium

The modern loss of consortium cause of action is the result of centuries of continuous societal change reflected in the common law of our judicial system. Loss of consortium traces its roots back to ancient times. Its origins can be found in early Roman law which looked upon wives, children, and slaves as physical extensions of the male head of household.[3] Under this theory, when a household member was injured through an act of violence by a nonmember, the male head of household would consider the act as directed against his person.[4] Therefore, he, *not* the injured person, was entitled to bring an action against the nonmember for the inflicted injury.

This concept was further developed by English common law, sometime prior to the thirteenth century,[5] when the former action available to the male head of household was modified to conform to the English "master-servant" relationship.[6] The master-servant relationship was one in which the master had a quasi-proprietary interest in his servant.[7] When the servant could no longer perform his duties due to injuries inflicted upon him by another, the modified action compensated the master for the resulting loss of services. The emphasis of the action was placed on services instead of bodily injury, and the action was

---

[3] W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 979 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

[4] *Id.* at 979-80.

[5] *Id.* at 980.

[6] *Id.* The master and servant relationship is defined as follows: "The relation of master and servant exists where one person, for pay or other valuable consideration enters into the service of another and devotes to him his personal labor for an agreed period." BLACK'S LAW DICTIONARY 879 (5th ed. 1979).

[7] PROSSER & KEETON ON TORTS, *supra* note 3, § 124, at 915-16. The quasi-proprietary interest was created by statute in England by the "Ordinance of Labourers" to alleviate the shortage of labor resulting from the Black Plague. *Id.* at 980.

classified as a tort of trespass.[8]

Eventually the master's action for trespass was extended to include lost services due to injuries wrongfully inflicted on his wife as well as his servants.[9] This extension was logical, since at early common law, when a woman married, her identity became completely merged with that of her husband. Husband and wife became one person in the eyes of the law; and that one person was the husband.[10] Once vows were exchanged, the wife's services, affection, and all the property she possessed came under the exclusive ownership and control of her husband.[11] Therefore, it follows from the very nature of this relationship, that the husband suffered damage to his property rights if his wife was injured.[12] Since a master could bring an action against one who had injured his servant, it appeared reasonable that a husband should be able to bring an action against one who had injured his wife. Thus the action of *consortium amisit*[13] evolved

---

[8] Trespass to chattels is a wrong of intentional interference and usually requires "[a]n intent to intrude upon or intermeddle in some way . . . ." PROSSER & KEETON ON TORTS, *supra* note 3, § 14, at 86.

[9] *See* PROSSER & KEETON ON TORTS, *supra* note 3, § 124, at 916; Comment, *Loss of Consortium: Adaptation of a Common Law Cause of Action to a Modern Day Reality*, 54 UMKC L. REV. 512, 514 (1986) [hereinafter Comment, *Modern Day Reality*] ("[t]he husband's interest in his wife's consortium . . . was considered to be sufficiently proprietary to support an action of trespass.") (quoting 8 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 429-30 (3d ed. 1923)).

[10] Thompson v. Thompson, 218 U.S. 611, 614 (1910). One commentator explains that "[b]y marriage, the husband and wife are one person in law . . . that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything . . . ." Matsuda, *The West and the Legal Status of Women: Explanations of Frontier Feminism*, 24 J.W. 47, 48 (1985) (quoting W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 355 (19th ed. 1891)). *See also* Comment, *Loss of Consortium: Should Marriage Be Retained as a Prerequisite?*, 52 U. CIN. L. REV. 842, 843 (1983) [hereinafter Comment, *Should Marriage Be Retained*].

[11] Comment, *Should Marriage Be Retained*, *supra* note 10, at 843.

[12] Chicago, B. & Q.R. Co. v. Honey, 63 F. 39 (8th Cir. 1894). In *Chicago*, a husband brought an action against a third party for the loss of society of his wife, her aid, and surgical attendance, due to the physical injuries she received. *Id.* at 40. The major issue was whether a wife's contributory negligence could be imputed to the husband and used as a defense by a third party. *Id.* In reaching its conclusion, the court noted:

> [The husband's right to sue for loss of society and services] has its origin in the existence of a valid marriage, which relation entitles him to the benefit of the wife's services and society, and which also imposes on him the duty of providing her with medical attendance in case of sickness or accident. When the husband loses the services of his wife, or is compelled to incur medical expenses, through the fault of another, then he may sue the wrongdoer.

Id. at 42.

[13] *See* Comment, *Modern Day Reality*, *supra* note 9, at 514. *Consortium amisit* was a term used to signify society or companionship under old English law. BLACK'S LAW DICTIONARY 280 (5th ed. 1979).

and allowed the husband to seek compensation for the deprivation of his wife's services.

In contrast, the wife's position in the marital relationship afforded her neither the right to sue nor to be sued in her own name.[14] Since she was not legally entitled to the services of her husband, the wife could not bring an action against a third party for the loss of her husband's services when he was the injured party.[15]

The limited legal rights afforded married women remained relatively unchanged until the latter half of the nineteenth century. During that period, many states passed Married Women's Property Acts[16] in an effort to relieve married women of the disabilities created by the common law.[17] These acts served to erode the disparity between the husband and wife's status in the marriage by allowing the wife to own property, receive earnings, and bring an action in her own name in a court of law.[18] As a result, women gained access to the courts, enabling them to obtain legal redress for their injuries.[19]

In 1950, the landmark decision of *Hitaffer v. Argonne*,[20] established that a wife has a cause of action for loss of consortium. In *Hitaffer*, the United States Court of Appeals for the District of Columbia reasoned that both the husband and wife are entitled to equal rights in the marital relationship, including the comfort, companionship, and affection of the other.[21] As a result, the *Hitaffer*

---

[14] PROSSER & KEETON ON TORTS, *supra* note 3, § 124, at 916.

[15] *Id.* at 931; Comment, *Should Marriage Be Retained*, *supra* note 10, at 843.

[16] The first Married Women's Property Act was passed in Mississippi in 1839, and by 1865, twenty-nine states had passed such laws. *See* Matsuda, *supra* note 10, at 50.

[17] At common law, the legal existence of married women was severely limited through court decisions originally intended to protect them. Among other things, married women were prohibited from entering into contracts, and buying and selling property. These protective laws turned into legal disabilities, evidenced by the phrase *feme covert*, meaning married woman, which was later used to describe a woman's lack of legal rights. Thompson v. Thompson, 218 U.S. 611, 614-15 (1910).

[18] *See* Comment, *Should Marriage Be Retained*, *supra* note 10, at 844; Herzog, *Loss of Consortium*, CASE & COM., July-Aug. 1985, at 39.

[19] *See* Note, *Butcher v. Superior Court of Orange County: Reconceptualizing the Action for Loss of Consortium*, 10 J. CONTEMP. L. 255, 257 (1984) [hereinafter Note, *Butcher*].

[20] 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950).

[21] 183 F.2d at 816-17. In *Hitaffer*, the appellant's husband was severely injured while employed by the appellee, resulting in the appellant's loss of her husband's aid, assistance and enjoyment. In allowing the appellant her action, the United States Court of Appeals for the District of Columbia reversed the lower court's granting of summary judgment in favor of the appellee for failure of the appellant to state a cause of action in her complaint. The court concluded:

> There can be no doubt, therefore, that if a cause of action in the wife for the loss of consortium from alienation of affections of criminal conversation is to be recognized it must be predicated on a legally protected interest. Now then, may we say that she has a legally protected and hence actionable interest in her consortium when it is injured from

decision not only extended the loss of consortium action to women, it also shifted the emphasis of the action away from services to recognize the more intangible elements of the marital relationship, such as companionship and affection.[22]

Although *Hitaffer* was decided in 1950, the concept of equality of spouses in the marital relationship was slow to gain acceptance by other jurisdictions. Today, however, courts in most jurisdictions recognize a wife's cause of action for loss of consortium.[23]

B. *Development of the Action for Loss of Consortium in Hawaii*

The cause of action for loss of consortium in Hawaii developed in much the same manner as in the rest of the United States. In the late nineteenth and early twentieth centuries, the status of women in Hawaii was essentially the same as the status of women in the United States. For example, in 1856, the Hawaii Supreme Court, in *Hookii v. Nicholson*,[24] noted that the society and service of a wife belonged exclusively to her husband, and neither could be contracted away without his consent.[25] Later in *Maa v. Leiau*,[26] the same court held that all of the wife's property and money became the property and money of her husband upon marriage.[27] In *Maa*, the wife loaned defendant, Kalua, $75. The debt remained unpaid for twenty years, but eventually, Kalua revived the debt with

---

one of these so-called intentional invasions, and yet, when the very same interest is injured by a negligent defendant, deny her a right of action? It does not seem so to us. Such a result would be neither legal nor logical.

Id. at 817.

[22] *See* Note, *Loss of Consortium: Should California Protect Cohabitants' Relational Interest?*, 58 S. CAL. L. REV. 1467, 1469 (1985) [hereinafter Note, *Should California*].

[23] *See, e.g.*, Nichols v. Sonneman, 91 Idaho 199, 418 P.2d 562 (1966); Tjaden v. Moses, 94 Ill. App. 2d 361, 237 N.E.2d 562 (1968); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539 (Mo. 1963); Ekalo v. Constructive Serv. Corp., 46 N.J. 82, 215 A.2d 1 (1965); Ross v. Cuthbert, 239 Or. 429, 397 P.2d 529 (1965). For a more complete list, see Annot., *Wife's Right of Action for Loss of Consortium*, 36 A.L.R.3d 900 (1987 Supp.).

[24] 1 Haw. 467 (1856).

[25] *Id.* at 468. In *Hookii*, plaintiffs were married women who brought a complaint for misusage against defendant, a Honolulu tailor, and prayed to be discharged from their contractual obligations of service to him. *Id.* at 467. They admitted that they were married women when they contracted with defendant, thus making their contracts void at law without the written consent of their husbands. *Id.* at 468. The court found that the contracts were valid because the consent of the husbands need not be written, *id.* at 469, however, the court noted that "[t]here can be no question as to the general principal of law, that the husband is exclusively entitled to the society and service of the wife, and that no contract made with the wife in contravention of, or affecting the rights of the husband is valid without his consent." *Id.* at 468.

[26] 4 Haw. 201 (1879).

[27] *Id.* at 203.

a new promise to pay. After Maa's husband died, the court determined that the money loaned belonged to her husband, and therefore the action on the debt was either his or his estate's.[28]

The legal status of married women substantially improved in 1888 when the Married Woman's Property Act was passed in Hawaii.[29] Through this act, married women became legally capable of retaining control and ownership of their own property, both real and personal. They also gained access to the courts with the right to sue and be sued.[30]

Although there are few reported loss of consortium cases from the early Hawaiian courts, there is evidence that the loss of consortium action was recognized in Hawaii as early as 1921. In *Waki v. Yamada*,[31] for example, the Hawaii Supreme Court allowed a husband to bring a loss of consortium claim against a third party for enticing his wife away.[32] The claim alleged that the third party caused the wife's alienation, thereby depriving the husband of his wife's society, aid, and affection.[33]

A married woman's cause of action for loss of consortium, however, was not clearly established until 1955. In that year, the Hawaii State Legislature modified the "Death by Wrongful Act" statute so as to recognize a woman's right to a loss of consortium action, and also to shift the basis of the action from a deprivation of services to a wrongful interference with the relationship between the parties.[34] The amended statute allowed spouses, children, parents, and dependents to recover both for pecuniary loss and loss of love and affection in a wrongful death action. Love and affection was statutorily defined as including loss of society, companionship, comfort, consortium, and protection.[35]

---

[28] *Id.* at 202, 204.

[29] The revised version of this act is codified in Hawaii Revised Statutes Chapter 573 (1985).

[30] HAW. REV. STAT. ch. 573 (1985).

[31] 26 Haw. 52 (1921).

[32] *Id.* The plaintiff, Waki, brought an action against the defendant alleging that the defendant sent the plaintiff's wife to Japan without his knowledge or consent, to deprive the plaintiff of her company and services. *Id.* The Hawaii Supreme Court upheld the dismissal of the case on the grounds that the plaintiff had failed to make out a prima facie case due to insufficient evidence. *Id.* at 52-53.

[33] *Id.* at 52.

[34] HAW. REV. STAT. § 663-3 (1985).

[35] The "Death by Wrongful Act" statute states, in relevant part:

> In any action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including (1) loss of society, companionship, comfort, consortium, or protection, (2) loss of marital care, attention, advice, or counsel, (3) loss of filial care or attention, or (4) loss of parental care, training, guidance, or education, suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person.

HAW. REV. STAT. § 663-3 (1985).

The Hawaii courts eventually adopted the *Hitaffer* rationale for the loss of consortium action just as the legislature did for wrongful death actions. In *Nishi v. Hartwell*,[36] the Hawaii Supreme Court, while ruling on a different issue, suggested in dicta that the court would permit a wife's loss of consortium action to go forth.[37] The court later confirmed this suggestion in *Towse v. State*[38] and *Yamamoto v. Premier Insurance Co.*,[39] wherein wives were allowed to maintain actions for loss of consortium.

With these legislative and judicial developments, the loss of consortium action in Hawaii attained the same level of maturity as the action had attained in the rest of the United States. The evolution of the action, however, is still not complete. Loss of consortium issues have arisen in two new areas of controversy: (1) the child's claim for loss of parental consortium,[40] and (2) the claim for loss of consortium by cohabitors. This comment focuses on analyzing the second claim, paying particular attention to Hawaii law and social policy in determining the position that Hawaii courts might reasonably adopt with regard to this issue.

---

[36] 52 Haw. 188, 473 P.2d 116 (1970).

[37] *Id.* at 189-90, 473 P.2d at 118. The plaintiff husband brought an action in negligence for medical malpractice against two defendant doctors for not apprising him of the risks associated with the surgical procedure performed on him and the resulting paralysis he suffered. His wife brought an action for loss of consortium. *Id.*

[38] 64 Haw. 624, 647 P.2d 696 (1982). In *Towse*, the plaintiffs were prison guards alleging defamation and false imprisonment, and certain of their wives claiming loss of consortium. *Id.* at 625, 647 P.2d at 698. The claims resulted from an overhaul of the Hawaii State Prison and the subsequent press conference and preliminary report concerning the overhaul. *Id.* at 625-27, 647 P.2d at 699-700. The court found that summary judgment was properly granted to the wives' claims since loss of consortium is a derivative claim and summary judgment had been granted for their husbands' claims. *Id.* at 637, 647 P.2d at 705.

[39] 4 Haw. App. 429, 668 P.2d 42 (1983). In *Yamamoto*, the husband was seriously injured in a car accident and sued the other driver and his own insurance company for wrongful denial of uninsured motorist benefits. *Id.* at 430, 668 P.2d at 45. His wife joined the suit claiming loss of consortium. *Id.* The court found the wife's claim sufficient to make her an injured party allowing her recovery for damages that were separate and independent from her husband's, and determined that her claim was derivative only because a loss of consortium claim does not arise unless one spouse sustains an injury. *Id.* at 435, 668 P.2d at 48.

[40] In a small but growing number of cases, children are recovering damages for loss of "parental consortium." The first case to allow such an action was Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980). Other courts have held accordingly. *See, e.g.*, Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Burger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981).

C. *Development of Loss of Consortium in a Changing Society: Claims By Cohabitors*

The evolution of the loss of consortium action appears to reflect an effort made by courts to adapt the common law to an ever changing society. As one court has explained:

> [T]he common law is not static but is endowed with vitality and a capacity to grow. It never becomes permanently crystalized but changes and adjusts from time to time to new developments in social and economic life to meet the changing needs of a complex society.[41]

One societal development that is currently demanding much attention is the cohabitation of unmarried couples. Although this is not a new development, the dramatic increase in couples who opt for cohabitation instead of marriage has become a much publicized subject of concern.

In 1970, 523,000 unmarried couples were reported to be living together in the United States.[42] By 1980, this figure had more than tripled, reaching 1,589,000.[43] This tremendous increase is not just a temporary phase that will be outgrown. Instead, it represents a definite trend that experts predict will continue.[44] Indeed, in 1986, there were some 2,220,000 unmarried couples in the United States,[45] a figure representing four of every (one) hundred couples in the nation.[46]

Although married people continue to represent a large portion of this nation's population, the number of newly formed cohabitation relationships is increasing at a rapid rate. The rate of increase in the number of unmarried cohabitors was more than 300 percent between 1970 and 1980, and forty percent between 1980 and 1986. The number of married couples increased by only eleven percent and four percent in each respective period of time.[47] With over four mil-

---

[41] Hoffman v. Dautel, 192 Kan. 406, 411, 388 P.2d 615, 620 (1964) (citing Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962)). For a discussion of *Hoffman*, see *supra* notes 25-26 and accompanying text.

[42] MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1985, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-20, NO. 410, at 14 (1986).

[43] *Id.*

[44] *See* Comment, *Modern Day Reality*, *supra* note 9, at 513 (M.I.T. and Harvard demographers estimate that by 1990 only slightly more than one-quarter of the nation's households will consist of married couples with children.).

[45] HOUSEHOLDS, FAMILIES, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1986 (ADVANCE REPORT), U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-20, NO. 412, at 2 (1986).

[46] *Id.* at 3.

[47] *Id.* at 2.

lion people involved in this alternative living arrangement, our legal system has been confronted with the task of determining what legal rights should be afforded cohabitors.

One of the most significant and controversial issues facing the courts today in this area is whether cohabitors should receive the legal right to the tort action for loss of consortium. Traditionally, this cause of action has been limited to couples in a valid marriage, including common law marriages formed in states that recognize them.[48] Recently, however, cohabitors have begun to challenge the requirement of a valid marriage.[49] Their general contention is that cohabitors suffer the same type of injury to their relationship when one partner is injured as do married couples in the same situation.[50]

Most courts have thus far rejected this contention, exhibiting a great reluctance to modify the common law in this respect. They have chosen, instead, to continue to view marriage as a prerequisite to the loss of consortium claim.[51] The general reasons most often given as to why the loss of consortium action should not be extended to unmarried cohabitants are discussed at length in the following sections.

III. ANALYSIS

A. *Judicial Reluctance to Recognize Cohabitor's Claims for Loss of Consortium*

The question whether unmarried cohabitants should be allowed to bring a loss of consortium claim has provoked competing arguments from both courts and commentators.[52] It is generally accepted that the goal of tort law is to make

---

[48] *See, e.g.*, Ledger v. Tippitt, 164 Cal. App. 3d 625, 633, 210 Cal. Rptr. 814, 817 (1985) (California recognizes the cause of action for a common-law marriage partner if the marriage was validly created in a state that recognizes common law marriages).

[49] *See, e.g.*, Kiesel v. Peter Kiewit & Sons' Co., 638 F. Supp. 1251 (D. Haw. 1986) (discussed *infra*, notes 152-165 and accompanying text); Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980) (discussed *infra*, notes 55-65 and accompanying text); Ledger v. Tippitt, 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985) (discussed *infra*, notes 122-27 and accompanying text); Sawyer v. Bailey, 413 A.2d 165 (Me. 1980) (discussed *infra*, notes 88-92 and accompanying text); Feliciano v. Rosemar Silver Co., 401 Mass. 141, 514 N.E.2d 1095 (1987).

[50] *See* Comment, *Consortium Rights of Unmarried Cohabitants*, 9 AM. J. TRIAL ADVOC. 145, 154 (1985). *See also* Comment, *Iowa Unmarried Cohabitants Denied Recovery for Loss of Consortium*, 69 IOWA L. REV. 811, 818 (1984) (injury affects de facto spouse in same way it affects de jure spouse).

[51] *See* Comment, *Modern Day Reality*, *supra* note 9, at 518-19. For further discussion see *infra* notes 52-127 and accompanying text.

[52] *See, e.g.*, Kiesel v. Peter Kiewit & Sons' Co., 638 F. Supp. 1251 (D. Haw. 1986) (granting summary judgment to deny cohabitors' loss of consortium action); Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980) (allowing loss of consortium action to cohabitors); Butcher v.

a wrongfully harmed person whole again by compensating him for an injury that was caused by another. While this general goal alone arguably weighs in favor of extending the loss of consortium action to cohabitors, the courts have resisted the extension on grounds of policy.

These policy concerns typically include the following: (1) a perceived lack of legal precedent supporting the extension of the loss of consortium action; (2) the belief that the action arises out of the marital relationship; (3) the expectation that an extension of the action to cohabitors would devalue the institution of marriage; (4) the fear that allowing such an extension would open the floodgates of liability to all foreseeable plaintiffs; and (5) the concern that any test used to determine whether a cohabitor should be allowed the action would place too great a burden on the courts.

1. The lack of legal precedent

The lack of legal precedent argument is commonly used by courts when faced with a new or expanded cause of action. Where there is no precedent, courts are reluctant to allow expansion of the common law. Common law progresses, however, only when courts are willing to take the risk of setting new precedent, or going against whatever precedent already exists. Without such risk taking, the common law would remain rigid and static, never modified to adapt to our changing society.[53]

When the *Hitaffer* court rendered its decision in favor of a wife's loss of consortium action, it was defying years of contrary legal precedent. The *Hitaffer* court acknowledged this by concluding that "we are not unaware of the unanimity of authority elsewhere denying . . . recovery under these circumstances . . . .[However,] after a careful examination of these cases we remain unconvinced that the rule which they laid down should be followed."[54]

The landmark decision of *Bulloch v. United States*[55] similarly defied existing precedent by allowing an unmarried cohabitor's loss of consortium action to proceed. In *Bulloch*, the New Jersey federal district court allowed an unmarried

---

Superior Court of Orange County, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983) (allowing loss of consortium action to cohabitors); Comment, *Modern Day Reality*, *supra* note 9 (supporting extension of loss of consortium action to cohabitors); Comment, *Should Marriage Be Retained*, *supra* note 10 (against extending loss of consortium action to cohabitors).

[53] As one commentator has noted, "[t]he inherent capacity of the common law to grow and change is its most significant feature. Its development has been determined by the needs of the community which it serves." Comment, *Modern Day Reality*, *supra* note 9, at 519-20. *See also infra* text accompanying notes 80-81.

[54] Hitaffer v. Argonne, 183 F.2d 811, 813 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950).

[55] 487 F. Supp. 1078 (D.N.J. 1980).

female to recover for loss of consortium when her male counterpart was severely injured and rendered impotent.[56] Edith and David Bulloch had previously been married and had two children together. Their marital relationship deteriorated, however, and they subsequently obtained a decree of divorce.[57] They continued to keep in close contact throughout the divorce, and prior to David's accident had agreed to a reconciliation and made plans to remarry.[58] David's accident occurred, however, before the remarriage took place, and while David and Edith were still living in separate homes.[59]

In her loss of consortium suit, Edith argued that "a legal marriage is not a required element of proof in a consortium claim."[60] The court agreed, pointing out that although previous cases on the subject held marriage as necessary to the consortium claim, none of the cases cited any authority for this proposition.[61] The court considered four factors in rendering its decision: (1) the absence of a case showing authority for establishing marriage as a necessary prerequisite;[62] (2) the current trend of increased cohabitation and its similarity to marriage;[63] (3) recent decisions by the New Jersey Supreme Court holding that cohabitation is lawful and should not be penalized;[64] and (4) the fact that the public policy favoring tort compensation is stronger than the policy favoring marriage.[65]

Soon after *Bulloch*, the New Jersey state courts voiced their criticisms of the decision claiming that it was an incorrect interpretation of state law.[66] In spite of this criticism, the impact of *Bulloch* was felt. Three years later, a California state court followed its example.

In *Butcher v. Superior Court of Orange County*,[67] the California Court of Appeal held, as the *Bulloch* court had, that an unmarried cohabitant may state a cause of action for loss of consortium.[68] Thus *Butcher* was the first case in which

---

[56] *Id.* at 1081.

[57] *Id.* The Bullochs had been married for approximately 26 years. *Id.*

[58] *Id.* The Bullochs were divorced on February 17, 1977 and had agreed to a reconciliation prior to David's accident on May 21, 1977. *Id.*

[59] *Id.*

[60] *Id.* at 1079.

[61] *Id.*

[62] *See* Note, *Loss of Consortium: Extending Recovery to Unmarried Couples in Texas*, 35 BAYLOR L. REV. 543, 549 (1983) [hereinafter Note, *Extending Recovery*] (citing *Bulloch*, 487 F. Supp. at 1079).

[63] *Id.* (citing 487 F.Supp. at 1080).

[64] *Id.* (citing 487 F.Supp. at 1083).

[65] *Id.* (citing 487 F.Supp. at 1084).

[66] *See* Comment, *Should Marriage Be Retained*, *supra* note 10, at 848.

[67] 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983).

[68] *Id.* at 71, 188 Cal. Rptr. at 512.

a state court recognized this cause of action.[69]

The facts of *Butcher* are compelling. The plaintiffs were Paul and Cindy Forte, a couple who had never been formally married but who considered themselves married at common law.[70] Paul Forte was injured when he was struck by Ralph Butcher's car as Forte was crossing the street.[71] As a result, Forte sustained injuries to his neck, forearm, and leg, along with a severe cerebral contusion.[72] Paul Forte sued for his personal injuries and Cindy Forte sued for her subsequent loss of consortium.[73]

At the time of the accident, the Fortes had lived together for more than eleven years, during which time they had raised two children, filed joint income tax returns, and maintained joint savings and checking accounts.[74] The Fortes considered their marriage valid, and represented each other as husband and wife to the general public.[75] The court decided in favor of Cindy Forte's loss of consortium claim, after observing that the Fortes' relationship was both "significant and stable."[76]

Since *Bulloch* and *Butcher*, no other court has similarly expanded the loss of consortium cause of action.[77] Instead, the *Bulloch* and *Butcher* decisions have been severely criticized in a manner reminiscent of the intense opposition the *Hitaffer* decision met with thirty years earlier.[78] Thus, *Bulloch* and *Butcher* still stand alone in allowing a loss of consortium claim by an unmarried cohabitant.[79]

---

[69] *See* Note, *Extending Recovery*, *supra* note 62, at 544.

[70] *Butcher*, 139 Cal. App. 3d at 60, 188 Cal. Rptr. at 505.

[71] *Id.* at 59, 188 Cal. Rptr. at 504.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 60, 188 Cal. Rptr. at 505.

[75] *Id.*

[76] *Id.*

[77] One court applied the *Butcher* stable and significant test to a cohabitor's claim for loss of consortium, but found that plaintiffs failed to prove that approximately one month of cohabitation while one "spouse" was still legally married to another person was stable or significant. Grant v. Avis Rent A Car System, Inc., 158 Cal. App. 3d 813, 204 Cal. Rptr. 869 (1984). Another court denied summary judgment of plaintiff's loss of consortium claim where the couple was engaged on the date of the accident and were married two months later. The court, without mentioning *Bulloch* or *Butcher*, called it callous to compare the taking of a wife to that of an employer hiring an employee. Stahl v. Nugent, 212 N.J. Super. 340, 514 A.2d 1367 (1986).

[78] *See, e.g.*, Kiesel v. Peter Kiewit & Sons' Co., 638 F. Supp. 1251, 1253-54 (D. Haw. 1986) (lack of legal criteria makes it difficult to distinguish "stable and significant" relationships from other relationships); Ledger v. Tippitt, 164 Cal. App. 3d 625, 637-38, 210 Cal. Rptr. 814, 820-21 (1985) (*Butcher* court's definition of "stable and significant" invites mischief and inconsistent results); Childers v. Shannon, 183 N.J. Super. 591, 441 A.2d 1141 (1982) (marriage is the only dependable means by which relationship can be defined).

[79] *See, e.g.*, Curry v. Caterpillar Tractor Co., 577 F. Supp. 991 (Pa. 1984) (no loss of consor-

One reason for this is that courts justifiably feel constrained by traditional doctrines well and long established in the common law. However, as one commentator noted, "the common law is not a codification of exact or inflexible rules for human conduct, but is rather a forum wherein the needs of the time can be scrutinized to ensure that current rules of law are promoting justice."[80] Arguably, "[t]he inherent capacity of the common law to grow and change is its most significant feature. Its development has been determined by the needs of the community which it serves."[81]

Another reason is some courts feel they should await a legislative decision on this issue before taking action. However, since both the loss of consortium action and the limitation of this action to married parties were created by the

---

tium where couple cohabited for fifteen years without marriage and raised three children together); Lewis v. Hughes Helicopter, Inc., 175 Cal. App. 3d 403, 184 Cal. App. 3d 1184, 193 Cal. App. 3d 569, 220 Cal. Rptr. 615 (1985); *Review granted Feb. 20, 1986 (S.F. 24984) Reprinted without change in 184 Cal. App. 3d 1134, to permit tracking pending review by Supreme Ct. Reprinted without change in 193 Cal. App. 3d 569, to permit tracking pending review by Supreme Ct* (no loss of consortium where marriage occurred two weeks after husband's accident); Elden v. Sheldon, 164 Cal. App. 3d 745, 210 Cal. Rptr. 755 (1985) (unmarried cohabitant cannot claim loss of consortium or negligent infliction of emotional distress); Hendrix v. General Motors Corp., 146 Cal. App. 3d 296, 193 Cal. Rptr. 922 (1983) (court declined to follow *Butcher*, holding marriage as a necessary prerequisite for loss of consortium claims); Lieding v. Commercial Diving Center, 143 Cal. App. 3d 72, 191 Cal. Rptr. 559 (1983) (no loss of consortium when plaintiffs were engaged but not married on the date of the accident); Tong v. Jocson, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977) (no loss of consortium where the plaintiffs were engaged and living together when the accident occurred, and were married two weeks later); Tremblay v. Carter, 390 So. 2d 816 (Fla. 1980) (no loss of consortium where the accident occurred before the marriage); Laws v. Griep, 332 N.W.2d 339 (Iowa 1983) (court recognized the couple possessed a "stable and significant" relationship but dismissed the loss of consortium claim for the cohabitors); Gillespie-Linton v. Miles, 58 Md. App. 484, 473 A.2d 947 (1984) (court denied loss of consortium claim where engaged couple was married four days after the accident); Rockwell v. Liston, 71 Pa. D. & C.2d 756 (1975) (no loss of consortium where the parties were engaged but not married); Denil v. Integrity Mutual Ins. Co., 135 Wis. 2d 373, 401 N.W.2d 13 (1986) (no loss of consortium where couple married two months after accident). However, the United States District Court for the District of Pennsylvania has allowed recovery to a man whose fiancee was injured just three months before the wedding, but damages accrued only after the wedding. Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127 (E.D. Pa. 1973).

[80] *See* Comment, *Modern Day Reality*, *supra* note 9, at 513.

[81] *Id.* at 520. The lack of legal precedent or established opposing legal precedent arguably should be irrelevant when standards established long ago are obsolete in modern society. As Justice Oliver Wendell Holmes once remarked:

> It is revolting to have no better reason for a rule of law than that so it was laid in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Whitmire v. Jewell, 223 Kan. 67, ____, 573 P.2d 573, 575 (1977) (Owsley, J., dissenting) (quoting O.W. HOLMES, COLLECTED LEGAL PAPERS 187 (1920)).

courts at common law, it seems consistent and appropriate that the courts should be the vehicle through which the action is modified or extended in the face of changing societal realities.[82]

2. *The loss of consortium claim as arising out of the marital relationship*

A distinction must be made between marriage and the marital relationship at the outset. Marriage is the "legal union of one man and one woman as husband and wife."[83] The marital relationship concerns the emotional qualities of the marriage, such as the love, comfort, and security shared by the partners.[84] The significance of marriage per se is the legal status it creates, while the significance of the marital relationship is the relational interest.[85] It is recognized, for example, that a husband and wife each possess such a valuable interest in the continuance of their spousal relationship that, when one is injured, the other is injured as well.[86]

The modern loss of consortium claim stresses the importance of protecting the marital relationship from interference by providing compensation for injuries to the relationship.[87] Most courts, however, view the marital relationship as existing only between couples who are legally married. For example, in *Sawyer v. Bailey*,[88] the Supreme Court of Maine denied the loss of consortium claim of a man whose wife was injured when they were still engaged.[89] The *Sawyer* court

---

[82] One commentator notes "as the obstacles to the cohabitants' cause of action are judge-invented, they should be judge-destroyed." Comment, *Modern Day Reality*, *supra* note 9, at 520.

[83] BLACK'S LAW DICTIONARY 876 (5th ed. 1979).

[84] *Butcher*, 139 Cal. App. 3d at 65, 188 Cal. Rptr. at 508 (1983).

[85] The law of torts is also concerned with what Professor Prosser calls " 'relational' interests, founded upon the relation in which the plaintiff stands toward one or more third persons." PROSSER & KEETON ON TORTS, *supra* note 3, § 124, at 915.

[86] *See* General Electric Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972). In *Bush*, the husband was severely injured when his skull was crushed while assisting in the reassembly of a giant vehicle as part of his employment duties. *Id.* at ____, 498 P.2d at 367. In affirming the wife's recovery for loss of consortium, the court noted that "the basis of the wife's recovery is the anguish which she suffers when the injury to her husband destroys or impairs those components that make for the traditional marriage. . . ." *Id.* at ____, 498 P.2d at 370. "[T]his is an example of a single tortious act which harms two people by virtue of their relationship to each other." *Id.* at ____, 498 P.2d at 371.

[87] Donough v. Vile, 61 Pa. D. & C. 460 (1947).

[88] 413 A.2d 165 (Me. 1980).

[89] *Id.* at 169. In *Sawyer*, the wife was injured in a car accident after her engagement was announced but two months before her wedding day. *Id.* at 166. She sued the defendant driver of the other vehicle for personal injuries, and her husband sued for loss of consortium, since she was treated for injuries up to and after the wedding day and required surgery thereafter. *Id.* The court affirmed the grant of summary judgment for the defendant on the grounds that the husband suffered no injury since he had no marital right at the time of the accident, and took his wife as

noted that "the law is concerned with the protection of the relational interests of married persons and recognizes as an actionable tort any interference . . . with the continuation of the relation of husband and wife."[90]

The court acknowledged the fact that it possessed the power to broaden causes of action to provide remedies for tortious conduct.[91] The *Sawyer* court, however, decided against affording redress for the wrong committed against the fiancee in this case, and decided, instead, to maintain the status quo.[92]

"The essential disagreement is whether the action for loss of consortium [was] intended to protect the institution of marriage, or whether it [was] intended to protect the relationship embodied in the marriage."[93] If it was intended to protect the marriage itself, the loss of consortium claim for cohabitants must necessarily fail. It is at least arguable, however, that the action was intended to protect the marital relationship. If this is so, then cohabitors may base a claim for protection of their relationship on the ground that their relationship is equivalent to a marital relationship.

Cohabitors often have relationships that are as enduring, loving, and family-oriented as married couples. In reaching its decision, the *Butcher* court noted that "the relationship of unmarried cohabitants bears every resemblance to the spousal relationship, including the sexual aspect absent from other relationships, except that the relationship has not been solemnized by a formal marriage ceremony."[94]

Marital and cohabitation relationships are often "familial." Familial relationships traditionally have been looked upon as the foundations of society, regardless of their legal status and formality.[95] In *Stanley v. Illinois*,[96] for example, the United States Supreme Court explained that "[t]he Court has frequently emphasized the importance of the family. . . . Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony . . . familial bounds in such cases [are] often as warm, enduring, and important as those arising within a more formally organized family unit."[97]

In *Stanley*, the Supreme Court recognized that the importance of family relationships does not necessarily depend upon whether the relationships have legal validation. Certainly, marital relationships often form the foundation for family relationships; and thus, marital relationships are clearly deserving of court pro-

---

she existed on her wedding day. *Id.* at 167.

[90] *Id.* at 167.

[91] *Id.*

[92] *Id.*

[93] *See* Note, *Should California*, *supra* note 22, at 1467.

[94] *Butcher*, 139 Cal. App. 3d at 65, 188 Cal. Rptr. at 508.

[95] *See* Stanley v. Illinois, 406 U.S. 645 (1972).

[96] 406 U.S. 645 (1972).

[97] *Id.* at 651-52.

tection. Arguably, however, it is the "familial" aspect of the relationship which makes it worthy of protection through a loss of consortium action, and not the fact that the relationship happens to have been legally validated. In any event, the losses suffered by unmarried cohabitants when one partner is seriously injured are as real and as damaging to the cohabitation relationship as the same injury would be to a married couple.[98] Thus, if the loss of consortium action was intended to protect certain intimate *relationships*, and not merely the *institution* of marriage itself, then many (if not all) cohabitation relationships would appear to deserve such protection.

3. Extending the action to cohabitors will devalue marriage

Another policy reason for not allowing a cohabitor's loss of consortium action is that this allowance may devalue the institution of marriage. There is no doubt that marriage is beneficial to society, and that the states and the courts have done their best to protect it and encourage it. One court recently cautioned, for example, that courts should not allow claims that may increase the popularity of a relationship that may, in time, become a substitute for marriage.[99]

Similarly, in *Marvin v. Marvin*,[100] the California Supreme Court held that "the structure of society itself largely depends upon the institution of marriage. . . . The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."[101] Without denying the social and personal value of marriage, it is important to note that the focus of the *Marvin* court was on the marital relationship, and not on the legal institution of marriage *per se*.[102] Nev-

---

[98] *Butcher*, 139 Cal. App. 3d at 67, 188 Cal. Rptr. at 509-10. *See also* Comment, *Consortium Rights of Unmarried Cohabitants*, 9 AM. J. TRIAL ADVOC. 145, 154 (1985); Comment, *Iowa Unmarried Cohabitants Denied Recovery for Loss of Consortium*, 69 IOWA L. REV. 811, 818 (1984).

[99] Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). In *Hewitt*, plaintiff lived with defendant for fifteen years in a family-like relationship to which three children were born. In this action, she sought a division of profits and property accumulated during that period. *Id.* at ____, 394 N.E.2d at 1205. The court held that plaintiff's claims were unenforceable since there was no valid marriage and to grant her claims would be to contravene public policy. *Id.* at ____, 394 N.E.2d at 1211.

[100] 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

[101] *Id.* at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.

[102] The plaintiff and defendant had lived together for seven years without marrying, during which time all property was acquired in defendant's name. An oral contract was made in 1964 where the parties agreed to combine efforts and earnings while living together and to share equally in all property accumulated, and to publicly hold each other as husband and wife. Plaintiff gave up her career to serve as homemaker and defendant promised to support her for life. Defendant later kicked plaintiff out of the house and refused to support her further. The court

ertheless, the court's language appears to reflect a presumption that the relationship shared by married couples is unique and importantly different from all other relationships.[103] In the case of cohabitation, however, this presumption is clearly open to question.[104]

In addition, there is no evidence that a court decision allowing or even supporting an alternative living arrangement will encourage couples, who would otherwise get married, to choose this alternative.[105] The unavailability of a loss of consortium action to cohabitors normally is not the deciding factor when couples consider marriage.[106] As the *Bulloch* court concluded, allowing legal redress for legitimate injuries to cohabitors does not necessarily mean that the institution of marriage is devalued.[107] Thus, absent more persuasive evidence, the argument that marriage will be devalued by allowing unmarried cohabitors a loss of consortium action appears weak.

4. *Expansion of liability to all foreseeable plaintiffs*

Setting limits to the liability of tortfeasors is a topic of great concern among the courts. Limits are necessary because "[e]very injury has ramifying consequences, like the ripplings of the waters without end."[108] The concern regarding loss of consortium is that, if the action is granted to unmarried couples, the courts may have no legal criteria for preventing brothers, sisters, friends, and other relatives from bringing the same type of action. The courts are therefore faced with a conflict between the need to promote justice and redress injuries on the one hand, while still maintaining control over the legal consequences attributed to tortious conduct on the other.[109]

One way of limiting tortfeasors' liability is to appeal to the notion of foresee-

---

granted plaintiff's request for declaratory relief. *Id.* at 666, 557 P.2d at 110-11, 134 Cal. Rptr. at 819-20.

[103] *See* Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977). In *Borer*, nine children claimed the loss of consortium of their mother, due to injuries she suffered when the cover of a lighting fixture fell and struck her in defendant's airline terminal. *Id.* at 445, 563 P.2d at 861, 138 Cal. Rptr. at 305. In denying recovery, the court reasoned that there are "significant differences between the marital relationship and the parent-child relationship that support the limitation of a cause of action for loss of consortium to the marital situation. . . ." *Id.* at 444, 563 P.2d at 860, 138 Cal. Rptr. at 304-05.

[104] *See supra* text accompanying notes 83-98.

[105] *See* Comment, *Loss of Consortium Claims by Unmarried Cohabitants: The Roles of Private Self-Determination and Public Policy*, 57 IND. L. REV. 605, 617-18 (1982).

[106] *Id.* at 618; *Bulloch*, 487 F. Supp. at 1086.

[107] *Bulloch*, 487 F. Supp. at 1085-86.

[108] Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969).

[109] *Id.*

ability. In *Borer v. American Airlines, Inc.*,[110] the California Supreme Court reasoned that even though the plaintiff must be foreseeably related to the person injured to claim loss of consortium, not all foreseeable plaintiffs are allowed to state such a claim.[111] If all foreseeable plaintiffs were allowed to recover for loss of consortium, the potential liability of the tortfeasor would be proportional to the size of the injured person's family, since all his relatives, and perhaps his friends, could bring their own claims.[112] This situation could be avoided in its entirety, however, by limiting loss of consortium claims according to the type of relationship the foreseeable plaintiff shares with the injured party.

The *Butcher* court focused on the spousal nature of the relationship shared by married persons and cohabitors alike. More specifically, the court focused on the sexual aspects that distinguish these relationships from all others.[113] The challenge facing the *Butcher* court was to develop a test that would evaluate the relationships of unmarried cohabitors to allow remedies for legitimate claims, while avoiding the "floodgate" problem.[114] This was necessary since even by limiting the loss of consortium claim to cohabitors, excluding friends and relatives, there was still the chance that courts would be flooded with frivolous cohabitor claims.

The standard put forth by the *Butcher* court was that the cohabitation relationship must be both "stable and significant."[115] The burden would fall on the plaintiff to prove that the relationship meets both criteria. If this were accomplished, the relationship would be deemed the equivalent of a marital relationship, and it would be treated as such with regard to a loss of consortium cause of action.[116] The basic elements considered in demonstrating that the relationship is stable and significant under the *Butcher* test are as follows: (1) the duration of the relationship; (2) whether or not the parties have a mutual contract; (3) the degree of economic cooperation and interdependency; (4) the exclusivity of each partner's sexual relations; and (5) whether the element of a family relationship involving children is present.[117]

It is possible, of course, that cohabitors may fabricate these elements, but the safeguard is that cohabitors must prove these elements before they can even bring an action. By applying the *Butcher* test to the relationship of the cohabitor bringing a claim for loss of consortium, courts can measure the sincerity of the plaintiff, and determine whether there is actually a relationship present that has

---

[110] 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

[111] *Id.* at 446, 563 P.2d at 861-62, 138 Cal. Rptr. at 305-06.

[112] *Id.* at 446, 563 P.2d at 862, 138 Cal. Rptr. at 306.

[113] *Butcher*, 139 Cal. App. 3d at 69, 188 Cal. Rptr. at 511.

[114] *Id.*

[115] *Id.* at 70, 188 Cal. Rptr. at 512.

[116] *Id.*

[117] *Id.*

been damaged.

Thus, the *Butcher* test provides an objective mechanism whereby courts can focus upon the nature of the relationship between the parties, and distinguish between those relationships which are equivalent to the marital relationship, and those which are not. By allowing a loss of consortium action only when the *Butcher* criteria have been met, courts can control the floodgates without denying compensation to those individuals who have suffered the very type of loss which the loss of consortium action is intended to redress.

5. *Extending loss of consortium will place too great a burden on the courts*

In *Weaver v. G. D. Searle*,[118] an Alabama federal district court held that the *Butcher* test was so difficult that it was impossible to apply in the real world.[119] One of the court's concerns was that the test is too time consuming and burdens courts with deciding which cases warrant action and which cases do not. In the interest of judicial efficiency, the court favored a bright-line test with a legal marriage as the determinative factor.[120]

This argument loses force, however, when it is recognized that even a legally married plaintiff in a loss of consortium action must prove that a sufficient relationship exists, and that it has been damaged.[121] The marriage certificate only serves to get the plaintiff into the courtroom. Once there, the plaintiff is questioned as to the duration and quality of the relationship, to facilitate the computation of damages. Thus, courts arguably should have no added difficulties in deciding between legitimate and frivolous claims by cohabitors since courts already engage in relational investigations to determine damages in loss of consortium actions.

In *Ledger v. Tippet*,[122] the California Court of Appeal criticized the *Butcher* test on the ground that the definitions of the test invited "mischief and inconsistent results."[123] Because of difficulties with the words "significant" and "stable," the *Ledger* court concluded that the *Butcher* test would cause both jurors

---

[118] 558 F. Supp. 720 (N.D. Ala. 1983).

[119] *Id.* at 723. In *Weaver*, plaintiff wife was injured prior to marriage by an intrauterine device manufactured by defendant. She sued for her injuries and her husband sued for loss of consortium. *Id.* at 720. Defendant moved for summary judgment of the husband's claim since they were not married when the injury occurred, claiming "a man cannot, by marrying, acquire a cause of action for loss of his wife's services." *Id.* The court agreed and granted the motion. *Id.* at 724.

[120] *Id.* at 723-24.

[121] *See* Comment, *Should California*, *supra* note 22, at 1489.

[122] 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985).

[123] *Id.* at 637, 210 Cal. Rptr. at 820.

and courts to "guess as to its meaning and differ as to its application."[124]

However, "[c]ourts have often successfully met the challenge of making determinations in areas where the subject of the inquiry is not readily quantifiable."[125] The dissent in *Ledger* echoed this observation, and disagreed with the majority that the *Butcher* standard would confuse jurors.[126] In fact, the dissent found little difference between a juror applying the *Butcher* test, and a juror applying the reasonable doubt standard in criminal proceedings or the reasonably prudent person standard in negligence cases.[127]

In summary, the reasoning used by courts to deny a cause of action for loss of consortium to cohabitors seems generally unpersuasive. The *Bulloch* and *Butcher* cases provide legal precedent for those courts reluctant to act without such precedent. The similarity between a marital relationship and many cohabitors' familial relationships seems to weigh against the argument that marriage is a unique institution and should be consequently protected as such. Moreover, there is no evidence nor reason to believe that allowing cohabitor claims would erode the institution of marriage.

Finally, the *Butcher* test could be used to limit the liability of defendants, preventing the floodgates from being thrown open. Such a test would be no more burdensome to judge or juror than those standards already applied every day in courts across the nation. Thus, without stronger arguments against allowing cohabitors the loss of consortium action, it appears arbitrary and unreasonable for the courts to continue to deny cohabitors the relational protections to which they are arguably entitled.

B. Hawaii as a Unique Forum for Expansion of the Loss of Consortium Action

As the melting pot of the Pacific, Hawaii is unique in its sense of "family." The great mixture of ethnic backgrounds in Hawaii has created family units that vary as much as the people do. Children are often heard calling unrelated adults "aunty" or "uncle," signifying that there are people outside the traditional family unit that are considered relatives of the family in spirit if not by blood. This unorthodox view of family and relationships makes Hawaii uniquely qualified to be a forum for expansion of the loss of consortium action, since the Hawaii courts are experienced in dealing with non-traditional relationships.

---

[124] *Id.* at 639, 210 Cal. Rptr. at 821.

[125] *See* Comment, *Should California*, *supra* note 22, at 1488-89.

[126] *Ledger*, 164 Cal. App. 3d at 648-51, 210 Cal. Rptr. at 828-30.

[127] *Id.* at 649, 210 Cal. Rptr. at 828.

1. Hawaii's tradition of protecting relational interests

The Hawaii Supreme Court has already exhibited a willingness to break new ground in the area of relational interests. In *Leong v. Takasaki*,[128] the court allowed recovery for emotional distress to a young boy who witnessed the death of his step-grandmother.[129] Prior to *Leong*, recovery for emotional distress had been allowed only when the plaintiff was a blood relative of the person whose injury had been witnessed.[130] In rejecting the blood-relationship requirement, the *Leong* court implied that the bond between the plaintiff and his step-grandmother had been sufficiently strong to warrant recovery.[131] In particular, the court noted that the relationship had been close and loving, and the step-grandmother had lived in the same house as the plaintiff for several months.[132] Thus, *Leong* reflects the Hawaii Supreme Court's willingness to reach beyond the previously determined scope of the law in order to promote fairness and to redress otherwise uncompensable injuries, in certain circumstances.

The Hawaii *Death by Wrongful Act* statute[133] also shows a willingness on the part of the state legislature to expand protection of relational interests. Loss of consortium is comparable to the tort of mental distress in that both actions recognize that a person may suffer real emotional injury as a result of physical injury to another. The Hawaii legislature has extended recovery for wrongful death to include the resulting loss of consortium. This claim is available to the spouse, children, parents, and anyone else who qualifies as a dependent of the deceased,[134] irrespective of any marital relationship.

Hawaii courts have also recognized that the state has a special interest in

---

[128] 55 Haw. 398, 520 P.2d 758 (1974).

[129] *Id.* at 413, 520 P.2d at 767. In *Leong*, the plaintiff, a ten year-old boy, brought an action for negligent infliction of emotional distress after he had witnessed his stepfather's mother being struck and killed by the defendant's vehicle. The plaintiff had been crossing the street hand-in-hand with his step-grandmother before she was killed. *Id.* at 400, 520 P.2d at 760. The plaintiff had suffered nervous shock and psychic injuries, but no physical injuries. *Id.* at 399, 520 P.2d at 760. The Hawaii Supreme Court reversed the trial court's grant of summary judgment for the defendant, and found in favor of the plaintiff. *Id.* at 413, 520 P.2d at 767.

[130] *Id.* at 410, 520 P.2d at 767. The reason for this blood-relationship requirement is that the defendant's duty to the plaintiff is tested on foreseeability standards rather than proximate cause. *Id.* at 410, 520 P.2d at 765-66. The court recognized that family structures in Hawaii are different, noting that "Hawaiian and Asian families of this state have long maintained strong ties among members of the same extended family group." *Id.* at 410, 520 P.2d at 766. The court, therefore, determined that absence of blood-relationship should not foreclose recovery but rather the plaintiff should be permitted to prove the nature of his relationship with the victim. *Id.* at 410-11, 520 P.2d at 766.

[131] *Id.* at 410, 520 P.2d at 766.

[132] *Id.* at 400, 520 P.2d at 760.

[133] HAW. REV. STAT. § 663-3 (1985). For the text of the statute, see *supra* note 35.

[134] *Id.*

protecting certain relationships, even absent a valid marriage. In 1906, for example, the Supreme Court of the Territory of Hawaii, in *Godfrey v. Rowland*,[135] upheld the validity of a common law marriage, reasoning that the requirement of a marriage license was not mandatory, even though a state statute provided for it.[136] Fourteen years later, the same court, in *Parke v. Parke*,[137] overruled *Godfrey* on a statutory basis, and reinforced the proposition that Hawaii law does not recognize common law marriages.[138] Of even greater significance, perhaps, was the *Parke* court's determination that marriage is more than just a civil contract creating legal status. It also creates a relationship between the parties.[139]

The Territorial court later departed somewhat from this trend of relational interest recognition, but was quickly guided back on track by the Ninth Circuit Court of Appeals in the 1928 decision of *Fung Dai Kim Ah Leong v. Lau Ah Leong*.[140] In *Ah Leong*, the plaintiff brought an action to establish an interest in the property held by the defendant. The plaintiff had been married to the defendant in a Chinese wedding without a marriage license, and lived with him as his wife for thirty-five years, helping with his business and raising their thirteen children.[141] The defendant subsequently left the plaintiff, taking everything with him.[142] Although the marriage was legally invalid, the long duration of the marital relationship, and plaintiff's underlying understanding and expectation that she would receive a pecuniary benefit, entitled her to a measure of relief.[143] The court noted that "[i]n common usage, equity protects relationships and vindicates rights not recognized in a court of law, and we are of the opinion that there is here substantial ground for the exercise of its jurisdiction."[144]

---

[135] 16 Haw. 377 (1906).

[136] *Id.* at 380. *Godfrey*, involved an action of ejectment where it was necessary for the plaintiff to prove that Thomas Metcalf was the legitimate son of Frank Metcalf, and consequently, that his parents were lawfully married. *Id.* at 378. The court found that the requirement of a license to make a marriage valid is directory and not mandatory unless accompanied by a provision of nullity. *Id.* at 380. The court noted that "failure to obtain a marriage license, as required by section 1879, however, is not made a ground for declaring a marriage void." *Id.*

[137] 25 Haw. 397 (1920).

[138] *Id.* at 405. In *Parke*, the husband died intestate and Frances Parke, the plaintiff, filed a claim alleging that she was his lawful wife at the time of his death. *Id.* at 398. There was no showing of a license to marry. She and her husband had taken each other, by mutual contract and agreement, as husband and wife. *Id.* at 399-400. The court, therefore, affirmed the dismissal of the plaintiff's claim. *Id.* at 405.

[139] *Id.* at 404.

[140] 27 F.2d 582 (9th Cir. 1928).

[141] *Id.* at 582

[142] *Id.*

[143] *Id.* at 585.

[144] *Id.*

Since *Ah Leong*, Hawaii has experienced growing acceptance of unmarried cohabitation despite the fact that common law marriages are not recognized. In 1972, the Hawaii State Legislature repealed the laws creating criminal sanctions and prohibitions against adultery and fornication.[145] The rationale for the repeal was that the legislature regarded the statutes as "[serving] no social function."[146]

A decade later, in 1982, a Hawaii circuit court in *Artiss v. Artiss*,[147] exercised the equity powers identified in *Ah Leong*. Margaret and Frank Artiss had cohabited for a number of years without being married, had represented themselves to the public as husband and wife, and had raised four children under the family name.[148] Upon the Artiss' separation, Margaret sued Frank for one-half of all the accumulated property. In ordering the property division, the court noted that "[i]n the exercise of this Court's equity powers, it has the power to adapt to new conditions (including new lifestyles) arising out of different social or economic systems . . . to adopt a new rule appropriate to relationships unknown to common law."[149]

In determining the stability and significance of the cohabitor's relationship, the *Artiss* court utilized a detailed but practical test. The relevant factors considered in the test include whether the cohabitation was continuous, the duration of the relationship, whether children were born out of the relationship, whether the cohabitors represented themselves to the public as husband and wife including the wife's and children's use of the husband's surname, and whether each cohabitor contributed his or her efforts in the accumulation of wealth.[150]

Although the *Artiss* case dealt with property division between cohabitors upon separation, the test appears to be useful in determining whether a cohabitor has stated an actionable claim for loss of consortium. The information necessary to answer the *Artiss* questions is easily obtained through pre-trial discovery. Of course, courts would have to use their best judgment in determining what length of duration makes a relationship worthy of an action, and whether

---

[145] The laws were formerly the Revised Laws of Hawaii Sections 309-6 to -13 (1955):

> In recent years, one of the most significant and widely-accepted advances in the penal law has been the recognition that the social harm, if any, from consensual sexual activity between mature persons in private is not significant enough to warrant a penal sanction and that other institutions of government and society are better equipped to ameliorate any social ills which may result from such conduct.

HAW. REV. STAT. CHAP. 707 PT. IV, INTRODUCTION (1985).

[146] H.R. CONF. COM. REP. NO. 1, 6th Sess. at 1038 (1972).

[147] Civ. No. 58973 (Haw. 1st Cir. Jan. 4, 1982), 82-1 HAW LEGAL REP. 82-0253 (1982).

[148] *Id.* at 82-0257 to -0258.

[149] *Id.* at 82-0279.

[150] The court noted that "[a]n actual family has been defined as a basic societal living group which is a) centered around cohabiting adults and b) who accept mutual assumption of rights, duties and obligations towards one another." *Id.* at 82-0283.

a particular cohabitation relationship has met all of the *Artiss* factors satisfactorily. In the interest of justice, however, it may be better "to let proof of the relationship itself, its purpose, its duration and the like determine the merits of the claim,"[151] rather than preclude all claims by cohabitors from ever reaching the court for trial on the merits. The *Artiss* test together with the *Butcher* stable and significant test provides Hawaii courts with a means for assessing cohabitation relationships so as to determine whether a loss of consortium action should be allowed to lie in a given case.

2. *The* Kiesel *case: a setback to the possibility of cohabitor claims for loss of consortium in Hawaii*

Although Hawaii law, both statutory and common law, has grown to recognize the importance and significance of cohabitation relationships, a Hawaii state court has yet to be afforded an opportunity to decide whether the cohabitation relationship should merit an action for loss of consortium when a cohabitor is wrongfully injured. In 1986, however, the United States District Court for the District of Hawaii, sitting in admiralty, was given such an opportunity.

Kiesel v. Peter Kiewit & Sons' Co.[152] came before the district court on a defense motion for summary judgment.[153] The motion concerned plaintiff Ethel Kiesel's claim for loss of her husband John Kiesel's consortium.[154] The defendant's only supporting argument was that Ethel Kiesel was not entitled to recover for loss of consortium because she was not married to John Kiesel at the time of the accident.[155]

The plaintiffs admitted they were not married when the accident occurred, nor were they married when the hearing took place. They contended, however, that Ethel Kiesel was John Kiesel's common-law wife for more than twenty years,[156] and should therefore be afforded the right to a loss of consortium claim. Plaintiffs reasoned that the loss Ethel Kiesel suffered was the same, regardless of whether she was married or not.[157] In addition, plaintiffs argued that their relationship so resembled marriage that Ethel Kiesel should be al-

---

[151] *Id.* at 82-0282.

[152] 638 F. Supp. 1251 (D. Haw. 1986).

[153] *Id.* at 1251.

[154] *Id.*

[155] Memorandum in Support of Motion for Partial Summary Judgment at 2, *Kiesel*, 638 F. Supp. 1251 (1986).

[156] Memorandum in Opposition to Motion for Partial Summary Judgment at 3, *Kiesel*, 638 F. Supp. 1251 (1986).

[157] *Id.*

lowed to pursue her loss of consortium claim.[158]

The Kiesels had lived together continuously for more than twenty-two years before the accident occurred, and had openly represented themselves to the public as husband and wife.[159] They raised two sons together, both of whom use the surname "Kiesel" as does their mother. The Kiesels also shared the financial responsibility for the family and the ownership of their property.[160]

In ruling against the Kiesels, the court noted that since the case was brought in admiralty, the law of the state where the injury occurred was not controlling. Instead, the law of the majority of states needed to be considered.[161] Despite this rule of law, the court specifically found that Hawaii law required a valid marriage as a prerequisite to a loss of consortium action.[162]

The court also specifically rejected *Butcher's* "stable and significant" test and refused to recognize a trend among the states of allowing unmarried cohabitants to recover for loss of consortium.[163] In conclusion, the court explained:

> Of necessity, the general federal maritime law lags slightly behind the common law of the individual states. Where the general state of the common law is itself far from settled, a federal district court sitting in admiralty should not be quick to apply a questionable legal proposition to the general maritime law.[164]

Although the *Kiesel* decision is certainly a setback to Hawaii's progression towards allowing cohabitors the loss of consortium action, its precedential value is limited. The district court's interpretation of Hawaii law was dicta, and possibly incorrect. State courts may still rule on this issue, applying state law,[165] or creating new law to meet the demands of justice in a changing society. Because of Hawaii's particular interest in protecting familial relationships, regardless of the existence of valid marriages, it would be consistent for Hawaii courts to extend the common law and allow cohabitors an action for loss of consortium.

IV. CONCLUSION

The loss of consortium cause of action has evolved from its original connec-

---

[158] *Id.*

[159] Affidavit of John Kiesel, *Kiesel*, 638 F. Supp. 1251 (1986).

[160] *Id.*

[161] *Kiesel*, 638 F. Supp. at 1254.

[162] *Id.*

[163] *Id.* at 1254. However, the court did recognize a trend of allowing recovery for intangible elements in domestic relations, instead of for lost services. *Id.*

[164] *Id.*

[165] In fact, the court suggested that "[i]f modern social conditions are to mandate a different result, it must come from the legislature or the state courts." *Id.*

tion with the master-servant relationship. For many years, loss of consortium was an action only the husband could bring due to the wife's subservient status in society and the marriage.

In the past century, the loss of consortium action has expanded to give wives a cause of action, and to provide compensation for a relational interest injured by outside interference. The emphasis of the action has shifted away from the loss of services and toward the loss of love, affection, society, comfort, and sexual relations.

Traditionally, a valid marriage was necessary to the loss of consortium action. However, a changing society and a dramatic increase in unmarried cohabitation is challenging this requirement. At present, only two courts have allowed unmarried cohabitors a claim for loss of consortium, and both court decisions have been severely criticized but the arguments given against expanding the common law are unpersuasive.

Hawaii courts have recognized cohabitation as a legitimate alternative living arrangement in other areas of law, and it would be consistent for Hawaii also to recognize it as grounding an actionable claim for loss of consortium. It is hoped that the courts in Hawaii and elsewhere will eventually treat cohabitors who exhibit stable and significant relationships on an equal basis with married people under law. This will entitle cohabitors to the legal rights and protection that they arguably deserve, but have traditionally been denied.

Carol Ann Lum

Asahi Metal Industry, Co., Ltd. v. Superior Court of California, Solano County: Personal Jurisdiction at the Crossroads

I. INTRODUCTION

Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County[1] is the United States Supreme Court's most recent, and perhaps most perplexing,[2] decision regarding the assertion of *in personam* jurisdiction over out-of-state defendants.[3] While the Court was unanimous in deciding that the assertion of personal jurisdiction over Asahi was unreasonable,[4] the Court divided sharply[5] when it considered the appropriate role of "minimum contacts"[6] in jurisdictional analysis.

This note provides a detailed discussion of the *Asahi* case and an overview of personal jurisdiction case law as articulated by the United States Supreme Court. Part II of the note provides the facts and procedural history of the *Asahi* case.[7] Part III examines the history of the law of personal jurisdiction.[8] Part IV examines the Court's unanimous holding that personal jurisdiction over Asahi was unreasonable and also examines the sharp split in the Court concerning minimum contacts analysis.[9] Part V examines the impact of the *Asahi* decision on personal jurisdiction analysis.[10]

---

[1] 107 S. Ct. 1026 (1987).

[2] *See infra* notes 172-245 and accompanying text.

[3] Terms used in this note will include "foreign," connoting an "out-of-state" defendant, and "alien," connoting a defendant who is not a U.S. citizen.

[4] *See infra* notes 156-71 and accompanying text.

[5] *See infra* notes 172-245 and accompanying text.

[6] Minimum contacts as a threshold step to jurisdictional analysis had its birth in International Shoe Co. v. Washington, 326 U.S. 310 (1945). It has developed a considerable progeny, a portion of which is discussed *infra* at notes 39-155 and accompanying text.

[7] *See infra* notes 11-33 and accompanying text.

[8] *See infra* notes 34-150 and accompanying text.

[9] *See infra* notes 151-216 and accompanying text.

[10] *See infra* notes 217-38 and accompanying text.

II. FACTS

Asahi began as a products liability suit filed in the Superior Court of California, Solano County, by Gary Zurcher. Zurcher was involved in an accident while operating his Honda motorcycle on a California highway. His wife was a passenger on the motorcycle at the time of the accident. Zurcher was severely injured in the accident, and his wife was killed.[11]

Zurcher claimed that the accident was caused by a defect in the rear tire of his motorcycle, which caused the tire to explode.[12] Zurcher alleged that the motorcycle tire, tube and sealant were defective.[13]

In his complaint, Zurcher named, *inter alia*, Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tube. Cheng Shin in turn filed a cross-complaint seeking indemnification from Asahi Metal Industry Co., Ltd. (Asahi), the Japanese manufacturer of the tube's valve assembly.[14] Zurcher and Cheng Shin eventually settled[15] leaving the indemnity claim by Cheng Shin against Asahi as the only remaining cause of action.[16]

Asahi moved to quash Cheng Shin's service of summons,[17] arguing that assertion of *in personam* jurisdiction by the California court[18] would violate the due process clause of the fourteenth amendment.[19] Certain information was provided to the trial court in relation to Asahi's motion to quash. This information revealed that Asahi manufactured tire valve assemblies in Japan,[20] and that the valves were sold to Cheng Shin and others for use in finished tires.[21] The valves were shipped from Japan by Asahi and purchased by Cheng Shin in Taiwan.

From 1978 through 1982, Asahi sold approximately 1,350,000 valves to Cheng Shin.[22] "Cheng Shin estimated that 20 percent of its sales in the United States are in California."[23] An attorney for Cheng Shin attested that an informal

---

[11] 107 S. Ct. at 1029.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] California Superior Court, Solano County. *Id.*

[19] The jurisdictional reach of California's Long-Arm Statute is coextensive with the limits of the Due Process Clause. 107 S. Ct. at 1030. *See* CAL. CIV. PROC. CODE § 410.10 (West 1973).

[20] 107 S. Ct. at 1030.

[21] *Id.*

[22] *Id.*

[23] In 1978: 150,000 valves; 1979: 500,000 valves; 1980: 500,000 valves; 1981: 100,000 valves; and 1982: 100,000 valves. These sales accounted for 1.24 percent of Asahi's income in 1981 and 0.44 percent in 1982. *Id.*

survey of a California motorcycle store revealed that 18% of all tube tires carried Asahi valves, and 10% of the Cheng Shin tires carried Asahi valves.[24]

Cheng Shin then asserted that Asahi was "fully aware that valve systems sold" to Cheng Shin would "end up . . . in California."[25] Asahi did not deny this assertion, stating instead that it "never contemplated that its limited sales of tire valves to Cheng Shin in Taiwan would subject it to lawsuits in California."[26]

The California Superior Court denied Asahi's motion to quash, reasoning that the international scope of Asahi's business rendered Asahi amenable to suit wherever its product caused injury.[27] The State Court of Appeal reversed, issuing a peremptory writ of mandate to quash the service of summons.[28] The court declared that "it would be unreasonable to require Asahi to respond in California solely on the basis of ultimately realized foreseeability that the product into which its component was embodied would be sold all over the world including California."[29]

The California Supreme Court reversed the Court of Appeal and held the exercise of jurisdiction to be consistent with the due process clause.[30] The California Supreme Court acknowledged that Asahi did not conduct direct sales, solicit business, or maintain offices, agents, or property in California.[31] However, the court premised jurisdiction on two factors: (1) Asahi deliberately placed its goods into the stream of commerce by its sales to Cheng Shin; and (2) Asahi was aware that some of its goods would be sold in California.[32] As a result, Asahi received indirect benefits through the Cheng Shin distribution scheme, which, combined with Asahi's knowledge of that scheme, rendered the assertion of personal jurisdiction consistent with the due process clause.[33] Asahi appealed to the United States Supreme Court which granted certiorari.

---

[24] The attorney claimed that of a total 115 tube tires, 21 valve stems carried the Asahi trademark. Of these 21 valve stems, 12 were "incorporated into Cheng Shin tire tubes." *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* (quoting the Court of Appeal of the State of California).

[30] 107 S. Ct. at 1031

[31] *Id.*

[32] *Id.*

[33] *Id.*

III. HISTORY OF THE LAW

A. Introduction

In the landmark case of *Pennoyer v. Neff*[34] the United States Supreme Court held that a state's boundaries set the limits on its jurisdictional reach over non-residents.[35] While *Pennoyer* recognized some exceptions,[36] the general rule of the case required actual physical presence in the forum before a court had power over an individual defendant.[37]

As interstate travel increased,[38] alternate jurisdictional theories evolved. Three theories gained prominence: (1) implied consent,[39] (2) presence,[40] and (3) doing business.[41]

A significant break with *Pennoyer* occurred in 1945, in *International Shoe v. Washington.*[42] There, the Washington state courts asserted personal jurisdiction over the International Shoe Company (the "Company").[43] Washington sought to collect unemployment compensation fees from the Company. The Company argued that *in personam* jurisdiction would be improper because it had no offices in Washington, nor did it stock merchandise, maintain an agent to receive process, or initiate contracts there.[44] The Company was a Delaware corporation with its primary place of business in St. Louis.[45] However, the Company did employ eleven to thirteen salesmen in Washington.[46] These salesmen solicited

---

[34] 95 U.S. 714 (1877).

[35] *Id* at 720.

[36] These areas were generally related to a state court's ability to grant a binding divorce for its citizens, even if one of the spouses lived out-of-state; or a state requirement upon non-residents who entered in-state partnerships to appoint an agent to receive service of process. *Id.* at 722.

[37] "[N]o natural person is subject to the jurisdiction of a court of the State, 'unless he appear in the court, or be found within the State . . . .' " *Id.* at 720 (citation omitted).

[38] An example of this is the increased reach of the nation's railways and the invention of the automobile.

[39] *See* Kane v. State of New Jersey, 242 U.S. 160 (1916) (state could require a foreign motorist to file a formal instrument appointing a New Jersey agent to receive process prior to using the state's highways).

[40] *See* Philadelphia and Reading R.R. v. McKibbin, 243 U.S. 264 (1917) ("A foreign corporation is amenable to process to enforce a personal liability in the absence of consent, only if it is doing business within the state in such manner . . . as to warrant the inference that it is present there."). *Id.* at 265-66.

[41] This theory utilized aspects of the consent and presence theories, but resulted in "fine lines which made little sense in terms of either theory." J. COUND, J. FRIEDENTHAL, A. MILLER, J. SEXTON, CIVIL PROCEDURE 79 (1985).

[42] 326 U.S. 310 (1945).

[43] *Id.* at 313.

[44] *Id.*

[45] *Id.*

[46] *Id.*

orders from prospective buyers,[47] and would occasionally rent hotel rooms as temporary show cases for the Company's products.[48] Although the salesmens' roles were confined to soliciting orders and forwarding them to the Company in St. Louis, the Company did receive substantial revenues from their activity in Washington.[49]

In addressing the question of whether the Washington courts could assert personal jurisdiction over the Company, the United States Supreme Court adopted a more flexible jurisdictional standard than the one articulated in *Pennoyer*:

> Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[50]

Significantly, the Court declined to formulate a "bright-line" rule as to the sufficiency of minimum contacts:

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely . . . whether the activity . . . is a little more or a little less . . . . [W]hether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of laws which it was the purpose of the due process clause to ensure.[51]

The test articulated in *International Shoe* has remained the standard for *in personam* jurisdiction analysis.[52] Yet the vagueness of its lines has given birth to a

---

[47] *Id.* at 313-14.

[48] *Id.* at 314.

[49] *Id.* at 320.

[50] *Id.* at 316.

[51] *Id.* at 319.

[52] The *International Shoe* Court laid the foundation for what ultimately became the standard analytical framework in personal jurisdiction issues. Although vague at its inception, the *International Shoe* test evolved into a two-step test, with "minimum contacts" as the threshold, followed by a "convenience" or "reasonableness" step. The former required that a defendant have at least some contact with the forum state before he is haled before its tribunals. The latter examined the relative inconvenience caused a defendant if he was forced to litigate in a distant forum. The amount of contacts a defendant must have with the forum has been the subject of great debate in the United States Supreme Court. *See infra* notes 92-103, 115-23, 148-55, 174-92, 194-213, 215-21 and accompanying text for examples of this debate. The "convenience" or "reasonableness" factors, which the *International Shoe* Court noted in passing as "[a]n 'estimate of the inconveniences' which would result to the [defendant] from a trial away from its 'home' . . .," has

series of Supreme Court decisions which have alternately expanded,[53] then retracted,[54] the jurisdictional reach of state courts over nonresidents.

B. In Personam Jurisdiction Since International Shoe

McGee v. International Life Ins. Co.[55] provided the Court with its first opportunity to implement the test articulated in *International Shoe*. The Court's analysis appeared to herald an expansive jurisdictional approach.

McGee involved a California resident[56] who sought to collect insurance benefits from a Texas-based insurance company.[57] Suit was based on a California statute which imposed personal jurisdiction over foreign corporations that issued insurance policies to state residents.[58] Service of process was made through registered mail.[59]

The California trial court rendered a judgment for the plaintiff, who was unable to execute it in California.[60] The plaintiff traveled to Texas and instituted suit on the judgment there.[61] The Texas court refused to enforce the judgment holding it void under the fourteenth amendment because service of process outside California could not give the courts of that state jurisdiction

---

been expanded upon considerably. 326 U.S. at 313. For example, it was expanded in McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957). In *McGee* the Court weighed not only the burden on the defendant who was forced to litigate far from home, but added the interests of the forum state in providing effective redress for its citizens, the plaintiff's interests in obtaining relief and the location of witnesses as relevant "convenience" or "reasonableness" step inquiries. Additionally, World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), articulated a list of factors which must be weighed at the "convenience" or "reasonableness" step of analysis. In *World-Wide* the Court noted that the inconvenience which might burden a foreign defendant will, when appropriate, be weighed against the "forum State's interest in adjudicating the dispute[,] . . . the plaintiff's interest in obtaining convenient and effective relief[,] . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interests of the several States in furthering fundamental substantive social policies." 444 U.S. at 292 (citations omitted). The factors enunciated in *McGee* and *World-Wide Volkswagen* have been utilized in part or in full in each subsequent personal jurisdiction case decided by the Supreme Court. *See infra* notes 129-33, 148-55, 157-65 and accompanying text for examples of the Court's use of these factors in various cases.

[53] *See, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984). *See infra* notes 60-78 and accompanying text.

[54] *See, e.g.*, Hanson v. Denckla, 357 U.S. 235 (1958); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980). *See infra* notes 79-123 and accompanying text.

[55] 355 U.S. 220 (1957).

[56] *Id.* at 221.

[57] *Id.* at 221-22.

[58] *Id.* at 221.

[59] *Id.*

[60] *Id.*

[61] *Id.*

over respondent.[62]

The United States Supreme Court reversed,[63] noting that although the insurance company never maintained an office or agent in California, never solicited business or did any insurance business in California aside from the instant policy,[64] jurisidiction was in fact proper:

> Looking back over this long history of litigation, a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part, this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.[65]

Turning from policy considerations, the Court directed its attention to the test articulated in *International Shoe*.[66] The Court determined that minimum contacts were established if the defendant's contact involved a "substantial connection"[67] with the forum state. The single insurance contract was found to satisfy the "substantial connection" test because the contract was delivered in California, the premiums were mailed from there, and the insured resided there.[68]

The Court also noted several additional factors which substantiated the reasonableness of jurisdiction. It noted that California had an interest in protecting its residents from foreign insurers who refused to pay.[69] Additionally, the Court considered the plaintiff's interest in having access to relief without incurring the burden of traveling to distant states,[70] the location of witnesses,[71] and the lack of undue inconvenience to the defendant.[72]

Thus, *McGee* seemed to herald widely expanded state jurisdictional reach.

---

[62] *Id.*

[63] *Id.* at 222.

[64] *Id.*

[65] *Id.* at 222-23.

[66] *Id.* at 223.

[67] *Id.* at 222.

[68] *Id.*

[69] *Id.* The statute enacted evidenced this forum state interest.

[70] The court noted that "[w]hen claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof." *Id.* at 223.

[71] *Id.*

[72] *Id.* at 224.

The "substantial connection" test[73] was satisfied by a single contract carried out in California. Moreover, the reasonableness factors seemed to carry great weight in the determination of whether personal jurisdiction was proper. Yet, barely six months later,[74] in *Hanson v. Denckla*,[75] the Supreme Court issued a decision which retreated from an expansive jurisdictional reach.

Hanson v. Denckla involved a Florida state court assertion of *in personam* jurisdiction over a Delaware trustee.[76] In 1935, decedent established a trust instrument in Delaware.[77] At the time, decedent resided in Pennsylvania.[78] In 1944, decedent moved to Florida and remained there until her death in 1952.[79] Decedent conducted "several bits of trust administration"[80] from Florida, and trust income was mailed from the Delaware trustee to decedent at her Florida home.[81] When decedent died, competing beneficiaries brought suit in Florida.[82] The Delaware trustee was named in the suit as a defendant.[83] The trustee refused to appear and the Florida Supreme Court asserted personal jurisdiction over the trustee, ruling in favor of the plaintiffs.[84] The United States Supreme Court reversed.[85]

The Court acknowledged that the standard for asserting personal jurisdiction over nonresidents had relaxed from the "rigid rule of *Pennoyer v. Neff*,[86] . . . to the flexible standard of *International Shoe v. Washington*."[87] However, it also noted that:

> it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not

---

[73] *Id.* at 223.

[74] *McGee* was decided on December 16, 1957. *Hanson* was decided on June 23, 1958.

[75] 357 U.S. 235 (1958).

[76] *Id.* at 240-43.

[77] Wilmington Trust Co., of Wilmington, Delaware, was named as trustee. *Id.* at 238.

[78] *Id.*

[79] *Id.* at 239.

[80] *Id.* at 252. The Court noted that these activities were comparable to the mailing of insurance premiums from the forum state in *McGee*.

[81] The only relationship the defendant had with Florida was the trust at issue. Defendant never maintained offices, administered other trusts or solicited business in Florida. *Id.* at 251-52.

[82] *Id.* at 240.

[83] Notice was provided by ordinary mail and publication in accordance with a Florida Statute. *Id.* at 242-43.

[84] *Id.*

[85] *Id.* at 256.

[86] 95 U.S. 714 (1877).

[87] 326 U.S. 310 (1945).

> be called upon to do so unless he has had the minimal contacts with that state that are a prerequisite to its exercise of power over him.[88]

Moving from the standard enunciated in *McGee*, which seemed to suggest that contacts could be minimal indeed[89] if certain convenience factors were present,[90] the *Hanson* Court appeared to increase the level of required contacts in jurisdictional analysis. The *Hanson* Court stated that the contact requirement could only be met if "there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[91]

The "purposeful availment" test could not be satisfied by "[t]he unilateral act of those who claim some relationship with a nonresident defendant."[92] Since the trustee's contacts with Florida were solely a result of decedent's change in residence, "the suit cannot be said to enforce an obligation that arose from a privilege the defendant exercised in Florida."[93]

The *Hanson* decision seemed to dispel any notion that *Pennoyer v. Neff* was to be abandoned as a historical relic.[94] By invoking the notion of state territorial limits[95] and focusing upon the *defendant's* activity in relation to the forum state, the Court took a step away from the plaintiff-oriented "substantial connection test" articulated in *McGee*.[96] While *McGee* suggested that even minimal contacts would suffice if convenience interests[97] were sufficiently compelling,

---

[88] 357 U.S. at 251 (citation omitted).

[89] A single contact satisfied the "substantial connection test" enunciated in *McGee*. 355 U.S. at 223.

[90] The various convenience factors include interests of the forum state, plaintiff's interest in judicial relief, and the relative inconvenience to a defendant.

[91] 357 U.S. at 253 (relying on International Shoe v. Washington, 326 U.S. 310 (1945)) (emphasis added).

[92] *Id.*

[93] *Id.* at 253. *Cf. International Shoe*, 326 U.S. at 319 (The Court distinguished *McGee* by noting that, in *McGee*, the defendant solicited the insurance policy from the forum state resident. This solicitation, combined with the convenience factors, justified California's imposition of personal jurisdiction. In *Hanson*, the trustees conducted no solicitation. Its contacts with Florida resulted solely from decedent's change in residence.)

[94] Indeed, in a separate opinion, Justice Black noted that the *Hanson* Court's "decision that Florida did not have jurisdiction over the trustee (and inferentially the nonresident beneficiaries) stems from principles stated the better part of a century ago in Pennoyer v. Neff." 357 U.S. at 259-60 (Black, J., dissenting) (citation omitted).

[95] *Id.* at 251.

[96] The "substantial connection" test seemed satisfied so long as some contact was made by the defendant and convenience or reasonableness factors were present. As Justice Black noted, the defendant trustee clearly had "substantial connections" with Florida evidenced by eight years of correspondence with the decedent as well as its agency relationship with her. *Id.* at 259-60 (Black, J., dissenting.)

[97] *See supra* note 94.

Hanson reminded the states of their territorial limits, and reinvigorated the notion that contacts initiated by the defendant were the primary focus of inquiry in jurisdictional analysis.[98]

C. Personal Jurisdiction Analysis In The 1980s

Since 1980, the United States Supreme Court has issued several decisions concerning matters of personal jurisdiction.[99] *World-Wide Volkswagen v. Woodson*[100] was the first such case.[101]

In *World-Wide Volkswagen*, the plaintiffs purchased an Audi automobile from Seaway Volkswagen, Inc.,[102] a local retail dealer of Volkswagen products incorporated in New York.[103] World-Wide Volkswagen was a distributor of Volkswagen parts, accessories and vehicles,[104] serving various retail dealers, including Seaway, in the tri-state area of New York, New Jersey and Connecticut.[105]

The plaintiffs drove their Audi through Oklahoma enroute to their new home in Arizona.[106] While in Oklahoma, their car was struck from behind by a truck, which ignited the car's fuel tank and caused the plaintiffs severe burns.[107] They subsequently brought a products liability action in Oklahoma, alleging that their injuries resulted from defective design and placement of the fuel tank.[108] Seaway and World-Wide, among others, were joined in the suit.[109]

The United States Supreme Court declared that *in personam* jurisdiction could not be validly asserted over Seaway or World-Wide. Two closely knit issues were relevant to this holding: the "stream of commerce" theory and "notice" to the defendant.

The "stream of commerce" theory was upheld by the Supreme Court as a valid ground for imposing personal jurisdiction.[110] Simply stated, this theory

---

[98] 375 U.S. at 251.

[99] *See infra* notes 106-55 and accompanying text.

[100] 444 U.S. 286 (1980).

[101] Decided January 21, 1980.

[102] 444 U.S. at 288-89.

[103] *Id.* at 289.

[104] *Id.*

[105] *Id.* at 288.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] Also joined were the manufacturer, Audi NSU Auto Union Aktiengesellschaft ("Audi"); and its importer, Volkswagen of America, Inc. ("Volkswagen"). Neither Audi nor Volkswagen contested Oklahoma's assertion of personal jurisdiction. *Id.* at 288 n.3.

[110] *Id.* at 297.

would support personal jurisdiction "if the sale of a product of a manufacturer or distributor . . . arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states . . . ."[111]

However, the Court would not extend this theory to those cases where a retail distributor sold its product to a consumer and the consumer took the product to the forum state where the injury occurred. While the Court acknowledged that a retail seller of automobiles could, for example, foresee that its product might end up in a distant state, such foreseeability was not enough for personal jurisdiction purposes.[112] Rather, the due process clause required that a defendant "purposefully avail itself of the privilege of conducting activities within the forum state . . . [and] ha[ve] clear notice that it is subject to suit there".[113]

While the Court had little trouble in determining that a manufacturer or distributor of products could be sued in a forum where his products were sold, it was unconvinced that a retail dealer serving a local market, whose product was taken to the forum by a consumer, had in fact "purposely availed itself of the privileges of conducting activities within the forum . . ."[114] The concept of "notice" was central to the Court's distinction between manufacturers and distributors on the one hand, and localized retail dealers, on the other. In the former case, the manufacturer or distributor benefitted from sales of its product in the forum. As such, "it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its ties with the state . . ." [115] In contrast, the retailer serving a limited local or regional market benefits primarily from local sales. To subject such a dealer to suit wherever a customer took its chattel would merely place the retailer on notice that it is potentially subject to suit in every state of the country, with no comparable opportunity to minimize the risk of litigation in a distant state.[116]

When the Court applied this analysis to the facts of *World-Wide*, it found that there were insufficient grounds for Oklahoma to assert *in personam* jurisdic-

---

[111] *Id.*

[112] *Id.* at 298.

[113] *Id.* at 297.

[114] *Id.*

[115] *Id.*

[116] The Court declared that "[i]f foreseeability were the criterion, the local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, . . .; a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, . . .; or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there . . ." 444 U.S. 295-96 (citations omitted).

tion over defendants. First, the scope of defendants distribution network was too localized and limited to meet the crucial notice requirement. Moreover, the only contact between defendants and the forum was the fact that the accident in which plaintiffs were injured fortuitously occurred in Oklahoma. Thus, the "purposeful availment" requirement also had not been met.[117]

The vigorous dissent in *World-Wide* highlighted the notion that the majority was again restricting the scope of personal jurisdiction.[118] But in 1984, and again in 1985, the Court issued two decisions that seemed to swing the pendulum back to a more expansive view. The 1984 decision of *Keeton v. Hustler Magazine, Inc.*[119] involved a libel suit brought in a New Hampshire state court by a New York State resident against Hustler Magazine, an Ohio corporation.[120] The Supreme Court in *Keeton* had little difficulty determining that jurisdiction was appropriate[121] based on the personal jurisdiction test of minimum contacts and reasonableness.

The Court first noted that Hustler's monthly sale of 10,000 to 15,000 copies of its magazine in New Hampshire[122] "[could not] by any stretch of the imagination be characterized as random, isolated or fortuitous."[123] Thus, the minimum contacts requirement was met. The Court then discussed several "reasonableness factors."[124] The Court determined that the interests of the forum state,[125] the plaintiff's interest,[126] and Hustler's inability to claim surprise by

---

[117] *Id.* at 295.

[118] In separate dissents, Justice Brennan argued that convenience factors may augment minimal contacts and render jurisdiction reasonable. *Id.* at 309-10 (Brennan, J., dissenting). Justice Marshall noted that no distinction necessarily exists between a product entering the forum state in a "channel of distribution" as opposed to entering the forum "in the course of its intended use of the consumer." *Id.* at 315 (Marshall, J., dissenting). Justice Blackmun argued that "foreseeable use in another state seems . . . to be little different from foreseeable resale in another state." *Id.* at 318-19 (Blackmun, J., dissenting).

[119] 465 U.S. 770 (1984).

[120] *Id.* at 772.

[121] The court's decision was unanimous, in marked contrast to its recent forebearers. *See supra* notes 99 and 123 and accompanying text.

[122] 465 U.S. at 772.

[123] *Id.* at 774.

[124] *See supra* note 95 and accompanying text.

[125] Interestingly, the New Hampshire State Court of Appeals dismissed Keeton's claim because it found only minimal state interest in adjudicating this claim. The Supreme Court disagreed: "[I]t is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the state." 465 U.S. at 776.

[126] Justification for the plaintiff's interest was found because "[t]he reputation of the libel victim may suffer harm even in a state in which he has hitherto been anonymous. *Id.* at 777 (footnote omitted). The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation was, however small, at least unblemished." *Id.*

being haled into a New Hampshire Court,[127] were collectively sufficient to support New Hampshire's assertion of *in personam* jurisdiction.

Most interesting in this opinion was Justice Rehnquist's approval of the notion that a "plaintiff's residence in the forum may, because of the defendant's relationship with the plaintiff, enhance [the] defendant's contacts with the forum."[128] This notion of "enhanced contacts" seemed to increase the importance of the "reasonableness tier" of analysis.[129] The point was apparently that a defendant's contacts with the forum may be *augmented* for purposes of due process jurisdictional analysis, if the nature of the defendant's relationship with the plaintiff renders the interests of the plaintiff and the forum state especially compelling. While the precise contours of the relationship the defendant and plaintiff must have are unclear, Justice Rehnquist's analysis may mean that contacts usually considered too minimal to support an assertion of personal jurisdiction may become sufficient if the plaintiff's interests and the forum state's interests are compelling in light of the contacts.[130]

The Supreme Court expanded upon this idea one year later in *Burger King Corporation v. Rudzewicz*.[131] In *Burger King*, Justice Brennan's broad view of personal jurisdiction finally found its voice in a majority opinion.[132]

In *Burger King*, the defendants, two Michigan residents, entered into a franchise agreement with the plaintiff, Burger King, a Florida corporation.[133] Primary negotiations regarding the franchise agreement took place in Birming-

---

[127] No undue inconvenience would attach to Hustler being forced to litigate in New Hampshire because "Hustler, . . . which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor or other commercial partner. *Id.* at 779.

[128] *Id.* at 780 (relying upon Calder v. Jones, 465 U.S. 783 (1984) and McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957)).

[129] *See supra* note 57.

[130] Such an analysis seems to be a marked departure from the much more rigid personal jurisdiction approach in *World-Wide Volkswagen*, which noted that: "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." 444 U.S. at 294 (citation omitted).

[131] 471 U.S. at 462.

[132] Before the *Burger King* decision, Justice Brennan's views were frequently relegated to separate dissenting or concurring opinions. *See, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (Brennan, J., dissenting); Keeton v. Hustler Magazine Inc., 465 U.S. 770 (1984) (Brennan, J., concurring); Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982) (Brennan, J., concurring); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) (Brennan, J., dissenting); Hanson v. Denckla, 357 U.S. 235 (1958) (Brennan, J., dissenting).

[133] 471 U.S. at 466.

ham, Michigan, at Burger King's district office.[134] Defendants signed "standard boilerplate"[135] contracts indicating that Florida law would control the franchise relationship,[136] despite the fact that the defendants were to deal "with the Birmingham office on a regular basis."[137] Defendant's applied for the franchise at the Birmingham office and they conducted almost all of their dispute resolution in Birmingham.[138]

Ultimately, the defendants suffered financial problems, and the plaintiff moved to terminate the franchise.[139] Suit was initiated in a Florida Federal District Court.[140] The District Court found a sufficient basis for the assertion of *in personam* jurisdiction, but the Eleventh Circuit Court of Appeals reversed.[141] The United States Supreme Court reversed the court of appeals and held that the district court had properly asserted personal jurisdiction. The Supreme Court's decision incorporated nearly every case on personal jurisdiction decided in the past half-century,[142] and Justice Brennan, writing for the majority,

---

[134] The district office was located in Birmingham, Michigan. Burger King Corporation maintained a two-tier management system. "The governing contracts provide[d] that the franchise relationship [was] established in Miami and governed by Florida law, and call[ed] for payment of all required fees and forwarding all relevant notices to the Miami headquarters." *Id.* at 465-66 (citation omitted). "The Miami headquarters sets policy and works directly with its franchisees in attempting to resolve major problems . . . . Day to day monitoring of franchisees, however, was conducted through a network of 10 district offices which in turn report[ed] to the Miami headquarters." *Id.*

[135] *Id.* at 487 (Stevens, J., dissenting).

[136] *Id.* at 465-66.

[137] *Id.* at 467 n.7.

[138] *Id.* at 488 (Stevens, J., dissenting).

[139] *Id.* at 466.

[140] *Id.* at 468. Specifically, the action was brought in the United States District Court for the Southern District of Florida. Federal subject matter jurisdiction was based on two theories: (1) diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) which required the federal district court to invoke the Florida Long-Arm Statute; and (2) original jurisdiction over federal trademark disputes pursuant to 28 U.S.C. § 1338(a).

[141] The eleventh circuit found that "the circumstances of the . . . franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of litigation in Florida." Burger King v. MacShara, 724 F.2d 1505, 1513 (11th Cir. 1984). Following this decision, MacShara did not appeal, leaving only Rudzewicz a party to the suit. 471 U.S. at 469, n.11.

[142] Included in the *Burger King* analysis were: International Shoe Co. v. Washington, 326 U.S. 310, (1945); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) (distinguishing "general" from "specific" jurisdiction); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958); Shaffer v. Heitner, 433 U.S. 186 (1977); Kulko v. California Superior Court, 436 U.S. 84 (1978); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694 (1982); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Calder v. Jones, 465 U.S. 783 (1984); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

adopted a test with broad jurisdictional implications. He adopted the *McGee*[143] "substantial connection" test[144] and seemed to indicate that, so long as the relevant connection could not be deemed "as 'random,' 'fortuitous,' or 'attenuated,' "[145] imposition of personal jurisdiction would be appropriate.[146]

The "substantial connection" test, as elaborated in *Burger King*, included a consideration of whether plaintiff's injuries were "foreseeable",[147] and whether the defendant's affiliation with the forum state was "knowing".[148] If these factors were present, they would militate in favor of imposing personal jurisdiction over the defendant. Indeed, much of the language of prior cases regarding a heightened concern with the defendant's contacts with the forum[149] was minimized, and dovetailed in *Burger King* into a single "substantial connection" test. Based upon how the test was applied in *McGee*[150] and *Burger King*, the implication is that the contacts required for *in personam* jurisdiction may be minimal indeed, when the plaintiff's interests are sufficiently compelling. Thus, *Burger King* seemed to expand considerably the extent to which courts could assert personal jurisdiction over foreign defendants.

IV. ANALYSIS

This section of the note is divided into two subsections. Subsection A considers the United States Supreme Court's unanimous finding that personal jurisdiction over Asahi was unreasonable.[151] Subsection B focuses on the sharp split by the Court regarding the proper analytical framework for minimum contacts in personal jurisdiction questions.

A. Reasonableness

The *Asahi* Court had little difficulty in determining that personal jurisdiction asserted by a California state court[152] over Japanese and Taiwanese litigants[153]

---

[143] *See supra* note 60 and accompanying text.

[144] *See supra* note 149.

[145] 471 U.S. at 486.

[146] *Id.* at 487.

[147] *Id.* at 480.

[148] *Id.*

[149] *See supra* notes 121-23 and accompanying text.

[150] 355 U.S. 220 (1957).

[151] Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 107 S. Ct. 1026 (1987).

[152] *Id.* at 1029.

[153] Cheng Shin Rubber Industrial Co., Ltd., was a Taiwan corporation; Asahi Metal Industry Co., Ltd., was a Japan corporation. *Id.* at 1029-30.

involving a claim for indemnification[154] was unreasonable. The Court used the traditional analysis[155] by which reasonableness is determined and concluded that the *Asahi* facts could not justify a finding of *in personam* jurisdiction.

The Court first found that several of the traditional criteria for establishing reasonableness in jurisdictional analysis were absent in *Asahi*. For example, the plaintiff's interest in obtaining relief in California was minimal because Cheng Shin made no showing that California was a more appropriate or convenient forum than Taiwan or Japan.[156] Moreover, California's interest in providing its citizens with access to judicial relief against foreign defendants was no longer a factor since the only California resident involved in the suit had settled out of court. This left Cheng Shin's crossclaim for indemnification against Asahi as the only remaining cause of action.[157] Accordingly, the state's interest in providing its citizens with access to judicial relief against foreign defendants did not apply.[158] The Court noted, however, that the dispute was "primarily about indemnification rather than *safety* standards."[159] Thus, a question remained as to whether personal jurisdiction over Asahi would have been reasonable if a safety standard issue were invloved, and if the California plaintiff had not settled his claim.[160]

Of primary importance in *Asahi*, however, was the Court's discussion of the propriety of imposing personal jurisdiction over an alien defendant,[161] given the expanded nature of international commerce. Aware that a defendant's alien status in jurisdictional analysis would have far reaching implications in future cases, the Court declared that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international

---

[154] *See supra* note 20 and accompanying text.

[155] In discussing the "reasonableness" factors, the Court noted that it "must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief." 107 S. Ct. at 1034. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.' " *Id.* (quoting World-Wide Volkswagen v. Woodson, 444 U.S. at 229 (1980)).

[156] *Id.* at 1034.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] Indeed, the Supreme Court of California "argued that the state had an interest in 'protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards'." 107 S. Ct. at 1034 (citation omitted). Such a concern with safety seemingly militated in favor of the assertion of personal jurisdiction by the Supreme Court of California. Additionally, *McGee*, *Keeton*, and *Burger King* all suggested that the plaintiff's interests and forum state's interest could support the assertion of personal jurisdiction even in the face of very minimal contacts. *See supra* notes 72-78, 113-35, 150-55 and accompanying text.

[161] 107 S. Ct. at 1034.

field."[162] Yet, the Court also noted that investigations into the burden on an alien defendant will "differ from case to case."[163] Such case-by-case treatment may lend special credence to the decisions of those lower courts which have allowed alien status to *enhance* the possibility of personal jurisdiction being asserted over a defendant.[164]

The *Asahi* Court refused to delineate a bright line rule as to the effect of a defendant's alien status upon the jurisdictional inquiry. Consequently, it failed to reconcile conflicting lower court opinions[165] as to the treatment of this issue and seemed to leave open the possibility that very different results will occur throughout the federal and state court systems. The Court's approach in *Asahi* may reflect a continuing reluctance to formulate any bright line standards in the realm of personal jurisdiction. Indeed, had the Court desired to insure special protection for alien defendants, the *Asahi* case provided it an opportunity to do so.[166] The question, therefore, remains open as to the weight that a defendant's alien status carries in making the assertion of jurisdiction more or less likely.

B. *The Minimum Contacts Threshold*

1. *Introduction*

The Supreme Court Justices were clearly divided in *Asahi* on the issue of minimum contacts in personal jurisdiction analysis. The plurality opinion offered two[167] and perhaps three[168] alternate methods of analysis for this thresh-

---

[162] *Id.* at 1035. (quoting United States v. First National City Bank, 379 U.S. 378 (1965) (Harlan, J., dissenting)).

[163] *Id.* at 1034.

[164] *See, e.g.*, Hendrick v. Daiko Shoji Co., Ltd., Osaka, 715 F.2d 1355, 1359 (9th Cir. 1983) (involving an Oregon longshoreman injured when a Japanese splice proved defective. The court noted that defendant's awareness that his product entered the world market and plaintiff's burden of litigating in Japan combined with no discernible conflict with Japan's sovereign interests supported imposition of personal jurisdiction); Poyer v. Erma Werke GMBH, 618 F.2d 1186, 1191-92 (6th Cir. 1980) (the court noted that personal jurisdiction over a German manufacturer of guns was reasonable in part because "many foreign enterprises dominate our markets . . . [and because of] the influx of foreign goods to our shores . . ."); Engineered Sports Products v. Brunswick Corp., 362 F. Supp. 722, 729 (D. Utah 1973) (noting that the case for imposing personal jurisdiction when the defendant is an alien is "strengthened . . . since the apparent choice presented the court is not between domestic forums but between domestic and alien forums" (citations omitted)).

[165] *See infra* note 178-83.

[166] Both the plaintiff and defendant in *Asahi* were aliens. This fact pattern seemed to beg the question of precisely how *in personam* jurisdiction ought to be applied to aliens.

[167] Justice O'Connor was joined by Justices Rehnquist, Powell and Scalia. Justice Brennan was joined by Justices White, Marshall and Blackmun. These two groups offered very different analytical frameworks. *See infra* notes 174-213 and accompanying text.

[168] Justice Stevens, joined by Justices White and Blackmun, posited a more problematic analysis. *See infra* notes 214-21 and accompanying text.

old step. A discussion of each method follows.

2. *Justice O'Connor's minimum contacts analysis*

Justice O'Connor's discussion of minimum contacts posited a redefinition of the *Burger King* and *McGee* "substantial connection" test. Where *Burger King* interpreted "substantial connection" to provide an extremely low threshold for minimum contacts,[169] Justice O'Connor incorporated a much higher contacts threshold into the "substantial connection" test. In the process of redefining "substantial connection," Justice O'Connor also seemed to limit the extent to which courts may utilize the *World -Wide Volkswagen* "stream of commerce"[170] theory as a basis for imposing *in personam* jurisdiction over a foreign defendant.

As to the stream of commerce theory, Justice O'Connor devoted considerable attention to decisions among the lower courts subsequent to the Supreme Court's 1980 decision of *World-Wide Volkswagen*.[171] Justice O'Connor noted that the lower court decisions were divided between those which merely required that a defendant was *aware* that its product entered the forum, and those which required "additional conduct" on the part of the defendant before personal jurisdiction would be imposed.

The "additional conduct" which Justice O'Connor referred to seemed to require an "intent or purpose to serve the market in the forum State."[172] Justice O'Connor gleaned a number of factors which may establish such an intent from a minority of lower court decisions.[173] These factors included whether a defend-

---

[169] *See supra* notes 134-55 and accompanying text.

[170] *See supra* notes 115-21 and accompanying text.

[171] *See supra* note 105 and accompanying text.

[172] 107 S. Ct. 1032-33.

[173] While the lower courts are split on the circumstances which render a defendant amenable to suit under the "stream of commerce" theory, Justice O'Connor's adoption of additional factors clearly embraced the minority view among the lower federal courts. Only the First, Third and Eighth Circuits seem to subscribe to her view. *See* Dalmau Rodriguez v. Hughes Aircraft Company, 781 F.2d 9 (1st Cir. 1986) (rejecting the contention that "knowledge of the ultimate destination of the product" would satisfy due process contraints under the stream of commerce theory). Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 299 (3d Cir. 1985) ("a review of the 'stream of commerce' cases indicates that the manufacturers involved had made *deliberate decisions* to market their product in the forum state." (emphasis added)); Humble v. Toyota Motor Co. Ltd., 727 F.2d 709 (8th Cir. 1984) (the court listed a series of factors, including whether the defendant advertised, solicited business or sought to serve the particular market in the forum state, in determining whether jurisdiction premised on the stream of commerce theory was reasonable); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir. 1981) (Japanese company which converted ships for third party not amenable to suit when third party sailed ship to New Jersey and defective conversion work caused injury to New Jersey resident). On the other

ant designed the product for marketing in the forum state, whether the defendant advertised, established regular advice giving channels, or marketed a product through a distributor in the forum state.[174] Having an office, employee or agent in the forum state, or creating the distribution system through which the product finds its way into the forum via the stream of commerce, may also evidence the additional conduct required for personal jurisdiction.[175] A defendant's mere awareness that the stream of commerce may or will sweep the product into the forum state, however, does not convert the act of placing a product into the stream into an act purposefully directed toward the forum state.[176] Thus, Justice O'Connor's opinion seemed to narrow the stream of commerce theory articulated in *World-Wide Volkswagen*.[177] While a majority of lower federal courts had found the notice requirement to be satisfied by a defendant's mere awareness that its product would find its way into the forum,[178] Justice

---

hand, the Fourth, Tenth and Eleventh Circuits seem to take a middle course in analyzing stream of commerce cases. *See* Banton Indus., Inc. v. Dimatic Die & Tool Co., 801 F.2d 1283 (11th Cir. 1986) (jurisdiction inappropriate where defendant sold plaintiff a defective product in Nebraska, plaintiff took the product to Alabama and there sustained injuries due to a defect in the product. The defendant's sole contact with the forum was its unsolicited sale to the plaintiff); Chung v. Nana Dev. Corp., 783 F.2d 1124, 1126 (4th Cir. 1986) (Plaintiff solicited reindeer antlers from defendant in Alaska and took partial delivery in Alaska, and Defendant mailed remainder of the order to plaintiff in Virginia and antlers spoiled en route. Jurisdiction was held inappropriate because of the "unique and unsolicited link" between defendant and the forum); Fidelity and Casualty Co. of New York v. Philadelphia Resins Corp., 766 F.2d 440, 446 (10th Cir. 1985) (while placement "of one's product into the 'stream of commerce' with the expectation of distribution to particular areas" will support jurisdiction, the unilateral act of a consumer bringing the defendant's product to the forum, combined with defendant's advertisement in a national magazine and the miniscule sale of products other than the defective product will not support jurisdiction.). Finally, the Second, Fifth, Sixth, Seventh, Ninth and District of Columbia Circuits do not require a showing of "additional conduct" under the stream of commerce theory. Rather, mere awareness by the defendant that his product would reach the forum state is usually sufficient to impose personal jurisdiction in these circuits. See infra note 183.

[174] 107 S. Ct. at 1033.

[175] *Id.*

[176] *Id.*

[177] *See supra* notes 105 and accompanying text.

[178] The courts found constructive notice to be satisfied if the defendant was aware that his product had reached the forum state. This view has been adopted by the Second, Fifth, Sixth, Seventh, Ninth and D.C. Circuits. *See* Montalbano v. Easco Hand Tools, 766 F.2d 737, 743 (2d Cir. 1985) (jurisdictional issue not reached, however, the Court noted that "the critical factor . . . is whether [the defendant] was aware of the nature and extent of [the] distribution system"); Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081, 1083-84 (5th Cir. 1984) (jurisdiction held proper where defendant did not control distribution system, but placed goods in the stream of commerce. "[T]he contacts must support an inference that the nonresident defendant purposefully availed himself of the benefits of the forum state . . . and . . . even activities outside one state can fulfill this requirement if they have reasonably foreseeable consequences within the state."); Nelson v. Park Industries, Inc., 717 F.2d 1120,

O'Connor's enumerated factors test required more than this.[179] In contrast to *World-Wide Volkswagen*, which indicated almost per se imposition of jurisdiction over primary distributors and manufacturers of products,[180] Justice O'Connor's enumerated factors test seemed significantly to limit *in personam* jurisdiction even over this class of defendants.[181]

Most significantly, Justice O'Connor redefined the "substantial connection" test. Under *Burger King*, the test required very minimal contacts, so long as they were not "random, fortuitous or attenuated."[182] Under the O'Connor test, however, the defendant must have undertaken a "purposeful direction"[183] of its goods towards the forum. In order to find a purposeful direction, a court must find several factors[184] indicating the defendant's intent to serve the market in the forum.[185] Whether "purposeful direction" actually heralds a new test[186] in the minimum contacts analysis or whether it is merely a definitional aid giving

---

1127 (7th Cir. 1983) (jurisdiction held proper even though defendant did not control distribution scheme and had only general knowledge that its products would be distributed thorughout national retail stores in the United States because the defendant was "more than possibly aware" of distribution scheme), *cert. denied*, 104 S. Ct. 1278 (1984); Hendrick v. Daiko Shoji Co., Ltd., Osaka, 715 F.2d 1355, 1358 (9th Cir. 1983) (jurisdiction proper over a Japanese manufacturer of splices for ocean-going ships whose sole contact with the forum state was injury to a workman caused by a defect in the splice. "A manufacturer or supplier of a defective product who knew or should have known that a product would enter the stream of foreign commerce can be subjected, consistent with due process, to a forum state's long-arm jurisdiction and can be sued in the forum where the injury occurred."); Raffaele v. Compagnie Generale Maritime, 707 F.2d 395, 397 (9th Cir. 1983) (noting that increased commerce requires increased jurisdictional reach, jurisdiction may be found "where 'under the totality of the circumstances the defendant could reasonably anticipate being called upon to present a defense in a distant forum' ") (quoting Taubler v. Giraud, 655 F.2d 991, 993 (9th Cir. 1981)); Stabilisierungs fonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 647 F.2d 200, 203 (D.C. Cir. 1981) (due process satisfied when defendants placed their products into the stream of commerce "with the expectation (or at least the intention and hope) that their products will be shelved and sold at numerous local outlets in diverse parts of the country."); Poyer v. Erma Werke GMBH, 618 F.2d 1186, 1190 (6th Cir. 1980) (An indirect marketing scheme will not bar jurisdiction, thus, jurisdiction is proper if defendant causes a consequence in the forum state, the claim arises from that consequence and [the] consequence caused has "a substantial enough connection with the forum . . . to make the exercise of jurisdiction . . . reasonable.") (quoting Southern Mach. Co. v. Mohasco Ind, Inc., 401 F.2d 374, 381 (6th Cir. 1968)).

[179] This is evidenced by the enumerated factors required to be found prior to the assertion of *in personam* jurisdiction. *See supra* notes 179-81 and accompanying text.

[180] *See supra* notes 116-18 and accompanying text.

[181] *See supra* notes 177-82 and accompanying text.

[182] 471 U.S. at 480.

[183] 107 S. Ct. 1033.

[184] *Id. See supra* notes 177-80 and accompanying text.

[185] *Id.* at 1033.

[186] *See* Justice Stevens' dissent, 107 S. Ct. at 1038 (Stevens, J., dissenting). *See also infra* notes 217-18 and accompanying text.

substance to the "substantial connection" test is unclear.[187] What is clear, however, is that Justice O'Connor seeks a higher contacts threshold before personal jurisdiction may properly be imposed.

3. *Justice Brennan's minimum contacts analysis*[188]

In a concurring opinion, Justice Brennan focused on preserving the stream of commerce theory enunciated in *World-Wide Volkswagen*.[189] He noted that the "stream of commerce refers not to unpredictable currents . . . but to the regular and anticipated flow of products from manufacturer to distribution to retail sale."[190]

This "regular . . . flow"[191] met the *World-Wide Volkswagen* concern that a defendant who benefits, directly or indirectly, from contacts with the forum state not be surprised at being haled before the forum's courts.[192] Accordingly, and in contrast with Justice O'Connor's position, Justice Brennan asserted that "[a]s long as a [defendant] is *aware* that the final product is being marketed in the forum state,"[193] minimum contacts are satisfied without a showing of "additional conduct directed toward that state."[194]

Brennan noted that a defendant's awareness is quite distinguishable from the "mere foreseeability" that concerned the *World-Wide Volkswagen* court.[195] The "foreseeability" concern in *World-Wide Volkswagen* was that retail products could be taken anywhere by a consumer, and such consumer activity would render the retail dealer amenable to suit in any jurisdiction where the defendant's products were found.[196] In contrast, a defendant's awareness that his product had entered the stream of commerce, had made its way to the forum and was accruing benefits to the defendant, provided adequate notice to the defendant that he was subject to the forum's laws and gave the defendant the opportunity to "sever[] its connection with the state."[197]

The key analytical distinction is that "mere foreseeability" does not allow the

---

[187] It may be irrelevant whether purposeful direction, buttressed by the enumerated factors, merely defines the "substantial connection" test or is an independent test. What is relevant is that the minimum contacts threshold is considerably heightened by the factors listed.

[188] Justice Brennan's concurring opinion was joined by Justices White, Marshall and Blackmun.

[189] 444 U.S. 286 (1980). *See supra* notes 115-20 and accompanying text.

[190] 107 S. Ct at 1035.

[191] *Id.*

[192] *Id.*

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

[194] 107 S. Ct. at 1035.

[195] 444 U.S. at 295-96.

[196] *See supra* notes 119-21 and accompanying text.

[197] 444 U.S. at 297. *See supra* note 120 and accompanying text.

defendant to remedy his amenability to suit in a distant forum; but, when the defendant is aware that his product had made its way to the forum by way of the stream of commerce, he can take remedial steps which limit his exposure to litigation. Moreover, the *World-Wide Volkswagen* stream of commerce theory preserves an important distinction between primary distributors and manufacturers on the one hand, and retail dealers on the other.[198] That distinction recognizes the generally greater benefits that accrue to a primary manufacturer or distributor from a broad-based marketing network, as opposed to a retail dealer who profits primarily from local sales. The "quid pro quo"[199] aspect of *in personam* jurisdiction is more easily satisfied when a defendant desires the broadest possible distribution network to increase private gain.

Justice Brennan also buttressed his stream of commerce argument by pointing out that the *World-Wide Volkswagen* Court favorably relied upon *Gray v. American Radiator & Standard Sanitary Corp.*,[200] a seminal stream of commerce case. In *Gray*, the defendant's awareness that his product would end up in other states, combined with the indirect benefit accruing to that defendant from increased sales of his component product, made jurisdiction reasonable.

Justice Brennan's concern that the O'Connor plurality was attempting a retreat from the *World-Wide Volkswagen* principles is supported by positions of the circuit courts following *World-Wide Volkswagen*. The Second, Fifth, Sixth, Ninth, and D.C. Circuits have found that a defendant's awareness that his product had made its way into the forum by way of the stream of commerce was sufficient grounds to impose personal jurisdiction over that defendant when the injury arose in the forum.[201] The Fourth, Tenth, and Eleventh Circuits also seem willing to accept the imposition of personal jurisdiction based on a defendant's awareness that the stream of commerce has carried its product to the forum, finding only that jurisdiction will not exist where: (1) the *consumer solicited* a sale which amounted to the defendant's sole contact with the forum;[202] (2) the consumer took the product to the forum and defendant's contacts with the forum consisted only of advertising in a national magazine, coupled with

---

[198] Justice Brennan would include retail sellers within the stream of commerce theory, finding the distinction between wholesale distributors and retail dealers without constitutional significance. *See* 444 U.S. at 306-07 (Brennan, J., dissenting).

[199] *See generally* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[200] 22 Ill. 2d 432, 176 N.E.2d 761 (1961). In this case, the Illinois Supreme Court imposed personal jurisdiction over the manufacturer of a valve which was a component part in a hot water heater. Although the defendant never did business in Illinois, it sold its component to a manufacturer who did sell in Illinois. Because the defendant indirectly benefitted from the manufacturer's distribution scheme (i.e., the manufacturer purchased more valves due to its broader marketing scope), jurisdiction was found to be proper.

[201] *See supra* notes 178, 183 and accompanying text.

[202] Chung v. Nana Dev. Corp., 783 F.2d 1124 (4th Cir. 1986).

the miniscule sale of products other than the defective one to the forum;[203] or (3) the defendant's sole contact with the forum was a *consumer's unilateral act* of taking the defendant's product there.[204] Only the First, Third and Eighth Circuits have interpreted *World-Wide Volkswagen* as requiring something more than awareness by the defendant that his product has entered the forum state through the stream of commerce.[205]

Given *World-Wide Volkswagen*, its acceptance of *Gray*, and the trend of the lower federal courts, Justice Brennan concluded that the minimum contacts threshold in the instant case was easily met. Because Asahi was aware of Cheng Shin's distribution scheme,[206] and because Asahi benefitted economically from sales of over one million valves, many of which were sold in California, the minimum contacts threshold was satisfied.[207] The significant area left unaddressed by Justice Brennan was Justice O'Connor's redefinition of the "substantial connection" test. His failure to address this issue leaves unclear the future role of this test.[208]

4. *Justice Stevens' minimum contacts analysis*[209]

Justice Stevens' opinion in *Asahi* is problematic. In a minimum contacts discussion that divided the Court into camps of four members each,[210] Justice Stevens' view could be decisive in the next personal jurisdiction case to reach the Supreme Court.

Justice Stevens' central point seemed to be that minimum contacts need not even be discussed where the imposition of personal jurisdiction was clearly "un-

---

[203] Fidelity and Casualty Co. of New York v. Philadelphia Resins Corp., 766 F.2d 440 (10th Cir. 1985).

[204] Banton Ind. Inc. v. Dimatic Die & Tool Co., 801 F.2d 1283 (11th Cir. 1986).

[205] *See supra* note 178 and accompanying text.

[206] This scheme carried Asahi's products throughout the world, including California. 107 S. Ct. at 1037.

[207] *Id.* at 1037-38.

[208] The "substantial connection" test has generally been utilized in non-stream of commerce cases and may be distinguished based on a theory that separate tests should be used depending on the specific facts. Thus, the "stream of commerce" test seems applicable in product liability cases, while the "substantial connection" test may be used more readily in contract cases. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). For a non-stream of commerce tort action case, see Keeton v. Hustler Magazine Corp., 465 U.S. 770 (1984).

[209] Justice Stevens' concurring opinion was joined by Justices White and Blackmun.

[210] Justices O'Connor, Rehnquist, Scalia and Powell argued for a "heightened contacts threshold while Justices Brennan, Marshall, White and Blackmun argued for a reinforcement of the lower "awareness/stream of commerce" theory.

reasonable and unfair."[211] Thus, he refused to embrace either the O'Connor or the Brennan analyses.

Justice Stevens did, however, indicate a reluctance to adopt the O'Connor test.[212] He further noted that even if the test were accepted, he believed Justice O'Connor "misappli[ed] it to the facts of this case."[213] He was unconvinced that "an unwavering line can be drawn between 'mere awareness' that a component will find its way into the forum state and 'purposeful availment' of the forum's market."[214] Justice Stevens indicated that he would analyze minimum contacts in stream of commerce cases in terms of a "constitutional determination that is affected by the volume, the value, and the hazardous character of the components."[215]

This "constitutional determination" arguably places less importance on a defendant's intent to serve the market, a factor seen as crucial to Justice O'Connor. Yet, it also may require more than a defendant's awareness that his product, through the stream of commerce, has found its way into the forum, thus distancing Stevens from the Brennan analysis. However, Justice Stevens did indicate that, on the *Asahi* facts, the defendant's contacts probably would be sufficient to satisfy the minimum contacts threshold:

> In most circumstances, I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute purposeful availment even though the item delivered to the forum state was a standard product marketed throughout the world.[216]

V. Impact

The practical impact of the *Asahi* case is minimal in terms of establishing new law regarding personal jurisdiction. Few would disagree that a California court's assertion of personal jurisdiction over a Japanese defendant in a claim brought by a Taiwanese plaintiff for indemnification is unreasonable.

In terms of the Court's minimum contacts analysis, the decision lacks significant precedential value because a majority of justices failed to subscribe to either

---

[211] 107 S. Ct. at 1038.

[212] Justice Stevens opined that there was no reason in this case for the Court "to articulate 'purposeful direction' or any other test as the nexus between the act of a defendant and the forum State that is necessary to establish minimum contacts." *Id.* (Stevens, J., dissenting).

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *Id.*

the Justice O'Connor or Justice Brennan view. Yet, *Asahi* gives an extremely clear picture of the conflict within the Supreme Court regarding *in personam* jurisdiction, and provides a context for lucid discussions of the conflicting tests that should measure minimum contacts. For these reasons, *Asahi* is a valuable case to study.

Should Justice O'Connor's view prevail, the result would be a marked retreat from the recently expanded personal jurisdiction trends. The factors she would examine[217] tend to decrease a plaintiff's access to relief, especially when the defendant is a component part manufacturer with no direct control over the distribution scheme for the completed product. The "intent"[218] to serve a particular market may be especially difficult to establish when the defendant is a component manufacturer because his primary customer is not the retail dealer, but the manufacturer of a completed product. Even where the component manufacturer may be shielded from an injured plaintiff's claim, however, it is likely that the manufacturer of the finished product will place considerable pressure on the component's maker and may sue for indemnification. This will provide a form of deterrence to the negligent component manufacturer[219] similar to the deterrence exacted were the injured plaintiff to sue directly.

Where the component part manufacturer is the only possible defendant (if, for example, the general manufacturer became bankrupt or was otherwise judgment proof), then a plaintiff's remedy might be difficult or impossible to obtain under the O'Connor analysis. In close cases, Justice O'Connor strikes a firm stance for protection of foreign and alien defendants from being haled into foreign courts. The desirability of this result at one level turns on whether one is a plaintiff or defendant. But at a deeper level, the O'Connor test underscores a particular judicial philosophy: one which favors limitations on judicial power, litigation, and a plaintiff's access to forums.

Such a view, if it prevails, may increase interstate and international commerce, since primary distributors and manufacturers will have less concern regarding suit in distant forums. It should also reduce the burdens on the federal court system by reducing suits brought against foreign or alien defendants.

Conversely, should Justice Brennan's analysis prevail, it is likely that the reach of personal jurisdiction will continue the expansive trend of *Burger King*.[220] By preserving the *World-Wide Volkswagen*[221] stream of commerce theory, the power of courts to hale foreign and alien defendants into the forum would remain intact, especially as to component part makers.

---

[217] *See supra* notes 177-81 and accompanying text.

[218] *See supra* note 178 and accompanying text.

[219] 107 S. Ct. at 1034.

[220] *See supra* notes 148-55 and accompanying text.

[221] *See supra* note 105 and accompanying text.

More substantively, it is fair to read Justice Brennan's position as seeking a diminished role for minimum contacts in personal jurisdiction analysis.[222] Brennan asserts that factors of reasonableness should weigh as heavily as minimum contacts in jurisdictional queries. This view balances the interests of the plaintiff, the defendant, and the forum state[223] and allows an enhancement of a defendant's minimum contacts if the plaintiff's interests are sufficiently compelling.[224]

The Brennan analysis thus provides plaintiffs with greater access to judicial relief. It also ensures that a state may readily protect its interests when a resident is injured by a foreign or alien defendant. Moreover, adoption of the Brennan analysis would better comport with the majority of lower federal court decisions, at least in terms of the appropriate analysis for "stream of commerce" cases.[225]

Concurrently, however, the Brennan analysis could increase the burden on consumers, who ultimately absorb the costs of litigation.[226] It may also have an inhibiting effect on interstate and international commerce, since the chance of litigation against a foreign or alien defendant will increase. The producers of component parts which add little to corporate profits[227] may decide that it is better to stop production rather than risk litigation on a massive scale for such comparatively minor returns.[228]

Finally, even though Justice Stevens did not embrace the Brennan analysis,[229] it is fair to suppose that Justice Stevens would find sufficient minimum contacts in an *Asahi*-like fact pattern to support jurisdiction, and reject[230] the "purposeful direction" test formulated by Justice O'Connor.[231] Justice Stevens seems to desire a reaffirmation of the traditional notion that personal jurisdiction rests not on dogmatic rules or tests, but rather upon a fact-specific inquiry into the overall fairness of the imposition of personal jurisdiction.[232]

The *Asahi* case is most instructive for what it did not decide. It left to the lower courts a continuing division over the proper analysis of minimum con-

---

[222] As evidenced in *Asahi*, *Burger King*, and *World-Wide-Volkswagen*.

[223] This view was affirmed by the Court in *World-Wide Volkswagen*, 444 U.S. at 292.

[224] This view was affirmed in Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

[225] *See supra* notes 178-83 and accompanying text.

[226] *See* World-Wide Volkswagen v. Woodson, 444 U.S. at 297 (1980).

[227] The instant case highlights this point. Asahi Metals, Inc. received between 1.24 and .44 percent of its income in 1981 and 1982 respectively from the sale of its valves to Cheng Shin. 107 S. Ct. at 1030.

[228] *Id.* at 1038.

[229] *See supra* notes 217-20 and accompanying text.

[230] 107 S. Ct. at 1038.

[231] *Id.* at 1038.

[232] *See generally* International Shoe Co. v. Washington, 326 U.S. 310 (1945); McGee v. International Life Insurance Co., 355 U.S. 220 (1957).

tacts.[233] Further, the Court declined to determine the proper weight a court should accord to factors of reasonableness in deciding whether the minimum contacts threshold is of reduced importance in certain situations. Finally, the "substantial connection" test, articulated in *McGee*[234] and reaffirmed in *Burger King*,[235] was drastically reconstructed by Justice O'Connor.[236] How lower courts should and will apply this test is uncertain.

The instructive feature of these non-decisions is that they point out the deep rift in the Supreme Court regarding personal jurisdiction analysis, as well as a corresponding rift among the lower courts.[237] Based on historical precedent, it is likely that there will be further expansions, then retractions of personal jurisdiction power. That is, the ebb and flow of jurisdictional reach, evidenced by the history of Supreme Court decisions since *International Shoe*,[238] will likely continue. *Asahi* is extremely useful, therefore, because it clearly articulates the underlying analytical and policy reasons for the continued flux in personal jurisdiction issues.

VI. CONCLUSION

In *Asahi*, the United States Supreme Court reversed a case where the assertion of *in personam* jurisdiction was clearly unreasonable. Yet the Court chose not to stop at that point and provided an in-depth view of the schism regarding the question of minimum contacts as a threshold step in personal jurisdiction analysis.

Unable to form a majority opinion as to an appropriate minimum contacts analysis, the Court left for another day the resolution of a conflict among the lower federal courts on this issue. Regrettably, the Court also declined to address the increasingly common problem of the alien defendant.

In the end, the Court revealed two radically different approaches to the minimum contacts analysis. Until this issue is resolved, lower courts must seek guidance in earlier United States Supreme Court decisions and precedents in their own circuits.

David J. Gierlach

---

[233] *See supra* notes 178-83 and accompanying text.

[234] 355 U.S. 220 (1957).

[235] 471 U.S. 462 (1985).

[236] *See supra* notes 222-24 and accompanying text.

[237] *See supra* notes 178-83 and accompanying text.

[238] *See supra* notes 39-155 and accompanying text.

The Trustees of the Office of Hawaiian Affairs v. Yamasaki: The Application of the Political Question Doctrine to Hawaii's Public Land Trust Dispute

I. INTRODUCTION

In *The Trustees of the Office of Hawaiian Affairs v. Yamasaki*,[1] the issues before the Hawaii Supreme Court involved the boundaries of the public land trust. More specifically, the issues were, (1) whether the Office of Hawaiian Affairs (OHA) was entitled to twenty percent of the damages received by the state for an illegal sand mining operation on trust land; and (2) whether OHA would be entitled to twenty percent of the income and proceeds from the sale, lease, or other disposition of land surrounding all the major harbors, land on Sand Island, land on which the Honolulu International Airport is located, and land on which the Aloha Tower complex stands.[2] The Hawaii Supreme Court held that these issues involved a political question and were, therefore, nonjusticiable.[3] The court concluded that the issues should be reserved for legislative determination, thus declining to decide the case on the merits.[4]

The political question doctrine is based on the proposition that certain matters are best resolved by the political branches of government rather than by the judiciary.[5] In applying the doctrine, courts hold such issues to be nonjusticiable; "courts will neither approve nor reject the judgments of the political branches, and will instead let the political process take its course."[6] Thus, the political

---

[1] 69 Haw. ____, 737 P.2d 446 (1987).

[2] *Id.* at ____, 737 P.2d at 458.

[3] The Office of Hawaiian Affairs instituted two actions in the Circuit Court of the First Circuit, the other being *The Trustees of the Office of Hawaiian Affairs v. Hong*. The two cases were consolidated for the purposes of hearing the defendants' motions. 69 Haw. at ____, 737 P.2d at 448.

[4] 69 Haw. at ____, 737 P.2d at 448-49.

[5] Redish, *Judicial Review and the "Political Question,"* 79 NW. U.L. REV. 1031, 1031 (1985).

[6] *Id.*

question doctrine is primarily a function of the separation of powers,[7] and is a "check to assure that the . . . courts will not intrude into areas committed to the other branches of government."[8]

This note examines the evolution of the political question doctrine and analyzes its application by the Hawaii Supreme Court in *Yamasaki*. Part II examines the factual background of the case, beginning with the history of the public land trust, and then the actual issues involved in the case. Part III discusses the history of the political question doctrine as applied by both the United States Supreme Court and the Hawaii Supreme Court. In Part IV, the note analyzes the Hawaii Supreme Court's application of the political question doctrine to the facts of *Yamasaki*. Finally, Part V examines the impact of *Yamasaki* on the parties involved.

II. FACTUAL BACKGROUND

A. History of the Public Land Trust

The history of the public land trust began with the annexation of Hawaii by the United States in 1898.[9] The Republic of Hawaii gained its sovereignty and ceded all its land to the United States.[10] Although legal title to the public land in Hawaii was vested in the United States, under the Organic Act equitable title to the ceded lands remained with the Territory of Hawaii.[11] Thus, the Territory retained possession, use, and control over the land.[12] With the advent of statehood in 1959, however, the ownership of public lands in Hawaii was redefined. This restructuring of ownership of Hawaii's public lands was accomplished through section 5 of the Admission Act.[13] Section 5(f) of the Admis-

---

[7] Baker v. Carr, 369 U.S. 186, 210 (1962).

[8] 69 Haw. at ____, 737 P.2d at 455 (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)).

[9] LEGISLATIVE AUDITOR OF THE STATE OF HAWAII, Final Report on the Public Land Trust 7 (1986) [Hereinafter LEGISLATIVE AUDITOR].

[10] H.R.J. Res. 259, 30 Stat. 750 (1898).

[11] LEGISLATIVE AUDITOR, *supra* note 9, at 7.

[12] Organic Act, ch. 339, § 91, 31 Stat. 141, 159 (1900).

[13] Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959). Under section 5(a), the State of Hawaii and its political subdivisions became the successors in title to the Territory of Hawaii and its subdivisions in lands in which the Territory held title at the time of admission, except as provided in subsection (c). Under section 5(b), the State became the successor in title to the United States in those ceded lands in which the United States had title at the time of admission, except as provided in subsections (c) and (d). Under section 5(c), title to lands that had been set aside pursuant to any act of Congress, executive order, presidential proclamation or proclamation by the Governor of Hawaii, shall remain with the United States. Section 5(d) granted the federal government the authority to vest in the United States title to ceded lands controlled by the United States at the time of admission under permit, license, or permission of the Territory,

sion Act embodies the concept of the public land trust[14] and provides that the specified lands, and the income and proceeds from the sale or other disposition of those lands, shall be held by the State as a public trust for several specified purposes. Until 1978, however, the Hawaii Constitution made only general references to the trust,[15] and the single piece of legislation regarding the trust merely reiterated provisions of section 5 of the Admission Act.[16] Thus, absent more specific constitutional language and legislation, public educational institutions became the primary beneficiaries of the trust.[17]

In 1978, however, delegates to Hawaii's Constitutional Convention proposed several amendments to the Hawaii Constitution that expressly directed the pursuit of other objectives.[18] The amendments were ratified and the two principal beneficiaries of the trust—native Hawaiians and the general public—were added to the constitution.[19] As a result, the ceded lands were to "be held by the State as a public trust for native Hawaiians and the general public."[20]

---

within five years following admission. Under section 5(e), the President was mandated to convey to the State, at the end of the five-year period, lands no longer needed by the United States.

[14] Section 5(f) of the Admission Act provides in part:

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, . . . for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.

Id.

[15] The Hawaii State Constitution, article XI, section 10 (previously article X, section 5) states that "the public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law." HAW. CONST. art. XI, § 10 (1978).

The Hawaii State Constitution, article XVI, section 7 (previously article XVI, section 8 states that "any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation." HAW. CONST. art. XVI, § 7 (1978).

[16] 69 Haw. at ____, 737 P.2d at 450-51.

[17] LEGISLATIVE AUDITOR, *supra* note 9, at 14.

[18] *Yamasaki*, 69 Haw. at ____, 737 P.2d at 451.

[19] 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 643-44 (1980) [hereinafter 1978 HAWAII CONSTITUTIONAL CONVENTION].

[20] Article XII, section 4 of the Hawaii State Constitution states:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended shall be held by the State as a public trust for native Hawaiians and the general public.

Another product of the 1978 Constitutional Convention was the Office of Hawaiian Affairs, a governmental entity established by article XII, section 5 of the Hawaii State Constitution.[21] Under this provision, OHA holds title to all real and personal property set aside for or conveyed to it in trust for "native Hawaiians" and "Hawaiians."[22] OHA was established with the intent that it would "provide Hawaiians the right to determine the priorities [that would] effectuate the betterment of their condition and welfare . . . . "[23]

In 1979, the legislature, in response to the directives of the Constitutional Convention, enacted Act 196,[24] which is now codified in Hawaii Revised Statutes chapter 10.[25] Hawaii Revised Statutes section 10-3, which states the purpose of OHA, declares that "a pro rata portion of all the funds derived from the public land trust . . . shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians."[26] Included in the public

---

HAW. CONST. art. XII § 4 (1978).

[21] Article XII, section 5 of the Hawaii State Constitution states:

There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

HAW. CONST. art. XII, § 5 (1978).

[22] The statute states:

"Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

"Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778 . . . .

HAW. REV. STAT. § 10-2 (1985).

[23] 1978 HAWAII CONSTITUTIONAL CONVENTION, *supra* note 19, at 1018.

[24] Act of June 7, 1979, 1979 Haw. Sess. Laws 398.

[25] 69 Haw. at ____, 737 P.2d at 452.

[26] The statute provides in part:

The purposes of the Office of Hawaiian Affairs include:

(1) The betterment of conditions of native Hawaiians. A pro rata portion of all the funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians. For the purpose of this chapter, the public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admissions Act), (excluding therefrom lands and all proceeds and income from the

trust are "all proceeds and income from the sale, lease, or other disposition"[27] of "ceded lands" as described in Hawaii Revised Statutes section 10-3. In 1980, the legislature enacted Hawaii Revised Statutes section 10-13.5 which specifically sets the "pro rata portion of all funds" at twenty percent.[28]

B. *Facts of* Yamasaki

The intra-governmental dispute in *Yamasaki* revolved around the mandate of Hawaii Revised Statutes section 10-13.5 that twenty percent of the funds derived from the trust be expended by OHA for the purposes set forth in Hawaii Revised Statutes section 10-3.[29] On September 7, 1983, and March 8, 1984, OHA, acting through its trustees, instituted two actions in the Circuit Court of the First Circuit against several state officers and a public corporation.[30]

In the first suit, the Trustees named the Attorney General of the State, the Chairman of the Board of Land and Natural Resources, and the Director of Finance as defendants. The Trustees sought a declaration by the circuit court that OHA was entitled to receive an undivided twenty percent interest in the land conveyed to the State as damages for the illegal mining of sand from Papohaku Beach on Molokai.[31] Alternatively, the Trustees sought a cash amount equal to twenty percent of the appraised value of the conveyed land. They also sought mandatory injunctive relief to enforce the judgment.

> sale, lease, or disposition of land defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e) . . . .

HAW. REV. STAT. § 10-3 (1985).

[27] *Id.* This section defines the public land trust.

[28] The statute provides that "[t]wenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter." HAW. REV. STAT. § 10-13.5.

[29] 69 Haw. at ____, 737 P.2d at 449.

[30] *Id.* at ____, 737 P.2d at 448.

[31] The alleged facts of the case were as follows:

> Between 1958 and 1973, the State owned land at Papohaku Beach, which was "ceded land." Pursuant to a contract between Molokai Ranch and HC & D, Ltd., HC & D was allowed to mine sand from Papohaku Beach in exchange for royalty payments made to Molokai Ranch. In 1973, the State brought suit in the State Land Court to recover damages for the sand mined from the beach. In 1982, the State agreed to accept a conveyance of real property as damages. This land, owned by Molokai Ranch, was valued as $1,279,006.00, and was not ceded land. OHA claimed that it was entitled to 20% of the damage proceeds from the illegal sand mining operation, under Article XII, sections 4 and 6 of the State Constitution, and Hawaii Revised Statutes sections 10-3(1) and 10-13.5.

Yamasaki, 69 Haw. at ____ n.14, 737 P.2d at 453 n.14.

In the second suit, the Director of Transportation and the Aloha Tower Development Corporation, a government corporation, were named as additional defendants. The Trustees sought a declaration that OHA was entitled to receive twenty percent of all the income and proceeds received by the State from various "trust lands." The claim included lands surrounding harbors on all the major islands, land on Sand Island, the land on which the Honolulu International Airport is located, and the land on which the Aloha Tower Complex is situated.[32] Also, the Trustees sought a mandatory injunction to enforce the judgment.

In both suits, the defendants moved for dismissal of the complaints based on the State's sovereign immunity and the plaintiff's lack of standing.[33] The cases were consolidated by the circuit court for the purpose of hearing the defendants' motions.[34] The circuit court denied the defendants' motions, but granted them leave to seek an interlocutory appeal.[35] Interlocutory appeal was granted and the Hawaii Supreme Court also consolidated the cases for hearing and disposition.[36]

III. History of The Law

A. Justiciability

The United States Constitution distributes power among three branches of government: the legislative,[37] the executive,[38] and the judicial.[39] By creating these three separate departments, the Framers of the Constitution intended to prevent a commingling of these different powers so that the acts of each branch would "never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments."[40] However, although the coequal branches are separate and distinct, "[t]he Constitution [did] not contem-

---

[32] *Id.* at ____, 737 P.2d at 453.

[33] *Id.* at ____, 737 P.2d at 453-54.

[34] *Id.* at ____, 737 P.2d at 448.

[35] *Id.*

[36] *Id.* at ____, 737 P.2d at 454.

[37] *See* U.S. Const. art. I. "All legislative Powers herein granted shall be vested in a congress of the United States, which shall consist of a Senate and House of Representatives." *Id.* at art. I, § 1.

[38] *See Id.* at art. II. "The executive Power shall be vested in a President of the United States of America." *Id.* at art. II, § 1.

[39] *See Id.* at art. III. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* at art. III, § 1.

[40] O'Donoghue v. United States, 289 U.S. 516, 530 (1933). *See also* The Federalist No. 48 at 343-347 (J. Madison) (B. Fletcher Wright ed. 1966).

plate total separation of the three branches . . . . "[41] The Framers intended the branches to be "so far connected and blended as to give to each a constitutional control over the others . . . . "[42] The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[43] Thus, the particular sphere of authority of each branch of government is not marked by bright lines.

Yet, despite the lack of clear and definite boundaries between the branches, the Constitution has granted the judiciary the power of passing judgment on the acts of the legislative and executive branches of the federal government in "determining whether they are beyond the limits of power marked out for them respectively by the Constitution . . . . "[44] Courts, therefore, "should be the last to overstep the boundaries which limit [their] own jurisdiction."[45] Thus, "[t]he question of how far a judicial inquiry should range has been the most extensive and central debate in constitutional law throughout our country's history."[46]

Article III of the Constitution defines and limits the jurisdiction of the federal courts. Under article III, section 2, the judicial power of the federal courts is restricted to "cases" and "controversies."[47] "Justiciability" is a term of art used to describe the limitation placed upon federal courts by the "case or controversy" doctrine.[48] If a controversy is deemed "justiciable," it is an appropriate matter for judicial review.[49]

The "case or controversy" doctrine places a dual limitation on federal courts. First, the doctrine "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolu-

---

[41] INS v. Chadha, 462 U.S. 919, 999 (1983) (White, J., dissenting).

[42] THE FEDERALIST No. 48, *supra* note 40, at 343.

[43] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[44] Luther v. Borden, 48 U.S. (7 How.) 1, 47 (1849).

[45] *Id.*

[46] K. RIPPLE, CONSTITUTIONAL LITIGATION § 3-1, at 87 (1984).

[47] Article III, section 2 of the United States Constitution states in pertinent part:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party; to Controversies between two or more States;—between a state and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art III, § 2.

[48] Flast v. Cohen, 392 U.S. 83, 95 (1968).

[49] *Id.*

tion through the judicial process."[50] Second, the doctrine "define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[51] Therefore, the "case or controversy" doctrine is designed (1) to preserve the adversarial process, and (2) to preserve the principle of the separation of powers. The political question doctrine falls under the basic concept of justiciability.[52]

B. The Political Question Doctrine

The political question doctrine is one of the more amorphous subcategories of justiciability.[53] Despite the United States Supreme Court's frequent application of the political question doctrine, a considerable degree of uncertainty still surrounds the doctrine's scope and validity.[54] Some commentators question whether the political question doctrine even exists at all.[55] Part of this uncertainty is undoubtedly due to the rather broad and unclear boundaries of the doctrine,[56] and the consequent difficulty in predicting when the courts will elect to invoke it.

Despite the doctrine's uncertainty, certain relatively specific issues have consistently been held to be political questions. For example, foreign affairs,[57] constitutional amendments,[58] impeachment,[59] and the guaranty clause[60] have been

---

[50] *Id.*

[51] *Id.*

[52] K. RIPPLE, *supra* note 46, § 3-2(A), at 89.

[53] *Id.* at § 3-7 at 96.

[54] *See* Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 505 (1984); Redish, *supra* note 5, at 1031. *See, e.g.*, Tigar, *The "Political Question" Doctrine and Foreign Relations*, 17 UCLA L. REV. 1135 (1979); Michelman, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 62 (1969).

[55] *See* Stern, *supra* note 54, at 406 n.6; Redish, *supra* note 5, at 1031 & n.4; Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 597 (1976).

[56] *See Yamasaki*, 69 Haw. at ____, 737 P.2d at 456.

[57] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979) (four justices agreed that President's unilateral decision to terminate a treaty with Taiwan was nonjusticiable political question); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948) (President's granting of international air routes, which was authorized by Congress, was nonjusticiable); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (Cambodian bombing nonjusticiable); Altee v. Laird, 347 F.Supp. 689 (E.D. Pa. 1972) (legality of Vietnam War nonjusticiable).

[58] *See, e.g.*, Coleman v. Miller, 307 U.S. 433 (1939). In Coleman, three justices reasoned that a time limitation of a proposed amendment to the Constitution and the effect of a ratification of a previously rejected amendment were political questions. *Id.* at 450, 453-54. Although four other justices concurred that the case should be dismissed, they reasoned that the plaintiffs lacked standing to sue. *Id.* at 460, 464, 468.

[59] Congress's power to expel is analogous to the power to impeach. *See infra* note 79. *Cf.* Roudebush v. Hartke, 405 U.S. 15 (1972). Article I, section 5, of the United States Constitution

held to be within the boundary of the political question doctrine and, therefore, nonjusticiable. To understand how the political question doctrine applies to issues outside these areas, however, it is necessary to examine several cases that have been instrumental in developing the doctrine.

The shaping of the political question doctrine began with *Luther v. Borden*.[61] *Luther* was an action for trespass that arose out of Dorr's Rebellion, an attempt by Rhode Island citizens to overthrow the government under the original colonial charter and force the adoption of a new and more democratic constitution.[62] The defendants, who broke into the plaintiff's house, claimed to have acted lawfully pursuant to orders of the charter government. The plaintiff insisted that the charter government had been overthrown and replaced by the new government, and thus, the plaintiff was supporting the lawful authority of the state.[63] From a simple action of trespass, the United States Supreme Court was eventually called upon to determine which government was the legitimate government of Rhode Island.[64] The Court held that this issue should be determined by the political branches and declined to decide the case.[65]

The Supreme Court discussed various reasons why the issue in *Luther* was nonjusticiable,[66] yet article IV, section 4 of the United States Constitution—the guaranty clause—was ultimately dispositive.[67] The Court concluded:

---

provides that the Senate shall judge election returns and qualification of its members. U.S. CONST. art. I, § 5. This, however, did not prohibit Indiana from recounting election ballots for a United States Senator after he had been seated. *Roudebush*, 405 U.S. at 26.

[60] *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (determination of the legitimate government of Rhode Island was nonjusticiable); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (whether tax adopted by initiative contravened a republican form of government was a political question).

[61] 48 U.S. (7 How.) 1 (1849).

[62] *Id.* at 34-36.

[63] *Id.* at 35.

[64] *Id.* at 34-35.

[65] *Id.* at 47.

[66] The issue was inappropriate for judicial decision for various reasons. The acceptance of judicial authority would automatically recognize the authority of the government which established the judiciary. *Id.* at 40. There was a need for a timely result. *Id.* at 41. Much of the evidence relied upon would have been the credibility of witnesses and the decisions of the jury, both of which were too tenuous and unstable. *Id.* at 41-42. The Court thought it appropriate to defer to the apparent Presidential approval of the charter government. *Id.* at 43-44.

[67] Article IV, section 4 of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

U.S. CONST. art. IV, § 4.

> Under this article of the Constitution it rests with Congress to decide what government is the established in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. . . . [Congress's] decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.[68]

Moreover, the power to determine the means to achieve this guarantee was within congressional authority and Congress elected to transfer this power to the President of the United States.[69] Thus, this issue clearly fell outside the boundaries of the judiciary.

After *Luther v. Borden*, all claims arising under the guaranty clause have been held to be nonjusticiable.[70] Not all political questions, however, are that easily recognized and labeled as such. *Baker v. Carr*[71] was the landmark case that examined previous political question decisions and "infer[red] from them the analytical threads that make up the political question doctrine."[72] *Baker* was a reapportionment case in which Tennessee voters sought to invalidate a 1901 apportionment statute.[73] The plaintiffs claimed the statute had become unconstitutional and obsolete because of the significant growth and population shift since 1900.[74] In this context, the Supreme Court articulated the often-cited "test" or standard by which courts may determine whether a claim involves a political question. The *Baker* test provided:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multi-

---

[68] 48 U.S. (7 How.) at 42.

[69] *Id.* at 42-43.

[70] *See* Baker v. Carr, 369 U.S. 186, 223 (1962). *Luther* would probably not be decided under the Guaranty clause today. A case like *Luther* would most likely follow an analysis similar to *Baker v. Carr* and be decided under the equal protection clause because, unlike the guaranty clause, the equal protection clause has judicially manageable standards. Thus, cases arising under the equal protection clause are more likely to be justiciable.

[71] 369 U.S. 186 (1962).

[72] *Id.* at 211.

[73] *Id.* at 193.

[74] *Id.* The *Baker* Court held that the plaintiffs' claim did not involve a political question and was, therefore, justiciable. *Id.* at 237.

farious pronouncements by various departments on one question.[75]

The Court concluded that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence."[76]

The *Baker* test suggests that the Court was attempting to lay out a standard by which future courts would be more inclined to decide cases than dismiss them for nonjusticiability. Indeed, since *Baker*, the Supreme Court only once has decided that an issue was nonjusticiable because it involved a political question.[77] Cases since *Baker* have illustrated various approaches that the Supreme Court has taken in dealing with the political question doctrine and yet ultimately determining the issues to be justiciable.

The Court's analysis in *Powell v. McCormack*[78] demonstrates one such approach. In *Powell*, the Supreme Court reviewed the constitutionality of the exclusion of Congressman-elect Adam Clayton Powell, Jr. from his seat in 1966. In applying the *Baker* test, the main hurdle the Court faced was determining whether there was a "textually demonstrable constitutional commitment" to the House of Representatives to determine Powell's qualifications. Upon examination of the relevant historical materials, the Court concluded that "the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[79] The Court then analyzed the other *Baker* factors[80] and concluded that the claim did not involve a political question and was, therefore, justiciable.[81]

United States v. Nixon[82] illustrates another approach to analyzing an issue under the political question doctrine. In *Nixon*, the Supreme Court declined to

---

[75] *Id.* at 217.

[76] *Id.* In *Baker*, the Court held that the appellants were claiming a denial of equal protection; therefore, their right to relief under the equal protection clause was justiciable. *Id.* at 209-10.

[77] *See* Gilligan v. Morgan, 413 U.S. 1 (1973) (injunction to restrain National Guard from infringing upon rights of Kent State students in future was a political question). *See also* Goldwater v. Carter, 444 U.S. 996 (1979) (plurality reasoning President's unilateral decision to terminate treaty with Taiwan was nonjusticiable political question); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 596 (1966) (beyond the area of foreign relations the political question doctrine has been restricted to a few relatively specific issues of constitutional law).

[78] 395 U.S. 486 (1969).

[79] *Id.* at 521-22 (emphasis in original). Congress did have the discretionary power to expel a member. *Id.* at 547. However, Congress was without discretionary power to exclude a person duly elected, who met the constitutional standing requirements of age, residence, and citizenship. Powell met these requirements, and yet, he was excluded. *Id.* at 517.

[80] *Id.* at 548-49.

[81] *Id.* at 549.

[82] 418 U.S. 683 (1974).

apply the *Baker* test strictly, as was done in *Powell*. The issue in *Nixon* was whether it was within the Court's power to issue a subpoena upon motion by the Watergate Special Prosecutor for the production of certain materials by President Nixon. The Court quoted language from *Baker*, but did not analyze the case under the *Baker* test. The case, instead, turned upon the fact that the production or nonproduction of evidence was "the kind of controversy courts traditionally resolve. . . . Whatever the correct answer on the merits, these issues are 'of a type which are traditionally justiciable.' "[83]

C. *The Political Question Doctrine in Hawaii*

In Hawaii, the development of the political question doctrine, like the United States Supreme Court cases, display amorphous characteristics.[84] In the area of judicial restraint, the Hawaii Supreme Court has followed the United States Supreme Court with respect to the proper role of courts in a democratic society.[85]

The Hawaii Supreme Court in *Yamasaki* traced the development of the political question doctrine in Hawaii to *Koike v. Board of Water Supply*[86] and *Akahane v. Fasi*.[87] Although these cases did not directly involve the political question doctrine,[88] they illustrated the broad policy of the Hawaii Court to infuse some flexibility into fundamental doctrine respecting the separation of powers.[89] The *Koike* court noted, however, that "while [the] unconstitutional exercise of power by the executive and legislative branches of government is

---

[83] *Id.* at 697 (quoting in part United States v. ICC, 337 U.S. 426, 430 (1949)).

[84] 69 Haw. at ____, 737 P.2d at 456.

[85] In *Yamasaki*, the Supreme Court stated:

> When confronted with an abstract or hypothetical question, we have addressed the problem in terms of a prohibition against rendering "advisory opinions," see State v. Fields, 67 Haw. at 274, 686 P.2d at 1385 (1984); when asked to decide whether a litigant is asserting "legally recognized interests, personal and peculiar to [him]," we have spoken of "standing," Life of the Land v. Land Use Commission, 63 Haw. at 172, 623 P.2d at 438 (1981); when a later decision appeared more appropriate, we have resolved the justiciability question in terms of "ripeness," State v. Fields, 67 Haw. at 274-75, 686 P.2d at 1385 (1984); and when the continued vitality of the suit was questionable we have invoked the "mootness" bar, Wong v. Board of Regents, 62 Haw. 391, 394, 616 P.2d 201, 203-04 (1980).

69 Haw. at ____, 737 P.2d at 456.

[86] 44 Haw. 100, 114, 352 P.2d 835, 843 (1960).

[87] 58 Haw. 74, 565 P.2d 552 (1977).

[88] *Koike* dealt with an illegal invasion by the legislature into the powers of the judiciary, and *Akahane* dealt with a separation of powers conflict between the legislative and executive branches of government.

[89] 44 Haw. at 114, 352 P.2d at 843.

subject to judicial restraint, the only check upon [the judiciary's] exercise of power is [the judiciary's] own sense of self-restraint."[90] Moreover, the court acknowledged that "[t]oo often, courts in their zeal to safeguard their prerogatives overlook the pitfalls of their own trespass on legislative functions."[91]

The political question doctrine has not been thoroughly developed in Hawaii. Although the Hawaii Supreme Court has discussed the doctrine in various cases,[92] the court has invoked the doctrine only once, in *Bulgo v. County of Maui*,[93] in determining a case to be nonjusticiable. In *Bulgo*, an action by a taxpayer seeking an injunction against the holding of an election, the court recognized "the inappropriateness of judicial intrusion into matters which concern the political branch of government,"[94] and concluded that "*Baker v. Carr* and other reapportionment cases have no bearing on the rule which restrains the judiciary from enjoining the holding of elections for public offices."[95] The *Bulgo* court cited generally to *Baker v. Carr*, but did not apply the *Baker* test.[96] Twenty years later, in *Yamasaki*, the Hawaii Supreme Court again turned to *Baker v. Carr*, but this time the court specifically applied the *Baker* test.

IV. ANALYSIS

In *Yamasaki*, the Hawaii Supreme Court applied the political question doctrine and concluded that "the disputes . . . [did] not constitute traditional fare for the judiciary; and if the circuit court ruled on them, it would be intruding in an area committed to the legislature."[97] The court applied the *Baker v. Carr* test and ultimately held the case to be nonjusticiable. In the first issue, the court found that whether damages from the illegal sand mining operation should be included in the trust could not be decided "without an initial policy determina-

---

[90] *Id.* at 103, 352 P.2d at 838.

[91] *Id.*

[92] *See* Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979) (dispute over the validity of the adoption of an amendment to state constitution not a political question); Hayes v. Gill, 52 Haw. 251, 473 P.2d 872 (1970) (judicial interpretation of state constitution's three year residency requirement for state representatives not a political question); Akizaki v. Fong, 51 Haw. 354, 461 P.2d 221 (1969) (contested state house election not a political question and court ordered run-off).

[93] 50 Haw. 51, 56, 430 P.2d 321, 325 (1967) (courts will not enjoin the holding of elections for public offices).

[94] *Id.*

[95] *Id.* at 57, 530 P.2d at 325. In *Bulgo*, the Hawaii Supreme Court did not apply any of the factors of the *Baker v. Carr* test and in its analysis stated that "[the reapportionment cases] do not provide a carte blanche license for the judiciary to concern itself with all political questions." 50 Haw. at 56, 430 P.2d at 325.

[96] The *Bulgo* court did not specifically state why *Baker* was not applicable.

[97] 69 Haw. at ____, 737 P.2d at 457.

tion of a kind clearly for nonjudicial discretion."[98] In the second issue, the court found that there was a "[lack of] judicially discoverable and manageable standards"[99] for resolving the conflict between the mandates of Hawaii Revised Statutes sections 10-13.5 and 261-5.[100]

A. Policy Determination For Legislature

In analyzing whether OHA would be entitled to twenty percent of the damages received by the state for the illegal mining of sand from Papohaku Beach, the court concluded:

> Nothing in HRS §10-3, where the public land trust is described, serves as a statutory base for a ruling that such damages are funds derived from the public land trust or that a pro rata portion of the land conveyed to the state in lieu of the damages should in turn be conveyed to the Trustees of OHA. Either ruling would be rendered possible only by an initial policy determination by the court of a kind normally reserved for nonjudicial discretion.[101]

In reaching this conclusion, the court looked to the legislative history of Hawaii Revised Statutes chapter 10. The legislative history of OHA illustrated that "much [was] left to subsequent legislatures, the Office of Hawaiian Affairs, and its board of trustees to work out the appropriate boundaries of the public trust."[102] Although the legislature determined that OHA would receive twenty percent of the funds derived from the trust, the question of exactly which funds OHA would be entitled to was still left unanswered.[103]

The court concluded that, absent a statutory base for declaring that damages such as those in question were to be included in the public land trust, the matter must be deferred to nonjudicial discretion—in this case, legislative discretion.[104] The legislative history under review established that the legislature was not yet "finished" with Hawaii Revised Statutes chapter 10. Therefore, given the fundamental principle that the judiciary's function is to interpret but not make the law, where the statutory boundaries are unstated, the court decided to defer to the legislature to determine the boundaries. Thus, the court concluded that the issue of whether these types of damages were intended to be

---

[98] *Id.* at ____, 737 P.2d at 458.

[99] *Id.*

[100] *Id.*

[101] *Id.* at ____, 737 P.2d at 458 (citing Baker v. Carr, 369 U.S. at 217).

[102] S. REP. NO. 784, 10th Haw. Leg., Reg. Sess., 1979 Senate J. 1350, 1353.

[103] 69 Haw. at ____, 737 P.2d at 457.

[104] *Id.* at ____, 737 P.2d at 458.

included in "the sale, lease or other disposition"[105] of the ceded lands, as described in Hawaii Revised Statutes section 10-3, was a matter to be determined by the legislature.

Although the court held the case to be nonjusticiable, it could easily have reached an alternative holding. The mandate of section 10-13.5 that "[t]wenty per cent of *all funds* derived from the public land trust . . . shall be expended by [OHA]"[106] could arguably have been intended to include the damages involved here. Moreover, section 10-3 simply states that "the public land trust shall be all proceeds and income from the sale, lease, or *other disposition*"[107] of ceded lands, again illustrating the broad language of the statute.

Thus, under this view, the court could reasonably have viewed its task as one of statutory interpretation.[108] Since statutory interpretation is "the kind of controversy courts traditionally resolve,"[109] the court could have avoided the political question doctrine and decided the case on the merits. Like *Nixon*, the issues presented in *Yamasaki* imply "[w]hatever the correct answer on the merits, these issues are 'of a type which are traditionally justiciable.' "[110] Therefore, under the scheme depicted here, the court need not have made an initial nonjudicial policy determination before it could act. Indeed, the determination of whether such damages are funds derived from the public land trust would merely be a matter of statutory interpretation, which has historically been a function of the judiciary.

Thus, by reading sections 10-3 and 10-13.5 broadly, the court could have decided the case without infringing on legislative turf. As a practical matter, the ramifications of a decision in favor of OHA on this issue would not have been very great.[111] The court elected to read the statute narrowly however, and chose,

---

[105] HAW. REV. STAT. § 10-3.

[106] *Id.* at § 10-13.5 (emphasis added).

[107] *Id.* at § 10-3 (emphasis added).

[108] The court acknowledged the statutory interpretation argument but dismissed the possibility. The court stated that "the task at first sight appears to be one of statutory interpretation. But a closer look at the disputes reveals they do not constitute traditional fare for the judiciary." 69 Haw. at ____, 737 P.2d at 457.

[109] *Cf.* United States v. Nixon, 418 U.S. 683, 696 (1974) (an issue is justiciable when it is a controversy that courts traditionally resolve). Although the Hawaii Constitution is not limited by the "case or controversy" requirement of article III, section 2 of the United States Constitution, the Hawaii Supreme Court has followed the teachings of the U.S. Supreme Court " 'that the use of Judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context.' " 69 Haw. at ____, 737 P.2d at 456 (quoting Life of the Land v. Land Use Comm'n, 63 Haw at 171-72, 623 P.2d at 438 (1981)).

[110] 418 U.S. at 697 (quoting in part United States v. ICC, 337 U.S. 426, 430 (1949)).

[111] The set of facts involved here are unique and not likely to be duplicated to the extent that a decision of this issue will be a continuously applied precedent. In this one issue, the dollar amount involved was relatively low.

as a matter of policy, to defer to the legislature all issues concerning OHA's entitlement because of the continuing ramifications of a decision in the second issue.

B. Lack of Judicially Discoverable and Manageable Standards

The second issue involved a more complicated matter with potentially far-reaching ramifications. OHA sought the declaration that it was entitled to twenty percent of the income and proceeds from the sale, lease, or other disposition of various "Trust Lands," as defined in section 5(f) of the Admission Act.[112] The lands specifically designated in OHA's pleading as "5(f) Trust Lands" included the lands surrounding harbors on all the major islands, land on Sand Island, land on which the Honolulu International Airport is located, and land on which the Aloha Tower complex is situated.[113] OHA claimed that, under Hawaii Revised Statutes section 10-13.5, it was entitled to receive twenty percent of the revenues generated from the foregoing lands, which are concededly part of the trust res.[114]

On this issue, the court used the second factor in the *Baker* test and found no "judicially discoverable and manageable standards"[115] that could be used to resolve the statutory conflict between Hawaii Revised Statutes sections 10-13.5 and 261-5,[116] and held this issue to be nonjusticiable. Section 261-5 provides that all income and proceeds from the airport operations be paid into the airport revenue fund, and that all the money in this fund be expended for the maintenance of the state airport system.[117] Obviously, if *all* the money from airport operations must be expended for the airports, then this statute directly conflicts with section 10-13.5. Section 10-13.5 declares that twenty percent of all funds derived from the airport, which is concededly part of the trust res, be expended by OHA.

The reluctance to allow OHA a share in the airport revenue fund stems from

---

[112] 69 Haw. at ____, 737 P.2d at 453.

[113] *Id.*

[114] *Id.* at ____, 737 P.2d at 458.

[115] *Baker*, 396 U.S. at 217.

[116] 69 Haw. at ____, 737 P.2d at 458.

[117] The statute provides in pertinent part:

> All moneys received by the department of transportation from rents, fees and other charges pursuant to this chapter as well as all aviation fuel taxes . . . shall be paid into the airport revenue fund . . . . All such moneys paid into the airport revenue fund shall be expended by the department for the statewide system of airports . . . and for operation and maintenance of airports and air navigation facilities . . . .

HAW. REV. STAT. § 261-5 (1985).

the legislative commitments of the funds.[118] "The construction of the State's harbors and airports is primarily financed through the sale of bonds which carry the State's pledge that revenues obtained from their operation shall be employed to repay bondholders."[119] If section 10-13.5 is applied, the state may not be able to meet its obligations to bondholders. The legislative history of section 10-13.5 provides no indication that the section was intended to overrule section 261-5, and "[i]t would be unrealistic, to say the least, for [the court] to conclude this could have been the intent of the legislature when the language of HRS § 10-13.5 was adopted."[120] Therefore, absent "judicially discoverable and manageable standards"[121] for resolving the conflict, the legislature should address the matter of conflicting statutes, and not the courts.

The court, in deciding this issue to be nonjusticiable, could also have drawn from another factor of the *Baker v. Carr* test: The court could not decide the issue "without an initial policy determination of a kind clearly for nonjudicial discretion."[122] In his final report, the legislative auditor stated that it is possible for the state to meet both its obligations to bondholders and its obligation to OHA under chapter 10:[123]

> The airport and harbor systems can and do raise revenues in excess of the cost of construction, operation, maintenance, and repair; but none of that excess can be reached by chapter 10 . . . unless and until all the requirements of the bond covenants are met. It is possible, under the certificates, for the State to raise revenues in excess of the requirements specified in the certificates. To the extent that there is such an excess, and the excess is attributable to lands subject to chapter 10, OHA probably may legitimately claim a share of it.[124]

Regardless of which factor of the *Baker* test is applied, a decision that OHA is entitled to such an excess is not a decision for a court to render. Such a ruling could not be made without legislative input as to the policy of the State to keep the airport and harbor systems operating on a self-sustaining basis by generating just enough revenues to cover all the system's expenses, including bond requirements.[125] It is the function of the legislature to analyze the mandates of section 261-5 and section 10-13.5 together with the State's financial obligations with respect to the airports and harbors, and to determine a feasible solution. Thus,

---

[118] *See* 69 Haw. at ____, 737 P.2d at 458.

[119] 69 Haw. at ____, 737 P.2d at 458.

[120] *Id.*

[121] Baker v. Carr, 369 U.S. 186, 217 (1962).

[122] *Id.*

[123] LEGISLATIVE AUDITOR, *supra* note 9, at 123.

[124] *Id.*

[125] *Id.* at 123-24.

this "initial policy decision"[126] must be determined by the legislature before the courts can rule on the issue.

V. IMPACT

Perhaps the true significance of *Yamasaki* lies not in the fact that the case articulated or clarified any particular rule of law, for the case did not make the boundaries of the political question doctrine any more concrete nor definite; nor did the case make it easier to predict how and when courts will invoke the doctrine in the future. But this should not come as a surprise when one considers the nature and the history of the political question doctrine. The court did not render a ruling either for or against OHA, but elected, instead, to leave the entire matter to the legislature for resolution.

The decision in this case, however, does not leave OHA without a forum. With the burden affirmatively on the legislature to clarify chapter 10, the legislature may still determine that OHA should receive the funds that it seeks. Also, if the legislature fails to take action in clarifying the statute, OHA is free to bring the matter before the courts again. Perhaps the court will be more inclined to reach the merits if it is convinced that the legislature intends to remain silent. Thus, the court's decision here is not fatal to OHA's chances of ultimately obtaining a favorable result.

A decision in OHA's favor, however, would not have completely resolved the problem of OHA's entitlement, but would instead have raised more issues. Among these uncertainties are whether "income," as used in section 10-3, refers to "net income" or "gross income," and how to allocate revenues generated from facilities situated on both trust and non-trust land.[127] Court decisions on these subissues would again lead to more uncertainties.[128] Therefore, judicial resolution at this point would be ineffective in achieving the end result of determining OHA's entitlement because the court would have to proceed on a piecemeal basis, resolving issues as they arise. Clearly, the most efficient way of resolving the dispute is for the legislature to clarify chapter 10 all at once and determine exactly what OHA is entitled to. If the court were to decide now, before any further legislation is passed to clarify chapter 10, the court would be intervening in an active and continuing concern of the legislature.[129]

---

[126] *See Baker*, 369 U.S. at 217.

[127] LEGISLATIVE AUDITOR, *supra* note 9, at 114. The Honolulu International Airport is an example of a facility that straddles both trust and non-trust land. *See id.* at 124.

[128] For example, if the court were to conclude that "net income" is the appropriate definition of "income," the next question is what may be deducted from gross income as cost or expense. *Id.* at 121. The legislative auditor stated that the "resolution of the income issue is less likely to be achieved without legislative intervention." *Id.* at 114.

[129] The legislature appropriated funds to the Office of the Legislative Auditor, through Act

Yet, even if the legislature should resolve the airport and harbor revenues issue by clarifying the statute, the legislature would probably not be able to foresee all the different situations that may arise in the future to challenge potential "holes" in the statute; revenues or proceeds derived from these situations might arguably be included in the trust.[130] If the glaring uncertainties of the airport and harbor dispute were no longer in issue, however, the court may be more willing to resolve the smaller issues that may arise. The court would then be resolving the conflict itself and viewing its action as statutory interpretation rather than as an intrusion on the legislature's discretion.[131] In this case, the court was exercising self-restraint, at least until the legislature has a chance to have its final word on the matter.

VI. CONCLUSION

The fact that the issue of OHA's entitlement is a continuing and active concern of the legislature together, with the sheer magnitude of the dollar amounts involved in this area,[132] combined to create a scenario unfit for judicial intervention. The political question doctrine provides an active role for judicial discretion that makes the doctrine that much more difficult to crystalize into a hard and fast rule of law. In *Yamasaki*, the Hawaii Supreme Court apparently viewed the disputes involved in the same manner as the United States Supreme Court viewed the issues in *Luther v. Borden*.[133] Like the *Luther* Court, the

---

121 Session Laws of Hawaii 1982, "(1) to complete the inventory of, (2) to study the numerous legal and fiscal issues relating to the use of and (3) to study the use and distribution of revenues from ceded lands." *Id.* at 1. The auditor submitted the *Progress Report on the Public Land Trust* in 1983 and the *Final Report on the Public Land Trust* in 1986, which superceded the progress report, to complete the tasks assigned under the Act. The subject of the *Final Report* centered specifically on the entitlement of OHA. *Id.* Thus, it is apparent that the issue of OHA's entitlement is an active and continuing concern of the legislature.

[130] For example, the issue of damages for the illegal sand mining operation constituted a unique set of facts that would unlikely have been contemplated by the previous legislatures.

[131] Had the damages issue come up after the legislative resolution of the airport and harbor revenues issue, perhaps the court would have been less hesitant to find the issue justiciable. *See supra* note 111.

[132] In the *Final Report on the Public Land Trust*, the auditor stated that if the twenty-percent provision of section 10-13.5 had been applied to the revenues from Sand Island, OHA might have received more than nine million dollars between November 1978 and June 30, 1986. LEGISLATIVE AUDITOR, *supra* note 9, at 109.

[133] The Supreme Court in *Luther* acknowledged the extreme ramifications if the Court were to find in favor of the plaintiff and recognized that:

> [T]he question presented is certainly a very serious one. For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned—if it had been annulled by the adoption of the opposing government—then the laws passed

Hawaii Supreme Court seemed to realize the tremendous weight of the issues presented and the ramifications of a decision in favor of OHA. The court would certainly agree that "[w]hen the decision of th[e] court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."[134] The court examined the situation and ultimately concluded the issues presented in *The Trustees of the Office of Hawaiian Affairs v. Yamasaki* were nonjusticiable.

Kellie M. N. Sekiya

---

by its Legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

48 U.S. (7 How.) at 38-39.

[134] *Id.* The United States Supreme Court denied a petition for a writ of certiorari on October 13, 1987. *Yamasaki*, 69 Haw. ____, 737 P.2d 446(1987), *cert. denied* 108 S.Ct. 234 (1987).

Dedman v. Board of Land and Natural Resources: Native Hawaiian Sacred Site Claims

I. INTRODUCTION

In *Dedman v. Board of Land and Natural Resources*,[1] the Hawaii Supreme Court held that geothermal development of an area considered sacred by Native Hawaiian worshippers of the volcano fire goddess, Pele, was not an unconstitutional infringement of their rights to exercise freely their religion as guaranteed by the first amendment to the United States Constitution[2] and article I, section 4 of the Hawaii Constitution.[3] In assessing whether an unconstitutional infringement of the Native Hawaiians' religious freedom had occurred, the court followed the United States Supreme Court's approach in *Wisconsin v. Yoder*.[4] The Hawaii Supreme Court concluded that, absent any showing by the Native Hawaiians that they had actually performed religious ceremonies and activities on the land, no discernible objective harm was evident,[5] and therefore, claimants had failed to establish that the requisite "substantial burden"[6] on their religion was imposed by geothermal development of the region.

The concern raised by *Dedman* is that the Hawaii Supreme Court's adoption of *Yoder's* "objective harm" test prejudicially excludes consideration of the intrinsic religious importance of Hawaiian sacred lands. This note focuses upon this concern. Section II discusses the factual background of *Dedman*. Section III outlines the relevant constitutional religious standards. Section IV comments on the *Dedman* decision and proposes that the shortcomings of the approaches

---

[1] 69 Haw. ____, 740 P.2d 28 (1987).

[2] The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[3] This section states that "no law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." HAW. CONST. art. I, § 4.

[4] 406 U.S. 205 (1972). The United States Supreme Court in *Yoder* articulated an "objective" harm threshold requirement as one of its essential criterion for finding an unconstitutional religious infringement. *Id.* at 218. The Hawaii Supreme Court had previously applied the constitutional standards of *Yoder* in deciding State ex rel. Minami v. Andrews, 65 Haw. 289, 651 P.2d 473 (1982).

[5] *Dedman*, 69 Haw. at ____, 740 P.2d at 33.

[6] *Id.* at ____, 740 P.2d at 33.

taken by courts in applying constitutional standards to Native American Indian sacred site controversies are relevant to an assessment of the Hawaii Supreme Court's analysis in *Dedman*. Section V discusses the future implications of the *Dedman* decision. Section VI concludes that *Dedman* will adversely affect future Native Hawaiian religious claims by advocating constitutional standards which preclude adequate consideration of unique Native Hawaiian theology.

II. FACTS

On March 2, 1982, the Estate of James Campbell and True/Mid-Pacific Geothermal Ventures (Campbell) applied for a conservation district use permit with the Board of Land and Natural Resources (Board) for the purpose of conducting geothermal development activities in the Kahauale'a area on the Island of Hawaii.[7] The Board granted Campbell the permit on February 25, 1983.[8]

In May of 1984, the Hawaii legislature directed the Board to reassess its decision to grant the permit.[9] On December 28, 1984, the Board reapproved the Kahauale'a area as a geothermal subzone. However, the Board directed Campbell to consider exchanging the Kahauale'a land for land in the Kilauea Middle East Rift Zone (KMERZ).[10] On August 10, 1985, Campbell applied for a conservation district use permit in the KMERZ.[11]

---

[7] *Id.* at ____, 740 P.2d at 30. The Kahauale'a region had already been classified as a geothermal resource subzone by the Board of Land and Natural Resources pursuant to its authority under HAW. REV. STAT. § 205-5.1(b) (1985) which provides: "The board of land and natural resources shall have the responsibility for designating areas as geothermal resource subzones . . . ." Because Campbell desired to engage in geothermal development activities within a conservation district, Campbell was required to apply to the Board for a conservation district use permit under HAW. REV. STAT. § 205-5.1(d) (1985), which reads, "If geothermal development activities are proposed within a conservation district . . . the board of land and natural resources shall . . . determine whether . . . a conservation district use permit shall be granted to authorize the geothermal development activities described in the application."

[8] *Dedman*, 69 Haw. at ____, 740 P.2d at 30.

[9] This legislative mandate (Act 151, 1984 Haw. Sess. Laws § 3) was sparked by the occurrence of volcanic eruptions in the Kahauale'a area in June of 1983 which raised doubts as to the safety of tapping geothermal resources at the approved location and as to the Board's proposal in May 1984 of new administrative rules to guide the designation and regulation of geothermal resource subzones. *Dedman*, 69 Haw. at ____, 740 P.2d at 30. The Board's proposed rules were adopted in July and amended in August of 1984. *Id.* at ____, 740 P.2d at 30.

[10] *Id.* at ____, 740 P.2d at 30. The Board advocated the land exchange to relocate the geothermal project five to ten miles farther from the sacred Hawaiian lands in an effort to accommodate the Native Hawaiians' religious beliefs. *Id.* at ____, 740 P.2d at 33. The initial site was in close proximity to Volcano National Park whereas the revised location was in the Wao Kele'O Puna Natural Area Reserve. *Id.* at ____, 740 P.2d at 30.

[11] The permit requested permission to develop 100 megawatts of geothermally generated elec-

In October of 1985, the Board approved the land exchange, and amended its decision of December 28, 1984. Ralph Palikapu O'Kamohoalii Dedman and Dr. Noa Emmett Auwae Aluli (Appellants) were granted intervenor status in November 1985 to participate in contested case hearings challenging the approval of the KMERZ as a geothermal resource subzone.[12] On April 9, 1985, the Board approved 9,014 acres of the KMERZ as a geothermal resource subzone.[13] On June 18, 1986, the Board approved Campbell's application for a conservation district use permit in the KMERZ, thereby permitting Campbell to explore, develop, and produce up to twenty-five megawatts of geothermally generated electricity and to explore for future additional development of seventy-five megawatts.[14]

Appellants filed a motion to appeal to the Hawaii Supreme Court. Appellants contended that the Board's approval of geothermal development activities in the KMERZ constituted a deprivation of their federal and state constitutional rights to freedom of religion.[15]

III. HISTORY OF THE LAW

A. *The First Amendment's Religion Clauses*

The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[16] Although the amendment consists of two identifiable clauses—the "establishment" clause and "free exercise" clause—the unitary objective of both clauses is to restrict governmental interference with religion.[17] The establishment clause precludes Congress from enacting laws which would favor or promote religion.[18] The free exercise clause prohibits govern-

---

tricity. *Id.* at ____, 740 P.2d at 30-31.

[12] *Id.* at ____, 740 P.2d at 31. The hearings were held from November 13-15 in Hilo, Hawaii. *Id.* at ____, 740 P.2d at 31.

[13] *Id.* at ____, 740 P.2d at 31. The land exchange was completed on December 27, 1985, when the State and Campbell Estate exchanged deeds to the Kahauale'a and KMERZ land, respectively. *Id.* at ____, 740 P.2d at 31.

[14] *Id.* at ____, 740 P.2d at 31. Granting of the permit was contingent upon preservation of archaeological sites and compliance with environmental conditions. *Id.*

[15] *Id.* at ____, 740 P.2d at 31.

[16] U.S. CONST. amend. I.

[17] Note, *Indian Worship v. Government Development: A New Breed of Religion Cases*, 2 UTAH L. REV. 313, 319 (1984) (The "[u]nitary purpose of the [religion] clauses [is] maximum freedom of religion with minimum governmental interference.").

[18] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962). The *Engel* Court held a New York public school board's program of daily classroom prayer unconstitutional because it violated the establishment clause. The Court repeated some of the essential purposes underlying the establishment

ment from restraining religious beliefs and activities.[19] Neither clause is absolutely enforceable because absolute enforcement of either would often contradict the purpose of the other. Thus, the concept of neutrality,[20] that government should neither foster and promote, nor restrict or prohibit religious freedom, is used as a guide to balance these competing protections. The United States Supreme Court stated that the first amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used as to handicap religions, than it is to favor them."[21]

B. The Free Exercise Clause

1. General Standards Developed by the United States Supreme Court

Since the landmark decision of *Cantwell v. State of Connecticut*,[22] the United States Supreme Court has consistently and unequivocally upheld the applicability of the first amendment to the states through the due process clause of the

---

clause:

> The Establishment Clause . . . is violated by the enactment of laws which establish an official religion . . . . When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain . . . . [The establishment clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion . . . showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who had contrary beliefs.

Id. at 431

[19] J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 17.6 (1986).

[20] *See id.* at § 17.1.

[21] Everson v. Board of Education, 330 U.S. 1, 18 (1947).

[22] 310 U.S. 296 (1940). The Court in *Cantwell* had to determine the constitutionality of a Connecticut statute which prohibited the solicitation of money for religious, charitable, or philanthropic causes unless the approval of the secretary of the Public Welfare Council was first received. The statute empowered the secretary with authority to determine whether a cause was religious or not. The Court ruled:

> We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

Id. at 303.

fourteenth amendment.[23] The right to freedom of religion is not, however, absolute. For instance, the Court has with regularity differentiated between the absolute freedom of individual religious belief and the limited freedom of individual conduct regarding one's religious beliefs.[24] Moreover, in assessing the propriety of an infringement claim, the Court declines any attempt to define religion[25] and inquires only into whether the asserted religious infringement stems from legitimate and sincere religious beliefs.

In deciding the constitutionality of legitimate and sincere claims of religious infringements, the Court weighs the state's interests against the severity of the burden imposed upon religion. The Court employs various criteria in its balancing analysis and has established threshold levels which each side must attain in order to tip the scales in its favor and ultimately prevail. For instance, not all

---

[23] *See, e.g.*, School District of Abington Township v. Schempp, 374 U.S. 203, 215 (1963); Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943).

[24] *See, e.g.*, *Cantwell*, 310 U.S. at 303, 304 ("Thus the [First] Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."); Bowen v. Roy, 106 S. Ct. 2147 (1986). In Braunfeld v. Brown, 366 U.S. 599 (1961), the Court said:

> Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation . . . . The freedom to hold religious beliefs and opinions is absolute.
>
> However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions.

Id. at 603 (citations omitted). *See also* Reynolds v. United States, 98 U.S. 145, 166 (1879) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."); Koolau Baptist Church v. Dep't of Labor, 68 Haw. ____, ____, 718 P.2d 267, 271 (1986) ("The door of the Free Exercise clause stands tightly closed against any governmental regulation of religious beliefs . . . . However the freedom to act . . . is not totally free from legislative restrictions.").

[25] *See, e.g.*, Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 714-16 (1981). In upholding a Jehovah's Witness' right to collect unemployment compensation benefits after leaving a job for religious reasons, the United States Supreme Court stated "courts are not arbiters of scriptural interpretation," *id.* at 716, and "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714. The Court further emphasized its position of non-involvement in questions of religion by stating that "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 715.

The courts have liberally defined religion. *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970) (conventionality of practice is irrelevant as to whether or not the practice is religious). *See generally* Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969) (court held Science of Dianetics is a religion entitled to first amendment protection), *cert. denied*, 396 U.S. 963 (1969); Malnak v. Yogi, 440 F. Supp. 1284 (D.N.J. 1977) (court held transcendental meditation is a religion entitled to first amendment protection); Note, *Native American Free Exercise Rights to the Use of Public Lands*, 63 B.U.L. REV. 141, 154-57 (1983).

religious burdens are unconstitutional.[26] An aggrieved party must show that the government's actions have "substantially burdened" his or her religious freedom.[27] The Court has often interpreted "substantial burden" to represent the "coercive effect" of the government's actions in inhibiting the practice of religion.[28]

The state must convince the Court that its secular interests outweigh the concomitant religious burden imposed. Failure to do so will result in the state regulation or practice being declared unconstitutional.[29] The Court has stressed that the government's burden is demanding and has remarked that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[30] One of the more important

---

[26] *See, e.g.*, United States v. Lee, 455 U.S. 252, 257 (1982). The Court held that the religious burden imposed on an Amish employer as a result of having to pay social security taxes was not unconstitutional when weighed against the compelling governmental interest in maintaining an effective tax system. In arriving at its decision, the *Lee* Court remarked:

> To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated . . . but there is a point at which accommodation would "radically restrict the operating latitude of the legislature."

Id. at 258.

[27] *See supra* note 24. *See also* Prince v. Massachusetts, 321 U.S. 158 (1944) (held statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals, or merchandise in public places as constitutional despite the fact that the girl was a Jehovah's Witness and believed it her religious calling to perform the work); Reynolds v. United States, 98 U.S. 145 (1878) (Mormon church which practiced polygamy as part of its religious faith was not exempt from federal statute outlawing such practice); Koolau Baptist Church v. Dep't of Labor, 68 Haw. ____, 718 P.2d 267, 272 (1986) (citing United States v. Lee).

[28] *See, e.g.*, School District of Abington Township v. Schempp, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.").

[29] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (the possibility of the filing of fraudulent unemployment compensation claims and potential disruption to employers in scheduling Saturday work did not warrant denial of benefits under South Carolina unemployment compensation statute to claimant who, because of her religious beliefs, refused employment which required her to work on Saturdays, the Sabbath day of her faith); *cf.* Braunfeld v. Brown, 366 U.S. 599 (1961) (Pennsylvania criminal statute which prohibited the Sunday retail sale of specific commodities for secular purpose of setting aside one day each week for rest, recreation, and tranquility held constitutional, notwithstanding economic loss suffered by adherents of Orthodox Jewish faith whose religious tenets mandated that, in observance of Saturday Sabbath, they could not transact business).

[30] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). *See also* Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations. . . . '"). *But cf.* Bowen v. Roy, 106 S. Ct. 2147 (1986), wherein the court held:

factors taken into consideration, when balancing each side's interests and burdens, is whether the state could have fulfilled its objectives and satisfied its interests through an alternative means, thereby imposing a lesser burden on religious practices. When this situation arises, the Court will instead direct implementation of the "least restrictive means."[31]

2. *Native American Sacred Site Claims*

The Native Hawaiians in *Dedman* sought to preserve the sanctity of volcanic lands where they believed the fire goddess, Pele, resided. Native American Indians have brought similar free exercise claims before the courts, arguing that certain lands or sites are sacred and indispensable to their religion, and therefore should not be disturbed by commercial or governmental development.[32] Because of the similarities between Native Hawaiian and Native American Indian

---

> The test applied in cases like *Wisconsin v. Yoder* . . . is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the [lower court]; that standard required the Government to justify enforcement . . . [based on] the least restrictive means of accomplishing a compelling state interest. Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

Id. at 2156.

The *Bowen* lesser government standard test of reasonableness was later rejected by the Court in Hobbie v. Unemployment Appeals Comm'n of Fla., 106 S. Ct. 1046, 1049 (1987) ("We reject the argument again today . . . '[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny' . . . ." (citations omitted)).

[31] *See, e.g.*, Thomas v. Review Bd. of the Ind. Employment Security Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); Crow v. Gullet, 541 F. Supp. 785, 790 (D.S.D. 1982) ("Even if the state's interest weighs heavier in this balance the regulation or restriction will be invalid if the state's interest can be achieved by less restrictive alternative means."), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983). *But cf.* Bowen v. Roy, 106 S. Ct. 2147 (1986).

[32] *See, e.g.*, Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), *modified*, 764 F.2d 581 (9th Cir. 1985), *cert. granted sub nom.* Lyng v. Northwest Indian Cemetery Ass'n, 107 S. Ct. 1971 (1987); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983); Hopi Indian Tribe v. Block, 8 Indian L. Rep. 3073 (D.D.C. 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983); Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608, (E.D. Tenn. 1979), *aff'd on other grounds*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

sacred site claims, an examination of the courts' treatment of Native American Indian sacred site claims serves as a useful background to an analysis of the Hawaii Supreme Court's decision in *Dedman*.

Native American sacred site cases have been decided predominantly in favor of the state, despite findings that American Indian sacred sites and religions had been infringed upon.[33] One reason for the pro-government outcomes is the courts' over-reliance on the concept of coercion in their assessment of the severity of the religious interference.[34] Unlike free exercise claims that involve the government conditioning the receipt of public benefits on an alteration of religious practices,[35] or a law requiring actions or compliance in violation of religious tenets,[36] sacred site claims are not based primarily upon allegations of governmental coercion.[37] Rather, the issue in such claims is to what extent the state may use publicly owned lands[38] when doing so violates American Indian

---

[33] The Ninth Circuit, which prohibited timber harvesting within a sacred site, is the only federal appellate court which has decided in favor of Native American Indians. Northwest Indian Cemetery Protective Association v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), *modified*, 764 F.2d 581 (9th Cir. 1985), *cert. granted sub nom.* Lyng v. Northwest Indian Cemetery Association, 107 S. Ct. 1971 (1987).

[34] *See generally* Note, *supra* note 15, at 325-26.

[35] *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Florida, 107 S. Ct. 1046 (1987) (free exercise clause prohibits withholding of unemployment compensation benefits for Seventh-Day Adventist who is discharged for refusing to work on Saturday, her day of Sabbath); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (Indiana's denial of unemployment compensation benefits to a Jehovah's Witness who refused to continue to work for his employer upon discovering he was participating in the manufacture of armaments, an activity abhorrent to his religion, was in violation of the free exercise clause); Sherbert v. Verner, 374 U.S. 398 (1963) (South Carolina could not deny unemployment compensation benefits to a Seventh-Day Adventist who refused employment which required her to work on Saturday, her Sabbath day).

[36] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (The Court held unconstitutional a compulsory school attendance law requiring every child to attend school until age sixteen. The Amish religious order successfully demonstrated that the law clearly violated their religious beliefs and practices.).

[37] *See generally* Note, supra note 15, at 325-26 (courts generally find the element of coercion a major factor only in situations where government regulations require actions in violation of religious beliefs, or when receipt of government benefits is contingent upon a compromise of religious beliefs).

[38] Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1454, 1455 n.32 (1985) (common to this area is often a contention by the state or federal entity that Native Americans are making claims to public lands and therefore have no property interest and no claim under the first amendment). *See, e.g.*, Hopi Indian Tribe v. Block, 8 Indian L. Rep. 3073 (D.D.C. 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983) (Native American religious claims made to halt construction of a ski resort in the Coconino Mountains were defeated for lack of a property interest); Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608, 612 (E.D. Tenn. 1979), *aff'd on other grounds*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980) (free exercise claim was rejected where plaintiffs had no

theology, and not whether the state is coercing its citizens to renounce their religious beliefs or practices. Nevertheless, courts have relied on findings of "lack of government coercion" to sustain activities which infringe upon use of American Indian sacred sites and religious practices.[39]

Moreover, even where free exercise infringements have been found, federal courts appear to have applied different standards in determining the constitutionality of the infringements, depending upon whether the claims involved sacred Indian sites. In *Thomas v. Review Board of the Indiana Employment Security Division*,[40] for example, the Supreme Court upheld the claim of a Jehovah's Witness despite the fact that the alleged infringement was caused indirectly.[41] In *Hopi Indian Tribe v. Block*,[42] however, the United States Court of Appeals for the District of Columbia held that a commercial development on land considered sacred by the Hopi Indians was constitutional because the government did not intend to burden the Hopis' exercise of their religion and the resulting infringement was not a direct result of the development.[43] The applicability of the conventional *Yoder* analysis[44] to the adjudication of Native American free exercise claims has been criticized.[45] A number of cases have arisen in which

---

legal property interest in the land in question).

[39] *See supra* note 26. *See also* Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983) (where Indians retained access to sacred sites court found no coercion); Hopi Indian Tribe v. Block, 8 Indian L. Rep. 3073 (D.D.C. 1981), *aff'd sub nom.* Wilson V. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983) (court found no coercion present where Navajo and Hopi Indian tribes could continue to enter sacred lands and allow expansion of a ski resort); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (government construction of Glen Canyon dam in Utah that caused flooding of the Rainbow Bridge National Monument, a Navajo Indian sacred area, was not an unlawful attempt to regulate religion, not coercive, and found constitutional despite the complete destruction of a prominent Indian religious site).

[40] 450 U.S. 707 (1981).

[41] *Thomas*, 450 U.S. at 718 (Court held unconstitutional Indiana's denial of unemployment benefits to claimant who refused to continue working for employer engaged in manufacture of products abhorrent to claimant's religion). The Court, noting that a state cannot pressure a Jehovah's Witness into violating his religious tenets in order to receive important public benefits, stated that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.*

[42] 8 Indian L. Rep. 3073 (D.D.C. 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983.), *cert. denied*, 464 U.S. 956 (1983).

[43] *Id.*

[44] *See supra* note 4.

[45] *See, e.g.*, Note, *supra* note 36, at 1471 ("[C]ourts have failed to protect Indian religions. Because native free exercise claims are unique in their emphasis on specific sites as the loci of spirits and spirituality, courts must approach the analysis of governmental development of sacred sites with a test that takes these considerations to account."); Note, *Native Americans and the Free Exercise Clause*, 28 HASTINGS L.J. 1509, 1509-10, 1535 (1977) (*Yoder* decision does not clearly articulate a uniform standard applicable to first amendment freedom of religion cases in-

Native Americans challenged various government sponsored projects on public lands on the grounds that such projects violated the sanctity of Native American religious sites, thus constituting an unconstitutional infringement on their freedom of religion.[46] The continuing debate focuses on whether the present *Yoder* analysis is adequate in all contexts, and whether a slightly modified or wholly new first amendment test is warranted in order to assure an equal and proper scope of constitutional protection for even the most unconventional religions.[47]

The Ninth Circuit's holding in *Northwest Indian Cemetery Protective Association v. Peterson*[48] is the only decision to date concerning Native American sacred site free exercise challenges in which Native Americans have prevailed. In *Peterson*, an association of Northwest Indians[49] argued that road construction and timber harvesting within a portion of a national forest violated their constitutional free exercise rights. Notwithstanding the Ninth Circuit's application of the stringent "centrality" standard,[50] the court affirmed the district court's conclusion that the proposed activities impermissibly burdened the Indian claimants' first amendment rights to free exercise of their religion.[51]

Although courts generally have not appreciated the fragility of Native Ameri-

---

volving Native American religious practices) [hereinafter Note, *Native Americans*]; Note, *supra* note 15, at 336 ("By using the traditional religion tests in nontraditional ways, the courts have defeated the Indian claims of right of access to public property for worship purposes . . . ."); Note, *supra* note 23 (unless the courts modify the *Yoder* balancing test in its application to unconventional Native American religious practices, such practices will wrongfully be left unprotected under the first amendment); Note, *American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting*, 85 MICH. L. REV. 771 (1987) (the courts' application of conventional free exercise analysis to unique Native Americans' beliefs and practices is inadequate, and deprives Native Americans of full constitutional first amendment protection) [hereinafter Note, *American Indian*].

[46] *See supra* note 30.

[47] *See supra* note 43.

[48] 764 F.2d 581 (9th Cir. 1985), *modifying*, 565 F. Supp. 586 (N.D. Cal. 1983), *cert. granted sub nom.* Lyng v. Northwest Indian Cemetery Ass'n, 107 S. Ct. 1971 (1987).

[49] The Association comprised Yurok, Karok, and Tolowa Indians who resided in the surrounding region. *Northwest Indian Cemetery Protective Ass'n*, 764 F.2d at 583.

[50] The court noted that "[t]he Indians have to show that the area at issue is indispensable and central to their religious practices and beliefs and that the proposed governmental actions will seriously interfere with or impair those religious practices." *Id.* at 585. The centrality standard is designed to provide greater constitutional protection for religious practices that are central to beliefs. Courts have generally associated sacred sites as being central to beliefs only in cases where the site was considered irreplaceable in terms of the importance of ceremonies and rituals actually performed there. Native Americans have criticized the use of the centrality standard as an inaccurate measure of a sacred site's religious value. Native American Indians contend that centrality fails to account for a sacred site's intrinsic religious value and is overemphasized in application. *See infra* note 110.

[51] 764 F.2d at 586.

can religions, Congress, on the other hand, has explicitly pronounced that these religions deserve special protection. For example, the American Indian Religious Freedom Act of 1978 (AIRFA)[52] expressed that the policy of the United States is:

> [T]o protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[53]

The legislative history of the Act indicates that the aforementioned objective would be supported by "[insuring] that the policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion."[54]

AIRFA acknowledged the extraordinary needs of Native Americans regarding their religious beliefs and practices and affirmatively endorsed the use of novel approaches to satisfy those needs and ensure first amendment protections.[55] Although AIRFA formally recognized the need to guard against Native American religious infringement, the courts interpret the Act to do no more. In *Crow v. Gullet*,[56] the District Court for the District of South Dakota explicitly stated "the Act does not create a cause of action in federal courts for violation of rights of religious freedom."[57]

3. *Free Exercise Clause Standards Developed by the Hawaii Courts*

Article I, section 4 of the Hawaii Constitution is the counterpart to the first amendment to the United States Constitution.[58] The few Hawaii cases which have arisen under the free exercise clause have all been decided in favor of the state.[59] Prior to *Dedman*, however, none of the first amendment cases had arisen

---

[52] 42 U.S.C. § 1996 (1982).

[53] *Id.*

[54] S. REP. NO. 709, H.R. REP. NO. 1308, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262. *See generally* Note, *Native American Free Exercise Rights*, 63 B.U.L. REV. 141, 152-54 (1983).

[55] For discussion of AIRFA, see Note, *supra* note 15, at 319-21.

[56] 541 F. Supp. 785, 793 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983).

[57] 541 F. Supp. at 793.

[58] *See supra* note 3.

[59] *See, e.g.*, Koolau Baptist Church v. Dep't of Labor and Indus. Relations, 68 Haw. ____, 718 P.2d 267 (1986) (church sponsored school was not exempt from taxation under state unem-

under the "sacred site" theory.

The Hawaii Supreme Court, in *Minami v. Andrews*,[60] applied the *Yoder* analysis and found in *Yoder* a four-factor test to use in determining whether unconstitutional religious infringements had occurred:

> According to *Yoder* . . . to determine whether there exists an unconstitutional infringement of the freedom of religion, it would be necessary to examine [1] whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, [2] whether or not the parties' free exercise of religion had been burdened by the regulation, [3] the extent or impact of the regulation on the parties' religious practices, and [4] whether or not the state had a compelling interest in the regulation which justified such a burden.[61]

Minami involved a state statute requiring licensing of private schools.[62] Individuals affiliated with the Church of the Pacific operated a private school without the requisite license. Church personnel contended that applying for and obtaining a license impinged upon their religious beliefs and constituted a deprivation of their constitutional right to freedom of religion.[63] The Supreme Court of Hawaii disagreed and held that, under *Yoder*, the Church had not shown that refusal to comply with licensing requirements was a legitimate and sincerely held religious belief; that licensing would not unduly burden religious activities; and finally that the state did have a compelling interest in licensing private schools.[64]

Minami set the precedent for a later decision by the Hawaii Intermediate Court of Appeals in *State v. Blake*.[65] The defendant Blake was convicted of knowingly possessing marijuana in violation of state law.[66] Blake contended that he practiced the Hindu Tantrism religion, which ostensibly advocated the use of marijuana, and that the state statute criminalizing marijuana unconstitu-

---

ployment compensation law because plaintiffs had failed to show a substantial burden on their religion); State ex rel. Minami v. Andrews, 65 Haw. 289, 651 P.2d 473 (1982) (a state statute requiring private schools to obtain a license was held as no infringement on religion); Medeiros v. Kiyosaki, 52 Haw. 436, 478 P.2d 314 (1970) (court held a noncompulsory public grade school film series on family life and sex education was not coercive and found no violation of the free exercise clause); State v. Blake, 5 Haw. App. 411, 695 P.2d 336 (1985) (law proscribing possession of marijuana did not violate defendant's rights to freely exercise Hindu Tantrism, a religion which condoned but did not require the use of marijuana for religious purposes).

[60] 65 Haw. 289, 651 P.2d 473 (1982).

[61] *Id.* at 291, 651 P.2d at 474.

[62] *See* HAW. REV. STAT. § 298-6.

[63] *Minami*, 65 Haw. at 290, 651 P.2d at 474.

[64] *Id.* at 291-92, 651 P.2d at 474-75.

[65] 5 Haw. App. 411, 695 P.2d 336 (1985).

[66] *See* HAW. REV. STAT. § 712-1249 (1976).

tionally infringed on his religious beliefs and practices.[67] The Intermediate Court of Appeals relied on the *Minami* test and accepted the sincerity of Blake's religious beliefs, but nevertheless determined that Hindu Tantric practices did not require the use of marijuana, nor was its use essential to the group's practices or beliefs.[68] The court held that Blake had failed to establish that smoking marijuana was an "integral part of [his] religious faith,"[69] which, if prohibited, would cause a "virtual inhibition of the religion or the practice of the faith,"[70] and concluded that he had failed to satisfy the burden requirement.[71]

The *Blake* court did not analyze the state's interest in prohibiting the use of marijuana, nor whether the state's interests could have been achieved through less restrictive means. Nor did the court balance those interests against Blake's sincere religious beliefs in the use of marijuana. However, the court nonetheless concluded that the state did have a compelling interest in prohibiting the possession of marijuana which "overrides defendant's claimed religious interests."[72] The court also characterized Blake's belief in using marijuana as personal and not religious because marijuana was not "an intrinsic or essential part of Hindu Tantrism."[73]

Koolau Baptist Church v. Department of Labor and Industrial Relations[74] was,

---

[67] State v. Blake, 5 Haw. App. 411, 412, 695 P.2d 336, 337 (1985).

[68] *Id.* at 417, 695 P.2d at 339.

[69] *Id.* at 417, 695 P.2d at 340 (citing People v. Mullins, 50 Cal. App. 3d 61, 70, 123 Cal. Rptr. 201, 207 (1975)).

[70] 5 Haw. App. at 417, 695 P.2d at 340.

[71] The *Blake* court's interpretation of the *Minami* "burden" requirement imposed on those alleging religious infringements could be considered excessive particularly in light of the broad protections afforded under the first amendment and the fact that the "burden" requirement was extracted from a California Supreme Court decision and not a United States Supreme Court decision. *Blake*, 5 Haw. App. at 417, 695 P.2d at 340.

See generally Note, *Native Americans*, *supra* note 43, at 1533 ("[P]urpose underlying the free exercise clause . . . is to guarantee the widest possible exercise of religious practices consistent with ordered liberty."). The United States Supreme Court recognizes broad first amendment protections:

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them and of the lack of any one religious creed on which all men could agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views . . . . The first amendment does not select any one group for preferred treatment. It puts them all in that position.

United States v. Ballard, 332 U.S. 78, 87 (1943). *See also* Note, *Soul Rebels: The Rastafarians and the Free Exercise Clause*, 72 GEO. L.J. 1605, 1616 (1984) ("[P]art of the *raison d'etre* for the safeguards afforded religion under our Constitution is the protection of unpopular or unorthodox religious sects.").

[72] *Blake*, 5 Haw. App. at 418, 695 P.2d at 340.

[73] *Id.*

[74] 68 Haw. ____, 718 P.2d 267 (1986).

until *Dedman*, the most recent case involving the issue of free exercise rights. Koolau Baptist Church ran a private school and paid wages to its lay teachers and staff. Church officials contended that it was exempt from a state unemployment compensation statute which required employers, unless exempted, to contribute to a state unemployment compensation fund.[75] The church's primary argument against the statute was that it allowed the state to determine who would be exempt from the state unemployment tax, thereby promoting excessive entanglement with religion in violation of the establishment clause.[76] The Hawaii Supreme Court rejected this argument and held that the state had violated neither the establishment nor the free exercise clause.

The church's argument under the free exercise clause was that "[t]he function of the faculty or staff member of the church school is *per se* a religious exercise."[77] The court cited several United States Supreme Court decisions for the proposition that a claimant must, at a minimum, expose an actual burden on his freedom to exercise his religious rights as a result of inclusion in a governmental program before the free exercise clause will justify an exemption.[78] The court then established that the burden must be substantial, "that is, one which would inhibit the practice of the religion and in effect be a coercion to forego the practice."[79] The court concluded that claimants had not met the "substantial burden" standard and found no free exercise violation.[80] Although the court discussed the balancing test, it found the test inapplicable because claimants had failed to establish the prerequisite substantial burden on their religion.[81]

IV. ANALYSIS

A. Narrative

In *Dedman v. Board of Land and Natural Resources*,[82] the Hawaii Supreme Court held that the state's statutory provisions providing for the development of geothermal energy[83] within sacred Hawaiian land imposed no substantial

---

[75] *Id.* at ____, 718 P.2d at 269.
[76] *Id.* at ____, 718 P.2d at 273.
[77] *Id.* at ____, 718 P.2d at 272.
[78] *Id.*
[79] *Id.*
[80] *Id.* at ____, 718 P.2d at 273.
[81] *Id.*
[82] 69 Haw. ____, 740 P.2d 28 (1987).
[83] The relevant statutes were HAW. REV. STAT. §§ 205-5.1 and 205-5.2. HAW. REV. STAT. § 205-5.2 was facially neutral towards religion and empowered the Board of Land and Natural Resources with the authority to designate areas as geothermal resource subzones. HAW. REV. STAT. § 205-5.1 conferred upon the Board authority to grant permits for geothermal development.

burden on Native Hawaiian religious practices and were thus constitutional. The court determined that the United States Supreme Court's decision in *Wisconsin v. Yoder*[84] prescribed the appropriate constitutional standard in determining whether the claimants' first amendment rights to exercise their Hawaiian religion freely had been violated. Specifically, the court stated:

> In order to find an unconstitutional infringement on [the Native Hawaiian's] religious practices, "it [is] necessary to examine whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, whether or not the parties' free exercise of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious practices, and whether or not the state had a compelling interest in the regulation which justified such a burden.[85]

The court promptly dispensed with the need to ascertain whether the religious claims brought before it were legitimately and sincerely held. The court concluded that the issue did not arise because the opposition had mounted no challenge against the legitimacy and sincerity of the religious beliefs per se.[86]

The court then focused on measuring the magnitude of the religious burden caused by geothermal development conducted in the KMERZ area and the propriety of the state regulation through which approval of the geothermal project was granted. The court required claimants to show not only a burden on their free exercise of religion, but that the burden was substantial, that is, one which had a "coercive effect" and operated against them in the practice of their religion.[87] Apparently, the court concluded that the Hawaiian religious practitioners failed in this regard because they had not shown actual use of the land for religious ceremonies. This finding, coupled with the Board's conclusion that the extraction of geothermal energy would not adversely affect the eruptive nature of nearby Kilauea volcano,[88] served to deny the Hawaiian religious practitioners the requisite "substantial" grounds necessary to sustain a first amendment cause of action.[89]

Because the threshold substantial burden requirement had not been met, the court never reached the question of whether the state had a compelling interest

---

[84] 406 U.S. 205 (1972).

[85] *Dedman*, 69 Haw. at ____, 740 P.2d at 32 (1987) (*quoting* State ex rel. Minami v. Andrews, 65 Haw. 289, 291, 651 P.2d 473, 474 (1982)).

[86] *Id.* at ____, 740 P.2d at 32.

[87] *Id.* at ____, 740 P.2d at 32-33.

[88] Claimants had contended that extraction of geothermal energy would "desecrate the body of Pele [Hawaiian goddess] by digging into the ground and [would] destroy the goddess by robbing her of vital heat," interfering with their rituals and traditional beliefs and practices. *Id.* at ____, 740 P.2d at 32.

[89] *Id.* at ____, 740 P.2d at 33.

in maintaining the regulation. Nor did the court find it necessary to invoke the balancing test, whereby the alleged religious burden would have been weighed against the state's interest in regulating and promoting geothermal development.[90]

B. Commentary

Judged by the standards set forth in *Yoder*, the Native Hawaiians' claims in *Dedman* may appear weak. The constitutional infringement claimed by the Native Hawaiians was not that the government had in some way compelled or coerced them to act or not to act in contravention of their religious beliefs. Rather, the alleged infringement was that the state had endorsed an interference with certain volcanic phenomena, including the release of geothermal energy, which the Native Hawaiians held sacred. The *Dedman* court, however, accepted the Board's finding that geothermal "tapping" in the disputed area would not disrupt the volcanic activity of the region;[91] and the Native Hawaiians neither contradicted nor challenged the Board's findings in this respect.

Moreover, although the Native Hawaiians argued that geothermal development would interfere with various rituals and the training of young Hawaiians in traditional beliefs and practices (e.g. chant and hula), they offered no testimony that the disputed land had actually ever been used for religious purposes.[92] Absent such testimony, the court was able to conclude that the land itself was apparently not necessary for the Native Hawaiian religious practices. Thus, in the court's view, the claimants had not demonstrated that the proposed geothermal development posed an "objective danger to the free exercise of religion that the First Amendment was designed to prevent."[93]

Finally, as an accommodation to Native Hawaiian religious beliefs, the Board relocated the geothermal site five to ten miles away from the Kilauea volcano, thus further undermining the allegation of a harmful impact on the Native Hawaiians' religious practices. On this basis, the court reasoned that the state had adopted the least restrictive means of promoting its compelling interest in

---

[90] Only cursory mention was made of the state's interest in neutrality towards religion. The court relied on the oft quoted constitutional interpretation that the free exercise clause was "written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government," in support of the constitutionality of the state's approval of geothermal development. *Id.* at ____, 740 P.2d at 33 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1983)).

[91] *Dedman*, 69 Haw. at ____, 740 P.2d at 33. Hence, the sacred effects associated with volcanic activity—e.g., heat, steam, and magma—would continue unabated.

[92] *Id.* at ____, 740 P.2d at 33.

[93] *Id.* at ____, 740 P.2d at 33 (quoting Wisconsin v. Yoder, 406 U.S. at 218, 92 S. Ct. at 1534).

cultivating an independent source of electricity.[94]

C. *Analogy to Native American Indian Sacred Site Case Law*

1. *Similarity Between Native American Indian and Native Hawaiian Religious and Sacred Site Claims*

Native American Indian and Native Hawaiian religions are similar in that fundamental religious beliefs and practices of both religions are inextricably linked to and dependent upon sacred sites. This subsection discusses the similarity in beliefs of both American Indians and Hawaiians towards their sacred sites, in order to demonstrate that recent criticisms of free exercise standards as applied to Native American Indian sacred site claims also apply to *Dedman* and Hawaiian sacred site claims.

Native American and Hawaiian religions regard religious sites as possessing inherent spiritual power. Presumed visitations to—or residence at—a particular site by a religious entity or power may determine the site's religious significance among the adherents. From a purely objective perspective, however, a more precise measure of a site's significance is simply the importance attached by the adherents to the site, and to the entities or powers believed to be associated with the site. Some sites are considered so significant that the very vitality and survival of the beliefs and practices which constitute the religion depends upon the continued existence of those sites.

For example, Navajo Indians believe their gods occupy stone formations in designated sacred site areas.[95] Likewise, the Hawaiian religion recognizes Pele as the Goddess of Fire or Volcano Goddess who occupies Kilauea Crater and whose spirit is omnipresent throughout the natural environmental surroundings.[96] Both Native American Indian and Hawaiian religious adherents contend

---

[94] 69 Haw. at ____, 740 P.2d at 33.

[95] Note, *supra* note 23, at 160-61.

[96] *Dedman*, 69 Haw. at ____, 740 P.2d at 31 (1987). *See also* In re the Designation of the Kilauea Middle East Rift, Island of Hawaii, as a Geothermal Resource Subzone; Finding of Fact, Conclusion of Law, Decision and Order, Dedman v. Board of Land and Natural Resources, 69 Haw. ____, 740 P.2d 28 (1987) (Board of Land and Natural Resources, State of Hawaii, G.S. No. 9/26/85-5). Based on the testimony of Dr. Noa Emmett Auwae Aluli and Ralph Palikapu O'Kamohoalii Dedman, the Board of Land and Natural Resources pronounced the following findings of fact:

> Pele practitioners believe Pele is a living god, whose presence is manifested in periodic and frequent volcanic eruptions. Pele is believed to also be present in the sacred area surrounding the Kilauea Volcano in kinolau (alternate body forms) such as ferns, certain shrubs and trees, and certain volcanic land forms and features, such as significant pu'u (hills).

Id. at 36 (citing testimony of Dr. Emmett Aluli, TR. Ex. 2, G.S. No. 9/26/85-5).

that tampering with sacred sites could result in death to the deities who reside there and a loss of the site's spiritual powers and significance.[97] Thus, the effect of such tampering could well be a weakening or even the complete extinction of the religion itself.[98]

The immediate need to protect both Native American Indian and Hawaiian sacred sites has been recognized and explicitly addressed by the national government in the American Indian Religious Freedom Act of 1978 (AIRFA).[99]

Pele practitioners testified that Pele is also the heat, water, steam, smoke, and vapor present in and throughout the Kilauea Volcano and its rift zones.

Id. at 36 (citing Intervenors Aluli and Dedman, Ex. 2, G.S. No. 9/26/85-5).

[T]estimony indicat[ed] that Pele is a spiritual concept central to the lives and psychological survival of the believers, and that Pele provides inspiration, strength and a focus for their lives.

Id. at 36 (citing Intervenors Aluli and Dedman, Ex. 2, and Pre-Hearing Statements, G.S. No. 9/26/85-5).

Dr. Aluli and Palikapu Dedman testified that they consider any activity impermissible within the area considered to be Pele's abode. They believe that geothermal exploration and development is an offense against Pele, a desecration of her body and being, because this activity involves drilling into Pele's body and removing her energy. They believe this activity will take Pele and kill her forever.

Id. at 37 (citing testimony of Dr. Emmett Aluli, G.S. No. 9/26/85-5).

[Aluli and Dedman] also testified that they believe that offenses against Pele will cause Pele to retaliate violently in the form of volcanic eruptions, earthquakes and tsunami.

Id. at 37 (citing testimony of Mr. Dedman, G.S. No. 9/26/85-5).

[Aluli and Dedman] testified that they believe that geothermal exploration and development will threaten and probably prevent the continuation of all essential ritual practices associated with Pele and thereby impair the ability of Pele practitioners to train young Hawaiians in the traditional Hawaiian beliefs and practices. They believe therefore that Hawaiian religion and culture will not be conveyed to future generations and will therefore die.

Id. at 37 (citing Intervenors Aluli and Dedman, Ex. 2, G.S. No. 9/26/85-5).

[97] *See, e.g.*, Note, *supra* note 36, at 1448 ("Adherents of traditional religions claim . . . fear that development [of sacred sites] will undermine the religious power of sacred sites, inhibit communication with spirits, prevent the collection of healing herbs, and even kill tribal deities.").

[98] *See, e.g.*, Wilson v. Block, 708 F.2d 735, 740-41 n.2 (D.C. Cir. 1983), *aff'g* Hopi Indian Tribe v. Block, 8 Indian L. Rep. 3073 (D.D.C. 1981), *cert. denied*, 464 U.S. 956 (1983). In attempting to halt expansion of a ski resort on land considered sacred by the Hopi Indians, the chairman of the Hopi tribe argued:

> [I]f the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place . . . . The basis of our existence as a society will become a mere fairy tale to our people. If our people no longer possess this long-held belief . . . a direct and negative impact upon our religious practices [will result].

Badoni v. Higginson, 638 F.2d at 177 (10th Cir. 1980), *aff'g* 455 F. Supp. 641 (D. Utah 1977), *cert. denied*, 452 U.S. 954 (1981) (Navajo plaintiffs claimed that damming of the Colorado River and the resultant flooding of a sacred site tract of land would drown some of plaintiffs' gods).

[99] 42 U.S.C. § 1996 (1982).

AIRFA specifically includes "Native Hawaiians"[100] in reaffirming Congress's and the government's duty to safeguard sacred sites and the traditional religious beliefs and practices unique to the Native Indian and Hawaiian cultures. Although no court has interpreted the Act to provide a cause of action,[101] such affirmative legislative action signifies that federal agencies must be more cognizant of the impact their policies and procedures may have on both Indian and Native Hawaiian religions.[102] Moreover, the Act recognizes that conventional constitutional approaches, which may adequately secure protection from religious infringement for Euro-American religions, may be unsatisfactory in safeguarding religious freedoms of less orthodox Native American and Native Hawaiian religions.[103]

2. *Inapplicability of Current Standards to Sacred Site Claims*

Federal courts, in assessing the constitutionality of American Indian sacred site claims under the free exercise clause, have been criticized for: (1) overemphasizing the role of "centrality";[104] (2) failing to comprehend fully unorthodox religious principles;[105] and (3) inappropriately applying the *Yoder* balancing test.[106] Commentators contend that the above three shortcomings by courts are largely responsible for outcomes prejudicial to Native Americans.

The concept of centrality is that a religious group be afforded greater constitutional protection for those practices which are more directly related, and hence considered central, to their religious beliefs.[107] Thus, under this test, the religious value of a sacred site is measured by the importance of the ceremonies

---

[100] *Id.*

[101] *See, e.g.*, Crow v. Gullet, 541 F. Supp. 785, 793 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) *cert. denied*, 464 U.S. 977 (1983). *See generally* Note, *supra* note 36, at 1457-58.

[102] *See* Note, *supra* note 15, at 320-21.

[103] *See* Note, *supra* note 36, at 1457-58.

[104] *See e.g.*, *Developments—Religion and the State*, 100 HARV. L. REV. 1606 (1987). The author argues that the courts have misused the concept of centrality because:

> By rejecting Native Americans' free exercise claims because they are not based on practices essential to their religious life or on beliefs recognized as genuinely religious, courts discriminate against Native American claimants . . . . The inability of courts to comprehend Native American religious practice undermines courts' ability to give due weight to Native American claims: the centrality test's distinction between central and peripheral religious rituals has little meaning to Native Americans because they do not—and courts therefore should not—rank the importance of the rituals that comprise their religious life . . . .

Id. at 1735.

[105] *See infra* note 113.

[106] *See infra* notes 118-22.

[107] *See generally* Note, *supra* note 15, at 323-34; Note, *supra* note 23, at 163-67.

and rituals performed there.[108] The flaw in applying the "centrality" concept to Native American religions is that it fails to account for the intrinsic sacredness the ceremonial sites possess[109] irrespective of the actual use each site may or may not receive.[110] Moreover, the courts' apparent over-reliance on the central-

---

[108] *See infra* note 106.

[109] The importance of sacred sites to Native American religions cannot be overstated. For example, Navajo Indians believe that some of their gods inhabit natural rock formations while other gods have transformed themselves into other natural phenomena. Ceremonies are conducted on sacred sites to communicate with and elicit favors from the gods. The Cherokee Indians also similarly believe that sacred sites are essential to communicating with spiritual forces. *See generally* K. LUCKERT, NAVAJO MOUNTAIN AND RAINBOW BRIDGE RELIGION (1977); Note, *supra* note 23.

[110] Note, *American Indian*, *supra* note 43, at 780 n.65 (1987) ("It might be argued that intrinsic characteristics of the sites themselves may call for their protection, regardless of the quantity of practices carried on at those sites."); *see, e.g.*, Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir. 1980), *aff'g.* 480 F. Supp. 608 (E.D.Tenn. 1979), *cert. denied*, 449 U.S. 953 (1980) (Cherokee Indians sought to enjoin the completion of the Tellico Dam on the Little Tennessee River claiming that the resultant flooding would consume what some Cherokee Indians regard as their "Jerusalem."). For discussion and description of this case, *see generally* Note, *American Indian*, *supra* note 43, at 783-85.

See also id. at 784 n.90 (1987) (Cherokee Indians sought to protect not only religious practices but the intrinsic sacred character of the site itself); Note, *supra* note 23, at 161 ("The Cherokee practice their religion, in part, by worshipping the valley itself; they believe that prayer to and at sacred sites facilitates direct communication with the supernatural world."); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983) (Navajo Indians believed the San Francisco Peaks possessed the body of living gods).

Another potential reason commentators suggest Native American religious sites receive less constitutional protection than their orthodox counterparts involves the location and surroundings of sacred sites. Judeo-Christian sites are for the most part found in the Middle East, which not only removes the United States from having jurisdiction over these sites, but surrounds the site with an aura of mysticism which accompanies a distant foreign land. Note, *supra* note 36.

The Judeo-Christian sites again normally possess sacred significance only to the extent that they represent historical religious events. On the other hand, Native American religious sites are often found within national parks or other federal lands; the difficulty in relating to the spiritual significance of religious sites, which are in these locales and which are predominantly thought of and used for recreation and other leisure time activities, becomes that much more pronounced. Nevertheless, one commentator who assessed this situation said "[a]n examination of the religious interests at stake in Indian claims . . . illustrates that the Indian claims are not out of the ordinary . . . . For example, Christians could begin to comprehend the devastation to religion caused by the destruction of a sacred site if they imagine a proposal to construct a ski resort on the Mount of Olives." Note, *supra* note 36, at 1464 n.83 (1985).

Commentators suggest that unconventional Native American religions are not understood and are therefore oftentimes deprived of constitutional protections. Note, *supra* note 36. For example, it has been noted that Judeo-Christian belief in a supreme immortal deity is unrelated to a specific and irreplacable site; that removal, destruction or intrusion of the site cannot destroy or damage the religious belief. However, sacred sites in Native American religions play a much more dominant role in all facets of religious belief, preeminently in the very fact that many Native American religious beliefs are premised on concepts that their god(s) or various other

ity concept,[111] not just as a single factor, but as the controlling factor in measuring the burden imposed on a Native American religion, deviates from conventional free exercise analysis[112] and results in erecting nearly insurmountable barriers to a successful claim of a substantial burden on religion.[113]

---

forms of spiritual powers reside at the site itself. Hence, destruction or alteration of the sacred site could result in an eviction of the occupying of the spiritual forces. *Id.* at 1448-49. The danger exists that "[a] religion may be destroyed when the cosmology upon which it is founded is undermined." *Id.* at 1448 n.7. It is particularly because Indian sacred sites do play such a vital role in sustaining their religious beliefs, that the free exercise clause should extend to protect these interests. After all, "[t]he freedom to believe and worship embodied in the First Amendment is rendered meaningless if government destroys the object of belief." *Id.* at 1468.

[111] *See generally* Note, *supra* note 15, at 323-34 (Author commented that "technically 'centrality' is a prerequisite to, and not part of, the 'burden' analysis.").

See also Note, *supra* note 23. It has been contended that the *Sequoyah* and *Badoni* courts, in holding against the Indians' religious claims, misinterpreted the relationship between the concept of centrality and whether the Native American practices were intimately related to daily life: "Centrality and an intimate relation between belief and daily conduct are thus two different concepts. In describing Amish practices as intimately related to daily living, the *Yoder* Court did not manifest an intent to expand or modify the requirements for a finding of centrality." *Id.* at 166.

[112] *See, e.g.*, Note, *supra* note 15, at 328-29 ("Pleading and proving centrality have been widely required only in Indian cases."). The author compared the major non-Native American free exercise cases which have abstained from centrality analysis with Native American sacred site cases which, in contrast, have overwhelmingly relied on centrality. *Id.* at 329 n.119.

[113] Note, *American Indian*, *supra* note 43, at 778 n.49 ("Courts in the sacred site cases, however, did not treat the centrality inquiry merely as a threshold issue in a free exercise claim, but instead transformed the inquiry into the controlling factor in determining whether claimants' practices were burdened."). *See also* Note, *supra* note 15, at 324 (in order to sustain a first amendment free exercise claim, plaintiffs who alleged a substantial burden on their religion must be prepared to demonstrate under the demanding and dominant centrality standard that the religious burden, if allowed to continue, will cause the extinction of the religion). *See, e.g.*, People v. Mullins, 60 Cal. App. 61, 70, 123 Cal. Rptr. 201, 207 (1975) ("[I]t must be established that such practice is an integral part of a religious faith and that the prohibition . . . results in a virtual inhibition of the religion or the practice of the faith."); *cf.* Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979) (Athabascan Indians were entitled under free exercise clause to kill a moose for a religious funeral ceremony when the moose was considered "the centerpiece of the most important ritual in Athabascan life" and was "needed for proper observance of [the] sacred ritual.").

"Centrality" by nature and application excludes consideration of fundamental concepts of Indian theology. Thorough understanding of Indian religious principles is absolutely essential to an accurate assessment of the religious burden imposed. Overemphasis of the centrality standard distorts the court's perception of the true religious burden and neutralizes the severity of the infringement. *See, e.g.*, Note, *supra* note 14, at 329-30. The author reprimands the use of centrality in the Native American situation:

> The centrality test, however, as formulated, and applied in the Indian cases, effectively denies protection to Indian religious practices despite the first amendment intent to protect religious exercise. Further, it is questionable whether a religion test with the burden of

Commentators contend that courts which do not fully understand unorthodox Native American religious principles will inadvertently rely on conventional Judeo-Christian beliefs in their free exercise analysis.[114] As a result, courts resolve Native American religious issues from a wholly inappropriate Judeo-Christian perspective.[115] Courts have refrained from defining religion[116] and have construed the sincerity requirement broadly to allow all religious claims that are brought in good faith.[117] However, the courts' religious value judg-

---

proof that is practically impossible to carry is a practical help in assuring religious freedom. If no practice can be shown to be important enough to be protected, then the religion clauses ensure nothing.

Id.

[114] *See generally* Note, *supra* note 36. Current free exercise analysis evolved as a by-product of individuals bringing claims for exemption from governmental activity. It is contended by some that this analysis is not suited for Native American sacred site claims, that it only "tends to limit the range [of protection] of the free exercise clause to societally mainstream or nonthreatening beliefs, or to the aspects of nontraditional beliefs that are similar to Euro-American practices." *Id.* at 1462. An even more fundamental reason for the purported lack of judicial understanding, with respect to the sanctity of Native American religious sites, is the presence of a national sense of "civil religion" within the governmental structure, based in part on Judeo-Christian beliefs and prominent throughout the Declaration of Independence, Constitution, and Pledge of Allegiance. *Id.* at 1463.

See also Note, *supra* note 15. One unique aspect of the American Indian religious sacred site claims is that almost always, the claims are rooted not only in sincere religious beliefs, but also in terms of cultural and historical preservations. Often perplexing and foreign to the non-Indian observer is the conceptual framework in which Native Americans comprehend life and religion. For instance, Christian religions perceive the world in a linear manner, relying on the life and teachings of Jesus Christ to establish everlasting principles which serve as benchmarks to guide everyday life. In contrast, Native American religions are less concerned with abiding by biblical oriented concepts and depend more on the use of sacred sites as a source of spiritual renewal and a means of exercising their religion. *Id.* at 319-20. The courts tend to gravitate towards an inquiry into the usefulness of the land and weigh Indian religious interests against governmental interests.

[115] *See infra* note 113.

[116] Because of the courts' need to protect minority religions, courts must avoid defining religion in other than the broadest sense. One commentator has stated that the Court's opinion in Reynolds v. United States, 98 U.S. 145 (1878), highlights the need for judicial self-restraint in that it "expressed clear contempt for the Mormon Church and thus demonstrated that underlying the hostility toward polygamy was hostility toward an unpopular religious faith." Note, *Developments—Religion and State*, 100 HARV. L. REV. 1606, 1736 (1987). The *Reynolds* Court upheld an anti-polygamy statute which had the effect of stripping the Mormon faith of a long-standing and pervasive religious practice.

[117] Although the courts have applied a very low sincerity threshold standard, in rare instances claims have been denied for lack of sincerity. For example, in United States v. Kuch, 28 F. Supp. 439 (D.D.C. 1968), the court rejected as insincere a religious claim brought by adherents of the Neo-American Church. The adherents called themselves Boo Hoos, had a three-eyed toad for a church symbol, and stated that "victory over Horseshit" was their motto. *See also* Dobkin v. District of Columbia, 194 A.2d 657 (D.C. 1963) (Sabbatarian who was routinely open for busi-

ments remain an integral part of their decision-making process.

It has been argued that the centrality inquiry serves to promote a Judeo-Christian approach to determining the religious value of an Indian sacred site[118] and, as a result, undermines Native American religions which place as high a value on their sacred sites as more orthodox religions may place on, for instance, Jerusalem. Furthermore, even if a Native American claim can survive the centrality inquiry and establish a substantial burden on religion, any claimants would still need to overcome the balancing test of *Yoder*. Again, as with the centrality inquiry, if the court fails to review the extent of the infringement from the perspective of the affected Indian religion, then the outcome may well inappropriately favor the state.

Because courts have treated centrality as the threshold issue in Native American free exercise claims, and because most claims fail to cross this threshold, the majority of Native American claims are decided without benefit of a balancing of the government and religious interests at stake.[119] When the interests are balanced, however, the government generally prevails, although courts rarely fully explain why.[120]

Furthermore, the balancing test under traditional free exercise analysis includes consideration of reasonable and available government alternatives.[121]

---

ness on Sabbath held not to have sincere religious beliefs).

[118] Note, *supra* note 36. One commentator argued that the centrality approach "narrows the scope of the free exercise protection to familiar and well-documented religious tenets, despite the Supreme Court's statement that the First Amendment knows no orthodoxy." *Id.* at 1461.

[119] *See, e.g.*, Wilson v. Block, 708 F.2d 735, 745 (D.C. Cir. 1983) (plaintiffs failed to show religious burden, therefore, the court abstained from deciding whether ski resort expansion onto sacred Indian land was justified by a compelling governmental interest or whether a lesser restricted means of achieving that interest existed); *see also Dedman*, 69 Haw. ____, 740 P.2d 28 (1987) (the Hawaii Supreme Court never addressed the balancing test, nor did it discuss the state's interest in geothermal energy development).

Even if courts reach the balancing test, courts at times apply the test incorrectly as to sacred site claims. In Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *aff'g* 455 F. Supp. 641 (D. Utah 1977), *cert. denied*, 452 U.S. 954 (1981), Navajo tribal members challenged the flooding of the Rainbow Bridge National Monument, resulting from damming of the Colorado River, claiming violation of their free exercise rights because the flooding had drowned their gods and denied them access to a sacred prayer spot. *Id.* at 176. Although the court agreed that the Navajo Indians had a religious interest at stake, it held, "the government's interests in maintaining the capacity of [the lake] at a level that intrudes into the Monument outweighs plaintiffs' religious interest." *Id.* at 177. However, the court's reasoning was that because the government's interest was so compelling, it need not even ascertain whether the free exercise rights of the Navajo Indians had been trampled upon. *Id.* at 178.

[120] *See generally* Note, *supra* note 23, at 173-76.

[121] Wisconsin v. Yoder, 406 U.S. at 235; Sherbert v. Verner, 374 U.S. at 407. However, absent a showing by the aggrieved parties of an unconstitutional infringement on religion, a state need not show that its means could not have been accomplished by "less restrictive alternatives." Native American sacred site decisions are inequitably one-sided; challengers must overcome an

Courts frequently ignore this aspect of balancing altogether, however, once a determination is made that government interests outweigh the concomitant religious burden imposed.[122] One commentator suggests that the mechanical way in which courts go about denying Native American religious practices under the balancing test exhibits an "insensitivity to Native American religion [which] is inconsistent with the policy of religious toleration."[123]

3. *Inapplicability of Current Standards to* Dedman

The striking similarities between the Native American sacred site cases and *Dedman* strongly suggest that criticisms directed towards the inadequacy of the *Yoder* free exercise analysis as applied to Indian theology are equally relevant to Native Hawaiian religion. Thus, Native Hawaiian religion may not be receiving proper first amendment protection under the *Yoder* test, which arguably allows Judeo-Christian thinking and bias to influence the decision-making process.

The *Dedman* decision exemplifies the conventional *Yoder* analysis used in deciding Native American freedom of religion claims. The primary shortcoming of the *Yoder* analysis is that courts, when considering the severity of the religious burden, either: (1) undervalue the importance of sacred sites because of a lack of understanding of the conceptually unique religious principles involved, or (2) interpret the *Yoder* "burden" standard in such a way that it will rarely, if ever, be satisfied.

As to the first critique, the Hawaii Supreme Court in *Dedman* accepted the Native Hawaiian's religious beliefs,[124] and acknowledged the argument that "construction of geothermal energy plants will desecrate the body of Pele by digging into the ground and will destroy the goddess by robbing her of vital heat."[125] The court noted that the Native Hawaiians claimed that geothermal development "will interfere with their ritual practices, and will disable them from training young Hawaiians in traditional beliefs and practices."[126] Despite these arguments, however, the court held that the Native Hawaiians had not shown a "substantial burden" on religious interests pursuant to *Yoder*.[127] The *Dedman* court reasoned that the Native Hawaiians had not shown an "objective" burden, absent testimony that the land was actually used for religious

---

almost insurmountable burden (because most courts perceive the burden from orthodox religious principles and not from unique Native American religious precepts), while in contrast, unless this burden is satisfied, government need only rationally justify its interest.

[122] *See generally* Note, *supra* note 23, at 173-76.

[123] *Id.* at 175.

[124] *Dedman*, 69 Haw. at ____, 740 P.2d at 32 (1987).

[125] *Id.* at ____, 740 P.2d at 32.

[126] *Id.* at ____, 740 P.2d at 32.

[127] *Id.* at ____, 740 P.2d at 33.

activities, and found that geological studies had revealed that the projected extraction of geothermal energy would have only a negligible effect on Kilauea's volcanic activity.[128]

By relying on an "objective"[129] showing of a burden on religion, the court implied, that because the Native Hawaiians did not extensively use the sacred area, and because no reduction in volcanic activity would occur, there was no substantial harm to religious interests. However, courts deciding Native American cases on similar grounds have been criticized for misunderstanding Native American theology. The claimed burden on religion is often one that cannot be "objectively" shown but can only be characterized in terms of its subjective impact on beliefs and fully comprehended only by understanding the religion itself.[130] Thus, commentators have argued that while courts are willing under *Yoder* to concede that Indians' religious claims are legitimate, sincere, and rooted in religious belief, rarely will courts ever find that Indian claimants have shown a religious burden sufficient to invoke constitutional protection.[131]

The *Dedman* court, like a number of courts that have decided sacred site claims, arguably overemphasized the "centrality inquiry" and implied that the disputed site was only sacred insofar as religious practices were actually performed on it. The court thus ignored a core tenet of both Native American and Hawaiian religions: sites possess *intrinsic* sacredness independent of the actual use each receives. Moreover, the *Dedman* court's observation that one Pele worshipper considered it acceptable to worship Pele in her home[132] should not be used to defeat the Native Hawaiians' claims.[133]

Absent a showing of substantial and objective religious harm, the *Dedman* court deemed it unnecessary to balance competing state and religious interests.

---

[128] *Id.* at ____, 740 P.2d at 33.

[129] The court stated that "[t]here is simply no showing of the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Id.* at ____, 740 P.2d at 33.

[130] *See supra* notes 109 & 113. The courts' misunderstanding of Indian (or Hawaiian) theology likely results in judges inadvertently resorting to traditional orthodox religious principles which are wholly inadequate to an accurate assessment of Indian (or Hawaiian) religious burdens.

[131] *See infra* note 129.

[132] *Dedman*, 69 Haw. at ____ n.2, 740 P.2d at 31 n.2.

[133] *Cf.* Frank v. State, 604 P.2d 1068 (Alaska 1979). An Athabascan Indian who had violated Alaskan game laws by taking a moose out of season for the purpose of a religious funeral ceremony was protected by the free exercise clause. The court commented that a practice need not be "absolutely necessary" to the religion but that "[i]t is sufficient that the practice be deeply rooted in religious belief to bring it within the ambit of the free exercise clause and place on the state its burden of justification." *Id.* at 1072-73; Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975). In *Teterud*, a Cree Indian challenged a prison regulation prohibiting his wearing of long-braided hair, claiming it violated his rights of freedom of religion. The court held that the defendant need not show that wearing long-braided hair was a religious tenet practiced by all Cree Indians. *Id.*

Neither did the court actively inquire as to whether geothermal development could be accomodated through an alternative means less intrusive to sacred lands. By neglecting these considerations, the *Dedman* court simply followed several federal courts in applying an analysis which is arguably unsuitable in the context of both Native Hawaiian and Native American Indian sacred site claims.[134]

V. IMPACT

In *Dedman*, the Hawaii Supreme Court held that, where neutral state action poses no tangible objective harm to religious practices, such state action is constitutional under the free exercise clauses of both the United States and Hawaii Constitutions. Future claimants must therefore demonstrate not only that their religious beliefs are legitimate and sincere, but also that the government intrusion will substantially impair actual religious activities. Unless claimants can show more than a mere "assertion of harm"[135] to religious practices, the state's actions will not be nullified.

By adopting an "objective harm" analysis of the threshold "substantial burden" requirement, the *Dedman* court made clear that alleged disruptions of—or interferences with—an individual's legitimate ability to sustain certain subjective religious beliefs are less worthy of constitutional protection than disruptions or interferences which are objectively manifested. Admittedly, an advantage to an "objective harm" criterion is that if individuals are allowed to inhibit legitimate and reasonable governmental activity simply by claiming harm to their subjective religious beliefs, then the legislative power of government may be significantly threatened.[136]

---

[134] *See, e.g.*, Wilson v. Block, 708 F.2d 735, 745 (D.C. Cir. 1983) (plaintiffs failed to show religious burden, therefore, the court abstained from deciding whether ski resort expansion onto sacred Indian land was justified by a compelling governmental interest or whether a lesser restrictive means of achieving that interest existed).

[135] The *Dedman* court stated that "[t]o invalidate the Board's actions based on the mere assertion of harm to religious practices would contravene the fundamental purpose of preventing the state from fostering support of one religion over another." *Dedman*, 69 Haw. at ____, 740 P.2d at 33.

[136] The United States Supreme Court directly addressed this concern in Braunfeld v. Brown:

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature . . . . [W]hen entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it . . . . If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the state regulates conduct by enacting a gen-

Nevertheless, the *Dedman* court may have gone further than necessary in this respect. By requiring an initial showing of an objective harm before an alleged burden upon religion will be balanced against a state's interest, the *Dedman* court effectively held that no infringement or adverse effect upon a person's sincere and legitimate subjective religious beliefs will sustain a free exercise claim, absent a showing of some objective harm, regardless of the strength of the state's interests. Indeed, without a showing of an objective harm, the strength of the state's interests does not come into question. Thus, a significant impact of *Dedman* is that government can act in ways that genuinely infringe upon individuals' ability to sustain religious beliefs which are "central" to their religion, without a showing that the interest supported by the governmental acts outweigh the burden thereby imposed.

In the final analysis, the Hawaii Supreme Court's decision in *Dedman* appears to be consistent with the general analysis set forth in *Yoder* and with the majority of decisions that have addressed sacred site claims. *Dedman* broke no new ground, except insofar as the case involved a sacred site claim by Native Hawaiians.

Perhaps the most important impact of *Dedman*, however, is precisely that. Adherents to Native Hawaiian religion now know that a governmental act, which according to the Native Hawaiian's sincere belief system, threatens the very survival of a worshipped deity, is not necessarily prohibited by either the Hawaii or the United States Constitutions, regardless of the strength of the governmental interest behind the act.

VI. CONCLUSION

In *Dedman v. Board of Land and Natural Resources*, the Hawaii Supreme Court denied the claim of Native Hawaiians that interference with a sacred site unconstitutionally infringed upon their rights to religious freedom. By applying the traditional *Yoder* analysis in *Dedman*, the Hawaii court in effect held that governmental acts which, in the eyes of adherents to Native Hawaiian religion,

---

eral law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

366 U.S. 599, 606-07 (1961). *See also* Reynolds v. United States, 98 U.S. at 166-67. In *Reynolds*, the Court upheld the government's statutory prohibition of polygamy notwithstanding Mormon religious tenets which advocated plural marriages:

Can a man excuse his practices to the contrary [of the laws of society] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Id.

undermined the vitality of the religion and threatened the very life of a worshipped deity, were not unconstitutional absent a showing that the acts caused the claimants some "objective harm." Thus, the court implicitedly rejected a core belief of Native Hawaiian religion, namely that certain sacred sites have intrinsic religious value and significance, entirely apart from whether such sites have ever been actively used in the practice of the religion.

The *Dedman* decision is in accord with the majority of decisions of other courts that have addressed sacred site claims by adherents of non-traditional religions. The decision is also subject to the same criticisms that have been leveled against prior decisions in this area; the main criticism is that the application of the *Yoder* test to non-traditional sacred site claims may improperly deny claimants the full first amendment protections that they deserve and which the authors of the amendment arguably intended them to have.

The court's decision in *Dedman* appears unfortunate, given the uniqueness and fragility of Native Hawaiian religion, and given also that AIRFA clearly provides a basis upon which the court could have adopted a novel approach in order to protect the special needs of the claimants in this case. Although AIRFA may not provide a cause of action for violation of free exercise rights, the Act clearly expresses Congress's sensitivity to the special characteristics of Native American and Native Hawaiian religions, and Congress's desire that such religions be accorded the full first amendment protections which they deserve. By applying the traditional *Yoder* analysis to the Native Hawaiian claims in *Dedman*, the Hawaii Supreme Court arguably let pass an opportunity to implement Congress's intent as expressed in AIRFA and to provide other jurisdictions with a precedent for doing the same.[137]

Glenn Ching

---

[137] On the eve of publication, the United States Supreme Court denied the petition for writ of certiorari that arose from *Dedman*. Dedman v. Bd. of Land and Natural Resources, 69 Haw. \$1r, 740 P.2d 28 (1987), *cert. denied*, 56 U.S.L.W. 3737 (1988). The Court also reversed, in a five to three decision, *Northwest Indian Cemetery Protective Ass'n*. Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Ass'n, 56 U.S.L.W. 4292 (1988).

Armstrong v. Cione and *Hao v. Owens-Illinois*: Applying Pure Comparative Negligence Principles To Strict Products Liability Actions

I. INTRODUCTION

On June 1, 1987, the Hawaii Supreme Court decided the case of *Armstrong v. Cione*.[1] The main issue presented in *Armstrong* was whether Hawaii's modified comparative negligence statute[2] or a pure form of comparative negligence should apply in products liability actions.[3] Reviewing its earlier decision in *Kaneko v. Hilo Coast Processing*,[4] the court in *Armstrong* determined that Hawaii's comparative negligence statute did not reach products liability claims. Rather, the court applied a judicially fashioned rule of pure comparative negligence, and thus the court held that a plaintiff should not be barred from recovery even though largely at fault for his injuries. The court ultimately held, however, that the products liability claim in *Armstrong* failed because there was no "product" involved in the case.

On June 10, 1987, nine days after the decision in *Armstrong*, the Hawaii Supreme Court decided *Hao v. Owens-Illinois, Inc.*[5] *As in Armstrong*, the issue here was whether to apply a pure or modified form of comparative negligence to products liability claims. In a brief opinion, the court cited *Armstrong* and held that a pure form of comparative negligence, rather than the modified form required by section 663-31 of Hawaii Revised Statutes, applied in products liability claims.[6]

This note examines the Hawaii Supreme Court's rationale for adopting a pure form of comparative negligence for products liability claims, as illustrated

---

[1] 69 Haw. ____, 738 P.2d 79 (1987).

[2] HAW. REV. STAT. § 663-31 (1985). See *infra* note 35 for full text of the statute.

[3] Under a pure form of comparative negligence, the negligent plaintiff would be able to recover whatever percentage of liability is allocated to the defendant, whereas under Hawaii's modified comparative neligence statute, if the plaintiff is found to be 51% or more negligent, his liability would bar any recovery. *See infra* notes 22-36 and accompanying text.

[4] 65 Haw. 447, 654 P.2d 343 (1982).

[5] 69 Haw. ____, 738 P.2d 416 (1987).

[6] *Id.* at ____, 738 P.2d at 418-19.

in *Armstrong* and *Hao*. The note also examines the possible impact of these cases upon future products liability cases, and upon future application of other tort doctrines.

II. FACTS

A. Armstrong v. Cione

On April 12, 1982, Adam Armstrong was injured when he attempted to close a glass shower door[7] in his rented apartment.[8] While trying to shut the door, Armstrong's hand slipped and struck the glass. The door then shattered, cutting his right arm.[9]

Armstrong brought suit against his landlord, Jack Cione, alleging, inter alia,[10] negligence and products liability. The Circuit Court dismissed the products liability claim,[11] but on the negligence issue, the jury found Armstrong to be sixty-seven percent at fault and Cione to be thirty-three percent at fault. Judgment was entered for defendant Cione based on the provisions of Hawaii's comparative negligence statute, according to which a plaintiff may not recover if he is more negligent than the defendant.[12]

On appeal to the Intermediate Court of Appeals (ICA), Armstrong argued that the Circuit Court had erred in dismissing his products liability claim. The

---

[7] The shower door involved was the original one dating back to the time the apartment building was constructed in 1959. The door consisted of three panes of glass. These panes of glass were made of ordinary rather than safety quality glass. *Armstrong*, 69 Haw. at ____, 738 P.2d at 80.

[8] Armstrong's rented apartment unit was part of the Waikiki Regent, a cooperative. Defendant Jack Cione had purchased two units within the cooperative in 1981, and had subsequently rented one of them to Armstrong. *Id.* at ____, 738 P.2d at 80.

[9] Armstrong testified that the glass had been cracked before the accident, and that the shower door had always been hard to close, but this fact had never been reported to Cione. *Id.* at ____, 738 P.2d at 80.

[10] Armstrong brought claims for negligence, products liability, implied warranty of habitability, and strict liability in tort. The circuit court granted Cione's motion for a directed verdict on Armstrong's claim of strict liability in tort. This ruling was not argued upon appeal. Further, the jury found against Armstrong on his claim of implied warranty of habitability. *Id.* at ____, 738 P.2d at 80-81.

[11] The circuit court dismissed the products liability claim based on a review of Bidar v. Amfac, Inc., 66 Haw. 547, 669 P.2d 154 (1983), where the Supreme Court of Hawaii held that a portion of a leased premises was not a "product" for purposes of a products liability claim. *Id.* at ____, 738 P.2d at 81.

[12] Under Hawaii's modified comparative negligence statute, HAW. REV. STAT. § 663-31, a plaintiff is not allowed recovery if the percentage of negligence attributed to him is greater than the amount attributed to the defendant. See *infra* note 35 for the full text of HAW. REV. STAT. § 663-31.

ICA ruled, however, that even if the Circuit Court had erred, it was harmless error. Regardless of the Circuit Court's decision, Armstrong would not be able to recover on the products liability claim because he was found to be more at fault than defendant Cione. In reaching this conclusion, the ICA construed the Hawaii Supreme Court's decision in *Kaneko v. Hilo Coast Processing*[13] to require that section 663-31 of Hawaii Revised Statutes applied to products liability claims. Thus, the same modified principles which barred Armstrong's recovery on his negligence claim also barred recovery on the products liability claim. In interpreting *Kaneko*, the ICA stated:

> The *Kaneko* court does not cite HRS § 663-31; however, it is the only basis for application of the doctrine of comparative negligence in this jurisdiction and the court must have had it in mind. Therefore, effective merger of the two doctrines requires that *all the provisions of HRS § 663-31 be applied to strict products liability cases*, and the injured plaintiff cannot recover in such cases if the proportion of negligence attributed to him exceeds the proportion of negligence attributed to the defendant.[14]

Armstrong appealed this decision to the Hawaii Supreme Court, arguing that a pure form of comparative negligence should apply to strict products liability claims, rather than the modified form spelled out in section 663-31. Under a pure form of comparative negligence, recovery would be allowed even though Armstrong's negligence exceeded the amount of fault attributed to defendant Cione.

B. Hao v. Owens-Illinois, Inc.

From 1939 to 1970, Stephen Hao, Sr. (Hao), was employed as a shipyard worker in Pearl Harbor, where he was exposed to asbestos dust and fibers.[15] He also smoked between a pack-and-a-half and three packs of cigarettes each day.[16] Hao eventually developed several different asbestos-related diseases, and in 1979 sued various manufacturers and distributors of asbestos products.[17]

---

[13] 65 Haw. 447, 654 P.2d 343 (1982).

[14] *Armstrong*, 69 Haw. at ____, 738 P.2d at 81 (emphasis added).

[15] 69 Haw. ____, ____, 738 P.2d 416, 417 (1987).

[16] *Id.* at ____, 738 P.2d at 417.

[17] The Defendants named were Owens-Illinois, Inc.; Johns-Manville Sales Corporation, fka Johns-Manville Products Corporation, fka Johns-Manville Corporation; Raybestos-Manhattan, Inc.; Fibreboard Corporation, fka Fibreboard Paper Products Corporation; Combustion Engineering, Inc.; Owens-Corning Fiber Glass Corporation; Eagle-Picher Industries, Incorporated, fka Union Asbestos and Rubber Company; Celotex Corporation, fka Panacon Corporation, fka Briggs Manufacturing Company; Philip Carey Corporation; A, C and S, fka Armstrong Contracting and Supply Corporation; Standard Asbestos Manufacturing and Insulating Company; Ruberoid Com-

Owens-Illinois, Inc. (Owens), remained as the only defendant after Hao reached settlement agreements with the other parties named.[18] Hao alleged that Owens had manufactured a defective product and negligently failed to warn of the dangers associated with exposure to asbestos dust and fibers.[19]

At the close of the evidence, the First Circuit Court submitted the case to the jury on a special verdict form containing the names of the twenty-three original defendants. The jury found Owens to be only two percent responsible for Hao's illness. Accordingly, the court entered judgment in favor of Owens.[20] Hao then appealed this decision to the Hawaii Supreme Court. The principal question on appeal, as in *Armstrong*, was whether the trial court erred by applying Hawaii's modified comparative negligence statute to strict products liability actions, rather than using a pure comparative negligence standard.[21]

III. History of the Law

For a complete understanding of the Hawaii Supreme Court's decisions in *Armstrong* and *Hao*, it is necessary to have background knowledge of the two legal doctrines which were involved in the determination of these cases. This section presents the historical development of a) comparative negligence law; b) products liability law; and c) the merger of these two doctrines.

---

pany, Forty-Eight Insulation, Inc., Nicolet Industries, Inc.; GAF Corporation; Southern Asbestos Company; J. P. Stevens, Inc.; Delaware Asbestos and Rubber Company; Pacor, Inc.; H. K. Porter Co., Inc.; Amatex Corporation; Keene Corporation; Armstrong Cork Company; Carey Canadian Mines, Ltd.; Aloha State Sales Company, Inc.; and Doe One Through Doe One Hundred. Hao v. Owens-Illinois, Inc., No. 11184, slip op. at 1 (Haw. Sup. Ct. June 10, 1987). Hao did not join his employer, the United States Navy.

[18] *Id.* at ____, 738 P.2d at 417 (1987).

[19] *Id.*

[20] Total damages were assessed at $256,000. The jury found that Owens was negligent in the manufacture, distribution, sale and/or supply of asbestos products and that Owens was a substantial factor in bringing about Hao's claimed illness; that the products containing asbestos were manufactured, distributed, sold or supplied in a defective condition; that the conduct of the U.S. Navy was not a superceding cause of Mr. Hao's claimed illnesses; and that Hao was negligent in smoking cigarettes and that smoking was a substantial factor in bringing about his illness. Hao was found to be 51 per cent responsible and the combined Defendants to be 49 per cent. *Id.* at ____, 738 P.2d at 417-18.

[21] Hao alleged that the lower court erred in applying HRS § 663-31 to defeat his suit because he was found to be more responsible for his injuries combined, and that the court erred in refusing to order a new trial to determine the relative fault of his employer, the United States Navy. *Id.* at ____, 738 P.2d at 417.

A. *Comparative Negligence*

In 1969, Hawaii enacted a comparative negligence statute[22] and thereby joined a small number of other states that had previously opted for this development in tort law.[23] Since that time, the doctrine of comparative negligence has become increasingly popular, with a large majority of states now employing it in some form.[24]

Comparative negligence gained its recent popularity as a reaction to the harshness of the common law defense of contributory negligence.[25] Prior to the transition to comparative negligence law, contributory negligence had been a principal defense in the law of torts.[26] Contributory negligence provides that a plaintiff's negligence will completely bar any recovery.[27] Thus, by using this defense, a defendant could avoid payment of any damages despite being largely at fault for the plaintiff's injuries, so long as it could be proved that the plaintiff was also partly negligent.[28] The inherent unfairness of such a defense led to

---

[22] HAW. REV. STAT. § 663-31 (1985).

[23] Prior to the mid-1960's, only seven states had adopted comparative negligence over contributory negligence. Those states were Georgia, Mississippi, Nebraska, Wisconsin, South Dakota, Arkansas, and Maine. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 471 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS].

[24] By 1985, forty-four states had adopted comparative negligence as the law. The six states which still retained contributory negligence as of 1985 were Alabama, Maryland, North Carolina, South Carolina, Tennessee, and Virginia. SCHWARTZ, COMPARATIVE NEGLIGENCE appendix A, 387-90 (2nd ed. 1986).

[25] From a historical perspective, comparative fault was part of admiralty law as far back as contributory negligence can trace its roots. Thus, comparative negligence may actually pre-date contributory negligence. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 1.2, 3 (1974).

[26] The origin of contributory negligence is traced to the English case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B.). The plaintiff in *Butterfield* was injured when his horse ran into a pole which the defendant had left protruding across the road. The court denied recovery, however, because the plaintiff had been contributorily negligent in riding his horse at an extremely fast pace. The court stated, "[a] party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right." 11 East at 61, 103 Eng. Rep. at 927.

[27] Contributory negligence gained popularity with American courts during the industrial revolution. It was a means of protecting developing industries from liability, such that new industries could be promoted. Carestia, *The Interaction of Comparative Negligence and Strict Products Liability - Where Are We?*, 47 INS. COUNS. J. 53, 58 (1980).

[28] The defense of contributory negligence undercuts two important principles of tort law. First, it avoids compensating a victim for injuries caused by another's negligence. The plaintiff is disallowed any recovery although part of his injury is directly caused by the defendant. Second, it frustrates the deterrent effect of tort law. The defendant may escape liability although he was negligent. Thus, potential defendants have less incentive to exercise due care for the safety of others. Note, *Comparative Negligence*, 81 COLUM. L. REV. 1668, 1669 (1981). The inherent problem of contributory negligence is that it places the entire burden of loss on the plaintiff, when in fact both plaintiff and defendant are responsible for the harm. Further, because of the injury

several common law exceptions that provided recovery for the plaintiff, the most notable being the doctrine of last clear chance.[29] None of these exceptions proved satisfactory,[30] however, and the contributory negligence defense has since been largely abandoned for the more accommodating principles of comparative negligence.

The basic concept of comparative negligence is that the costs of an accident should be apportioned based on the relative fault of the parties involved. Thus, a plaintiff who is partly at fault for his injuries will have his recovery reduced by his percentage of fault. The defendant will pay only his proportionate share of the damages.[31] Not all jurisdictions, however, apply this concept in the same manner. There are three main forms of comparative negligence: pure, modified, and slight-gross.

The pure system simply allocates damages according to the relative fault of the parties, thus allowing the plaintiff compensation for all damages attributable to the defendant. Under this system, the plaintiff's negligence never bars recovery unless the plaintiff is one-hundred percent at fault.[32]

The modified system apportions damages except when the plaintiff's share of fault reaches a certain limit. When the limit is reached, the plaintiff is barred from any recovery. Some states employ the "not as great as" limit, which bars recovery when the plaintiff is over forty-nine percent at fault. Other states employ the "not greater than" limit, which bars recovery when the plaintiff is over fifty percent at fault.[33]

---

done, the plaintiff is probably the least able of the two parties to bear the burden of the loss. PROSSER AND KEETON ON TORTS, *supra* note 23, at 468-69.

[29] The doctrine of Last Clear Chance allowed the plaintiff total recovery if the defendant had the last clear chance to avoid the accident. Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842) (although plaintiff was careless in leaving his donkey on a highway and causing an obstruction, defendant was held liable because he had the better opportunity to avoid the accident).

[30] The problem with the exceptions to contributory negligence was that they provided full recovery, even though the plaintiff was partly at fault. In this sense, the defendant was now being treated unfairly by being required to pay for damages although he was not solely responsible for the harm. Hence, the exceptions, rather than solving the problem, merely recreated a situation where one party must bear the entire burden of loss, although two are actually at fault. The only difference under the exceptions is that the defendant must bear the sole burden, rather than the plaintiff. *Id.*

[31] SCHWARTZ, *supra* note 25, at 31.

[32] Under the pure system, the plaintiff may recover damages even though he is largely at fault for his injuries, but the recovery will be reduced in proportion to the plaintiff's fault. The defendant thus only pays damages proportionate to his share of the apportioned fault. PROSSER AND KEETON ON TORTS, *supra* note 23, at 471-72.

[33] The modified system is the most widely accepted, for it serves the rationale that a person should not be allowed compensation when he is more at fault than those from whom he seeks compensation. Note, *Comparative Negligence*, *supra* note 28, at 1672.

The slight-gross system bars recovery when the plaintiff is negligent, unless the plaintiff's negligence is slight and the defendant's negligence is gross by comparison. If recovery is allowed, damages are apportioned according to relative fault.[34]

With the adoption of Hawaii Revised Statutes section 663-31,[35] the Hawaii Legislature chose to employ a "not greater than" modified system of comparative negligence. In support of its decision to adopt a comparative negligence system, the Hawaii Legislature pointed to the basic unfairness of the contributory negligence defense.[36] Although there is no legislative history to explain the legislature's decision to adopt a modified system, as opposed to a pure or slight-gross system, it can be inferred that the legislature felt that it would be unfair to provide recovery to a plaintiff who was more at fault than the defendant.

---

[34] The slight-gross system is applicable only in the states of Nebraska and South Dakota. *See* NEB. REV. STAT. § 25-1151; S.D. CODIFIED LAWS, § 20-9-2.

[35] HAW. REV. STAT. § 663-31 reads:

> Contributory negligence no bar; comparative negligence; findings of fact and special verdicts.
>
> (a) Contributory negligence shall not bar recovery in any action by any person or the person's legal representative to recover damages in negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.
>
> (b) In any action to which subsection (a) of this section applies, the court, in a non-jury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state:
>
> (1) The amount of damages which would have been recoverable if there had been no contributory negligence; and
>
> (2) The degree of negligence of each party, expressed as a percentage.
>
> (c) Upon making the findings of fact or the return of a special verdict, as is contemplated by subsection (b) above, the court shall reduce the amount of the award in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made; provided that if the said proportion is greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, the court will enter a judgment for the defendant.
>
> (d) The court shall instruct the jury regarding the law of comparative negligence where appropriate.

[36] Commenting on the contributory negligence defense, the Senate Standing Committee report stated, "[s]uch a rule seems to be unfair and in opposition to the average person's concept of justice." S. Stand. Comm. Rep. No. 849, 5th Haw. Leg., Reg. Sess., *reprinted in* 1969 Senate J. 1194.

B. *Products Liability*

At early common law, a seller of a product could be held liable in contract or tort only for fraud, intentional deception, or where there had been an express manifestation of an intention to guarantee some specific characteristic or quality of the product, and where the product had failed in that respect. Eventually this standard became inadequate as pressure developed for the protection of the economic interests of those involved in consumer transactions. Courts recognized a need to protect purchasers from economic and commercial losses suffered as a result of the frustration of their expectations regarding the worth, efficacy, or desirability of the product to serve their needs.[37]

The 1842 case of *Winterbottom v. Wright*[38] was the first to impose strict products liability with respect to physical harm to persons and tangible things. *Winterbottom* involved a claim against a coach repairman by a passenger who was subsequently injured by the coach. In denying recovery, *Winterbottom* limited the liability of the original seller of the product to damages to the immediate buyer, or one in privity with him, caused by the product's defect(s). Resale to a third party by the consumer thus insulated the original seller from liability to the third party for negligent design or construction. The rationale was that a seller could not foresee injuries to third parties and that it would impose too heavy a burden to hold manufacturers responsible to people remotely related to them.

Subsequent cases recognized various exceptions to *Winterbottom*.[39] Finally, in *MacPherson v. Buick Motor Co.*,[40] the New York Court of Appeals articulated a standard which imposed liability upon a manufacturer for negligence in the manufacture or sale of any product which could reasonably be expected to be capable of inflicting substantial harm if defective. Under *MacPherson*, manufacturers are held to the same standard of due care required of any reasonable

---

[37] This resulted in the development of the warranty theory of recovery. Express warranties result from express statements made amounting to representations or affirmations of fact about the characteristics of goods sold, and implied warranties result simply as a consequence of the act of selling when the sale was by a merchant. PROSSER AND KEETON ON TORTS, *supra* note 23, at 679.

[38] 10 M & W 109, 152 Eng. Rep. 402 (1842).

[39] The most notable exception was exemplified in Thomas v. Winchester, 6 N.Y. 397 (1852), which held that a seller was liable to a third person for negligence in the preparation or sale of an article "imminently" or "inherently" dangerous to human safety. Also, uncertainty arose as to how to treat certain products such as soap in Hasbrouck v. Armour & Co., 139 Wis. 357, 12 N.W. 157 (1909), and tobacco in Liggett & Meyers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009 (1915).

[40] 217 N.Y. 382 (1916). This case involved the manufacturer of an automobile with a defective tire rim, purchased from a subcontractor, which collapsed and injured a purchaser.

person.[41] Liability in *MacPherson* was based on the theory that the manufacturer, by placing a product in the market, derived an economic benefit from the sale and therefore assumed a responsibility to the consumer resting not upon the contract, but upon the manufacture or sale.

The doctrine of strict liability for sellers was first applied in regard to food products. In *Mazzetti v. Armour & Co.*,[42] the Washington Supreme Court in 1913 discarded the privity requirement as to food products. The court in *Mazzetti* held that, even where no privity of contract existed between the victim and defendant, a seller of food products gave an implied warranty as to the safety of the product despite the fact that he had exercised all reasonable care.[43] In 1960, the Supreme Court of New Jersey extended the implied warranty theory beyond food products in *Henningsen v. Bloomfield Motors*,[44] which held a dealer and manufacturer liable to a purchaser on a warranty basis.[45] The term "warranty" had become so closely identified with contract in the minds of most courts and lawyers that contract rules were assumed to apply to it. Traditional warranty theory required that the plaintiff act in reliance upon some express or implied representation or assurance, or some promise or undertaking, on the part of the defendant.

The trend towards the application of strict liability in tort reflects three major policy considerations. The first consideration recognizes that the costs resulting from dangerously defective products can best be borne by the people who make and sell the products, as they have the capacity to distribute the losses of the few among the many who purchase the products by charging higher prices for the products.[46] The second consideration is that the adoption of strict liability and the elimination of the necessity for proving negligence is likely to promote accident prevention.[47] The third consideration is that, because the fault of the defendant is often difficult to prove, and because litigation is costly, proof of fault or negligence with regard to defective products should not be required, especially if the defect is properly defined and limited.[48] As a result of these policy considerations, the American Law Institute adopted section 402A of the

---

[41] *Id.* at 389.

[42] 75 Wash. 622, 135 P. 633 (1913).

[43] *Mazzetti*, 75 Wash. at 623, 135 P. at 635.

[44] 32 N.J. 358, 161 A.2d 69 (1960). In *Henningson*, plaintiff was injured when the steering gear malfunctioned in a car purchased by her husband. She sued the manufacturer and dealer.

[45] Many subsequent cases have followed *Henningson* and found an implied warranty as to a wide assortment of products. Some examples are: B.F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959)(tire); Hurtig v. Terminox, 67 Haw. 480, 69 P.2d 1153 (1984)(termite treatment); and Sturla v. Fireman's Fund Insurance, 67 Haw. 203, 684 P.2d 960 (1984)(insurance).

[46] PROSSER AND KEETON ON TORTS, *supra* note 23, at 692.

[47] *Id.* at 693.

[48] *Id.*

Second Restatement of Torts, accepting the principle of strict liability in tort.[49] The present rule is that a manufacturer has a responsibility to the ultimate consumer based on the fact that the manufacturer deals with goods that are likely to come into the hands of another, and likely to cause harm if defective.

In 1970, the Hawaii Supreme Court first ruled on strict products liability in *Stewart v. Budget Rent-A-Car.*[50] In *Stewart*, the plaintiff was injured when her rental car went off the road. She brought suit against the rental agency, the distributor, and the manufacturer of the car, alleging breach of an implied warranty of fitness.[51] The court held that strict liability in tort, for one who sells or leases a defective product which is dangerous to a user, consumer, or his property, is a sound legal basis for recovery in products liability cases. The court justified its decision on the theory that:

> the public interest in human life and safety requires the maximum possible protection that the law can muster against dangerous defects in products. By placing the goods on the market, the maker and those in the chain of distribution represent to the public that the products are suitable and safe for use; and that the burden of accidental injuries caused by the defective chattel should be placed upon those in the chain of distribution as a cost of doing business and as an incentive to guard against such defects.[52]

While the basis for recovery in *Stewart* was strict liability in tort, the court stressed that this in no way dispensed with the requirements of proof that the product was in some way defective and that the damages were caused by the

---

[49] The Restatement states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[50] 52 Haw. 71, 470 P.2d 240 (1970).

[51] Because of the condition of the automobile after the accident, the expert mechanic could not give his honest opinion as to the existence of a mechanical defect in the car. In such a case, the user's testimony on what happened is another method of proving that the product was defective, and her testimony was sufficient to yield an inference that there was a defective condition. *Id.* at 73, 470 P.2d at 242.

[52] *Id.* at 74, 470 P.2d at 243.

defect.[53]

The *Stewart* court essentially adopted the rule of section 402A of the Second Restatement of Torts. As noted by the *Stewart* court, section 402A requires that:

> one who sells or leases a defective product which is dangerous to the user or consumer or to his property is subject to liability for physical harm caused by the defective product to the ultimate user, consumer, or his property, if (a) the seller or lessor is engaged in the business of selling or leasing such product, and (b) the product is expected to and does reach the user or consumer without substantial change in its condition after it is sold or leased.[54]

Many Hawaii Supreme Court cases subsequent to *Stewart* have upheld the propositions of strict liability relied on in *Stewart*.[55]

C. *The Merger of Comparative Negligence and Products Liability*

The emergence of comparative negligence in tort law required the courts to address two preliminary questions: First, could comparative negligence principles be applied to products liability actions;[56] and second, how—if at all—would application of comparative negligence in this area affect the more established doctrine of products liability?[57]

---

[53] *Id.* at 75, 470 P.2d at 243.

[54] *Id.*

[55] *See, e.g.*, Larsen v. State Savings and Loan, 64 Haw. 302, 640 P.2d 286 (1982)(plaintiff suffered an eye injury while opening a champagne bottle); Kaneko v. Hilo Coast Processing, 65 Haw. 447, 654 P.2d 343 (1982)(plaintiff fell while a mill building was being erected); Ontai v. Straub Clinic, 66 Haw. 237, 659 P.2d 734 (1983)(plaintiff patient slipped in an examining room); Bidar v. Amfac, 66 Haw. 547, 669 P.2d 154 (1983)(plaintiff injured in hotel bathroom when towel bar broke); Nobriga v. Raybestos, 67 Haw. 157, 683 P.2d 389 (1984)(plaintiff injured from asbestos); and Monlux v. General Motors, ____ Haw. ____, 714 P.2d 930 (1986)(plaintiff suffered auto injury due to defect in vehicle).

[56] One commentator frames the issue in terms of consistency. The law of products liability had become fairly consistent in the past, but with the recent convergence with comparative principles, the area is now increasingly inconsistent as different theories have been put forth to explain the merger. Carestia, *supra* note 27, at 53.

[57] The Wisconsin Supreme Court was the first to decide the issue in Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). The court analogized products liability claims to negligence per se, and as the comparative negligence statute of Wisconsin had been applied to other negligence per se actions, it could likewise be applied to products liability. *Id.* at 462, 155 N.W.2d at 64-65. The claim in *Dippel* resulted from the plaintiff's foot being crushed when a leg of a large pool table collapsed as the plaintiff attempted to move it. *Id.* at 447, 155 N.W.2d at 56. The negligence per se doctrine involves the violation of a standard of conduct laid out in a criminal statute. Such a violation renders the violator negligent per se in civil litigation, and thus it becomes unnecessary for a jury to determine the issue of negligence. Schwartz, *supra* note 25, at

In 1978, the California Supreme Court answered the first of these questions affirmatively in *Daly v. General Motors Corp.*[58] *Daly* involved an auto accident in which plaintiffs' decedent was ejected from his car. Plaintiffs alleged that the ejection was due to a defective door latch, while defendant manufacturer argued that the decedent had been contributorily negligent by his failure to use the door lock and seat belt provided in the car.[59] In concluding that comparative negligence principles should apply in products liability actions,[60] the court recognized, but dismissed, three major arguments against such an application.

The first objection the court noted involved certain conceptual and semantic difficulties allegedly created by an attempt to merge comparative negligence with products liability. As products liability is not a negligence or fault-based claim, the argument ran that merging it with comparative negligence was like mixing "apples and oranges."[61] The court responded, however, that this was not an insurmountable obstacle. Rather, the court felt that such conceptual interweaving was appropriate when the result was fair and just.[62]

The second objection to the merger of the two doctrines was that a manufacturer would have less incentive to produce safe products if comparative fault applied. The court also strongly rejected this idea. First, the court pointed out that the manufacturer's liability for defects still remained strict. Recovery would merely be reduced by plaintiff's share of fault.[63] Second, manufacturers could not assume that an injured user of a defective product would also be at fault. Thus, there would still be an incentive to provide safe products.[64]

The third objection addressed by the court was that juries would be unable to compare a plaintiff's negligence with a defendant's strict liability. Pointing to maritime law, where for a number of years comparative principles have applied to a form of strict liability, the court noted that juries are quite capable of

---

111.

[58] 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

[59] *Id.* at 730-31, 575 P.2d at 1164-65, 144 Cal. Rptr. at 382-83.

[60] Previous California decisions in products liability actions had held that the only relevant contributory negligence defense was when there had been assumption of risk. *See* Woods, *The Trend Toward Comparative Fault*, 20 TRIAL 16, 19 (1984). *See also* RESTATEMENT (SECOND) OF TORTS § 402A COMMENT N (1965).

[61] 20 Cal. 3d at 734, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

[62] *Id.* at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386. The court noted that, "Fixed semantic consistency at this point is less important than the attainment of a just and equitable result. The interweaving of concept and terminology in this area suggests a judicial posture that is flexible rather than doctrinaire." *Id.*

[63] The court implied that exposure to liability is a sufficient incentive for manufacturers to produce safe products. Merely reducing the amount of damages paid out will not unduly reduce the incentive to produce safe products. *Id.* at 738, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

[64] *Id.*

making the necessary comparison.[65]

As to assumption of risk, the *Daly* court pointed out that applying comparative negligence in product liability actions meant that the defense would be merged with comparative negligence principles.[66] Thus, the assumption of risk defense would no longer be a complete bar to a plaintiff's recovery under products liability, but would now work only to reduce that recovery.[67]

With the decision in *Daly*, the movement toward extending comparative negligence principles to products liability was well on its way.[68] Among the courts most influenced by *Daly* was the Hawaii Supreme Court in the 1982 case of *Kaneko v. Hilo Coast Processing*.[69] The claim in *Kaneko* involved a construction worker who was injured when a beam upon which he was standing collapsed. The jury found the plaintiff to be twenty-seven percent negligent for his failure to wear a life-line.[70] After determining that there was a valid products liability claim,[71] the Hawaii Supreme Court turned to the issue of applying comparative principles to that claim. As in *Daly*, the court addressed the three main arguments against such a merger. First, in holding that the two doctrines were not incompatible, the court emphasized that fairness and equity were the overriding considerations, rather than conceptual and semantic consistency.[72] The court noted that the adoption of products liability had been based on equitable reasons, and these were the relevant factors in deciding the issue. Second, in overcoming the argument that manufacturers' incentives to produce safe

---

[65] *Id.* at 738, 575 P.2d at 1170, 144 Cal. Rptr. at 388. The maritime doctrine of "unseaworthiness" is a form of strict liability which considers the fitness of a ship without regard to the cause of deficiencies. *Id.*

[66] *Id.* at 738, 575 P.2d at 1169, 144 Cal. Rptr. at 387.

[67] *Id.* at 738, 575 P.2d at 1170, 144 Cal. Rptr. at 388. The court noted that the assumption of risk defense to products liability had created an anomaly where a plaintiff would be in a worse position by claiming products liability than if he had claimed mere negligence. Products liability had been created to make it easier for plaintiffs to recover, yet they could be completely barred if they had assumed the risk. Under a negligence claim, however, the recovery would just be reduced. By merging the assumption of risk defense into comparative principles, this anomaly no longer exists. *Id.* at 738, 575 P.2d at 1169-70, 144 Cal. Rptr. at 387-88.

[68] For other decisions extending comparative negligence to products liability actions, see Butaud v. Suburban Marine and Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Busch v. Busch Construction, Inc., 262 N.W.2d 377 (Minn. 1977); Sandford v. Chevrolet Division of General Motors, 642 P.2d 624 (Or. 1982); and Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W.Va. 1982).

[69] 65 Haw. 447, 654 P.2d 343 (1982).

[70] *Id.* at 448-50, 654 P.2d at 345.

[71] On the issue of whether a product was involved, the court stated, "a prefabricated building that must be assembled is a product where the seller-manufacturer may be found strictly liable for injuries caused by a defective component part . . . strict liability applies to 'assembly-type situations.' " *Id.* at 457, 654 P.2d at 350.

[72] *Id.* at 461, 654 P.2d at 352.

products would be lessened, the court noted, as the *Daly* court had, that manufacturers' *liability* would not be reduced; only the amount awarded to successful plaintiffs. Moreover, manufacturers would still have no reason to assume negligence in the use of their defective products.[73] Finally, the court noted that, although some jurisdictions refused to merge the two doctrines for fear of confusing the jury, the better reasoned view was that jurors would not be confused in determining damages.[74]

Although a few courts have refused to extend comparative negligence to product liability claims,[75] the *Kaneko* decision clearly reflects the majority view. The shortcomings of *Kaneko*, however, were the court's failure to specify whether the comparative principles applied there were based on judicial adoption or Hawaii Revised Statutes section 663-31, and thus whether a pure or modified form of comparative negligence had been adopted.[76] Since the plaintiff in *Kaneko* was found only twenty-seven percent negligent, he did not reach the prohibitive limit set out by the modified principles in section 663-31. Thus, whether a pure or modified form applied did not matter; plaintiff could still recover in either case.

Kaneko, therefore, was the Hawaii Supreme Court's first step in extending comparative negligence to products liability. It was left to the *Armstrong* and *Hao* decisions five years later, however, to clarify which specific form of comparative negligence applied.

IV. ANALYSIS

A. Narrative

In *Kaneko v. Hilo Coast Processing*,[77] the Hawaii Supreme Court held that the general concept of comparative negligence applied to claims based on products liability. The court in *Armstrong* and *Hao* went one step further by address-

---

[73] *Id.* at 462, 654 P.2d at 353.

[74] *Id.* at 463, 654 P.2d at 353.

[75] These courts have relied on the arguments that it is unwise to mix "apples with oranges," and that manufacturers will have less incentive to produce safe products if damages are allowed to be reduced due to comparative principles. PROSSER AND KEETON ON TORTS, *supra* note 23, at 478.

[76] Comment, *Rethinking Products Liability: Kaneko v. Hilo Coast Processing*, 6 U. HAW. L. REV. 613, 626 (1984). The language in *Kaneko* that the doctrines should be "judicially" merged leads to the conclusion that the case involved judicial adoption rather than application of HRS § 663-31. Further, it was more likely that the court adopted a pure form of comparative negligence. A pure form would provide the fairest results, and the *Daly* decision, which the *Kaneko* court relied on heavily, utilized a pure form which had been judicially adopted. *Id.* at 626-28.

[77] 65 Haw. 447, 654 P.2d 343 (1982).

ing the question of whether pure or modified comparative negligence should apply to such a claim.[78] Since the juries in both cases found the plaintiffs to be over fifty percent negligent, adoption of Hawaii Revised Statutes section 663-31 to a strict products liability action would have barred their recovery. But if a pure system of comparative negligence were applied by the court, then the plaintiffs would recover in an amount reduced by their proportionate share of fault.

In bringing his appeal, Armstrong argued that the Intermediate Court of Appeals erred in its interpretation of *Kaneko* by holding that Hawaii's modified comparative negligence statute applied to strict products liability claims. Thus, the *Armstrong* court had to determine whether the comparative negligence principles applied in *Kaneko* had originated from section 663-31, or whether a pure form had been judicially adopted.[79] The court clarified the *Kaneko* decision by stating that the *Kaneko* court had purposefully omitted citation to section 663-31.

The *Armstrong* court held that pure comparative negligence principles apply to strict products liability claims. Therefore, plaintiff's negligence reduces but does not defeat his claim sounding in strict products liability, even though his responsibility for the damages was found to be greater than that of the defendant. Because the legislature had not acted in this area of the law, the court felt it was free to fashion a rule of comparative negligence to suit the original purpose in adopting strict products liability for Hawaii.[80] Therefore the court did not feel bound to apply the modified principles of section 663-31.

The *Armstrong* court also found that the words of section 663-31, in their plain meaning, showed no indication of the legislature's intent to apply the statute to strict products liability cases. The court reasoned that the legislature's use of the word "negligence" within section 663-31 worked to limit the statute's application to negligence claims only.[81] Further, research had not indicated that the legislature intended to enter into this area of the tort law. The legislative history of section 663-31 instead indicated an intent to prevent any unfair-

---

[78] As discussed earlier, there are three basic forms of comparative negligence: pure, modified, and slight-gross. *See supra* notes 32-34 and accompanying text.

[79] The Intermediate Court of Appeals, in deciding *Armstrong*, had determined that the *Kaneko* decision was based on the comparative negligence principles laid down by HRS § 663-31. Thus, it held that a modified form applied to products liability claims, not a pure form. 69 Haw. at ____, 738 P.2d at 81.

[80] In *Stewart*, 52 Haw. at 74-75, 470 P.2d at 243, the goal of protecting consumers and holding manufacturers and distributors liable for placing unsafe goods in the market was best served by ensuring that application of comparative negligence principles does not create an "all or nothing" bar to plaintiffs' recovery. By applying a pure standard to strict products liability, a plaintiff will be able to recover damages even though he is up to ninety-nine percent negligent. *Armstrong*, 69 Haw. at ____, 738 P.2d at 82.

[81] *Id.* at ____, 738 P.2d at 82.

ness in the application of the doctrine of contributory negligence to defeat a plaintiff's common law negligence claim.[82] The *Armstrong* court therefore refused to construe the term "negligence" in section 663-31 to apply to strict products liability, in light of the statute's legislative history and principles of strict products liability.[83]

In reaching its holding, the court gave consideration to preserving the policy aspects of the strict products liability doctrine. In particular, the court felt that a pure system of comparative negligence would be most compatible with the policy considerations underlying its earlier decision in *Stewart v. Budget Rent-A-Car Corp.*[84] *The Stewart* court's intention was to protect the public interest in human life and safety, give maximum protection to consumers against products defects, and to provide an incentive for manufacturers to guard against such defects.[85] These goals would be best furthered by not allowing comparative negligence principles to create an all-or-nothing bar to a plaintiff's recovery.[86]

In the final analysis, the *Armstrong* court held that the plaintiff's products liability claim had no merit, because no "product" was involved in the case. In reaching this conclusion, the court relied upon its earlier decision in *Bidar v. Amfac, Inc.*[87] There, the court held that a portion of leased premises was not a "product" for purposes of strict products liability. The *Armstrong* court further alluded to *Kaneko* to illustrate the adoption of a case-by-case approach in determining whether a "product" was involved.[88] *Armstrong* was decided on this point. Because there was no valid products liability claim, it was not necessary to apply comparative negligence principles.

Hao, which was decided nine days after *Armstrong*, presented the same issue of whether a pure or modified form of comparative negligence applied to strict product liability claims.[89] The *Hao* court merely cited *Armstrong* and held that a

---

[82] *Armstrong*, 69 Haw. at ____, 738 P.2d at 82. The court in Wong v. Hawaiian Scenic Tours, 64 Haw. 401, 642 P.2d 930 (1982), likewise noted that the doctrine of contributory negligence is unfair and in opposition to the average person's concept of justice. *Id.*

[83] *Armstrong*, 69 Haw. at ____, 738 P.2d at 82.

[84] 52 Haw. 71, 470 P.2d 240 (1970). See *supra*, notes 50-55 and accompanying text for a discussion of *Stewart*.

[85] *Id.* at 74-75, 470 P.2d at 243, *cited in Armstrong*, 69 Haw. at ____, 738 P.2d at 81.

[86] *Armstrong*, 69 Haw. at ____, 738 P.2d at 82. The court cited the Third Circuit case of Murray v. Fairbanks Morse, 610 F.2d 149 (3d Cir. 1979), and the Texas Supreme Court case of Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984), to support its position that a modified system would create an all-or-nothing bar when a plaintiff is over fifty percent negligent. *Armstrong*, 69 Haw. at ____, 738 P.2d at 83.

[87] 66 Haw. at 556-57, 669 P.2d at 161, *cited in Armstrong*, 69 Haw. at ____, 738 P.2d at 84.

[88] *Kaneko*, 65 Haw. at 452-58, 654 P.2d at 347, 350, *cited in Armstrong*, 69 Haw. at ____, 738 P.2d at 83.

[89] 69 Haw. at ____, 738 P.2d at 418.

pure form applied.[90] In *Hao*, there was no question as to whether the products containing asbestos were "products" for purposes of strict products liability.[91]

1. *In Support of Applying Pure Comparative Negligence*

The *Armstrong* court's decision to adopt a pure comparative negligence rule in products liability cases was influenced by the decisions of other courts in jurisdictions with modified comparative negligence statutes similar to Hawaii's. In particular, the court agreed with the Third Circuit Court's conclusion, in *Murray v. Fairbanks Morse*,[92] that no sound reason exists for allowing a defendant in a products liability action to escape liability allocated to him by a jury, regardless of whether or not the plaintiff was also at fault.[93] Moreover, the *Armstrong* court cited the District Court for the District of Kansas[94] for the proposition that it is inconsistent with the purposes of strict liability to bar from recovery a plaintiff who is more at fault than the strictly liable defendant.[95] Thus, in comparative negligence jurisdictions, a pure comparative liability scheme should be employed in products liability actions under section 402A.[96]

The *Armstrong* court acknowledged that the decision to adopt pure comparative negligence in a strict products liability situation stemmed in part from a

---

[90] *Id.* The court in *Armstrong* eventually held that the products liability claim was inapplicable to the case because no "product" was involved. It might therefore be argued that the decision to apply a pure form of comparative negligence was merely dicta, as it may not have been necessary for the court to reach the question of which form of comparative negligence applied. The decision in *Hao*, however, involved a situation where the facts were appropriate to the issue, for there was a valid products liability claim.

The problem with the Hawaii Supreme Court's resolution of the issue was that all of the arguments in favor of adopting a pure form for products liability claims were stated in *Armstrong*, a case whose result did not depend on such arguments. On the other hand, *Hao*, a case whose outcome necessarily relied on a determination of the issue, merely cited to the *Armstrong* decision as binding precedent, without an adequate discussion of its own. The affirmance of *Armstrong* in *Hao* makes clear that the determination in *Armstrong* is good law. The only difficulty was that it took the court two cases to clarify the area, instead of having one appropriate case carry the full force of the law. Clearly, the court was correct in that this area of the law, first dealt with in *Kaneko*, needed clarification, but perhaps it would have been more appropriate to wait a few days more such that the whole issue could have been argued and decided in *Hao*, a case which was directly on point.

[91] A further issue was brought out in *Hao* whether causation could be apportioned to Hao's employer, the United States Navy, who was not cross-claimed in the action. The court refused to allow apportionment of liability to an absent cross-claimed employer. *Id.* at 419.

[92] 610 F.2d 149, 162 (3d Cir. 1979).

[93] 69 Haw. at ____, 738 P.2d at 82.

[94] Stueve v. American Honda Motors Co., 457 F. Supp. 740 (D. Kan. 1978).

[95] *Id.* at 757.

[96] *Id.*

desire to create economic incentives for safer products. There are several strong policy arguments supporting the court's approach. Arguably, that goal would best be served by allowing a plaintiff recovery where the manufacturer or distributor is partially responsible, regardless of the percentage of liability allocated to him.[97] To hold otherwise would significantly reduce the incentives for creating safer products that are often or easily misused or altered by the consumer and would place the entire cost of unsafe products on the consumer.[98] Application of a pure system would better serve as an incentive to the manufacturer to avoid and correct product defects in that, regardless of the degree of the plaintiff's culpability, the manufacturer would still be liable for that portion of the injury proximately caused by the product defect.[99] This is a more equitable rule, according to some courts, than the "some or nothing" principle of the modified comparative negligence statute.[100]

The *Armstrong* court also found support from other jurisdictions for its limiting construction of Hawaii's comparative negligence statute. In *Thibault v. Sears, Roebuck, & Co.*,[101] for example, the Supreme Court of New Hampshire held that a statute similar to Hawaii's did not apply to strict liability cases because the statute was confined, by its terms, to actions for negligence.[102] According to the *Thibault* court, strict liability is a judicially created doctrine to which principles of comparative causation[103] unrelated to comparative negli-

---

[97] 69 Haw. at ____, 738 P.2d at 83.

[98] *Id.*

[99] *Id.* at ____, 738 P.2d at 83. *See also Stueve*, 457 F. Supp. at 757 (pure system would better serve as a deterrent).

Kaneko held that comparative negligence principles should not create an "all or nothing" bar to plaintiff's recovery in order to ensure that consumers are protected and that manufacturers and distributors are held accountable for unsafe goods in the market. 62 Haw. at 464, 654 P.2d at 354.

[100] *See, e.g., Stueve*, 457 F. Supp. at 757.

[101] 118 N.H. 802, 395 A.2d 843 (1978).

[102] *Id.* at 806, 395 A.2d at 848.

[103] Comparative causation is not a new concept in strict products liability cases, and should be broken down into "cause-in-fact" and "proximate cause". Comparative causation is a more precise term than "comparative fault", because fault alone without causation does not subject a person to liability. Comparative causation is otherwise known as a "cause-in-fact" of the injury, more traditionally known as the "but-for" test. Without causation on the part of the defendant, there is no liability. The relevant inquiry in a strict products liability suit should be whether the product defect was a cause-in-fact of some or all of the injury and whether plaintiff's conduct was a cause-in-fact of all or some of the injury. If the answer is affirmative for both of these questions, proximate cause must be determined to establish if the individual should be held liable for the loss even though his conduct was a substantial factor in bringing it about. Sometimes both the product defect and the plaintiff's conduct may be substantial factors in bringing about the injury. Once the jury finds that the product defect caused the injury, the defendant is strictly liable, and his liability is reduced only by the amount of the plaintiff's contribution to his own injury. *See* Murray v. Fairbanks Morse, 610 F.2d 149, 160 (3d Cir. 1979).

gence statutes, apply.[104]

2. *In Support of Applying The Modified Form In Hawaii Revised Statutes, Section 663-31*

The *Armstrong* court acknowledged that not all courts in jurisdictions with comparative negligence statutes similar to Hawaii's have held their statutes not to apply to products liability actions.[105] The Supreme Court of Wisconsin, for example, has held that conduct giving rise to products liability claims can be construed as negligence per se and, thus, as within the scope of a statute limited by its terms to negligence claims.[106] The Supreme Court of New Jersey reached a similar result by construing "negligence" in the relevant statute to mean "fault," in a sense broad enough to cover products liability claims.[107]

There are several possible rationales for extending the reach of modified comparative negligence statutes so as to include products liability claims. First, there is a desire to promote the public policy declared through the legislature's choice of a modified system. In this sense, courts that extend the reach of the statute are exercising caution not to intrude into the legislature's sphere of authority.[108] Second, some courts are wary of the confusion that might arise from having two different forms of comparative negligence in the same jurisdiction, one being legislatively adopted, the other judicially.[109] Finally, some courts have reasoned that modified principles of comparative negligence do not unduly undercut the policies behind products liability doctrine. Modified principles, in their view, still abolish the "all or nothing" rule of contributory negligence, and the manu-

---

[104] *Thibault*, 118 N.H. at 806, 395 A.2d at 848 (1979). In *Hao*, the jury determined that both Owens' defective product and Hao's smoking of cigarettes were substantial factors in bringing about his claimed illness. *Hao*, 69 Haw. at ____, 738 P.2d at 418.

[105] The problem of whether a comparative negligence statute can be extended to products liability claims arises only when the statute contains such limiting words as "negligence". Schwartz, *supra* note 24, at 196. The *Armstrong* court could have extended the modified principles of Hawaii's statute to products liability if it had adopted a rationale similar to that of some other jurisdictions, but it chose not to. *Armstrong*, 69 Haw. ____, ____, 738 P.2d 79, 82 (1987).

[106] Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (strict liability is similar to negligence per se because neither involves foreseeability).

[107] Suter v. San Angelo Foundry and Machine Co., 81 N.J. 150, 406 A.2d 140 (1979) (comparative negligence statute is applicable to strict products liability because the statute was intended to go beyond mere negligence and was meant to cover fault in a broad sense).

[108] The choice between pure or modified comparative negligence was a policy decision made by the legislature. Forsythe v. Coats Co., Inc., 230 Kan. 553, 639 P.2d 43 (1982). If the court adopts a pure form for actions based on strict liability, such adoption would cause court intrusion into a legislative sphere. *Id.* at 557, 639 P.2d at 46.

[109] *Id.*

facturer must still pay damages so long as the plaintiff is found not responsible for a greater portion of the fault. With a modified form of comparative negligence, the consumer-plaintiff must simply take more responsibility for his actions than under a pure system, and he will not be able to pass on the burden of his injury if he is mostly to blame.[110]

The Hawaii State Legislature could have expressly exempted products liability from the reach of Hawaii's comparative negligence statute. Because it did not, it can be argued that the Hawaii Supreme Court, in *Armstrong* and *Hao*, contravened the legislature's intent. The court's analysis of the legislative history of the statute, however, demonstrated a sensitivity to this possibility, and the conclusion that the statute was not meant to reach products liability appears reasonable. Moreover, the rationales offered by other courts for extending the reach of similar statutes seem strained,[111] and the argument that a pure form of comparative negligence is more consistent with the policies behind the products liability doctrine is persuasive.[112]

V. IMPACT

A. Manufacturers

If the Hawaii Supreme Court's reasoning is correct, the decisions in *Armstrong* and *Hao* could play a major part in increasing incentives for producers and manufacturers to create safer products.[113] This incentive would arise from the assurance that the manufacturer will be held liable for damages, irrespective of whether the plaintiff-consumer bears the majority of fault for the injuries incurred. As illustrated by the *Hao* decision, manufacturers defending against a products liability claim will no longer be allowed to rely on section 663-31 as a shield to liability. Prior to *Armstrong*, it was unclear whether the manufacturer of a defective product could escape liability in certain cases based on the fifty percent rule of Hawaii's modified comparative negligence statute. Now, however, the manufacturer's liability for a defective product is clear, with the plain-

---

[110] The court in *Forsythe* argued that use of the modified form of comparative negligence was not inherently inconsistent with the policies of strict products liability. The court therefore chose to "promote and enhance rather than frustrate what it consider[ed] to be the public policy declared by the legislature in enacting the modified comparative negligence statute." *Id.* at 558, 639 P.2d at 46.

[111] *See* Schwartz, *supra* note 25, at 215.

[112] *See* Comment, *Comparative Negligence and Strict Products Liability: Where Do We Stand? Where Do We Go?*, 29 VILL. L. REV. 695, 724 (1983).

[113] The products of major concern are those which are easily or often misused and altered, and those commonly subject to manufacture or design defects. *Armstrong*, 69 Haw. at ____, 738 P.2d at 83.

tiff's negligence working only to reduce recovery, never working to bar it.

B. *Consumers*

In response to *Armstrong*'s holding, an average informed consumer would appear in theory to have less incentive to act in a reasonable manner for his own safety.[114] This reduced incentive would arise, if at all, from the consumer's knowledge that he can recover for defective product-related injuries even if his own negligence was a partial—but not exclusive—cause of his injuries. Considering the overall operation of pure comparative negligence law, however, the apparent decrease in incentives for due care should be offset by the apportionment principles of the comparative system. The informed consumer will recognize that his negligent actions will serve to reduce any recovery. The result of these two competing factors will probably be only a slight reduction in the incentive for the consumer to protect himself, if in fact there is any reduction at all.

C. *Anomalies Which Result From* Armstrong *and* Hao

With the decision in *Armstrong* and *Hao* to apply a pure form of comparative negligence to products liability actions, the Hawaii Supreme Court has followed what most commentators feel to be the better reasoned approach in this area of the law.[115] All of the policy considerations underlying the products liability doctrine seem to favor a pure form rather than a modified one, as the court clearly noted in *Armstrong*.[116] There is, nevertheless, an apparent anomaly in the court's decision when viewed in the larger context of tort law. Put generally, the court's decision seems to treat certain negligent defendants more favorably than non-negligent tortfeasors in situations where the overall injury to the plaintiff is precisely the same. For example, a plaintiff injured by a negligent

---

[114] By decreasing the deterring effect on consumers, costs of injuries will be borne by society. The manufacturer will have to pay damages, but this cost will ultimately be passed on to other innocent consumers. Note, *Comparative Negligence*, 81 COLUM. L. REV. 1668, 1686 (1981).

This result, however, is consistent with the principles behind the adoption of strict products liability. *See generally*, *infra* notes 37-55 and accompanying text.

[115] A pure form is favored for products liability actions because a modified form would work to undermine the risk distribution policies of products liability doctrine by creating a complete bar to recovery in certain instances. Schwartz, *supra* note 25, at 215. *See also* Woods, *The Trend Toward Comparative Fault*, 20 TRIAL 16, 21 (1984) (comparative fault works most fairly under a pure system); Comment, *supra* note 112, at 724 (1983) (the better approach consists of applying a pure comparative analysis to strict products liability).

[116] For a discussion of relevant policy considerations, see *supra* notes 92-104 and accompanying text.

defendant may recover nothing under Hawaii's comparative negligence statute, if the plaintiff's responsibility for his injury were a mere one percent greater than that of the negligent defendant.[117] If the plaintiff's injury was due to a product defect, however, then the plaintiff may recover against a non-negligent defendant, and even where the plaintiff was ninety-nine percent at fault.[118] Thus, a forty-nine percent negligent tortfeasor in a non-products liability action may go without paying anything, while a non-negligent but strictly liable defendant in a products liability action may be required to pay anywhere from one to one hundred percent of the plaintiff's damages. Arguably, this result creates a moral inconsistency which favors a blameworthy defendant over a defendant who is held liable simply because public policy favors risk distribution through the products liability doctrine.

An extension of this anomaly will also likely arise regarding joint-tortfeasors.[119] For instance, assume a situation where a product defect and the negligence of another person combine to cause an injury, and where the injured plaintiff also contributed to the injury. Assume further that the plaintiff is found to be fifty-one percent at fault, the negligent defendant twenty-five percent at fault, and the manufacturer of the defective product strictly liable for twenty-four percent in causing the injury. In light of Hawaii's modified comparative negligence statute, the plaintiff in this situation would not be able to recover against the negligent defendant,[120] but because of the decisions in *Armstrong* and *Hao*, the plaintiff could still recover against the manufacturer. Further, with the application of the joint and several liability doctrine,[121] the manufacturer may have to pay damages for the entire harm, reduced only by plaintiff's apportioned fault, even though the negligent defendant has a greater share of responsibility in causing the injury than the manufacturer.[122] In other

---

[117] HAW. REV. STAT. § 663-31 (1985). See *supra* note 35 for the full text of the statute.

[118] *See, e.g., Armstrong*, 69 Haw. ____, 738 P.2d 79; *Hao*, 69 Haw. ____, 738 P.2d 416.

[119] This area of Hawaii tort law is covered in HAW. REV. STAT. §§ 663-11 to 663-17 (1985).

[120] HAW. REV. STAT. § 663-31 (1985) (recovery allowed unless plaintiff's negligence is greater than the *aggregate* of all defendants' responsibility).

[121] HAW. REV. STAT. § 663-11 (1985). This provision reads: "Joint Tortfeasors Defined. For the purpose of this part the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." It is unclear whether a strict products liability defendant is a "tortfeasor" for purposes of being held jointly and severally liable as a joint tortfeasor under this provision. Unlike a usual "tortfeasor", a strict products liability defendant can be held liable without having breached a duty. Given that the liability sounds in tort, however, it is probable that the strict products liability defendant is a "tortfeasor" for purposes of this provision.

[122] HAW. REV. STAT. §§ 663-11 to 663-17 provide for apportionment of liability between joint tortfeasors among themselves, but does not affect the joint and several liability of each defendant toward the plaintiff. *See* Peterson v. City and County of Honolulu, 51 Haw. 484, 462 P.2d 1007 (1969).

words, the manufacturer would be liable for forty-nine percent of the damages, which includes the percentage of damages for which the negligent joint-tortfeasor would have been liable if not for Hawaii's comparative negligence statute. It is also unlikely that the manufacturer would have an action for contribution against the negligent defendant, because the original plaintiff could not enforce liability against that defendant.[123]

Perhaps when the factual situation above presents itself to the Hawaii courts, a different result may be fashioned.[124] With the present law in the tort area, however, the above outcome is a disturbing possibility, and the entire problem stems from having two forms of comparative principles which apply to different tort claims. Given that the modified comparative negligence statute was in effect at the time of the *Armstrong* and *Hao* decisions, it might have been more appropriate for the court in those cases to have applied a modified form to products liability, and thereby to have ensured consistent application of comparative principles to all tort claims. However, given the fact that a pure form is more in line with the policies underlying the products liability doctrine, and is arguably the fairest in applying comparative principles, the ideal response may be for the legislature to amend the present modified comparative negligence statute and apply pure comparative principles to negligence claims as well. This option would bring about the desired consistency in the application of comparative principles, and would thus abrogate the anomalies arising under the present law. This is an area which should receive legislative consideration in the future.

D. Effect on Settlements

The court's decision in *Armstrong* may have a significant effect on both the number of cases that are settled and the amount that is settled for in each case between a negligent plaintiff and a strictly liable defendant. Due to the court's adoption of a pure system, manufacturers may be more likely to settle a case out of court rather than go to trial. Had the court held that Hawaii's modified comparative negligence statute applied to strict products liability actions, manufacturers would have had an incentive to litigate on the chance that the plaintiff would be held to be over fifty percent negligent.

With the adoption of a pure system, however, the manufacturers may have a greater incentive to settle the case, realizing that any portion of liability allo-

---

[123] Whether contribution may be had from a person depends upon whether the original plaintiff could have enforced liability against him, had he chosen to do so. *Id.*

[124] Some jurisdictions have dealt with the joint and several liability problem by allowing joint and several liability only when the plaintiff has not been negligent, or totally abolishing joint and several liability when adopting comparative negligence law. *See* Schwartz, *supra* note 25, at 258-61.

cated to them will require them to pay damages. This factor, coupled with the time and expense of litigation, should encourage the manufacturer to work out some agreement with the plaintiff. Conversely, with the adoption of a pure system, even a plaintiff who is likely to be found substantially at fault will be inclined to go to trial because he can recover whatever percentage of liability is allocated to the manufacturer.

VI. CONCLUSION

The Hawaii Supreme Court, in *Armstrong* and *Hao*, held that pure comparative negligence principles apply in strict products liability cases. The court reasoned that adopting a pure form of comparative negligence in such cases would provide manufacturers with an added incentive to create safer products and would be most consistent with the general policy considerations underlying the law of strict products liability. Moreover, the court determined that nothing in the legislative history of Hawaii's modified comparative negligence statute suggested that the legislature had intended the statute to apply to strict products liability actions. Therefore, the court felt free to follow a majority of courts in other jurisdictions and fashion a new rule to govern such actions.

Armstrong and *Hao* are likely to impact upon both plaintiffs and defendants in at least two ways. On the one hand, defendants in strict products liability actions may now have a greater incentive to settle than they would have under Hawaii's comparative negligence statute, due to the fact that no percentage of fault on the plaintiff's part, short of one-hundred percent, poses a bar to recovery under the new rule. On the other hand, negligent plaintiffs who believe that a jury may find their percentage of fault to be greater then fifty percent now have a reason to litigate anyway—and an added advantage in settlement negotiations—whereas under Hawaii's statute, they would have had neither.

Finally, *Armstrong* and *Hao* appear to have created an anomaly. Under Hawaii's new rule, for example, it is possible for a non-negligent, blameless defendant to bear the burden of up to forty-nine percent liability for injuries for which the plaintiff was more than fifty percent responsible, whereas a defendant whose negligence was forty-nine percent responsible for similar but differently caused injuries may not be liable at all. Thus, while the degree of a plaintiff's fault can protect a negligent defendant, no degree of fault on the part of a plaintiff can protect a non-negligent defendant under the new rule, where products liability is involved.

The policy considerations supporting strict products liability may appear to justify this disparate treatment of negligent and non-negligent defendants. Nevertheless, it seems peculiar that the law should protect a negligent tortfeasor and

yet impose liability upon one who has neither breached a duty nor been negligent at all. How—and whether—the Hawaii Supreme Court will address this anomaly remains to be seen.

Lisa M. Ginoza
Curtis B.K. Yuen

Anthony v. Kualoa Ranch, Inc.: Statutory Requirement to Purchase Residential Leasehold Improvements is Unconstitutional as Applied Retroactively

I. INTRODUCTION

The Hawaii Supreme Court, in *Anthony v. Kualoa Ranch, Inc.*,[1] ruled that Hawaii Revised Statutes section 516-70, as amended, [also referred to as Leasehold Improvement Reversion Provision][2] is unconstitutional as applied retroactively.[3] The statute was created to empower a lessee to compel a lessor to purchase the improvements erected by the lessee on the leasehold estate.[4] The Hawaii Supreme Court held that the compulsory purchase requirement cannot apply constitutionally to residential leases that existed at the time the requirement was added to section 516-70 in 1975.[5]

---

[1] 69 Haw. ____, 736 P.2d 55 (1987) (Lum, C.J., and Nakamura, Padgett, Hayashi and Wakatsuki, JJ.).

[2] *See infra* note 66 for full text of statute.

[3] As provided in the Hawaii Revised Statutes, "[n]o law has any retrospective operation, unless expressed or obviously intended." HAW. REV. STAT. § 1-3 (1985); *see also In re* Estate of Christian, 65 Haw. 394, 652 P.2d 1137 (1982) (at common law, statutes do not apply retrospectively unless otherwise expressly provided).

With respect to Hawaii Revised Statutes § 516-70, the intended retrospective effect of the statute is expressly provided in Part III of Hawaii Revised Statutes chapter 516, which states that, "except as otherwise expressly provided, this part [which includes Hawaii Revised Statutes § 516-70] applies to all leases of residential lots existing and in force on June 24, 1967, and to all leases of residential lots executed thereafter." HAW. REV. STAT. § 516-61 (1985).

[4] A leasehold is a "less-than-freehold estate which a tenant possesses in real property. In a lease situation, the tenant possesses a leasehold and the landlord possesses the reversion estate (that is, when the lease terminates, the property will revert to the landlord). Leasehold estates are generally classified as estates in personal property." J. REILLY, THE LANGUAGE OF REAL ESTATE 276 (2d ed. 1982).

[5] Hawaii Revised Statutes § 516-70, as amended, was enacted by Act 184, which states that "[t]his Act shall take effect upon its approval." Act approved June 2, 1975, No. 184, § 6, 1975 Haw. Sess. Laws 408, 419. Therefore, the court's decision holds that Hawaii Revised Statutes § 516-70 does not apply to leases that existed on June 2, 1975.

To reach its decision, the Hawaii Supreme Court relied upon the United States Constitution's rarely invoked contract clause.[6] This note focuses upon the analysis undertaken by the court to determine the constitutionality of the Leasehold Improvement Reversion Provision. In addition, this note considers the impact that both section 516-70, as amended, and the *Anthony* decision will have on residential leaseholds in Hawaii.

II. Facts of the Case

Kualoa Ranch, Inc. (Kualoa) is the fee simple owner of several acres of land located on the island of Oahu, Hawaii. In 1953, Kualoa leased a portion of the land to Albert F. Biehl and Josephine H. Biehl for residential purposes.[7] In 1976, with the consent of Kualoa, James N. Anthony and Alberta Pua Anthony acquired the leasehold property through mesne assignments.[8] Subsequently, the Anthonys erected substantial improvements to the residence situated on the property. At the end of the lease term, the Anthonys were entitled, under the lease, to remove the improvements at their own expense.[9]

The lease expired on July 1, 1983.[10] Kualoa allegedly agreed to enter into a new lease with the Anthonys, and then reneged.[11] The Anthonys filed a lawsuit

---

[6] U.S. Const. art. I, § 10, cl. 1. *See* J. Nowak, R. Rotunda & J. Young, Constitutional Law § 11.8(a), at 372 (3d ed. 1986) ("Within the last 100 years . . . the [United States Supreme] Court rarely has relied on the clause as a reason to invalidate state legislation which retroactively affected contractual rights or obligations.").

[7] The lease was "entered into in September 1953 as of July 1, 1953." 69 Haw. at ____, 736 P.2d at 59. The lease rent was set at $75 per annum for a term of 30 years. *Id.* at ____, 736 P.2d at 55.

[8] Mesne assignments are intermediate or intervening assignments of a lease; any assignment between the first assignment and the most recent assignment. *See* Black's Law Dictionary 893 (5th ed. 1979).

[9] The surrender clause in the lease agreement between the Anthonys and Kualoa expressly provided:

> THAT on the last day of the term hereby demised or on any sooner termination thereof, the Lessee will peaceably and quietly yield and deliver up to the Lessor possession of the demised premises; PROVIDED, HOWEVER, that the Lessee, if he shall have observed and performed all of the covenants and conditions herein contained and on his part to be observed and performed, after giving written notice of his intention to the Lessor, shall have the privilege of removing any building or buildings which have been placed on the demised premises at his own expense . . . .

69 Haw. at ____, 736 P.2d at 57.

[10] *Id.*

[11] Prior to purchasing the lease, the Anthonys were orally assured that Kualoa would enter a new 19-½ year lease when the existing lease expired. This understanding was subsequently confirmed in writing in a letter on Kualoa's stationery and signed by a secretary of Kualoa. Plaintiffs-Appellees Answering Brief at 2, Anthony v. Kualoa Ranch, Inc., 69 Haw. ____, 736 P.2d 55

for specific performance.[12] Pleading in the alternative, the Anthonys also asked the trial court to require Kualoa, pursuant to Hawaii Revised Statutes section 516-70, as amended, to buy the residential improvements erected by the Anthonys. Kualoa counterclaimed for a declaration that the lease had terminated and for ejectment.[13]

On March 6, 1986, the First Circuit Court, sitting with a jury, declared the lease terminated and granted Kualoa's request for ejectment.[14] In addition, the trial court granted the Anthonys' request that Kualoa pay the Anthonys the fair market value of the improvements erected by the Anthonys on the premises during the lease term, pursuant to the Leasehold Improvement Reversion Provision. The parties were then ordered to agree upon a value for the improvements as of the date the lease expired.[15] In the event the parties were unable to agree upon a value, the parties were required to proceed to appraisal or arbitration of the fair market value.[16]

The parties were unable to agree upon the value of the leasehold improvements. On May 5, 1986, the trial court entered an Order Staying Judgment Pending Arbitration.[17] The order required Kualoa to submit to arbitration to determine the fair market value of the improvements. Kualoa appealed to the Hawaii Supreme Court.

(1987) (No. 11424).

[12] The Anthonys also alleged damages for unfair and deceptive trade practices and retaliatory acts. 69 Haw. at ____, 736 P.2d at 57.

[13] Ejectment is "a legal action brought and maintained by one who claims a right to the present possession of real property against another or others who hold such property adversely." Sun Oil Co. v. Fleming, 469 F.2d 211, 214 (10th Cir. 1972).

[14] The Anthonys were ordered to pay a lease rent of $212 a month for the period from July 2, 1983 to the time of ejectment. 69 Haw. at ____, 736 P.2d at 57.

[15] The lease expired on July 1, 1983. *Id.*

[16] Hawaii Revised Statutes § 516-70 provides for appraisal to determine the fair market value of the improvements if parties fail to agree upon a value. In pertinent part, the statute provides that:

> [I]f the lessor refuses to extend the term of the existing lease or to issue a new lease . . . the lessor shall be required to compensate the lessee for the current fair market value of all [onsite improvements constructed at the lessee's cost]. Such improvements shall be *appraised* at the expense of the lessee. The appraiser selected shall be by mutual agreement of the lessee and the lessor or in conformance to chapter 658.

HAW. REV. STAT. § 516-70(b) (1985) (emphasis added).

[17] The March 6 Order gave the parties 30 days to agree upon an appraiser. When the parties failed to agree upon an appraiser, the Anthonys filed a "Motion to Stay Entry of Judgment" and an "Application for Appointment of Arbitrator/Appraiser." The trial court heard the motion and application together and issued the May 5 Order Staying Judgment Pending Arbitration, which stayed the entry of judgment and appointed an appraiser. Plaintiffs-Appellees Answering Brief at 5, Anthony v. Kualoa Ranch, Inc., 69 Haw. ____, 736 P.2d 55 (1987) (No. 11424).

III. HISTORY

The legal issues in Anthony primarily concern statutory and constitutional principles of law. This section, however, begins with a discussion of the common law of fixtures as a backdrop to the Leasehold Improvement Reversion Provision, and then discusses the provision as the statutory scheme devised to address perceived shortcomings in the common law. The section concludes with a discussion of the contract clause of the United States Constitution and the analysis developed to test the constitutionality of state statutes that impact private contracts.

A. Common Law of Fixtures

Absent legislation to the contrary, the ownership of improvements erected by a lessee on a leasehold estate is dictated by the common law of fixtures.[18] The early English rule of fixtures was embodied in the maxim *quicquid plantatur solo, solo cedit*.[19] When a fixture was annexed to the realty, title to the fixture vested automatically in the owner of the fee simple interest in the land.[20] The lessee was not entitled to compensation for the value of the improvement.[21] This strict rule was developed while England was dominated by an agrarian society.[22] During the English industrial revolution, this rule became unworkable and a judicial exception was created for trade fixtures,[23] thus allowing manufac-

---

[18] A fixture is "an article of personal property which has been so annexed to the real estate that it is regarded as a part of the land[.]" Marsh v. Spradling, 537 S.W.2d 402, 404 (Mo. 1976); *see, e.g.*, Adams v. Kauwa, 6 Haw. 280 (1881) (If a house is a fixture, it becomes a part of the realty.).

[19] "Whatever is affixed to the soil belongs to the soil." BLACK'S LAW DICTIONARY 1123 (5th ed. 1979); *see, e.g.*, Lawton v. Salmon, 126 Eng. Rep. 151 (1789) (maxim used to decide controversy between an heir and an executor).

[20] *See* 5 AMERICAN LAW OF PROPERTY § 19.11, at 39 (1952); R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 5:29, at 307 (1980); *see, e.g.*, Hobson v. Gorringe, 1 Ch. 182 (1897) (whatever is annexed and fixed to the freehold becomes part of it and passes with it).

[21] *See* J. TAYLOR, A TREATISE ON THE AMERICAN LAW OF LANDLORD AND TENANT § 544, at 477 (7th ed. 1879); *but see* 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 625 (3d ed. 1939) (the doctrine of unjust enrichment may require compensation to a person acting in good faith and in ignorance of any adverse claim).

[22] The strict rule "was apparently acceptable while England was largely agricultural, since the tenant's annexations were likely to be buildings or similar improvements generally considered realty." R. SCHOSHINSKI, *supra* note 20, § 5:29, at 307.

[23] A trade fixture is "an article annexed to the leasehold by the tenant to enable him to carry on the trade, profession, or business contemplated by the lease agreement or in which he is engaged while occupying the premises and which can be removed without material or permanent injury to the leasehold." Connelly v. Art & Gary, Inc., 630 S.W.2d 514, 515 (Tex. Ct. App. 1982).

turers to remove machinery when their leases expired.[24] With the exception of trade fixtures, the English rule was strictly applied to prevent the removal of fixtures erected by the lessee on the leasehold estate.[25]

American courts have generally declined to adopt a strict application of the English rule. American courts permit removal where the lessee does not intend the chattel to become a part of the realty.[26] The rationale for permitting removal is to avoid discouraging the lessee from developing the leasehold estate to its highest and best use.[27] The American rule permits a lessee "to remove a great variety of fixtures so long as removal does not cause substantial injury to the freehold or the virtual destruction of the fixtures, and so long as the removal takes place within the time limits permitted by law."[28] The right of removal, however, is subject to the lessee accomplishing the removal without substantial damage to the realty.[29]

Hawaii courts have long followed the American rule of fixtures.[30] Hawaii

---

[24] The strict rule became intolerable because "the industrial revolution inverted the relative value of personal and real property . . . . English courts, however, held to a strict view of what constituted a trade fixture." *Id.*; *see, e.g.*, Elwes v. Maw, 102 Eng. Rep. 510 (1802) (trade fixtures removable).

[25] *See* R. SCHOSHINSKI, *supra* note 20, § 5:29, at 307 ("Articles not strictly applied to a business purpose, except for ornaments, could not be removed.").

[26] In the leading case of Teaff v. Hewitt, 1 Ohio St. 511 (1853), the lessee was permitted to remove trade fixtures where "it was not the *intention* of the tenant to make them permanent annexations to the freehold and thereby donations to the owner of it." *Id.* at 531 (original emphasis); *accord In re* Waipuna Trading Co., 41 Bankr. 812 (Bankr. D. Haw. 1984) (The question of intent is the chief test in determining whether an item is a fixture.).

Therefore, to become a fixture, personal property "must be annexed to the realty either actually or constructively, must be appropriated to the use of that part of the realty with which it is connected and must be intended as a permanent accession to the freehold." 1 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 55, at 182 (repl. 1980); *accord* State Highway Comm'n v. Empire Bldg. Material Co., 17 Or. App. 616, 523 P.2d 584 (1974).

[27] *See* 2 H. TIFFANY, *supra* note 21, § 616, at 597 (relaxation avoids discouraging tenants from making improvements and most beneficial use of the premises); J. TAYLOR, *supra* note 21, § 544, at 478 (relaxation encourages tenants to make trade improvements and do what is advantageous for the estate during the lease term).

[28] 5 AMERICAN LAW OF PROPERTY § 19.11, at 41 (1952) (footnotes omitted).

[29] R. SCHOSHINSKI, *supra* note 20, § 5:29, at 310.

[30] In adopting a rule of fixtures, the Hawaii Supreme Court surveyed the laws of other jurisdictions and concluded that:

> It is undoubtedly the law by weight of authority, that where one builds a house on the land of another, the house becomes a part of the realty and the property of the owner of the land, unless there is an agreement, express or implied, between the parties that it is removable by the builder, in which case the house is personal property . . . .

Apolo v. Kauo, 7 Haw. 755, 756 (1889). Hawaii has also adopted the Uniform Commercial Code provision governing the priority of security interests in fixtures. *See* HAW. REV. STAT. § 490:9-313 (1985).

recognizes that, in the absence of an understanding to the contrary, "a house built upon land becomes appurtenant thereto and a part thereof, — in other words, becomes realty."[31] As such, a lessee may avoid forfeiture by expressly providing for the right to remove fixtures built at the lessee's expense.[32] A lessee who has a right to remove fixtures must do so before surrendering possession to the lessor.[33] Failure to remove the fixtures before surrendering the property constitutes abandonment.[34] Moreover, the lessee must exercise the right to remove fixtures in accordance with the terms of the lease.[35] Deeply concerned with promoting lessee rights, the Hawaii Legislature has enacted legislation to guarantee lessees the right to remove fixtures. This legislation is the focus of the following section.

B. The Land Reform Act and the Leasehold Improvement Reversion Provision

In 1967, the Fourth Legislature of the State of Hawaii adopted Act 307[36] to address the social and economic disruptions caused by the concentrated land ownership maintained through the use of leasehold land sales.[37] Act 307 created Hawaii Revised Statutes chapter 516, which was entitled "Residential Leaseholds."[38] Chapter 516 is best known as the source for Hawaii's Land Reform Act.[39] The chapter, however, also contains a part entitled "Rights of Les-

---

[31] Ahoi v. Pacheco, 22 Haw. 257, 258 (1914).

[32] In Pioneer Mill Co. v. Ward, 34 Haw. 686 (1938), the Hawaii Supreme Court declared, "[t]he general rule is that improvements annexed to real estate by a tenant become part of the realty and, in the absence of the specific agreement to the contrary, revert to the lessor unless removed prior to the expiration of the term." *Id.* at 687.

[33] In Akiona v. Kohala Sugar Co., 5 Haw. 359 (1885), the Hawaii Supreme Court noted that:

> By all authorities[,] a tenant who has a right to remove his fixtures must do so before he quits possession. . . . Failing to exercise this privilege before his interest in the land expired, he could not do so afterward, because the right to possess the land and the fixtures as a part of the realty vested immediately in the landlord.

Id. at 361-62.

[34] *See id.*

[35] *Anthony*, 69 Haw. at ____, 736 P.2d at 60 (citing Akiona v. Kohala Sugar Co., 5 Haw. 359 (1885)).

[36] Act effective June 24, 1967, No. 307, §§ 1-46, 1967 Haw. Sess. Laws 488. Act 307 is codified at Hawaii Revised Statutes chapter 516.

[37] "The primary purpose of [Act 307] is to provide means by which the lessees of residential leasehold lots may become vested with the fee simple title to their lots." H.R. CONF. REP. NO. 18, 4th Haw. Leg., Reg. Sess., *reprinted in* 1967 HOUSE J. 859; S. CONF. REP. NO. 19, 4th Haw. Leg., Reg. Sess., *reprinted in* 1967 SENATE J. 800.

[38] HAW. REV. STAT. §§ 516-1 to -186 (1985 & Supp. 1987).

[39] *Id.*

sees," which includes the Leasehold Improvement Reversion Provision.[40]

1. *Land Reform Act of 1967*

The Land Reform Act was enacted to promote private ownership of residential real property.[41] Since the inception of private land ownership in Hawaii,[42] a few private landowners have controlled the bulk of the available residential land.[43] This concentration of ownership has resulted in an oligopoly.[44] Moreover, the major landowners have favored a policy of leasing their land for resi-

---

[40] *Id.* § 516-70.

[41] The desire to promote widespread private land ownership is reflected in the legislative findings, which begin with the statement that:

> A prime goal in the United States is the promotion of the public welfare and the securing of liberty as enunciated in the Constitution of the United States through the *attainment of fee simple ownership of residential lots by the greatest number of people.* Article I, section 2 of the State Constitution recognizes this goal when it states:
>
> 'All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the *acquiring and possessing of property.* . . .'

Act effective June 24, 1967, No. 307, § 1(a), 1967 Haw. Sess. Laws 488, 488 (emphasis added); *see also* HAW. CONST. art. I, § 2.

[42] The allodial system of absolute landownership, which is presently used in Hawaii, was unknown during the early Hawaiian monarchy. During the monarchy, all land was controlled by the king under a feudal land system. In 1848, the feudal land system was abolished with the Great Mahele, or division of lands. P. VITOUSEK, J. REILLY & R. REDISKE, PRINCIPLES & PRACTICES OF HAWAIIAN REAL ESTATE (8th ed. 1979); *see also* Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982); State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977).

Through the Great Mahele, King Kamehameha III retained his private lands as his own individual property, and distributed the remaining lands as follows: (1) one-third was for the Hawaiian Government; (2) one-third was for the chiefs and konohikis; and (3) one-third was for the people that actually possessed and cultivated the soil. J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848 (1958); *see also* Chinen, *The Hawaiian Land Revolution*, 5 HAW. B.J. 11 (1967).

[43] In Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984), the United States Supreme Court repeated the findings of the Hawaii Legislature, stating that:

> [W]hile the State and Federal governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners. . . . The [Hawaii] legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles.

Id. at 232; *see also* HAW. REV. STAT. § 516-83(a)(1) (1985) (legislative findings and declaration of necessity; purpose).

[44] An oligopoly is "[a] situation of imperfect competition in which an industry is dominated by a small number of suppliers." P. SAMUELSON & W. NORDHAUS, ECONOMICS 911 (12th ed. 1985); *see, e.g., Midkiff*, 467 U.S. 229 (1984) (land oligopoly).

dential purposes, as opposed to selling their land.[45] The combination of oligopolistic landownership and the preferred use of leaseholds has created a shortage of fee simple housing and has denied a substantial number of homeowners the choice of owning the land beneath their homes.[46] The legislature was concerned that oligopolistic land ownership was injurious to the economy and the public welfare, thereby necessitating legislative action.[47]

In response, the legislature adopted the Land Reform Act.[48] The Act empowered the Hawaii Housing Authority (HHA), a state agency, to condemn[49] residential leasehold tracts and to transfer the fee interests to the lessees residing thereon.[50] To begin the process, lessees living on single-family residential lots,

---

[45] The legislature found that "because of restrictive indentures in instruments creating the various trusts and estates, and because of income taxation problems, the landowners have generally engaged in the practice of leasing, rather than selling in fee simple, the residential lots developed on their lands." Act effective June 24, 1967, No. 307, § 1(e), 1967 Haw. Sess. Laws 488, 489; *see also* HAW. REV. STAT. § 516-83(a)(1) (1985) (legislative findings and declaration of necessity; purpose).

[46] The Hawaii Legislature has attributed the shortage of fee simple residential housing to the following:

> The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the people of the State of a choice to own or to take leases to the land on which their homes are situated.

Act effective June 24, 1967, No. 307, § 1(f), 1967 Haw. Sess. Laws 488, 489; *see also* HAW. REV. STAT. § 516-83(a)(2) (1985) (legislative findings and declaration of necessity; purpose).

[47] The legislative findings express the legislature's rationale for invoking the State's police powers:

> The dispersion of ownership of fee simple residential lots to as large a number of people as possible, the ability of the people to acquire fee simple ownership of residential lots at a fair and reasonable price and the ability of lessees of residential leases to derive full enjoyment from their leaseholds are factors which vitally affect the economy of the State and the public interest, health, welfare, security and happiness.

Act effective June 24, 1967, No. 308, § 1(j), 1967 Haw. Sess. Laws 488, 490; *see also* HAW. REV. STAT. §§ 516-83(a)(4) to (7) (1985) (legislative findings and declaration of necessity; purpose); *Midkiff*, 467 U.S. 229, 242 (1984) ("Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.").

[48] Land reform was deemed a necessary and proper exercise of the State's police power because "[t]he right to own land is not an irrevocable grant of a special privilege where it operates against the general welfare of the many for the particular benefit of the few[.]" HAW. REV. STAT. § 516-83(a)(8) (1985) (legislative findings and declaration of necessity; purpose).

[49] Condemnation is "the process by which private property is taken for public use without the owner's consent but upon the payment of an adequate compensation." Hudson v. Arkansas La. Gas Co., 626 S.W.2d 561, 563 (Tex. Ct. App. 1981); *see also* U.S. CONST. amend. V ("private property [shall not] be taken for public use, without just compensation").

[50] The exercise of eminent domain is only permissible for public purposes. *See* U.S. CONST.

within development tracts of five acres or more, must request the HHA to designate their lots for condemnation.[51] When twenty-five lessees or the lessees of more than one-half of the residential lease lots (whichever is less) file appropriate applications, the HHA holds a public hearing to determine whether condemnation would "effectuate the public purposes" of the Act.[52] Upon finding that the public purpose requirement is met, the HHA then designates the lots for condemnation.[53] After the HHA has condemned the leasehold lots, the HHA sells the fee simple interests to the lessees.

The Land Reform Act has survived constitutional challenges. In *Hawaii Housing Authority v. Midkiff*,[54] the United States Supreme Court held that the Land Reform Act does not violate the United States Constitution.[55] In analyzing the constitutionality of the Act, the Supreme Court deferred to the judgment of the Hawaii Legislature[56] and agreed that attacking the evils of concentrated property ownership is a legitimate public purpose for exercising the State's condemnation powers.[57]

---

amend. V. "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." *Midkiff*, 467 U.S. at 243-44. Under the Land Reform Act, condemnation is condoned as a means to correct the land oligopoly in Hawaii.

[51] HAW. REV. STAT. §§ 516-1 to -56 (1985).

[52] *Id.* § 516-22.

[53] *Id.* § 516-23.

[54] 467 U.S. 229 (1984) (exercise of eminent domain under the Land Reform Act does not violate the public use clause of the fifth amendment of the United States Constitution).

[55] In *Midkiff*, the United States Supreme Court was asked to consider the constitutionality of the Land Reform Act in light of the public purpose requirement, the due process clause and the contract clause of the United States Constitution. Upon considering the matter, the Court stated, "we have no trouble concluding that the Hawaii [Land Reform] Act *is constitutional*." 467 U.S. at 241 (emphasis added).

[56] In *Midkiff*, the Supreme Court stated it will not substitute its judgment for the legislature's judgment as to what constitutes a public use "where the exercise of eminent domain power is rationally related to a conceivable public purpose." *Id.* at 241; *see also* Berman v. Parker, 348 U.S. 26, 33 (1954) (once the object is within the legislature's authority, the means by which it is attained is also for the legislature to determine).

[57] In determining that the Land Reform Act would serve a legitimate public purpose, the Hawaii Legislature stated that "[t]he State's acquisition of residential lands held in fee simple, through the exercise of the power of eminent domain, for the purposes of this chapter is for the public use and purpose of protecting the public safety, health and welfare of all people in Hawaii." HAW. REV. STAT. § 516-8(a)(10) (1985); *see also* HAW. REV. STAT. §§ 516-83(a)(11) to (13) (1985) (legislative findings and declaration of necessity; purpose).

In response to the legislature's determination, the United States Supreme Court acknowledged, "[t]he Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii - a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational." *Midkiff*, 467 U.S. at 245.

2. *Leasehold Improvement Reversion Provision*

The Fourth Legislature recognized that the Land Reform Act was not the panacea for all the ills the legislature sought to cure. The legislature noted that additional legislation was needed to protect lessees[58] and promote the public welfare.[59] In response, the legislature enacted the original version of Hawaii Revised Statutes section 516-70, which governs the reversion of improvements at the end of the lease term.[60] Section 516-70 was enacted as a part of the Land Reform Act and guaranteed the right of lessees to remove, at the end of the lease term, any improvements erected at the lessee's expense. The provision prevented the forfeiture of improvements provided for in the surrender clauses[61] commonly found in Hawaii residential leases.

While later amending the Land Reform Act, the Eighth Legislature[62] was reminded of the "undesirable social effects" of residential leaseholds.[63] Addi-

---

[58] In its findings, the Hawaii Legislature recognized the need to enact additional legislation to protect residential lessees:

> Even when the provisions providing for purchase of the fee simple title of residential lots by lessees or the State as provided in this act become effective, neither the lessees nor the State can possibly acquire all leasehold lands. Thus, many of the over 16,000 leasehold contracts now in existence and future leases will remain outstanding, and the economic facts stated above indicate clearly that *lessees require certain statutory protection* of their fundamental rights to bargain and to otherwise preserve their equitable and legal interests.

Act effective June 24, 1967, No. 307, § 1(i), 1967 Haw. Sess. Laws 488, 490 (emphasis added).

[59] For legislative statement regarding public welfare, see *supra* note 47.

[60] As originally enacted in 1967, Hawaii Revised Statutes § 516-70 read as follows:

> *Reversion of improvements.* At the termination of any lease, or at the expiration of the lease term, the lessee may remove all improvements on the lot which were constructed at the cost of, or otherwise paid for by the lessee, without compensating the lessor therefor.

Act effective June 24, 1967, No. 307, § 43, 1967 Haw. Sess. Laws 488, 503.

[61] The typical surrender clause included in a residential lease might read as follows:

> Lessee shall immediately quit and surrender possession of the demised premises *and any improvements thereon* to lessor at the termination of this lease, by expiration of the lease term or otherwise, in as good condition as reasonable use and wear will permit, damage by fire and other elements excepted, and lessee shall return the keys to the demised premises to lessor at the place stipulated herein for the payment of rent.

11 AM. JUR. LEGAL FORMS 2D § 161:850 (1972) (emphasis added); *but see* Souza v. Estate of Bishop, 594 F. Supp. 1480 (D. Haw. 1984) (unsuccessful anti-trust action was based upon common lease terms that, *inter alia*, allowed sub-lessees to remove all buildings at the end of the lease term, while the land and offsite improvements reverted to the lessor).

[62] During the Eighth Legislature, the Speaker of the House of Representatives was James H. Wakatsuki, from the Eighteenth District in Honolulu, Hawaii. Speaker Wakatuski was subsequently appointed and qualified as an associate justice to the Hawaii Supreme Court on September 7, 1983.

[63] The legislative findings describe the adverse social effects that result from the widespread use of residential leaseholds:

> Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed

tional legislation was deemed necessary to address the problems incident to residential leaseholds.[64] During lease renegotiation, lessees were often compelled to accept the lease terms dictated by the lessor. For example, while section 516-70 permitted lessees to remove their improvements, lessees were often forced to forfeit their improvements because alternative sites were unavailable, or the expense of removal was too costly to justify relocating the improvements. Thus, lessees had few options and little bargaining power.

The Eighth Legislature opted for an equitable solution to the problem[65] and added the Leasehold Improvement Reversion Provision to section 516-70.[66]

---

rent period of 25 to 30 years. Thus, as the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations. Then when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home. These situations aggravated the already acute need for government-sponsored low and middle income and elderly housing. With the increasing number of elderly in this State, *the problem promises to become even more acute in the foreseeable future*, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii.

Act approved June 2, 1975, No. 184, § 1(e), 1975 Haw. Sess. Laws 408, 409 (emphasis added).

[64] The legislative findings indicate that Hawaii Revised Statutes § 516-70, as amended, was authorized as supplementary legislation necessary to address the problems incident to residential leaseholds:

> The legislature further finds and declares . . . (4) That the public health, safety, and welfare of the people of Hawaii demand that Act 307, Session Laws of Hawaii 1967, be fully implemented and that *other applicable laws* be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on leased property.

Id. § 1(e)(4) (emphasis added).

[65] The legislature sought to allow lessees to recover the value of their improvements. The legislative history states that:

> The purpose of this bill is to make more equitable and convenient the opportunity for the conversion of residential leasehold lands to fee simple ownership, and to clarify the rights and responsibilities of the parties to these procedures.
>
> To accomplish the purpose of the bill your Committee has generally made the following amendments to S.B. No. 1200, S.D. 2, H.D. 1:
>
> . . . .
>
> C. Permit owners of residential improvements to recover the value of their onsite improvements upon the termination or expiration of the leases. Your Committee feels that this will provide an equitable solution for both lessees seeking equity at lease termination, and for lessors seeking to redevelop lands to contemporary use.

S. CONF. REP. NO. 24, 8th Haw. Leg., Reg. Sess., *reprinted in* 1975 SENATE J. 864; H.R. CONF. REP. NO. 27, 8th Haw. Leg., Reg. Sess., *reprinted in* 1975 HOUSE J. 895.

[66] The full text of Hawaii Revised Statutes § 516-70, as amended by Act 184, § 1, 1975 Haw. Sess. Laws. 408, 418, reads as follows:

> *Reversion of improvements.* (a) This section applies to all leases of residential lands as defined by section 516-1(5).

The provision pertains only to leases with minimum terms of twenty years,[67] and enables lessees to recover the cost of any improvements erected at their expense.[68] The provision applies if: (1) the lessee is not in default under the terms of the lease; (2) the lessee has given the lessor sixty days' written notice of the lessee's decision to abandon the improvements; and (3) the lessor has refused to extend the existing lease or issue a new lease, at a mutually agreeable rental rate, for a term of at least thirty years.[69]

Where the provision applies, the lessor is required to pay the lessee the fair market value of the improvements.[70] The fair market value is determined by the mutual agreement of the parties, or by an appraisal prepared at the lessee's expense.[71] If an appraisal is required, both parties are to agree mutually upon the appraiser selected.[72] In the event the parties are unable to agree mutually, the appraiser is selected by the circuit court in conformity with Hawaii Revised Statutes chapter 658, which governs arbitration procedures.[73] The lessor is re-

---

> (b) At the termination of any lease, or at the expiration of the lease term, the lessee may, if not then in default under the terms of his lease, remove all onsite improvements on the lot which were constructed at the cost of, or otherwise paid for by the lessee, without compensating the lessor therefor. If the lessee notifies the lessor in writing within sixty days before the termination or expiration that he declines to remove such onsite improvements and if the lessee is not then in default under the terms of his lease, and if the lessor refuses to extend the term of the existing lease or to issue a new lease for a term of at least thirty years at a rental that is mutually agreeable to the parties or failing such agreement that is determined by arbitration pursuant to chapter 658, the lessor shall be required to compensate the lessee for the current fair market value of all such onsite improvements. Such improvements shall be appraised at the expense of the lessee. The appraiser selected shall be by mutual agreement of the lessee and the lessor or in conformance to chapter 658. The compensation shall be determined by mutual agreement or in conformity with chapter 658, and the compensation shall be paid within thirty days of determination. Such expense of arbitration shall be equally shared by both parties.

HAW. REV. STAT. § 516-70 (1985).

[67] Hawaii Revised Statutes § 516-70 does not apply to all residential leases. The provision applies only to "leases of residential lands as defined by section 516-1(5)." *Id.* § 516-70(a). Hawaii Revised Statutes § 516-1(5) defines such leases as:

> a conveyance of land or an interest in land, by fee simple owner as lessor, or by a lessee or sublessee as sublessor, to any person, in consideration of a return of rent or other recompense, for a term, measured from the initial date of the conveyance, twenty years or more (including any periods for which the lease may be extended or renewed at the option of the lessee).

Id. § 516-1(5).

[68] *Id.* § 516-70(b).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Hawaii Revised Statutes § 516-70 states that "[t]he appraiser selected shall be by mutual agreement of the lessee and the lessor or in conformance to chapter 658." *Id.* In turn, Hawaii

quired to pay the lessee within thirty days following the date the value is determined.[74] Failure to comply with the provision results in criminal penalties.[75]

C. *The Contract Clause of the United States Constitution*

The ability to contract is a basic right.[76] Concomitant with the right to enter into contracts is the right to rely upon the obligations created thereunder.[77] To guarantee the sanctity of contracts, the framers of the United States Constitution created the contract clause, which declares, "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."[78] The ability to impair contractual relationships was considered destructive to the orderly functioning of our capitalist society. In the Federalist Papers, James Madison wrote that, *inter alia*, "laws impairing the obligations of contracts[] are contrary to the first principles of the social compact, and to every principle of sound legislation."[79]

Revised Statutes chapter 658 provides, in pertinent part, that:

> If, in the agreement, provision is made for a method of naming or appointing an [appraiser], such method shall be followed. If no method is provided therein, or if a method is provided and any party thereto fails to avail himself of the method, or for any other reason there is a lapse in the naming of an [appraiser], or in filling a vacancy, then, upon application by either party to the controversy, the circuit court shall designate and appoint an [appraiser], who shall act under the agreement with the same force and effect as if he or they had been specifically named therein. Unless otherwise provided, the [appraisal] shall be by a single [appraiser].

Id. § 658-4.

[74] *Id.* § 516-70(b).

[75] Hawaii Revised Statutes chapter 516 provides that "[a]ny person who violates this chapter shall be fined not more than $5,000 nor less than $1,000 or imprisoned not more than one year, or both." *Id.* § 516-5.

[76] Freedom to contract is "protected under the liberty concept of both the Fifth and Fourteenth Amendment due process clauses." 1 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 3:22 (1969); *see, e.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.16 (1977) (a contract right is a form of property protected by the takings clause of the fifth amendment); Prudential Ins. Co. v. Cheek, 259 U.S. 530, 536 (1922) (freedom to contract is an elementary part of the rights of personal liberty and private property, protected by the due process clause of the fourteenth amendment); *but see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 546 (1978) (fundamental rights do not encompass a liberty to contract).

[77] The Supreme Court has noted that "[c]ontracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978).

[78] U.S. CONST. art. I, § 10, cl. 1; *see also* United States v. Merriam, 2 U.S. Dist. Ct. Haw. 431, 432 (1906) ("The Constitution of the United States . . . forbids any State to enact legislation impairing the obligation of contracts.").

[79] THE FEDERALIST NO. 44, at 279 (J. Madison) (H. Lodge ed. 1888). Arguing in support of the contract clause, Madison went on to write:

The contract clause was originally directed toward preventing states from enacting debtor relief laws.[80] Debtor relief laws had become a widespread means of handling the economic depression that preceded the adoption of the United States Constitution. Protection was needed "to protect private contracts from improvident majoritarian impairment."[81] Recognizing the sanctity of private contracts was deemed essential to the just and orderly society promised under the Constitution. The contract clause was later expanded judicially to invalidate all types of statutes that impaired the contractual obligations of private parties,[82] but only with regard to laws that retrospectively impaired[83] contractual relationships.[84]

States are not completely impotent to enact legislation that impairs private

---

> The sober people of America are weary of fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community.

Id.

[80] In Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), the Supreme Court described the circumstances that prompted the Framers to enact the contract clause:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which . . . had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. . . . To guard against the continuance of the evil, was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform in government.

Id. at 354.

[81] L. TRIBE, *supra* note 76, § 9-5 (footnotes omitted).

[82] J. NOWAK, R. ROTUNDA & J. NELSON, *supra* note 6, § 11.8(a), at 372.

[83] In determining impairment, the Supreme Court has noted that "[t]he obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them . . . and impairment . . . has been predicated of laws which without destroying contracts derogate from substantial contractual rights." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 431 (1934) (footnote omitted) (citing Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819)); *but see* McCarthy v. Mayo, 827 F.2d 1310 (9th Cir. 1987) (criminal prosecution is not an unconstitutional interference with the right to contract).

[84] With regard to retrospective application, "the settled doctrine is that the contract clause applies only to legislation subsequent in time to the contract alleged to have been impaired." Munday v. Wisconsin Trust Co., 252 U.S. 499, 503 (1920); *see also Blaisdell*, 290 U.S. at 429 n.8 ("Contracts, within meaning of the clause, have been held to embrace those that are executed[.]"); *McCarthy*, 827 F.2d at 1315 ("The Constitution protects freedom of contract only by limiting the states' power to modify or affect contracts already formed."); *see, e.g.*, Hovnanian Fla., Inc. v. Division of Fla. Land Sales & Condominiums, 401 So. 2d 851 (Fla. Dist. Ct. App. 1981) (rent escalation clause was constitutional as applied prospectively); Sans Souci v. Division of Fla. Land Sales & Condominiums, 448 So. 2d 1116 (Fla. Dist. Ct. App. 1984) (Rent escalation clause was unconstitutional as applied retroactively.).

contractual obligations.[85] The valid exercise of police power[86] is considered "paramount to any rights under contracts between individuals."[87] Thus, states retain power to enact such legislation as is necessary to protect the public health, safety, morals, or general welfare.[88] This power extends to economic needs, such as the contractual arrangements between landlords and tenants.[89] The right of a state to exercise its police power is implied in every contract,[90] although the right is subject to certain restraints.[91]

The United States Supreme Court has established a three-part test to determine whether a state statute violates the contract clause. The threshold question

---

[85] The United States Supreme Court has noted that states are not powerless to enact all forms of legislation with retroactive impact. In *United States Trust*, the court stated that, "the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects." 431 U.S. at 17.

[86] Police power is "the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals and general welfare of society." Godbold v. Manibog, 34 Haw. 206, 215 (1942) (quoting 12 C.J. *Constitutional Law* § 412, at 904 (1917)).

A state's right to exercise police power is preserved under the tenth amendment of the United States Constitution, which states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[87] Manigault v. Springs, 199 U.S. 473, 480 (1905); *accord Spannaus*, 438 U.S. 234 (1978); *Blaisdell*, 290 U.S. 398 (1934).

[88] A state is entitled to exercise its police power for the public welfare even though a private contract is impaired. In *Blaisdell*, 290 U.S. 398 (1934), the Supreme Court stated that:

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.

Id. at 437 (quoting *Manigault*, 199 U.S. at 480); *accord* Exxon Corp. v. Eagerton, 462 U.S. 176, 190 (1983).

[89] *See* Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 39 (1940) (withdrawal of shares regulated to prevent the failure of building and loan associations and consequent depression of real estate values); *see also* City of El Paso v. Simmons, 379 U.S. 497 (1965) (forfeiture of land purchase rights instituted to restore confidence in land titles and to improve the state's ability to administer its property); *Blaisdell*, 290 U.S. 398 (1934) (moratorium on mortgage foreclosures and execution sales imposed to provide relief from depreciated land values during the Great Depression).

[90] *See Blaisdell*, 290 U.S. at 435 ("Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."); *see also* Long Island Water-Supply Co. v. City of Brooklyn, 166 U.S. 685 (1897) (every contract is subordinate to a pre-existing and higher authority of laws and contracts must yield to their control when their execution is necessary).

[91] In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the Supreme Court stated that "[i]f the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Id.* at 242 (original emphasis).

is whether the state statute substantially impairs a contractual relationship.[92] If a substantial impairment exists, a significant and legitimate public purpose is necessary to justify the impairment.[93] If a legitimate public purpose is identified, the statutory adjustment of the rights and responsibilities of the contracting parties must be based upon reasonable conditions, and must be of a character appropriate to the public purpose justifying the statute's adoption.[94] In the following section, the analysis focuses upon the Hawaii Supreme Court's application of the three-part test to the Leasehold Improvement Reversion Provision.

IV. ANALYSIS

A. Narrative

Kualoa raised two constitutional objections in *Anthony*.[95] Kualoa argued, first, that section 516-70, as amended, violated the contract clause of the United States Constitution;[96] and second, that the compulsory arbitration provision of section 516-70, as amended,[97] violated Kualoa's right to a jury trial as provided under the constitutions of the United States and the State of Hawaii.[98] Kualoa prevailed on its contract clause argument and, as a consequence,

---

[92] *See Spannaus*, 438 U.S. at 244; *accord* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983); Kaiser Dev. Co. v. City & County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986).

[93] *See United States Trust*, 431 U.S. at 22 (elimination of unforeseen windfall profits is a legitimate state interest); *see, e.g.*, Keystone Bituminous Coal Ass'n v. De Benedictus, 107 S. Ct. 1232 (1987) (preventing subsidence damage to protect buildings, cemeteries and water courses is a significant and legitimate public interest); *Energy Reserves Group*, 459 U.S. 400 (regulating natural gas prices is a legitimate interest where higher prices cause hardship among those who are on fixed incomes and use gas heat).

The Supreme Court has noted that "[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Id.* at 412.

[94] *Energy Reserves Group*, 459 U.S. at 412 (quoting *United States Trust*, 431 U.S. at 22); *Kaiser Dev.*, 649 F. Supp. 926.

[95] 69 Haw. at ____, 736 P.2d at 59.

[96] The contract clause applies to leasehold relationships. The Hawaii Supreme Court has noted that, "the landlord-tenant relationship is a contractual one in our jurisdiction." Aluli v. Trusdell, 54 Haw. 417, 419, 508 P.2d 1217, 1219, *cert. denied*, 414 U.S. 1040 (1973); *see also* R. SCHOSHINSKI, *supra* note 20, § 1:1, at 1-6 (leases are contracts).

[97] *See supra* note 66 for full text of statute.

[98] With regard to the right to a jury trial, the United States Constitution provides that, "[I]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

the court did not address Kualoa's second objection.[99]

The court began its analysis by comparing the Leasehold Improvement Reversion Provision and the Land Reform Act. Given the relationship between these statutes,[100] the inquiry was necessary in order to determine the precedential value of *Hawaii Housing Authority v. Midkiff*,[101] which held that the Land Reform Act did not violate the contract clause.[102] The court ruled that the Land Reform Act was dissimilar to section 516-70, as amended, thereby rendering *Midkiff* inapposite. In the court's opinion, the Leasehold Improvement Reversion Provision was not designed to break-up oligopolistic landownership.[103] In addition, the provision did not involve the State's power of eminent domain to take private property for public use.[104]

Unable to rely upon *Midkiff*, the court examined the Leasehold Improvement Reversion Provision in light of the contract clause analysis mandated by several recent United States Supreme Court decisions.[105] The *Anthony* court concluded, first, that section 516-70, as amended, was not per se unconstitutional simply because the provision affected Kualoa's contractual relationship with the Anthonys. The Supreme Court cases indicated that legislation impinging upon contractual rights is not automatically unconstitutional if it is within the legiti-

---

The right to a jury trial is also preserved in the Hawaii Constitution, which provides that, "[I]n suits at common law where the value in controversy shall exceed one thousand dollars, the right to trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury." HAW. CONST. art. I, § 13.

[99] 69 Haw. at ____, 736 P.2d at 59.

[100] For discussion of the relationship between the Leasehold Improvement Reversion Provision and the Land Reform Act, see *supra* notes 36-40 and accompanying text.

[101] 467 U.S. 229 (1984).

[102] *Id.* at 243 n.6.

[103] In *Anthony*, the court found that Hawaii Revised Statutes § 516-70 will:

> have no effect in breaking up the oligopolistic landownership, and the inequality of bargaining power resulting therefrom, which was the objective of the Hawaii leasehold conversion act, and which was the basis for upholding that act as a legitimate exercise of the power of eminent domain under the federal and state constitutions.

69 Haw. at ____, 736 P.2d at 60.

[104] *Id.*

[105] The cases cited by the court were, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (concurrent and parallel New Jersey and New York statutes held unconstitutional where the statutes repealed an important security provision for bondholders); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (Minnesota's Private Pension Benefits Protection Act held unconstitutional where the Act superimposed pension obligations upon the company beyond those the company voluntarily agreed to undertake); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) (Kansas Natural Gas Price Protection Act held constitutional though the Act established a ceiling price, which capped the benefit of an indefinite price escalator clause in the supplier's contract); and Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (Alabama Natural Gas Act held constitutional despite a royalty-owner exemption and a pass-through prohibition).

mate exercise of the state's police power.[106] By the same token, however, not all legitimate exercise of a state's police power is tolerable.[107]

The court then applied the three-part contract clause test.[108] The threshold inquiry examined whether the Leasehold Improvement Reversion Provision substantially impaired Kualoa's contractual rights.[109] Based upon the economic implications of the provision, the court held that the provision "very substantially impairs [Kualoa's] contractual rights."[110] Kualoa received a total of $2,250 in lease rent during the 30-year term of the lease.[111] Under section 516-70, as amended, Kualoa was now required, involuntarily, and at the sole option of the Anthonys, to pay the Anthonys an estimated $100,000 to $140,000 in order to regain possession of the leased premises, even though the lease had expired.[112] The court remarked that, "[t]o say that this is not a substantial impairment of [Kualoa's] contractual rights is absurd."[113] Having found substantial impairment, the court proceeded to apply the second part of the test.

The second part of the test considered whether the state had a significant and legitimate public purpose to justify the substantial impairment.[114] To answer this question, the court consulted the legislative history for the 1975 Act that created the compulsory purchase requirement.[115] Based upon the court's reading, the legislative policy statement addressed only the Land Reform Act and did not apply to the Leasehold Improvement Reversion Provision.[116] Since the statement did not apply to section 516-70, as amended, the retroactive application of the provision was declared invalid for want of a public purpose justifying the impairment. Unable to identify a public purpose, the court was not

---

[106] *Anthony*, 69 Haw. at ____, 736 P.2d at 60.

[107] *Id.* at ____, 736 P.2d at 62 (quoting *Spannaus*, 438 U.S. at 242).

[108] For discussion of the three-part contract clause analysis, see *supra* notes 92-94 and accompanying text.

[109] 69 Haw. at ____, 736 P.2d at 60.

[110] *Id.*

[111] *Id.*

[112] *Id.* at ____, 736 P.2d at 60; *cf. Aluli*, 54 Haw. 417, 508 P.2d 1217 (1973) (tenant's obligation under a month-to-month tenancy to return the possession of the demised premises to the landlord upon the termination of the tenancy was not abrogated in light of contract clause).

[113] 69 Haw. at ____, 736 P.2d at 60.

[114] *Id.*

[115] The court examined the legislative policy expressed in the Act, Act approved June 2, 1975, No. 184, § 1, 1975 Haw. Sess. Laws 408, 408-09, and the conference committee reports. S. CONF. REP. NO. 24, 8th Haw. Leg. Reg. Sess., *reprinted in* 1975 SENATE J. 864; H.R. CONF. REP. NO. 27, 8th Haw. Leg., Reg. Sess., *reprinted in* 1975 HOUSE J. 895.

[116] The court stated that, "[n]othing in the [policy statement] adverts to, or addresses the mandated involuntary buy-out by lessors, at lessees' option, of leasehold improvements on the expiration of a lease already existing at the time of the adoption of the 1975 amendment to Hawaii Revised Statutes § 516-70." 69 Haw. at ____, 736 P.2d at 62.

required to continue to the third part of the test and consider whether the provision's impact was reasonable and appropriate given the public purpose of the statute.

The court went on to hold that "[i]f there is any meaning at all to the contract clause, it prohibits the application of [Hawaii Revised Statutes section] 516-70 to leases existing at the time of the 1975 amendment."[117] In the court's opinion, the provision was simply a naked attempt by the State "to do what it regards as equity."[118] The court concluded that the Leasehold Improvement Reversion Provision had a substantial, material, and confiscatory effect on existing contractual obligations and property rights.[119] Moreover, the court concluded that the provision's impact was limited to affecting contractual obligations and remedies, rather than imposing a generally applicable rule of conduct designed to promote broad societal interests.[120]

The court did not address the prospective application of the Leasehold Improvement Reversion Provision, which was not before the court.[121] Reversing the trial court's holding, the supreme court remanded the case for further proceedings. The following section is a commentary on the court's application of the three-part test to the Leasehold Improvement Reversion Provision.

B. Commentary

The Hawaii Supreme Court unanimously[122] ruled that Hawaii Revised Stat-

---

[117] *Id.* at ____, 736 P.2d at 63.

[118] *Id.*; *but cf.* Jenkins v. Wise, 58 Haw. 592, 574 P.2d 1337 (1978) (equity abhors forfeiture).

[119] 69 Haw. at ____, 736 P.2d at 63.

[120] *Id.*

[121] The retroactive application of Hawaii Revised Statutes § 516-70 is severable from the prospective application of the statute. Severability is provided by Hawaii Revised Statutes chapter 516, which states that:

> If any part, section, sentence, clause, or phrase of this chapter, or its application to any person or transaction or other circumstances, is for any reason held to be unconstitutional or invalid, the remaining parts, sections, sentences, clauses, and phrases of this chapter, or the application of this chapter to other persons or transactions or circumstances, shall not be affected.

HAW. REV. STAT. § 516-82 (1985); *see also* State v. Bloss, 62 Haw. 147, 153, 613 P.2d 354, 358 (1980) ("if any part of a statute is held invalid, and if the remainder is complete in itself and is capable of being executed in accordance with the apparent legislative intent, then the remainder must be upheld as constitutional").

[122] The Code of Judicial Conduct requires a judge to promote public confidence in the impartiality of the judiciary at all times. CODE OF JUDICIAL CONDUCT Canon 2A (1987). Against this background, it appears appropriate for Justice Wakatsuki to have recused himself rather than participating in the decision. *See supra* note 1. In taking part, Justice Wakatsuki has passed upon the constitutionality of legislation enacted while the Justice was the majority leader of the State

utes section 516-70, as amended, unconstitutionally impaired Kualoa's contractual obligations.[123] The Leasehold Improvement Reversion Provision functioned to alter the contractual expectations of the parties. Prior to the 1975 amendment of section 516-70, the common law would have enabled Kualoa to recover the demised premises at the end of the lease term without requiring Kualoa to purchase any improvements the Anthonys may have erected on the premises.[124] This common law principle was implied in the residential lease between Kualoa Ranch and the Anthonys.[125] With the 1975 amendment of section 516-70, the common law principle was superseded and rendered inapplicable with regard to long-term residential leases.

After performing a contract clause analysis, the court concluded "that [Hawaii Revised Statutes section] 516-70 very substantially impairs [Kualoa's] contractual rights."[126] In the court's opinion, retroactively requiring a lessor to pay the fair market value of the improvements accruing to the lessor, as a prerequi-

---

House of Representatives. *See supra* note 62.

The Code of Judicial Conduct requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. CODE OF JUDICIAL CONDUCT Canon 3C(1) (1987). Without the aid of hindsight, it is reasonable to believe that Justice Wakatsuki considered *Anthony* with a preconceived opinion as to the statute's constitutionality. This belief is founded upon the legislature's responsibility to enact constitutional laws. *Cf.* Brest, *The Conscientious Legislator's Guide To Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). As such, it is presumed that the Justice, while the house majority leader, considered Hawaii Revised Statutes § 516-70, as amended, constitutional. *Cf.* Wood Bros. Homes, Inc. v. City of Fort Collins, 670 P.2d 9, 10 (Colo. Ct. App. 1983) ("While we find no evidence of partiality, we conclude that because of the trial judge's prior association with the [city planning and zoning commission], one might reasonably question his impartiality so as to render it improper for him to have presided over the trial in this case.").

Justice William Rehnquist, however, has a different view on the necessity for recusal. In Laird v. Tatum, 409 U.S. 824 (1972) (mem.), Justice Rehnquist stated that, "it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution." *Id.* at 839 (testimony on behalf of the Department of Justice espousing the constitutionality of governmental surveillance). *See also* United States v. Darby, 312 U.S. 100 (1941) (Justice Hugo Black upheld the constitutionality of the Fair Labor Standards Act, which the former Justice part-authored while he was a United States Senator).

[123] *See* 69 Haw. at ____, 736 P.2d at 63.

[124] For discussion of the Hawaii common law of fixtures, see *supra* notes 30-35 and accompanying text.

[125] The general rule of construction is that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." United States *ex rel.* Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 550 (1867); *but see* 3 A. Corbin, CORBIN ON CONTRACTS § 551, at 197 (1960) ("A statement in such general terms as this can not be accepted as true.").

[126] 69 Haw. at ____, 736 P.2d at 60; *cf. supra* note 77.

site to regaining possession of the leased premises, is an impermissible impairment of private contractual rights.[127] The Leasehold Improvement Reversion Provision impairs the contractual expectations of a pre-1975 lessor by preventing the windfall that would have otherwise accrued to the lessor under the common law rule of fixtures, presuming that the improvements are of some value. Where the lessor does not want the improvements, the lessor's expectations are nevertheless impaired because the lessor is now required to purchase improvements that the lessor may not want to own or may not want present on the lessor's property.[128]

Substantial impairment, however, was not the death knell to the Leasehold Improvement Reversion Provision's retroactive application. Despite substantial impairment, the provision could have withstood the constitutional challenge if the Anthonys had been able to show that retrospective application of section 516-70, as amended, was justified by a significant and legitimate public purpose.[129] In the court's view, however, the Anthonys were unable to carry this burden. Upon reviewing the policy statement promulgated by the legislature, the court found no specific reference to the Leasehold Improvement Reversion Provision or any of the particular terms of the provision.[130] In the absence of an express reference, the court concluded that section 516-70, as amended, if applied retroactively, would not pass constitutional muster for want of a legitimate public purpose.[131]

The legislative history may be read to support the conclusion that retrospective application of section 516-70, as amended, is not justified by a significant and legitimate public purpose. A closer reading, however, suggests a possible

---

[127] *See id.* at ____, 736 P.2d at 60.

[128] Hawaii Revised Statutes § 516-70 could thwart a lessor's desire to redevelop the leasehold to its highest and best use. Where a lessor desired to redevelop the leasehold, Hawaii Revised Statutes § 516-70 nevertheless required the lessor to purchase improvements that the lessor intended to raze to prepare the property for new development. The effect is potentially disastrous from the lessor's point of view. The magnitude of the additional costs could render redevelopment economically infeasible and defeat the lessor's attempt to develop the property to its highest and best use. *See generally* W. BRUEGGEMAN & L. STONE, REAL ESTATE FINANCE (7th ed. 1981) (financial analysis of income-producing real property).

[129] *See supra* text accompanying note 93.

[130] The policy statement issued by the Hawaii Legislature provides:

> (2) That it is the policy of the State that each person shall have the right of ownership of the land on which he makes his home;
>
> (3) That it is also the policy of the State that the lessee of a residential unit, so long as he remains a lessee, shall have the right to have rentals set at reasonable levels and to enjoy his leasehold estate under reasonable leasehold terms.

Act approved June 2, 1975, No. 184, § 1(e), 1975 Haw. Sess. Laws 408, 409.

[131] The court stated that Hawaii Revised Statutes § 516-70 is "without relation to the purposes of the leasehold conversion act . . . but simply for the purpose of doing equity, as the legislature saw it." 69 Haw. at ____, 736 P.2d at 63.

justification for such an application.[132] To begin, it is significant that the policy statement was issued with regard to several revisions made throughout the whole of Hawaii Revised Statutes chapter 516. These revisions dealt primarily with the Land Reform Act, which was also the focus of chapter 516. Thus, as a consequence, the policy statement focused primarily upon the Land Reform Act. Be that as it may, the statement did not entirely ignore the public policy behind the Leasehold Improvement Reversion Provision.

Admittedly, the policy statement did not explicitly address "the mandated involuntary buy-out by lessors, at lessees' option, of leasehold improvements on the expiration of a lease already existing at the time of adoption of the 1975 amendments to [Hawaii Revised Statutes section] 516-70."[133] The statement did, however, expressly encourage widespread fee ownership of residential land.[134] Arguably, the Leasehold Improvement Reversion Provision furthers this goal, the court's assessment of the provision notwithstanding.[135] Under the provision, a lessor is faced with three options when the lease term expires. The lessor may elect to (1) extend the lessee's lease term, (2) purchase the lessee's improvements, or (3) sell the fee interest to the lessee or a third party.[136] Thus, by encouraging the sale of fee simple residential land, the provision furthers the policy statement's goals.

Alternatively, the Leasehold Improvement Reversion Provision's public purpose of controlling the undesirable effects of residential leaseholds is furthered. The legislature has identified the widespread use of residential leaseholds as a source of undesirable economic[137] and social[138] consequences, and has chosen various means to remedy this situation.[139] The Leasehold Improvement Reversion Provision, among other provisions, was revised because the legislature de-

---

[132] Significant and legitimate public purposes include "the remedying of a broad and general social or economic problem." *Energy Reserves Group*, 459 U.S. at 411-12.

[133] 69 Haw. at ____, 736 P.2d at 62.

[134] The policy statement states, *inter alia*, "[t]hat it is the policy of the state that each person shall have the right of ownership of the land on which he makes his home." Act approved June 2, 1975, No. 184, § 1(e)(2), 1975 Haw. Sess. Laws 408, 409.

[135] *See supra* note 103 for court's viewpoint.

[136] Since Hawaii Revised Statutes § 516-70 applies to all lessors, this method of fee conversion will operate to coerce small lessors to sell. Coercing small landowners will not further the aims of the policy statement since the effect is simply to transfer ownership from one small landowner to another small landowner, which does nothing to alleviate the land oligopoly. Nevertheless, the means employed to attain a goal are for the legislature to determine. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) ("Once the object is within the authority of [the legislature], the means by which it will be attained is also for the [legislature] to determine.").

[137] Act approved June 2, 1975, No. 184, § 1(d), 1975 Haw. Sess. Laws 408, 408 (list of undesirable economic effects).

[138] *Id.* at 409 (list of undesirable social effects).

[139] *See supra* note 136.

termined that "the public health, safety, and welfare of the people of Hawaii demand that . . . applicable laws be enacted including legislation to prevent the imposition of confiscatory economic burdens upon the thousands of lessees presently living on lease property."[140]

Clearly, the "remedying of a broad and general social or economic problem" is a significant and legitimate public purpose.[141] The problems arising under a wide-spread residential leasehold regime affect a broad and general class consisting of all residential lessees in the state. Section 516-70, as amended, attempts to remedy the problems by adjusting the imbalance of power between lessees and lessors.[142] Under Hawaii's residential leasehold system, lessees are often severely disadvantaged. During rent and lease renegotiations, lessees are compelled to consent to the terms dictated by the lessor,[143] or to forfeit the improvements to the lessor, or convey the leasehold interest at a substantial economic loss.[144]

These economic problems often translate into social problems. For example, residential leaseholds adversely affect the elderly. As noted in the provision's

---

[140] Act approved June 2, 1975, No. 184, § 1(e)(4), 1975 Haw. Sess. Laws 408, 409.

[141] *Energy Reserves Group*, 459 U.S. at 411-12.

[142] The statutory findings of the legislature acknowledge the imbalance of power between lessees and lessors:

> Due to [the] shortage of fee simple residential land and such artificial inflation of residential land values, the people of the State have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land[.]

HAW. REV. STAT. § 516-83(a)(3) (1985). Hawaii Revised Statutes § 516-70 attempts to adjust this balance of power by allowing lessees to require the lessor to purchase the improvements constructed at the lessee's expense should the lessor refuse to extend the lease term at a mutually agreeable rent. *See id.* § 516-70(b).

[143] Hawaii Revised Statutes § 516-70 was revised to address the inequitable bargaining power identified in the legislative findings, which state that:

> (5) Rental renegotiations have strongly favored the lessor, the lessee having little option but to consent to such rental as determined by the lessor or to *give up the leasehold and home*, although the lease may yet have 25 or more years to run; and
>
> (6) The inequity of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements which have already been paid for or will be paid for by the lessee and on the value accruing thereon;
>
> (7) The high increases in lease rentals have caused leasehold values to drop after the initial fixed period (e.g., a house appraised at $68,000 before renegotiation of lease rental was increased), causing lessees opting to dispose of their leasehold interests to *suffer severe economic losses*.

Act approved June 2, 1975, No. 184, § 1(d), 1975 Haw. Sess. Laws 408, 409 (emphasis added).

[144] *Id.*

legislative history, when "the lessee advances in age and his income potential declines, his lease rentals increase, causing him to give up the lease and to look for other accommodations."[145] Allowing the lessee to recover the value of the improvements may serve to restrain the rate at which lease rentals will increase and will certainly afford the lessee a greater opportunity to obtain alternative housing if necessary.[146] If unable to afford alternate housing, some individuals are forced to rely upon public housing.[147] The increased burden upon government-sponsored housing affects the general public welfare by diverting tax revenues from other social uses.[148] When the economic interests of the State are involved, the exercise of the State's continuing and dominant police power is justified notwithstanding the interference with contracts.[149]

Identifying an appropriate public purpose, however, does not end of the contract clause analysis.[150] Once a legitimate public purpose is identified, the final inquiry is whether the challenged statute "changes the contractual and property rights on reasonable conditions and is of a character appropriate to its public purpose."[151] The Hawaii Supreme Court did not address this final question with regard to section 516-70, as amended, because the court concluded that the retrospective application of the provision was not justified by a significant and legitimate public purpose.

It is well established, however, that where legislation involves the social or economic welfare of the public, courts must defer to the legislative judgment as to the necessity and reasonableness of the measure.[152] Having enacted the provision, it is generally presumed that the legislature believed that the legislation

---

[145] *Id.* § 1(e), at 409.

[146] The legislature was aware that elderly lessees may not have the financial capacity to obtain adequate alternative housing at the end of the lease term. The legislative findings note that "the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income, and the lack of value remaining in the leasehold, left without means to purchase another home." *Id.* The end result is that once independent citizens are forced to rent, live with relatives, or live in public housing.

[147] Commenting upon the undesirable social effects of residential leaseholds, the legislature stated that "[t]hese situations aggravated the already acute need for government-sponsored low and middle income and elderly housing." *Id.*

[148] The legislature noted that, "[w]ith the increasing number of elderly in this State, the problem promises to become *even more acute* in the foreseeable future, and will adversely affect the health and welfare of these people and the general welfare of the people of the State of Hawaii." *Id.* (emphasis added).

[149] *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 437 (1934).

[150] *See supra* text accompanying note 94.

[151] *Anthony*, 69 Haw. at ____, 736 P.2d at 60.

[152] *See* Kaiser Dev. Co. v. City & County of Honolulu, 649 F. Supp. 926, 948 (D. Haw. 1986); *accord Energy Reserves Group*, 459 U.S. at 412-13; Keystone Bituminous Coal Ass'n v. De Benedictus, 107 S. Ct. 1232, 1253 (1987).

was a necessary and reasonable measure.[153] Deference to the legislature then requires courts to accept the legislature's decision.[154]

The court characterized section 516-70, as amended, as an improper exercise of police power that was based solely upon the legislature's desire to do equity.[155] The court apparently feared that the unrestrained desire to do equity was the beginning of the end of lease contracts. The court was concerned that the legislature might use an unchecked desire to do equity to justify changing any material term in any existing lease.[156] The court's fears in this respect, however, seem to overlook the political constraints upon the legislature as a representative body endowed with the public trust to carry forth the will of the people. Moreover, minority rights are protected by the court's power to review the legislature's acts and to invalidate any acts beyond the legislature's scope of authority.

As an aside, the court noted that retrospective application of the Leasehold Improvement Reversion Provision was permissible in an emergency situation and for a limited period.[157] "Emergency situations" and "limited periods" are tests formerly applied in contract clause analysis.[158] The United States Supreme Court, however, has since indicated that the public purpose does not require an emergency or temporary situation.[159]

Despite any shortcomings in the court's analysis, the decision stands since the Anthonys have failed to file an appeal. Until this matter is reconsidered, *Anthony* remains governing law and dictates that the Leasehold Improvement Reversion Provision is unconstitutional as applied retrospectively. The potential ramifications of the court's decision are the focus of the following section.

---

[153] It is presumed that legislation enacted by the legislature is consitutional. *Cf.* Hawaii Hous. Auth. v. Lyman, 68 Haw. ____, 704 P.2d 888 (1985); State v. Raitz, 63 Haw. 64, 621 P.2d 352 (1980).

[154] Deference is accorded to the legislative judgment, except in instances where the state itself is a contracting party. United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977).

[155] 69 Haw. at ____, 736 P.2d at 63. *But see Blaisdell*, 290 U.S. 398 (provision authorizing the extension of the period of redemption from foreclosure sales for such time as deemed "just and equitable" was upheld).

[156] If the expressed desire of the legislature is to accomplish equity, "it could also be used to justify changing any of the other material terms of existing lease agreements." 69 Haw. at ____, 736 P.2d at 63.

[157] *Id.*

[158] *See, e.g., Blaisdell*, 290 U.S. 398 (Minnesota legislature declared a public economic emergency and imposed a temporary moratorium on mortgage foreclosures and execution sales during the Great Depression).

[159] *Energy Reserves Group*, 459 U.S. at 412; *see also United States Trust*, 431 U.S. at 22 n.19; Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 39 (1940) ("While emergency does not create [consitutional] power, emergency may furnish the occasion for the exercise of power.").

V. IMPACT

The holding of *Anthony* is limited to the retroactive effect of Hawaii Revised Statutes section 516-70, as amended. The court invalidated only "that section [of the statute], as applied to leases existing at the time of the adoption of the 1975 amendment."[160] By invalidating the retroactive application of the section, the court has frustrated the expectations of all pre-1975 residential lessees who relied upon the legislation and added substantial improvements to their property subsequent to the 1975 amendment. Before the 1975 amendment, the prospect of forfeiture arguably discouraged lessees from further developing or maintaining the existing improvements toward the end of the lease term. With the advent of the 1975 amendment, this situation changed. The Leasehold Improvement Reversion Provision eliminated the economic disincentive to maintain the property at its highest and best use toward the end of the lease term. As such, lessees may have developed improvements they would not otherwise have developed in the absence of section 516-70, as amended. After *Anthony*, these lessees are unable to realize their statute-based expectations.

While pre-1975 lessors are spared the consequences of the provision, post-1975 lessors are not, since the prospective application of section 516-70, as amended, remains unaffected. The prospective character of the provision has far-reaching implications for residential leaseholds. The intact portion of the provision may represent the first of several other statutes the legislature will ultimately enact over time to regulate the relationships between lessees and lessors.[161] As these relationships become increasingly regulated, lessors will find themselves less successful in avoiding the retroactive applications of these regulations because the contracts clause does not prevent retroactive application of statutes governing the activities of regulated businesses.[162] Until then, the retrospective application of statutory provisions, similar in nature to the Leasehold Improvement Reversion Provision, is susceptible to identical constitutional

---

[160] 69 Haw. at ____, 736 P.2d at 63.

[161] *See, e.g.*, HAW. REV. STAT. § 519-2 (1985) (Hawaii Lease Rent Renegotiation Relief Act of 1975); Midkiff v. Amemiya, 78-1 HAW. LEGAL REP. 78-59 (1978) (constitutionality of Hawaii Revised Statutes § 519-2 upheld).

[162] The Supreme Court recognizes that retroactive statutes are more tolerable in regulated businesses. The court has stated that, "[i]n determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983) (production and sale of natural gas was subject to substantial state and federal regulations); *see, e.g.*, Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38 (1940) (a regulation affecting the right to withdraw shares in a building and loan association was constitutional where regulation of associations pre-dated petitioner's purchase of shares); *see also* Comment, *The Contract Clause: The "Regulated Industry" Exception*, 8 U. HAW. L. REV. 135 (1986).

challenges.[163]

In any event, the *Anthony* opinion serves to illuminate the potential problems facing post-1975 lessors who are not relieved from the Leasehold Improvement Reversion Provision. Such lessors are held to a constructive knowledge of the Leasehold Improvement Reversion Provision and the provision's ramifications, especially after *Anthony*. Affected lessors who are unaware of the provision may find themselves in financial situations not unlike that faced by Kualoa. If nothing else, *Anthony* should increase the public's awareness of the Leasehold Improvement Reversion Provision.

The Leasehold Improvement Reversion Provision was enacted partially in response to distortions in the Hawaii real estate market.[164] Whether the provision will succeed in relieving the market distortions is open to speculation.[165] The distortions resulted from the oligopolistic land ownership patterns in Hawaii.[166] By imposing statutory regulations upon the market, the legislature has introduced an additional factor to the multi-faceted equation that ultimately defines the structure of the real estate market in Hawaii.[167] The equation is currently skewed in favor of lessors.[168] The legislature has attempted to adjust the market

---

[163] *See, e.g.*, HAW. REV. STAT. § 516-63 (1985) (Despite express language to the contrary, lessees may freely assign their leases without having to obtain the lessor's approval or consent. In addition, the lessor's consent will relieve the lessee of any secondary liability without having to rely upon novation.). Hawaii Revised Statutes § 516-63 applies retroactively. For discussion on retroactive application of statutes, see *supra* note 3.

[164] Recognizing distortions in the Hawaii real estate market, the legislature noted that, "[t]he high levels of fee simple residential unit prices have *artificially* raised the level of prices for leasehold units." Act approved June 2, 1975, No. 184, § 1(d)(2), 1975 Haw. Sess. Laws 408, 408 (emphasis added).

[165] Hawaii Revised Statutes § 516-70 is an effort to counteract the adverse effects of oligopolistic landownership by forcing landowners to purchase improvements, regardless of whether the transaction is economically rational. Such "[f]orced exchanges with an after-the-fact determination by the legal system as to whether the exchange increased or reduced efficiency constitute[s] a less efficient mechanism for the allocation of resources than market transactions — where market transactions are feasible." R. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2, at 11 (2d ed. 1977).

[166] For discussion of the land oligopoly in Hawaii, see *supra* notes 42-47 and accompanying text. The oligopoly distorts the market because large landowners are able to control the supply of available fee simple residential land without much regard to free market forces. By limiting the supply of land, many potential buyers are forced to compete for smaller supply of land. When demand exceeds supply, the price of land rises to levels in excess of those otherwise found in efficient market systems. *See* P. SAMUELSON & W. NORDHAUS, *supra* note 44, at 530-52.

[167] *See* OFFICE OF THE LIEUTENANT GOVERNOR OF THE STATE OF HAWAII, HAWAII'S CRISIS IN HOUSING 76 (Nov. 1970) ("Various factors act together to contribute to the high cost of the housing which is being built [in Hawaii]."). For general discussion on pricing theory, see P. SAMUELSON & W. NORDHAUS, *supra* note 44, at 601-09.

[168] The legislature has found that rental renegotiations have traditionally favored lessors. Act approved June 2, 1975, No. 184, § 1(d)(5), 1975 Haw. Sess. Laws 408, 409.

by altering the common law of fixtures to confer a benefit to residential lessees. Unless restraints are imposed, however, lessors will freely structure lease contracts to neutralize the sought-after benefits of the statute.

Prudent lessors will bargain for higher rental rates.[169] Given the prospect of having to purchase the lessee's improvements, the lessor's lease rent calculation will include an amount sufficient to enable the lessor to purchase the lessee's improvements without any out-of-pocket expenditure.[170] Such calculation, however, is made difficult by the uncertainty inherent in all long-term contracts.[171] This uncertainty involves predicting whether the lessor will have to purchase the lessee's improvements, and what the market value of those improvements will be at termination of the underlying lease. If the lessor overestimates the lease rent, the lessee will be reluctant to accept the lease contract. If the lessor underestimates, the lessor will not realize the lessor's anticipated rate of return for the lease.

The inability accurately to predict future events over the course of a lease spanning a term of at least twenty years entails risk allocation. Prudent lessors will attempt to control or allocate their risk exposure. To reduce risk, lessors may consider periodic lease rent renegotiations during the term of the lease. Periodic renegotiations will permit the lessor to reevaluate the required lease rent with improved knowledge. Renegotiations will consider the value of any improvements actually erected by the lessee, as well as those the lessee is in the process of erecting or is planning to erect. Lessees will view this alternative with mixed feelings.[172] On one hand, lessees erecting few or no improvements will enjoy lease rents that are not unduly inflated. In addition, renegotiation provides an opportunity for lessees to request rent reductions if the lessor has overesti-

---

[169] Under the economic theory of law, "[i]t is implicit in the definition of man as a rational maximizer of his self-interest that people respond to incentives . . . ." R. POSNER, *supra* note 165, § 1.1, at 4. To counteract the effects of Hawaii Revised Statutes § 516-70, lessors will require greater lease rents as incentive to lease their property. *See, e.g.*, *Anthony*, 69 Haw. at ____, 736 P.2d at 60 ("if [lessors] knew they would be obliged to purchase the lessees' improvements at the termination of the lease, they may well have bargained for a different rental, [or] a different term").

[170] Calculating lease rents based upon the value of improvements erected by lessees is currently practiced by lessors, as evident in the legislative findings, which state:

> The inequality of bargaining power has allowed lessors to charge lease rent based not only on the raw land value of the property but also on the value of the offsite and onsite improvements which have already been paid for *or will be paid for by the lessee* and on the value accruing thereon[.]

Act approved June 2, 1975, No. 184, § 1(d)(6), 1975 Haw. Sess. Laws 408, 409 (emphasis added).

[171] *See* O. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM, § 1.2, at 70 (1985) (problems inherent in long-term contracts include the inability to anticipate all future contingencies at the outset).

[172] *See supra* note 168.

mated the factored amount. On the other hand, lessees erecting substantial improvements will not enjoy the benefits that result when the lessor has underestimated the factored amount. Moreover, lessees generally frown upon the uncertainty inherent in rent renegotiations as opposed to the certainty of fixed lease rents throughout the entire lease term.[173]

Lessors subject to the Leasehold Improvement Reversion Provision may want to impose additional controls upon the types of improvements lessees may erect on the leasehold premises in light of the possibility that the lessee may later force the lessor to buy the improvements. Controls may include minimum or maximum building expenditures.[174] Expenditure controls regulate the quality of the workmanship of the improvements and the lessor's maximum exposure. To ensure quality construction, lessors may also reserve the right to approve all plans[175] and specifications[176] for the improvements. To ensure compliance, the lease agreement should grant the lessor an adequate remedy to discourage the lessee from violating the lessor's efforts to control the types of improvements constructed.[177]

Arguably, the effectiveness of the Leasehold Improvement Reversion Provision is severely curtailed by limiting the provision to prospective application. The provision would have been most effective if permitted to operate retrospectively. Such application would have permitted the provision to operate against

---

[173] *See id.*

[174] In *Anthony*, the court suggested that if lessors knew "they would be obliged to purchase the lessees' improvements at the termination of the lease, they may well have bargained for . . . minimum or maximum building expenditures, and may very well have exercised their right of approval of lessees' plans for improvements on the premises, in a very different manner." 69 Haw. at ____, 736 P.2d at 60.

[175] The plans "include all the drawings pertaining to a development under consideration, such as the building, the mechanical and the electrical drawings and the like." J. REILLY, *supra* note 4, at 358.

[176] The specifications "include the written instructions to the builder containing all information pertaining to dimensions, materials, workmanship, style, fabrication, colors, and finishes which supplement the details appearing on the working drawings." J. REILLY, *supra* note 4, at 358.

[177] Kualoa attempted to control the improvements constructed by the Anthonys by expressly providing in the lease agreement:

> THAT the Lessee will not erect or permit to be erected upon the demised premises any new buildings or to make or permit to be made any addition to any buildings which may at present exist or shall at any time during the said term be erected upon the land hereby demised, except in accordance with plans and specifications previously approved by the Lessor . . . .

69 Haw. at ____, 736 P.2d at 57. The attempt was ineffective because the Anthonys, despite the express lease terms, made the improvements without obtaining Kualoa's prior consent. Defendants-Appellants Opening Brief at 31, Anthony v. Kualoa Ranch, Inc., 69 Haw. ____, 736 P.2d (1987) (No. 11424).

the many leasehold relationships that existed when section 516-70 was amended in 1975. Moreover, the parties to these contracts were bound by the terms of their agreements and were thus unable to freely readjust their relationship to avoid the effects of the provision. Under prospective application, lessors are free to circumvent the objective of section 516-70, as amended, by structuring their contractual relationship so as to defeat the benefit the legislature sought to confer upon residential lessees.

VI. CONCLUSION

In *Anthony v. Kualoa Ranch, Inc.*,[178] the Hawaii Supreme Court held unconstitutional "that section [of Hawaii Revised Statutes section 516-70], as applied to leases existing at the time of the adoption of the 1975 amendment . . . ."[179] The retrospective application of the Leasehold Improvement Reversion Provision is an impermissible impairment of contractual obligations under the contract clause of the United States Constitution. As the contract clause applies retroactively only, section 516-70, as amended, does not affect residential leases executed before the 1975 amendment.

The purpose of section 516-70, as amended, was to adjust the imbalance of power between lessors and lessees. The legislature sought to achieve this aim by empowering lessees to compel lessors to purchase the lessees' improvements in the event the lessors refused to extend the terms of the leases. Without deferring to the legislature, the court concluded that the provision substantially impairs lessors' contractual rights and obligations, and that the impairment is not justified by a significant and legitimate public purpose. Since lessors remain free to adjust their contractual relationships to counteract the prospective effect of the provision, the court has effectively thwarted much of the legislature's efforts.

Adelbert Green

---

[178] 69 Haw. ____, 736 P.2d 55 (1987).

[179] *Id.* at ____, 736 P.2d at 63.

Labor Law—*Abilla v. Agsalud*: The Labor Dispute Disqualification Under Hawaii Employment Security Law

I. INTRODUCTION

In *Abilla v. Agsalud*,[1] the Hawaii Supreme Court held that, when there had been a stoppage of work, employees locked out[2] of their places of work by their employers were barred from receiving benefits under the Hawaii Employment Security Law.[3] The court held that the term "labor dispute," as used in Hawaii Revised Statutes section 383-30(4), encompassed a lockout and therefore precluded employee benefit claims under the Hawaii Employment Security Law.[4]

---

[1] 69 Haw. ____, 741 P.2d 1272 (1987) (opinion of the court by Nakamura, J.). *Abilla* was a consolidation of Civil Nos. 85-4358 (*Abilla v. Agsalud*) and 86-0846 (*Goodnue v. Agsalud*). Claimants-Appellants were 96 employees of Pacific Concrete and Rock Co., Ltd. and 71 employees of Lone Star Hawaii Rock Products, Inc. *Id.* at ____, 741 P.2d at 1273.

[2] A lockout is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms. Iron Molders' Union No. 125 v. Allis-Chalmers Co., 166 F. 45, 52 (7th Cir. 1908) (Grosscup, J., concurring).

[3] The Hawaii Employment Security Law is codified in HAW. REV. STAT. ch. 383 (1985 Replacement).

[4] The Hawaii Employment Security Law provides the labor dispute disqualification in HAW. REV. STAT. § 383-30(4), which reads, in pertinent part:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (4) For any week with respect to which it is found that the individual's unemployment is due to a stoppage of work which exists because of a *labor dispute* at the factory, establishment or other premises at which the individual is or was last employed; provided that this paragraph shall not apply if it is shown that:
>
> (A) The individual is not participating in or directly interested in the labor dispute which caused the stoppage of work; and
>
> (B) The individual does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or directly interested in the dispute; provided that if in any case separate branches of work, which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the

The court also declined to adopt either a "volitional"[5] or an "impasse" unemployment test to determine disqualification, on the ground that such determinations by the court would violate the doctrine of neutrality generally adhered to by courts and administrative agencies in the labor dispute context.[6] This recent development analyzes the Hawaii Supreme Court's holding and its impact on the distribution of bargaining power in labor negotiations.

II. FACTS

Prior to 1984, Pacific Concrete and Rock Company, Inc. (Pacific Concrete), Lone Star Hawaii Rock Products, Inc. (Lone Star), and Ameron HC&D (Ameron), the major suppliers of concrete on the island of Oahu, each bargained separately with Cement Quarry Workers, Ready Mix and Dump Truck Drivers Local 681 (Local 681)[7] to set wages, hours, and other terms and conditions of employment for their respective employees. In 1983, the three employers formed the Concrete Industry Bargaining Association of Hawaii (CIBA-HAWAII) to facilitate collective bargaining on a multi-employer basis in 1984.[8]

> same premises, each such department shall, for the purpose of this paragraph, be deemed to be a separate factory, establishment or other premises.

HAW. REV. STAT. § 383-30(4) (1985) (emphasis added).

The labor dispute disqualification is triggered when two discrete conditions are met. First, the employee's unemployment must be due to a "labor dispute"; and second, if the unemployment is due to a labor dispute, there must be a "stoppage of work." Only the "labor dispute" component was at issue in *Abilla*. See *infra* note 67 for a discussion of the "stoppage of work" issue.

[5] 69 Haw. at ____, 741 P.2d at 1279. Claimants-Appellants urged the court to adopt a "volitional" test to determine benefit entitlement for persons involved in a labor dispute. Such a test would require a determination by the administering agency or court as to whether the claimants were involuntarily unemployed, through no fault of their own. Absent a voluntary job separation on their part, the claimants maintained that the denial of benefits was error. See *infra* notes 58, 60, 62 and accompanying text for a discussion of the "volitional" test.

[6] *Abilla*, 69 Haw. at ____, 741 P.2d at 1277. The court noted the basic principle that agencies administering the unemployment compensation law, and courts reviewing their rulings, should remain neutral in a labor dispute and refrain from passing on its merits. The court stated that:

> [i]f the receipt of unemployment benefits during a lockout turned on whether or not claimants "were involuntarily unemployed through no fault of their own," the administering agency and the courts would be called upon "to determine both the justice of the [employer's] cause and the reasonableness of the . . . lockout as a means of enforcing its demands."

Id. at ____, 741 P.2d at 1279-80. The court used the same reasoning to dismiss the "impasse" test in a single sentence. *Id.* at ____, 741 P.2d at 1280.

[7] Cement Quarry Workers, Ready Mix and Dump Truck Drivers, Local 681, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[8] *Abilla*, 69 Haw. at ____, 741 P.2d at 1273. Although the court characterized the creation of CIBA-HAWAII as being for the purpose of "facilitating collective bargaining on a multi-

The employers designated CIBA as their collective bargaining representative and signed a mutual assistance pact, agreeing, *inter alia*, that "[i]f [the] union takes strike action against any member, all members of CIBA-HAWAII will close down and lock out their employees as a defensive measure to such tactics . . . ."[9] Local 681 resisted the employers' demands to conduct contract negotiations and bargaining on a multi-employer basis through CIBA-HAWAII and, instead, insisted on independent negotiations with each of the three employers. A number of meetings[10] between representatives of the union and the CIBA-HAWAII bargaining team[11] were held before the expiration of the

---

employer basis," the attorney who represented appellees, and who was instrumental in the creation of CIBA-HAWAII, disputed this interpretation of the organization's creation: "The real [reason for the] formation [of] CIBA . . . was the fact that the employers in previous years had been 'whipsawed' by Local 681 whereby the union would gain an agreement with the weakest company and then use it as a precedent for negotiations with the remaining two companies." Memorandum from Richard M. Rand to Andrew Pepper (Feb. 11, 1988) (discussing *Abilla v. Agsalud*) [hereinafter Rand letter]. Thus, despite the court's formulation, in appellees' view it was the union which sought to force collective, standardized terms and conditions of employment upon the employers, and not vice versa.

Prior to the formation of CIBA-HAWAII in 1983, the employers had never formed a formal organization to bargain with the respective union representatives. Department of Labor and Industrial Relations Record at 23 [hereinafter DLIR Rec.]. Thus, there was no history of joint negotiations between the employers and the union. *Id.* Despite the fact that no formal multi-employer bargaining organization existed prior to the creation of CIBA-HAWAII, the appellees believed that:

> [t]he fact that the contracts were identical in many respects even prior to 1984 and that they all expired on the same date [was] . . . substantial evidence of the fact that negotiations had always been somewhat coordinated and the employer's [sic] efforts [with] CIBA to formally coordinate them was an attempt to transform what had been *de facto* multi-employer bargaining into *de jure* multi-employer bargaining."

Rand letter, *supra*.

The collective bargaining contracts between the union and the three concrete companies all had simultaneous expiration dates of July 15, 1984. Answering Brief of Appellees Pacific Concrete and Rock Co., Ltd., and Lone Star Hawaii Rock Products, Inc., at 6, Abilla v. Agsalud, 69 Haw. ____, 741 P.2d 1272 (1987)(No. 11699).

[9] *Abilla*, 69 Haw. at ____, 741 P.2d at 1273 (quoting the CIBA-HAWAII agreement). The agreement also provided that in the event one of the employers should withdraw from the agreement or breach the agreement in part (such as by not locking out employees), a penalty of $10,000 per day of the breach would be payable by the breaching company. DLIR Rec., *supra* note 8, at 40-47.

The union (Local 681) was apprised, on April 18, 1984, of the existence of the employers' pact to bargain together on a multi-employer basis, and of their mutual resolve to counter a strike against one company with a lock out of the employees of the other two companies. *Id.* at 38-39.

[10] The union insisted upon characterizing these meetings as either Pacific Concrete or Ameron negotiating sessions and refused to recognize the meetings as negotiations with CIBA-HAWAII, the multi-employer representative. DLIR Rec., *supra* note 8, at 161.

[11] The CIBA-HAWAII bargaining team was composed of representatives from the three concrete companies and Benjamin Akana, a person versed in collective bargaining, who acted as their

old agreements on July 15, 1984. No bargaining for a new agreement covering the employees of Lone Star occurred until CIBA-HAWAII filed a refusal to bargain charge with the National Labor Relations Board.[12]

Prior to the crucial date of July 15, 1984, the tempo of the parties' negotiations increased but no accord was reached.[13] The union continued to designate the bargaining meetings as either Pacific Concrete or Ameron sessions.[14] As the deadline drew closer, neither side declared an impasse; instead, each side attempted to negotiate an extension of the old agreements.[15] Attempts to this end proved futile and the contracts expired on July 15, 1984.[16]

Despite the absence of any collective bargaining agreement, the employees of the three companies reported for work on July 16, 1984.[17] On the following day, the employees of Pacific Concrete and Lone Star reported for work but the employees of Ameron did not, the ostensible reason being that they were at a "stop-work meeting."[18] The union did not deem their absence from work a strike since the membership had not yet authorized any strike action.[19] The employer responded by informing the employees of Pacific Concrete and Lone Star that a defensive lockout[20] had been imposed and that no work would be offered as of July 18, 1984, because of the union's decision to "selectively shut down a single member of this group (CIBA)."[21] The dispute and lockout continued for approximately three months.[22]

The locked-out employees filed claims for weekly unemployment benefits

---

spokesperson.

[12] *Abilla*, 69 Haw. at ____, 741 P.2d at 1273-74.

[13] *Id.* at ____, 741 P.2d at 1274.

[14] *See supra* note 10 and accompanying text.

[15] *Abilla*, 69 Haw. at ____, 741 P.2d at 1274.

[16] *Id.*

[17] *Id.*

[18] The court noted that: "[i]n the parlance of labor-management relations, a 'stop-work meeting' is a union meeting conducted during what would otherwise be working hours." *Abilla*, 69 Haw. at ____ n.2, 741 P.2d at 1274 n.2. "Under the old collective bargaining agreements the union had to request permission to have a stop-work meeting and normally requested it at least [two] weeks in advance." Rand letter, *supra* note 8, at 5. As no permission was requested for the July 17, 1984 "stop-work" meeting, CIBA-HAWAII "took the position . . . [that] the meeting was a strike despite the union's appellation of it being a 'stop-work' meeting." *Id.*

[19] *Abilla*, 69 Haw. at ____, 741 P.2d at 1274.

[20] See *supra* note 2 for a definition of a lockout. Although the employers deemed the lockout as "defensive," it is clear that the court's decision draws no distinction between "defensive" and "offensive" lockouts.

[21] *Abilla*, 69 Haw. at ____, 741 P.2d at 1274 (quoting a communication of July 17, 1984, from CIBA-HAWAII to Local 681, informing the employees of Pacific Concrete and Lone Star that a lockout was being imposed).

[22] *Abilla*, 69 Haw. at ____, 741 P.2d at 1274.

under the Hawaii Employment Security Law for the weeks of the lockout.[23] The Unemployment Insurance Division of the Department of Labor and Industrial Relations[24] denied the benefit claims, ruling that the claimants "were disqualified from receiving benefits because their unemployment was due to a labor dispute."[25] The claimants appealed[26] this ruling to the Referee for Unemployment Compensation Appeals[27] who upheld the decision of the Unemployment Insurance Division,[28] concluding that "the claimants . . . were, in fact, involved in a labor dispute as defined in Administrative Rule section 12-5-63,[29] and, therefore, [fell] under the disqualifying provision of [Hawaii Revised Statutes section] 383-30(4) . . . ."[30] The claimants then turned to the courts for judicial review of the unfavorable administrative ruling.[31] The circuit

---

[23] HAW. REV. STAT. § 383-32 (1985) provides for the filing of unemployment benefit claims.

[24] Defendant-Appellee Joshua C. Agsalud was, at the time of the filing of this suit, the Director of the Department of Labor and Industrial Relations, State of Hawaii. He was named a party in compliance with HAW. R. CIV. P. 72(a). HAW. REV. STAT. § 383-41 (1985) also provides for the naming of the director as a party to any judicial review of benefit determinations.

[25] *Abilla*, 69 Haw. at ____, 741 P.2d at 1274 (quoting the ruling of the Unemployment Insurance Division, Department of Labor and Industrial Relations, State of Hawaii).

[26] The right to appeal a determination of benefits by the Department of Labor and Industrial Relations is provided by HAW. REV. STAT. § 383-38 (1985).

[27] HAW. REV. STAT. § 383-37 provides for the appointment of a claims referee to hear appeals with respect to the denial of benefits: "Appeals from determinations and redeterminations with respect to benefits shall be heard by an impartial referee for unemployment compensation appeals, who shall serve as the appeal tribunal. The referee shall be appointed as provided by Sections 383-98." HAW. REV. STAT. § 383-37 (1985).

[28] The claimants had argued they were:

> actually locked out by their employers, not because of a labor dispute but because of the provision in the CIBA agreement which mandated that "[i]f a union takes strike action against any member, all members of CIBA-Hawaii will close down and lock out their employees as a defensive measure to such tactics . . . ."

Abilla, 69 Haw. at ____, 741 P.2d at 1274 (quoting the ruling of the Referee for Unemployment Compensation Appeals, Unemployment Insurance Division, Department of Labor and Industrial Relations, State of Hawaii).

The referee found this argument untenable. In his view "it [was] clear that the lockout would not have occurred but for the dispute between claimants and their employers regarding terms and conditions of employment." *Id.*

[29] Administrative Rules and Regulations Section 12-5-63 is an administrative codification of the "labor dispute" definition embraced by the court in Inter-Island Resorts, Ltd. v. Akahane, 46 Haw. 140, 145 n.3, 377 P.2d 715, 719 n.3 (1962). See *infra* notes 42-47 and accompanying text for a discussion of *Inter-Island Resorts*.

[30] *Abilla*, 69 Haw. at ____, 741 P.2d at 1274 (quoting the ruling of the Referee for Unemployment Compensation Appeals, Unemployment Insurance Division, Department of Labor and Industrial Relations, State of Hawaii).

[31] The right to seek judicial review of the decisions of the Referee for Unemployment Compensation Appeals is provided for by HAW. REV. STAT. § 383-41, which reads in pertinent part:

> [A]ny party to the proceedings before the referee may obtain judicial review of the decision

court affirmed the referee's decision and the claimants sought final review by the Hawaii Supreme Court. The supreme court unanimously affirmed the decision of the circuit court.[32]

III. ANALYSIS OF *Abilla*

The Hawaii Supreme Court faced two major issues in *Abilla*. First, the court had to determine whether the term "labor dispute," as used in Hawaii Revised Statutes section 383-30(4), encompassed the term "lockout" and therefore led to the inclusion of locked out workers under the labor dispute disqualification of the unemployment insurance law. Second, if it was determined that the labor dispute disqualification applied, *prima facie*, to locked out employees, should the court adopt either a "volitional" or an "impasse" test in determining the rights of locked out employees to claim and receive unemployment benefits.

A. The "Labor Dispute"

An unemployment compensation claimant is disqualified from receiving benefits "[f]or any week with respect to which it is found that [his] unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which [he] is or was last employed."[33] The basic question faced by the Hawaii Supreme Court in *Abilla* was "whether a stoppage of work brought on by an employer's decision to 'lock out' its employees disqualifie[d] them from receiving [unemployment insurance] benefits."[34] The court reaffirmed that the term "labor dispute" covers "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment."[35] Having so defined "labor dispute" as used in Hawaii Revised Statutes section 383-30(4), the court concluded that the unemployment of appellants-claimants in *Abilla* was due to an employer lockout that resulted from an underlying labor dispute and, therefore, the appellants-claimants were barred from ob-

---

> of the referee . . . by instituting proceedings in the circuit court . . . . Proceedings for review by the supreme court may be taken and had in the same manner as is provided for a review of the judgment of a circuit court . . . . Upon the final termination of any judicial proceeding, the referee shall enter an order in accordance with the mandate of the court.

HAW. REV. STAT. § 383-41 (1985).

[32] *Abilla*, 69 Haw. at ____, 741 P.2d at 1272.

[33] *Id.* at ____, 741 P.2d at 1275 (quoting HAW. REV. STAT. § 383-30(4)). See *supra* note 4 for the pertinent textual portion of HAW. REV. STAT. § 383-30(4).

[34] *Abilla*, 69 Haw. at ____, 741 P.2d at 1273.

[35] *Id.* (quoting *Inter-Island Resorts*, 46 Haw. at 145 n.3, 377 P.2d at 719 n.3).

taining unemployment insurance benefits.

Justice Nakamura, writing for the court, began his inquiry into the construction of the labor dispute disqualification by noting that such a disqualification "has been a part of the Hawaii Employment Security law since 1941."[36] "In enacting a 'labor dispute' disqualification, Hawaii, like the vast majority of the states doing so, followed a draft bill furnished by the Social Security Board."[37]

---

[36] 69 Haw. at ____, 741 P.2d at 1275. *See* Act effective May 20, 1941, No. 304, Sec. 1, 1941 Haw. Sess. Laws 357.

[37] *Abilla*, 69 Haw. at ____, 741 P.2d at 1275. Fifty-three American jurisdictions include a labor dispute disqualification provision in their employment security statutes. The 53 jurisdictions are the 48 contiguous states, Alaska, Hawaii, the District of Columbia, the Virgin Islands, and Puerto Rico.

Under pressure to meet a deadline to qualify for credits under the federal Social Security Act, 49 Stat. 620 (1935) (codified at 42 U.S.C.A. §§ 30-____ (1943)), most state legislatures had taken advantage of the "Draft Bills," Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types (1936) (rev. ed. 1937), prepared by Congress' Committee on Economic Security. *See* Shadur, *Unemployment Benefits And The "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294, 294 nn.2-4 and accompanying text (1950).

The Hawaii State Legislature expressly noted that its establishment of a system of unemployment compensation was directly motivated by the opportunity for Hawaii to take advantage of the substantial credits offered by the federal enactment, stating, "[t]he purpose of this Bill is to bring this Territory under the provisions of the Federal Social Security Act . . . ." H.R. STAND. COMM. REP. NO. 207, 19th Haw. Leg., Reg. Sess., 1937 HOUSE J. 1133. The committee report further noted that "[o]nly states adopting unemployment compensation laws (like House Bill No. 303) can share in the[] federal funds . . . . Hence it seems absolutely necessary to pass this particular legislation." *Id.* at 1134. "Its enactment into law is of vital importance and is unescapable if the people of this Territory are to receive the benefits of the unemployment insurance tax moneys now being collected and in the future to be collected under [the] . . . Federal legislation." *Id.*

For those states adopting language substantially identical to the "Draft Bills," see ARIZ. REV. STAT. ANN. § 23-277 (1983); ARK. STAT. ANN. § 81-1105(f) (1976); CONN. GEN. STAT. ANN. § 31-236(3) (West Supp. 1984); D.C. CODE ANN. § 46-110(f)(1981); FLA. STAT. ANN. § 443.101(4) (West 1981); GA. CODE ANN. § 54-610(d) (1982); HAW. REV. STAT. § 383-30(4) (1985); IDAHO CODE § 72-1366(j) (Supp. 1984); IND. CODE ANN. § 22-4-15-3(a) (West 1981); IOWA CODE ANN. § 96.5(4) (West 1984); KAN. STAT. ANN. § 44/706(d) (1981); LA. CIV. CODE ANN. art. 23:1601(4) (West 1964); ME. REV. STAT. ANN. tit. 26, § 1193(4) (Supp. 1984); MD. ANN. CODE art. 95A, § 6(e) (1979); MASS. GEN. LAWS ANN. ch. 151 A, § 25(b) (West 1982); MICH. COMP. LAWS ANN. § 421.29(8) (West 1978); MINN. STAT. ANN. § 268.09-3 (West Supp. 1984); MISS. CODE ANN. § 71-5-513(5) (Supp. 1983); MO. ANN. STAT. § 288.040-5 (Vernon Supp. 1985); MONT. CODE ANN. § 39-51-2305 (1983); NEB. REV. STAT. § 48/628(d) (Supp. 1983); NEV. REV. STAT. § 612.395 (1983); N.H. REV. STAT. ANN. § 282A:4-F (Supp. 1983); N.J STAT. ANN. § 43:21-5(d) (West Supp. 1984); OKLA. STAT. ANN. tit. 40 § 2-410 (West Supp. 1984); OR. REV. STAT. § 657.200 (1983); PA. CONS. STAT. ANN. § 802(d) (Purdon 1984); P.R. LAWS ANN. tit. 29, § 704 (Supp. 1979); S.C. CODE ANN. § 41-35-120(4) (Law. Co-op 1976); S.D. CODIFIED LAWS ANN. § 61-6-19 (1978); TENN. CODE ANN. § 50-7-303(4) (1983); VT. STAT. ANN. tit. 21, § 1344(a)(4) (Supp. 1980); V.I. CODE ANN. tit. 24, § 304(b)(6) (Supp.

By the time the Hawaii Supreme Court first explored the labor dispute disqualification in 1962,[38] "[t]he various ramifications[39] [of the language borrowed from the federal draft] ha[d] been evaluated in inquiring and thorough detail."[40] And, "with regard to most of the questions arising [thereunder], generally accepted answers [had emerged]—answers which [did] not vary across jurisdictional lines."[41]

In *Inter-Island Resorts, Ltd. v. Akahane*[42] the Hawaii Supreme Court interpreted the employment security law's[43] labor dispute disqualification for the first time. There, the court observed that the term "labor dispute" "is nowhere defined in the . . . [l]aw"[44] and "[f]or the most part courts . . . have resorted to the definition given in the National Labor Relations Act and the Norris-La Guardia Act."[45] The Hawaii Supreme Court did not feel compelled to accept

---

1983); VA. CODE § 60.1-52(b) (Supp. 1984); WASH. REV. CODE § 50.20.090 (1962); W. VA. CODE § 21 A-6-3(4) (Supp. 1984); WYO. STAT. § 27-3-313(a)(i) (1983).

[38] *See generally Inter-Island Resorts*, 46 Haw. 140, 377 P.2d 715 (1962).

[39] Professor Jerre S. Williams has identified ten major questions raised by the text of the standard statutory provisions of the "Draft Bill." They are:

1. What constitutes a "stoppage of work"?
2. What constitutes a "labor dispute"?
3. What casual [sic] relationship is required by the words "unemployment due to a stoppage of work"?
4. What casual [sic] relationship is required by the words "stoppage of work which exists because of a labor dispute"?
5. What constitutes a "factory, establishment or other premises"?
6. What constitutes "participating in" a labor dispute?
7. What constitutes "financing" a labor dispute?
8. What constitutes being "directly interested" in a labor dispute?
9. What constitutes membership in "a grade or class of workers," some of whom are participating in, financing or directly interested in a labor dispute?
10. What constitutes "separate branches of work which are commonly conducted as separate businesses in separate premises"?

Williams, *The Labor Dispute Disqualification—A Primer and Some Problems*, 8 VAND. L. REV. 338, 339 (1955).

[40] 69 Haw. at ____, 741 P.2d at 1275 (citing Williams, *supra* note 39, at 338 (footnote omitted)).

[41] *Id.*

[42] 46 Haw. 140, 377 P.2d 715 (1962).

[43] The court in *Inter-Island Resorts* interpreted REV. LAWS HAW. § 4231(d), which was the labor dispute disqualification prior to enactment of the current Hawaii statutory compilation. REV. LAWS HAW. § 4231(d) (1945) was reenacted as HAW. REV. STAT. § 383-30(4) (1985). The pertinent language, however, has not been amended. *See Abilla*, 69 Haw. at ____ n.6, 741 P.2d at 1275 n.6.

[44] *Inter-Island Resorts*, 46 Haw. at 145, 377 P.2d at 719.

[45] *Id.* The definition in the National Labor Relations Act reads:

The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating,

such statutory definitions as binding, however, for the "definition contained in the National Labor Relations Act has been substantially incorporated in Chapter 92, Revised Laws of Hawaii 1955, dealing with Labor Disputes, [and the] Stevedoring Industry."[46] "In light of 'this legislative expression of approval,' [the Hawaii Supreme Court] applied the term [labor dispute] expansively to 'embrace[] the concept of a dispute over employee representation by a union resulting in an organizational strike.' "[47]

The court was not swayed by arguments that Hawaii statutes "are silent as to whether a lockout is a labor dispute"[48] and stated that:

> [t]he absence of an express provision that a 'lockout' is a 'labor dispute' within the meaning of the unemployment compensation law can hardly be equated with silence. For the legislature has spoken clearly and unmistakably on the matter in other labor laws and in the very section of the Hawaii Employment Security Law at issue, H[awaii] R[evised] S[tatutes] Section 383-30."[49]

Justice Nakamura noted four other statutes compiled under Hawaii labor law[50] that define "labor dispute" in the same or essentially the same language. The statute regulating disputes between public utilities and their employees[51] contains the same definition of "labor dispute" as that employed in Hawaii

---

> fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 152(9) (1982).

[46] *Abilla*, 69 Haw. at ____, 741 P.2d at 1276. Chapter 92, REV. LAWS HAW., reads:

> As used in this chapter unless the context clearly indicates otherwise:
>
> . . . .
>
> (f) 'Industrial dispute' and 'labor dispute' mean any controversy concerning wages, hours or other terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange wages, hours or other terms or conditions of employment.

REV. LAWS. HAW. § 92-2(f) (1955). REV. LAWS HAW. § 92-2(f) is now HAW. REV. STAT. § 382-1 (1985). The pertinent language has not been amended.

[47] *Abilla*, 69 Haw. at ____, 741 P.2d at 1276 (quoting *Inter-Island Resorts*, 46 Haw. at 146, 377 P.2d at 719).

[48] *Id.* at ____, 741 P.2d at 1278 (quoting Appellant's Opening Brief at 16, *Abilla v. Agsalud*, 69 Haw ____, 741 P.2d 1272).

[49] 69 Haw. at ____, 741 P.2d at 1278. The court went on to note that the "opinion in *Inter-Island Resorts, Ltd. v. Akahane*, reflected a perception of a 'legislative expression of approval' in another labor law of an expansive reading of 'labor dispute' for the purposes of applying the labor dispute disqualification." 69 Haw. at ____, 741 P.2d at 1278 (citation omitted).

[50] The four labor statutes enumerated in *Abilla* are compiled within HAW. REV. STAT. tit. 21, which is entitled "Labor and Industrial Relations." *See* HAW. REV. STAT. chs. 377, 379, 380 & 381 (1985). *See also infra* text accompanying notes 51-54 and 55.

[51] HAW. REV. STAT. ch. 381 (1985).

Revised Statutes Chapter 382. The Hawaii counterpart of the National Labor Relations Act,[52] the State version of the Little Norris-La Guardia Act,[53] and the statute dealing with the recruiting and hiring of employees during labor disputes,[54] all define "labor dispute" in language essentially similar[55] to that adopted by the court in *Inter-Island Resorts*.

The court concluded its investigation and construction of the term "labor dispute" by analyzing the labor dispute disqualification contained in Hawaii's unemployment insurance law.[56] The court found that the structure of the statute, and the language contained therein, were probative indicia of the legislature's intent to include lockouts within the labor dispute disqualification. Justice Nakamura spoke unequivocally for the court when he wrote that "H[awaii] R[evised] S[tatutes] Section 383-30(3)(B)(i) speaks of 'a *strike, lockout, or other labor dispute*' in the same breath and leaves no room for conjecture on whether 'labor dispute' when used in H[awaii] R[evised] S[tatutes] Chapter 383 describes a lockout or not."[57]

---

[52] HAW. REV. STAT. ch. 377 (1985).

[53] HAW. REV. STAT. ch. 380 (1985).

[54] HAW. REV. STAT. ch. 379 (1985).

[55] A comparative reading of two of the definitions alluded to by the court illustrates the similarity of statutory language used in defining the term "labor dispute" within HAW. REV. STAT. tit. 21. The Hawaii Employment Relations Act reads: "Labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." HAW. REV. STAT. § 377-1(8) (1985).

The Hawaii statute entitled "Labor Disputes; Jurisdiction of Courts" reads:

> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

HAW. REV. STAT. § 380-13(3) (1985).

HAW. REV. STAT. § 379-1 (1985) includes "tenure" of employment in defining "labor disputes" and is otherwise similar to the definition used in HAW. REV. STAT. § 377-1(8) (1985).

[56] HAW. REV. STAT. § 383-30 (1985). See *supra* note 4 for the pertinent text of the labor dispute disqualification.

[57] 69 Haw. at ____, 741 P.2d at 1279 (emphasis in the original). HAW. REV. STAT. § 383-30(b) reads in pertinent part:

> . . . .
>
> (B) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> . . . .
>
> (i) If the position offered is vacant due directly to a strike, lockout, or other labor dispute . . . .

B. *The "Volitional" Test*

Having been disqualified from obtaining unemployment benefits on a *prima facie* application of Hawaii Revised Statutes section 383-30(4), appellants urged the court to follow a line of cases developed elsewhere[58] and employ a "volitional" test[59] to determine benefit entitlement in a labor dispute context. Appellants maintained that if their unemployment was deemed involuntary or without volition, the labor dispute disqualification should not be invoked to deny their benefit claims. The *Abilla* court summarily rejected such a test, stating that: "[W]e . . . eschew[] the use of a voluntary-involuntary unemployment test to determine disqualification in a labor dispute context."[60]

HAW. REV. STAT. § 383-30(b) (1985).

[58] Appellants contended that the Hawaii Supreme Court should follow the lead set by California in developing a "volitional" test to determine benefit entitlement in the "labor dispute" context. *See e.g.*, Gardner v. State Director of Employment, 53 Cal. 2d 23, 346 P.2d 193 (1959) ("voluntary" test applied to determine unemployment insurance benefit claims); McKinley v. California Employment Stabilization Comm'n, 34 Cal. 2d 239, 209 P.2d 602 (1949) ("volitional" test used to determine rights of locked out employees to unemployment benefits); Bunny's Waffle Shop, Inc. v. California Employment Comm'n, 24 Cal. 2d 735, 151 P.2d 224 (1944) (employees with "good cause" to leave work not deemed to have left work voluntarily for the purposes of determining unemployment insurance benefits). The "volitional" test has also gained acceptance in Utah. *See, e.g.*, Daniel v. Industrial Comm'n of Utah, 617 P.2d 381 (Utah 1980) ("volitional" test used in determining locked out employee's eligibility for unemployment benefits); Teamsters, Chauffeurs & Helpers of Am. Local Unions No. 222 and No. 979 v. Board of Review, Dep't of Employment Sec., 10 Utah 2d 63, 348 P.2d 558 (1960) (employee lockout constituted *prima facie* evidence of involuntary unemployment and thus entitled the employees to unemployment compensation).

[59] See *supra* note 5 for a general statement of appellants' argument to the court on the matter of the "volitional" test. Appellants offered, as an alternative ground for decision, the "impasse" test. The court dismissed the "impasse" test in a single sentence at the end of its discussion and analysis of the "volitional" test. *See Abilla*, 69 Haw. at ____, 741 P.2d at 1280. *See also infra* note 78.

[60] 69 Haw. at ____, 741 P.2d at 1279. In rejecting the "volitional" test, the court brought Hawaii law into line with the decisions of a number of courts which had previously ruled on the construction of labor dispute disqualifications identical or substantially similar to that contained in HAW. REV. STAT. § 383-30(4) (1985). *See, e.g.*, Sakrison v. Pierce, 66 Ariz. 162, 165-166, 185 P.2d 528, 530-531 (1947) (merits of the labor dispute not a concern of the court); Randall Div. of Textron v. Director of Dep't of Labor, 268 Ark. 375, 591 S.W.2d 71 (1980) (necessity for inquiry into fault eliminated by statutory labor dispute disqualification provision); Depaoli v. Ernest, 73 Nev. 79, 309 P.2d 363 (1957) ("volitional" test rejected); Basso v. News Syndicate Co., Inc., 90 N.J. Super. 150, 216 A.2d 597 (N.J. Super. Ct. App. Div. 1966) (state neutral when labor dispute manifests itself as either a strike or a lockout); Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942) (merits of labor dispute not of concern to administrative agency and court); Ancheta v. Daly, 77 Wash. 2d 255, 461 P.2d 531 (1969) (determination of responsibility in a work stoppage situation not a function of the state); In re Usery, 31 N.C. App. 783, 230 S.E.2d 585 (1976) (responsibility for stoppage of work not material).

The court's refusal to apply a test based on volition or voluntariness was based on the court's theory that it is a "fundamental tenet[] of the unemployment compensation law . . . that the administering agency [should] remain neutral in the labor dispute and refrain from passing on the merits of the dispute."[61] Clearly, the court did not want to involve the administering agency or court in an analysis and determination of the relative merits of the disputants' claims. Such a determination was seen by the court as a necessary precursor to any findings of voluntariness:[62]

> If the receipt of unemployment benefits during a lockout turned on whether or not claimants "were involuntarily unemployed through no fault of their own" the administering agency and the courts would be called upon "to determine both the justice of the [employer's] cause and the reasonableness of the . . . lockout as a means of enforcing [its] demands."[63]

Averring a breach of the neutrality doctrine, the court rejected an exception to the "labor dispute" disqualification based on a volition test. Having concluded that a "labor dispute" embraced a lockout, the Supreme Court thus affirmed the judgment of the circuit court in denying appellants' claims.[64]

IV. COMMENTARY ON *Abilla*

The holding of *Abilla* leaves little doubt that employees unemployed due to a stoppage of work arising from a dispute over hours, wages, or other terms of employment are barred by the labor dispute disqualification of Hawaii Revised Statutes section 383-30(4) from receiving unemployment insurance benefit payments. With regard to the character of the labor dispute, Hawaii has joined the great majority of states in recognizing no distinction between strikes and lockouts.[65]

---

[61] *Abilla*, 69 Haw. at ____, 741 P.2d at 1277 (quoting *Inter-Island Resorts*, 46 Haw. at 156-57, 377 P.2d at 724).

[62] Previously, in *Inter-Island Resorts*, the court had enunciated its fear that determinations of voluntariness in the labor dispute context would violate the doctrine of neutrality. In *Inter-Island Resorts* the court adopted the reasoning that to apply the voluntary-leaving disqualification in a labor-dispute context "might . . . require the . . . agency and the courts to determine both the justice of the parties' cause and the reasonableness of the strike or lockout as a means of enforcing their demands." *Inter-Island Resorts*, 46 Haw. at 157, 377 P.2d at 725 (quoting Lesser, *Labor Dispute and Unemployment Compensation*, 55 YALE L.J. 167, 178 (1945)).

[63] *Inter-Island Resorts*, 46 Haw. at 157, 377 P.2d at 725 (quoting Lesser, *supra* note 62, at 178).

[64] *Abilla*, 69 Haw. at ____, 741 P.2d at 1272.

[65] *See* Fierst & Spector, *Unemployment Compensation in Labor Disputes*, 49 YALE L.J. 461, 462 (1940).

The labor dispute disqualifications were enacted to effectuate a policy that the state governments should not "finance strikes out of unemployment compensation funds."[66] The belief was that strikers calculate the impact of their economic actions and, therefore, they should not be able to avail themselves of a social safety net intended for persons involuntarily unemployed.[67] Arguably, if strikers received unemployment benefits, such payments would complement the union strike fund treasury, bolster durational survival of the strike effort, and

---

[66] Local Union No. 11 v. Gordon, 396 Ill. 293, 303, 71 N.E.2d 637, 642 (1947).

[67] Despite the fact that the legislature, in enacting the labor dispute disqualification, manifested a policy decision that only those persons unemployed through no fault of their own should be compensated, the Hawaii Supreme Court has "soften[ed] the harshness of the disqualification provision." Ahnne v. Department of Labor and Indus. Relations, 53 Haw. 185, 489 P.2d 1397 (1971). The statutory construction used to achieve this softening of the statute was first enunciated in *Inter-Island Resorts*. In *Inter-Island Resorts* the court interpreted the phrase "stoppage of work" to mean a "substantial curtailment of the business activities at the employer's establishment rather than unemployment on the part of the striking employee." 46 Haw. at 148, 377 P.2d at 720. *Accord* Meadow Gold Dairies-Hawaii v. Wiig, 50 Haw. 225, 227-228, 437 P.2d 317, 319 (1968). "Under that interpretation, even an employee who voluntarily [goes out] on strike w[ill] receive compensation, so long as the employer's business activities [are] not substantially curtailed. Whether or not compensation [is] awarded turn[s] on the degree to which the employer's business activities [are] affected by the worker's unemployment." *Ahnne*, 53 Haw. at 188, 489 P.2d at 1399.

"The courts fastened on the 'stoppage of work' language [in the labor dispute disqualification] to impose an additional condition which must be present before an employee is disqualified from receiving benefits." *Id.* at 189, 489 P.2d at 1400. By imposing an additional barrier to denial of benefits, the court was not attempting to adopt a sensible dividing line between cases in which benefits would be granted or denied. Rather, it was using the "interpretation [as] a handy device to soften the harshness of the disqualification provision." *Id.*

The *Abilla* decision creates an anomalous situation in light of *Inter-Island Resorts*. The *Abilla* employees were denied benefits on the basis that the labor dispute caused a "stoppage of work." The court did not inquire into, and did not base its decision upon, whether or not the employees left work voluntarily. (It is ironic that the cases interpreting the "stoppage of work" component of the labor dispute disqualification have continuously emphasized the idea that the state must remain neutral, a principle which is stated in one breath and violated in the next by requiring the state to determine what constitutes a "stoppage of work."). Under *Inter-Island Resorts* and its progeny, if the CIBA-HAWAII employers had maintained substantial operations during the lockout, the appellants would have been entitled to unemployment benefits. Therefore, claim disqualification would seem to rest more on a *post facto* determination of the success of a strike or lockout and not on a neutral determination of the existence of a "labor dispute."

With the above in mind, it is possible to view the decision in *Abilla* as ultimately to the benefit of the great majority of employees enmeshed in a labor dispute. Arguably, if a test of volition was adopted by the court, it would apply to both those employees striking and those employees locked out. Therefore, strikers who are now entitled to unemployment benefits under the "stoppage of work" test would lose those benefits when their job separation was tested for voluntariness. Following this line of argument, adoption of the "volitional" test would have the functional effect of wiping the generally pro-employee "stoppage of work" clause out of the labor dispute disqualification.

thereby increase the likelihood that the strike would conclude on terms favorable to the strikers.

Employers' contributions to the unemployment compensation fund are based on a calculation involving the number of their employees who have received benefits in the past.[68] Given the nature of the contributions system,[69] when strikers are allowed benefits, employers are arguably in the ironic position of indirectly financing an economic action against themselves. Obviously, employers have strong objections to giving either direct or indirect financial aid to persons or labor elements against whom they stand in a relationship of bilateral conflict.

The traditional strike is an exemplary manifestation of the bilateral adversarial relationship that exists between an employer and its employees. During a strike, employees elect to exert economic pressure on their employer to extract various concessions, while the employer, in turn, resists and seeks ways to exert economic pressure on the strikers in order to return them to their jobs, having conceded as little as possible.

Lockouts are different, however. In a lockout the unemployment is caused by the unilateral action of the employer, and the normal give-and-take that is the benchmark of the adversarial system becomes skewed in management's favor. Having made the unilateral decision both to inflict and to suffer the economic injuries attendant to a cessation of business activities, the employer wields sub-

---

[68] HAW. REV. STAT. § 383-66 provides the method of determining an employer's rate of contribution. The general methodology is described as follows: "The department of labor and industrial relations shall . . . classify employers in accordance with their actual experience in the payment of contributions and with respect to benefits charged against their accounts with a view to fixing such contribution rates as will reflect such experience." HAW. REV. STAT. § 383-66 (1985). HAW. REV. STAT. § 383-66 provides an extensive and complex method for the purpose of determining employer contribution rates to the unemployment compensation fund based on their "experience rating." The end result, after applying the formulas detailed in § 383-66, is that the contributions required of an employer to the fund may increase in proportion to the number and duration of claims filed by employees against a specific employer's account. Variances from standard rate contributions depend upon whether a company's employees experience a low or high incidence of compensable unemployment. Therefore, from an employer's point of view, a desirable feature of having the labor dispute disqualification applied as a bar to the benefit claims of employees is that the disqualification results in a conclusion of noncompensability, and thereby precludes the employer from being required to replenish the unemployment compensation fund. However, it must be kept in mind that the rate at which an employer repays the benefits and the amount of benefits chargeable to that employer are a function of many different portions of HAW. REV. STAT. ch. 383. The above description is a much simplified description of the "experience rating" system for the purposes of this footnote. The reader should consult HAW. REV. STAT. ch. 383 to gain a more comprehensive understanding of the various factors influencing employer contributions to the fund.

[69] See *supra* note 68 for a discussion of the contribution system.

stantial bargaining power in a lockout situation.[70]

The unemployment of the employees at Pacific Concrete and Lone Star was precipitated by the actions of employees at the entirely distinct Ameron facility. These employees became unemployed when CIBA-HAWAII enforced its contractual rights against its member employers.[71] Thus, it is difficult to view the unemployment of appellants as a voluntary act arrived at after a timely and rational evaluation of the impact and effect of job separation. The employees of both Pacific Concrete and Lone Star contended that because they were willing to continue to work during ongoing negotiations, prior to an impasse, they were involuntarily unemployed and, therefore, should have been eligible for benefits under the employment security law.

The situation of the Pacific Concrete and Lone Star employees demonstrated the lack of voluntariness on their part. At a general membership meeting the day before the expiration of their contracts, the employees complained bitterly about being tied to Ameron in the bargaining process.[72] The employees of Pacific Concrete and Lone Star, who had never recognized CIBA-HAWAII for the purposes of bargaining, felt that Ameron and its employees should take care of their own problems and not drag disinterested employees into the dispute.[73] In situations such as this, application of the labor dispute disqualification fails to further the public policy goals underlying the unemployment compensation sys-

---

[70] An employer may, under the National Labor Relations Act, hire *temporary* replacements for locked out employees. *See* Harter Equip. Co., 280 N.L.R.B. No. 71, 122 LRRM 1219 (1986) *pet. for review denied sub nom*; Operating Engineers Local 825 v. N.L.R.B., 829 F.2d 458 (3rd Cir. 1987). Therefore, an employer has the unilateral ability to decide whether or not to continue operations or to cause a "stoppage of work."

[71] See *generally* Appellants' Reply Brief to Appellee Director at 5, Abilla v. Agsalud, 69 Haw. ____, 741 P.2d 1272 (1987) (No. 11699) for employees'-appellants' argument to the court that the lockout was the result of the CIBA-HAWAII contract and not of a "labor dispute."

[72] On July 15, 1984, Local 681 held a general membership meeting for the employees of all three concrete companies. DLIR Rec., *supra* note 8 at 41-42. According to the union's president, Renny Rego, much of the meeting was devoted to employees from Pacific Concrete and Lone Star "arguing about let [sic] Ameron take care of their own damn problems, we take care of our problems, that's [sic] . . . its a beef that's goin [sic] on between the compe [sic] . . . the three companies that they wanted to do their own thing [sic]." *Id.* at 42.

[73] The Lone Star employees informed Lone Star management of their desire to remain at work. The Lone Star representative responded by stating, "with CIBA, you just can't [continue to work] because there is a penalty to it." *Id.* at 105. See *infra* note 9 for a description of the penalties contained in the CIBA-HAWAII agreement.

Apparently Lone Star would have allowed its employees to continue to work, but for the terms of the CIBA-HAWAII agreement. Exemplifying the good relations that Lone Star enjoyed with its employees is the fact that, during the lockout, Lone Star attempted to make the pickerers comfortable by providing them with a telephone, cots, chairs, benches, and shaving rights. DLIR Rec., *supra* note 8, at 104.

tem.[74] This was the implicit dilemma faced by the court in *Abilla*: in order to accept the appellants' arguments, the court would have been forced to ignore what it regarded as clear statutory language, in favor of a policy decision which the court believed should be left to the state legislature. However, in deferring to the language of the disqualification, the court arguably failed to give equal, deserving cognizance to the overall policy upon which employment security laws are based.[75] In denying unemployment benefits to locked out workers, the *Abilla* court deviated from the underlying policy of the unemployment insurance law to provide benefits for employees who are willing and ready to work, to support themselves and their families, and who are unemployed because of conditions over which they have little or no control.[76] This failure to harmonize the interpretation of the labor dispute disqualification with the overall policy of the statute will lead to unnecessary hardship for locked out employees, and may engender new tactical labor strategies not conducive to the continuance of peaceful labor relations.

One question that the court's holding in *Abilla* left unresolved is whether the

---

[74] Counsel for the appellees disputes this contention and posits that the court's decision was entirely in accord with the overall statutory purpose of the employment security law, stating that:

> [t]he main purpose of unemployment benefits is to finance a job search . . . . Employees in a labor dispute situation are not required to conduct such a job search because they are presumed to remain attached to their old employer . . . . Therefore, it is difficult to argue that employees who are either locked out or engaged in a strike are the intended beneficiaries of the unemployment compensation law.

Rand letter, *supra* note 8, at 21.

The Employment Security Act of Michigan contains a clear statement of the public policy underlying unemployment insurance laws:

> Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people . . . . Involuntary unemployment is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family, and to the detriment of the welfare of the people . . . . Employers should be encouraged to provide stable employment. The systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment . . . to be used for the benefit of persons unemployed through no fault of their own, thus maintaining purchasing power and limiting the serious and social consequences of relief assistance, is for public good, and the general welfare of the people . . . .

Employment Security Act, MICH. COMP. LAWS ANN. § 421.2 (1978).

[75] See *supra* note 74 for a representative statement of the public policy underlying the enactment of the various state unemployment insurance statutes.

[76] "Employment security statutes have been compared to insurance programs, and insurance contracts are designed to transfer certain defined risks from the insured to the insurer . . . . The insured event is a chance one, not intentionally brought about by the insured." Note, *Labor Law-Unemployment Compensation: State v. Michigan Employment Sec. Comm'n*, 60 U. DET. J. URB. LAW 106, 116 (1982) (quoting Sanders, *Disqualification For Unemployment Insurance,* 8 VAND. L. REV. 307 (1955)). "A lockout is such an event." *Id.* at 116.

decision will strengthen the position of an employer who now may obtain an advantage from the ruling. Under *Abilla*, it seems that an employer might now find it advantageous to use a failure to resolve labor issues as a pretext for declaring a labor dispute in a situation where the employer would have curtailed operations in any event because of economic conditions. This question is all the more acute given the facts of *Abilla*. Here, the court found a "labor dispute" based on the unilateral declaration and acts of CIBA-HAWAII prior to any formal negotiating impasse.[77] By finding that a "labor dispute" could occur when negotiations were in a fluid state, the court left looming the question of whether or not good faith bargaining is a prerequisite to the unilateral invocation of a "labor dispute" and its consequent impact on employee rights to unemployment benefits.[78]

V. CONCLUSION

In *Abilla v. Agsalud*, the Hawaii Supreme Court ruled that a "labor dispute," for the purposes of the Hawaii Employment Security Law, encompassed an employer lockout of workers, and brought locked out employees under the

---

[77] "The referee [for unemployment compensation appeals] found that there was no impasse on the eve of the expiration of the collective bargaining agreement with all the employers . . . . The circuit court [agreed with the referee and] affirmed the referee's decision . . . ." Answering Brief for Appellee Director at 3, Abilla v. Agsalud, 69 Haw. ____, 741 P.2d 1272 (1987).

[78] Although the court in *Abilla* did not reach the question of whether or not an impasse had formally occurred, the court's language clearly indicated that the court would have considered such a determination as inappropriate: "[I]f the agency or the courts were required to decide whether an 'impasse' had been reached before the lockout they would . . . be violating the doctrine of neutrality . . . ." *Abilla*, 69 Haw. at ____, 741 P.2d at 1280.

Justice Moody of the Michigan Supreme Court has suggested that a "labor dispute" should not be found prior to an invocation of an impasse in negotiations. Adopting an impasse test would narrow the definition of a labor dispute to one in which the dispute was in active progress. Although not totally curative of the shortcomings of the labor dispute disqualification, an impasse test would at least prevent the disqualification from becoming a tactical weapon in labor negotiations. Justice Moody stated:

> [G]ood faith negotiations between representatives of management and labor, where the facts show that the bargaining is in a fluid state and no impasse has occurred, gives neither party the right to declare a labor dispute. Therefore, an employer cannot unilaterally declare a labor dispute to deny the employees unemployment compensation. The impasse test brings the labor dispute disqualification into harmony with the policy behind the [Employment Security Law] as well as the state's desire to remain neutral in labor disputes. Also, the impasse test does not encourage the employer to use denial of benefits to enforce its bargaining demands. Refusal to pay benefits under these circumstances will discourage attempts at labor peace.

Smith v. Michigan Employment Sec. Comm'n, 410 Mich. 231, 301 N.W.2d 285 (1981) (Moody J., dissenting).

umbrella of the labor dispute disqualification of Hawaii Revised Statutes section 383-30(4). The court refused to create an exception to the disqualification based on considerations of volition, voluntariness, or impasse, holding that such determinations would require a breach of the doctrine of neutrality adhered to by courts and administrative agencies in the labor dispute context.

The decision highlights the inherent conflict between the underlying policy of the employment security law to provide a social safety net to persons unemployed involuntarily or due to no fault of their own, and the policy underlying the labor dispute disqualification to deny benefits to persons who elect to become unemployed. *Abilla* suggests that, under current Hawaii law, a judicial reconciliation between these two laudable goals is impossible because the notion of compensation for involuntary unemployment apparently cannot be accommodated under the express terms of the labor dispute disqualification.

The *Abilla* court's decision underscores the need for statutory modification of the labor dispute disqualification to accommodate fairly the employment security needs of persons unemployed involutarily. The courts and administrative agencies must be given the statutory tools with which they can fairly deal with the "inescapable presence of polarized claims to social justice and to economic survival."[79] Absent statutory changes, the courts and the Department of Labor and Industrial Relations will have no choice but to continue to deny benefits to persons who are arguably the intended beneficiaries of the Hawaii Employment Security Law.

Andrew L. Pepper

---

[79] Lewis, *The Lockout Exception: A Study in Unemployment Insurance Law and Administrative Neutrality*, 6 CAL. W.L. REV. 89, 98 (1969).